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Subject : Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest
- Compilation of replies to questionnaire

By note of 11 January 2012 ¹, the Presidency issued a questionnaire in order to obtain additional, more extensive information on the practical application of the Member States' criminal law systems on the issue of "access to a lawyer".

As of today, 2 February 2012, the General Secretariat has received replies by 25 delegations, which are set out in the Annex to this note.

The Presidency and the General Secretariat would like to thank all Member States and Croatia for these replies, which will without doubt facilitate the work on the draft Directive.

¹ 5219/12 DROIPEN 3 COPEN 4 CODEC 73.

COMPILATION OF REPLIES TO QUESTIONNAIRE 5219/12

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BELGIUM

Questioning of suspects and accused persons in the pre-trial phase

1. In your legal order, when a person that is suspected or accused of having committed a criminal offence is arrested (deprived of liberty) and asked by the police or investigating judge to reply to questions concerning the (alleged) crime committed,
 - a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?

Yes, he has the right to have a confidential consultation with a lawyer.

- ii) In the affirmative: in which situations does this right exist?

This right exists in every situation, without any exception (without prejudice to the exceptional situation when there is a derogation, see question 1.e). When arrested, the person has always the right to have a confidential consultation with his lawyer before questioning.

- iii) If the person has the right to be assisted by a lawyer before questioning, may this right in your legal order be limited to the person contacting the lawyer by phone? If so, please indicate in which situations this may be the case.

When the person is deprived of liberty, contact with a lawyer (of choice or a duty lawyer) is always done via the ‘on-call service’ (service de permanence) of the Bar Associations. The person may choose to have a confidential consultation with a lawyer by phone or in person.

- **If he chooses to have a confidential consultation by phone, this consultation may last 30 minutes maximum.**

- **If he chooses to have a consultation with a lawyer in person, this lawyer should be present within two hours after the contact with the on-call service. If the lawyer arrives on time, the confidential consultation takes place for a maximum of 30 minutes. If the consultation scheduled with a lawyer has not taken place within this two hour period, a confidential consultation will nevertheless be organised over the telephone.**

- b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?

Yes.

ii) In the affirmative: is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

This is true for all situations in the first 24 hours after the arrest (without prejudice to the exceptional situation when there is a derogation, see question 1.e), regardless if the questioning is performed by the police, the public prosecutor or the investigating judge. If the arrest is confirmed by the investigating judge and the person is in provisional detention, he has an unlimited right to confidential consultation with his lawyer.

- c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?

Yes

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?

This obligation exists automatically in all cases.

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?
 - **To inform the person of his rights before questioning, orally and by handing over the letter of rights (information on the facts, rights to remain silent, right to access to a lawyer etcetera – see the letter of rights number 2 in annex).**
 - **Concerning the access to a lawyer in particular, the authority competent for the questioning must contact the on-call service organised by the Bar Associations by filling in the necessary data in a web application (i.a. identity, language, indication of 2 lawyers of choice or duty lawyer etcetera). This on-call service is financed by the Government.**
 - **Depending on the choice of the arrested person, the competent authority shall wait for the arrival of the lawyer or wait for the ending of the confidential consultation by phone (see question 1.b.).**
 - **At the start of the questioning, to inform the person orally of his rights during the questioning (see letter of rights number 2 in annex).**
 - **To interrupt the questioning at the request of the person of his lawyer on one occasion to have an extra confidential consultation for 15 minutes.**
 - **To interrupt the questioning every time new facts should emerge during the questioning for a confidential consultation for 15 minutes each time.**

- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police or investigating judge to wait until the arrival of the lawyer before the questioning starts?

Yes

- ii) In the affirmative, how long (how many hours) do the police or investigating judge have to wait until the arrival of the lawyer?

Depending on the choice of the arrested person:

- **If the person request the assistance of a lawyer on the spot: waiting for the arrival of the lawyer: 2 hours maximum + 30 minutes confidential consultation + extra safeguard if the lawyer should not arrive within this two hour period by means of a confidential consultation by phone with the on-call service; OR**
 - **If the person chooses a confidential consultation by phone: waiting for the ending of the confidential consultation by phone (30 minutes maximum).**
- e) i) In your legal order, is there a possibility of making derogations to the right of a person to be assisted by a lawyer before and/or during questioning in the pre-trial phase? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police or investigating judge to proceed with the questioning without the presence of a lawyer, or without the lawyer having been contacted in advance by phone?

Yes.

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

Only in the event of exceptional circumstances and for compelling reasons, the public prosecutor or the investigating judge may decide not to grant the right to a confidential consultation in advance or to be assisted by a lawyer during the interview. This decision shall be motivated and in writing and is joined to the case file.

2. In your legal order, when a person is officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence and is asked to come 'voluntarily' to a police station in order to be questioned by the police in relation to that crime,

a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?

Yes

ii) In the affirmative: in which situations does this right exist?

In general, as the person is not deprived of his liberty, he is free to consult a lawyer if he wants to and whenever he wants to.

However, in addition to this general possibility, the Belgian law provides for legal consequences to certain situations.

If the person is invited to the police station to be questioned about facts that are punishable by a imprisonment of 1 year or more (except for road traffic offences), he may:

- **ask once to postpone the questioning to a later date or time so that he has the opportunity to consult his lawyer;**
- **ask to have a confidential consultation with his lawyer by phone at the police station;**
- **ask to wait for his lawyer to arrive at the police station to have a confidential consultation.**

He can not ask for one of these three possibilities, if the written convocation to come to the police station for questioning includes the following information:

- **brief information about the facts;**
- **right to remain silent;**
- **right to a confidential consultation with a lawyer**
- **indicating that he is presumed to have consulted a lawyer before coming to the police station for questioning.**

iii) If the person has a right to be assisted by a lawyer before questioning, is he informed of this right in the convocation for the questioning?

Yes, in principle. However, if the person was not informed of these three rights as mentioned under ii), for whatever reason, he may:

- **ask once to postpone the questioning to a later date or time so that he has the opportunity to consult his lawyer;**
- **ask to have a confidential consultation with his lawyer by phone at the police station;**
- **ask to wait for his lawyer to arrive at the police station to have a confidential consultation.**

If so, in what way?

The written convocation mentions the information mentioned in ii) and iii) as well as by communicating the letter of rights (model 1 see annex).

- b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?

No

ii) In the affirmative, is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

iii) If the person has a right to be assisted by a lawyer during questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

- c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right? **Yes.**

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?
- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

See above

- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?

Yes, but only for the right to a confidential consultation before questioning.

- ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

With regard to permit the exercise of the right to confidential consultation before questioning the police can :

- **postpone the questioning to a later date or time; or**
- **wait the arrival of the lawyer to the police station; or**
- **allow the person to have a confidential consultation with his lawyer by phone.**

- e) i) In your legal order, is there a possibility of making derogations to the right to be assisted by a lawyer before and/or during the questioning? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer? **No**

- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

3. In your legal order, when a person is stopped on the street by the police and, after having been officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence, is asked by the police to reply to questions concerning the (alleged) crime committed,

According to Belgian law, a person must be informed about the facts concerning which he will be questioned and for which he can be charged. The Belgian safeguards as explained in the questions above (see questions 1 and 2) are applicable, regardless the place the suspect or accused person is questioned.

- a) What kind of questions could be asked to this person? Is it possible to question the person regarding the alleged crime?
- b) i) Does this person have the right to be assisted by a lawyer during such questioning?
ii) In the affirmative, in which situations does such a right exist?
iii) If the person has the right to be assisted by a lawyer, may this right be limited to the person contacting the lawyer by phone before questioning starts? If so, please indicate in which situations this may be the case.
- c) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there an obligation in your legal order for the police or any other competent authorities to facilitate or assist the person in exercising this right?
ii) In the affirmative,
- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?
- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority?
- d) i) If the person has a right to be assisted by a lawyer during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?
ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

- e) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there a possibility of making derogations to this right in your legal order? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer or without contact by phone having been made?
- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

Evidence-gathering and investigating acts in the pre-trial stage

4. Questions regarding evidence-gathering or investigating acts in the pre-trial stage:

- a) i) In your legal order, does the suspect or accused person have a right for his lawyer to be present at evidence-gathering or investigating acts?

Yes.

- ii) In the affirmative, which evidence-gathering or investigating acts are concerned?

Reconstruction of the facts at the scene of crime. It has to be mentioned that also the civil party and his lawyer are present during this investigating act.

- b) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the competent authorities to facilitate or assist the person in exercising this right?

Yes.

ii) In the affirmative, what are the concrete act(s) concerned that have to be taken by the competent authorities?

The investigating judge must communicate the details (place, hour...) to all the parties in due time to allow them to prepare the reconstruction act.

c) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before starting the evidence-gathering or investigating act? **Yes, as the investigating judge shall inform the parties in due time of the time and place of the reconstruction.**

ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer? Please specify as appropriate. **Not specified by law.**

d) i) In your legal order, is there a possibility of making derogations to the right of the suspected or accused person for his lawyer to be present at evidence-gathering or investigating act? In other words, if the person concerned wants to be assisted by a lawyer during such acts, is there nevertheless a possibility for the competent authorities to proceed with the evidence-gathering or investigating act without the lawyer being present? **No**

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

Questioning in the pre-trial stage of persons who are initially not suspected or accused of having committed an offence but obtain this status during questioning

5. In your legal order, when a person that is initially not suspected or accused of an alleged crime, such as a witness, is questioned by the police or an investigating judge:
- a) Does this person have the right to be assisted by a lawyer during questioning? **No.**
 - c) When, during the questioning, such a person becomes suspected or accused of having committed a criminal offence, do the competent authorities have to inform the person concerned of this change of status?

Yes, the Belgian law provides that if during the questioning of a person who was not initially considered as a suspect, elements arise for which the person may be charged, the questioning is stopped to inform the person of his relevant rights (see above) and to perform the consecutive formalities depending on the situation (see answers to questions 1 and 2). Only after all these rights are fulfilled, the questioning can resume.

- c) If the answer to question b) is positive:
 - i) When precisely do the competent authorities have to inform the person concerned?

When, during questioning, elements arise for which the person can be charged.

- ii) In what manner do the competent authorities have to inform the person concerned (notification, information, ...)?

Orally and by communicating the written letter of rights.

- iii) Do the competent authorities have to stop the questioning? **Yes.**
- iv) Does the person concerned obtain the right to be assisted by a lawyer (when he did not have it before)? If so, as from which moment in time?

Yes, the common system (rights and consequences) for suspected or accused persons becomes applicable (see answers to questions 1 and 2).

- iv) May the statements made by the person before he was informed of the change of status be used in the ensuing criminal proceedings against him? If so, in which circumstances? Please specify as much as possible.

Yes. There are joined to the case-file and are submitted to the common Belgian rules regarding admissibility of evidence.

Minor offences

6. Questions regarding exclusions / minor offences:

- a) In your legal order, are there any categories of offences (in particular so-called "minor offences"), in respect of which the right to be assisted by a lawyer does not exist or is restricted, totally or partially, in the pre-trial phase?

Yes

b) In the affirmative, please describe the category or categories of exclusions as precisely as possible, defining the category by a common denominator, e.g.

- where the offence is initially dealt with in an administrative manner;
- where pre-trial detention is not possible in relation to the offence concerned;
- where deprivation of liberty cannot be imposed as a sanction in relation to the offence concerned;
- where the fine that may be imposed as a sanction in relation to the offence concerned does not exceed a certain amount;
- other definition.

In case of road traffic offences or if the offence is not punishable by imprisonment of 1 year or more, except when the person is arrested. From the moment a person is arrested, he has the right to confidential consultation and the right to be assisted by a lawyer during questioning.

d) In case your legal order contains one or more categories of exclusions: please indicate the consequence of each category of exclusion, e.g. is there a total or partial exclusion from the right to be assisted by a lawyer, does the exclusion entail different modalities for the assistance by a lawyer, etc. ...

See above

Lawyer provided by the State / Payment of lawyer's fees

7. The proposed Directive does not deal with the question of legal aid; even so the Presidency believes that the following questions regarding the payment of a lawyer's fee could have an impact on the formulation and application of the Directive.

With this in mind delegations are kindly invited to respond to the following questions:

- a) i) In your legal order, does an obligation exist for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *but cannot afford to pay a lawyer or cannot afford to pay the lawyer that he has chosen?*
- ii) If so, in which situations and under which conditions does such obligation exist?
When answering this question, please take into account the situations mentioned under questions 1-4.
- b) i) In your legal order, does there exist an obligation for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *even if he could himself afford to pay a lawyer, or the lawyer that he has chosen?*
- ii) If so, in which situations and under which conditions does such obligation exist?
When answering this question, please take into account the situations mentioned under questions 1-4.

Legal aid is provided for by the State in different situations:

- **Any suspected or accused person who enters into the conditions determined by the Law may receive such legal aid. In that regard, Belgian Law identified different beneficiaries of such legal aid depending on their financial resources, social status, current vulnerable situation, and etcetera.**

This possibility to benefit from total or partial legal aid applies in cases determined by law and includes all situations where the person has the right to access to a lawyer as mentioned under questions 1-4 (regardless any deprivation of liberty).

It applies at the person's request and if the person complies with the predetermined conditions at the moment of the request.

- **In certain situations determined by law, a lawyer is designated ex officio (mandatory defence lawyer) such as for minors, persons subject to a European Arrest Warrant, persons subject to a proceedings with regard to their goods, mentally ill persons, persons subject to a proceeding before the Court of Assizes, and cetera as well as if the person does not obtain the assistance of a lawyer in civil matters.**

In such cases, Belgian Law identified different beneficiaries of such legal aid depending on their financial resources, social status, current vulnerable situation, and etcetera.

Within this framework of mandatory defence lawyer, if the concerned person who does not satisfies the conditions for legal aid, designates his lawyer but does not pays the fees, a compensation is provided for by the State to the lawyer.

It has to be underlined that, in certain situations, a presumption of insolvency, until proved otherwise, is applicable to different categories of persons, including inter alia any person who is detained and any person subjects to an immediate court appearance.

Principle of confidentiality

8. a) In your legal order, can any derogations be made to the principle of confidentiality of communication between the suspected or accused person and his lawyer?

Only when the lawyer himself is suspected of being involved in criminal offences with the suspected or accused person.

- b) In the affirmative, in which situations can such derogations be made? Please specify as much as possible, and make a distinction, if appropriate, between oral and written communication, and between communication in the pre-trial phase and in the trial phase.

See above

Waiver

9. a) In your legal order, does a suspect or accused person has the right to waive his right to be assisted by a lawyer?

Yes

- b) In the affirmative,
i) What, if any, information has to be given to the person concerned prior to making the waiver?

If the person is not arrested, he can waive the right voluntarily and in an unequivocal manner. He must sign and date a document provided for this.

If the person is arrested, he can only waive his right voluntarily and in an unequivocal manner after having a confidential consultation with the on-call service by phone – explaining him the consequences of this waiver – and by signing and dating a document provided for this.

- ii) If such information has to be given:
- which person(s) or authorities may / should give that information?

See above

- how is that information to be given (oral, writing,) ? Please specify.

See above (via letter of rights and / or prior legal advice via on-call service).

- iii) How is the waiver noted/registered? What are the formalities, if any?

By a signed and dated document that is joined to the case file.

- iv) May a decision to waive the right to a lawyer be revoked, and if so,

Yes

- may this be done at any stage of the proceedings? **Yes**
- are there any (other) limitations to the possibility of revoking a waiver? **No**

- c) Are the answers to the questions under a) and b) different if the person concerned is a minor? If so, please specify.

Yes, a child can not waive his right to be assisted by a lawyer.

Remedies

10. a) Does your national law provide for remedies in case of breach of the right of access to a lawyer?

Yes

- b) In the affirmative:
- i) which are those remedies?

The Belgian law states that: ‘No conviction can be pronounced against a person on the sole basis of statements made in infringement of the rights to prior confidential consultation with a lawyer and/or to assistance of the lawyer during questioning.’

- ii) do the remedies also include the possibility for the (judicial) authorities to exclude evidence that has been obtained in breach of the right of access to a lawyer?

No, this option was not considered in the Belgian system of procedural rules of admissibility of evidence as this option means that the statement is taken out of the case-file. This could have as a consequence that the statement could also not be used ‘à décharge’ for another person. For this reason, the Belgian legislator decided to rephrase literally the Salduz case law. (see above).

General concerns regarding the proposed Directive

11. Are there any other aspects of your legal order that could be of importance for the further discussions on this proposed Directive? If so, please highlight them.

BULGARIA

Questioning of suspects and accused persons in the pre-trial phase

1. In your legal order, when a person that is suspected or accused of having committed a criminal offence is arrested (deprived of liberty) and asked by the police or investigating judge to reply to questions concerning the (alleged) crime committed,
 - a)
 - i) Does this person have the right to be assisted by a lawyer *before* such questioning?
 - ii) In the affirmative: in which situations does this right exist?
 - iii) If the person has the right to be assisted by a lawyer before questioning, may this right in your legal order be limited to the person contacting the lawyer by phone? If so, please indicate in which situations this may be the case.

First of all we would like to point out that the Bulgarian criminal legislation doesn't know the figure of a "suspected person". Therefore the right to be assisted by a lawyer shall apply only ² to persons accused of having committed a criminal offence from the time of their arrest (deprivation of liberty) irrespective of whether it is before or during questioning.

Regarding the limitation of the right to access to lawyer to contacting the lawyer by phone, the Bulgarian legislation does not provide such a possibility. The presence of a lawyer is a must.

² Although in the Republic of Bulgaria the right to a lawyer is absolute for all persons accused of having committed a criminal offence and deprived of their liberty and there's no such figure in criminal proceedings as "suspected person" the Bulgarian legislation allows, and that is confirmed by the judicial practice, even a witness or in case of minor offences the person who have committed it to have access to lawyer if he so wishes.

- b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?
ii) In the affirmative: is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

The presence of a lawyer during questioning, where the person states its will to be assisted by a lawyer, is a condition sine qua non in all cases where a person is accused of having committed a criminal offence and arrested (deprived of liberty). There are also cases where the presence of a lawyer is obligatory by law even without the express will of the person to exercise his right, such are the cases where the person is a foreign national, a minor, where the punishment prescribed for the crime committed is for not less than 10 years of deprivation of liberty and etc.

- c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?
ii) In the affirmative,
- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?
 - what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

The Bulgarian legislation holds a double approach to this problem.

When the person is accused of having committed a criminal offence, arrested (deprived of liberty) he is informed of his rights and signs a Declaration of rights. If he wishes to exercise his right to be assisted by a lawyer, he usually exercises his right to inform his relatives and tells them to contact a lawyer or if he wants to contact certain lawyer the competent authorities shall assist him contact this particular lawyer.

In some cases such as where the person is a foreign national, a minor, where the punishment prescribed for the crime committed is for not less than 10 years of deprivation of liberty the right to be assisted by a lawyer is obligatory by law, then the competent authorities has an obligation to facilitate and/or assist the person in exercising his right and appoint a legal assistance.

- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police or investigating judge to wait until the arrival of the lawyer before the questioning starts?

Yes, there is.

- ii) In the affirmative, how long (how many hours) do the police or investigating judge have to wait until the arrival of the lawyer?

If the person is accused of having committed a criminal offence, arrested (deprived of liberty) and expresses his will to be assisted by a lawyer, where the presence of a lawyer is obligatory by law and where the person has the right to legal assistance, there is no time limitation prescribed by law for how long should the police or investigating judge have to wait until the arrival of the lawyer.

Only in cases where the lawyer appointed by the accused person does not present himself several times the competent authorities may (in case there are no conditions for legal aid) proceed with the questioning or shall (in cases where the presence of a lawyer is obligatory by law and where the person has the right to legal assistance) appoint an alternative lawyer.

- e) i) In your legal order, is there a possibility of making derogations to the right of a person to be assisted by a lawyer before and/or during questioning in the pre-trial phase? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police or investigating judge to proceed with the questioning without the presence of a lawyer, or without the lawyer having been contacted in advance by phone?

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

Only in cases where the lawyer appointed by the accused person does not present himself several times and the presence of a lawyer is not mandatory the competent authorities may (in case there are no conditions for legal aid) proceed with the questioning.

2. In your legal order, when a person is officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence and is asked to come 'voluntarily' to a police station in order to be questioned by the police in relation to that crime,
- a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?
ii) In the affirmative: in which situations does this right exist?
iii) If the person has a right to be assisted by a lawyer before questioning, is he informed of this right in the convocation for the questioning? If so, in what way?
- b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?
ii) In the affirmative, is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.
iii) If the person has a right to be assisted by a lawyer during questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

Answer to a) and b): When a person is officially summoned to appear to the police station for serving charges and questioning, and he voluntarily comes to the police station, he is also informed of his right to a lawyer by a relevant text in the convocation. In this case he'll have the right to access to a lawyer before the questioning or during the questioning whichever he wishes, as the obligation to contact and appoint a lawyer, and guarantee the presence of this lawyer during such questioning shall be on himself.

In case the person can't afford to nominate a lawyer but wishes to do so he shall come to the police station at the stated date and time for serving charges but the questioning will be appointed for another day, usually within the next 72 hours. In such a case the obligation to provide legal assistance (and the presence of this lawyer) shall be on the competent authority.

- c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?
- ii) In the affirmative,
- does this obligation exist automatically in all cases, or is it only 'activated' further to a request of the person concerned?
 - what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

When a person is officially summoned to appear to the police station for questioning and he wishes to exercise his right to a lawyer the obligation to contact and appoint a lawyer, and guarantee the presence of this lawyer during such questioning shall be on the accused person. If the person appears without a lawyer for questioning, the competent authorities shall appoint another date and time for the questioning within the next 72 hours. If the person appears without a lawyer for questioning again the competent authority may proceed with the questioning or appoint an alternative lawyer.

In some cases such as where the person is a foreign national, a minor, where the punishment prescribed for the crime committed is for not less than 10 years of deprivation of liberty the right to be assisted by a lawyer is obligatory by law or where the accused person has the right to legal assistance, then the competent authorities has an obligation to facilitate and/or assist the person in exercising his right and appoint a legal assistance. In this event it doesn't matter if the accused person came voluntarily or not.

- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?
- ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

When a person is officially summoned to appear at a stated time and date to the police station for serving charges and questioning, he is informed of his right to be assisted by a lawyer. If he wishes to exercise this right but appears without the lawyer, he may be served charges but the competent authorities shall appoint another date for the questioning so that his lawyer can be present. If the person appears without a lawyer for questioning again the competent authority may proceed with the questioning or appoint an alternative lawyer where the presence of the lawyer is obligatory by law or where the accused person has the right to legal assistance.

- e) i) In your legal order, is there a possibility of making derogations to the right to be assisted by a lawyer before and/or during the questioning? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer?
- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

If the person appears without a lawyer for questioning, the competent authorities shall appoint another date and time for the questioning within the next 72 hours. If the person appears without a lawyer for questioning again the competent authority may proceed with the questioning.

The abovementioned shall not apply where the accused is entitled to legal assistance or where the presence of a lawyer is obligatory by law. In this event the competent authority shall appoint an alternative lawyer.

3. In your legal order, when a person is stopped on the street by the police and, after having been officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence, is asked by the police to reply to questions concerning the (alleged) crime committed,

There's no such possibility provided by law the questioning to be made on the street, it would be a breach of the rules of procedure and the person accused of having committed a criminal offence shall not reply to such questions. He may be stopped by the police on the street but any questioning shall be made in the police station or other official place. In any case, the accused person shall have the right to a lawyer from the time the charges are served and may not make statements in breach of his right.

- a) What kind of questions could be asked to this person? Is it possible to question the person regarding the alleged crime?
- b) i) Does this person have the right to be assisted by a lawyer during such questioning?
ii) In the affirmative, in which situations does such a right exist?
iii) If the person has the right to be assisted by a lawyer, may this right be limited to the person contacting the lawyer by phone before questioning starts? If so, please indicate in which situations this may be the case.
- c) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there an obligation in your legal order for the police or any other competent authorities to facilitate or assist the person in exercising this right?
ii) In the affirmative,
- does this obligation exist automatically in all cases, or is it only 'activated' further to a request of the person concerned?
- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority?

- d) i) If the person has a right to be assisted by a lawyer during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?
- ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?
- e) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there a possibility of making derogations to this right in your legal order? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer or without contact by phone having been made?
- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

Evidence-gathering and investigating acts in the pre-trial stage

4. Questions regarding evidence-gathering or investigating acts in the pre-trial stage:

- a) i) In your legal order, does the suspect or accused person have a right for his lawyer to be present at evidence-gathering or investigating acts?

Yes, but only at evidence-gathering or investigating acts involving the accused person. The lawyer may be present at other evidence-gathering or investigating acts only upon request of the accused person to the prosecutor and with the written consent of the latter.

- ii) In the affirmative, which evidence-gathering or investigating acts are concerned?

There's no special provision in the Bulgarian legislation providing the obligatory presence of the lawyer during evidence-gathering or investigating acts.

The common rule is that if the accused person so wishes he has the right for his lawyer to be present at all evidence-gathering or investigating acts involving the accused person, his failure to appear not being an obstacle to their progress.

- b) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the competent authorities to facilitate or assist the person in exercising this right?

No. The presence of the lawyer shall be guaranteed by the accused person. Failure of the lawyer to appear shall not be a reason for not performing the acts.

ii) In the affirmative, what are the concrete act(s) concerned that have to be taken by the competent authorities?

- c) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before starting the evidence-gathering or investigating act?

No. The presence of the lawyer shall be guaranteed by the accused person. Failure of the lawyer to appear shall not be a reason for not performing the acts.

ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer? Please specify as appropriate.

- d) i) In your legal order, is there a possibility of making derogations to the right of the suspected or accused person for his lawyer to be present at evidence-gathering or investigating act? In other words, if the person concerned wants to be assisted by a lawyer during such acts, is there nevertheless a possibility for the competent authorities to proceed with the evidence-gathering or investigating act without the lawyer being present?

Yes.

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

The competent authority may derogate from the right of the accused person and his lawyer to attend any investigating acts, provided this may jeopardize the investigation.

Questioning in the pre-trial stage of persons who are initially not suspected or accused of having committed an offence but obtain this status during questioning

5. In your legal order, when a person that is initially not suspected or accused of an alleged crime, such as a witness, is questioned by the police or an investigating judge:

a) Does this person have the right to be assisted by a lawyer during questioning?

There are no provisions in the current Bulgarian law about the right to access to a lawyer for a witness. However, the judicial practice shows that if the witness so wishes nothing can prevent him from appointing a lawyer and exercising this right.

b) When, during the questioning, such a person becomes suspected or accused of having committed a criminal offence, do the competent authorities have to inform the person concerned of this change of status?

c) If the answer to question b) is positive:

i) When precisely do the competent authorities have to inform the person concerned?

ii) In what manner do the competent authorities have to inform the person concerned (notification, information, ...)?

iii) Do the competent authorities have to stop the questioning?

iv) Does the person concerned obtain the right to be assisted by a lawyer (when he did not have it before)? If so, as from which moment in time?

- v) May the statements made by the person before he was informed of the change of status be used in the ensuing criminal proceedings against him? If so, in which circumstances? Please specify as much as possible.

According to the practitioners statements made by a witness during questioning can not serve itself as a ground and are not sufficient for becoming an accused person. Nevertheless, if the competent authority assumes that there are good reasons to believe that the witness might be involved in committing a criminal offence he shall stop immediately the questioning and inform the witness that his status may be changed. Where there are sufficient information and evidences, beside the statements during questioning, to believe that the witness is involved, and not earlier than 3 days after the questioning as a witness, the person shall be summoned to appear to the police station for serving charges and questioning. He is also informed of his right to a lawyer by a relevant text in the convocation.

All statements that may self-incriminate the person made during questioning as a witness shall not be used against him and are inadmissible to court.

Minor offences

6. Questions regarding exclusions / minor offences:
- a) In your legal order, are there any categories of offences (in particular so-called "minor offences"), in respect of which the right to be assisted by a lawyer does not exist or is restricted, totally or partially, in the pre-trial phase?

There's no such category in Bulgarian criminal law as "minor offences". There's a category of offences named "disorderly behaviour" that impose administrative sanctions "15 days of detention within the relevant structure department of the Ministry of Interior" or "a fine from 100 lv (approx. 50 euro) to 500 lv (approx. 250 euro)". But even in these cases the person has the right to access to a lawyer, although the presence of a lawyer is not mandatory.

- b) In the affirmative, please describe the category or categories of exclusions as precisely as possible, defining the category by a common denominator, e.g.
- where the offence is initially dealt with in an administrative manner;
 - where pre-trial detention is not possible in relation to the offence concerned;
 - where deprivation of liberty cannot be imposed as a sanction in relation to the offence concerned;
 - where the fine that may be imposed as a sanction in relation to the offence concerned does not exceed a certain amount;
 - other definition.
- c) In case your legal order contains one or more categories of exclusions: please indicate the consequence of each category of exclusion, e.g. is there a total or partial exclusion from the right to be assisted by a lawyer, does the exclusion entail different modalities for the assistance by a lawyer, etc. ...

Lawyer provided by the State / Payment of lawyer's fees

7. The proposed Directive does not deal with the question of legal aid; even so the Presidency believes that the following questions regarding the payment of a lawyer's fee could have an impact on the formulation and application of the Directive.

With this in mind delegations are kindly invited to respond to the following questions:

- a) i) In your legal order, does an obligation exist for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *but cannot afford to pay a lawyer or cannot afford to pay the lawyer that he has chosen?*

ii) If so, in which situations and under which conditions does such obligation exist?
When answering this question, please take into account the situations mentioned under questions 1-4.

(1) Participation of the lawyer in criminal proceedings shall be mandatory in cases where:

- 1. The accused person is a minor;**
- 2. The accused person suffers from physical or mental deficiencies, which prevent him/her from proceeding pro se;**
- 3. The case concerns a criminal offence punishable by deprivation of liberty for no less than ten years or another heavier punishment;**
- 4. The accused person does not have command of the Bulgarian language;**
- 5. The interests of the accused persons are contradictory and one of the persons has his/her own lawyer;**
- 6. A request under Article 64 has been made or the accused party is detained;**
- 7. (Repealed, SG No. 32/2010, effective 28.05.2010);**
- 8. The case is carried in the absence of the accused party;**
- 9. The accused person cannot afford to pay a lawyer fee, wishes to have a lawyer and the interests of justice so require.**

(2) In cases within the scope of Paragraph 1, items 4 and 5, the participation of a lawyer shall not be mandatory, provided the accused person makes a statement he/she wishes to dispense with having a lawyer.

(3) Where participation of a lawyer is mandatory, the respective body shall appoint a lawyer.

(4) (Amended, SG No. 32/2010, effective 28.05.2010) Outside the scope of Paragraph 1, in respect of serious crime cases, the prosecutor or the court may appoint, subject to the procedure of the Legal Aid Act, an alternative lawyer irrespective of the assignment of a lawyer, where this appointment is crucial with a view to holding the criminal proceedings within a reasonable time limit.

(5) (New, SG No. 32/2010, effective 28.05.2010) In cases within the scope of Paragraph 1, the appointed lawyer shall continue his participation in the criminal proceedings as an alternative lawyer where the accused person authorises another lawyer or forgoes a lawyer, provided that the conditions under Paragraph 4 are satisfied.

(6) (New, SG No. 32/2010, effective 28.05.2010) The alternative lawyer shall make the necessary preparations to examine the case-file and gain insight in the case, obtain the necessary excerpts, and take part in all investigative acts involving the accused party. Any other rights provided under Article 99(1) shall be exercised by the alternative lawyer upon the accused party's request or with the accused party's consent, and without such consent where defence is mandatory, and the authorised lawyer, though validly summoned, fails to appear in court without showing good cause for such absence.

b) i) In your legal order, does there exist an obligation for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *even if he could himself afford to pay a lawyer, or the lawyer that he has chosen?*

No.

ii) If so, in which situations and under which conditions does such obligation exist?

When answering this question, please take into account the situations mentioned under questions 1-4.

Principle of confidentiality

8. a) In your legal order, can any derogations be made to the principle of confidentiality of communication between the suspected or accused person and his lawyer?

The common rule is that no derogation shall be made to the principle of confidentiality of communication between the suspected or accused person and his lawyer.

- b) In the affirmative, in which situations can such derogations be made? Please specify as much as possible, and make a distinction, if appropriate, between oral and written communication, and between communication in the pre-trial phase and in the trial phase.

Nevertheless, if there are compelling reasons to believe that the lawyer is involved in an organized criminal group with the accused person and/or to disclose and/or to prevent the committing of another serious criminal offence the court may allow the pre-trial bodies to use special intelligence means where these circumstances cannot be established in any other way or this would be accompanied by exceptional difficulties.

Waiver

9. a) In your legal order, does a suspect or accused person has the right to waive his right to be assisted by a lawyer?

The accused person may waive his right to be assisted by a lawyer except in cases where the presence of the latter is mandatory.

- b) In the affirmative,
i) What, if any, information has to be given to the person concerned prior to making the waiver?

No information is to be given. The accused person shall only state that he's aware of the consequences of such waiver.

- ii) If such information has to be given:
 - which person(s) or authorities may / should give that information?
 - how is that information to be given (oral, writing, ...) ? Please specify.
- iii) How is the waiver noted/registered? What are the formalities, if any?

The person signs a special “declaration of rights” in which he states whether he wants to dispose of his right to be assisted by a lawyer or his will to waive this right expressly and in writing and that he is aware of the consequences of such waiver.

- iv) May a decision to waive the right to a lawyer be revoked, and if so,
 - may this be done at any stage of the proceedings? **Yes.**
 - are there any (other) limitations to the possibility of revoking a waiver?

Only in case of misuse.

- c) Are the answers to the questions under a) and b) different if the person concerned is a minor? If so, please specify.

If the person is a minor the presence of a lawyer is mandatory and he may not be revoked.

Remedies

- 10. a) Does your national law provide for remedies in case of breach of the right of access to a lawyer?
- b) In the affirmative:
 - i) which are those remedies?

1. The judge-rapporteur shall terminate court proceedings in cases under Article 248, Paragraph 2, items 1 and 3 (whether there have been any substantial violations of the rules of procedure in the course of pre-trial proceedings susceptible of being removed, which have resulted in the restriction of procedural rights of the accused person and his lawyer;

2. The court shall terminate court proceedings and shall forward the case-file to the respective prosecutor where there have been any removable substantial violations of the rules of procedure in the course of preliminary proceedings, which have resulted in the restriction of procedural rights of the accused or his lawyer;

3. The intermediate appellate review court shall revoke the sentence and return the case for new examination to the prosecutor where there have been any substantial violations of procedural rules in the course of preliminary proceedings, which have resulted in the restriction of procedural rights of the accused and his lawyer;

4. The sentence and the judgement shall be subject to revocation or modification in the course of cassation proceedings in cases of substantial breach of procedural rules.

The breach of procedural rules shall be substantial where: it has led to restriction of the procedural rights of the accused person or the other parties and has not been remedied.

5. Inadmissibility of statements and evidences in court.

6. The accused person may challenge the detention, claim for breach of the rules of procedure and challenge all unlawful and unjustified acts.

- ii) do the remedies also include the possibility for the (judicial) authorities to exclude evidence that has been obtained in breach of the right of access to a lawyer?

Yes, a judicial authority at its discretion may exclude evidences that have been obtained in breach of the right of access to a lawyer.

General concerns regarding the proposed Directive

11. Are there any other aspects of your legal order that could be of importance for the further discussions on this proposed Directive? If so, please highlight them.

CZECH REPUBLIC

CPC = Code of Criminal Procedure

Questioning of suspects and accused persons in the pre-trial phase

1. In your legal order, when a person that is suspected or accused of having committed a criminal offence is arrested (deprived of liberty) and asked by the police or investigating judge to reply to questions concerning the (alleged) crime committed,
 - a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?
Yes.
 - ii) In the affirmative: in which situations does this right exist?

A person becomes an accused person when a copy of a Police resolution commencing the criminal prosecution has been served on him. An accused person may be arrested or detained in CZ. An accused has a right to choose a lawyer and consult him (Section 33(1) CPC).

An accused must always have a lawyer under certain circumstances (therefore, so called mandatory defense applies in CZ), e. g. if he is in a pre-trial detention, was deprived of a legal capacity or his legal capacity was reduced, in case of proceedings against fugitive, etc.

A suspected person cannot be arrested but may be detained in CZ. A detained suspected person may choose a lawyer and consult him already during the detention (Section 76(6) CPC).

A suspected person may be subject to shortened proceedings; if so, he has the same rights as an accused person during these proceedings; he may choose a lawyer and consult him already during the detention (Section 179b(2) CPC).

Please take note that CZ legal order makes a difference between arrest (if there are grounds for a pre-trial detention, based on an arrest warrant) and detention (if there are grounds for a pre-trial detention but an arrest warrant could not have been issued due to the urgent circumstances).

iii) If the person has the right to be assisted by a lawyer before questioning, may this right in your legal order be limited to the person contacting the lawyer by phone? If so, please indicate in which situations this may be the case.

There are no provisions in the Code of Criminal Procedure prohibiting or explicitly enabling a contact of a lawyer with the suspect or accused person only *via* telephone. There is a right to have a lawyer and consult with him, regardless of the means by which they decide to execute this right.

b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?

Yes.

ii) In the affirmative: is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

An accused person may ask to have his lawyer present during any questioning and may consult his lawyer also during the questioning (with one exception - he cannot consult the lawyer about a reply to a question which has been already asked). There is a general exemption from the principle that an accused person has a right to have his lawyer present during the questioning - when it is not possible to postpone the questioning and ensure that the lawyer is informed about the questioning the authorities may question an accused without his lawyer being present (Sections 33(1) CPC; 165 (2) CPC).

In case of a decision on a pre-trial detention: an arrested accused person has a right to have his lawyer present during his questioning by a judge except when the lawyer is unreachable within the 24 hours since his arrest, which is a time-limit during which the judge has to decide on the pre-trial detention or free an accused person. Similarly in case of a detained suspected person, this person has a right to have his lawyer present during his questioning except when the lawyer is unreachable within 48 hours which is a time-limit during which the Police authority has to question a person, submit motions to a public prosecutor and hand a person over to a court or free him. Therefore, if the lawyer cannot be reached within these set time-limits, a person may be questioned without his lawyer being present (Section 69(5) CPC; Section 76(3)(5) CPC).

- c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?

Yes.

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?
- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

Any person subject to criminal proceedings must be in every stage of the criminal proceedings informed about the rights enabling him full exercise of the defense and of his right to choose a lawyer (Section 2(13) CPC).

All law enforcement authorities are obliged to provide an accused person a full possibility to exercise his rights (Section 33(5) CPC).

If the lawyer informs the Police authority that he wishes to participate in an investigative act, whose result may be used as evidence (questioning is considered to be one of these investigative acts), the Police authority is obliged in a timely manner to inform the lawyer about the type of an investigative act and about the time and place of its performance, except when it is not possible to postpone the act and ensure that the lawyer is informed about it (Section 165(3) CPC).

In case of mandatory defense (when in specified situations an accused person has to have a lawyer even if he does not wish so), an accused will be given a time-limit to choose a lawyer. If he (or any of the competent persons as e. g. relatives, spouse) does not choose a lawyer during the set time, a court will without delay appoint the lawyer for him (Section 38 CPC).

- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police or investigating judge to wait until the arrival of the lawyer before the questioning starts?

In several situations stipulated by law, CZ applies mandatory defense in relation to an accused person (not to a suspected person), i. e. an accused person must always have a lawyer under specified circumstances. In all other situations, a suspected or accused person has a right to choose a lawyer. It means that it is up to the decision of a person to choose a lawyer and be represented by him or not to choose a lawyer and represent himself. If a person does not wish to be represented by a lawyer and it is not a mandatory defense case, the authorities may proceed with questioning. If a person expresses his wish to have a lawyer or in case of mandatory defense, the law enforcement authorities cannot proceed with the questioning until the arrival of the lawyer. There is one general exception to this rule – the questioning may proceed if it is not possible to postpone it and ensure that the lawyer is informed about the questioning.

In case of a decision on a pre-trial detention: an arrested accused person has a right to have his lawyer present during his questioning by a judge except when the lawyer is unreachable within the 24 hours since his arrest, which is a time-limit during which the judge has to decide on the pre-trial detention or free an accused person. Similarly, in case of a detained suspected person, this person has a right to have his lawyer present during his questioning except when the lawyer is unreachable within 48 hours, which is a time-limit during which the Police authority has to question a person, submit motions to a public prosecutor and hand a person over to a court or free him. Therefore, if the lawyer cannot be reached within these set time-limits, a person may be questioned without his lawyer being present (Section 69(5) CPC; Section 76(3)(5) CPC).

ii) In the affirmative, how long (how many hours) do the police or investigating judge have to wait until the arrival of the lawyer?

See previous reply.

- e) i) In your legal order, is there a possibility of making derogations to the right of a person to be assisted by a lawyer before and/or during questioning in the pre-trial phase? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police or investigating judge to proceed with the questioning without the presence of a lawyer, or without the lawyer having been contacted in advance by phone?

Yes. See previous reply.

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

An open list. See previous reply.

2. In your legal order, when a person is officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence and is asked to come 'voluntarily' to a police station in order to be questioned by the police in relation to that crime,

a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?
Yes.

ii) In the affirmative: in which situations does this right exist?

Once a person becomes an accused (a copy of a Police resolution commencing the criminal prosecution has been served on this person), such a person has the right to choose a lawyer and to consult him (Section 33 (1) CPC).

For more see reply to 1(a).

iii) If the person has a right to be assisted by a lawyer before questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

A copy of a Police resolution commencing the criminal prosecution of a person does not include such information, this information is included in a copy of Police resolution only in case of mandatory defense. However, an accused or suspected person has to be advised of his defense rights, including the right to choose a lawyer, at the latest before the beginning of the questioning.

b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?
Yes.

ii) In the affirmative, is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

See reply to 1(b), the same rules apply.

iii) If the person has a right to be assisted by a lawyer during questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

See reply to 2(a)(iii), the same rules apply.

- c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?

Yes.

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?
- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

See reply to 1(c), the same rules apply.

- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?

ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

See reply to 1(d), the same rules apply.

- e) i) In your legal order, is there a possibility of making derogations to the right to be assisted by a lawyer before and/or during the questioning? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer?
- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

See previous reply.

3. In your legal order, when a person is stopped on the street by the police and, after having been officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence, is asked by the police to reply to questions concerning the (alleged) crime committed,

- a) What kind of questions could be asked to this person? Is it possible to question the person regarding the alleged crime?

Yes, any questions.

- b) i) Does this person have the right to be assisted by a lawyer during such questioning?

Yes.

- ii) In the affirmative, in which situations does such a right exist?

An accused: A person becomes an accused person once a copy of a Police resolution commencing the criminal prosecution has been served on this person (into own hands). A person cannot become an accused person in any other way, e.g. by oral information from the police on the street. An accused person has a right to choose a lawyer. For more see 1(b).

A suspect: A suspected person, who has been detained (in urgent cases, without an arrest warrant being issued, e. g. if caught red-handed), has the right to have his lawyer present during the questioning except when the lawyer is unreachable within 48 hours since detention. For more see 1(b).

The Police may require an explanation from any person. When giving an explanation, everybody has a right for a legal assistance by a lawyer (158(5) CPC). Such legal assistance is limited and does not cover e. g. possibility to ask questions to the person giving an explanation.

iii) If the person has the right to be assisted by a lawyer, may this right be limited to the person contacting the lawyer by phone before questioning starts? If so, please indicate in which situations this may be the case.

No.

c) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there an obligation in your legal order for the police or any other competent authorities to facilitate or assist the person in exercising this right?

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?
- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority?

See reply to 1(c).

d) i) If the person has a right to be assisted by a lawyer during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?

ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

See reply to 1(d)

- e) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there a possibility of making derogations to this right in your legal order? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer or without contact by phone having been made?
- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

See previous reply.

Evidence-gathering and investigating acts in the pre-trial stage

4. Questions regarding evidence-gathering or investigating acts in the pre-trial stage:

- a) i) In your legal order, does the suspect or accused person have a right for his lawyer to be present at evidence-gathering or investigating acts?

Yes, under specified conditions.

- ii) In the affirmative, which evidence-gathering or investigating acts are concerned?

The lawyer of an accused (not a suspected person) has a right to be present during investigative acts whose result may be used as evidence in the trial, except when it is not possible to postpone the act and ensure that the lawyer is informed about it (Section 165(2) CPC).

The Czech legislation does not explicitly define “investigative acts whose result may be used as evidence in the trial”; this term according to the jurisprudence covers in particular questioning, confrontation, identity parade, experimental reconstruction of the scene, reconstruction etc.

- b)
 - i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the competent authorities to facilitate or assist the person in exercising this right?
 - ii) In the affirmative, what are the concrete act(s) concerned that have to be taken by the competent authorities?

If the lawyer informs the Police authority that he wishes to participate in an investigative act whose result may be used as evidence, the Police authority is obliged to inform the lawyer in time about the type of an investigative act and about the time and place of its performance, except when it is not possible to postpone the act and ensure that the lawyer is informed about it (Section 165(3) CPC).

- c)
 - i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before starting the evidence-gathering or investigating act?
 - ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer? Please specify as appropriate.

If the lawyer expresses his wish to participate in an investigative act whose result may be used as evidence, the Police authority must inform the lawyer in time about the type of an investigative act, the time and place of its performance and cannot proceed until the arrival of a lawyer. There is an exception to this rule – the Police authority may proceed when it is not possible to postpone the act and ensure that the lawyer is informed about it.

- d)
 - i) In your legal order, is there a possibility of making derogations to the right of the suspected or accused person for his lawyer to be present at evidence-gathering or investigating act? In other words, if the person concerned wants to be assisted by a lawyer during such acts, is there nevertheless a possibility for the competent authorities to proceed with the evidence-gathering or investigating act without the lawyer being present?

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

An open list, see previous reply.

Questioning in the pre-trial stage of persons who are initially not suspected or accused of having committed an offence but obtain this status during questioning

5. In your legal order, when a person that is initially not suspected or accused of an alleged crime, such as a witness, is questioned by the police or an investigating judge:
- a) Does this person have the right to be assisted by a lawyer during questioning?

Yes, every person in proceedings conducted before courts, state authorities or other administrative authorities is entitled to legal assistance. In accordance with the Code of Criminal Procedure, every person providing an “explanation” to any law enforcement authority has the right to be assisted by a lawyer (Section 158(5) CPC), although the police authority has no duty to supply legal services if requested by the person.

In case that the person requests legal assistance after he has been informed about his rights, but has not sufficient means for legal assistance, Police will provide a telephone so he can call the lawyer. The participation of the lawyer in this case is generally limited though to mere legal assistance (supplying information on the importance of the requested explanation, possible consequences of information given by the person, further clarification of his rights, possibility to remain silent, etc.). The lawyer’s rights to participate during the actual questioning are therefore limited, and are not equal to full participation-rights of an attorney in case of questioning of accused person. A lawyer is not allowed to intervene in the questioning itself, such as by asking the person questions, reviewing the criminal file, requesting participation in other investigative acts, where the presence of the person is not requested, or by objecting to the course of questioning the person. The lawyer is allowed though to advice the questioned person to raise such objections or requests himself.

- b) When, during the questioning, such a person becomes suspected or accused of having committed a criminal offence, do the competent authorities have to inform the person concerned of this change of status?

No, there is no formal notification procedure in place for informing a person that he is a suspect in the Czech Republic. He has rights similar to accused person (although to a lesser extent) if he was deprived of his liberty, or in case of expedited trial against him, but there is no definition of a suspected person in general or a specified moment when a person becomes a suspect. Generally speaking, a person is a suspect before he becomes accused. Also, a suspected person may not be questioned / interrogated unless he was deprived of his liberty or unless he is tried in an expedited trial (where the suspect has the same rights as an accused person in usual criminal trials).

As for the accused person, yes, the authorities have to inform a person if he becomes accused.

- c) If the answer to question b) is positive:
- i) When precisely do the competent authorities have to inform the person concerned?

A person becomes an accused after the official criminal prosecution has been launched (Section 32 CPC), which is triggered by delivering a copy of “Police resolution commencing the criminal prosecution” to the person’s own hands.

- ii) In what manner do the competent authorities have to inform the person concerned (notification, information, ...)?

The “Police resolution commencing the criminal prosecution” has to be delivered to accused person at the latest before the beginning of the first interrogation (Section 160(2) CPC).

- iii) Do the competent authorities have to stop the questioning?
No.

- iv) Does the person concerned obtain the right to be assisted by a lawyer (when he did not have it before)? If so, as from which moment in time?
See letter a).
- v) May the statements made by the person before he was informed of the change of status be used in the ensuing criminal proceedings against him? If so, in which circumstances? Please specify as much as possible.

The statements made by a person providing “explanation” may not be read or otherwise used or referred to later on if the person is questioned as a witness or as an accused (Section 158 (6) CPC).

If a witness decided to give his statement and waves his right to remain silent on the matter, and later becomes suspected or accused, such statement may not be used as statement of suspected or accused person in further criminal proceedings against him. His statements may be used as a basis for commencing criminal prosecution against him though.

Minor offences

6. Questions regarding exclusions / minor offences:

- a) In your legal order, are there any categories of offences (in particular so-called "minor offences"), in respect of which the right to be assisted by a lawyer does not exist or is restricted, totally or partially, in the pre-trial phase?

No, there is no category of criminal offences corresponding to the concept of “minor offences” with a lower standard of procedural rights guaranteed to suspects of accused persons. This category would in CZ apply only to purely administrative offences entirely within administrative law, and therefore outside the scope of the directive.

- b) In the affirmative, please describe the category or categories of exclusions as precisely as possible, defining the category by a common denominator, e.g.
- where the offence is initially dealt with in an administrative manner;
 - where pre-trial detention is not possible in relation to the offence concerned;
 - where deprivation of liberty cannot be imposed as a sanction in relation to the offence concerned;
 - where the fine that may be imposed as a sanction in relation to the offence concerned does not exceed a certain amount;
 - other definition.

Not applicable.

- c) In case your legal order contains one or more categories of exclusions: please indicate the consequence of each category of exclusion, e.g. is there a total or partial exclusion from the right to be assisted by a lawyer, does the exclusion entail different modalities for the assistance by a lawyer, etc. ...

Not applicable.

Lawyer provided by the State / Payment of lawyer's fees

7. The proposed Directive does not deal with the question of legal aid; even so the Presidency believes that the following questions regarding the payment of a lawyer's fee could have an impact on the formulation and application of the Directive.

With this in mind delegations are kindly invited to respond to the following questions:

- a) i) In your legal order, does an obligation exist for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *but cannot afford to pay a lawyer or cannot afford to pay the lawyer that he has chosen?*

Regarding accused person – yes, there is an obligation of the state to pay the fees of the lawyer entirely or at least partially in case that the accused person wants to exercise his right to a lawyer, but does not have sufficient means to pay for his defense (Section 33(2) CPC). The decision on whether the state will bear the cost of the defense is made either by the head judge of the senate or by the judge in case of a single judge panel.

Regarding suspected person – he does not have the right to a lawyer paid entirely or partially by the state even though suspected persons generally have the right to legal assistance.

- ii) If so, in which situations and under which conditions does such obligation exist?

When answering this question, please take into account the situations mentioned under questions 1-4.

The right to a free or partially free legal assistance is based on a means test. Every accused person, who claims his right to a lawyer as it is established according to the Code of Criminal Procedure, has a right to free assistance if he sufficiently proves that he does not have enough means to pay for his defense himself. This right applies under the same conditions in case of mandatory defense.

The request for free/partially free legal assistance can be submitted by the accused person himself, as well as by his lawyer, legal guardian, his relatives from the direct line of descendants, siblings, spouse, partner, companions, by his adopted child or adoptive parent, or the interested party. The requesting party should together with the request supply documents proving the lack of financial means for the defense (e.g. confirmation about being registered at the employment bureau, requalification program, confirmation about being a recipient of unemployment benefits, tax reports, bank statements about his account, extract from the real estate register, etc.).

A judge may decide on free legal assistance for the accused person even without the request if he has enough evidence in the court file to conclude that the person does not have enough means to pay for his legal defense and the legal assistance is necessary to protect his rights (Section 33(2) CPC).

The decision on granting the free legal assistance is not connected to a decision on appointing a specific lawyer to the accused. The accused himself has the right to choose his own lawyer, which will then be paid by the state. The accused or his legal guardian, his relatives from the direct line of descendants, siblings, spouse, partner, companions, adopted child or adoptive parent, and the interested party may likewise request a lawyer to be appointed by the court. Even if the accused is later on in the trial found guilty he does not have to repay the legal fees to his attorney if he was previously granted the free or partially free legal assistance.

Please take note mandatory defense which CZ applies (an accused must always have a lawyer under certain circumstances, e. g. if he is in a pre-trial detention, was deprived of a legal capacity or his legal capacity was reduced) is considered separately and the conditions for mandatory defense and for free / partially free legal assistance are not related.

- b) i) In your legal order, does there exist an obligation for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *even if he could himself afford to pay a lawyer, or the lawyer that he has chosen?*

No, even in cases of mandatory defense the court will via the means test evaluate the need to provide for a free/partially free legal assistance to the accused person. If conditions for granting the free/partially free legal assistance are not met by an accused, two different rules apply. If he has chosen the lawyer, he has to pay for him himself. In case of mandatory defense when he has not chosen the lawyer and as a consequence the lawyer has been appointed to him by a decision of a court, an accused will cover the costs for the appointed lawyer only if he is finally found guilty; if he is not found guilty, the state will pay the expenses of the appointed lawyer (Sections 151, 152 CPC).

- ii) If so, in which situations and under which conditions does such obligation exist? When answering this question, please take into account the situations mentioned under questions 1-4.

Not applicable.

Principle of confidentiality

8. a) In your legal order, can any derogations be made to the principle of confidentiality of communication between the suspected or accused person and his lawyer?

No, it is not possible to derogate from principle of confidentiality in written or oral communication between the suspect or accused person and his lawyer (Section 33(1) CPC, Section 75(5) CPC).

- c) In the affirmative, in which situations can such derogations be made? Please specify as much as possible, and make a distinction, if appropriate, between oral and written communication, and between communication in the pre-trial phase and in the trial phase.

Not applicable.

Waiver

9. a) In your legal order, does a suspect or accused person has the right to waive his right to be assisted by a lawyer?

Yes, suspected or accused persons generally have the possibility to waive their right to a lawyer.

In case of mandatory defense a waiver is generally not possible unless there is an exception (Section 36b CPC). If the waiver is possible in cases of otherwise mandatory defense (e.g. the maximum sentence, which can be imposed is higher than 5 years of imprisonment, but the accused may not be sentenced to an exceptional prison sentence), the accused person may waive his right to a defense by explicit oral or written statement, which will be recorded into a report of the competent authority conducting the criminal proceedings; such a statement may only be made in the presence of a lawyer and after a prior consultation with him. The accused may revoke his wish at any time of the proceedings and such revocation will have no legal effect on acts conducted prior to such revocation.

- b) In the affirmative,
i) What, if any, information has to be given to the person concerned prior to making the waiver?

Every person, who is a subject to criminal proceedings, has to be informed at every stage of the proceedings about his rights to defense and right to appoint himself a lawyer (Section 2(13), 33(5), 76(5), 95 CPC). Both the suspect and the accused person have a guaranteed right to proper information/instruction from the Police and judicial authorities. The adequate and sufficient instruction on rights of a person has to be provided on a case by case basis depending on the particular circumstances and situation.

- ii) If such information has to be given:
 - which person(s) or authorities may / should give that information?

Depending on the stage of proceedings - the Police, Prosecutor or the Court itself provide the instructions on rights to suspected or accused persons.

- how is that information to be given (oral, writing, ...) ? Please specify.

The instruction can be given in both ways, but in every case such instruction has to be recorded in a report after every act of criminal proceedings. The report has to always include the given instructions, and if applicable also the statement of the instructed persons.

- iii) How is the waiver noted/registered? What are the formalities, if any?

There are no formalities for the waiver (unless it is a case of mandatory defense - then see above letter a)). The suspected or accused person is given a full instruction on his rights regarding the right to a defense (also including the right to choose a lawyer), and he acknowledges that he understood the instruction by his signature in the official report. Afterwards it is up to his choice whether he will use his right and choose the lawyer, request the court to appoint him a lawyer, or to defend himself.

- iv) May a decision to waive the right to a lawyer be revoked, and if so, may this be done at any stage of the proceedings?

The right to a defense is a fundamental principle of the criminal proceedings in the Czech Republic (Section 2(13) CPC), and the accused or suspected person, who waived this right can at any time of the proceedings revoke his waiver. Moreover, should any reason for mandatory defense (Section 36 CPC) emerge, a lawyer will be chosen or appointed by the court.

- are there any (other) limitations to the possibility of revoking a waiver?
No.

- c) Are the answers to the questions under a) and b) different if the person concerned is a minor? If so, please specify.

Yes, a minor has to have a lawyer in any case from the commencement of any criminal proceedings based on the Code on criminal justice of minors (Section 42(2)) or the Code of Criminal Procedure, and a waiver of this right is not possible. The minor has to receive proper instructions on his rights; incl. the right to a defense, from competent authorities in all the stages of criminal proceedings and the instructions must be adequate and correspond to particular circumstances of the personality of the minor.

Remedies

10. a) Does your national law provide for remedies in case of breach of the right of access to a lawyer?

Yes.

- b) In the affirmative:
i) which are those remedies?

There are several types of remedies that can be used in case of violation of procedural rights. These are:

- 1. referring the case back to the Prosecutor for additional investigation (Section 186(e) CPC),**
- 2. reversal of the contested judgment by the appellate court (Section 259(1)(a)),**
- 3. launching an extraordinary appeal (Section 265b(1)(c)),**
- 4. complaint on violation of the Law (Section 266 (1), 268 (2), 269 – 272),**
- 5. the need to repeat the investigative act in case of a violation (e.g. if suspect provides “explanation” to competent authorities and he has not been enabled to use his right to have a lawyer present, Section 158 (4) CPC)); Prosecutor may also refer the case to another Police unit (Section 157(2)(b)) or another officer (Section 174 (2)(f).**

According to judicature in the Czech Republic, the phases of criminal proceedings cannot be evaluated separately. Therefore, if the preliminary criminal proceedings suffer an irreparable damage, the proceedings before the court cannot cure such violation. The entire proceedings would then violate the fundamental principle of just and unbiased criminal proceedings.

- ii) do the remedies also include the possibility for the (judicial) authorities to exclude evidence that has been obtained in breach of the right of access to a lawyer?

Yes, all the authorities participating in criminal proceedings (i.e. the Police, Prosecutor and the Court) have to personally and thoroughly evaluate all the evidence obtained – its impeccability, relevance, significance, etc. (Section 2(6) CPC). Evidence obtained in breach of procedural laws will generally be considered null and void if the violation of the procedure equals to a significant breach of the criminal procedure. Such a significant breach will be caused for example by failure to inform a witness about his rights. The right to a defense is a constitutional right and belongs to the fundamental principles of criminal proceedings. Its violation will therefore usually lead to a significant breach of the criminal procedure.

General concerns regarding the proposed Directive

- 11. Are there any other aspects of your legal order that could be of importance for the further discussions on this proposed Directive? If so, please highlight them.

Article 6:

The directive should in our view expressly deal with the possible conflict between provisions of this directive and divergent provisions in the existing bilateral agreements (both between Member States and in particular between Member States and third countries outside the EU).

Some Member States apply between themselves or in relations with third countries bilateral agreements containing in the field of a consular assistance provisions with content diverging from the Article 36 of the Vienna Consular Convention (1963). E. g. bilateral agreement between the Czech Republic and Italy stipulates that competent authorities of the receiving state have to without delay and in any case at the latest within 3 days inform the state of a nationality of a person if such person has been deprived of liberty in the receiving state (i. e. there is no room for a discretion of a person contrary to the Article 6 of the draft directive).

If the relation between the Article 6 of the draft directive and the provisions in the existing bilateral agreements is not addressed in the directive, a question could arise which of the conflicting provision should the Member State apply in a concrete case – if the one from the EU act, usually implemented into an act in the national law, or that one in the international agreement. If a more favourable provision is included in a bilateral agreement, such provision should prevail with reference to the directive non-regression clause. For contrary situations, it should be taken into account that constitutional courts of some Member States and the ECJ do not in all cases share the same view regarding the supremacy of the EU law before national law.

In particular a question could arise how to proceed when complying with the obligations towards the third countries stemming from the bilateral agreements as according to the Article 351(2) TFEU „the rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties. To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. ...“ (i. e. to seek their renegotiation).

Procedure under the Article 351(2) TFEU was already subject to deliberation within the Council. E. g. the opinion of the Legal Service of the Council to the proposal of Regulation "Brussels I" (document no. 5353/00, 7 February 2000) stated following:

"11. Paragraph 2 of Article 307 of the EC Treaty (current Article 351 TFEU) imposes the obligation on the Member State concerned to take all appropriate steps to eliminate the incompatibilities between the prior agreement and Community law. The Member State concerned must therefore renegotiate the prior agreement in order to bring it in line with Community law or denounce the agreement, where this is possible under the agreement or the principles of public international law.

12. However, a specific provision in the relevant Community measure may eliminate the incompatibility between the measure and prior agreements by authorizing the continued application of the prior agreements and thereby dispensing the Member State concerned from renegotiating them. Such a provision would constitute a derogation from the regime normally applicable under the Community measure; therefore, it must be objectively justified."

To avoid any future un-clarities in interpretation, we suggest to follow the above mentioned recommendation of the LS of the Council also for the purpose of the draft directive and clarify the relationship between the directive and other instruments in the final provisions of the directive, e. g. by using the similar wording as the one contained in the Article 25 of the Regulation „Rome I“.³

We would deem useful to obtain the written view of the LS of the Council on this matter (only oral information has been provided do far).

³

Article 25

Relationship with existing international conventions

1. This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to contractual obligations.

2. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.

DENMARK

Questioning of suspects and accused persons in the pre-trial phase

1. In your legal order, when a person that is suspected or accused of having committed a criminal offence is arrested (deprived of liberty) and asked by the police or investigating judge to reply to questions concerning the (alleged) crime committed,

a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?

Yes.

ii) In the affirmative: in which situations does this right exist?

The suspected or accused person may consult with a lawyer at any stage of the proceedings.

iii) If the person has the right to be assisted by a lawyer before questioning, may this right in your legal order be limited to the person contacting the lawyer by phone? If so, please indicate in which situations this may be the case.

No, the police or other competent authorities may not limit the right to a lawyer in such a way, however, if the suspect or accused person prefers to confer with his or her lawyer over the phone, the police will facilitate such contact.

b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?

Yes.

ii) In the affirmative: is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

The right to have a lawyer present during any questioning is valid in all situations.

c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?

Yes.

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?

The obligation exists automatically, except in cases pertaining to minor offences that are only punishable by fine.

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

The police are required to inform the suspect or accused person of these rights. If the suspect or accused person has no present or preferred counsel, the police must assist in providing a lawyer.

- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police or investigating judge to wait until the arrival of the lawyer before the questioning starts?

Yes.

ii) In the affirmative, how long (how many hours) do the police or investigating judge have to wait until the arrival of the lawyer?

No such time limits are stated in Danish law. Questioning may not start or resume until the suspect or accused person has had time to consult with his or her lawyer. However, a person who is deprived of liberty must be arraigned before the court within 24 hours of his or her arrest. In the event that the person’s preferred lawyer cannot be present, a lawyer will be appointed by the court.

- e) i) In your legal order, is there a possibility of making derogations to the right of a person to be assisted by a lawyer before and/or during questioning in the pre-trial phase? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police or investigating judge to proceed with the questioning without the presence of a lawyer, or without the lawyer having been contacted in advance by phone?

No.

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

Not Applicable (N/A)

2. In your legal order, when a person is officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence and is asked to come 'voluntarily' to a police station in order to be questioned by the police in relation to that crime,

a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?

Yes.

ii) In the affirmative: in which situations does this right exist?

The suspected or accused person may consult with a lawyer at any stage of the proceedings.

iii) If the person has a right to be assisted by a lawyer before questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

Yes. The way in which the suspect or accused person is informed of this right depends on the means of communication used in the convocation. If the convocation is verbal, the information regarding this right is given verbally, if the convocation is done in writing, so will the information regarding this right be given in writing.

b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?

Yes.

ii) In the affirmative, is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

The right to have a lawyer present during any questioning is valid in all situations, there are no exceptions.

iii) If the person has a right to be assisted by a lawyer during questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

Yes. The way in which the suspect or accused person is informed of this right depends on the means of communication used in the convocation. If the convocation is verbal, the information regarding this right is given verbally, if the convocation is done in writing, so will the information regarding this right be given in writing.

- c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?

Yes.

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?

The obligation exists automatically, except in cases pertaining to minor offences that are only punishable by fine.

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

The police are required to inform the suspect or accused person of these rights. If the suspect or accused person has no present or preferred counsel, the police must assist in providing a lawyer.

- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?

Yes.

ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

No such time limits are stated in Danish law. Questioning may not start or resume until the suspect or accused person has had time to consult with his or her lawyer.

- f) i) In your legal order, is there a possibility of making derogations to the right to be assisted by a lawyer before and/or during the questioning? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer?

No.

- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

Not Applicable (N/A)

3. In your legal order, when a person is stopped on the street by the police and, after having been officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence, is asked by the police to reply to questions concerning the (alleged) crime committed,

- a) What kind of questions could be asked to this person? Is it possible to question the person regarding the alleged crime?

The police always have the right to ask questions in order to establish the identity of said person.

The police are also required to inform said person of the following:

- 1. That he or she is accused**
- 2. The nature of the crime he or she is accused of committing**
- 3. The right to remain silent**
- 4. The right to be represented by a lawyer**

Should the suspect or accused person be willing to answer questions regarding the alleged crime, regardless of his or her rights, as mentioned above, the police may question the person.

- b) i) Does this person have the right to be assisted by a lawyer during such questioning?

Yes.

- ii) In the affirmative, in which situations does such a right exist?

The right to have a lawyer present during any questioning is valid in all situations.

- iii) If the person has the right to be assisted by a lawyer, may this right be limited to the person contacting the lawyer by phone before questioning starts? If so, please indicate in which situations this may be the case.

No, the police or other competent authorities may not limit the right to a lawyer in such a way, however, if the suspect or accused person prefers to confer with his or her lawyer over the phone, the police will facilitate such contact.

- c) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there an obligation in your legal order for the police or any other competent authorities to facilitate or assist the person in exercising this right?

Yes.

- ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only 'activated' further to a request of the person concerned?

The obligation exists automatically, except in cases pertaining to minor offences that are only punishable by fine.

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority?

The police are required to inform the suspect or accused person of these rights. If the suspect or accused person has no present or preferred counsel, the police must assist in providing a lawyer.

- d) i) If the person has a right to be assisted by a lawyer during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?

Yes.

ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

No such time limits are stated in Danish law. Questioning may not start or resume until the suspect or accused person has had time to consult with his or her lawyer.

- e) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there a possibility of making derogations to this right in your legal order? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer or without contact by phone having been made?

No.

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

Not Applicable (N/A)

Evidence-gathering and investigating acts in the pre-trial stage

4. Questions regarding evidence-gathering or investigating acts in the pre-trial stage:

- a) i) In your legal order, does the suspect or accused person have a right for his lawyer to be present at evidence-gathering or investigating acts?

Such a right exists, but is limited to certain evidence-gathering or investigative acts.

ii) In the affirmative, which evidence-gathering or investigating acts are concerned?

A questioning, a confrontation, a photo-lineup, a video interrogation of a minor, or any similar evidence-gathering or investigative act, that would presumably be applicable as evidence during the trial.

- b) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the competent authorities to facilitate or assist the person in exercising this right?

Yes.

- ii) In the affirmative, what are the concrete act(s) concerned that have to be taken by the competent authorities?

The police are required to inform the lawyer of the time and place of the evidence-gathering or investigative act beforehand.

- c) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before starting the evidence-gathering or investigating act?

In general, the police must await the arrival of the lawyer before commencing the aforementioned activities. This rule can be disregarded under the following circumstances:

- 1. With the approval of the suspect or accused persons lawyer**
- 2. In such a case where the investigative or evidence-gathering act is of a nature that cannot be delayed, and where it is either not possible to inform the lawyer of the activity, or it is not possible for the lawyer be present.**

- ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer? Please specify as appropriate.

No such time limits are stated in Danish law. Certain exceptions apply. Cf. 4.c.i

- d) i) In your legal order, is there a possibility of making derogations to the right of the suspected or accused person for his lawyer to be present at evidence-gathering or investigating act? In other words, if the person concerned wants to be assisted by a lawyer during such acts, is there nevertheless a possibility for the competent authorities to proceed with the evidence-gathering or investigating act without the lawyer being present?

Yes, but only under certain exceptions.

- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

There is a closed list as follows:

The right to the lawyer being present during such investigative or evidence-gathering acts as mentioned in our answer to 4.a.ii, can by ruling of the court be derogated if considerations pertaining to the following so requires:

- 1. Foreign powers**
- 2. National security**
- 3. The solving of the crime**
- 4. The life or well-being of a third party**
- 5. The investigation of another current case regarding a crime that is, by law, punishable by prison for six years or more, or a crime pertaining to matters of national security**
- 6. The protection of classified information pertaining to the investigative methods of the police.**

The above mentioned derogations are not applicable if they jeopardize the overall fairness of the trial.

Questioning in the pre-trial stage of persons who are initially not suspected or accused of having committed an offence but obtain this status during questioning

5. In your legal order, when a person that is initially not suspected or accused of an alleged crime, such as a witness, is questioned by the police or an investigating judge:

a) Does this person have the right to be assisted by a lawyer during questioning?

No, except in such a case that the person being questioned is a victim of a violent crime.

b) When, during the questioning, such a person becomes suspected or accused of having committed a criminal offence, do the competent authorities have to inform the person concerned of this change of status?

Yes.

c) If the answer to question b) is positive:

i) When precisely do the competent authorities have to inform the person concerned?

At such a time when there is grounds for suspecting the person of having committed a criminal offense. At this time the now suspect person must be informed of his or her rights to be represented by a lawyer.

ii) In what manner do the competent authorities have to inform the person concerned (notification, information, ...)?

By way of information.

iii) Do the competent authorities have to stop the questioning?

Only in such a case, that the person chooses to exercise his right to have a lawyer present.

iv) Does the person concerned obtain the right to be assisted by a lawyer (when he did not have it before)? If so, as from which moment in time?

Yes. Cf. 5.c.i

- v) May the statements made by the person before he was informed of the change of status be used in the ensuing criminal proceedings against him? If so, in which circumstances? Please specify as much as possible.

Yes, it may be used in ensuing criminal proceedings. The statements are subject to review by the court with regards to admissibility and quality of evidence.

Minor offences

6. Questions regarding exclusions / minor offences:

- a) In your legal order, are there any categories of offences (in particular so-called "minor offences"), in respect of which the right to be assisted by a lawyer does not exist or is restricted, totally or partially, in the pre-trial phase?

No.

- b) In the affirmative, please describe the category or categories of exclusions as precisely as possible, defining the category by a common denominator, e.g.

- where the offence is initially dealt with in an administrative manner;
- where pre-trial detention is not possible in relation to the offence concerned;
- where deprivation of liberty cannot be imposed as a sanction in relation to the offence concerned;
- where the fine that may be imposed as a sanction in relation to the offence concerned does not exceed a certain amount;
- other definition.

Not Applicable (N/A)

- c) In case your legal order contains one or more categories of exclusions: please indicate the consequence of each category of exclusion, e.g. is there a total or partial exclusion from the right to be assisted by a lawyer, does the exclusion entail different modalities for the assistance by a lawyer, etc. ...

Not Applicable (N/A)

Lawyer provided by the State / Payment of lawyer's fees

7. The proposed Directive does not deal with the question of legal aid; even so the Presidency believes that the following questions regarding the payment of a lawyer's fee could have an impact on the formulation and application of the Directive.

With this in mind delegations are kindly invited to respond to the following questions:

- a) i) In your legal order, does an obligation exist for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *but cannot afford to pay a lawyer or cannot afford to pay the lawyer that he has chosen?*

Yes.

- ii) If so, in which situations and under which conditions does such obligation exist?

When answering this question, please take into account the situations mentioned under questions 1-4.

The obligation exists under all the conditions listed in the answers to questions 1-4.

- b) i) In your legal order, does there exist an obligation for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *even if he could himself afford to pay a lawyer, or the lawyer that he has chosen?*

Yes. If the suspect or accused person is found guilty of having committed the alleged crime, he or she is required to pay the legal fees incurred during the criminal proceedings.

ii) If so, in which situations and under which conditions does such obligation exist?
When answering this question, please take into account the situations mentioned under questions 1-4.

The obligation exists under all the conditions listed in the answers to questions 1-4.

Principle of confidentiality

8. a) In your legal order, can any derogations be made to the principle of confidentiality of communication between the suspected or accused person and his lawyer?

No. The principle of confidentiality of communication between the suspected or accused person and his or her defense lawyer is fundamental to Danish law.

b) In the affirmative, in which situations can such derogations be made? Please specify as much as possible, and make a distinction, if appropriate, between oral and written communication, and between communication in the pre-trial phase and in the trial phase.

Not Applicable (N/A)

Waiver

9. a) In your legal order, does a suspect or accused person has the right to waive his right to be assisted by a lawyer?

For criminal proceedings pertaining to most crimes, the suspect or accused person has the right to waive this right. This does not apply in certain proceedings pertaining to very serious offences, in which case it is mandatory to be represented by a lawyer.

b) In the affirmative,

i) What, if any, information has to be given to the person concerned prior to making the waiver?

The suspect or accused person must be provided with sufficient information to make an informed decision, and to understand the consequences of waiving this right.

ii) If such information has to be given:

- which person(s) or authorities may / should give that information?

The information should be given by the police.

- how is that information to be given (oral, writing,) ? Please specify.

There are no requirements pertaining to how.

iii) How is the waiver noted/registered? What are the formalities, if any?

There are no formalities pertaining to the waiving of this right. However, it will typically be entered into the police report, that the suspect or accused person was given the required information, and that he or she chose to waive the right to be represented by a lawyer.

iv) May a decision to waive the right to a lawyer be revoked, and if so,

- may this be done at any stage of the proceedings?

Yes.

- are there any (other) limitations to the possibility of revoking a waiver?

No.

c) Are the answers to the questions under a) and b) different if the person concerned is a minor? If so, please specify.

The minor is not able to waive the right to be represented by a lawyer; this decision lies with the legal guardian of said minor. The answers to questions 9.a and 9.b are the same.

Remedies

10. a) Does your national law provide for remedies in case of breach of the right of access to a lawyer?

Yes.

- b) In the affirmative:

- i) which are those remedies?

No explicit remedies are described. The court will assess the admissibility and quality of evidence, as well as any remedies the court sees fit.

- ii) do the remedies also include the possibility for the (judicial) authorities to exclude evidence that has been obtained in breach of the right of access to a lawyer?

Yes, at the court's discretion.

General concerns regarding the proposed Directive

11. Are there any other aspects of your legal order that could be of importance for the further discussions on this proposed Directive? If so, please highlight them.

No.

GERMANY

Questioning of suspects and accused persons in the pre-trial phase

1. In your legal order, when a person that is suspected or accused of having committed a criminal offence is arrested (deprived of liberty) and asked by the police or investigating judge to reply to questions concerning the (alleged) crime committed,

a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?

Yes.

ii) In the affirmative: in which situations does this right exist?

The suspected or accused person may consult with a lawyer at any stage of the proceedings.

iii) If the person has the right to be assisted by a lawyer before questioning, may this right in your legal order be limited to the person contacting the lawyer by phone? If so, please indicate in which situations this may be the case.

No, the right to be assisted by a lawyer cannot be limited to telephone contact.

b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?

Yes.

ii) In the affirmative: is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

The accused person may consult with a lawyer at any stage of the proceedings, including questionings. The right for a lawyer to be present at questionings is codified only for those interviews carried out by a prosecutor or a judge.

There is no codified right for a lawyer to be present at questionings carried out by the police. However, in practice, a lawyer can also be present at police questionings in the actual questioning room. In the rather theoretical case in which the presence of a lawyer would be denied by the police, the accused person would still be able to meet and to deliberate with his lawyer as often and as long as he likes.

Furthermore it has to be stressed that the accused person can always choose to remain silent and to answer only when his lawyer is present; thus the presence of a lawyer can be compelled by the suspected or accused person in practice.

- c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?

Yes.

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?

This obligation exists in all cases.

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

At the commencement of the first questioning the suspected or accused person has to be informed that the law grants him the right to respond to the charges, or not to make any statement on the charges, and the right, at any stage, even prior to his questioning, to consult with a lawyer of his choice.

The police or any other competent authority have to assist the accused person in contacting his lawyer.

- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police or investigating judge to wait until the arrival of the lawyer before the questioning starts?

Once a lawyer has taken up the defence of the accused person, the questioning may only commence or be continued after the accused person has had the opportunity to consult with his lawyer.

If the accused person has not succeeded in contacting his preferred lawyer, the questioning may only commence or be continued if the police informs the accused person of his rights again and if the police has made serious efforts in assisting the accused person with reaching his lawyer.

- ii) In the affirmative, how long (how many hours) do the police or investigating judge have to wait until the arrival of the lawyer?

There are no fixed time limits. The questioning may only commence or be continued after the accused person has had the opportunity to consult with his lawyer.

- e) i) In your legal order, is there a possibility of making derogations to the right of a person to be assisted by a lawyer before and/or during questioning in the pre-trial phase? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police or investigating judge to proceed with the questioning without the presence of a lawyer, or without the lawyer having been contacted in advance by phone?

Cf. answer to question 1 (d): Once a lawyer has taken up the defence of the accused person, the questioning may only commence or be continued after the accused person has had the opportunity to consult with his lawyer.

If the accused person has not succeeded in contacting his preferred lawyer, the questioning may only commence or be continued if the police informs the accused person of his rights again and if the police has made serious efforts in assisting the accused person with reaching his lawyer.

There is no possibility of making derogations. The police or investigating judge may not proceed without the consent of the accused person.

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

n/a

2. In your legal order, when a person is officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence and is asked to come 'voluntarily' to a police station in order to be questioned by the police in relation to that crime,

a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?
Cf. answer to question 1 (a) (i).

ii) In the affirmative: in which situations does this right exist?

Cf. answer to question 1 (a) (ii).

iii) If the person has a right to be assisted by a lawyer before questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

The accused person does not have to be informed of his right to be assisted by a lawyer in the summons. However, at the commencement of the first questioning the accused person has to be informed that the law grants him the right to respond to the charges, or not to make any statement on the charges, and the right, at any stage, even prior to his questioning, to consult with a lawyer of his choice.

b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?
Cf. answer to question 1 (b) (i).

ii) In the affirmative, is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

Cf. answer to question 1 (b) (ii).

iii) If the person has a right to be assisted by a lawyer during questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

Cf. answer to question 2 (a) (iii).

c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?

Cf. answer to question 1 (c) (i).

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?

Cf. answer to question 1 (c) (ii).

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

Cf. answer to question 1 (c) (ii).

d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?

Cf. answer to question 1 (d) (i).

ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

Cf. answer to question 1 (d) (ii).

- e) i) In your legal order, is there a possibility of making derogations to the right to be assisted by a lawyer before and/or during the questioning? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer?

Cf. answer to question 1 (e) (i).

- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

n/a

3. In your legal order, when a person is stopped on the street by the police and, after having been officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence, is asked by the police to reply to questions concerning the (alleged) crime committed,

- a) What kind of questions could be asked to this person? Is it possible to question the person regarding the alleged crime?

The accused person has to be informed about the police's suspicion and he has to be advised that the law grants him the right to respond to the charges, or not to make any statement on the charges, and the right, at any stage, even prior to his questioning, to consult with a lawyer of his choice. After that, it is possible to question the person regarding the alleged crime.

- b) i) Does this person have the right to be assisted by a lawyer during such questioning?

Cf. answer to question 1 (b) (i).

- ii) In the affirmative, in which **situations** does such a right exist?

Cf. answer to question 1 (a) (ii).

- iii) If the person has the right to be assisted by a lawyer, may this right be limited to the person contacting the lawyer by phone before questioning starts? If so, please indicate in which situations this may be the case.

Cf. answer to question 1 (a) (iii).

- c) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there an obligation in your legal order for the police or any other competent authorities to facilitate or assist the person in exercising this right?

Cf. answer to question 1 (c) (i).

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?

Cf. answer to question 1 (c) (ii).

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority?

Cf. answer to question 1 (c) (ii).

- d) i) If the person has a right to be assisted by a lawyer during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?

Cf. answer to question 1 (d) (i).

ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

Cf. answer to question 1 (d) (ii).

- e) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there a possibility of making derogations to this right in your legal order? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer or without contact by phone having been made?

Cf. answer to questions 1 (e) (i) and (b) (i).

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

n/a

Evidence-gathering and investigating acts in the pre-trial stage

4. Questions regarding evidence-gathering or investigating acts in the pre-trial stage:

- a) i) In your legal order, does the suspect or accused person have a right for his lawyer to be present at evidence-gathering or investigating acts?

Yes, depending on the type of evidence gathering or investigating act.

ii) In the affirmative, which evidence-gathering or investigating acts are concerned?

The lawyer has the explicit right to be present at evidence gathering carried out by the prosecutor (questioning of the accused person) and by the investigating judge (questioning of the accused person, of witnesses and of experts; legal inspection [Augenschein]). There are no explicit rules that deal with the presence of a lawyer at evidence gathering by the police.

It should be pointed out that, in general, all evidence gathering has to be repeated during the court session; it is not possible to simply refer to the evidence contained in the court file. Needless to say, in the court session the lawyer has the right to be present and to participate.

- b) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the competent authorities to facilitate or assist the person in exercising this right?

Yes.

ii) In the affirmative, what are the concrete act(s) concerned that have to be taken by the competent authorities?

The persons entitled to be present have to be given prior notice of the dates set down for certain evidence gathering (carried out by the prosecutor or the investigating judge).

- c) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before starting the evidence-gathering or investigating act?

There is no obligation to wait. Persons entitled to be present do not have the right to request a change of the date set down for evidence gathering when prevented from being present.

ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer? Please specify as appropriate.

n/a

- d) i) In your legal order, is there a possibility of making derogations to the right of the suspected or accused person for his lawyer to be present at evidence-gathering or investigating act? In other words, if the person concerned wants to be assisted by a lawyer during such acts, is there nevertheless a possibility for the competent authorities to proceed with the evidence-gathering or investigating act without the lawyer being present?

In cases in which the lawyer has the right to be present, the notification of the lawyer may be dispensed with if it endangers the success of the investigation.

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

The notification of the lawyer may only be dispensed with if it endangers the success of the investigation.

Questioning in the pre-trial stage of persons who are initially not suspected or accused of having committed an offence but obtain this status during questioning

5. In your legal order, when a person that is initially not suspected or accused of an alleged crime, such as a witness, is questioned by the police or an investigating judge:

a) Does this person have the right to be assisted by a lawyer during questioning?

Witnesses may avail themselves of the assistance of legal counsel. Legal counsel appearing at the questioning of the witness is permitted to be present. He may be barred from the questioning if certain facts justify the assumption that his presence would not only negligibly hinder the orderly taking of evidence.

b) When, during the questioning, such a person becomes suspected or accused of having committed a criminal offence, do the competent authorities have to inform the person concerned of this change of status?

Once the person becomes accused the authorities have to either inform the person or to stop the questioning immediately.

c) If the answer to question b) is positive:

i) When precisely do the competent authorities have to inform the person concerned?

Before they continue questioning.

ii) In what manner do the competent authorities have to inform the person concerned (notification, information, ...)?

At the commencement of the first questioning as an accused person he has to be informed that the law grants him the right to respond to the charges, or not to make any statement on the charges, and the right, at any stage, even prior to his questioning, to consult with a lawyer of his choice.

In most cases the information is provided orally. An arrested person is informed by a written letter of rights.

- iii) Do the competent authorities have to stop the questioning?
The competent authorities have to stop the questioning immediately if they do not inform the accused person of his rights.
- iv) Does the person concerned obtain the right to be assisted by a lawyer (when he did not have it before)? If so, as from which moment in time?
Both witnesses and accused persons may avail themselves of the assistance of legal counsel at any time.
- v) May the statements made by the person before he was informed of the change of status be used in the ensuing criminal proceedings against him? If so, in which circumstances? Please specify as much as possible.
If the person made statements before the competent authorities had any reason to treat him as an accused, his statements may be used in court. In such a case, the person who questioned him (i.e. in most cases a police officer) would be heard as a witness in court. The court would have to evaluate the testimony of the person who questioned him, depending on the individual case (e.g. if the information was given on time or if it was not given accidentally or on purpose).

Minor offences

6. Questions regarding exclusions / minor offences:

- a) In your legal order, are there any categories of offences (in particular so-called "minor offences"), in respect of which the right to be assisted by a lawyer does not exist or is restricted, totally or partially, in the pre-trial phase?

No.

- b) In the affirmative, please describe the category or categories of exclusions as precisely as possible, defining the category by a common denominator, e.g.
- where the offence is initially dealt with in an administrative manner;
 - where pre-trial detention is not possible in relation to the offence concerned;
 - where deprivation of liberty cannot be imposed as a sanction in relation to the offence concerned;
 - where the fine that may be imposed as a sanction in relation to the offence concerned does not exceed a certain amount;
 - other definition.

n/a

- c) In case your legal order contains one or more categories of exclusions: please indicate the consequence of each category of exclusion, e.g. is there a total or partial exclusion from the right to be assisted by a lawyer, does the exclusion entail different modalities for the assistance by a lawyer, etc. ...

n/a

Lawyer provided by the State / Payment of lawyer's fees

7. The proposed Directive does not deal with the question of legal aid; even so the Presidency believes that the following questions regarding the payment of a lawyer's fee could have an impact on the formulation and application of the Directive.

With this in mind delegations are kindly invited to respond to the following questions:

- a) i) In your legal order, does an obligation exist for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *but cannot afford to pay a lawyer or cannot afford to pay the lawyer that he has chosen?*

Whether a lawyer is provided by the State does not depend on the financial situation of the accused person, but on the case, e.g. the seriousness of the offence, the severity of a potential sentence, the complexity of the case or the personal situation of the accused person (e.g. his mental condition or age).

ii) If so, in which situations and under which conditions does such obligation exist?

When answering this question, please take into account the situations mentioned under questions 1-4.

The participation of a defence counsel is mandatory if

- **the main hearing at first instance is held at the Higher Regional Court or at the Regional Court;**
- **the accused person is charged with a felony (i.e. minimum sentence of one year of prison);**
- **the proceedings may result in an order prohibiting the pursuit of an occupation;**
- **remand detention pursuant to Sections 112 or 112a or provisional committal pursuant to Section 126a or Section 275a subsection (6) is executed against an accused;**
- **the accused person has been in an institution for at least three months based on judicial order or with the approval of the judge and will not be released from such institution at least two weeks prior to commencement of the main hearing;**
- **committal of the accused person pursuant to Section 81 is being considered for the purpose of preparing an opinion on his mental condition;**
- **proceedings for preventive detention are conducted;**
- **the previous defence counsel is excluded from participation in the proceedings by a decision;**
- **the assistance of defence counsel appears necessary because of the seriousness of the offence, or because of the difficult factual or legal situation, or if it is evident that the accused person cannot defend himself, particularly where an attorney has been assigned to the aggrieved person;**
- **an accused person with a speech or hearing impairment applies for a legal counsel.**

If an accused person does not have a defence counsel in cases of mandatory defence the court will appoint a defence counsel. This does not depend on the financial situation of the accused person.

Prior to the appointment of a defence counsel, the accused person shall be given the opportunity to name a defence counsel of his choice within a time limit to be specified. The presiding judge must appoint that defence counsel unless there is an important reason for not doing so.

If convicted, the defendant is also sentenced to bear the costs of the proceedings (including the fees of a court-appointed defence counsel) insofar as they were caused by the trial for an offence of which he has been convicted. However, this obligation only becomes effective and may be enforced if his financial situation allows him to actually bear the costs. If the financial situation is below a certain limit, no costs have to be borne by the defendant.

- b) i) In your legal order, does there exist an obligation for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *even if he could himself afford to pay a lawyer, or the lawyer that he has chosen?*

Cf. answer to question 7 (a) (i). The same rules apply to everybody irrespective of their financial situation.

- ii) If so, in which situations and under which conditions does such obligation exist?

When answering this question, please take into account the situations mentioned under questions 1-4.

Cf. answer to question 7 (a) (ii). The same rules apply to everybody irrespective of their financial situation. If the convict has the financial means, the State's claim for reimbursement of the court-appointed lawyer's fees will be enforced.

Principle of confidentiality

8. a) In your legal order, can any derogations be made to the principle of confidentiality of communication between the suspected or accused person and his lawyer?

Yes, under strict limitations.

- b) In the affirmative, in which situations can such derogations be made? Please specify as much as possible, and make a distinction, if appropriate, between oral and written communication, and between communication in the pre-trial phase and in the trial phase.

The accused person is entitled to communicate confidentially with his lawyer in writing as well as orally even when he is not at liberty. The same rules apply in the pre-trial and in the trial stage.

If an accused person who is not at liberty is strongly suspected of having committed an offence of forming a criminal or terrorist organisation, the court has to order that in communication with defence counsel documents or other items may be rejected if the sender does not agree to their being first submitted to a court for inspection. Where written correspondence is subject to monitoring pursuant to the first sentence, devices which exclude the possibility of handing over documents and other items have to be put in place for conversations with defence counsel. The judge who is entrusted with implementing monitoring measures may not be or become seized of the subject of the investigation. The judge has to keep secret any knowledge which he obtains during monitoring.

Communications between the defence counsel and the accused person may generally not be intercepted and recorded. The telecommunications may be intercepted and recorded only where certain facts substantiate the suspicion that the defence counsel is involved in an offence committed by the accused person. The interception and recording is to be interrupted without delay if indications arise that statements concerning the core area of the private conduct of life are being recorded.

Waiver

9. a) In your legal order, does a suspect or accused person have the right to waive his right to be assisted by a lawyer?

The accused person may consult with a lawyer at any stage of the proceedings. He can freely choose to do so at any time. There is no formal procedure for a waiver in place, since it only depends on the accused person's decision which can be changed at any time.

In cases of mandatory defence (cf. answer to question 7), the accused person has to be assisted by a defence counsel during the trial. He cannot waive that right, neither formally nor informally.

- b) In the affirmative,
- i) What, if any, information has to be given to the person concerned prior to making the waiver?
 - ii) If such information has to be given:
 - which person(s) or authorities may / should give that information?
 - how is that information to be given (oral, writing, ...) ? Please specify.
 - iii) How is the waiver noted/registered? What are the formalities, if any?
 - iv) May a decision to waive the right to a lawyer be revoked, and if so,
 - may this be done at any stage of the proceedings?
 - are there any (other) limitations to the possibility of revoking a waiver?

n/a

- c) Are the answers to the questions under a) and b) different if the person concerned is a minor? If so, please specify.

No.

Remedies

10. a) Does your national law provide for remedies in case of breach of the right of access to a lawyer?

Yes.

- b) In the affirmative:

- i) which are those remedies?

An appeal against a judgment could be lodged on a violation of the right to fair trial.

There are no explicit remedies solely for cases of a breach of the right to access to a lawyer.

- ii) do the remedies also include the possibility for the (judicial) authorities to exclude evidence that has been obtained in breach of the right of access to a lawyer?

There is no general provision stating that evidence obtained in breach of the right to access to a lawyer is per se inadmissible. The court has to decide on the admissibility of evidence on a case by case basis. If, for example, an investigating judge does not inform the lawyer of a questioning although there is no reason for not doing so, the questioning protocol might not be used as evidence.

General concerns regarding the proposed Directive

11. Are there any other aspects of your legal order that could be of importance for the further discussions on this proposed Directive? If so, please highlight them.

A. General remarks

Germany has always welcomed the proposal and is looking forward to working together with the Danish Presidency closely.

Having common minimum standards in respect of the right to have access to a lawyer and the right to communicate upon arrest is an important basis for mutual recognition of judicial decisions in criminal matters. Germany would like to support the Presidency in achieving an appropriate result.

B. Right to access to a lawyer in criminal proceedings in Germany

According to the German Code of Criminal Procedure, an accused person may consult with a lawyer at any stage of the proceedings.

There are only few and narrow limitations of this right, in particular in exceptional cases of terrorism etc; these cases are very rare. Under no circumstances may a defendant be denied legal counsel in a court session.

The right to access to a lawyer does not imply that a lawyer always has to be present and does not mean that the lawyer has to be automatically paid by the state. What is guaranteed and has to be granted under all circumstances is the opportunity to have access to a lawyer and to consult with a lawyer.

C. Admissibility of evidence

The evaluation and admission of evidence is part of the core area of the Member States' codes of procedure. The different legal traditions of the Member States in this complex field should be taken into consideration. Assuming that all Member States have appropriate rules in place, the Directive should avoid setting rules on the admissibility of evidence.

D. Remedies

Germany assumes that all Member States have effective remedies in place in cases where the right to access to a lawyer is violated. Given the different legal traditions of the Member States and the diversity and complexity of this area, the Directive should not contain any rules on remedies.

E. Exceptional circumstances

In very exceptional circumstances, if there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person, and if this threat is caused by a terrorist organisation, the German legal order allows access to the lawyer that has been chosen by the accused person to be suspended for a limited amount of time. However, on request of the accused person another lawyer must be appointed as a contact person.

With the consent of the accused person this other lawyer may participate in questionings and other evidence gathering.

These provisions for very exceptional circumstances have not been applied since their adoption in 1977.

If the proceedings are already at the trial stage, no court sessions may take place. A trial that has already started is interrupted immediately. Thus a defendant cannot be deprived of legal counsel during a court trial.

With a minor change to Article 3 para. 4 this situation could possibly be taken into consideration without changing the spirit of the Article. It could read as follows:

“Member States may derogate from this Article in very exceptional circumstances and only if no trial session is taking place, when this is justified by compelling reasons in the light of the particular circumstances of the case, such as pertaining to the urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person, or to prevent a substantial jeopardy to ongoing criminal proceedings.”

Or alternatively:

“Member States may derogate from this Article in very exceptional circumstances and only if the accused person is not deprived of legal counsel during trial sessions, when this is justified by compelling reasons in the light of the particular circumstances of the case, such as pertaining to the urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person, or to prevent a substantial jeopardy to ongoing criminal proceedings.”

A derogation for very exceptional circumstances should be added to article 6 as well (cf. the proposal of SE, footnote 58 in document 18240/11).

GREECE

Questioning of suspects and accused persons in the pre-trial phase

1. In your legal order, when a person that is suspected or accused of having committed a criminal offence is arrested (deprived of liberty) and asked by the police or investigating judge to reply to questions concerning the (alleged) crime committed,

a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?

Yes

ii) In the affirmative: in which situations does this right exist?

The lawyer may communicate in person with the arrested person in the police station. The arrested person has the right to be informed of the reason of deprivation of his liberty and of the charges against him/her, and these rights may be exercised with the assistance of his/her lawyer. Also, when convoked to answer any questions concerning the charges against him/her, he/she has the rights to ask for a postponement of the questioning for up to 48 hours, access the documents of the investigation file, study them and make copies of them at his/her expense. These rights may be exercised with the assistance of his/her lawyer. Also, the arrested person may be assisted by his/her lawyer in all kinds of investigative acts conducted by an investigating judge, except the questioning of witnesses.

iii) If the person has the right to be assisted by a lawyer before questioning, may this right in your legal order be limited to the person contacting the lawyer by phone? If so, please indicate in which situations this may be the case.

No

b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?

Yes

ii) In the affirmative: is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

In all situations

- c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?

Yes

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?
- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

The accused has the right to be informed of the reason of deprivation of his liberty. He/She must be convoked to the questioning at least before 24 hours, in order for him/her to have the opportunity to exercise effectively his right to be assisted by and to appoint a lawyer. This deadline may be curtailed only in case of danger specifically mentioned in the questioning report. Furthermore, the accused has the right to ask for a postponement of the questioning for up to 48 hours. He/She is not obliged to answer to any questions concerning the charges against him before this deadline expires. Said deadline may be extended upon the accused person’s request. Also, the accused has the rights to be informed of the charges against him/her, to access the documents of the investigation file, to study them and make copies of them at his/her expense. The police/investigative judge must explain to the accused the above rights and report so to the questioning report. In case of investigation by an investigating judge, the latter must appoint to the accused a lawyer, if the accused asks so.

- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police or investigating judge to wait until the arrival of the lawyer before the questioning starts?

Yes

- ii) In the affirmative, how long (how many hours) do the police or investigating judge have to wait until the arrival of the lawyer?

As per answer 1c ii) above

- e) i) In your legal order, is there a possibility of making derogations to the right of a person to be assisted by a lawyer before and/or during questioning in the pre-trial phase? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police or investigating judge to proceed with the questioning without the presence of a lawyer, or without the lawyer having been contacted in advance by phone?

No

- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

2. In your legal order, when a person is officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence and is asked to come 'voluntarily' to a police station in order to be questioned by the police in relation to that crime,

a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?

Yes

ii) In the affirmative: in which situations does this right exist?

The lawyer may communicate in person with the accused. He/She must be convoked to the questioning at least before 24 hours, in order for him/her to have the opportunity to exercise effectively his right to be assisted by and to appoint a lawyer. This deadline may be curtailed only in case of danger specifically mentioned in the questioning report. Furthermore, the accused has the right to ask for a postponement of the questioning for up to 48 hours. He/She is not obliged to answer to any questions concerning the charges against him before this deadline expires. Said deadline may be extended upon the accused person's request. The accused has the rights to be informed of the charges against him/her, to access the documents of the investigation file, to study them and make copies of them at his/her expense. These rights may be exercised with the assistance of his/her lawyer. The police/investigative judge must explain to the accused the above rights and report so to the questioning report.

In case of investigation by an investigating judge, the latter must appoint to the accused a lawyer, if the accused asks so.

iii) If the person has a right to be assisted by a lawyer before questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

No

- b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?

Yes

ii) In the affirmative, is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

In all situations

iii) If the person has a right to be assisted by a lawyer during questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

No

- c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?

Yes

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?
- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

As per answer 2a) ii)above

- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?

Yes

ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

As per answer 2a) ii)above

- e) i) In your legal order, is there a possibility of making derogations to the right to be assisted by a lawyer before and/or during the questioning? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer?

No

- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

3. In your legal order, when a person is stopped on the street by the police and, after having been officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence, is asked by the police to reply to questions concerning the (alleged) crime committed,

- a) What kind of questions could be asked to this person? Is it possible to question the person regarding the alleged crime?

All questions

- b) i) Does this person have the right to be assisted by a lawyer during such questioning?

Yes

- ii) In the affirmative, in which situations does such a right exist?

As per answer 2b) ii)above

- iii) If the person has the right to be assisted by a lawyer, may this right be limited to the person contacting the lawyer by phone before questioning starts? If so, please indicate in which situations this may be the case.

No

- c) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there an obligation in your legal order for the police or any other competent authorities to facilitate or assist the person in exercising this right?

Yes

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?
- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority?

As per answer 2a)ii)above

- d) i) If the person has a right to be assisted by a lawyer during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?

Yes

ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

As per answer 2a) ii)above

- e) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there a possibility of making derogations to this right in your legal order? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer or without contact by phone having been made?

No

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

Evidence-gathering and investigating acts in the pre-trial stage

4. Questions regarding evidence-gathering or investigating acts in the pre-trial stage:

- a) i) In your legal order, does the suspect or accused person have a right for his lawyer to be present at evidence-gathering or investigating acts?

Yes

- ii) In the affirmative, which evidence-gathering or investigating acts are concerned?

In case of investigation by an investigative judge, in all investigating acts except the questioning of the witnesses (unless they are cross-examined with the accused) and of the other persons accused.

- b) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the competent authorities to facilitate or assist the person in exercising this right?

Yes

- ii) In the affirmative, what are the concrete act(s) concerned that have to be taken by the competent authorities?

The accused must be convoked in due time to be present at the investigative acts mentioned in answer 4 a) ii) above, and he may be assisted by his lawyer. If his/her presence is not possible, the act may be performed without him/her. But upon his/her request, and on the condition that the investigation is not harmed, the investigative act may be postponed.

- c) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before starting the evidence-gathering or investigating act?

In the event of an investigation conducted by the police (i.e. not by an investigating judge), there is no such right.

ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer? Please specify as appropriate.

- d) i) In your legal order, is there a possibility of making derogations to the right of the suspected or accused person for his lawyer to be present at evidence-gathering or investigating act? In other words, if the person concerned wants to be assisted by a lawyer during such acts, is there nevertheless a possibility for the competent authorities to proceed with the evidence-gathering or investigating act without the lawyer being present?

As per answer 4b) ii)above

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

There is no such list

Questioning in the pre-trial stage of persons who are initially not suspected or accused of having committed an offence but obtain this status during questioning

5. In your legal order, when a person that is initially not suspected or accused of an alleged crime, such as a witness, is questioned by the police or an investigating judge:

- a) Does this person have the right to be assisted by a lawyer during questioning?

No

- b) When, during the questioning, such a person becomes suspected or accused of having committed a criminal offence, do the competent authorities have to inform the person concerned of this change of status?

Yes

- c) If the answer to question b) is positive:

- i) When precisely do the competent authorities have to inform the person concerned?

- ii) In what manner do the competent authorities have to inform the person concerned (notification, information, ...)?

i-ii) When they officially convoke him to be questioned as accused.

- iii) Do the competent authorities have to stop the questioning?

No

- iv) Does the person concerned obtain the right to be assisted by a lawyer (when he did not have it before)? If so, as from which moment in time?

As per answer 5c) i-ii) above

- v) May the statements made by the person before he was informed of the change of status be used in the ensuing criminal proceedings against him? If so, in which circumstances? Please specify as much as possible.

No

Minor offences

6. Questions regarding exclusions / minor offences:

- a) In your legal order, are there any categories of offences (in particular so-called "minor offences"), in respect of which the right to be assisted by a lawyer does not exist or is restricted, totally or partially, in the pre-trial phase?

No

- b) In the affirmative, please describe the category or categories of exclusions as precisely as possible, defining the category by a common denominator, e.g.
- where the offence is initially dealt with in an administrative manner;
 - where pre-trial detention is not possible in relation to the offence concerned;
 - where deprivation of liberty cannot be imposed as a sanction in relation to the offence concerned;
 - where the fine that may be imposed as a sanction in relation to the offence concerned does not exceed a certain amount;
 - other definition.
- c) In case your legal order contains one or more categories of exclusions: please indicate the consequence of each category of exclusion, e.g. is there a total or partial exclusion from the right to be assisted by a lawyer, does the exclusion entail different modalities for the assistance by a lawyer, etc. ...

Lawyer provided by the State / Payment of lawyer's fees

7. The proposed Directive does not deal with the question of legal aid; even so the Presidency believes that the following questions regarding the payment of a lawyer's fee could have an impact on the formulation and application of the Directive.

With this in mind delegations are kindly invited to respond to the following questions:

- a) i) In your legal order, does an obligation exist for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *but cannot afford to pay a lawyer or cannot afford to pay the lawyer that he has chosen?*

Yes

ii) If so, in which situations and under which conditions does such obligation exist?
When answering this question, please take into account the situations mentioned under questions 1-4.

When he is accused of felony and is examined by an investigative judge.

- b) i) In your legal order, does there exist an obligation for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *even if he could himself afford to pay a lawyer, or the lawyer that he has chosen?*

Yes

ii) If so, in which situations and under which conditions does such obligation exist?
When answering this question, please take into account the situations mentioned under questions 1-4.

As per answer 7a) ii) above

Principle of confidentiality

8. a) In your legal order, can any derogations be made to the principle of confidentiality of communication between the suspected or accused person and his lawyer?

No

- b) In the affirmative, in which situations can such derogations be made? Please specify as much as possible, and make a distinction, if appropriate, between oral and written communication, and between communication in the pre-trial phase and in the trial phase.

Waiver

9. a) In your legal order, does a suspect or accused person has the right to waive his right to be assisted by a lawyer?

Yes

- b) In the affirmative,

- i) What, if any, information has to be given to the person concerned prior to making the waiver?

The person concerned must be informed of his right to appoint a lawyer.

- ii) If such information has be to given:

- which person(s) or authorities may / should give that information?
- how is that information to be given (oral, writing,) ? Please specify.

This information must be given by the person conducting the questioning before the questioning. A relevant mention must be made to the report.

- iii) How is the waiver noted/registered? What are the formalities, if any?

The waiver must also be mentioned in the report.

- iv) May a decision to waive the right to a lawyer be revoked, and if so,

- may this be done at any stage of the proceedings? **Yes**
- are there any (other) limitations to the possibility of revoking a waiver? **No**

- c) Are the answers to the questions under a) and b) different if the person concerned is a minor? If so, please specify. **No**

Remedies

10. a) Does your national law provide for remedies in case of breach of the right of access to a lawyer?

Yes

b) In the affirmative:

i) which are those remedies?

(Absolute) Nullity of the preliminary proceedings

ii) do the remedies also include the possibility for the (judicial) authorities to exclude evidence that has been obtained in breach of the right of access to a lawyer?

Yes

General concerns regarding the proposed Directive

11. Are there any other aspects of your legal order that could be of importance for the further discussions on this proposed Directive? If so, please highlight them.

SPAIN

Questioning of suspects and accused persons in the pre-trial phase

1. In your legal order, when a person that is suspected or accused of having committed a criminal offence is arrested (deprived of liberty) and asked by the police or investigating judge to reply to questions concerning the (alleged) crime committed,

a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?

Yes.

ii) In the affirmative: in which situations does this right exist?

All detained persons have the right to be assisted by a lawyer from the moment of detention.

iii) If the person has the right to be assisted by a lawyer before questioning, may this right in your legal order be limited to the person contacting the lawyer by phone? If so, please indicate in which situations this may be the case.

No, the detained person has the right to be assisted by a lawyer of his choice, who is then contacted. If that lawyer does not accept the assignment, does not appear, or is not located, then a State-appointed lawyer is designated.

b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?

Yes.

ii) In the affirmative: is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

The right to be assisted by a lawyer applies to all detained persons.

The only possibility of waiving the right to legal assistance is when the facts of the case could constitute a traffic safety offence.

- c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?

The police authorities are obliged to inform the detained person, immediately and in a way that is comprehensible to him, of his right to designate a lawyer to assist him. If the detained person does not designate a lawyer, a State-appointed lawyer is assigned to assist him.

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?

All detained persons have this right from the moment of their detention.

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

They are required to inform the detained person of this right, immediately and in a way that is comprehensible to him, and to contact the Bar Association to request a State-appointed lawyer if the detained person has not designated a lawyer himself.

- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police or investigating judge to wait until the arrival of the lawyer before the questioning starts?

Yes.

ii) In the affirmative, how long (how many hours) do the police or investigating judge have to wait until the arrival of the lawyer?

The police are required to wait eight hours for the arrival of the lawyer, after which questioning may begin with the agreement of the detained person, without prejudice to any liability that may be incurred by the designated lawyers.

- e) i) In your legal order, is there a possibility of making derogations to the right of a person to be assisted by a lawyer before and/or during questioning in the pre-trial phase? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police or investigating judge to proceed with the questioning without the presence of a lawyer, or without the lawyer having been contacted in advance by phone?

No.

- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

The only such situation is where the designated lawyer does not appear within eight hours of being contacted, and the detained person agrees that the questioning may begin without the presence of the designated lawyer.

2. In your legal order, when a person is officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence and is asked to come 'voluntarily' to a police station in order to be questioned by the police in relation to that crime,

- a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?
Yes.

- ii) In the affirmative: in which situations does this right exist?

From the moment formal charges are brought.

- iii) If the person has a right to be assisted by a lawyer before questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

He is informed of his right to be assisted by a lawyer when he is notified that charges have been brought against him.

- b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?

Yes.

ii) In the affirmative, is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

Only in the case of traffic safety offences.

iii) If the person has a right to be assisted by a lawyer during questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

Requests for questioning by the police are generally notified orally, and it is then that the person is informed of his right to be assisted by a lawyer, in all cases before questioning begins. This is set down in writing.

- c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?

Yes, the obligation applies to both the police and judicial authorities.

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?

This obligation exists automatically in all cases.

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

The relevant information must be provided to the accused person regarding his right to be assisted by a lawyer.

- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?

Yes.

- ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

In the case of a detained person, the time period is eight hours. Where the person appears voluntarily for questioning, the law makes no provision for a specific length of time, but the general rule is that the accused person cannot be questioned without the presence of a lawyer.

- e) i) In your legal order, is there a possibility of making derogations to the right to be assisted by a lawyer before and/or during the questioning? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer?

No.

- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

No.

3. In your legal order, when a person is stopped on the street by the police and, after having been officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence, is asked by the police to reply to questions concerning the (alleged) crime committed,

- a) What kind of questions could be asked to this person? Is it possible to question the person regarding the alleged crime?

A suspect may be stopped by the police and questioned in relation to the facts of the case. However, once the police are convinced of his status as an accused person, or detain him or formally charge him, he must be questioned at the police station in the presence of a lawyer.

- b) i) Does this person have the right to be assisted by a lawyer during such questioning?
Yes, if he is formally charged.

ii) In the affirmative, in which situations does such a right exist?

In all circumstances in which the suspect is accused of a criminal act.

iii) If the person has the right to be assisted by a lawyer, may this right be limited to the person contacting the lawyer by phone before questioning starts? If so, please indicate in which situations this may be the case.

The accused may designate the lawyer of his choice or have a State-appointed lawyer designated.

- c) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there an obligation in your legal order for the police or any other competent authorities to facilitate or assist the person in exercising this right?

Yes, by providing information on the person's right to legal assistance.

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only 'activated' further to a request of the person concerned?

Yes, automatically in all situations.

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority?

To inform the accused person of his right to be assisted by a lawyer.

- d) i) If the person has a right to be assisted by a lawyer during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?

Yes.

- ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

Eight hours in the case of detained persons.

- e) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there a possibility of making derogations to this right in your legal order? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer or without contact by phone having been made?

No, as a general rule the only possibility of waiving the right to legal assistance is in cases of traffic safety offences, and in cases in which the accused is being detained and over eight hours have elapsed without the designated lawyer having appeared.

- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

The cases outlined under i) above.

Evidence-gathering and investigating acts in the pre-trial stage

4. Questions regarding evidence-gathering or investigating acts in the pre-trial stage:

- a) i) In your legal order, does the suspect or accused person have a right for his lawyer to be present at evidence-gathering or investigating acts?

Yes.

- ii) In the affirmative, which evidence-gathering or investigating acts are concerned?

Statement by the accused, witness statement, entry and search procedures, inspection of the place or thing in question, statement by the injured party and any other act at which the accused person is present.

- i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the competent authorities to facilitate or assist the person in exercising this right?

Yes.

- ii) In the affirmative, what are the concrete act(s) concerned that have to be taken by the competent authorities?

The judicial authorities are obliged to contact the designated lawyer for the taking of evidence.

- c) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before starting the evidence-gathering or investigating act?

Yes.

- ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer? Please specify as appropriate.

In cases of detention, there is a requirement to wait eight hours before procedural steps or evidence-gathering by the police.

- d) i) In your legal order, is there a possibility of making derogations to the right of the suspected or accused person for his lawyer to be present at evidence-gathering or investigating act? In other words, if the person concerned wants to be assisted by a lawyer during such acts, is there nevertheless a possibility for the competent authorities to proceed with the evidence-gathering or investigating act without the lawyer being present?

No.

- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

Questioning in the pre-trial stage of persons who are initially not suspected or accused of having committed an offence but obtain this status during questioning

5. In your legal order, when a person that is initially not suspected or accused of an alleged crime, such as a witness, is questioned by the police or an investigating judge:

- a) Does this person have the right to be assisted by a lawyer during questioning?

No.

- b) When, during the questioning, such a person becomes suspected or accused of having committed a criminal offence, do the competent authorities have to inform the person concerned of this change of status?

Yes.

c) If the answer to question b) is positive:

i) When precisely do the competent authorities have to inform the person concerned?

At any point during the judicial investigation, and before the judge at any time during the investigation proceedings.

ii) In what manner do the competent authorities have to inform the person concerned (notification, information, ...)?

The person may be informed orally during the taking of statements, with a written record being made, or when he is notified of his status as an accused person.

iii) Do the competent authorities have to stop the questioning?

Yes.

iv) Does the person concerned obtain the right to be assisted by a lawyer (when he did not have it before)? If so, as from which moment in time?

Yes, from the moment he is informed of his status as an accused person.

iv) May the statements made by the person before he was informed of the change of status be used in the ensuing criminal proceedings against him? If so, in which circumstances? Please specify as much as possible.

The statement he makes as a witness is the basis on which he may be charged with an offence, but it definitely cannot be taken into account as the statement of an accused person.

Minor offences

6. Questions regarding exclusions / minor offences:

- a) In your legal order, are there any categories of offences (in particular so-called "minor offences"), in respect of which the right to be assisted by a lawyer does not exist or is restricted, totally or partially, in the pre-trial phase?

Yes, the presence of a lawyer is optional in the case of minor offences.

- b) In the affirmative, please describe the category or categories of exclusions as precisely as possible, defining the category by a common denominator, e.g.

- where the offence is initially dealt with in an administrative manner;
- where pre-trial detention is not possible in relation to the offence concerned;
- where deprivation of liberty cannot be imposed as a sanction in relation to the offence concerned;
- where the fine that may be imposed as a sanction in relation to the offence concerned does not exceed a certain amount;
- other definition:

Minor offences are those not classified by seriousness as offences under the Criminal Code and where the amount involved does not exceed EUR 400.

- c) In case your legal order contains one or more categories of exclusions: please indicate the consequence of each category of exclusion, e.g. is there a total or partial exclusion from the right to be assisted by a lawyer, does the exclusion entail different modalities for the assistance by a lawyer, etc. ...

Lawyer provided by the State / Payment of lawyer's fees

7. The proposed Directive does not deal with the question of legal aid; even so the Presidency believes that the following questions regarding the payment of a lawyer's fee could have an impact on the formulation and application of the Directive.

With this in mind delegations are kindly invited to respond to the following questions:

- a) i) In your legal order, does an obligation exist for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *but cannot afford to pay a lawyer or cannot afford to pay the lawyer that he has chosen?*

A distinction needs to be made between the State-appointed lawyer and a private lawyer. The fees of the State-appointed are paid by the State if the accused cannot afford to do so. If the lawyer is chosen by the accused himself, then there is no provision for the State to pay the lawyer's fees if the accused is unable to pay them.

- ii) If so, in which situations and under which conditions does such obligation exist? When answering this question, please take into account the situations mentioned under questions 1-4.

The obligation to provide a State-appointed lawyer exists from the moment of detention. The State is required to pay the lawyer's fees from the moment it is demonstrated that the accused person does not have the financial resources to pay them.

- b) i) In your legal order, does there exist an obligation for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *even if he could himself afford to pay a lawyer, or the lawyer that he has chosen?*

There is an obligation to designate a lawyer, but if the lawyer is State-appointed and the accused person has the financial resources to do so, then he has to pay the lawyer's fees. Where the accused has chosen his own lawyer, then it is for him to pay the fees.

- ii) If so, in which situations and under which conditions does such obligation exist? When answering this question, please take into account the situations mentioned under questions 1-4.

The obligation to designate a lawyer exists from the time of detention. The State is required to pay the lawyer's fees from the moment it is demonstrated that the accused cannot not afford to do so.

Principle of confidentiality

8. a) In your legal order, can any derogations be made to the principle of confidentiality of communication between the suspected or accused person and his lawyer?

Yes.

- b) In the affirmative, in which situations can such derogations be made? Please specify as much as possible, and make a distinction, if appropriate, between oral and written communication, and between communication in the pre-trial phase and in the trial phase.

In cases of terrorism, subject to judicial authorisation and for the limited and strictly necessary period of time stipulated in the judicial authorisation.

Waiver

9. a) In your legal order, does a suspect or accused person has the right to waive his right to be assisted by a lawyer?

Yes.

- b) In the affirmative,

- i) What, if any, information has to be given to the person concerned prior to making the waiver?

Information on the right to legal assistance.

- ii) If such information has be to given:

- which person(s) or authorities may / should give that information?

The police or judicial authority.

- how is that information to be given (oral, writing,) ? Please specify.

Orally, even if subsequently set down in writing.

- iii) How is the waiver noted/registered? What are the formalities, if any?

The waiver of the right to be assisted by a lawyer must be set down in writing.

- iv) May a decision to waive the right to a lawyer be revoked, and if so,

- may this be done at any stage of the proceedings? **Yes.**

- are there any (other) limitations to the possibility of revoking a waiver? **No.**

- c) Are the answers to the questions under a) and b) different if the person concerned is a minor? If so, please specify.

No.

Remedies

10. a) Does your national law provide for remedies in case of breach of the right of access to a lawyer?

Yes.

- b) In the affirmative:

- i) which are those remedies?

The annulment of the proceedings.

- ii) do the remedies also include the possibility for the (judicial) authorities to exclude evidence that has been obtained in breach of the right of access to a lawyer?

Yes, the procedural steps must be repeated.

General concerns regarding the proposed Directive

11. Are there any other aspects of your legal order that could be of importance for the further discussions on this proposed Directive? If so, please highlight them.

The right to legal assistance, as provided for under Spanish law, does not imply the automatic right to a private meeting between the lawyer and the detained person. In fact, such a meeting cannot take place until after the statement given by the accused at the police station.

ESTONIA

Questioning of suspects and accused persons in the pre-trial phase

1. In your legal order, when a person that is suspected or accused of having committed a criminal offence is arrested (deprived of liberty) and asked by the police or investigating judge to reply to questions concerning the (alleged) crime committed,

- a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?
ii) In the affirmative: in which situations does this right exist?
iii) If the person has the right to be assisted by a lawyer before questioning, may this right in your legal order be limited to the person contacting the lawyer by phone? If so, please indicate in which situations this may be the case.

Yes, the suspect has a right to the assistance of the lawyer. If he is arrested he has a right to meet the lawyer in person before the questioning and has a right to have the lawyer being present during the questioning.

- b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?
ii) In the affirmative: is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

Yes, the suspect has a right to the assistance and the lawyer has a right to be present and participate actively during questionings.

- c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?
ii) In the affirmative,
- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

If the suspect has already a lawyer then that lawyer may be present during the questioning. In addition the lawyer may ask questions, submit evidences, applications etc.

The task of the police or other investigative body, prosecutors office or court is to grant access to a lawyer if the suspect wishes so. If the suspect does not have a lawyer then it is also the task of the police etc to ask whether he wishes to choose a lawyer by himself or whether he wishes to get a lawyer appointed by the state. In cases of mandatory defence lawyer it is the task of the police etc to guarantee that the suspect has a lawyer (chosen or appointed lawyer).

- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police or investigating judge to wait until the arrival of the lawyer before the questioning starts?

- ii) In the affirmative, how long (how many hours) do the police or investigating judge have to wait until the arrival of the lawyer?

If the suspect wishes to use the assistance by the lawyer, it is not allowed to start with the questioning without the lawyer being present. If possible, the questioning may be postponed. If it is not possible, the suspect would get new lawyer appointed by the state.

A new lawyer shall be appointed by the Estonian Bar Association at the request of an investigative body, prosecutors office or court, if a lawyer chosen by a person cannot assume the duties of defence within twelve hours as of the detention of the person as a suspect or, in other cases, within twenty-four hours as of entry into an agreement to defend the suspect or accused or summoning to the body conducting the proceedings and the counsel has not appointed a substitute counsel for himself or herself.

e) i) In your legal order, is there a possibility of making derogations to the right of a person to be assisted by a lawyer before and/or during questioning in the pre-trial phase? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police or investigating judge to proceed with the questioning without the presence of a lawyer, or without the lawyer having been contacted in advance by phone?

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

No, if the suspect wishes to have a lawyer then it is not possible to proceed with the questioning without the lawyer being present. The same applies to the cases of mandatory participation of the defence lawyer.

2. In your legal order, when a person is officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence and is asked to come 'voluntarily' to a police station in order to be questioned by the police in relation to that crime,

a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?

ii) In the affirmative: in which situations does this right exist?

iii) If the person has a right to be assisted by a lawyer before questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

Before the start of the questioning person will be informed about his rights as a suspect. Among other right he will be informed about a right to a lawyer and he will be asked whether he wishes to choose one or have a lawyer appointed. The convocation letter does not include information on rights of the suspect.

b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?

ii) In the affirmative, is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

iii) If the person has a right to be assisted by a lawyer during questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

The suspect has a right to have a lawyer present during all the questionings. The convocation letter does not include information on rights of the suspect.

c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?
- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

The task of the police or other investigative body, prosecutors office or court is to grant access to a lawyer if the suspect wishes so. If the suspect does not have a lawyer then it is also the task of the police etc to ask whether he wishes to choose a lawyer by himself or whether he wishes to get a lawyer appointed by the state. In cases of mandatory defence lawyer it is the task of the police etc to guarantee that the suspect has a lawyer (chosen or appointed lawyer).

d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?

ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

If the suspect wishes to use the assistance by the lawyer, it is not allowed to start with the questioning without the lawyer being present. If possible, the questioning may be postponed. If it is not possible, the suspect would get new lawyer appointed by the state.

A new lawyer shall be appointed by the Estonian Bar Association at the request of an investigative body, prosecutors office or court, if a lawyer chosen by a person cannot assume the duties of defence within twelve hours as of the detention of the person as a suspect or, in other cases, within twenty-four hours as of entry into an agreement to defend the suspect or accused or summoning to the body conducting the proceedings and the counsel has not appointed a substitute counsel for himself or herself.

e) i) In your legal order, is there a possibility of making derogations to the right to be assisted by a lawyer before and/or during the questioning? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer?

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

No, if the suspect wishes to have a lawyer then it is not possible to proceed with the questioning without the lawyer being present. The same applies to the cases of mandatory participation of the defence lawyer.

3. In your legal order, when a person is stopped on the street by the police and, after having been officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence, is asked by the police to reply to questions concerning the (alleged) crime committed,

- a) What kind of questions could be asked to this person? Is it possible to question the person regarding the alleged crime?

A suspect is a person who has been detained on suspicion of a criminal offence, or a person whom there is sufficient ground to suspect of the commission of a criminal offence and who is subject to a procedural act.

The rights and obligations of a suspect shall be immediately explained to him or her and he or she shall be interrogated with regard to the content of the suspicion. Interrogation may be postponed if immediate interrogation is not possible due to the state of health of the suspect, or if postponing is necessary in order to ensure the participation of a counsel, translator or interpreter.

It is not possible to conduct a formal questioning of the suspect in a way shown in the example. If the police does not know whether the person is a suspect or not they may ask general questions and ask for explanations. If the police thinks that the person might be a witness he will be questioned as a witness. When it becomes clear that a person is the suspect in criminal proceedings he must be informed about his rights, including a right to a lawyer and this will be followed by the ordinary procedure of questioning.

- b) i) Does this person have the right to be assisted by a lawyer during such questioning?

ii) In the affirmative, in which situations does such a right exist?

iii) If the person has the right to be assisted by a lawyer, may this right be limited to the person contacting the lawyer by phone before questioning starts? If so, please indicate in which situations this may be the case.

If the person is considered as suspect he will have all the rights of the suspect, including right to a lawyer.

- c) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there an obligation in your legal order for the police or any other competent authorities to facilitate or assist the person in exercising this right?

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?
- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority?

The task of the police or other investigative body, prosecutors office or court is to grant access to a lawyer if the suspect wishes so. If the suspect does not have a lawyer then it is also the task of the police etc to ask whether he wishes to choose a lawyer by himself or whether he wishes to get a lawyer appointed by the state. In cases of mandatory defence lawyer it is the task of the police etc to guarantee that the suspect has a lawyer (chosen or appointed lawyer).

- d) i) If the person has a right to be assisted by a lawyer during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?
- ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

If the suspect wishes to use the assistance by the lawyer, it is not allowed to start with the questioning without the lawyer being present. If possible, the questioning may be postponed. If it is not possible, the suspect would get new lawyer appointed by the state.

A new layer shall be appointed by the Estonian Bar Association at the request of an investigative body, prosecutors office or court, if a lawyer chosen by a person cannot assume the duties of defence within twelve hours as of the detention of the person as a suspect or, in other cases, within twenty-four hours as of entry into an agreement to defend the suspect or accused or summoning to the body conducting the proceedings and the counsel has not appointed a substitute counsel for himself or herself.

e) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there a possibility of making derogations to this right in your legal order? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer or without contact by phone having been made?

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

No, if the suspect wishes to have a lawyer then it is not possible to proceed with the questioning without the lawyer being present. The same applies to the cases of mandatory participation of the defence lawyer.

Evidence-gathering and investigating acts in the pre-trial stage

4. Questions regarding evidence-gathering or investigating acts in the pre-trial stage:

a) i) In your legal order, does the suspect or accused person have a right for his lawyer to be present at evidence-gathering or investigating acts?

ii) In the affirmative, which evidence-gathering or investigating acts are concerned?

A suspect has the right to be questioned (interrogated) and participate in confrontation, comparison of testimony to circumstances and presentation for identification in the presence of a lawyer. A lawyer has the right to participate in the investigative activities carried out in the presence of the person being defended during the pre-trial proceeding, and pose questions through the body conducting the proceedings.

b) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the competent authorities to facilitate or assist the person in exercising this right?

ii) In the affirmative, what are the concrete act(s) concerned that have to be taken by the competent authorities?

In the investigative activities it is the task of the competent authorities to guarantee the presence of the lawyer if the suspect wishes so.

A lawyer has a right to participate in the investigative activities carried out in the presence of the suspect and pose questions through the body conducting the proceedings.

The task of the police or other investigative body, prosecutors office or court is to grant access to a lawyer if the suspect wishes so. If the suspect does not have a lawyer then it is also the task of the police etc to ask whether he wishes to choose a lawyer by himself or whether he wishes to get a lawyer appointed by the state. In cases of mandatory defence lawyer it is the task of the police etc to guarantee that the suspect has a lawyer (chosen or appointed lawyer).

c) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before starting the evidence-gathering or investigating act?

ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer? Please specify as appropriate.

A suspect has the right to be questioned (interrogated) and participate in confrontation, comparison of testimony to circumstances and presentation for identification in the presence of a lawyer. In these cases where the suspect wishes to have the lawyer present or where the participation of the lawyer in the proceeding is mandatory, the police has to guarantee the presence of the lawyer. A lawyer has the right to participate only in the investigative activities.

The time period is the same as usually: twelve hours as of the detention of the person as a suspect or, in other cases, within twenty-four hours as of entry into an agreement to defend the suspect or accused or summoning to the body conducting the proceedings and the counsel has not appointed a substitute counsel for himself or herself.

As regards other procedural acts which are not investigative acts, then the lawyer has no right to be present and the police does not to have wait for the lawyer.

d) i) In your legal order, is there a possibility of making derogations to the right of the suspected or accused person for his lawyer to be present at evidence-gathering or investigating act? In other words, if the person concerned wants to be assisted by a lawyer during such acts, is there nevertheless a possibility for the competent authorities to proceed with the evidence-gathering or investigating act without the lawyer being present?

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

A suspect has the right to be questioned (interrogated) and participate in confrontation, comparison of testimony to circumstances and presentation for identification in the presence of a lawyer. A lawyer has the right to participate only in the investigative activities. Investigative activities are:

- 1) Interrogation;**
- 2) Confrontation;**
- 3) Comparison of statements to circumstances;**
- 4) Presentation for identification;**
- 5) Inspection;**
- 6) Physical examination;**
- 7) Investigative experiment.**

As regards other procedural acts which are not investigative acts, then the lawyer has no right to be present and the police does not to have wait for the lawyer in order to proceed with the act.

Questioning in the pre-trial stage of persons who are initially not suspected or accused of having committed an offence but obtain this status during questioning

5. In your legal order, when a person that is initially not suspected or accused of an alleged crime, such as a witness, is questioned by the police or an investigating judge:

a) Does this person have the right to be assisted by a lawyer during questioning?

Yes, a witness can have a lawyer during the questioning order to protect his rights.

b) When, during the questioning, such a person becomes suspected or accused of having committed a criminal offence, do the competent authorities have to inform the person concerned of this change of status?

When during the questioning the police finds out that there are reasons to believe that person is suspected to have committed a criminal offence, questioning will be stopped. The person will be informed that he has become a suspect in criminal proceeding and he will be informed about his rights as a suspect.

c) If the answer to question b) is positive:

i) When precisely do the competent authorities have to inform the person concerned?

ii) In what manner do the competent authorities have to inform the person concerned (notification, information, ...)?

When the police has information that instead of being a witness, person can be suspected of having committed a criminal offence. It depends on the situation whether the person will be arrested as a suspect or not. When the person is detained as a suspect he will be informed immediately about his rights as a suspect. When there is no need for the detention, the police would inform the person about his rights as a suspect, including a right to a lawyer and would proceed with the questioning.

iii) Do the competent authorities have to stop the questioning?

- iv) Does the person concerned obtain the right to be assisted by a lawyer (when he did not have it before)? If so, as from which moment in time

If the person becomes a suspect he would have full rights as a suspect, including a right to be assisted by the lawyer.

- v) May the statements made by the person before he was informed of the change of status be used in the ensuing criminal proceedings against him? If so, in which circumstances? Please specify as much as possible.

No, statements made as a witness cannot be used against the person. If the person had previously given statements on the criminal offence as a witness, new questioning of the suspect has to be conducted.

Minor offences

6. Questions regarding exclusions / minor offences:

- a) In your legal order, are there any categories of offences (in particular so-called "minor offences"), in respect of which the right to be assisted by a lawyer does not exist or is restricted, totally or partially, in the pre-trial phase?

No.

- b) In the affirmative, please describe the category or categories of exclusions as precisely as possible, defining the category by a common denominator, e.g.
- where the offence is initially dealt with in an administrative manner;
 - where pre-trial detention is not possible in relation to the offence concerned;
 - where deprivation of liberty cannot be imposed as a sanction in relation to the offence concerned;
 - where the fine that may be imposed as a sanction in relation to the offence concerned does not exceed a certain amount;
 - other definition.

- c) In case your legal order contains one or more categories of exclusions: please indicate the consequence of each category of exclusion, e.g. is there a total or partial exclusion from the right to be assisted by a lawyer, does the exclusion entail different modalities for the assistance by a lawyer, etc. ...

Lawyer provided by the State / Payment of lawyer's fees

7. The proposed Directive does not deal with the question of legal aid; even so the Presidency believes that the following questions regarding the payment of a lawyer's fee could have an impact on the formulation and application of the Directive.

With this in mind delegations are kindly invited to respond to the following questions:

- a) i) In your legal order, does an obligation exist for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *but cannot afford to pay a lawyer or cannot afford to pay the lawyer that he has chosen?*

ii) If so, in which situations and under which conditions does such obligation exist?
When answering this question, please take into account the situations mentioned under questions 1-4.

During the criminal proceeding every suspect is entitled to have a lawyer. If the person who wishes to have a lawyer does not choose a lawyer by himself, then a lawyer will be appointed for him. If the suspect cannot afford contractual lawyer of his own choose, another lawyer will be appointed by the state. In order to have that the police sends a request to the Bar Association.

In cases of mandatory participation of lawyer, waiver is not possible and a lawyer will be appointed for him even if he does not wish so.

As regards the suspect in the criminal proceeding, there is no merits test and every suspect can have a lawyer appointed by the state.

Remuneration for an appointed lawyer is considered as procedural expenses and if the suspect or accused will be later convicted, these expenses will be borne by him.

b) i) In your legal order, does there exist an obligation for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *even if he could himself afford to pay a lawyer, or the lawyer that he has chosen?*

ii) If so, in which situations and under which conditions does such obligation exist? When answering this question, please take into account the situations mentioned under questions 1-4.

State does not pay the fees for the lawyer chosen by the person. State will initially cover the costs only for appointed lawyer.

Remuneration for an appointed lawyer is considered as procedural expenses and if the suspect or accused will be later convicted, these expenses will be borne by him.

Principle of confidentiality

8. a) In your legal order, can any derogations be made to the principle of confidentiality of communication between the suspected or accused person and his lawyer?

b) In the affirmative, in which situations can such derogations be made? Please specify as much as possible, and make a distinction, if appropriate, between oral and written communication, and between communication in the pre-trial phase and in the trial phase.

In cases of wiretapping of the suspects communications, information communicated by a lawyer shall not be used as evidence if such information contains facts which have become known to the person in his or her professional activities, unless the person has already given testimony with regard to the same facts or if the facts have been disclosed in any other manner.

Waiver

9. a) In your legal order, does a suspect or accused person has the right to waive his right to be assisted by a lawyer?
- b) In the affirmative,
- i) What, if any, information has to be given to the person concerned prior to making the waiver?
- ii) If such information has to be given:
- which person(s) or authorities may / should give that information?
 - how is that information to be given (oral, writing,) ? Please specify.
- iii) How is the waiver noted/registered? What are the formalities, if any?
- iv) May a decision to waive the right to a lawyer be revoked, and if so,
- may this be done at any stage of the proceedings?
 - are there any (other) limitations to the possibility of revoking a waiver?

Suspect and accused can waive their right to a lawyer, except in cases of mandatory participation of a lawyer in pre-trial proceeding. Waiver is given in a written form. Suspect and accused will always be informed about the consequences of the waiver and their right to revoke the waiver and to have a lawyer if they wish so.

The participation of a lawyer throughout a criminal proceeding is mandatory if:

- 1) at the time of commission of the criminal offence, the person being defended was a minor;**
- 2) due to his or her mental or physical disability, the person is unable to defend himself or herself or if defence is complicated due to such disability;**
- 3) the person is suspected or accused of a criminal offence for which life imprisonment may be imposed;**

- 4) **the interests of the person are in conflict with the interests of another person who has a counsel;**
- 5) **the person has been under arrest for at least six months;**
- 6) **proceedings are conducted in the criminal matter pursuant to expedited procedure.**

- c) Are the answers to the questions under a) and b) different if the person concerned is a minor? If so, please specify.

If the suspect is minor, the participation of a lawyer is mandatory and waiver is not possible.

Remedies

10. a) Does your national law provide for remedies in case of breach of the right of access to a lawyer?
- b) In the affirmative:
 - i) which are those remedies?
 - ii) do the remedies also include the possibility for the (judicial) authorities to exclude evidence that has been obtained in breach of the right of access to a lawyer?

One of the grounds for the annulment of a court judgment by way of appeal proceedings is

material violation of criminal procedural law. Violation is material for example when a court proceeding is conducted without the participation of a counsel when participation was mandatory.

A court may declare any other violation of criminal procedural law to be material if such violation results or may result in an unlawful or unfounded court judgment.

A court may also dismiss the evidence if it finds that it has been collected in violating the law.

General concerns regarding the proposed Directive

11. Are there any other aspects of your legal order that could be of importance for the further discussions on this proposed Directive? If so, please highlight them.

FRANCE

Questioning of suspects and accused persons in the pre-trial phase

1. In your legal order, when a person that is suspected or accused of having committed a criminal offence is arrested (deprived of liberty) and asked by the police or investigating judge to reply to questions concerning the (alleged) crime committed,

(a) (i) Does this person have the right to be assisted by a lawyer before such questioning?

Yes.

(ii) In the affirmative: in which situations does this right exist?

- During police custody

Police custody is a coercive measure that may be decided upon by a police officer, under the control of the courts, whereby a person reasonably suspected on one or more grounds of committing or attempting to commit an offence punishable by imprisonment is held at the disposal of investigators.

The police officer must consider, before putting a suspected person in police custody, whether that measure is the only means of achieving at least one of the following objectives:

- enabling investigations to be carried out that require the presence or participation of the person;**
- guaranteeing the person's presence before the legal authorities;**
- preventing the person from changing material evidence or clues, from putting pressure on witnesses or victims and members of their families or close relations or friends, or from liaising with other persons likely to be co-perpetrators or accomplices;**
- guaranteeing the implementation of measures aimed at putting an end to the crime or offence.**

In French law, a person in police custody is entitled to "talk to a lawyer" from the start of the custody period, following the notification of his rights by a judicial police officer, pursuant to Article 63-1 of the Code of Criminal Procedure.

Article 63-1 of the Code of Criminal Procedure provides that:

"Any person placed in police custody is immediately informed by a judicial police officer, or under the latter's supervision, by a judicial police agent, in a language he understands, where appropriate in writing, of:

(...)

3° the fact that he is entitled:

(...) -to be assisted by a lawyer, in accordance with Articles 63-3-1 to 63-4-3;"

Article 63-4 of the Code of Criminal Procedure provides that "the conversation may not extend beyond thirty minutes".

Minors have enhanced access to a lawyer.

*** for minors up to 13 years of age**

While a minor of less than 13 years of age cannot be placed in police custody, a minor of between 10 and 13 years of age against whom there is serious and corroborative evidence indicating that he has committed, or attempted to commit a serious crime or offence punishable by a sentence of at least five years' imprisonment may be detained by a judicial police officer subject to the prior agreement and under the supervision of a magistrate from the public prosecutor's office or an examining magistrate specialising in child protection, for a period not exceeding 12 hours. The detention may, however, be extended for a period that must again be no longer than 12 hours.

The relevant law provides that "where the minor or his legal representatives have not designated a lawyer, the public prosecutor, the examining magistrate or the judicial police officer must, from the start of the custody period, inform the president of the bar immediately by any available means, so that he can appoint a lawyer".

* for minors between 13 and 18 years of age

Article 4 of the Order of 2 February 1945 states that "from the start of the custody period, the minor may ask to be assisted by a lawyer, in accordance with Articles 63-3-1 to 63-4-3 of the Code of Criminal Procedure. He must be immediately notified of that right. Where the minor has not asked to be assisted by a lawyer, that request may also be made by his legal representatives, who are informed about that right on receiving notification of the police custody in accordance with point II of this Article."

The rules on access to a lawyer during police custody of a minor over 13 years of age are the same as those governing police custody of adults.

- During the proceedings

The suspect has the right of access to a lawyer as soon as the examining magistrate plans to interview him, i.e. to charge him, whether or not there has been provisional detention.

In certain cases, particularly where the suspected person has not yet been placed under judicial investigation by the examining magistrate, the latter may delegate his investigatory powers to the police or gendarmerie. In that event, the applicable rules are those for police custody.

When the person placed in police custody is presented to the examining magistrate to be placed under judicial investigation, he must be notified of his right to assistance from a lawyer.

Thereafter, the questioning conducted by the examining magistrate is governed by Article 114 of the Code of Criminal Procedure. The lawyer must have been contacted at least 5 days before the date of questioning.

- The right of access to a lawyer also exists for cases of detention by the customs authorities (Articles 323-1 to 323-10 of the Customs Code).

(iii) If the person has the right to be assisted by a lawyer before questioning, may this right in your legal order be limited to the person contacting the lawyer by phone? If so, please indicate in which situations this may be the case.

The interview prior to questioning cannot be conducted by phone.

The law does not allow a person in police custody or placed in provisional detention to have a telephone conversation with his lawyer. The lawyer must go to the police station or prison to talk to his client.

(b) (i) Does this person have the right to be assisted by a lawyer during such questioning?

Yes, the person held in police custody or under judicial investigation has the right to be assisted by a lawyer during such questioning.

Article 63-4-2 of the Code of Criminal Procedure provides that "the person held in police custody may ask for the interviews and confrontations with witnesses to take place in the presence of his lawyer".

Article 114 of the Code of Criminal Procedure provides that "unless they expressly waive this right, parties may only be heard, questioned or confronted in the presence of their lawyers or when their lawyers have been duly called upon".

(ii) In the affirmative: is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

- The system of police custody under ordinary law

Principle:

If the person in police custody has requested the presence of a lawyer, the first questioning may not begin without the attendance of the chosen or appointed lawyer until a period of two hours following the request has elapsed, except where the interview relates to identity details only.

Exceptions:

* Nevertheless, Article 63-4-2, paragraph 3, of the Code of Criminal Procedure provides that where "the needs of the investigation" call for the immediate questioning of the person, the public prosecutor may, by a substantiated decision in writing and at the request of the criminal police officer, authorise questioning to begin before the two hours have elapsed.

* In addition, in accordance with paragraph 4 of the article cited, at the request of the criminal police officer, the public prosecutor or the magistrate for custody and release ("juge des libertés et de la détention")⁴ may exceptionally authorise deferral of the attendance of the lawyer at questioning or interrogation, by a substantiated decision in writing, where this measure would appear necessary for "compelling reasons arising from the specific circumstances of the investigation, either to facilitate the conduct of urgent investigations aiming to obtain or preserve evidence, or to prevent imminent harm to individuals".

There are derogations from ordinary law:

- in cases of organised crime and delinquency

Pursuant to Article 706-88 of the Code of Criminal Procedure, for offences that fall within the scope of Article 706-73 of the Code of Criminal Procedure (felonies committed by an organised gang, drug trafficking, aggravated felonies related to procuring, aggravated felonies of extortion, counterfeiting, terrorism), the involvement of a lawyer (i.e. a preliminary interview and presence of a lawyer during questioning and confrontation) may be deferred for a period of up to 48 hours, in view of "compelling reasons arising from the specific circumstances of the inquiry or investigation, either to allow evidence to be obtained or preserved, or prevent harm to individuals".

⁴ In France, this judge is responsible for ruling on the temporary detention of a person placed under judicial investigation and any applications for release, and on the approval of measures curtailing individual liberties.

As regards drug trafficking and terrorism, the involvement of a lawyer may be deferred for up to 72 hours.

Deferral of the attendance of a lawyer for up to twenty-four hours is determined by the public prosecutor, acting *ex officio* or at the request of the criminal police officer.

Deferral of the involvement of the lawyer beyond the twenty-fourth hour is determined by the "magistrate for custody and release " at the request of the public prosecutor.

Where police custody occurs under letters rogatory, the deferral is decided on by the examining magistrate. In all instances, the decision of the magistrate, in writing and giving reasons, specifies the period during which the lawyer's involvement is deferred.

Where the lawyer's involvement is so deferred, he/she has the rights set out in Articles 63-4 and 63-4-1, the first paragraph of Article 63-4-2 and Article 63-4-3 from the time he/she is authorised to intervene during the custody period. Pursuant to these Articles:

- the lawyer may communicate with the person in police custody under conditions which ensure the confidentiality of the conversation.**
- the duration of the conversation may not exceed thirty minutes.**
- where police custody has been extended, the person may also request another interview with a lawyer at the start of the extension, subject to the same conditions and for the same maximum duration of thirty minutes.**
- at his/her own request, the lawyer may consult the record of notification of detention in custody and the accompanying rights, the medical certificate, and the records of questioning of the person he/she is counselling. He/she may not request a copy or make one, but may take notes.**
- the person in police custody may request that a lawyer attend his/her questioning and confrontations. In this instance, unless it relates to identity details only, the first questioning may not begin without the attendance of the chosen or appointed lawyer until two hours have elapsed following notification of the person's request for legal counsel by the chairman of the bar to that lawyer by all available means and without delay. During questioning or interrogation the lawyer may take notes.**

- if the lawyer arrives after the end of two-hour deferral period and while questioning or confrontation is in progress, the interview is suspended at the request of the person in police custody so as to enable the latter to consult his/her lawyer and so that the lawyer may become acquainted with the documents. If the person in police custody does not ask to consult the lawyer, the lawyer may attend the questioning or interrogation as soon as he/she arrives at the criminal police premises or the location of the confrontation.
- if the requirements of the investigation necessitate immediate questioning of the person, the public prosecutor may authorise questioning to begin without waiting for the two hours to elapse, by a substantiated decision in writing made at the request of the criminal police officer.
- in exceptional cases and at the request of the criminal police officer, the public prosecutor or the "magistrate for custody and release" may, by a substantiated decision in writing, authorise deferred attendance of the lawyer at questioning or confrontation, on the basis of the conditions set out in following paragraph, where this measure seems essential for compelling reasons arising from the particular circumstances of the investigation, either to facilitate the success of urgent enquiries aiming to obtain or preserve evidence, or to prevent imminent harm to individuals.
- The public prosecutor may postpone the attendance of a lawyer for a maximum period of twelve hours only. Where the person is detained for a crime or an offence liable to a prison sentence of 5 years or more, the "magistrate for custody and release" may, at the request of the public prosecutor, authorise deferral of the lawyer's attendance beyond the twelfth hour and up to the twenty-fourth hour of custody. Authorisations by the public prosecutor and the "magistrate for custody and release" must be in writing and be substantiated by reference to the conditions set out in the previous paragraph in the light of precise and detailed evidence arising from the facts of the case.
- Where the public prosecutor or the "magistrate for custody and release" authorises deferral of the lawyer's attendance during questioning or confrontation, he/she may also, under the terms and conditions provided for in these paragraphs, rule that for the same period of time the lawyer may not consult the record on the person in police custody.

- The questioning or confrontation is conducted under the supervision of a criminal police officer or agent who may at any time, in the event of difficulty, bring the questioning to a close and immediately inform the public prosecutor thereof. If necessary, the public prosecutor notifies the chairman of the bar with a view to designating another lawyer.
- Following each period of questioning or confrontation that he/she attends, the lawyer may ask questions. The criminal police officer or agent may refuse to answer those questions only if they might harm the investigation. This refusal is entered in the record.
- Following each interview with the person in police custody and each period of questioning or confrontation that he/she has attended, the lawyer may submit written comments in which he/she may record the questions to which an answer was refused pursuant to the previous paragraph. These are annexed to the case file. The lawyer may send his/her comments, or a copy thereof, to the public prosecutor during the period of police custody.

Furthermore, in terrorism cases, the magistrate for custody and release, contacted by the public prosecutor at the request of the law enforcement officer, or the examining magistrate if police custody occurs during an investigation, may decide that the person will be assisted by a lawyer appointed by the chairman of the Bar Association from a list of qualified legal practitioners, drawn up by the office of the National Council of Bar Associations on proposals from each bar association.

- if it appears to be physically impossible for the lawyer to make the journey on account of the distance

This concerns offences committed by persons considered to be members of the armed forces on territories on which external operations are being conducted (Article L211-25 of the Code of Military Justice), piracy offences and other offences committed at sea (Law of 5 January 2011) and offences committed in certain overseas territories (Articles 814 and 880 of the Code of Criminal Procedure, Article L621-8 of the new Mining Code concerning illegal gold extraction in French Guiana) on account of their distinctive geographical features (primary forests, insular nature, etc.).

- with regard to customs misdemeanours

Article 323-5 of the Customs Code provides for the possibility of deferring the involvement of the lawyer.

Involvement of the lawyer may be deferred under the same conditions as those described earlier for organised crime, if the person is detained for :

- smuggling, importing or exporting goods which constitute a danger to public health, morality or security, the list of which is fixed by decree of the Minister responsible for Customs, or if the offences are committed by an organised gang;**
- a financial transaction between France and a foreign country involving funds that they were able to derive, directly or indirectly, from a misdemeanour provided for in the Code or from violating the legislation on poisonous substances or plants classified as narcotics;**
- for a misdemeanour connected to an offence in the field of organised crime (these offences are listed in Article 706-73 of the Code of Criminal Procedure).**

- (c) (i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?

Yes, the person placed in police custody or under judicial investigation must be informed of his right of access to a lawyer.

(ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only 'activated' further to a request of the person concerned?

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

If the person placed in custody or under judicial investigation is not able to appoint a lawyer or if the chosen lawyer cannot be contacted or cannot travel, he may request that a lawyer be officially appointed by the chairman of the Bar Association⁵. The chosen lawyer or, in the case of a request for one to be officially appointed, the lawyer on duty or the chairman of the Bar Association is informed immediately by any means by the competent authority.

Special cases:

- **A minor under judicial investigation must be assisted by a lawyer;**
- **If the person is deaf and can neither read nor write, he must be assisted by a sign language interpreter or by any qualified person mastering a language or method making it possible to communicate with him. Recourse may also be had to any technical device providing for communication with a deaf person.**
- **If the person does not understand French, he must be informed of his rights by an interpreter, if necessary after he has been given a form to provide him with immediate information.**

(d) (i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police or investigating judge to wait until the arrival of the lawyer before the questioning starts?

Yes.

⁵ **Elected by the Members of the Bar for a term of two years, the chairman of the Bar is the spokesman for the lawyers registered with his bar association. He has the job of arbitrating between lawyers and that of conciliation when there is a dispute between a lawyer and his client. He is also the one who designates officially appointed lawyers.**

(ii) In the affirmative, how long (how many hours) do the police or investigating judge have to wait until the arrival of the lawyer?

- With the exceptions specified above, the investigating officials are under an obligation during custody to await the lawyer's arrival for two hours before questioning can commence. Whilst waiting, they may only question the person as to his identity.

- For the questioning on first appearance – i.e. when the examining magistrate meets the suspect for the first time, establishes his identity, notifies him that he is planning to question him and invites his comments – the examining magistrate must await the lawyer's arrival for an unlimited period.

On the other hand, for subsequent questioning, the examining magistrate is not required to wait for the lawyer, the only legal obligation being the notice period for a summons of 5 working days. However, in practice and out of courtesy, the examining magistrate calls the lawyer if there is any delay, to find out his intentions.

(e) (i) In your legal order, is there a possibility of making derogations to the right of a person to be assisted by a lawyer before and/or during questioning in the pre-trial phase? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police or investigating judge to proceed with the questioning without the presence of a lawyer, or without the lawyer having been contacted in advance by phone?

Yes, see the replies to question (1)(b)(ii).

(ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

Yes, see the replies to question (1)(b)(ii).

2. In your legal order, when a person is officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence and is asked to come 'voluntarily' to a police station in order to be questioned by the police in relation to that crime,

Under French law, a person in respect of whom there is one or more plausible grounds for suspecting that he has committed or attempted to commit an offence is only entitled to the assistance of a lawyer if he is interviewed whilst not in police custody. On the other hand, he may consult a lawyer freely before complying with the summons by the police or the gendarmerie.

(a) (i) Does this person have the right to be assisted by a lawyer before such questioning?

Yes.

(ii) In the affirmative: in which situations does this right exist?

In all cases.

(iii) If the person has a right to be assisted by a lawyer before questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

No.

(b) (i) Does this person have the right to be assisted by a lawyer during such questioning?

No.

(ii) In the affirmative, is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

(iii) If the person has a right to be assisted by a lawyer during questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

- (c) (i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?

No.

- (ii) In the affirmative,
- does this obligation exist automatically in all cases, or is it only 'activated' further to a request of the person concerned?
 - what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

- (c) (i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?

No.

- (ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

- (e) (i) In your legal order, is there a possibility of making derogations to the right to be assisted by a lawyer before and/or during the questioning? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer?

- (ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

3. In your legal order, when a person is stopped on the street by the police and, after having been officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence, is asked by the police to reply to questions concerning the (alleged) crime committed,

(a) What kind of questions could be asked to this person? Is it possible to question the person regarding the alleged crime?

The person may be asked questions about his identity, but not about what happened. Either the person is placed in police custody and the rules governing the situation described in question (1) apply, or the person is invited to present himself to the police or the gendarmerie, and the rules set out in question (2) apply.

(b) (i) Does this person have the right to be assisted by a lawyer during such questioning?

(ii) In the affirmative, in which situations does such a right exist?

(iii) If the person has the right to be assisted by a lawyer, may this right be limited to the person contacting the lawyer by phone before questioning starts? If so, please indicate in which situations this may be the case.

(c) (i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there an obligation in your legal order for the police or any other competent authorities to facilitate or assist the person in exercising this right?

(ii) In the affirmative,

– does this obligation exist automatically in all cases, or is it only 'activated' further to a request of the person concerned?

– what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority?

(d) (i) If the person has a right to be assisted by a lawyer during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?

(ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

(e) (i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there a possibility of making derogations to this right in your legal order? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer or without contact by phone having been made?

(ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

Evidence-gathering and investigating acts in the pre-trial stage

4. Questions regarding evidence-gathering or investigating acts in the pre-trial stage:

There is no provision under French law for the lawyer to be present during investigating acts or evidence-gathering by the police at which, in application of the law, the person in police custody must be present. Such acts are intended solely to collect indicative or material evidence, and no statement may be taken from the detained person. The assistance of a lawyer is not required.

(a) (i) In your legal order, does the suspect or accused person have a right for his lawyer to be present at evidence-gathering or investigating acts?

Yes, but only for certain acts carried out by the examining magistrate.

(ii) In the affirmative, which evidence-gathering or investigating acts are concerned?

The acts during which the person placed under judicial investigation is likely to be questioned by the examining magistrate are the examination of witnesses/confrontations, transport to the place where the offence was committed and reconstructions.

(b) (i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the competent authorities to facilitate or assist the person in exercising this right?

Yes.

(ii) In the affirmative, what are the concrete act(s) concerned that have to be taken by the competent authorities?

Lawyers are summoned at the latest five working days before the questioning or hearing involving the person they are assisting, by registered letter with advice of delivery, fax with receipt or orally with signature appended on the case file.

If the person under judicial investigation or his lawyer requests that an investigating act be performed, then the lawyer may ask to be present even if his client does not attend.

The examining magistrate adjudicates on such requests and, if he rejects them, must issue a reasoned order within one month of receipt of the request.

If he accepts the request, the examining magistrate must summon the lawyer at the latest two working days before the date of the journey, hearing or questioning, during which the lawyer is entitled to participate under the conditions provided for in Article 120.

(c) (i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before starting the evidence-gathering or investigating act?

Not applicable. The lawyer does not attend investigating acts or evidence-gathering during the police phase of the investigation.

(ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer? Please specify as appropriate.

(d) (i) In your legal order, is there a possibility of making derogations to the right of the suspected or accused person for his lawyer to be present at evidence-gathering or investigating act? In other words, if the person concerned wants to be assisted by a lawyer during such acts, is there nevertheless a possibility for the competent authorities to proceed with the evidence-gathering or investigating act without the lawyer being present?

Not applicable.

(ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

Questioning in the pre-trial stage of persons who are initially not suspected or accused of having committed an offence but obtain this status during questioning

5. In your legal order, when a person that is initially not suspected or accused of an alleged crime, such as a witness, is questioned by the police or an investigating judge:

(a) Does this person have the right to be assisted by a lawyer during questioning?

No.

(b) When, during the questioning, such a person becomes suspected or accused of having committed a criminal offence, do the competent authorities have to inform the person concerned of this change of status?

Yes.

(c) If the answer to question b) is positive:

(i) When precisely do the competent authorities have to inform the person concerned?

Immediately.

(ii) In what manner do the competent authorities have to inform the person concerned (notification, information, ...)?

If it emerges in the course of a hearing that there are reasonable grounds to suspect that the person concerned has committed, or attempted to commit, a crime or offence punishable by imprisonment, that person can only be kept in custody at the disposal of investigators under the police custody arrangements (Article 78 of the Code of Criminal Procedure). He will be notified of his placing in custody in accordance with the conditions provided for under Article 63 of the Code of Criminal Procedure.

(iii) Do the competent authorities have to stop the questioning?

Yes, if the investigators do not place the suspect in custody.

(iv) Does the person concerned obtain the right to be assisted by a lawyer (when he did not have it before)? If so, as from which moment in time?

Yes, from the moment he is notified that he has been placed in custody.

(v) May the statements made by the person before he was informed of the change of status be used in the ensuing criminal proceedings against him? If so, in which circumstances? Please specify as much as possible.

Yes, the statements made by the person before he was placed in custody can be used against him provided that they are not the only evidence against him.

The preliminary Article of the Code of Criminal Procedure (last paragraph) states that: "In criminal and correctional matters, no sentence may be passed on a person solely on the basis of statements made by him without his having had the opportunity to consult with and be assisted by a lawyer."

Minor offences

6. Questions regarding exclusions / minor offences:

(a) In your legal order, are there any categories of offences (in particular so-called "minor offences"), in respect of which the right to be assisted by a lawyer does not exist or is restricted, totally or partially, in the pre-trial phase?

Yes.

(b) In the affirmative, please describe the category or categories of exclusions as precisely as possible, defining the category by a common denominator, e.g.

- where the offence is initially dealt with in an administrative manner;
- where pre-trial detention is not possible in relation to the offence concerned;
- where deprivation of liberty cannot be imposed as a sanction in relation to the offence concerned;

- where the fine that may be imposed as a sanction in relation to the offence concerned does not exceed a certain amount;
- other definition.

In the case of investigations conducted by the police or the *gendarmerie*, a person may be assisted by a lawyer if he is placed in custody, a measure which can only be ordered for offences punishable by imprisonment. Accordingly, offences not subject to imprisonment, or minor offences, are excluded from the right to assistance from a lawyer in the context of police investigations.

In the case of investigations led by an examining magistrate, the nature of the offence does not come into play and the person under judicial investigation is always entitled to assistance from a lawyer.

(c) In case your legal order contains one or more categories of exclusions: please indicate the consequence of each category of exclusion, e.g. is there a total or partial exclusion from the right to be assisted by a lawyer, does the exclusion entail different modalities for the assistance by a lawyer, etc. ...

If the person is questioned by the police or by the *gendarmerie* outside the framework of police custody, then a lawyer will not be present.

Lawyer provided by the State / Payment of lawyer's fees

7. The proposed Directive does not deal with the question of legal aid; even so the Presidency believes that the following questions regarding the payment of a lawyer's fee could have an impact on the formulation and application of the Directive.

The French delegation shares the Presidency's view that the question of the payment of legal fees will have an impact on the implementation of the Directive.

For the moment, there is no provision under French law for the right to access to a lawyer when the police or *gendarmerie* question a suspect who is not placed in custody or perform an investigating act.

The criminal procedure reform of 14 April 2011, which reinforced the right of access to a lawyer during custody, resulted in an increase of EUR 103 800 000 in the 2012 justice budget. The financing of the right to be assisted by a lawyer outside the police custody framework could entail a similar increase.

With this in mind delegations are kindly invited to respond to the following questions:

(a) (i) In your legal order, does an obligation exist for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, but cannot afford to pay a lawyer or cannot afford to pay the lawyer that he has chosen? **Yes.**

(ii) If so, in which situations and under which conditions does such obligation exist? When answering this question, please taken into account the situations mentioned under questions 1-4.

Legal aid in the context of criminal proceedings is possible only where the person suspected of having committed an offence is:

- **arrested and placed in police custody**
- **brought before an examining magistrate to be placed under judicial investigation and also during the subsequent examination.**

- The State's contribution to the remuneration of officially appointed lawyers acting during police custody depends on the nature of their intervention and is as follows:

*** EUR 61, excluding tax, for the interview mentioned in Article 63-4 of the Code of Criminal Procedure where the lawyer's intervention is restricted to that interview at the start of the custody or the extension of the measure;**

*** EUR 300, excluding tax, for the interview at the start of the custody and for assisting the person held in police custody during his hearings and confrontations;**

*** EUR 150, excluding tax, for the interview at the start of the custody and for assisting the person held in police custody during his hearings and confrontations during that extension;**

*** EUR 150, excluding tax, for assisting the victim during confrontations with a person held in police custody.**

- For the investigation, legal aid is granted by the Legal Aid Office depending on the means of the person placed under judicial investigation. If the latter's means exceed the ceiling, he may nevertheless receive exceptional aid depending on the importance of the case or if the cost is particularly high.

If aid is granted, the fees are paid directly to the lawyer.

- If a person summoned voluntarily by the police or gendarmerie consults a lawyer before being questioned, he does so at his own expense because this is not a situation in which he is entitled to legal aid.

(b) (i) In your legal order, does there exist an obligation for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, even if he could himself afford to pay a lawyer, or the lawyer that he has chosen?

Yes, even if a person held in police custody or placed under judicial investigation has the means to pay a lawyer, the competent authorities must offer to provide an officially appointed lawyer if he so requests.

(ii) If so, in which situations and under which conditions does such obligation exist? When answering this question, please take into account the situations mentioned under questions 1-4.

The competent authorities must offer to provide an officially appointed lawyer:

- when the person concerned is placed in police custody;**
- when the person concerned is brought before an examining magistrate to be placed under judicial investigation;**
- when the person concerned is brought before a magistrate for custody and release for a ruling on provisional detention;**

– **when the person concerned is tried by summary proceedings or committed for trial before the Assize Court.**

In the case of remand in custody, the State pays the lawyer and can subsequently recover its expenses. In other cases, the person must pay the lawyer's fees directly.

Principle of confidentiality

8. (a) In your legal order, can any derogations be made to the principle of confidentiality of communication between the suspected or accused person and his lawyer?

No.

(b) In the affirmative, in which situations can such derogations be made? Please specify as much as possible, and make a distinction, if appropriate, between oral and written communication, and between communication in the pre-trial phase and in the trial phase.

Waiver

9. (a) In your legal order, does a suspect or accused person has the right to waive his right to be assisted by a lawyer?

Yes, but the person brought before a magistrate for custody and release cannot waive his right to be assisted by a lawyer.

(b) In the affirmative,

(i) What, if any, information has to be given to the person concerned prior to making the waiver?

The person must be informed that he is entitled to assistance from a lawyer and that he can be offered an officially appointed lawyer.

- (ii) If such information has to be given:
- which person(s) or authorities may / should give that information?

The police or gendarmerie, the examining magistrate.

- how is that information to be given (oral, writing,) ? Please specify.

The information is given orally.

- (iii) How is the waiver noted/registered? What are the formalities, if any?

The choice of whether to have a lawyer or waive the right to a lawyer is recorded in writing:

- **in the report confirming notification of custody rights**
- **in the report of the hearing before the examining magistrate**

- (iv) May a decision to waive the right to a lawyer be revoked, and if so,
- may this be done at any stage of the proceedings?

Yes.

- are there any (other) limitations to the possibility of revoking a waiver?

No.

- (c) Are the answers to the questions under a) and b) different if the person concerned is a minor?
If so, please specify.

- **a minor aged up to 13 cannot waive his right of access to a lawyer during remand in custody**
- **a minor aged up to 18 cannot waive his right of access to a lawyer during the investigation**

Remedies

10. (a) Does your national law provide for remedies in case of breach of the right of access to a lawyer?

Yes.

(b) In the affirmative:

(i) which are those remedies?

The defendant may allege nullity of the act or statement, as well as of the subsequent procedural measures.

(ii) do the remedies also include the possibility for the (judicial) authorities to exclude evidence that has been obtained in breach of the right of access to a lawyer?

Yes, apart from nullity exceptions which may be adduced by the suspect or the accused (where there is a failure to observe a substantive formality laid down by the Code of Criminal Procedure that might entail cancellation of the proceedings), statements made by the defendant before he was placed in custody may be used against him provided that they are not the sole incriminating elements.

The preliminary Article of the Code of Criminal Procedure (last paragraph) states that: "In criminal and correctional matters, no sentence may be passed on a person solely on the basis of statements made by him without his having had the opportunity to consult with and be assisted by a lawyer."

General concerns regarding the proposed Directive

11. Are there any other aspects of your legal order that could be of importance for the further discussions on this proposed Directive? If so, please highlight them.

- The proposal for a Directive does not distinguish sufficiently between the different stages of the criminal proceedings, which is also contrary to the ECHR, whereas it is necessary to draw a distinction between the police investigation stage and the judicial phase, and to adjust the level of safeguards offered in relation to the status of the person in the proceedings. In fact, the rights of the person and the prerogatives of the lawyer acting during the police investigation stage should be less than those accorded during the examination or during the judicial stage. It is important not to block the course of the investigation. At this stage, only persons subject to a custodial sentence should be entitled to a lawyer.

- The French delegation would also appreciate it if the discussions of the Working Party on Substantive Criminal Law could also examine possible derogations for organised crime, terrorism and customs offences. The regime for those activities which, in view not only of their serious nature but also of their very frequently cross-border nature, must allow scope for specific and European derogations. This observation on the derogations to be made is also relevant with regard to offences committed by persons regarded as members of the armed forces operating on foreign territory, piracy and other offences committed at sea or in certain overseas territories (see page 7 above).

IRELAND

Questioning of suspects and accused persons in the pre-trial phase

1. In your legal order, when a person that is suspected or accused of having committed a criminal offence is arrested (deprived of liberty) and asked by the police or investigating judge to reply to questions concerning the (alleged) crime committed,
 - a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?
A person who is arrested and detained in a Garda (Police) station for questioning in relation an offence is entitled to consult a solicitor before questioning.
 - ii) In the affirmative: in which situations does this right exist?
This right applies to all persons described in answer a) i) above.
 - iii) If the person has the right to be assisted by a lawyer before questioning, may this right in your legal order be limited to the person contacting the lawyer by phone? If so, please indicate in which situations this may be the case.
There is no legal restriction of this type in Ireland.
 - b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?
No, there is no right for the lawyer to be present during questioning.
 - ii) In the affirmative: is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.
Not applicable

- c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?

In all cases the Police will contact a lawyer for the suspect where he so requests.

- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police or investigating judge to wait until the arrival of the lawyer before the questioning starts?

Generally speaking, Yes.

ii) In the affirmative, how long (how many hours) do the police or investigating judge have to wait until the arrival of the lawyer?

Not specified

- e) i) In your legal order, is there a possibility of making derogations to the right of a person to be assisted by a lawyer before and/or during questioning in the pre-trial phase? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police or investigating judge to proceed with the questioning without the presence of a lawyer, or without the lawyer having been contacted in advance by phone?

Yes

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

Questioning of a person may proceed, before consultation with a lawyer where the police have reasonable grounds for believing that to delay the questioning until the arrival of the lawyer would involve a risk of—

- (a) interference with, or injury to, other persons,**
- (b) serious loss of, or damage to, property,**
- (c) the destruction of, or interference with, evidence,**

(d) accomplices being alerted or the securing of their apprehension being made more difficult, or

(e) hindering the recovery of property obtained as a result of an offence or the recovery of the value of any proceeds of an offence.

2. In your legal order, when a person is officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence and is asked to come 'voluntarily' to a police station in order to be questioned by the police in relation to that crime,

This situation does not exist in the Irish system.

3. In your legal order, when a person is stopped on the street by the police and, after having been officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence, is asked by the police to reply to questions concerning the (alleged) crime committed,

a) What kind of questions could be asked to this person? Is it possible to question the person regarding the alleged crime?

The use of the phrase “officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence,” would mean in the Irish system that the person has been arrested and will have been informed of his right to silence. Any questions may be put to the person but he is not obliged to answer them.

b) i) Does this person have the right to be assisted by a lawyer during such questioning
No

c) – e)

Not applicable

Evidence-gathering and investigating acts in the pre-trial stage

4. Questions regarding evidence-gathering or investigating acts in the pre-trial stage:

a) i) In your legal order, does the suspect or accused person have a right for his lawyer to be present at evidence-gathering or investigating acts?

ii) In the affirmative, which evidence-gathering or investigating acts are concerned?

i) and ii) - A suspect has the right to have his lawyer present at an identification parade.

b) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the competent authorities to facilitate or assist the person in exercising this right?

Yes

ii) In the affirmative, what are the concrete act(s) concerned that have to be taken by the competent authorities?

In all cases the Garda (Police) will contact a lawyer for the suspect where he so requests.

c) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before starting the evidence-gathering or investigating act?

Yes

ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer? Please specify as appropriate.

Not specified

- d) i) In your legal order, is there a possibility of making derogations to the right of the suspected or accused person for his lawyer to be present at evidence-gathering or investigating act? In other words, if the person concerned wants to be assisted by a lawyer during such acts, is there nevertheless a possibility for the competent authorities to proceed with the evidence-gathering or investigating act without the lawyer being present?

No

Questioning in the pre-trial stage of persons who are initially not suspected or accused of having committed an offence but obtain this status during questioning

5. In your legal order, when a person that is initially not suspected or accused of an alleged crime, such as a witness, is questioned by the police or an investigating judge:

- a) Does this person have the right to be assisted by a lawyer during questioning?

Yes

- b) When, during the questioning, such a person becomes suspected or accused of having committed a criminal offence, do the competent authorities have to inform the person concerned of this change of status?

- c) If the answer to question b) is positive:

- i) When precisely do the competent authorities have to inform the person concerned?

- ii) In what manner do the competent authorities have to inform the person concerned (notification, information, ...)?

- iii) Do the competent authorities have to stop the questioning?

- iv) Does the person concerned obtain the right to be assisted by a lawyer (when he did not have it before)? If so, as from which moment in time?

- v) May the statements made by the person before he was informed of the change of status be used in the ensuing criminal proceedings against him? If so, in which circumstances? Please specify as much as possible.

These questions presume that the change in status becomes definitive in the course of the questioning. This is not in most cases a realistic situation. Generally speaking the police would terminate the interview if it became apparent that the person might be a suspect. Normal procedures would then apply if and when the person becomes a suspect.

Minor offences

6. Questions regarding exclusions / minor offences:

- a) In your legal order, are there any categories of offences (in particular so-called "minor offences"), in respect of which the right to be assisted by a lawyer does not exist or is restricted, totally or partially, in the pre-trial phase?

No

Lawyer provided by the State / Payment of lawyer's fees

7 a) i) In your legal order, does an obligation exist for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *but cannot afford to pay a lawyer or cannot afford to pay the lawyer that he has chosen?*

Where the accused person does not have the means to pay for a lawyer themselves and the Court considers it is essential in the interests of justice, because of the seriousness of the charge or circumstances of the alleged crime, that the accused person be legally represented a solicitor will be appointed to the accused for the Court proceedings.

In the case of persons arrested and detained for questioning in a Garda station in relation to certain offences, where the person's income is below a specified level the State will pay for consultations with a solicitor.

b) i) In your legal order, does there exist an obligation for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *even if he could himself afford to pay a lawyer, or the lawyer that he has chosen?*

ii) If so, in which situations and under which conditions does such obligation exist? When answering this question, please take into account the situations mentioned under questions 1-4.

No

Principle of confidentiality

8. a) In your legal order, can any derogations be made to the principle of confidentiality of communication between the suspected or accused person and his lawyer?

In principle, No.

Waiver

9. a) In your legal order, does a suspect or accused person has the right to waive his right to be assisted by a lawyer?

9. a) – Yes

b) and c) no procedures specified.

Remedies

10. a) Does your national law provide for remedies in case of breach of the right of access to a lawyer?

There is no legislation on this matter

- b) In the affirmative:

- i) which are those remedies?
- ii) do the remedies also include the possibility for the (judicial) authorities to exclude evidence that has been obtained in breach of the right of access to a lawyer?

b) ii) It is always a matter for the trial judge to decide on the admissibility of any evidence

ITALY

OVERVIEW OF THE ITALIAN LEGAL ORDER

In the Italian legal order the judiciary is autonomous and independent from any other power of the State; it is composed of judges as well as of Public Prosecutors.

The judicial police [*polizia giudiziaria*] is composed of several police forces that have the task of repressing criminality and finding offenders.

Once the judicial police is informed of an offence, it has to communicate it without delay to the Public Prosecutor, who directs the investigations availing itself directly of the judicial police staff. The Public Prosecutor performs personally all the investigation activities. It may avail itself of the judicial police for carrying out investigative activities and specifically delegated activities, including questionings and confrontations to which the person under investigation but not under arrest participates, necessarily assisted by a defence counsel.

The judicial police can carry out also investigation activities of its own initiative complying with the relevant laws and keeping the Public Prosecutor informed.

At the conclusion of the investigation phase, the Public Prosecutor launches the prosecution if s/he deems that there are the grounds for it. Prosecution is mandatory: if the Public Prosecutor deems not to proceed to it, it has to explain the reasons to the judge.

The evidence collected during the preliminary investigations usually do not form evidence at the trial (however this is a very complex area that cannot be described synthetically) .

Questioning of suspects and accused persons in the pre-trial phase

1. In your legal order, when a person that is suspected or accused of having committed a criminal offence is arrested (deprived of liberty) and asked by the police or investigating judge to reply to questions concerning the (alleged) crime committed,
 - a)
 - i) Does this person have the right to be assisted by a lawyer *before* such questioning?
 - ii) In the affirmative: in which situations does this right exist?
 - iii) If the person has the right to be assisted by a lawyer before questioning, may this right in your legal order be limited to the person contacting the lawyer by phone? If so, please indicate in which situations this may be the case.
 - b)
 - i) Does this person have the right to be assisted by a lawyer *during* such questioning?
 - ii) In the affirmative: is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.
 - c)
 - i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?
 - ii) In the affirmative,
 - does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?
 - what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?
 - d)
 - i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police or investigating judge to wait until the arrival of the lawyer before the questioning starts?
 - ii) In the affirmative, how long (how many hours) do the police or investigating judge have to wait until the arrival of the lawyer?

- e) i) In your legal order, is there a possibility of making derogations to the right of a person to be assisted by a lawyer before and/or during questioning in the pre-trial phase? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police or investigating judge to proceed with the questioning without the presence of a lawyer, or without the lawyer having been contacted in advance by phone?
- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

1

In the Italian legal order the police can never question a person suspected or accused of having committed a crime who is in a state of deprivation of liberty/detention. The questioning can only be carried out by the Public Prosecutor (although it may be in the presence of the police, for investigation purposes) or by the judge.

a) :

1. The person suspected or accused of having committed a crime in a state of deprivation of liberty/detention – although the case is the same if the person to be questioned is at liberty – during the questioning is always entitled to being assisted by a lawyer/defence counsel who has been informed previously about the questioning.

2. The presence of the lawyer/defence counsel is mandatory both for the questionings carried out by the judge and also - although only if the person is at liberty - the ones carried out by the police, whether on its own initiative or being so delegated by the Public Prosecutor. Therefore the questioning cannot take place until the lawyer/defence counsel arrives and is physically present.

3. The lawyer/defence counsel is appointed by the person suspected or accused of having committed a crime. Failing such appointment, or if the counsel of choice fails to show up without giving a valid reason, a public defender chosen from a list formed by the Council of the Bar [Ordine degli Avvocati] is appointed.

4. When the questioning is carried out by the Public Prosecutor, the lawyer/defence counsel must be informed about it with at least 24 hours notice. In cases of extreme urgency, when there are founded reasons to believe that a delay may prejudice the search for or finding of evidence, the Public Prosecutor may carry out the questioning even before said time limit, informing of this - without delay - the lawyer/defence counsel.

Unlike the police and the judge, the Public Prosecutor can carry out the questioning even if the lawyer/defence counsel – who has regularly been informed – does not show up. However, the lawyer/defence counsel has the right to intervene and participate in the questioning at any time.

5. Article 104 of the code of criminal procedure: *1. A defendant who is held in pre-trial custody [custodia cautelare] has the right to confer with his/her lawyer/defence counsel from the start of execution of the measure. 2. The person arrested [arresto] in the act of committing a crime or under provisional arrest [fermo] ... has the right to confer with his/her lawyer/defence counsel immediately after arrest or provisional arrest. 3. During the preliminary investigation, when there are specific and exceptional precautionary reasons, the judge may, upon request by the Public Prosecutor and by means of a grounded decree [decreto motivato], extend by not more than five days the time for exercising the right to confer with the lawyer/defence counsel. 4. In case of arrest or provisional arrest, the power provided for in paragraph (3) is exercised by the Public Prosecutor until when the person arrested or under provisional arrest is placed at the disposal of the judge.*

In case of the extensions provided for in paragraphs (3) and (4) of Article 104, the person concerned can meet his/her defence counsel at the time of the questioning which therefore will always take place in the lawyer's/defence counsel's presence.

b) :

In no case is it possible to derogate from the above principles. Therefore the person suspected or accused of having committed a crime has always the right to be assisted by a lawyer/defence counsel during his/her questioning.

c) :

At the moment of arresting a person (either in case of flagrante delicto or of provisional arrest or executing an order of the judge) the police is always obliged to inform the lawyer/defence counsel chosen and appointed by the person arrested or, failing this, the counsel assigned by the court, chosen from a list formed by the Council of the Bar.

When a persons suspected/accused of having committed a crime is to be questioned, his/her lawyer/defence counsel (whether of his choice or assigned) must always be called in due time to take part in the questioning. If the lawyer/defence counsel is an assigned one, the person suspected/accused of having committed a crime must always be informed about the lawyer's/defence counsel's name, address and phone numbers of the law firm.

d) :

As already said, the police and the judge cannot carry out the questioning of a person suspected/accused of having committed a crime without the presence of his/her lawyer/defence counsel, therefore they must necessarily wait for him or, if s/he does not show up at the time indicated without giving a valid reason or informing in advance of the delay, they must appoint an assigned counsel.

As regards the questioning carried out by the Public Prosecutor during the preliminary investigations, see the answer given under a) – 4.

e) :

We reiterate that in the Italian system it is never possible to derogate from the right of the person suspected/accused of having committed a crime to be assisted by a lawyer/defence counsel during his/her questioning.

2. In your legal order, when a person is officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence and is asked to come 'voluntarily' to a police station in order to be questioned by the police in relation to that crime,
- a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?
ii) In the affirmative: in which situations does this right exist?
iii) If the person has a right to be assisted by a lawyer before questioning, is he informed of this right in the convocation for the questioning? If so, in what way?
- b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?
ii) In the affirmative, is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.
iii) If the person has a right to be assisted by a lawyer during questioning, is he informed of this right in the convocation for the questioning? If so, in what way?
- c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?
ii) In the affirmative,
- does this obligation exist automatically in all cases, or is it only 'activated' further to a request of the person concerned?
- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?
- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?
ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

- e) i) In your legal order, is there a possibility of making derogations to the right to be assisted by a lawyer before and/or during the questioning? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer?
- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

2

2.1 As already stated above, a person at large can be asked to come to a police station in order to be questioned in relation to a criminal offence he is accused of having committed in the mandatory presence of a lawyer/defence counsel (appointed by him or, failing that, appointed by the court) who must be promptly notified.

The person concerned has therefore the right and is entitled to consult his lawyer/defence counsel before the questioning begins and is informed of this right by the police staff.

2.2 Here follows the text of Article 350 paragraphs 5 and 6 of the Code of Criminal Procedure that applies to the above questions: “*On the place and immediately after the alleged criminal act, judicial police officers may, even without the presence of a lawyer, take from the person against whom investigations are been conducted, even if that person was arrested in flagranti or stopped on the street..., information and indications useful for the purpose of the immediate continuation of investigations*”.

It is “*prohibited to document and use*” all information taken without the lawyer’s assistance on the place or immediately after the alleged criminal act. Hence, these statements cannot in any case be used as evidence against the investigated person nor be submitted to the court during the trial.

2.3 The authority in charge of the questioning (Police, Public Prosecutor, Judge) must find and notify the lawyer/defence counsel appointed by the person concerned or, failing an appointment, the defence counsel appointed by the court. In the latter case, the investigated person shall receive information on the lawyer’s particulars, address and telephone numbers of the law firm.

2.4 As already stated above, the police cannot start the questioning before the lawyer/defence counsel has arrived.

2.5 In no case is it possible to derogate from the above principles, with the only exception of the situation described under 1(a)(4)

3. In your legal order, when a person is stopped on the street by the police and, after having been officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence, is asked by the police to reply to questions concerning the (alleged) crime committed,
- a) What kind of questions could be asked to this person? Is it possible to question the person regarding the alleged crime?
 - b)
 - i) Does this person have the right to be assisted by a lawyer during such questioning?
 - ii) In the affirmative, in which situations does such a right exist?
 - iii) If the person has the right to be assisted by a lawyer, may this right be limited to the person contacting the lawyer by phone before questioning starts? If so, please indicate in which situations this may be the case.
 - c)
 - i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there an obligation in your legal order for the police or any other competent authorities to facilitate or assist the person in exercising this right?
 - ii) In the affirmative,
 - does this obligation exist automatically in all cases, or is it only 'activated' further to a request of the person concerned?
 - what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority?

- d) i) If the person has a right to be assisted by a lawyer during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?
ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?
- e) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there a possibility of making derogations to this right in your legal order? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer or without contact by phone having been made?
ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

3

See answers under 2.

Evidence-gathering and investigating acts in the pre-trial stage

4. Questions regarding evidence-gathering or investigating acts in the pre-trial stage:
- a)
 - i) In your legal order, does the suspect or accused person have a right for his lawyer to be present at evidence-gathering or investigating acts?
 - ii) In the affirmative, which evidence-gathering or investigating acts are concerned?

 - b)
 - i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the competent authorities to facilitate or assist the person in exercising this right?
 - ii) In the affirmative, what are the concrete act(s) concerned that have to be taken by the competent authorities?

 - c)
 - i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before starting the evidence-gathering or investigating act?
 - ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer? Please specify as appropriate.

 - d)
 - i) In your legal order, is there a possibility of making derogations to the right of the suspected or accused person for his lawyer to be present at evidence-gathering or investigating act? In other words, if the person concerned wants to be assisted by a lawyer during such acts, is there nevertheless a possibility for the competent authorities to proceed with the evidence-gathering or investigating act without the lawyer being present?
 - ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

a) :

Yes.

The lawyer/defence counsel of the suspect or accused person has the right to be present at certain investigating acts and, *inter alia*:

- unrepeatable expert evidence (for instance autopsy, analyses implying the destruction of the exhibit);
- searches carried out in the presence of the suspect or accused person;
- seizures affecting the suspect or accused person;
- inspections where the suspect's participation is mandatory;
- confrontations where the suspect's participation is mandatory;
- carrying out of an "*incidente probatorio*" (i.e. evidence-taking before a judge during preliminary investigations and where certain strict conditions apply (e.g. questioning of a witness whose life is at risk and who is unlikely to be able to give evidence in the trial)).

b) :

Before performing any of the above activities, the Public Prosecutor (or the judge in the case of an "*incidente probatorio*") notifies the party concerned that he may appoint a defence counsel he chooses and, failing that, he shall be assisted by a court-appointed lawyer/defence counsel, whose particulars, address and telephone numbers of the law firm are notified to him.

The lawyer/defence counsel is promptly informed of the activity to be performed and of the place, date and time of performance.

c) :

Except for cases of "*incidente probatorio*", in which a lawyer/defence counsel (and a Prosecutor) must necessarily attend, the act may also be performed without the presence of a lawyer/defence counsel, if the latter has been duly notified. The lawyer/defence counsel shall in any case maintain his right to be present at the act.

d) :

No derogation from the right of the suspect or accused person for his lawyer to be present is possible. In certain circumstances it is possible to shorten the time for appearance or not to notify the lawyer who maintains in any case the right to be present at the act.

For these purposes, the text of Article 364 paragraphs 5 and 6 of the Code of Criminal Procedure is hereby reported: *“In cases of absolute urgency, when there are justified grounds for thinking that delay could harm the search or the securing of sources of evidence, the Public Prosecutor can proceed to the questioning, inspection or confrontation even before the scheduled time, notifying the lawyer/defence counsel without delay and, at any rate, promptly. The notice can be omitted when the Public Prosecutor proceeds to the inspection and where there is justified reason to believe that evidence or other material effects of the crime may be altered. The right of the lawyer/defence counsel to intervene shall apply in any case.*

When he proceeds in the manner provided in paragraph 5, the Public Prosecutor must specifically indicate, on penalty of nullity, the reasons for the derogation and the methods of giving notice”.

Questioning in the pre-trial stage of persons who are initially not suspected or accused of having committed an offence but obtain this status during questioning

5. In your legal order, when a person that is initially not suspected or accused of an alleged crime, such as a witness, is questioned by the police or an investigating judge:
 - a) Does this person have the right to be assisted by a lawyer during questioning?
 - b) When, during the questioning, such a person becomes suspected or accused of having committed a criminal offence, do the competent authorities have to inform the person concerned of this change of status?

- c) If the answer to question b) is positive:
- i) When precisely do the competent authorities have to inform the person concerned?
 - ii) In what manner do the competent authorities have to inform the person concerned (notification, information, ...)?
 - iii) Do the competent authorities have to stop the questioning?
 - iv) Does the person concerned obtain the right to be assisted by a lawyer (when he did not have it before)? If so, as from which moment in time?
 - v) May the statements made by the person before he was informed of the change of status be used in the ensuing criminal proceedings against him? If so, in which circumstances? Please specify as much as possible.

5

a) :

A person who is not the suspect or the accused has not the right to be assisted by a lawyer when he is questioned by the police or the public prosecutor during the preliminary investigation (as he has nothing to defend against).

However, any person who is suspected or accused of an offence connected or related to the crime which is being investigated (for example, a member of a criminal organisation who has dissociated from criminal activity and has started to give evidence concerning some other members of the criminal organisation) has the right to be assisted by a lawyer during questioning. In this case there are special rules for both the acquisition and the examination of the evidence.

b) and c) :

Here follows Article 63 of the Code of Criminal Procedure: “If, before the judicial authority or before the judicial police, a person who is not accused or a person who is not subjected to investigation makes statements revealing indications as to his culpability, then the investigating authority shall interrupt the examination warning the person that following such statements investigations may be carried out against him and urging him to appoint a lawyer. Prior statements may not be used against the person who has made them.

If the person should have been heard from the beginning in the capacity of accused or of person subjected to investigation his statements may not be used.

Minor offences

6. Questions regarding exclusions / minor offences:

- a) In your legal order, are there any categories of offences (in particular so-called "minor offences"), in respect of which the right to be assisted by a lawyer does not exist or is restricted, totally or partially, in the pre-trial phase?

- b) In the affirmative, please describe the category or categories of exclusions as precisely as possible, defining the category by a common denominator, e.g.
 - where the offence is initially dealt with in an administrative manner;
 - where pre-trial detention is not possible in relation to the offence concerned;
 - where deprivation of liberty cannot be imposed as a sanction in relation to the offence concerned;
 - where the fine that may be imposed as a sanction in relation to the offence concerned does not exceed a certain amount;
 - other definition.

- c) In case your legal order contains one or more categories of exclusions: please indicate the consequence of each category of exclusion, e.g. is there a total or partial exclusion from the right to be assisted by a lawyer, does the exclusion entail different modalities for the assistance by a lawyer, etc. ...

6

a) :

NO.

b) and c) :

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Lawyer provided by the State / Payment of lawyer's fees

7. The proposed Directive does not deal with the question of legal aid; even so the Presidency believes that the following questions regarding the payment of a lawyer's fee could have an impact on the formulation and application of the Directive.

With this in mind delegations are kindly invited to respond to the following questions:

- a) i) In your legal order, does an obligation exist for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *but cannot afford to pay a lawyer or cannot afford to pay the lawyer that he has chosen?*
- ii) If so, in which situations and under which conditions does such obligation exist? When answering this question, please take into account the situations mentioned under questions 1-4.

- b) i) In your legal order, does there exist an obligation for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *even if he could himself afford to pay a lawyer, or the lawyer that he has chosen?*
- ii) If so, in which situations and under which conditions does such obligation exist? When answering this question, please take into account the situations mentioned under questions 1-4.

7

The suspected/accused person has the right to appoint not more than two lawyers of choice. The suspected/accused person who has not appointed a lawyer or finds him/herself without a lawyer shall be assisted by a lawyer who - upon request of the prosecuting authority – shall be designated by the Bar Council of the relevant judicial district.

When a judge, a public prosecutor and the judicial police have to perform an act for the performance of which the presence of a lawyer is provided for - and the suspected/accused person has not a lawyer - they shall give notice of said act to the lawyer appointed by the Court upon designation by the Bar Council.

When the presence of a lawyer is required - and a lawyer of choice or appointed by the Court was not found, did not appear or abandoned his client's defence - the judge shall designate as his/her substitute another lawyer who is readily available. The public prosecutor and the judicial police, in said circumstances, shall ask for another lawyer to the Bar Council without prejudice for the designation, in urgent cases, of another readily available lawyer, upon issuing of a reasoned order stating the reasons for the urgency.

Each Bar Council has a special centralised office operating 24 hours out of 24 in order to comply with these requests.

The suspected/accused person has the obligation to remunerate his/her lawyer (either of choice or court appointed) according to the fees agreed between them and, in any case, according to approved fees and to the activity carried out.

Legal aid is governed by Sections 74 and following of decree no. 115/2002 of the President of the Republic providing for different law provisions on costs. The general principles are hereinafter summarised:

- **In a criminal proceeding, legal aid is always available for the defence of any non-wealthy national who is suspected, accused or has been sentenced, who is a victim, an injured party wanting to act in a criminal proceeding to recover damages, who is civilly liable or civilly liable to pay a pecuniary penalty.**
- **Legal aid is granted to any individual whose taxable income subjected to the personal tax on income does not exceed the threshold of 10,628.16 Euros – as stated in his/her last income tax return. If the applicant lives with his/her spouse or with other members of his/her family, the income is made up of the sum of the income produced in the same period by each member of his/her family, including the applicant and, in such a case, the income threshold is increased by 1,032.91 Euros for each member of the family living with the applicant.**
- **The request for legal aid shall only be submitted by the applicant - or by his/her lawyer - to the judicial authority before which the proceeding is pending; if the required conditions are met, said judicial authority shall grant the request within ten days.**
- **The fees and costs payable to a lawyer are set by the judicial authority who shall issue an order of payment; said fees shall be determined by the judicial authority in such a way as not to exceed the average values of the scale of fees applicable to lawyer's fees, charges and allowances, taking into account the nature of the lawyer's professional service with respect to the impact produced by said professional service on the procedural position of his/her client. The same provisions shall apply to any expert or private detective appointed by the lawyer.**

If the suspected/accused person who is not entitled to legal aid fails to pay his/her own lawyer (either of choice or court appointed), a civil obligation enforceable in the ordinary way shall arise.

Principle of confidentiality

8. a) In your legal order, can any derogations be made to the principle of confidentiality of communication between the suspected or accused person and his lawyer?
- b) In the affirmative, in which situations can such derogations be made? Please specify as much as possible, and make a distinction, if appropriate, between oral and written communication, and between communication in the pre-trial phase and in the trial phase.

8

Here follows the unabridged text of article 103 of the Code of Criminal Procedure, governing the “guarantees of lawyer’s liberty”.

- 1. Inspections and searches in the offices of a lawyer shall be allowed only: a) when he or other persons carrying out a steady activity in the same office are accused, only to the purposes of establishing the offence with which they are charged; b) in order to detect traces or other material effects of the offence or to search for things or persons specifically determined in advance. 2. Letters and documents concerning the object of the defence may not be seized in the offices of lawyers, private investigators authorized and entrusted with the case, and experts, except if they constitute the corpus delicti. 3. In preparing to carry out an inspection, a search or a seizure in the office of a lawyer, the judicial authority, on pain of nullity, shall inform the Bar association of the place so that the president or a councillor may be present at the operations. The latter shall be given a copy of the order, if he intervenes and requests it. 4. The judge or, during the preliminary investigation, the public prosecutor, with a motivated decree of authorization of the judge, shall proceed in person to inspections, searches and seizures. 5. Interceptions relating conversations or communications of lawyers, private investigators authorized and entrusted with the case, experts and their assistants shall*

2. not be allowed, nor shall such interceptions be permitted between them and the persons they assist. 6. Seizure and every form of control of the correspondence between the accused and his own lawyer, to the extent recognizable by the prescribed indications, shall be forbidden, except when the judicial authority has justified grounds for believing that this involves the corpus delicti. 7. Except as provided for by paragraph 3 and article 271, the results of inspections, searches, seizures, interceptions of conversations or of communications, carried out in violation of the preceding provisions, may not be used.

Waiver

9. a) In your legal order, does a suspect or accused person has the right to waive his right to be assisted by a lawyer?
- b) In the affirmative,
- i) What, if any, information has to be given to the person concerned prior to making the waiver?
 - ii) If such information has be to given:
 - which person(s) or authorities may / should give that information?
 - how is that information to be given (oral, writing,) ? Please specify.
 - iii) How is the waiver noted/registered? What are the formalities, if any?
 - iv) May a decision to waive the right to a lawyer be revoked, and if so,
 - may this be done at any stage of the proceedings?
 - are there any (other) limitations to the possibility of revoking a waiver?
- c) Are the answers to the questions under a) and b) different if the person concerned is a minor? If so, please specify.

a) :

NO

b) and c) :

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Remedies

10. a) Does your national law provide for remedies in case of breach of the right of access to a lawyer?
- b) In the affirmative:
- i) which are those remedies?
- ii) do the remedies also include the possibility for the (judicial) authorities to exclude evidence that has been obtained in breach of the right of access to a lawyer?

Pursuant to article 179 of the Code of Criminal Procedure: “The nullities ... deriving from failure to summon the accused or from the absence of his lawyer, in the cases in which his presence is mandatory, may not be remedied and shall be noted ex officio during every state or stage of the proceeding.”

In the cases in which the presence of the lawyer is not mandatory the possible nullity of an act has to be objected or pointed out within prescribed times (varying according to the state of the proceeding in which the nullity occurred).

According to article 191 of the Code of Criminal Procedure the unlawfully gained evidence may not be used (we speak, in these hypotheses, of “pathological unusability”).

Some specific provisions (like, for instance, in the cases indicated above under 2.2 and 5 – b) and c)) set out the unusability of the evidence also in the absence of a cause of nullity of the act (we speak, in these hypotheses, of “physiological unusability”).

General concerns regarding the proposed Directive

11. Are there any other aspects of your legal order that could be of importance for the further discussions on this proposed Directive? If so, please highlight them.

11

As already highlighted on a number of occasions, we believe that is important and indispensable for the Directive to establish that any detained suspect or accused has the right to meet his lawyer and any suspect or accused has the right to be assisted by a lawyer when acts are carried out in which the suspect or accused may or must take part, (apart from the trial phase) such as questioning or confrontation.

We are concerned about the possibility of establishing exceptions to the right to technical defence and to the right for detained persons to meet their lawyers.

We believe it is of paramount importance to guarantee that - save for the activities aimed at acquiring the body of crime - the meetings, the talks and the correspondence between a suspect or accused person and his lawyer be fully confidential.

CYPRUS

Questioning of suspects and accused persons in the pre-trial phase

In the Cypriot legal order, Law 163(I) 2005 regulates the rights of an arrested person to access to a lawyer and communication with third parties.

a) Once a person is arrested or deprived of liberty in Cyprus, he is informed immediately of his right to communicate with a lawyer by phone and his right to communicate with any other person of his choice. Should the person be under 18 years of age, he also has the right to communicate with his parents or custodians to inform them of his arrest. Non-nationals have in addition to the above, the right to communicate by phone with their consular or diplomatic authorities, and to be informed of all of their rights in a language they understand.

b) The only cases whereby there is an express right of the lawyer to be present during questioning are the cases of persons under 18 years of age and persons who are mentally handicapped.

c) There is a right to be assisted by a lawyer before questioning and as mentioned above, the police have the obligation to immediately inform the arrested person of such right. Moreover, “it is the obligation of every member of the police force who arrests someone to provide the arrested person with every means that it is practically necessary, so that they may exercise their rights of communication effectively”, (as referred to above). The obligation exists automatically, but it will only be activated, if the person concerned so requests. That means that, once the arrested person is informed of their right to communicate with a lawyer, a relative, etc, if they do not wish to make any such communication, then the police will not have an obligation to facilitate such unwanted communication. What the police has to do, in case the arrested person does not wish to exercise his rights, is to make a record of such choice in the file and fill in a special form, stating the rights of the arrested person, in a language he understands, and having the arrested person’s waiver signed by him. Any such waiver, does not prevent the arrested person of asking to exercise his rights of communication at a later stage.

d) If the arrested person asks to communicate with a lawyer, then he definitely has the right to consult with his lawyer before any questioning. If the police go ahead and question him without allowing him to communicate with his lawyer, anything that comes out of such questioning would probably not be admissible in the trial stage as evidence. The only two cases where police need to wait for a lawyer to arrive, because his presence during questioning is essential, are cases with young people under 18 and handicapped persons. In such cases, there is no indication as to how long the police need to wait for the lawyer to arrive, but in practical terms they wait.

e) Derogations from the above rights are allowed, if there is reasonable suspicion that the exercise of the rights will lead to destruction of evidence, prevent the arrest of another person in relation to the same offence, or might lead to the committal of another offence, or the death or bodily harm of another, or could harm the interests of national security, or constitutional, or social order, or could lead to intervention in the carriage of justice.

a) For a person to be questioned, he first has to be cautioned/informed as to the purposes of the questioning. Usually during this caution, the person is informed that he is suspected of having committed a criminal offence. If he is asked to come into the police station voluntarily, and he is not arrested or deprived of his liberty, then the police does not have the obligation to inform him of his right of access to a lawyer, but should he take his lawyer with him, or ask for his lawyer himself, before questioning, then there is nothing that should prevent the presence of the lawyer, or the right of access to a lawyer, should the person require it.

b) There is no express right of assistance by a lawyer *during* questioning, if the person is asked to come to the police station voluntarily, however, there is nothing stopping the person from requiring that his lawyer is present.

c)-e) As mentioned above, the rights of access to a lawyer under the Law of 2005, apply when someone is arrested or deprived of liberty and not when he is asked to come into the police station voluntarily.

a)-e) A person stopped on the street by the police, can be asked preliminary questions, but cannot actually be interrogated there and then, not without being informed of being suspected of having committed an offence and not before being arrested.

Questioning in the pre-trial stage of persons who are initially not suspected or accused of having committed an offence but obtain this status during questioning

a) A person, such as a witness being questioned by the police, does not have an express right to be assisted by a lawyer, but there should be nothing hindering any such assistance, should the person require it. Practically, even if the witness is in the middle of his statement, if he decides that he needs to consult his lawyer, the police will need to wait and provide him with the means to materialize such consultation. What will be difficult is for the police to accept the presence of such lawyer during the interview.

b) Once any such person becomes suspected or accused of a crime, the competent authorities have to immediately caution/inform the person concerned of this change in status, and inform him that he is now a suspect, that he has the right to a lawyer, with the following wording:

«What you have just mentioned could be a criminal offence. You are not obliged to say anything, unless you wish to do so, however, whatever you say, may be put into writing and given in evidence». Although there is no such obligation, unless the person is arrested or deprived of his liberty, it will be put by some policemen to the suspect, that they have a right to communicate with a lawyer.

c) The competent authorities would have to stop the questioning and start again, having cautioned the suspect with the wording above and informing him that he has the right of access to a lawyer. The right of access to a lawyer arises if the person is actually arrested or deprived of his liberty.

Evidence-gathering and investigative acts in the pre-trial stage

a) The suspected or accused person has no right for his lawyer to be present at evidence gathering acts, in the Cypriot legal order. An exception to this is the identification parade, whereby although there is no express obligation by the police to have a lawyer present, as a matter of practice they inform the suspect that he may have his lawyer, or any other person of his choice, present.

b) The competent authorities should then facilitate the person exercising this right, by arranging for the specific lawyer, or person to be present at a specific day, time and place.

Lawyer provided by the State/Payment of lawyer's fees

It is a constitutional right of an accused that he should have a lawyer of his choice to defend him in Court, and should he have no means to pay for the lawyer of his choice, the State shall provide for such payment, by way of legal aid. This right can only be acquired, once the case is filed at the Court and only if the accused cannot afford to pay for a lawyer himself.

Principle of confidentiality

According to Article 12 of Law 163(I) 2005, every person who is held by the police has a right to have personal, confidential meetings with his lawyer in the cell where he is held, in a private place without visual or hearing contact by the police or any of the prison staff, and to take or give confidential orders, requests, oral or written, during the meeting. This applies both to the pretrial and the trial phase of the proceedings. Moreover the police has the obligation not to hinder or limit any such contact. There is no derogation of any such right, referring to the personal meetings with the lawyer.

Correspondence between the person held and his lawyer is also protected by the principle of confidentiality, apart from exceptional circumstances whereby the police has reasonable ground to believe that an illegal object is included in the envelope and in such a case the envelope is opened and checked by the police in the presence of the accused.

Remedies

Law 163(I) 2005 provides that, should a member of the Police Force who neglects or omits to inform a person under arrest, at the time of his arrest the reasons for his arrest, is guilty of a criminal offence and is liable to one year's imprisonment or a fine.

Moreover, if a member of the Police Force breaches the right of communication (i.e. does not inform the person that he has a right to communicate with his lawyer before questioning, a right to call a relative or any other person he chooses and a right to understand in a language known to him, what the reasons for his arrest are, he is guilty of a criminal offence and liable to six months imprisonment.

There is also provision that a person whose rights are breached under the said Law has a right to damages under a civil action, irrespectively of the fact that he has suffered actual loss or damage, or not.

Lastly, but not least, it is the law that any statement made by the accused in breach of his rights under the said Law, would constitute such statement inadmissible in a Court of Law and no value could be added to any such statement or words.

LATVIA

Questioning of suspects and accused persons in the pre-trial phase

1. In your legal order, when a person that is suspected or accused of having committed a criminal offence is arrested (deprived of liberty) and asked by the police or investigating judge to reply to questions concerning the (alleged) crime committed,

a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?

Yes. According to the Criminal Procedure law of Latvia arrested person has the right to invite a defence counsel without delay.

ii) In the affirmative: in which situations does this right exist?

In all cases when person is arrested (deprived of liberty).

iii) If the person has the right to be assisted by a lawyer before questioning, may this right in your legal order be limited to the person contacting the lawyer by phone? If so, please indicate in which situations this may be the case.

According to the Criminal Procedure law of Latvia assistance by a lawyer must be given in presence. That means that arrested person does not have a right to contact the lawyer by phone.

b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?

Yes.

ii) In the affirmative: is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

There are no exceptions provided by the Criminal Procedure law of Latvia.

- c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?

Yes, a person has the right to receive from a person directing the proceedings (police inspector, prosecutor) a list of advocates practising in the relevant court region, as well as to invite a defence counsel by telephone free of charge.

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?

Yes, this obligation does exist automatically in all cases, but it is ‘activated’ only when person concerned requests for such a right.

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

Police or another other competent authority must issue to a person a list of advocates practising in the relevant court region, as well as to let the person to invite a defence counsel by telephone free of charge.

- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police or investigating judge to wait until the arrival of the lawyer before the questioning starts?

Yes.

ii) In the affirmative, how long (how many hours) do the police or investigating judge have to wait until the arrival of the lawyer?

There is no specific time limit for how long the police or other competent authority must wait until the arrival of the lawyer.

- e) i) In your legal order, is there a possibility of making derogations to the right of a person to be assisted by a lawyer before and/or during questioning in the pre-trial phase? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police or investigating judge to proceed with the questioning without the presence of a lawyer, or without the lawyer having been contacted in advance by phone?

No.

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

N/A.

2. In your legal order, when a person is officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence and is asked to come 'voluntarily' to a police station in order to be questioned by the police in relation to that crime,

- a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?

Yes.

ii) In the affirmative: in which situations does this right exist?

There are no specific rules in which situations this right does exist. Person has right to be assisted by a lawyer before any questioning.

iii) If the person has a right to be assisted by a lawyer before questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

Police or other competent authority has a duty to inform person about person's rights in criminal proceedings. That means that from the moment when a person is notified that he or she is recognised as a suspect, such person shall have the rights to be informed about rights to invite a defence counsel and enter into an agreement with him or her without delay.

b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?

Yes.

ii) In the affirmative, is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

Person has the right to be assisted by a lawyer during any questioning.

iii) If the person has a right to be assisted by a lawyer during questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

At the beginning of the interrogation of a person competent authority must to issue to the person an extract from the Criminal Procedure law wherein the procedural rights and duties thereof are specified and to explain meaning of these rights if person concerned is asking to do this.

- c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?

Yes, see previous answer.

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?

This obligation exists automatically in all cases.

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

The police or any other competent authority must to explain to person his procedural rights if person is asking for it. That means that competent authority must to explain person’s rights to be assisted by a defence counsel before questioning and during questioning as well.

- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?

Yes.

ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

There is no specific time limit for how long the police have to wait until the arrival of the lawyer.

- e) i) In your legal order, is there a possibility of making derogations to the right to be assisted by a lawyer before and/or during the questioning? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer?

No.

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

N/A.

3. In your legal order, when a person is stopped on the street by the police and, after having been officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence, is asked by the police to reply to questions concerning the (alleged) crime committed,

There is no difference of questioning person if he/she is stopped on the street by the police or in the police station or other relevant place. The person if he/she is stopped on the street by the police has the same rights as person who is questioned in the police station. That means that person if he/she is stopped on the street by the police and is asked by the police to reply to questions concerning the (alleged) crime committed can refuse to answer to these questions without presence of the lawyer.

- a) What kind of questions could be asked to this person? Is it possible to question the person regarding the alleged crime?

Police can ask questions about biographical information of the person but this will not be considered as an official questioning in criminal proceedings.

- b) i) Does this person have the right to be assisted by a lawyer during such questioning?

Yes.

- ii) In the affirmative, in which situations does such a right exist?

This right exist in all situations when person is officially notified or informed otherwise that he or she is suspected or accused of having committed a criminal offence and is asked to answer on questions concerning the (alleged) crime committed.

- iii) If the person has the right to be assisted by a lawyer, may this right be limited to the person contacting the lawyer by phone before questioning starts? If so, please indicate in which situations this may be the case.

No.

- c) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there an obligation in your legal order for the police or any other competent authorities to facilitate or assist the person in exercising this right?

At the beginning of the interrogation of a person competent authority must to issue to the person an extract from the Criminal Procedure law wherein the procedural rights and duties thereof are specified and to explain meaning of these rights if person concerned is asking to do this.

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?

This obligation exists automatically in all cases.

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority?

The police or any other competent authority must to explain to person his procedural rights if person is asking for it. That means that competent authority must to explain person’s rights to be assisted by a defence counsel before questioning and during questioning as well.

- d) i) If the person has a right to be assisted by a lawyer during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?

Yes.

- ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

There is no specific time limit for how long the police have to wait until the arrival of the lawyer.

- e) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there a possibility of making derogations to this right in your legal order? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer or without contact by phone having been made?

No.

- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

N/A.

Evidence-gathering and investigating acts in the pre-trial stage

4. Questions regarding evidence-gathering or investigating acts in the pre-trial stage:

- a) i) In your legal order, does the suspect or accused person have a right for his lawyer to be present at evidence-gathering or investigating acts?

Yes.

- ii) In the affirmative, which evidence-gathering or investigating acts are concerned?

A defence counsel has the rights to participate in an interrogation of the defendant, to participate in other investigative actions regarding the performance of which a person who has the right to defence, or the defence counsel, has submitted a request, and to participate in the investigative actions wherein the defendant would be entitled to participate, but does not do so.

- b) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the competent authorities to facilitate or assist the person in exercising this right?

The police or any other competent authority must to explain to person his procedural rights if person is asking for it. That means that competent authority must to explain person's rights for his lawyer to be present at evidence-gathering or investigating acts.

- ii) In the affirmative, what are the concrete act(s) concerned that have to be taken by the competent authorities?

Yes, see previous answer.

- c) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before starting the evidence-gathering or investigating act?

The obligation for the police to wait until the arrival of the lawyer before starting the evidence-gathering or investigating act does not exist in all evidence-gathering or investigating act. Police does not have to wait until the arrival of the lawyer before starting inspection, examination, search, seizure or other acts where presence of the suspected person is not obligatory.

- ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer? Please specify as appropriate.

There is no specific time limit for how long the police have to wait until the arrival of the lawyer.

- d) i) In your legal order, is there a possibility of making derogations to the right of the suspected or accused person for his lawyer to be present at evidence-gathering or investigating act? In other words, if the person concerned wants to be assisted by a lawyer during such acts, is there nevertheless a possibility for the competent authorities to proceed with the evidence-gathering or investigating act without the lawyer being present?

Yes.

- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

Police does not have obligation to wait until the arrival of the lawyer before starting inspection, examination, search, seizure or other acts where presence of the suspected person is not obligatory.

Specific provision is provided regarding search. According to the Criminal Procedure law a search shall be conducted in the presence of a suspect or accused person if it takes place in the declared place of residence and work place of the referred to persons, except for the case where it is not possible due to objective reasons.

Questioning in the pre-trial stage of persons who are initially not suspected or accused of having committed an offence but obtain this status during questioning

5. In your legal order, when a person that is initially not suspected or accused of an alleged crime, such as a witness, is questioned by the police or an investigating judge:

a) Does this person have the right to be assisted by a lawyer during questioning?

Yes.

b) When, during the questioning, such a person becomes suspected or accused of having committed a criminal offence, do the competent authorities have to inform the person concerned of this change of status?

Yes.

c) If the answer to question b) is positive:

i) When precisely do the competent authorities have to inform the person concerned?

The competent authorities have to inform the person concerned of this change of status if competent authorities have enough evidence to make an assumption or allegation that the person has committed the criminal offence.

Depending on acquired evidence, assumptions can be divided in the following manner:

1) the actual possibility exists that the person has committed the criminal offence to be investigated;

2) individual facts provide the basis for believing that the such person has committed the criminal offence (the person may be detained);

3) the totality of evidence provides a basis for the assumption that such person has most likely committed the criminal offence to be investigated (person may be a suspect);

4) the totality of evidence provides a basis for the public prosecutor – perform of proceedings to believe that precisely such person has committed a concrete criminal offence (person may be prosecuted).

5) the public prosecutor – person directing the proceedings does not doubt that he or she will be able to convince the court with the existing evidence that reasonable doubts do not exist regarding the fact that precisely such person has committed a concrete criminal offence.

ii) In what manner do the competent authorities have to inform the person concerned (notification, information, ...)?

The competent authorities have to inform the person concerned in writing.

iii) Do the competent authorities have to stop the questioning?

Yes.

iv) Does the person concerned obtain the right to be assisted by a lawyer (when he did not have it before)? If so, as from which moment in time?

Whiteness has the right not to testify against him or herself and to be assisted by a lawyer as well from the very beginning of interrogation by the police.

- v) May the statements made by the person before he was informed of the change of status be used in the ensuing criminal proceedings against him? If so, in which circumstances? Please specify as much as possible.

Yes, but information regarding facts that has been acquired in the following manner shall be recognised as inadmissible and unusable in proving:

- 1) using violence, threats, blackmail, fraud, or duress;**
- 2) in a procedural action that was performed by a person who, in accordance with Criminal Procedure law, did not have the right to perform such operation;**
- 3) allowing the violations specially indicated in Criminal Procedure law that prohibit the use of a concrete piece of evidence;**
- 4) violating the fundamental principles of criminal proceedings.**

Minor offences

6. Questions regarding exclusions / minor offences:

- a) In your legal order, are there any categories of offences (in particular so-called "minor offences"), in respect of which the right to be assisted by a lawyer does not exist or is restricted, totally or partially, in the pre-trial phase?

No.

- b) In the affirmative, please describe the category or categories of exclusions as precisely as possible, defining the category by a common denominator, e.g.
- where the offence is initially dealt with in an administrative manner;
 - where pre-trial detention is not possible in relation to the offence concerned;
 - where deprivation of liberty cannot be imposed as a sanction in relation to the offence concerned;

- where the fine that may be imposed as a sanction in relation to the offence concerned does not exceed a certain amount;
- other definition.

N/A.

- c) In case your legal order contains one or more categories of exclusions: please indicate the consequence of each category of exclusion, e.g. is there a total or partial exclusion from the right to be assisted by a lawyer, does the exclusion entail different modalities for the assistance by a lawyer, etc. ...

N/A.

Lawyer provided by the State / Payment of lawyer's fees

- 7. The proposed Directive does not deal with the question of legal aid; even so the Presidency believes that the following questions regarding the payment of a lawyer's fee could have an impact on the formulation and application of the Directive.

With this in mind delegations are kindly invited to respond to the following questions:

- a)
 - i) In your legal order, does an obligation exist for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *but cannot afford to pay a lawyer or cannot afford to pay the lawyer that he has chosen?*
 - ii) If so, in which situations and under which conditions does such obligation exist? When answering this question, please take into account the situations mentioned under questions 1-4.

b) i) In your legal order, does there exist an obligation for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *even if he could himself afford to pay a lawyer, or the lawyer that he has chosen?*

ii) If so, in which situations and under which conditions does such obligation exist?

When answering this question, please take into account the situations mentioned under questions 1-4.

Each person regarding whom an assumption or allegation has been expressed that such person has committed a criminal offence has the right to assistance of a defence counsel, that is, the right to know what offence such person is suspected of committing or is being accused of committing, and to choose his or her position of defence.

A person may implement the right to assistance of counsel by him or herself, or invite as a defence counsel, at his or her own choice.

The Criminal procedure law states that an agreement with an advocate regarding defence shall be entered into by the person him or herself or other persons in the interests thereof.

A person directing the proceedings shall not enter into an agreement regarding defence and may not retain a particular advocate as a defence counsel, but shall ensure an interested person with the necessary information and provide such person with the opportunity to use means of communication for the retention of the defence counsel.

If a person, who has the right to defence, has not entered into an agreement regarding defence, but the participation of a defence counsel is mandatory or the person wants that the defence counsel participated, the person directing the proceedings shall notify the senior of the sworn advocates of the territory of the relevant court process regarding the necessity to ensure the participation of a defence counsel in criminal proceedings.

The participation of a defence counsel is mandatory in the following cases:

- 1) if a minor, person not having the capacity to act, or person with diminished mental capacity has the right to assistance of a defence counsel;**
- 2) regarding the determination of compulsory measures of a medical nature;**
- 3) if such proceedings are continued in connection with an application regarding the exoneration of a deceased person;**
- 4) if the right to assistance of a defence counsel is held by a person who is not able to completely use his or her procedural rights due to a physical or mental deficiency;**
- 5) if the right to assistance of a defence counsel is held by an illiterate person or a person with a level of education so low that such person may not completely use his or her procedural rights.**

The participation of a defence counsel is mandatory in criminal proceedings that take place in accordance with the procedures of agreement proceedings from the moment when negotiations are begun with the accused regarding the entering into of an agreement.

During a trial the participation of a defence counsel is mandatory, if a case is examined while the accused is absent (in absentia) or without the participation of the accused.

If an agreement regarding defence has not been concluded or a defence counsel with whom the agreement has been concluded may not be present for the performance of procedural action, the person directing the proceedings shall invite an advocate to ensure defence in the following separate procedural actions:

- 1) investigative actions in which the detained person is involved;**
- 2) announcement of the decision on the recognition as a suspect, and the first interrogation of the suspect;**
- 3) examination by an investigating judge of a matter related to the application of a security measure.**

If a person wants that the defence counsel participated, but may not invite a defence counsel due to his or her financial situation, the State shall ensure assistance of a defence counsel for such person and decide on the remuneration of the defence counsel from State resources, completely or partially discharging such person from such payment. Payment for the assistance of a defence counsel shall be ensured, in accordance with an agreement, by the person who has invited the defence counsel and signed the agreement, but the Cabinet shall determine the amount of payment and reimbursable expenses related to the provision of the ensured legal assistance, the amount and expenses thereof to an advocate for the provision of legal assistance, provided by the State, to a person who has not entered into an agreement regarding defence.

Principle of confidentiality

8. a) In your legal order, can any derogations be made to the principle of confidentiality of communication between the suspected or accused person and his lawyer?

Yes.

- b) In the affirmative, in which situations can such derogations be made? Please specify as much as possible, and make a distinction, if appropriate, between oral and written communication, and between communication in the pre-trial phase and in the trial phase.

The Criminal Procedure law of Latvia provides only one derogation regarding the principle of confidentiality. Unlawful activity by an advocate performed in the interests of a client in providing legal assistance of any form, as well as an activity for the promotion of an unlawful offence of a client, shall not be recognised as a provision of legal assistance. The derogation is applicable in the pre-trial phase and in the trial phase as well, and there is no difference whether communication is in oral or written.

Waiver

9. a) In your legal order, does a suspect or accused person has the right to waive his right to be assisted by a lawyer?

Yes.

- b) In the affirmative,
i) What, if any, information has to be given to the person concerned prior to making the waiver?

There are no specific rules what information has to be given to the person concerned prior to making the waiver.

- ii) If such information has to be given:

N/A.

- which person(s) or authorities may / should give that information?
- how is that information to be given (oral, writing,) ? Please specify.

- iii) How is the waiver noted/registered? What are the formalities, if any?

The waiver is noted in writing before starting questioning of the person.

- iv) May a decision to waive the right to a lawyer be revoked, and if so,

Yes, the decision to waive the right to a lawyer may be revoked at any stage of criminal proceedings.

- may this be done at any stage of the proceedings?

Yes.

- are there any (other) limitations to the possibility of revoking a waiver?

No.

- c) Are the answers to the questions under a) and b) different if the person concerned is a minor? If so, please specify.

The minor does not have a right to waive his right to be assisted by a lawyer.

Remedies

10. a) Does your national law provide for remedies in case of breach of the right of access to a lawyer?

Yes.

- b) In the affirmative:
 - i) which are those remedies?

Information regarding facts that has been acquired violating the right of access to a lawyer shall be recognised as inadmissible and unusable in proving.

- ii) do the remedies also include the possibility for the (judicial) authorities to exclude evidence that has been obtained in breach of the right of access to a lawyer?

Yes, see previous answer.

General concerns regarding the proposed Directive

11. Are there any other aspects of your legal order that could be of importance for the further discussions on this proposed Directive? If so, please highlight them.

No.

LITHUANIA

Questioning of suspects and accused persons in the pre-trial phase

1. In your legal order, when a person that is suspected or accused of having committed a criminal offence is arrested (deprived of liberty) and asked by the police or investigating judge to reply to questions concerning the (alleged) crime committed,

a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?

Yes. In accordance with Article 21(4) and Article 10(1) of the Code of Criminal Procedure of the Republic of Lithuania (hereinafter referred to as CCP), the suspect has the right of access to a defence counsel from the moment of arrest or of the first questioning.

ii) In the affirmative: in which situations does this right exist?

Article 21(4) and Article 10(1) of CCP provide that a suspect shall be ensured access to the services of a defence counsel from arrest or from the first questioning. Therefore the suspect has the right to request time before questioning to consult a defence counsel.

iii) If the person has the right to be assisted by a lawyer before questioning, may this right in your legal order be limited to the person contacting the lawyer by phone? If so, please indicate in which situations this may be the case.

No such limitations exist.

b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?

Yes. See the answer to a) i).

ii) In the affirmative: is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

An exception exists only when the suspect waives the services of a defence counsel and confirms this in writing. An officer may not accept such waiver where the suspect's possibilities to defend himself without a defence counsel raise reasonable doubts.

- c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?

Yes. In accordance with Article 45 of CCP, the judge, the prosecutor and the pre-trial investigation officer must explain to the participants in the proceedings (including the suspects) their procedural rights and ensure the opportunity to exercise those rights.

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only 'activated' further to a request of the person concerned?

Exists in all cases.

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

Before the first questioning, to explain to the person his right of access to a defence counsel and to ensure the opportunity to exercise such a right, i.e. to find out whether the person has hired a defence counsel himself / herself and if not, to take actions that such a defence counsel is appointed and financed by the state.

Afterwards the specific defence counsel is contacted.

- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police or investigating judge to wait until the arrival of the lawyer before the questioning starts?

Yes.

ii) In the affirmative, how long (how many hours) do the police or investigating judge have to wait until the arrival of the lawyer?

Article 50(4) of CCP provides a term of 6 hours.

e) i) In your legal order, is there a possibility of making derogations to the right of a person to be assisted by a lawyer before and/or during questioning in the pre-trial phase? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police or investigating judge to proceed with the questioning without the presence of a lawyer, or without the lawyer having been contacted in advance by phone?

No.

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

2. In your legal order, when a person is officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence and is asked to come 'voluntarily' to a police station in order to be questioned by the police in relation to that crime,

a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?

Yes.

ii) In the affirmative: in which situations does this right exist?

There are no exceptions.

iii) If the person has a right to be assisted by a lawyer before questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

Such information is provided in the convocation for the questioning.

- b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?

Yes.

ii) In the affirmative, is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

The only exception is a voluntary waiver of a defence counsel's services.

iii) If the person has a right to be assisted by a lawyer during questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

Yes. Such information is provided in the convocation for questioning.

- c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?

Yes.

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only 'activated' further to a request of the person concerned?

Exists automatically.

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

Before the first questioning, to explain to the person his right of access to a defence counsel and to ensure the opportunity to exercise such a right, i.e. to find out whether the person has hired a defence counsel himself / herself and if not, to take actions that such a defence counsel is appointed and financed by the state.

Afterwards the specific defence counsel is contacted.

- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?

Yes.

- ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

The 6-hour rule applies.

- e) i) In your legal order, is there a possibility of making derogations to the right to be assisted by a lawyer before and/or during the questioning? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer?

No.

- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

3. In your legal order, when a person is stopped on the street by the police and, after having been officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence, is asked by the police to reply to questions concerning the (alleged) crime committed,

CCP does not provide for such a procedure of questioning a suspect, therefore a person stopped on the street will be taken to the pre-trial investigation authority and questioned by a pre-trial investigation officer according to the general procedure. At the site of an event such a person may be questioned only by a pre-trial investigation officer whereas no such right is granted to an ordinary police officer. In view of the above, the questions referred to in question 3 will not be answered.

- a) What kind of questions could be asked to this person? Is it possible to question the person regarding the alleged crime?

- b) i) Does this person have the right to be assisted by a lawyer during such questioning?
- ii) In the affirmative, in which situations does such a right exist?
- iii) If the person has the right to be assisted by a lawyer, may this right be limited to the person contacting the lawyer by phone before questioning starts? If so, please indicate in which situations this may be the case.
- c) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there an obligation in your legal order for the police or any other competent authorities to facilitate or assist the person in exercising this right?
- ii) In the affirmative,
- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?
 - what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority?
- d) i) If the person has a right to be assisted by a lawyer during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?
- ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

- e) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there a possibility of making derogations to this right in your legal order? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer or without contact by phone having been made?
- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

Evidence-gathering and investigating acts in the pre-trial stage

4. Questions regarding evidence-gathering or investigating acts in the pre-trial stage:

- a) i) In your legal order, does the suspect or accused person have a right for his lawyer to be present at evidence-gathering or investigating acts?

Yes.

- ii) In the affirmative, which evidence-gathering or investigating acts are concerned?

The defence counsel has a right to participate in all investigating acts in which his defendant participates and also has a right to participate in investigating acts that are carried out at the request of the suspect or of his defence counsel and can participate in other acts as permitted by the pre-trial investigation officer, prosecutor or judge (Article 48 of CCP).

- b) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the competent authorities to facilitate or assist the person in exercising this right?

Yes.

ii) In the affirmative, what are the concrete act(s) concerned that have to be taken by the competent authorities?

The defence counsel is informed about such planned investigating acts.

- c) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before starting the evidence-gathering or investigating act?

Yes.

ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer? Please specify as appropriate.

Article 50(4) of CCP provides for a maximum term of 3 days, afterwards the defence counsel is replaced.

- d) i) In your legal order, is there a possibility of making derogations to the right of the suspected or accused person for his lawyer to be present at evidence-gathering or investigating act? In other words, if the person concerned wants to be assisted by a lawyer during such acts, is there nevertheless a possibility for the competent authorities to proceed with the evidence-gathering or investigating act without the lawyer being present?

No.

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

Questioning in the pre-trial stage of persons who are initially not suspected or accused of having committed an offence but obtain this status during questioning

5. In your legal order, when a person that is initially not suspected or accused of an alleged crime, such as a witness, is questioned by the police or an investigating judge:

- a) Does this person have the right to be assisted by a lawyer during questioning? **Yes.**
- b) When, during the questioning, such a person becomes suspected or accused of having committed a criminal offence, do the competent authorities have to inform the person concerned of this change of status?

CPP prohibits questioning of a witness about a criminal offence that he himself has possibly committed. In such a case the questioning of a witness must be stopped on a mandatory basis and the person is provided with a notification of suspicion in writing. Article 82(3) provides for an exception – the status of a special witness, who is not subject to liability for avoidance to give evidence or falsehood.

- c) If the answer to question b) is positive:
 - i) When precisely do the competent authorities have to inform the person concerned?

See previous answer.

- ii) In what manner do the competent authorities have to inform the person concerned (notification, information, ...)?

Notification of suspicion.

- iii) Do the competent authorities have to stop the questioning?

Yes.

- iv) Does the person concerned obtain the right to be assisted by a lawyer (when he did not have it before)? If so, as from which moment in time?

Yes, from the moment of change of status.

- v) May the statements made by the person before he was informed of the change of status be used in the ensuing criminal proceedings against him? If so, in which circumstances? Please specify as much as possible.

Such evidence of the person is recognized void.

Minor offences

6. Questions regarding exclusions / minor offences:

- a) In your legal order, are there any categories of offences (in particular so-called "minor offences"), in respect of which the right to be assisted by a lawyer does not exist or is restricted, totally or partially, in the pre-trial phase?

No.

- b) In the affirmative, please describe the category or categories of exclusions as precisely as possible, defining the category by a common denominator, e.g.

- where the offence is initially dealt with in an administrative manner;
- where pre-trial detention is not possible in relation to the offence concerned;
- where deprivation of liberty cannot be imposed as a sanction in relation to the offence concerned;
- where the fine that may be imposed as a sanction in relation to the offence concerned does not exceed a certain amount;
- other definition.

- c) In case your legal order contains one or more categories of exclusions: please indicate the consequence of each category of exclusion, e.g. is there a total or partial exclusion from the right to be assisted by a lawyer, does the exclusion entail different modalities for the assistance by a lawyer, etc. ...

Lawyer provided by the State / Payment of lawyer's fees

7. The proposed Directive does not deal with the question of legal aid; even so the Presidency believes that the following questions regarding the payment of a lawyer's fee could have an impact on the formulation and application of the Directive.

With this in mind delegations are kindly invited to respond to the following questions:

- a) i) In your legal order, does an obligation exist for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *but cannot afford to pay a lawyer or cannot afford to pay the lawyer that he has chosen?*

Yes.

- ii) If so, in which situations and under which conditions does such obligation exist? When answering this question, please take into account the situations mentioned under questions 1-4.

In accordance with Article 11(2) of the Law on State-guaranteed Legal Aid of the Republic of Lithuania, the following persons shall be eligible for secondary legal aid: 1) citizens of the Republic of Lithuania, citizens of other Member States of the European Union as well as other natural persons residing lawfully in the Republic of Lithuania and other Member States of the European Union whose property and annual income do not exceed the property and income levels established by the Government of the Republic of Lithuania for the provision of legal aid under this Law; 2) citizens of the Republic of Lithuania, citizens of other Member States of the European Union as well as other natural persons residing lawfully in the Republic of Lithuania and other Member States of the European Union eligible for free-of-charge secondary legal aid regardless of their property and income; 3) other persons specified in international treaties of the Republic of Lithuania.

- b) i) In your legal order, does there exist an obligation for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *even if he could himself afford to pay a lawyer, or the lawyer that he has chosen?*

Such an obligation is provided in Article 12 of the Law on State-guaranteed Legal Aid (listing the categories of persons that could relate to criminal proceedings): 1) persons eligible for legal aid in criminal proceedings according to Article 51 of the Code of Criminal Procedure and in other cases provided by the law where participation of a defence counsel is obligatory; 2) persons eligible for a social allowance under the Republic of Lithuania Law on Cash Social Assistance for Low-Income Families; 3) persons maintained by the State in residential social care institutions; 4) persons found to have a severe disability or for whom incapacity for work has been recognised or who have attained the age entitling for an old-age pension for whom a level of high special needs has been established as prescribed by the law as well as guardians / carers of these persons, where State-guaranteed legal aid is required for the representation and defence of rights and interests of a ward / cared person; 5) persons who have presented proof that they cannot dispose of their property and funds for objective reasons and that for these reasons their property and annual income which they can freely dispose of do not exceed the property and income levels established by the Government of the Republic of Lithuania for the provision of legal aid under this Law; 6) persons suffering from serious mental disorders, when issues of their forced hospitalisation in psychiatric institutions and treatment are being considered according to the Republic of Lithuania Law on Mental Health Care, and their guardians / carers, where State-guaranteed legal aid is required for the representation of rights and interests of a ward / cared person; 7) other persons in the cases provided for in international treaties of the Republic of Lithuania. In other cases, when a person has sufficient funds, refusal to appoint a state-funded defence counsel must be reasoned. In such a case the person is explained that his income is sufficient to hire a defence counsel.

ii) If so, in which situations and under which conditions does such obligation exist? When answering this question, please take into account the situations mentioned under questions 1-4.

See previous answer.

Principle of confidentiality

8. a) In your legal order, can any derogations be made to the principle of confidentiality of communication between the suspected or accused person and his lawyer?

No.

b) In the affirmative, in which situations can such derogations be made? Please specify as much as possible, and make a distinction, if appropriate, between oral and written communication, and between communication in the pre-trial phase and in the trial phase.

Waiver

9. a) In your legal order, does a suspect or accused person has the right to waive his right to be assisted by a lawyer?

Yes.

b) In the affirmative,

i) What, if any, information has to be given to the person concerned prior to making the waiver?

The person is informed that he can request participation of a defence counsel again at any moment.

ii) If such information has to be given:

- which person(s) or authorities may / should give that information?

Pre-trial investigation authorities, prosecutor's office or court in charge of the case.

- how is that information to be given (oral, writing,) ? Please specify.

In writing.

iii) How is the waiver noted/registered? What are the formalities, if any?

The waiver is registered on a special protocol, in writing only.

iv) May a decision to waive the right to a lawyer be revoked, and if so,

- may this be done at any stage of the proceedings?

Yes.

- are there any (other) limitations to the possibility of revoking a waiver?

No.

c) Are the answers to the questions under a) and b) different if the person concerned is a minor? If so, please specify.

When a suspect / accused person who is minor waives a defence counsel, such waiver is not obligatory for a pre-trial investigation officer, prosecutor or court. The pre-trial investigation officer, prosecutor and court should normally not accept a waiver of a defence counsel in such cases. Only in the events where it is clear that due to waiver of a defence counsel the suspect / accused person will have no difficulty in exercising his right to defence may a waiver of a defence counsel be accepted.

Remedies

10. a) Does your national law provide for remedies in case of breach of the right of access to a lawyer?

Yes.

b) In the affirmative:

i) which are those remedies?

Restraint on the right to defence is recognized a material breach of criminal procedure. In such a case information gathered while the opportunity for participation of a defence lawyer was prevented will not be considered as evidence.

ii) do the remedies also include the possibility for the (judicial) authorities to exclude evidence that has been obtained in breach of the right of access to a lawyer?

Yes.

General concerns regarding the proposed Directive

11. Are there any other aspects of your legal order that could be of importance for the further discussions on this proposed Directive? If so, please highlight them.

LUXEMBOURG

The General Secretariat has not yet received the replies by the Luxembourg delegation.

HUNGARY

The Act XIX of 1998 on Criminal Proceedings (hereinafter: CP) regulates the right to defence (the right of access to a lawyer) in Hungary.

Questioning of suspects and accused persons in the pre-trial phase

1. In your legal order, when a person that is suspected or accused of having committed a criminal offence is arrested (deprived of liberty) and asked by the police or investigating judge to reply to questions concerning the (alleged) crime committed,
 - a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?

Yes. The defendant is entitled to the right to defence. [CP. 5. § (1)] A detained suspect may consult his defence counsel prior to his questioning. [CP. 184. § (3)]

ii) In the affirmative: in which situations does this right exist?

In all situations.

iii) If the person has the right to be assisted by a lawyer before questioning, may this right in your legal order be limited to the person contacting the lawyer by phone? If so, please indicate in which situations this may be the case.

No, it cannot be limited.

The defendant in custody is entitled to contact his defence counsel, and, in the case of foreign citizens, the representative of the consulate of his native country and communicate with them both in writing and verbally without supervision [CP. 43. § (3) a)]

- b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?

Yes. If the suspect is questioned by the prosecutor or the investigating authority, the defence counsel may be present during the questioning. [CP. 184. § (2)]

Furthermore, the participation of a defence counsel in the criminal proceedings is compulsory in the criminal proceedings if the defendant is detained (other reasons also justify such an obligation, such as at least 5 years of imprisonment as a potential sanction). [CP. 46. § b)]

ii) In the affirmative: is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

This is true in all situations.

- c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?

Yes. The court, the prosecutor and the investigating authority shall ensure that the person against whom criminal proceedings are conducted can defend himself as prescribed in the Act. [CP. 5. § (3)]

An obligation to inform: Prior to performing the procedural action, the court, the prosecutor and the investigating authority shall inform and advise the person involved in the action of his rights and obligations. [CP. 62. §]. As to the obligation to appoint a legal counsel, please see below.

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?

The participation of a defence counsel is compulsory in criminal proceedings if the defendant is detained. [CP. 46. § b)] The court, the prosecutor or the investigating authority shall appoint a counsel for the defence if the defence is compulsory and the defendant has not retained a counsel for the defence. In the case of Section 46 b), the counsel for the defence shall be appointed not later than the first questioning of the defendant. [CP. 48. § (1)]

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

The suspect shall be advised of the right to choose a defence counsel or to request the appointment thereof. If the participation of the counsel for the defence in the procedure is compulsory, the suspect shall be warned that upon failing to retain a counsel for the defence within three days, the defence counsel will be appointed by the prosecutor or the investigating authority. If the suspect states his intention of not retaining a defence counsel, the prosecutor or the investigating authority shall forthwith appoint one. [CP. 179. § (3)]

If the defendant is detained, the court, prosecutor or investigating authority proceeding in the case shall immediately notify the detention institute of the person and contact data of the assigned defence counsel. [CP. 47. § (3)]

The defendant shall be notified of the person and accessibility of the defence counsel after the official appointment thereof. [CP. 48. § (1)]

The defence counsel shall be informed about the place where the defendant is detained and about the planned place, date and time of the defendant’s questioning in the decision that appoints him. [CP. 48. § (1)]

- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police or investigating judge to wait until the arrival of the lawyer before the questioning starts?

No, there is no obligation to wait until the arrival of the lawyer, but the defendant has the right to remain silent.

At the start of the questioning, the defendant shall be advised that he is not under the obligation to testify, that he may refuse to testify or to respond to any of the questions at any time in the course of the questioning, but may freely decide to testify at any time even if he has previously refused to do so. The defendant shall also be warned that anything he says or provides may be used as evidence. The warning and the response thereto of the defendant shall be included in the records. In the absence of such warnings and the recording of the answer, the testimony of the defendant may not be admitted as a means of evidence. [CP. 117. § (2)]

Detained suspects shall be interrogated within twenty-four hours. The deadline shall be computed from the time when the suspect was brought before the investigating authority. [CP. 179. § (1)]

- ii) In the affirmative, how long (how many hours) do the police or investigating judge have to wait until the arrival of the lawyer? –

- e) i) In your legal order, is there a possibility of making derogations to the right of a person to be assisted by a lawyer before and/or during questioning in the pre-trial phase? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police or investigating judge to proceed with the questioning without the presence of a lawyer, or without the lawyer having been contacted in advance by phone?

If the lawyer is not present, the questioning may start but the suspect has the right to remain silent.

- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

There is no list for derogations. Unless provided otherwise herein, the court, the prosecutor and the investigating authority shall serve a subpoena on the person whose presence is obligatory for the procedural action and serve a notice on those whose presence is not obligatory but permitted by law. The person summoned by the subpoena is compelled to appear before the court, prosecutor or investigating authority having sent the subpoena. [CP. 67. § (1)]

2. In your legal order, when a person is officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence and is asked to come 'voluntarily' to a police station in order to be questioned by the police in relation to that crime,

- a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?

Yes. The defendant is entitled to the right to defence. [CP. 5. § (1)]

ii) In the affirmative: in which situations does this right exist?

In all situations.

iii) If the person has a right to be assisted by a lawyer before questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

No, it is not specified in the convocation for the questioning.

The court, the prosecutor or the investigating authority shall appoint a counsel for the defence if defence is compulsory and the defendant has not retained a counsel for the defence. The defendant shall be notified of the person and accessibility of the counsel for the defence after the official appointment thereof. [CP. 48. § (1)]

b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?

Yes. If the suspect is questioned by the prosecutor or the investigating authority, the defence counsel may be present at the questioning. [CP. 184. § (2)]

ii) In the affirmative, is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

This is true in all situations.

iii) If the person has a right to be assisted by a lawyer during questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

No, it is not specified in the convocation for the questioning.

At the beginning of the questioning the suspect shall be advised of the right to choose a defence counsel or to request the appointment thereof. If the participation of the counsel for the defence in the procedure is obligatory, the suspect shall be warned that upon failing to retain a counsel for the defence within three days, the defence counsel will be appointed by the prosecutor or the investigating authority. If the suspect states his intention of not retaining a defence counsel, the prosecutor or the investigating authority shall forthwith appoint one. [CP. 179. § (3)]

- c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?

Yes. The court, the prosecutor and the investigating authority shall ensure that the person against whom criminal proceedings are conducted can defend himself as prescribed in the Act. [CP. 5. § (3)]

Prior to performing the procedural action, the court, the prosecutor and the investigating authority shall inform and advise the person involved in the action of his rights and obligations. [CP. 62. §]

The court, the prosecutor or the investigating authority shall appoint a counsel for the defence if the defence is compulsory. Furthermore, even if the defence is not compulsory, but the suspect has no financial means to pay a defence counsel, on request by the suspect, the authorities appoint a counsel. [CP 48. § (1)-(2)] If the conditions as to the lack of financial means are met, the costs of the defence counsel will be paid by the state.

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?

The obligation to inform the suspect is automatic. The lawyer will be appointed if the defence is compulsory (ie. potential 5 years of imprisonment) and the suspect has no lawyer, or else if the suspect has no financial means to pay one but wishes to have a counsel. In the former case the procedure is automatic, in the latter, the request is put forward by the suspect.

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

The suspect shall be advised of the right to choose a defence counsel or to request the appointment thereof. If the participation of the counsel for the defence in the procedure is compulsory, the suspect shall be warned that upon failing to retain a counsel for the defence within three days, the defence counsel will be appointed by the prosecutor or the investigating authority. If the suspect states his intention of not retaining a defence counsel, the prosecutor or the investigating authority shall forthwith appoint one. [CP. 179. § (3)]

The court, the prosecutor or the investigating authority shall appoint a counsel for the defence if defence is compulsory and the defendant has not retained a counsel for the defence. [CP. 48. § (1)]

The court, the prosecutor or the investigating authority shall also appoint a counsel for the defence if defence is not obligatory, but the defendant requests the appointment of a counsel on the ground of inability to make arrangements for his defence due to his financial standing. [CP. 48. § (2)]

If deemed necessary in the interest of the defendant, at the request of those listed in Section 47 (1) or ex officio, the court, the prosecutor or the investigating authority shall appoint a counsel for the defence. [CP. 48. § (3)]

- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?

No, there is no obligation to wait until the arrival of the lawyer, but the defendant has the right to remain silent.

At the start of the questioning, the defendant shall be advised that he is not under the obligation to testify, that he may refuse to testify or to respond to any of the questions at any time in the course of the questioning, but may freely decide to testify at any time even if he has previously refused to do so. The defendant shall also be warned that anything he says or provides may be used as evidence. The warning and the response thereto of the defendant shall be included in the records. In the absence of such warnings and the recording of the answer, the testimony of the defendant may not be admitted as a means of evidence. [CP. 117. § (2)]

ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer? –

- e) i) In your legal order, is there a possibility of making derogations to the right to be assisted by a lawyer before and/or during the questioning? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer?

Yes. (We assume however that since under this group of questions, the person was invited to come voluntarily to the police station, he or she had time to arrange for the defence lawyer to be present, and in all cases, he/she also has the right to remain silent.)

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

There is no list for derogations. Unless provided otherwise herein, the court, the prosecutor and the investigating authority shall serve a subpoena on the person whose presence is compulsory for the procedural action and serve a notice on those whose presence is not compulsory but permitted by law. The person summoned by the subpoena is compelled to appear before the court, prosecutor or investigating authority having sent the subpoena. [CP. 67. § (1)]

3. In your legal order, when a person is stopped on the street by the police and, after having been officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence, is asked by the police to reply to questions concerning the (alleged) crime committed,

a) What kind of questions could be asked to this person? Is it possible to question the person regarding the alleged crime?

There is no limitation as to the type of questions to be asked, the person suspected or accused of having committed a criminal offence can be asked about the alleged crime, but he/she is not compelled to answer

b) i) Does this person have the right to be assisted by a lawyer during such questioning?

Yes. If the suspect is questioned by the prosecutor or the investigating authority, the defence counsel may be present at the questioning. [CP. 184. § (2)]

ii) In the affirmative, in which situations does such a right exist?

In all situations.

iii) If the person has the right to be assisted by a lawyer, may this right be limited to the person contacting the lawyer by phone before questioning starts? If so, please indicate in which situations this may be the case.

No.

- c) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there an obligation in your legal order for the police or any other competent authorities to facilitate or assist the person in exercising this right?

Yes, there is an obligation to inform the suspect. The court, the prosecutor and the investigating authority shall ensure that the person against whom criminal proceedings are conducted can defend himself as prescribed in the Act. [CP. 5. § (3)]

Prior to performing the procedural action, the court, the prosecutor and the investigating authority shall inform and advise the person involved in the action of his rights and obligations. [CP. 62. §]

The court, the prosecutor or the investigating authority shall appoint a counsel for the defence if the defence is compulsory (i.e. when the person is arrested). Furthermore, even if the defence is not compulsory, and the suspect has no financial means to pay a defence counsel, on request by the suspect, the authorities appoint a counsel. [CP 48. § (1)-(2)] If the conditions as to the lack of financial means are met, the costs of the defence counsel will be paid by the state. In the meanwhile the person can remain silent at any time.

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?

The obligation to inform the suspect about the rights is automatic. The lawyer will be appointed if the defence is compulsory or else if the suspect has no financial means to pay one but wishes to have a counsel. In the former case the procedure is automatic, in the latter, the request is put forward by the suspect.

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority?

The suspect shall be advised of the right to choose a defence counsel or to request the appointment thereof. If the participation of the counsel for the defence in the procedure is compulsory, the suspect shall be warned that upon failing to retain a counsel for the defence within three days, the defence counsel will be appointed by the prosecutor or the investigating authority. If the suspect states his intention of not retaining a defence counsel, the prosecutor or the investigating authority shall forthwith appoint one. [CP. 179. § (3)]

The court, the prosecutor or the investigating authority shall appoint a counsel for the defence if defence is compulsory and the defendant has not retained a counsel for the defence. [CP. 48. § (1)]

The court, the prosecutor or the investigating authority shall also appoint a counsel for the defence if defence is not compulsory, but the defendant requests the appointment of a counsel on the ground of inability to make arrangements for his defence due to his financial standing. [CP. 48. § (2)]

If deemed necessary in the interest of the defendant, at the request of those listed in Section 47 (1) or ex officio, the court, the prosecutor or the investigating authority shall appoint a counsel for the defence. [CP. 48. § (3)]

- d) i) If the person has a right to be assisted by a lawyer during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?

No, there are no obligation to wait until the arrival of the lawyer, but the defendant has the right remain silent.

At the start of the questioning, the defendant shall be advised that he is not under the obligation to testify, that he may refuse to testify or to respond to any of the questions at any time in the course of the questioning, but may freely decide to testify at any time even if he has previously refused to do so. The defendant shall also be warned that anything he says or provides may be used as evidence. The warning and the response thereto of the defendant shall be included in the records. In the absence of such warnings and the recording of the answer, the testimony of the defendant may not be admitted as a means of evidence. [CP. 117. § (2)]

ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer? –

- e) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there a possibility of making derogations to this right in your legal order? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer or without contact by phone having been made?

Yes.

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

There is no list for derogations. Unless provided otherwise herein, the court, the prosecutor and the investigating authority shall serve a subpoena on the person whose presence is obligatory for the procedural action and serve a notice on those whose presence is not obligatory but permitted by law. The person summoned by the subpoena is compelled to appear before the court, prosecutor or investigating authority having sent the subpoena. [CP. 67. § (1)]

Evidence-gathering and investigating acts in the pre-trial stage

4. Questions regarding evidence-gathering or investigating acts in the pre-trial stage:

- a) i) In your legal order, does the suspect or accused person have a right for his lawyer to be present at evidence-gathering or investigating acts?

Yes.

ii) In the affirmative, which evidence-gathering or investigating acts are concerned?

The counsel for the defence may attend the questioning of a witness if this was motioned by himself or the suspect he defends, as well as the confrontation held with the participation of such a witness. The counsel for the defence attending the questioning may ask questions from the suspect and the witness. [CP. 184. § (2)]

The suspect, the counsel for the defence and the victim may attend the hearing of the expert, the inspection, reconstruction and presentation for identification, may make motions and observations and may ask questions from the expert. [CP. 185. § (1)]

- b) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the competent authorities to facilitate or assist the person in exercising this right?

Yes.

- ii) In the affirmative, what are the concrete act(s) concerned that have to be taken by the competent authorities?

Unless provided otherwise herein, the court, the prosecutor and the investigating authority shall serve a subpoena on the person whose presence is obligatory for the procedural action and serve a notice on those whose presence is not obligatory but permitted by law. The person summoned by the subpoena is compelled to appear before the court, prosecutor or investigating authority having sent the subpoena. [CP. 67. § (1)]

- c) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before starting the evidence-gathering or investigating act?

No.

- ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer? Please specify as appropriate. –

- d) i) In your legal order, is there a possibility of making derogations to the right of the suspected or accused person for his lawyer to be present at evidence-gathering or investigating act? In other words, if the person concerned wants to be assisted by a lawyer during such acts, is there nevertheless a possibility for the competent authorities to proceed with the evidence-gathering or investigating act without the lawyer being present?

Yes.

- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

It is an open list.

The notification of the above persons (the suspect, the counsel for the defence and the victim) of the investigatory action may be omitted in exceptional cases if justified by the urgent nature of the investigatory action. Notification shall be omitted if it resulted in the disclosure of the confidential data of the witness to the suspect, the counsel for the defence and the victim. [CP. 185. § (1)]

The prosecutor and the investigating authority may remove a person whose presence obstructs the procedure from the site of the investigatory action, and may compel anyone to be present at the site of the investigatory action to facilitate the investigation. Those who interfere with the procedural order or fail to meet their obligation to be present at the site may be subjected to a disciplinary penalty. [CP. 185. § 3)]

Questioning in the pre-trial stage of persons who are initially not suspected or accused of having committed an offence but obtain this status during questioning

5. In your legal order, when a person that is initially not suspected or accused of an alleged crime, such as a witness, is questioned by the police or an investigating judge:
- a) Does this person have the right to be assisted by a lawyer during questioning?

Yes, but in the investigating stage, it is limited to a number of categories: the victim, the witness whose life is in imminent danger or who is believed, on reasonable grounds, to be unable to attend the hearing, the witness under special protection and the witness under fourteen years of age.

The witness may retain a lawyer to act in his interest if he deems it necessary for obtaining information of his rights. The witness shall be advised of this in the subpoena. [CP. 80. §]

The lawyer acting on behalf of the victim may attend the examination of the victim and may inform the witness of his rights, however, the lawyer may not perform any other activity, nor may he influence the testimony. After the examination, the lawyer may inspect the minutes taken and may make comments thereon either in writing or verbally. [CP. 85. § (4)]

At the examination of a witness whose life is in imminent danger or who is believed, on reasonable grounds, to be unable to attend the hearing (Section 87), the suspect and the counsel for the defence, as well as the lawyer acting on behalf of the witness may also be present, unless this is prevented by the state of the witness. [CP. 213. § (1)]

In addition to the investigating judge, the keeper of the minutes and – if necessary – the interpreter, the examination of a specially protected witness may only be attended by the prosecutor and the lawyer acting on behalf of the witness. [CP. 213. § (2)]

In addition to those listed in subsection (2), the examination of a witness under fourteen years of age may also be attended by the legal representative and the ward of the witness. [CP. 213. § (3)]

- b) When, during the questioning, such a person becomes suspected or accused of having committed a criminal offence, do the competent authorities have to inform the person concerned of this change of status?

Yes.

Criminal proceedings may only be initiated upon the suspicion of a criminal offence and only against the person reasonably suspected of having committed a criminal offence. [CP. 6. § (2)]

The defendant is entitled to receive information on the suspicion, on the charge and any changes therein. [CP. 43. § (2) a)]

- c) If the answer to question b) is positive:
- i) When precisely do the competent authorities have to inform the person concerned?

At the beginning of the questioning, the suspect shall be informed of the gist of the suspicion, as well as of the applicable legal regulations. [CP. 179. § (2)]

- ii) In what manner do the competent authorities have to inform the person concerned (notification, information, ...)?

At the beginning of the questioning, the suspect shall be informed of the gist of the suspicion, as well as of the applicable legal regulations. [CP. 179. § (2)]

- iii) Do the competent authorities have to stop the questioning?

The CP does not provide for this kind of obligation. However, if the witness incriminates himself or his relatives for having committed the criminal offence in his testimony, the witness shall be warned (again) by the competent authorities that he can refuse to testify as a witness. [CP. 181. § (2)]. This warning (no obligation to testify against oneself or against family members) is also given to all witnesses before questioning.

- iv) Does the person concerned obtain the right to be assisted by a lawyer (when he did not have it before)? If so, as from which moment in time?

Yes. The suspicion has to be communicated to the suspect. From this moment, all rights of defence are applicable. Therefore, the following rules come to application immediately.

At the beginning of the questioning, the suspect shall be informed of the gist of the suspicion, as well as of the applicable legal rules. [CP. 179. § (2)]

The suspect shall be advised of the right to choose a defence counsel or to request the appointment thereof. If the participation of the counsel for the defence in the procedure is obligatory, the suspect shall be warned that upon failing to retain a counsel for the defence within three days, the defence counsel will be appointed by the prosecutor or the investigating authority. If the suspect states his intention of not retaining a defence counsel, the prosecutor or the investigating authority shall forthwith appoint one. [CP. 179. § (3)] The person shall also be advised by the authorities about the right to refuse to answer (the only questions he/she has to answer are related to his/her identity).

- iv) May the statements made by the person before he was informed of the change of status be used in the ensuing criminal proceedings against him? If so, in which circumstances? Please specify as much as possible.

Yes, on condition that the competent authorities abide by the rules of CP.

Prior to the examination, the witness shall be advised of the grounds from exemption as well as of his rights. Both the advice and the response of the witness thereto shall be entered into the minutes. Upon the failure to record such advice and the response thereto in the minutes, the testimony of the witness may not be admitted as an evidence. [CP. 82. § (2)]

The testimony of witnesses examined in violation of the provisions of Section 83 and Section 85 (3) shall not be admitted as evidence. [CP. 84. §]

If the accused had been questioned as a witness in the course of the investigation, the testimony may only be reviewed or read out if it is motioned by the accused, or the minutes taken on the testimony clearly indicate the warning and advice specified in Section 85 (3), as well as the reply thereto. [CP. 291. § (2)]

Minor offences

6. Questions regarding exclusions / minor offences:

- a) In your legal order, are there any categories of offences (in particular so-called "minor offences"), in respect of which the right to be assisted by a lawyer does not exist or is restricted, totally or partially, in the pre-trial phase?

No.

- b) In the affirmative, please describe the category or categories of exclusions as precisely as possible, defining the category by a common denominator, e.g.
- where the offence is initially dealt with in an administrative manner;
 - where pre-trial detention is not possible in relation to the offence concerned;
 - where deprivation of liberty cannot be imposed as a sanction in relation to the offence concerned;
 - where the fine that may be imposed as a sanction in relation to the offence concerned does not exceed a certain amount;
 - other definition.
- c) In case your legal order contains one or more categories of exclusions: please indicate the consequence of each category of exclusion, e.g. is there a total or partial exclusion from the right to be assisted by a lawyer, does the exclusion entail different modalities for the assistance by a lawyer, etc. ...

Lawyer provided by the State / Payment of lawyer's fees

7. The proposed Directive does not deal with the question of legal aid; even so the Presidency believes that the following questions regarding the payment of a lawyer's fee could have an impact on the formulation and application of the Directive.

With this in mind delegations are kindly invited to respond to the following questions:

- a) i) In your legal order, does an obligation exist for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *but cannot afford to pay a lawyer or cannot afford to pay the lawyer that he has chosen?*

Yes, but this obligation extend only to the defender appointed by the authorities. If the suspect does not have financial means to bear the costs of a defence lawyer, the lawyer appointed by the state/authorities will be paid - as part of the cost of criminal proceedings- by the state.

- ii) If so, in which situations and under which conditions does such obligation exist?
When answering this question, please take into account the situations mentioned under questions 1-4.

If – as the question puts it – *the suspect cannot afford to pay a lawyer* – the costs will be up to the state to be paid: “The court, the prosecutor or the investigating authority shall also appoint a counsel for the defence if defence is not compulsory, but the defendant requests the appointment of a counsel on the ground of inability to make arrangements for his defence due to his financial standing.” [CP. 48. § (2)]

- b) i) In your legal order, does there exist an obligation for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *even if he could himself afford to pay a lawyer, or the lawyer that he has chosen?*

If he could himself afford to pay a lawyer: **The authorities have an obligation to appoint a lawyer under the circumstances prescribed by law, but the costs will be paid by the state only if the person is acquitted or the proceedings are laid.**

- ii) If so, in which situations and under which conditions does such obligation exist? When answering this question, please take into account the situations mentioned under questions 1-4.

The court, the prosecutor or the investigating authority shall appoint a counsel for the defence if defence is compulsory and the defendant has not retained a counsel for the defence. [CP. 48. § (1)] The participation of the defence lawyer is compulsory for instance if the suspect is arrested, or if the potential sanction as provided by la is equal to or superior of 5 years or imprisonment.

If deemed necessary in the interest of the defendant, at the request of those listed in Section 47 (1) or ex officio, the court, the prosecutor or the investigating authority shall appoint a counsel for the defence. [CP. 48. § (3)]

The fees of the appointed defender (it is part of the cost of criminal proceedings) fall on the person who is guilty except the personal exemption is permitted, in which case the State bears the fees of the appointed defender.

Principle of confidentiality

8. a) In your legal order, can any derogations be made to the principle of confidentiality of communication between the suspected or accused person and his lawyer?

No.

- b) In the affirmative, in which situations can such derogations be made? Please specify as much as possible, and make a distinction, if appropriate, between oral and written communication, and between communication in the pre-trial phase and in the trial phase. –

Waiver

9. a) In your legal order, does a suspect or accused person has the right to waive his right to be assisted by a lawyer?

Yes, except when the defence is obligatory.

The defendant may undertake his own defence, and may be defended by a counsel at any phase of the proceedings. [CP. 5. § (3)]

The defendant may withdraw the power of attorney, regardless of whether the counsel of defence was retained by himself or another person. [CP. 47. § (4)]

- b) In the affirmative,
i) What, if any, information has to be given to the person concerned prior to making the waiver?

The defendant is entitled to receive information from the court, the prosecutor and the investigating authority concerning his rights and obligations during the criminal proceedings. [CP. 43. § (2) f)]

The suspect shall be advised of the right to choose a defence counsel or to request the appointment thereof. If the participation of the counsel for the defence in the procedure is obligatory, the suspect shall be warned that upon failing to retain a counsel for the defence within three days, the defence counsel will be appointed by the prosecutor or the investigating authority. If the suspect states his intention of not retaining a defence counsel, the prosecutor or the investigating authority shall forthwith appoint one. [CP. 179. § (3)]

- ii) If such information has to be given:
- which person(s) or authorities may / should give that information?

It depends on the stage of the proceeding: the court, the prosecutor or the investigating authority.

- how is that information to be given (oral, writing,) ? Please specify.

It happens usually in orally, however, the competent authorities have to record this in the minutes of the investigatory actions.

The minutes shall contain the brief description of the course of the investigatory action so that it can also serve as the basis of verifying compliance with the procedural rules. [CP. 166. § (3)]

- iii) How is the waiver noted/registered? What are the formalities, if any?

It is recorded in the minutes – the official record has to comply with a long list of formalities prescribed by law (ie it has to contain the name of the authority, the crime concerned, the name of the suspect, the place and time of the investigative action, it has to enumerate those who are present including the person keeping the record, etc.; it also has to be signed –among others – by the suspect).

- iv) May a decision to waive the right to a lawyer be revoked, and if so,
- may this be done at any stage of the proceedings?

Yes.

- are there any (other) limitations to the possibility of revoking a waiver?

No.

- c) Are the answers to the questions under a) and b) different if the person concerned is a minor? If so, please specify.

The participation of a defence counsel is compulsory in the proceedings against a juvenile offender. [CP. 450. §]

Remedies

10. a) Does your national law provide for remedies in case of breach of the right of access to a lawyer?

Yes. The defendant is entitled to request a legal remedy [CP. 43. (2) e]

- b) In the affirmative:
i) which are those remedies?

In the investigating stage: Anyone being affected by the measure or omitted measure of the prosecutor or the investigating authority may make an objection thereto within eight days of receiving information thereabout. [CP. 196. § (1)]

In the later stage: The judgement of the court of first instance may be appealed at the court of second instance. [CP. 346. § (1)]

Certain serious breach of rights of the accused in the trial phase may result in the annulment of the judgment and reconduction of the trial.

- ii) do the remedies also include the possibility for the (judicial) authorities to exclude evidence that has been obtained in breach of the right of access to a lawyer?

Yes. Facts derived from means of evidence obtained by the court, the prosecutor or the investigating authority by way of committing a criminal act, by other illicit methods or by the substantial restriction of the procedural rights of the participants may not be admitted as evidence. [CP. 78. § (4)]

The court of second instance shall repeal the judgement of the court of first instance and order the court of first instance to conduct a new procedure in the event of a procedural irregularity cannot be remedied in a procedure of second instance and that had a significant impact on conducting the procedure or the establishment of guilt, the classification of the criminal offence or the imposition of the sentence or application of a measure. Such irregularities are, in particular, if the rules concerning the lawfulness of the evidence were violated, the persons participating in the procedure were prevented from or restricted in exercising their lawful rights. [CP. 375. § (1)]

The verdict of acquittal or the disposition of the judgement on acquittal need not be repealed if the procedural irregularity specified in subsection (1) restricted the accused or the defence counsel in exercising their lawful rights. [CP. 375. § (2)]

General concerns regarding the proposed Directive

11. Are there any other aspects of your legal order that could be of importance for the further discussions on this proposed Directive? If so, please highlight them.

MALTA

The General Secretariat has not yet received the replies by the Maltese delegation.

NETHERLANDS

Questioning of suspects and accused persons in the pre-trial phase

1. In your legal order, when a person that is suspected or accused of having committed a criminal offence is arrested (deprived of liberty) and asked by the police or investigating judge to reply to questions concerning the (alleged) crime committed,
 - a)
 - i) Does this person have the right to be assisted by a lawyer *before* such questioning?
 - ii) In the affirmative: in which situations does this right exist?
 - iii) If the person has the right to be assisted by a lawyer before questioning, may this right in your legal order be limited to the person contacting the lawyer by phone? If so, please indicate in which situations this may be the case.

A suspect deprived of his liberty has a right to consult with a lawyer – for a maximum period of half an hour – prior to his questioning concerning his engagement in an offence. This right exists in every situation where the suspect is deprived of his liberty.

When the suspect is arrested, prior consultation of the lawyer always takes place in person at the police station, with the exception of cases where no preventive custody is possible; in those cases consultation as a rule will take place by telephone.

The Salduz-ruling by the ECRM is implemented in Dutch practice as follows:

- **All suspects that have been arrested have the right to consult a lawyer prior to the questioning by the police.**
- **In cases where the suspect is suspected of a very serious crime, in certain cases where the suspect is a minor (suspects under the age of 18 years) or another vulnerable suspect (i.e. mentally handicapped or seriously disturbed) legal assistance is always provided, if they have been arrested. This means that the police will automatically call a lawyer in these cases.**

- **all other cases, either the police will call a lawyer if the suspect expressed his wish to consult a lawyer or the suspect is given the opportunity to call a lawyer before questioning.**
 - **In all these cases the suspects may consult with their lawyer for half an hour before police questioning and the police has to wait two hours before they may start the interview.**
 - **In the case of minors and other vulnerable suspects lawyers are subsequently allowed to be present during questioning, irrespective of the seriousness of the offence which they are suspected of.**
- b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?
 ii) In the affirmative: is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

A distinction must be made between questioning by the investigative judge and by the police. Every suspect has a right to legal assistance during his questioning by the investigating judge about his engagement in an offence.

As for questioning by the police the following applies. Currently only vulnerable suspects (i.e. a suspect who is a minor or a mentally handicapped or seriously disturbed suspect) have – when they have been deprived of their liberty – the right to legal assistance during police questioning. Adult suspects do not have such a right. However, a draft bill on legal assistance proposes to grant an adult suspect (who has been deprived of his liberty) the right to legal assistance during police questioning when he is suspected of having been engaged in an offence carrying a maximum term of imprisonment of six years or more.

- c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?
 ii) In the affirmative,
- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

See answer to question d).

- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police or investigating judge to wait until the arrival of the lawyer before the questioning starts?
 - ii) In the affirmative, how long (how many hours) do the police or investigating judge have to wait until the arrival of the lawyer?

There is – with regard to suspects deprived of their liberty – an obligation to facilitate legal assistance. With the exception of cases where no provisional detention is possible the police will inform the body that is responsible for appointing lawyers (see paragraph 7). The police will wait for a maximum of two hours for the lawyer to arrive. The existence of these obligations is not dependant on a request by the suspect. Of course these obligations do not apply when the suspect explicitly waives his right to legal assistance, after being informed of his rights.

- e) i) In your legal order, is there a possibility of making derogations to the right of a person to be assisted by a lawyer before and/or during questioning in the pre-trial phase? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police or investigating judge to proceed with the questioning without the presence of a lawyer, or without the lawyer having been contacted in advance by phone?

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

The law states that a derogation to the right to legal assistance is possible ‘in the interest of the investigation’. A derogation is in practice seldom made.

When the lawyer does not arrive in time (that is: within two hours) questioning can be started without the suspect having had the benefit of prior consultation or (for as long as it takes for the lawyer to arrive after the interrogation is started) legal assistance during the interrogation. Apart from the question whether this can be seen as a ‘derogation’ this may have as a consequence that the right to legal assistance is restricted.

2. In your legal order, when a person is officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence and is asked to come ‘voluntarily’ to a police station in order to be questioned by the police in relation to that crime,
 - a)
 - i) Does this person have the right to be assisted by a lawyer *before* such questioning?
 - ii) In the affirmative: in which situations does this right exist?
 - iii) If the person has a right to be assisted by a lawyer before questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

Generally in criminal proceedings the suspect is authorised to let himself be assisted by a lawyer. This general rule implies that the suspect who is invited to come voluntarily to the police station in order to be questioned, has the factual possibility of consulting a lawyer prior to the interrogation. This is, however, not a right that is facilitated by the State other than that a suspect who is invited to come to the police station in order to be interrogated, is sent a letter informing him about the offence he is suspected of having committed and about the possibility of contacting a lawyer prior to the interview.

- b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?
ii) In the affirmative, is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.
iii) If the person has a right to be assisted by a lawyer during questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

A distinction must be made between questioning by the investigative judge and by the police. Every suspect has a right to legal assistance during his questioning by the investigating judge about his engagement in an offence. That also goes for questioning on a voluntary basis. However, when it comes to questioning by the police there is no right to legal assistance during questioning when the suspect is not deprived of his liberty (with the exception of questioning of vulnerable suspects, see reply to question 1b).

- c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?
ii) In the affirmative,
- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?
- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

See answer to d).

- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?
- ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

There is – with regard to suspects who are questioned voluntarily and thus are not deprived of their liberty – no obligation to facilitate the exercise of his right to legal assistance (see 2a for more details). And there is no obligation to wait for a lawyer. In case of interrogation by the investigative judge normally a date for the interrogation will be set (also) in consultation with the lawyer, but when the lawyer does not attend, the investigative judge may decide that the interview will take place without him.

- e) i) In your legal order, is there a possibility of making derogations to the right to be assisted by a lawyer before and/or during the questioning? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer?
- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

The possibility of a derogation is – in the light of the answers given to the questions 2a-2d – only relevant with regard to voluntary questioning by the investigative judge. The right to legal assistance can be derogated from in the interest of the investigation. This in practice very rarely happens. Also, when the lawyer does not attend, the investigative judge may decide that the interview will take place without him.

3. In your legal order, when a person is stopped on the street by the police and, after having been officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence, is asked by the police to reply to questions concerning the (alleged) crime committed,
- a) What kind of questions could be asked to this person? Is it possible to question the person regarding the alleged crime?

When the suspect is stopped in the street by the police, without being arrested and – thus without being deprived of his liberty, the police may question him about his engagement in an offence, also for the purpose of collecting evidence. There is however an obligation to first inform the suspect of his right to remain silent and the offence of which he is a suspect. In the event of minor offences contacts between police officers and suspects are limited in time and extent. The suspect’s identity is checked and he is notified of the offence of which he is suspected.

- b) i) Does this person have the right to be assisted by a lawyer during such questioning?
ii) In the affirmative, in which situations does such a right exist?
iii) If the person has the right to be assisted by a lawyer, may this right be limited to the person contacting the lawyer by phone before questioning starts? If so, please indicate in which situations this may be the case.

The suspect has in the circumstances mentioned in 3a no right to legal assistance that is in any way facilitated by the State. However, he has the factual possibility of exercising his right to remain silent by not answering questions before he has consulted – either by phone or otherwise – with a lawyer.

- c) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there an obligation in your legal order for the police or any other competent authorities to facilitate or assist the person in exercising this right?
- ii) In the affirmative,
- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?
 - what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority?

See answer to d).

- d) i) If the person has a right to be assisted by a lawyer during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?
- ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

There is no obligation to facilitate the right to legal assistance in any way. And there is no obligation to wait for a lawyer.

- e) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there a possibility of making derogations to this right in your legal order? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer or without contact by phone having been made?

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

The possibility of a derogation is not relevant as legal assistance does not take place in these circumstances.

Evidence-gathering and investigating acts in the pre-trial stage

4. Questions regarding evidence-gathering or investigating acts in the pre-trial stage:

- a) i) In your legal order, does the suspect or accused person have a right for his lawyer to be present at evidence-gathering or investigating acts?
- ii) In the affirmative, which evidence-gathering or investigating acts are concerned?

There is no general right for the suspect to have his lawyer present at evidence-gathering or investigating acts in the pre-trial phase of the criminal proceedings. However, there are provisions for specific investigative acts. Without being exhaustive the following acts can be mentioned.

The suspect has a right to be assisted by a lawyer during the search of his house.

The suspect has a right to legal assistance before bodily tissues are taken from him for DNA-testing. However, there is no right for the lawyer to be present during the taking of these bodily tissues. The suspect and his lawyer are allowed to be present when the prosecutor or investigative judge decides to observe the place where the alleged crime has been committed or any other relevant place or object.

There is a provision on the right for the suspect to legal assistance in relation to identity parades. The lawyer can, before the identity parade takes place, comment on the intended selection of persons for the line up. However, the lawyer has no right to attend the identity parade.

When witnesses or experts are questioned by the investigative judge, the suspect has the right for his lawyer to attend the hearing.

- b) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the competent authorities to facilitate or assist the person in exercising this right?
- ii) In the affirmative, what are the concrete act(s) concerned that have to be taken by the competent authorities?

See answer to c).

- c) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before starting the evidence-gathering or investigating act?
- ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer? Please specify as appropriate.

With regard to the search of the suspects' house, DNA-testing and identity parades there is no legal obligation to wait for the lawyer to arrive. On the contrary: with regard to the house search and identity parades the law explicitly states that legal assistance in relation to these investigative acts may not in any way delay these acts.

When witnesses or experts are heard by the investigating judge, the suspects' lawyer will be invited to attend. When the lawyer does not attend there is no legal obligation to wait for the lawyer or to make another appointment for the hearing.

- d) i) In your legal order, is there a possibility of making derogations to the right of the suspected or accused person for his lawyer to be present at evidence-gathering or investigating act? In other words, if the person concerned wants to be assisted by a lawyer during such acts, is there nevertheless a possibility for the competent authorities to proceed with the evidence-gathering or investigating act without the lawyer being present?

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

There is a possibility for the competent authority to proceed without the lawyer, as there is no legal obligation to wait for the lawyer (see 4b and 4c).

With regard to the questioning of witnesses or experts by the investigative judge there is a statutory provision stating that the lawyer may in the interest of the investigation be refused to attend the hearing.

Questioning in the pre-trial stage of persons who are initially not suspected or accused of having committed an offence but obtain this status during questioning

5. In your legal order, when a person that is initially not suspected or accused of an alleged crime, such as a witness, is questioned by the police or an investigating judge:
- a) Does this person have the right to be assisted by a lawyer during questioning?

There is no right for witnesses in criminal proceedings to be assisted by a lawyer during questioning by the police or the investigating judge. Witnesses who claim to be victims have a right to request the presence of a lawyer or a trusted person to support them during their interrogation. The investigating judge may deny this request in the interest of the investigation. Victims may not feel free to elaborate on the circumstances of the offence in the presence of a trusted person (relative or spouse).

- b) When, during the questioning, such a person becomes suspected or accused of having committed a criminal offence, do the competent authorities have to inform the person concerned of this change of status?

See answer to c).

- c) If the answer to question b) is positive:
- i) When precisely do the competent authorities have to inform the person concerned?
 - ii) In what manner do the competent authorities have to inform the person concerned (notification, information, ...)?
 - iii) Do the competent authorities have to stop the questioning?
 - iv) Does the person concerned obtain the right to be assisted by a lawyer (when he did not have it before)? If so, as from which moment in time?
 - v) May the statements made by the person before he was informed of the change of status be used in the ensuing criminal proceedings against him? If so, in which circumstances? Please specify as much as possible.

When a witness during questioning becomes suspected of having committed an offence there is no obligation for the police to inform him about this ‘change of status’ when the police continues to ask questions that have no relation to that persons’ engagement in an offence. However, when the police continues to ask questions about his engagement in an offence, they first have to inform him (orally) that he has the right to remain silent. The obligation to inform a person, who is suspected of having committed an offence, that he has the right to remain silent, before asking him about his engagement in an offence, cannot be negated by continuing to treat the suspect as a witness. A person who is invited as a witness by the police, is free to refuse to answer questions and leave the police station, if he wishes to do so.

The police does not have a legal obligation to stop the questioning. In practice the questioning will continue if the intention is to question the witness about the involvement of another person in the offence. When the intention shifts to taking the opportunity to question him about his own involvement, this person will normally be questioned later on, as a suspect.

For a person who is heard as a witness and in the course of his hearing becomes suspected, the right to legal assistance as described in paragraph 1, 2 and 3 applies. When this person is arrested and deprived of his liberty, he has the right to consult with his lawyer prior to any further questioning about his engagement in the offence. When this person is not deprived of his liberty, he has no right to consult with a lawyer that has to be facilitated by the State; but he is free to leave the police station and can contact a lawyer if he so wishes.

When a person is heard as a witness, and in the course of the interrogation becomes suspected, his statements, when made in answer to questions about his involvement in an offence, may only be used as evidence if these statements were made after he has been informed that he has the right to remain silent.

Minor offences

6. Questions regarding exclusions / minor offences:

- a) In your legal order, are there any categories of offences (in particular so-called "minor offences"), in respect of which the right to be assisted by a lawyer does not exist or is restricted, totally or partially, in the pre-trial phase?

See answer to c).

- b) In the affirmative, please describe the category or categories of exclusions as precisely as possible, defining the category by a common denominator, e.g.
- where the offence is initially dealt with in an administrative manner;
 - where pre-trial detention is not possible in relation to the offence concerned;
 - where deprivation of liberty cannot be imposed as a sanction in relation to the offence concerned;
 - where the fine that may be imposed as a sanction in relation to the offence concerned does not exceed a certain amount;
 - other definition.

See answer to c).

- c) In case your legal order contains one or more categories of exclusions: please indicate the consequence of each category of exclusion, e.g. is there a total or partial exclusion from the right to be assisted by a lawyer, does the exclusion entail different modalities for the assistance by a lawyer, etc.

In criminal proceedings there are no categories of offences where the right to legal assistance ‘does not exist’. However, there are several situations in which the State is not obliged to facilitate the legal assistance in any way.

With regard to certain categories the right to legal assistance is partially restricted in the following sense:

- **The right to legal assistance in situations described in paragraph 2 and 3 – suspects not deprived of their liberty – is partially restricted in that the State will not facilitate this right in any way and that no right exists for the lawyer to be present during the police interview. In practice this means that suspects of minor offences who are not arrested by the police, but who are briefly questioned on the street, are not in any way facilitated by the State to contact a lawyer. They can however use their right to remain silent. The same goes for suspects that voluntarily go to the police station to be questioned. They have had their chance to contact a lawyer of their choosing before they go to the police station.**
- **With regard to the right of suspects deprived of their liberty to consult with a lawyer prior to an interview by the police, the starting point is consultation by phone (instead of consultation in person) in cases concerning offences for which provisional detention is not possible.**
- **In the draft bill, mentioned in paragraph 1, a right to legal assistance during the police interview is proposed, but confined to cases concerning offences carrying a maximum term of imprisonment of six years or more. In cases concerning other offences the right to legal assistance in relation to police questioning is confined to consultation prior to the interview.**

The right to legal assistance as is granted in criminal proceedings, is not applicable in administrative or disciplinary proceedings.

Lawyer provided by the State / Payment of lawyer's fees

7. The proposed Directive does not deal with the question of legal aid; even so the Presidency believes that the following questions regarding the payment of a lawyer's fee could have an impact on the formulation and application of the Directive.

With this in mind delegations are kindly invited to respond to the following questions:

- a) i) In your legal order, does an obligation exist for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *but cannot afford to pay a lawyer or cannot afford to pay the lawyer that he has chosen?*
- ii) If so, in which situations and under which conditions does such obligation exist?
When answering this question, please take into account the situations mentioned under questions 1-4.

See answer to b).

- b) i) In your legal order, does there exist an obligation for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *even if he could himself afford to pay a lawyer, or the lawyer that he has chosen?*
- ii) If so, in which situations and under which conditions does such obligation exist?
When answering this question, please take into account the situations mentioned under questions 1-4.

A distinction must be made between suspects who are deprived of their liberty and those who are not.

When the suspect is deprived of his liberty, a lawyer is appointed (and paid for) by the State for as long as he is deprived of his liberty. This form of legal aid is not subject to a means test, so that legal assistance is available to the suspect irrespective of whether he would have had the private means to engage the services of a lawyer himself. An exception is made for legal assistance in relation to police questioning about the suspects' engagement in an offence for which provisional detention is not possible: in that case the suspect must himself pay for a lawyer irrespective of whether he can afford one.

When the suspect is not deprived of his liberty (or not deprived of his liberty anymore) he is – upon request – entitled to free legal aid on the basis of a means test. When he meets the criteria a lawyer is appointed and paid for by the State.

The suspect can – of course – also chose to engage the services of his own lawyer, but that can imply that he will have to pay for this lawyer himself.

Lawyers (also lawyers paid for by the State) are allowed to provide for legal assistance in general and for all forms of legal assistance mentioned in paragraph 1-4. Lawyers who have indicated that they are prepared to provide legal assistance to suspects who have been arrested, are registered by the legal aid council. This council may set specific requirements in the terms of experience and education to lawyers specialized in criminal law or juvenile law.

Principle of confidentiality

8. a) In your legal order, can any derogations be made to the principle of confidentiality of communication between the suspected or accused person and his lawyer?
- b) In the affirmative, in which situations can such derogations be made? Please specify as much as possible, and make a distinction, if appropriate, between oral and written communication, and between communication in the pre-trial phase and in the trial phase.

To the principle that the authorities (that are competent in criminal proceedings) are not allowed to breach the confidentiality of communications between the suspect and the lawyer an exception can be made when the lawyer himself is suspected of having committed a serious crime. It is not a requirement that the lawyer is suspected of having committed such a crime in connection with the suspect.

Waiver

9. a) In your legal order, does a suspect or accused person has the right to waive his right to be assisted by a lawyer?

See answer to c).

- b) In the affirmative,
- i) What, if any, information has to be given to the person concerned prior to making the waiver?
- ii) If such information has be to given:
- which person(s) or authorities may / should give that information?
 - how is that information to be given (oral, writing,) ? Please specify.

- iii) How is the waiver noted/registered? What are the formalities, if any?
- iv) May a decision to waive the right to a lawyer be revoked, and if so,
 - may this be done at any stage of the proceedings?
 - are there any (other) limitations to the possibility of revoking a waiver?

See answer to c).

- c) Are the answers to the questions under a) and b) different if the person concerned is a minor? If so, please specify.

Generally a suspect has the right to waive his right to legal assistance. An exception is made in cases where mandatory defense applies (for instance when criminal proceedings are conducted against a suspect who is mentally deranged).

The right to consult with a lawyer prior to the interrogation and the right to legal assistance during the interrogation (see paragraph 1) can be waived unless:

- the suspect is suspected of being involved in a very serious crime;
- the suspect belongs to certain categories of minors and it concerns an offence for which provisional detention is possible.

Concerning the information that is given prior to waiving the right to legal assistance, the suspect is usually informed in writing about the right to consult a lawyer. In the written information (leaflet) it is stated that – apart from the abovementioned situations - the suspect has the right to choose whether or not to make use of his right to consult a lawyer.

The waiver is registered in the minutes. A waiver is not recorded when the authorities do not have any influence on decisions made by the suspect, for instance when the suspect who is invited to come to the police station in order to be questioned decides that he will not prior to the interview consult with a lawyer.

A decision to waive the right to legal assistance may be revoked. There is no limitation other than that the suspect is given the opportunity ‘as much as possible’ to communicate with his lawyer.

Remedies

10. a) Does your national law provide for remedies in case of breach of the right of access to a lawyer?

See answer to b).

- b) In the affirmative:
- i) which are those remedies?
 - ii) do the remedies also include the possibility for the (judicial) authorities to exclude evidence that has been obtained in breach of the right of access to a lawyer?

When the right to legal assistance was restricted during the pre-trial phase, this can be put forward before the court in the trial phase. On a request by the suspect or his lawyer the court will assess whether the restriction will have a legal consequence. Not using evidence for a conviction when the evidence was obtained whilst not observing the right to legal assistance can be one of those consequences.

General concerns regarding the proposed Directive

11. Are there any other aspects of your legal order that could be of importance for the further discussions on this proposed Directive? If so, please highlight them.

An aspect of our legal system that is of importance to discussions about the proposed Directive is the distinction in the pre-trial phase between suspects who are deprived of their liberty and those who are not. When a suspect is deprived of his liberty legal assistance is facilitated by the State in the sense that the police will wait for the lawyer to arrive before start of the suspects' interview and in the sense that free legal aid is provided irrespective whether the suspect has the private means to engage the services of a lawyer himself.

AUSTRIA

Questioning of suspects and accused persons in the pre-trial phase

1. In your legal order, when a person that is suspected or accused of having committed a criminal offence is arrested (deprived of liberty) and asked by the police or investigating judge to reply to questions concerning the (alleged) crime committed,

a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?

Yes

ii) In the affirmative: in which situations does this right exist?

According to Section 59 para 1 CCP (Austrian Code of Criminal Procedure) the arrested suspected person shall be given the opportunity to contact a defence counsel and to grant him powers of attorney. According to Section 171 para 3 subpara 1 CCP the suspect shall be informed immediately after his arrest of his right contact a lawyer. Police officers are obliged to inform the suspect in advance of his interrogation of his right to consult a counsel before being interrogated (Section 164 para 1 CCP).

iii) If the person has the right to be assisted by a lawyer before questioning, may this right in your legal order be limited to the person contacting the lawyer by phone? If so, please indicate in which situations this may be the case.

No

b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?

Yes

ii) In the affirmative: is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

According to Section 164 para 2 CCP the suspect has the right to call in a defence counsel to attend his questioning.

- c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?

Yes

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only 'activated' further to a request of the person concerned?

This obligation exists automatically in all cases.

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

For the purpose to guarantee an effective access to a lawyer, a stand-by legal counselling service (Rechtsanwaltlicher Journdienst) has been provided by initiative of the Austrian Bar Association (Österreichische Rechtsanwaltskammer) and the Federal Ministry of Justice. This service is available to arrested suspects/defendants under following conditions:

The right to assistance of a defence counsel comprises a telephone or, by request of the suspect/defendant, a personal consultation with a lawyer and, if necessary, legal assistance during his/her interrogation (§ 164 CCP) as well as other actions reasonably required for an appropriate defence (like e.g. the application for the appointment of a Legal Aid Lawyer by the court, etc.).

The Austrian Bar Association provides for this purpose a stand-by phone number ("hotline") available daily from 0.00 to 24.00 hours where, if required, a counsel entitled to represent clients in criminal proceedings can be contacted immediately. Any power of attorney given within the scope of the stand-by legal counselling service is considered as cancelled as soon as the suspect is detained in a penal institution or released from detention.

However, the suspect is free to extend this power of attorney for the defence counsel beyond that period. The first call and the first telephone consultation with a defence counsel are free of charge. During this first consultation the counsel will provide the suspect with detailed information on the nature, range and potential costs of services available within the scope of the legal counselling service.

- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police or investigating judge to wait until the arrival of the lawyer before the questioning starts?

There exists no obligation to wait until the arrival of the lawyer, but the suspect has the right to refuse to give information and to answer questions in respect of the charges that have been preferred against him.

If the suspect has not attained the age of 21 yet and if the lawyer is called on request of the suspect, the interrogation must not start before the arrival of the lawyer unless there is an urgent need to interrogate him immediately with a view not to disproportionately prolong the duration of his detention or to obtain a statement that is crucial for determining if immediate action is required to confirm or negate the grounds for suspicion of criminal conduct.

- ii) In the affirmative, how long (how many hours) do the police or investigating judge have to wait until the arrival of the lawyer?

See above

- e) i) In your legal order, is there a possibility of making derogations to the right of a person to be assisted by a lawyer before and/or during questioning in the pre-trial phase? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police or investigating judge to proceed with the questioning without the presence of a lawyer, or without the lawyer having been contacted in advance by phone?

Yes

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

Basically, the contact with the lawyer shall not be restricted. According to Section 59 para 1 CCP, before taking the suspect to penal institution of the court, this contact may be monitored, as well as limited to the extent necessary for granting powers of attorney and obtaining general legal advice, whenever this appears necessary in order to avoid any impairment of the investigations or the evidence. Serious reason to restrict the contact in this context means for example, if the suspect is a member of a criminal organisation and the other members are not yet arrested.

It should be mentioned that every detained suspect must within 48 hours of arrest either be released from custody or, if the Public prosecutor seeks to have this person placed in detention awaiting trial or if that person were arrested on the basis of a court warrant or an order of the prosecution authority that was authorised by a court, be taken to the penal institution of that court.

According to Section 164 para 2 CCP the suspect has the right to call in a defence counsel to attend her/his questioning. But calling in a lawyer may be waived, whenever this appears to be necessary in order to avoid any risk to the investigations, or an impairment of the evidence. In this case, an audio or video recording shall be made, to the extent possible.

2. In your legal order, when a person is officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence and is asked to come 'voluntarily' to a police station in order to be questioned by the police in relation to that crime,

a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?

Yes

ii) In the affirmative: in which situations does this right exist?

In all situations

iii) If the person has a right to be assisted by a lawyer before questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

Police officers are obliged to inform the suspect in advance of his interrogation of his right to consult a counsel before being interrogated (Section 164 para 1 CCP). A person who is to be examined in general has to be summoned in writing. The summons must contain the object of the proceeding and of the examination as well as the place, date and hour of its beginning. With the summons the suspects have to be informed about their essential rights in the proceeding as far as this has not happened before.

b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?

Yes

ii) In the affirmative, is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

There are no exceptions for certain cases.

iii) If the person has a right to be assisted by a lawyer during questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

According to Section 164 para 2 CCP the suspect has the right to call in a defence counsel to attend her/his questioning. A person who is to be examined in general has to be summoned in writing. The summons must contain the object of the proceeding and of the examination as well as the place, date and hour of its beginning. With the summons the suspects have to be informed about their essential rights in the proceeding as far as this has not happened before.

- b) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?

Yes

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?

In all cases

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

According to Section 49 CCP the suspect has the right to choose a defence counsel, to be assigned a legal-aid defence counsel and to call in a defence counsel to attend his interrogation. According to Section 50 CCP as soon as possible, every suspect shall be informed by the criminal police or the public prosecutor of these rights in proceedings.

- c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?

See the answer to question 1d.

ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

- d) i) In your legal order, is there a possibility of making derogations to the right to be assisted by a lawyer before and/or during the questioning? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer?

Yes

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

According to Section 164 para 2 CCP the suspect has the right to call in a defence counsel to attend her/his questioning. But calling in a lawyer may be waived, whenever this appears to be necessary in order to avoid any risk to the investigations, or an impairment of the evidence. In this case, an audio or video recording shall be made, to the extent possible.

3. In your legal order, when a person is stopped on the street by the police and, after having been officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence, is asked by the police to reply to questions concerning the (alleged) crime committed,

According to Section 48 CCP a suspect is a person who is actually suspected – on the basis of concrete facts – to have committed a punishable act, as soon as investigations are conducted or force is applied against that person. From this moment on the person have all rights of a suspect. Please see the answers to the previous questions.

When the person is suspected of having committed a criminal offence

- a) What kind of questions could be asked to this person? Is it possible to question the person regarding the alleged crime?
- b) i) Does this person have the right to be assisted by a lawyer during such questioning?
ii) In the affirmative, in which situations does such a right exist?

iii) If the person has the right to be assisted by a lawyer, may this right be limited to the person contacting the lawyer by phone before questioning starts? If so, please indicate in which situations this may be the case.

c) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there an obligation in your legal order for the police or any other competent authorities to facilitate or assist the person in exercising this right?

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only 'activated' further to a request of the person concerned?
- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority?

d) i) If the person has a right to be assisted by a lawyer during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?

ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

e) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there a possibility of making derogations to this right in your legal order? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer or without contact by phone having been made?

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

Evidence-gathering and investigating acts in the pre-trial stage

4. Questions regarding evidence-gathering or investigating acts in the pre-trial stage:

- a) i) In your legal order, does the suspect or accused person have a right for his lawyer to be present at evidence-gathering or investigating acts?

Yes

- ii) In the affirmative, which evidence-gathering or investigating acts are concerned?

For example the search of places and objects (Section 117 item 2 CCP), the search of a person (Section 117 item 3 CCP) and the reconstruction of the scene of crime (Section 150 CCP).

- b) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the competent authorities to facilitate or assist the person in exercising this right?

No

- ii) In the affirmative, what are the concrete act(s) concerned that have to be taken by the competent authorities?

- c) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before starting the evidence-gathering or investigating act?

The Austrian CCP does not contain specific rules with regard to this topic. But according to Section 120 CCP the suspect has the right to be accompanied by a confidant in a case of a search. If the owner of a premise is not present, also an adult cohabitant can exercise his/her rights. If this is also not possible, two adult persons who are not affected have to be present. This can only be abandoned in cases of imminent danger.

With regard to the reconstruction of the scene of crime (Section 150 CCP) the presence of the lawyer shall not be limited.

- ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer? Please specify as appropriate.
- d) i) In your legal order, is there a possibility of making derogations to the right of the suspected or accused person for his lawyer to be present at evidence-gathering or investigating act? In other words, if the person concerned wants to be assisted by a lawyer during such acts, is there nevertheless a possibility for the competent authorities to proceed with the evidence-gathering or investigating act without the lawyer being present?

See the answer to the question 4c.

- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

Questioning in the pre-trial stage of persons who are initially not suspected or accused of having committed an offence but obtain this status during questioning

5. In your legal order, when a person that is initially not suspected or accused of an alleged crime, such as a witness, is questioned by the police or an investigating judge:
- a) Does this person have the right to be assisted by a lawyer during questioning?
Yes
- b) When, during the questioning, such a person becomes suspected or accused of having committed a criminal offence, do the competent authorities have to inform the person concerned of this change of status?
Yes

- c) If the answer to question b) is positive:
- i) When precisely do the competent authorities have to inform the person concerned?

From the moment a person is actually suspected – on the basis of concrete facts – to have committed a punishable act and as soon as investigations are conducted or force is applied against that person, this person is a suspect with all rights of a suspect person. According to Section 50 CCP as soon as possible, every suspect shall be informed by the criminal police or the public prosecutor about the investigative proceedings conducted against him and of the offence of which he is suspected, as well as about his/her principal rights in proceedings. This may only be postponed for as long as there are special circumstances, giving rise to the fear that the purpose of the investigations may otherwise be jeopardized, especially because investigations must be conducted or evidence needs to be taken, the success of which requires that the accused does not obtain any knowledge of the investigations conducted against him.

But at the latest before commencing the hearing, the suspect shall be informed of the offence of which he is suspected. He shall then be informed of the fact that he has the right to comment on the matter, or not to give evidence and to first consult a defence counsel. The suspect shall also be informed of the fact that his testimony serves his defence, but that it may also be used as evidence against him.

- ii) In what manner do the competent authorities have to inform the person concerned (notification, information, ...)?

- iii) Do the competent authorities have to stop the questioning?

The competent authorities have to stop the questioning of the person as a witness. When they want to continue the questioning of the now suspect they have to give this person all of the information mentioned under point i. Then the hearing can start.

- iv) Does the person concerned obtain the right to be assisted by a lawyer (when he did not have it before)? If so, as from which moment in time?

See answer to point i.

- v) May the statements made by the person before he was informed of the change of status be used in the ensuing criminal proceedings against him? If so, in which circumstances? Please specify as much as possible.

If all the mentioned requirements are met, the statement can be used as evidence bearing in mind the principle of free evaluation of evidence. On the other hand any interrogation of a suspect person without notifying the suspect of his right to counsel and to remain silent would constitute an inadmissible circumvention of the rights of the suspect and would cause nullity (Section 152 (1) CCP).

Minor offences

6. Questions regarding exclusions / minor offences:

- a) In your legal order, are there any categories of offences (in particular so-called "minor offences"), in respect of which the right to be assisted by a lawyer does not exist or is restricted, totally or partially, in the pre-trial phase?

The Administrative Penal Act 1991 which rules the administrative penal proceedings does not foresee such exemptions or restrictions. A person that has been arrested caught in the act of committing an (administrative) offence in order to bring this person before the penal authority shall without undue delay be permitted to inform a relative in terms of § 36a of the General Administrative Procedure Act or any other person of his confidence as well as his legal counsel; the person detained shall be given instructions on this right. In case of reservations against the communication through the person detained, it shall be done by the penal authority.

- b) In the affirmative, please describe the category or categories of exclusions as precisely as possible, defining the category by a common denominator, e.g.
- where the offence is initially dealt with in an administrative manner;
 - where pre-trial detention is not possible in relation to the offence concerned;
 - where deprivation of liberty cannot be imposed as a sanction in relation to the offence concerned;
 - where the fine that may be imposed as a sanction in relation to the offence concerned does not exceed a certain amount;
 - other definition.
- c) In case your legal order contains one or more categories of exclusions: please indicate the consequence of each category of exclusion, e.g. is there a total or partial exclusion from the right to be assisted by a lawyer, does the exclusion entail different modalities for the assistance by a lawyer, etc. ...

Lawyer provided by the State / Payment of lawyer's fees

7. The proposed Directive does not deal with the question of legal aid; even so the Presidency believes that the following questions regarding the payment of a lawyer's fee could have an impact on the formulation and application of the Directive.

With this in mind delegations are kindly invited to respond to the following questions:

- a) i) In your legal order, does an obligation exist for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *but cannot afford to pay a lawyer or cannot afford to pay the lawyer that he has chosen?*

ii) If so, in which situations and under which conditions does such obligation exist?
When answering this question, please take into account the situations mentioned under questions 1-4.

According to Section 61 para 2 CCP the court has to decide on total or partial legal aid on the request of the defendant if the defendant can not bear the total costs for the defence lawyer without impairment of his own or his family's maintenance which enables him to a simple lifestyle and if it is necessary in the interest of justice in particular in the interest of an adequate defence. In any case the necessity for legal aid is given

- 1. if the defendant is held in pre trial detention; during the entire procedure on the confinement in an institution for mentally abnormal offenders; at the trial on the confinement in an institution for addicted offenders in need of curing and on the confinement in an institution for dangerous subsequent offender; at the trial in front of a jury or of a court of lay assessors; at the trial in front of a single judge if the sentence which may be imposed is more than three years of deprivation of liberty; during the appeal procedure against a verdict of a court of jury or a court of lay assessors, in case the European Court for Human Rights has determined a violation of the European Convention on Human Rights or an additional Protocol to it for conducting the request for the reopening of the procedure and for the trial in public;**
- 3. if the defendant is blind, deaf, mute or otherwise handicapped or is not able to conduct the defense by him self because he can do not understand the language at court,**
- 4. for the appeal procedure,**
- 5. if the factual and legal position is difficult.**

In the cases mentioned under point 1, where in any case the defendant needs a defense lawyer, the court has to decide on legal aid ex officio even if the defendant does not request for it but further requirements to provide legal aid are given. In regard of the decision on legal aid the court has to examine the defendant's economic capacity to bear the costs for a defense lawyer. The economic capacity is determined by the maintenance which enables the defendant and his family to a simple lifestyle, and can be indentified at the bases of the minimum living wage which may not be garnished given by sec 5 of the act on garnishment of wages and the appropriate maintenance which is higher than the minimum living wage. Unless the court rules otherwise in a specific case, the assignment of a legal-aid defence counsel shall be for the entire subsequent proceedings, until it has been completed and become res judicata, as well as for any possible proceedings on the basis of a nullity complaint required to safeguard the law, or an application for renewal of the criminal proceedings.

- b) i) In your legal order, does there exist an obligation for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *even if he could himself afford to pay a lawyer, or the lawyer that he has chosen?*

No

- ii) If so, in which situations and under which conditions does such obligation exist? When answering this question, please take into account the situations mentioned under questions 1-4.

Principle of confidentiality

8. a) In your legal order, can any derogations be made to the principle of confidentiality of communication between the suspected or accused person and his lawyer?

Yes

- b) In the affirmative, in which situations can such derogations be made? Please specify as much as possible, and make a distinction, if appropriate, between oral and written communication, and between communication in the pre-trial phase and in the trial phase.

The suspect's right to contact a lawyer, to talk to him and to ask him to be present during the interrogation is prescribed by Section 49 CCP. However, during the first 48 hours after arrest, this contact may be monitored, as well as restricted to the extent necessary for granting powers of attorney and obtaining general legal advice, whenever this appears appropriate in order to ensure that the collection of evidence and further investigative steps are not jeopardised. Such restriction and limitation in order to avoid any impairment of the investigations must be based in a case by case manner on well-founded reasons

According to Section 59 para 2 CCP a detained suspect may communicate with his defence counsel without being monitored. However, if the accused is also detained because of a danger of conspiracy or collusion, and if it needs to be feared, on account of specific aggravating circumstances, that contacts with the defence counsel might lead to an impairment of the evidence, the public prosecutor – before taking the accused to the court prison also the criminal police – may order the monitoring of the oral and the written contacts with the defence counsel. In any event, the monitoring may only take place when the accused and the defence counsel have been informed thereof, as well as for a maximum period of two months as of the date of the arrest. Once charges have been brought against the accused, the monitoring shall cease in any event. Such restriction and limitation in order to avoid any impairment of the investigations must be based in a case by case manner on well-founded reasons.

Waiver

9. a) In your legal order, does a suspect or accused person has the right to waive his right to be assisted by a lawyer?

In cases of obligatory defence, the suspect and his legal representative shall be requested to grant powers of attorney to a defence counsel, or to apply for assigning for a legal-aid defence counsel for the proceedings. If neither the suspect nor his legal representative authorised a defence counsel, the court shall assign a defence counsel ex officio, with the suspect bearing the costs of the defence counsel (ex officio defence counsel), unless the prerequisites of legal aid are existent (Section 61 para 3 CCP).

- b) In the affirmative,

- i) What, if any, information has to be given to the person concerned prior to making the waiver?

Yes

- ii) If such information has to be given:

- which person(s) or authorities may / should give that information?

The criminal police, the public prosecutor or the judge

- how is that information to be given (oral, writing,) ? Please specify.

The information has to be given oral or in writing.

- iii) How is the waiver noted/registered? What are the formalities, if any?

There are no formalities.

- iv) May a decision to waive the right to a lawyer be revoked, and if so,

- may this be done at any stage of the proceedings?

Yes

- are there any (other) limitations to the possibility of revoking a waiver?

No

- c) Are the answers to the questions under a) and b) different if the person concerned is a minor? If so, please specify.

If assistance by a lawyer is mandatory, a suspect or accused person (whether he is a minor or not) cannot waive his right for assistance. If it isn't mandatory, a minor must decide if he wants to be represented by a lawyer, so he can "waive" his right. But a minor's legal guardian can hire a lawyer without the sanction of the minor.

Remedies

10. a) Does your national law provide for remedies in case of breach of the right of access to a lawyer?

Yes

- b) In the affirmative:
i) which are those remedies?

According to Section 106 para 1 CCP the suspect can file an objection against the measure of the prosecutor. The decision over this remedy is taken by the court.

First-instance judgments can be challenged by a plea of nullity to the court of appeal.

For example in cases where the defendant must be represented by a lawyer at the trial, the presence of the lawyer at the adversary examination during the pre-trial phase is obligatory. Otherwise the court of appeal would annul the conviction based on the adversary examination according of the breach of the defendant's right to a lawyer.

Even at the pre-trial adversary examination the presence of the lawyer is obligatory

- ii) do the remedies also include the possibility for the (judicial) authorities to exclude evidence that has been obtained in breach of the right of access to a lawyer?

First of all, it should be mentioned that a suspect is to be informed of his right to refuse to give information and to answer questions in respect of the charges that have been preferred against him. He should also be advised to consider that his statement might help to clarify his position and to dispel the suspicions against him. Furthermore he should pay attention that refusing to give evidence he may deprive himself of the possibility to provide his version of the facts and to identify possible errors or false allegations. At least he should be informed that it will be considered an extenuating circumstance in the judicial proceedings, if his statement contributes to establishing the truth. On the other hand a confession never has a binding effect. The judicial authorities are obliged to ascertain the truth even a confession was made. The principle of free evaluation of evidence (Section 14 CCP) does not allow any rules on the probative value. The burden of proof lies with the prosecutor and the court has to proof each confession in the light of the whole evidence of the facts carefully and faithfully. If any doubts on the credibility remains, the court has to give the accused the benefit of the doubt.

General concerns regarding the proposed Directive

11. Are there any other aspects of your legal order that could be of importance for the further discussions on this proposed Directive? If so, please highlight them.

POLAND

To better understand the following answers, please adopt the following clarifications:

‘Suspect’ is construed to mean ‘suspect or accused person’.

In the Polish legal system, a person can be arrested if there is convincing evidence that they have committed an offence. Such a person is referred to as a ‘suspected person’. Only when such person is formally informed of charges do they become a ‘suspect’.

Only a suspect can formally appoint a defence counsel. A suspected person may seek assistance of a lawyer on general terms, like other citizens.

The Polish Criminal Procedure Code is abbreviated ‘CPC’

Questioning of suspects and accused persons in the pre-trial phase

1. a) i) **An arrested person is to be informed immediately upon arrest of his rights including the right to contact a lawyer (art. 244 § 2 CPC). If the arrested person so requests, he is to be allowed to contact a lawyer without delay by any means available, as well as allow him to have a personal conversation with the lawyer. (art. 245 § 1 CPC).**

ii) **The abovementioned right arises in case of any arrest.**

iii) **The abovementioned right allows the arrested person to contact the lawyer by any means available and to have a personal conversation with him (art. 245 § 1 CPC). Hence, the right is not limited to contacting the lawyer by phone.**

b) i) **A suspect has the right to demand to be questioned in the presence of his defence counsel (art. 301 CPC), although questioning can go ahead if the defence counsel does not appear for the questioning (art. 301 CPC). In this case, however, the arrested person can refuse to give statements.**

ii) There are no exceptions to the above rule .

c) i) The obligation to facilitate contact between the arrested person and the lawyer upon arrest rests with the authority conducting the arrest, such as the police (art. 245 § 1 CPC), Before a suspect is first questioned he is informed in writing about his rights in the proceedings, including the right to demand the presence of a legal counsel during the questioning (art. 300 CPC).

ii) - The obligation on the authorities is to inform the arrested person or suspect of their rights. The exercise of such rights depends on a demand by the arrested person/suspect. - The obligation in case of contact with the lawyer is to provide the arrested person with means to contact a lawyer (such as allowing them to use a telephone) and make no opposition to the arrested person talking with a lawyer in person. If the person does not know a lawyer, the authorities should assist him, e.g. by allowing to access a database of defence lawyers⁶. In case of legal aid the police has to refer the case to a court in order to have the legal counsel appointed for the arrested person.

In case of a questioning of a suspect, the authorities cannot oppose the presence of the lawyer, if the lawyer attends the questioning.

d) i) In practice, it is often so, that if the suspect has appointed a defence counsel, he will already be present by the time the questioning starts. In exceptional circumstances when it is not so, the prosecution or police will generally wait for the arrival of the defence counsel.

ii) There is no hard and fast rule on how long the authorities are supposed to wait. In practice, the questioning will generally go ahead if the term of the arrest (48 hours) is nearing expiry, i.e. around 3 hours before its end.

In cases where the suspect does not have a lawyer and wishes to employ the right to legal aid, the questioning will generally be postponed until the court decides whether legal aid is granted.

⁶ Such databases are maintained, among others, by bar councils.

e) i) There exists no derogation from the right to be assisted by a lawyer. As mentioned above, if the defence counsel does not attend the questioning, there is a possibility to question the suspect without his counsel's presence (art. 301 CPC), but the right on the suspect's part remains intact. It is the responsibility of the counsel to appear at the questioning.

2 a) i) If a suspected person is not arrested and instead is asked to report to the police or other authority voluntarily, they are free to seek legal advice.

ii) This right is not subject to limitation.

iii) The convocation for the questioning does not contain information on the right to assistance by a lawyer.

b) i) The suspect has the right to demand being questioned in the presence of a defence counsel (art. 301 CPC) although questioning can go ahead if the defence counsel does not appear for the questioning (art. 301 CPC).

ii) There are no exceptions to the above rule .

iii) The convocation for the questioning does not contain information on the right to assistance by a lawyer.

c) i) Before a suspect is first questioned he is informed in writing about his rights in the proceedings including the right to demand the presence of legal counsel during the questioning (art. 300 CPC).

ii)

- The obligation of the authorities is to inform the arrested person or suspect of their rights. The exercise of such rights depends on a demand by the arrested person/suspect. In case of legal aid the police has to refer the case to a court in order to have the legal counsel appointed for the arrested person.

- The authorities cannot oppose the presence of the lawyer, if the lawyer attends the questioning.

d) i) In practice, it is often so, that if the suspect has appointed a defence counsel, he will already be present by the time the questioning starts. In exceptional circumstances when it is not so, the prosecution or police will generally wait for the arrival of the defence counsel.

ii) There are no specific rules describing the time limit for the police to wait until the lawyer's arrival.

e) i) There exists no derogation from the right to be assisted by a lawyer. As mentioned above, if the defence counsel does not attend the questioning, there is a possibility to question the suspect without his counsel's presence (art. 301 CPC). It is the responsibility of the counsel to appear at the questioning.

3. When a person is suspected, they are either arrested or remain free and are called to attend a questioning voluntarily. Since both these instances have been discussed above, question 3 remains without relevance to the Polish legal system.

Evidence-gathering and investigating acts in the pre-trial stage

4 a) i) The defence counsel appointed by a suspect can be present at any evidence-gathering or investigating act, the suspect himself can participate in (art. 315 § 1, 316 § 1, 317 § 1, 318, 321 § 3 CPC).

ii) The above includes all evidence-gathering or investigating acts requested by the suspect (art. 315 § 1 CPC), all evidence-gathering or investigating acts that cannot be repeated at trial (316 § 1 CPC), the hearing of an expert opinion (318 CPC), or any other act, if the suspect so demands (art. 317 § 1 CPC), unless the public prosecutor refuses that for particularly justified reasons relating to the interests of the investigation (art. 317 § 2 CPC). Furthermore, the lawyer can participate in the final examination of the case file by the suspect (art. 321 § 3 CPC).

b) The authorities have no obligations apart from allowing the participation of the lawyer.

c) There are no specific rules describing the time limit for the police to wait until the lawyer's arrival. There is, however, an obligation for the competent authority to admit the lawyer's participation in the evidence-gathering or investigating acts when he so demands (315 § 2 CPC).

d) i) There exist some derogations from the right of the suspect for his lawyer to be present at evidence-gathering or investigating act.

ii) There are three instances of derogation to the above rules. One is when an evidence-gathering or investigating act cannot be repeated at trial and there is risk, that delays in carrying it out will result in the loss or deterioration of evidence (art. 316 § 1 CPC). The public prosecutor may also, for particularly justified reasons relating to the interests of the investigation, refuse the participation of the suspect in evidence-gathering or investigating acts, which were not requested by the suspect and can be repeated at trial (art. 317 § 2 CPC).

Questioning in the pre-trial stage of persons who are initially not suspected or accused of having committed an offence but obtain this status during questioning

5 a) A person who is not suspected and is not a party to the proceedings (such as a witness) is generally not assisted by a lawyer during questioning. However, if the interests of such person so require, he may be assisted by a lawyer (art. 87 § 2 CPC). During pre-trial proceedings, the court or the public prosecutor may refuse the participation of such lawyer, if they deem that it is not required by the interests of the person concerned (art. 87 § 3 CPC).

b) A situation, in which a person becomes a suspect during a questioning is only possible in urgent cases, especially when delays could result in the deterioration of evidence (art. 308 § 2 CPC) or in the course of an inquiry which is a simplified form of an investigation used in less grievous cases (art. 325g § 1, 517c § 1 CPC). The person concerned must be immediately informed of his change of status.

c) i) When the change of status occurs, the questioning as witness immediately ceases and a “new” questioning in the capacity of a suspect is begun. The new suspect must be informed of his rights before the new questioning commences.

ii) The suspect must be informed of the charges against him by the authority conducting the questioning (art. 308 § 2, 325g § 2 CPC). Before the first questioning in the capacity of a suspect commences, the suspect must be informed of his rights in proceedings (oral information recorded in the minutes), including the right to legal assistance.

iii) As mentioned above, the authorities do have to stop the questioning.

iv) The person being questioned does obtain the right to be assisted by a lawyer.. In such a case he must be granted sufficient time to prepare a defence and appoint a defence counsel (art. 325g § 3 CPC).

v) Statements made by a person before he was informed of a change in status to a suspect cannot be used in proceedings against him – only statements made by him as a suspect have any probative value (art. 389 § 1 CPC).

Minor offences

6. a) There is a category of less serious offences known as “petty offences”, proceedings in which are governed by a different act than regular crimes – The Code of Proceedings in Petty Offences (CPPO). There, the right of access to a lawyer is more limited than in the Criminal Procedure Code

b) Petty offences are defined by the maximum penalty, which is up to a month of deprivation of liberty, limitation of liberty or a fine of up to PLN 5000 (approx. 1 200 Euro).

c) In cases of petty offences, there is a possibility to arrest a suspected person for a term of up to 48 hours, but there is no possibility of imposing preventive detention – after the aforementioned term has elapsed, the suspected person must be released. Nevertheless, if a person is arrested, the authority carrying out the arrest must immediately allow them to contact a lawyer in any available way (such as by telephone) and enable them to talk with a lawyer personally. The authority may reserve the right to be present at such conversation (art. 46 § 4 CPPO). Hence, the right to contact a lawyer upon arrest is the same as in regular criminal proceedings.

If a person suspected of having committed a petty offence is not arrested they are to be immediately questioned by the Police (art. 54 § 6 CPPO). At the preliminary stage of the proceedings (before the case is referred to a court) such a person does not have the right to be assisted by a lawyer. Such right arises from the court proceedings.

Lawyer provided by the State / Payment of lawyer's fees

7. a) i) If a suspect has the right to be assisted by a lawyer and cannot afford it, it is the obligation of the state to provide the lawyer and pay his fees.

ii) This obligation arises in any situation (no matter whether it is the mandatory defence), in which a person has the right to a defence counsel and can prove that they are unable to bear the costs, without detriment to themselves or their family (art. 78 § 1 CPC). In cases of mandatory defence, a defence counsel must be appointed to such person (art. 81 § 1 CPC). The right to defence counsel arises as soon as the person becomes a suspect, i.e. when he is informed of charges or is questioned as a suspect. As such, it applies to all situations mentioned in questions 1, 2, 3 and 4 as soon as the person becomes a suspect.

b) If the suspect can bear the costs of legal assistance themselves, there is no obligation on the state to provide a lawyer.

Principle of confidentiality

8. a) In criminal proceedings there are instances when confidentiality may be limited.

b) As mentioned earlier, if a person is arrested, they have the right to consult a lawyer. The arresting authority may reserve the right to be present at such conversation.

If a suspect is in preventive detention they have a right to communicate with the defence counsel in person or via mail. The public prosecutor reserves the right to control the mail correspondence and, in particularly justified cases, to be present at the personal conversation (art. 73 § 2 and 3 CPC). Both rights apply only throughout the first 14 days of preventive detention (art. 73 § 4 CPC). After that, the communication between the suspect and the defence counsel is strictly confidential.

Waiver

9. a) There are no specific regulations on waiver of the assistance of a lawyer. The person concerned may simply choose not to exercise his rights in this respect. This does not prevent him from exercising them at a later stage of the proceedings.

Remedies

10. a) There are no specific remedies for the breach of right of access to a lawyer. Any such breach may be considered:

- a violation of procedure which might have affected the ruling and as such be grounds for an appeal (art. 438 item 2) or**
- an ex officio ground for repealing a judgment in case of proceedings before a court if the person was not assisted by the defence counsel or when the defence counsel did not participate in the procedural acts where his assistance and presence was obligatory (art. 439 § 1 item 10 CPC).**

PORTUGAL

Questioning of suspects and accused persons in the pre-trial phase

1. In your legal order, when a person that is suspected or accused of having committed a criminal offence is arrested (deprived of liberty) and asked by the police or investigating judge to reply to questions concerning the (alleged) crime committed,

a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?

In Portugal, being assisted by a lawyer in case of deprivation of liberty is mandatory.

ii) In the affirmative: in which situations does this right exist?

The suspected or accused of having committed a criminal offence must always be assisted by a lawyer if she or he is deprived of liberty.

iii) If the person has the right to be assisted by a lawyer before questioning, may this right in your legal order be limited to the person contacting the lawyer by phone? If so, please indicate in which situations this may be the case.

No. There are no important limitations regarding personnel contact with the lawyer. The only limitations are those related to the normal functioning of prisons.

b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?

Yes. It is mandatory whenever there is deprivation of liberty.

ii) In the affirmative: is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

There are no exceptions to this right. The absence of assistance determines the nullity of the procedure.

- c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?

Police or other competent authorities must give access to a public phone or if this is not possible they should allow the person to use an institutional phone to call his/her lawyer. If the person requests a lawyer and does not have economic means to afford this service, there are lawyers provided by the State that can be called by police or other authorities in order to assist the suspect or accused.

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?

A lawyer can be requested by the suspect or accused person or can be designated by the authority in the cases where the assistance is mandatory and the person did not appoint a lawyer of his/her her/his choice.

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

When the suspect or accused has no means to afford the assistance of a lawyer or when he or she simply did not designate a lawyer of his/her choice in cases where assistance is mandatory the police or other competent authority must call one of the lawyers determined by the Portuguese Bar association as on call on that same day, according to the provisions foreseen in the Code of Criminal Procedure.

- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police or investigating judge to wait until the arrival of the lawyer before the questioning starts?

Yes. Police or investigating judge must wait until the arrival of the lawyer. If the questioning is urgent competent authorities have the possibility to call a lawyer provided by the State.

- ii) In the affirmative, how long (how many hours) do the police or investigating judge have to wait until the arrival of the lawyer?

Questioning can be delayed as long as necessary. In urgent cases the competent authorities can call a lawyer provided by the State.

- e) i) In your legal order, is there a possibility of making derogations to the right of a person to be assisted by a lawyer before and/or during questioning in the pre-trial phase? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police or investigating judge to proceed with the questioning without the presence of a lawyer, or without the lawyer having been contacted in advance by phone?

The police or investigating judges can always interrogate the person. Nevertheless, the validity of the interrogation and subsequent acts can be challenged in court. In fact, Portuguese Code of Criminal Procedure determines the nullity of the procedural acts when the assistance is mandatory and the person did not have that assistance.

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

See the previous answer.

2. In your legal order, when a person is officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence and is asked to come 'voluntarily' to a police station in order to be questioned by the police in relation to that crime,

a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?

Yes. The person has the right to be assisted by a lawyer *before* such questioning.

ii) In the affirmative: in which situations does this right exist?

The person has the right to be assisted by a lawyer in all situations. The Constitution of the Portuguese Republic guarantees the right to be assisted by a lawyer whenever a person must be present before a public authority. Even in administrative *fora*.

iii) If the person has a right to be assisted by a lawyer before questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

Yes. The person is informed in the written convocation.

- b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?

Yes, the person has the right to be assisted by a lawyer *during* such questioning.

ii) In the affirmative, is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

The person has the right to be assisted by a lawyer in all situations.

iii) If the person has a right to be assisted by a lawyer during questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

Yes. The person is informed in the written convocation.

- c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?

When the suspect or accused has no means to afford the assistance of a lawyer the police or other competent authority must call a lawyer must call one of the lawyers determined by the Portuguese Bar association as on call on that same day, according to the provisions foreseen in the Code of Criminal Procedure .

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?

This obligation is “activated” only upon request.

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

Police or any other competent authority must call a lawyer determined by the Portuguese Bar association as on call on that same day, according to the provisions foreseen in the Code of Criminal Procedure.

- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?

Yes. Police or investigating judge must wait until the arrival of the lawyer. If the questioning is urgent authorities have the possibility to call a lawyer provided by the State.

- ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

Questioning can be delayed as long as necessary. In urgent cases the authorities can call a lawyer provided by the State

- e) i) In your legal order, is there a possibility of making derogations to the right to be assisted by a lawyer before and/or during the questioning? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer?

The police can proceed with the questioning in absence of a lawyer but the result of that questioning can be challenged in court in order to be declared void.

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

No derogation exists. Police acts on a case by case basis knowing, however, that the result of the questioning could be declared void by a court.

3. In your legal order, when a person is stopped on the street by the police and, after having been officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence, is asked by the police to reply to questions concerning the (alleged) crime committed,

a) What kind of questions could be asked to this person? Is it possible to question the person regarding the alleged crime?

If a person is stopped on the street and notified or informed that he or she is suspected or accused of having committed a criminal offense, he or she must be informed of his/her rights namely the right of being assisted by a lawyer. If he or she is arrested, the assistance by a lawyer is mandatory. Police can ask all the questions deemed necessary to the investigation.

b) i) Does this person have the right to be assisted by a lawyer during such questioning?

Yes. In Portugal everyone has the right to be assisted by a lawyer when presented before a public authority. If there is deprivation of liberty the assistance is mandatory.

ii) In the affirmative, in which situations does such a right exist?

The right of being assisted by a lawyer is guaranteed in all circumstances.

iii) If the person has the right to be assisted by a lawyer, may this right be limited to the person contacting the lawyer by phone before questioning starts? If so, please indicate in which situations this may be the case.

No. The right cannot be limited to the person contacting the lawyer by phone before questioning starts.

- c) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there an obligation in your legal order for the police or any other competent authorities to facilitate or assist the person in exercising this right?

Police or other competent authorities must give access to a public phone or if this is not possible they should allow the person to use an institutional phone to call the lawyer. If the person requests a lawyer and does not have economic means to afford this service, there are lawyers provided by the State that can be called by police or other authorities in order to assist the suspect or accused.

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only 'activated' further to a request of the person concerned?

A lawyer is provided by the State further to a request of the person concerned.

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority?

If the person concerned has no means to support the expenses, police or any other competent authority must call a lawyer determined by the Portuguese Bar Association as on call on that same day, according to the provisions foreseen in the Code of Criminal Procedure.

d) i) If the person has a right to be assisted by a lawyer during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?

Yes. Police or investigating judge must wait until the arrival of the lawyer. If the questioning is urgent the authorities may call a lawyer provided by the State.

ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

Questioning can be delayed as long as necessary. In urgent cases the authorities can call a lawyer provided by the State.

e) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there a possibility of making derogations to this right in your legal order? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer or without contact by phone having been made?

The police can proceed with the questioning in absence of a lawyer but the result of that questioning can be challenged in court in order to be declared void.

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

The police can proceed with the questioning in absence of a lawyer but the result of that questioning can be challenged in court in order to be declared void.

Evidence-gathering and investigating acts in the pre-trial stage

4. Questions regarding evidence-gathering or investigating acts in the pre-trial stage:

a) i) In your legal order, does the suspect or accused person have a right for his lawyer to be present at evidence-gathering or investigating acts?

Yes. The suspect or accused have the right for his/her lawyer to be present at evidence-gathering or investigating acts whenever he or she can also be present.

ii) In the affirmative, which evidence-gathering or investigating acts are concerned?

There is no list of evidence-gathering or investigating acts on which accused or suspects can be present. That is decided on a case-by-case basis.

b) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the competent authorities to facilitate or assist the person in exercising this right?

Yes. Authorities must allow the accused or suspect person to call his/her lawyer or, if the person has no means they must call a lawyer from the list of lawyers already mentioned. .

ii) In the affirmative, what are the concrete act(s) concerned that have to be taken by the competent authorities?

Police or other competent authorities must give access to a public phone or if this is not possible they should allow the person to use an institutional phone to call the lawyer. If the person requests a lawyer and does not have economic means to pay for this service, there are lawyers provided by the State that can be called by police or other authorities in order to assist the suspect or accused.

c) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before starting the evidence-gathering or investigating act?

Yes. Police or investigating judge must wait until the arrival of the lawyer. If the questioning is urgent, the authorities have the possibility to call a lawyer provides by the State.

ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer? Please specify as appropriate.

Questioning can be delayed as long as necessary. In urgent cases, the authorities can call a lawyer provided by the State.

- d) i) In your legal order, is there a possibility of making derogations to the right of the suspected or accused person for his lawyer to be present at evidence-gathering or investigating act? In other words, if the person concerned wants to be assisted by a lawyer during such acts, is there nevertheless a possibility for the competent authorities to proceed with the evidence-gathering or investigating act without the lawyer being present?

No. The lawyer has the right to be present when the suspect or accused person also has the right to be present.

- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

If the accused or suspect have the right to be present at a evidence-gathering or investigating act and he or she want to be assisted by a lawyer; therefore authorities cannot derogate this right.

Questioning in the pre-trial stage of persons who are initially not suspected or accused of having committed an offence but obtain this status during questioning

5. In your legal order, when a person that is initially not suspected or accused of an alleged crime, such as a witness, is questioned by the police or an investigating judge:
- a) Does this person have the right to be assisted by a lawyer during questioning?

Yes. A person who is initially not suspected or accused of an alleged crime, such as a witness, has the right to be assisted by a lawyer.

- b) When, during the questioning, such a person becomes suspected or accused of having committed a criminal offence, do the competent authorities have to inform the person concerned of this change of status?

Yes . Authorities should suspend the questioning and formally communicate the change of status and namely the rights and duties of the accused or suspect person.

- c) If the answer to question b) is positive:
- i) When precisely do the competent authorities have to inform the person concerned?

Competent authorities have to inform the person concerned when there are strong reasons to believe that he or she are involved in a crime and the person must be questioned or interrogated.

The person concerned can also ask to be considered suspect or accused in order to have a different status and entitled to the respective rights.

- ii) In what manner do the competent authorities have to inform the person concerned (notification, information, ...)?

Authorities have to inform the person concerned by oral or written communication. Authorities must, whenever possible, give a written document with the identification of the procedure and the list of rights and duties.

- iii) Do the competent authorities have to stop the questioning?

Yes, they do.

- iv) Does the person concerned obtain the right to be assisted by a lawyer (when he did not have it before)? If so, as from which moment in time?

The right to be assisted by a lawyer does not depend on the status of the person questioned.

- v) May the statements made by the person before he was informed of the change of status be used in the ensuing criminal proceedings against him? If so, in which circumstances? Please specify as much as possible.

Yes, but only for investigative purposes. They cannot be used as evidence in court.

Minor offences

6. Questions regarding exclusions / minor offences:

- a) In your legal order, are there any categories of offences (in particular so-called "minor offences"), in respect of which the right to be assisted by a lawyer does not exist or is restricted, totally or partially, in the pre-trial phase?

No. There are no categories of offences (in particular so-called "minor offences"), in respect of which the right to be assisted by a lawyer does not exist or is restricted, totally or partially, in the pre-trial phase.

- b) In the affirmative, please describe the category or categories of exclusions as precisely as possible, defining the category by a common denominator, e.g.
- where the offence is initially dealt with in an administrative manner;
 - where pre-trial detention is not possible in relation to the offence concerned;
 - where deprivation of liberty cannot be imposed as a sanction in relation to the offence concerned;
 - where the fine that may be imposed as a sanction in relation to the offence concerned does not exceed a certain amount;
 - other definition.

- c) In case your legal order contains one or more categories of exclusions: please indicate the consequence of each category of exclusion, e.g. is there a total or partial exclusion from the right to be assisted by a lawyer, does the exclusion entail different modalities for the assistance by a lawyer, etc. ...

Lawyer provided by the State / Payment of lawyer's fees

7. The proposed Directive does not deal with the question of legal aid; even so the Presidency believes that the following questions regarding the payment of a lawyer's fee could have an impact on the formulation and application of the Directive.

With this in mind delegations are kindly invited to respond to the following questions:

- a) i) In your legal order, does an obligation exist for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *but cannot afford to pay a lawyer or cannot afford to pay the lawyer that he has chosen?*

Yes, there is an obligation for the State to provide a lawyer when the suspected or accused person cannot afford to pay the expenses of a lawyer.

- ii) If so, in which situations and under which conditions does such obligation exist?

When answering this question, please take into account the situations mentioned under questions 1-4.

The obligation to provide a lawyer exists in all the situations mentioned under questions 1-4.

- b) i) In your legal order, does there exist an obligation for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *even if he could himself afford to pay a lawyer, or the lawyer that he has chosen?*

No.

- ii) If so, in which situations and under which conditions does such obligation exist? When answering this question, please take into account the situations mentioned under questions 1-4.

Principle of confidentiality

8. a) In your legal order, can any derogations be made to the principle of confidentiality of communication between the suspected or accused person and his lawyer?

Yes. It is possible to make a derogation to the principle of confidentiality of communication between the suspected or accused person and his lawyer.

- b) In the affirmative, in which situations can such derogations be made? Please specify as much as possible, and make a distinction, if appropriate, between oral and written communication, and between communication in the pre-trial phase and in the trial phase.

It is possible to breach confidentiality of communication between the suspected or accused person and his/her lawyer only when a judge has reasons to believe that the correspondence is an element of a crime. An authorised derogation is provided for written communication at any phase.

Waiver

9. a) In your legal order, does a suspect or accused person has the right to waive his right to be assisted by a lawyer?

A suspect or accused person has always the possibility of not exercising his/her right to be assisted by a lawyer except when the assistance his mandatory.

- b) In the affirmative,
- i) What, if any, information has to be given to the person concerned prior to making the waiver?

The suspect or accused must be informed of his/her right of being assisted by a lawyer eventually designated by the State. The suspect or accused may, in the cases where it is not mandatory, make the option of not exercising the right.

- ii) If such information has to be given:
- which person(s) or authorities may / should give that information?
 - how is that information to be given (oral, writing,) ? Please specify.
- iii) How is the waiver noted/registered? What are the formalities, if any?
- iv) May a decision to waive the right to a lawyer be revoked, and if so,
- may this be done at any stage of the proceedings?

The right to be assisted by a lawyer can be exercised at any time even if it did not happen from the beginning of criminal proceedings.

- are there any (other) limitations to the possibility of revoking a waiver?

- c) Are the answers to the questions under a) and b) different if the person concerned is a minor? If so, please specify.

Yes. Assistance of minors by lawyers is mandatory.

Remedies

10. a) Does your national law provide for remedies in case of breach of the right of access to a lawyer?

Yes.

- b) In the affirmative:
i) which are those remedies?

In the cases where assistance is mandatory and there is a breach of the right of access to a lawyer judicial, the authorities must declare invalid the interrogation and all procedural facts connected.

If the assistance is not mandatory and there is a breach of the right of access to a lawyer the suspect or accused must invoke the breach before the court. The court can declare invalid the interrogation and all procedural facts connected.

- ii) do the remedies also include the possibility for the (judicial) authorities to exclude evidence that has been obtained in breach of the right of access to a lawyer?

See previous answer.

General concerns regarding the proposed Directive

11. Are there any other aspects of your legal order that could be of importance for the further discussions on this proposed Directive? If so, please highlight them.

ROMANIA

CPC – Criminal Procedural Code

NCPC – New Criminal Procedural Code, adopted by Law no. 135/2010, but not yet into force.

Questioning of suspects and accused persons in the pre-trial phase

1. In your legal order, when a person that is suspected or accused of having committed a criminal offence is arrested (deprived of liberty) and asked by the police or investigating judge to reply to questions concerning the (alleged) crime committed,
 - a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?
Yes.
 - ii) In the affirmative: in which situations does this right exist?
In all situations.
 - iii) If the person has the right to be assisted by a lawyer before questioning, may this right in your legal order be limited to the person contacting the lawyer by phone? If so, please indicate in which situations this may be the case.
No, there are not such of limitations concerning the possibilities to contact the lawyer.
 - b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?
 - ii) In the affirmative: is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.
Yes.

CPC - Art. 137¹

The person in custody or deprived of liberty is informed without delay the reasons for her deprivation of liberty and without undue delay the reasons of his accusation. The person is informed about the reasons of his accusations only in the presence of a lawyer, chosen or designated.

Art. 143

The measure of custody can be disposed by the prosecutor or by the police after his audience in the presence of the lawyer, if there is evidence or information about the possibility of being committed an alleged offence.

NCPC – Law no. 135/2010

Art. 209 (5) The measure of custody can be disposed only after the audition of the suspected or accused person, in the presence of the lawyer chosen or designed.

The judicial authorities have the obligation to inform the suspected or accused person about the right to chose a lawyer.

- c)
 - i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?
 - ii) In the affirmative,
 - does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?
 - what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

The judicial authorities have the obligation to inform the suspected or accused person about the right to choose a lawyer. The judicial authorities inform the lawyer about this investigative act, the date and the hour where it will be performed by telephone, fax, internet or other means, registered in a report by the competent authorities.

- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police or investigating judge to wait until the arrival of the lawyer before the questioning starts?

CPC Art. 172

The absence of the lawyer doesn't prevent the investigative act, if there the evidence that the lawyer was informed about the date and the hour of the investigative act. The information may be done by telephone, fax, internet or other means, registered in a report by the competent authorities.

NCPC Art. 92

The absence of the lawyer doesn't prevent the investigative act, if there the evidence that the lawyer was informed about the date and the hour of the investigative act. The information may be done by telephone, fax, internet or other means, registered in a report by the competent authorities.

In the cases when the legal assistance is mandatory, if the chosen lawyer is absent to the date established for an investigative act and doesn't ensure a substitute or if he goes out or refuse to perform his duties, the competent authorities design a defender and give him the time necessary for the preparation of the defence.

If the person is deprived of liberty, the presence of the lawyer is mandatory during the questioning of this person. In this scope, the lawyer will be informed about the questioning in order to be present.

- ii) In the affirmative, how long (how many hours) do the police or investigating judge have to wait until the arrival of the lawyer?

In the cases when the legal assistance is mandatory, if the chosen lawyer is absent to the date established for an investigative act and doesn't ensure a substitute or if he goes out or refuse to perform his duties, the competent authorities design a defender and give him the necessary time for the preparation of the defence.

CPC ART. 294

The insurance of the defense

In cases where the appointment of a public defender is required, the court, when setting the hearing, takes action to appoint the public defender.

The accused person, the other parties and the lawyers may to inspect the dossier throughout the trial.

When the accused is deprived of liberty, the judge shall take the measures that it can exercise the right provided in the preceding paragraph and may make contact with his lawyer.

CPC art. 198

Judicial misconduct

The following misconduct during criminal proceedings are sanctioned with judicial fine from 100 lei to 1,000 lei:

b ^ 1) unjustified absence of chosen or appointed defenders office without replacement, according to the law, or replacement of or refusal to provide defense.

- e) i) In your legal order, is there a possibility of making derogations to the right of a person to be assisted by a lawyer before and/or during questioning in the pre-trial phase? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police or investigating judge to proceed with the questioning without the presence of a lawyer, or without the lawyer having been contacted in advance by phone?

If the person concerned has a chosen lawyer she will not be questioned without the presence of his lawyer. In the cases where the legal assistance is mandatory, the absence of the lawyer is cause of absolute nullity of the investigative act, including questioning.

The absence of the lawyer chosen doesn't prevent the investigative act, other than questioning the accused, if there the evidence that the lawyer was informed about the date and the hour of the investigative act.

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

2. In your legal order, when a person is officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence and is asked to come 'voluntarily' to a police station in order to be questioned by the police in relation to that crime,

a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?

Yes.

ii) In the affirmative: in which situations does this right exist?

In all the cases, the person which is not deprived of liberty can contact the lawyer and can be assisted by the lawyer.

iii) If the person has a right to be assisted by a lawyer before questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

The person is informed by the judicial authorities that she has the right to a lawyer.

CPC

Art. 70

(2) Before the questioning of a person who is suspected or accused of an alleged crime, the competent authorities inform that person about the facts which form the object of investigation, which type of offense he is suspected or accused, the right to have a lawyer, the right do not make any statement and he is informed that his statements can be used against him.

NCPC - Law nr. 135/2010

Art. 108

During the pre-trial phase, before the first questioning of the suspected or accused person, the competent authorities inform him about his rights and his obligations and give him a letter of rights that the person has to sign it. If the person can't or refuse to sign it, the competent authorities register it in a report.

CPC – by information.

NCPC – by notification – letter of rights.

- b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?

Yes.

CPC

Art. 172

During the pre-trial phase, the lawyer of the suspected or accused person has the right to assist to any investigating act, including evidence-gathering and may submit claims and make memories.

NCPC – Law no. 135/2010

Art. 92

(1) During the pre-trial phase, the lawyer of the suspected or accused person has the right to assist to any investigating act, including evidence-gathering, with the exception of the special supervision or investigative techniques, the cyber search, the corporal search and the vehicle search in case of flagrant crimes and if by the presence of the lawyer could be breached the right of the defence of the other parts in the criminal proceedings. In that case, the questions of the lawyer may be addressed by the competent authorities.

ii) In the affirmative, is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

iii) If the person has a right to be assisted by a lawyer during questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

The person is informed by the judicial authorities that she has the right to a lawyer.

CPC

Art. 70

(2) Before the questioning of a person who is suspected or accused of an alleged crime, the competent authorities inform that person about the facts which form the object of investigation, which type of offense he is suspected or accused, the right to have a lawyer, the right do not make any statement and he is informed that his statements can be used against him.

NCPC - Law nr. 135/2010

Art. 108

During the pre-trial phase, before the first questioning of the suspected or accused person, the competent authorities inform him about his rights and his obligations and give him a letter of rights that the person has to sign it. If the person can't or refuse to sign it, the competent authorities register it in a report.

CPC – by information.

NCPC – by notification – letter of rights.

- c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?

CPC Art. 172

The absence of the lawyer doesn't prevent the investigative act, if there is evidence that the lawyer was informed about the date and the hour of the investigative act. The information may be done by telephone, fax, internet or other means, registered in a report by the competent authorities.

NCPC Art. 92

The absence of the lawyer doesn't prevent the investigative act, if there is evidence that the lawyer was informed about the date and the hour of the investigative act. The information may be done by telephone, fax, internet or other means, registered in a report by the competent authorities.

In the cases when the legal assistance is mandatory, if the chosen lawyer is absent to the date established for an investigative act and doesn't ensure a substitute or if he goes out or refuse to perform his duties, the competent authorities design a defender and give him the time necessary for the preparation of the defence.

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only 'activated' further to a request of the person concerned?

This obligation exists automatically in all cases.

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

CPC

Art. 70

(2) Before the questioning of a person who is suspected or accused of an alleged crime, the competent authorities inform that person about the facts which form the object of investigation, which type of offense he is suspected or accused, the right to have a lawyer, the right do not make any statement and he is informed that his statements can be used against him.

NCPC - Law nr. 135/2010

Art. 108

During the pre-trial phase, before the first questioning of the suspected or accused person, the competent authorities inform him about his rights and his obligations and give him a letter of rights that the person has to sign it. If the person can't or refuse to sign it, the competent authorities register it in a report.

CPC – by information.

NCPC – by notification – letter of rights.

- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?

The judicial authorities inform the lawyer about this investigative act, the date and the hour where it will be performed by telephone, fax, internet or other means, registered in a report by the competent authorities.

CPC Art. 172

The absence of the lawyer doesn't prevent the investigative act, if there the evidence that the lawyer was informed about the date and the hour of the investigative act. The information may be done by telephone, fax, internet or other means, registered in a report by the competent authorities.

NCPC Art. 92

The absence of the lawyer doesn't prevent the investigative act, if there the evidence that the lawyer was informed about the date and the hour of the investigative act. The information may be done by telephone, fax, internet or other means, registered in a report by the competent authorities.

If the person is deprived of liberty, the presence of the lawyer is mandatory during the questioning of this person. In this scope, the lawyer will be informed about the questioning in order to be present.

ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

In the cases when the legal assistance is mandatory, if the chosen lawyer is absent to the date established for an investigative act and doesn't ensure a substitute or if he goes out or refuse to perform his duties, the competent authorities design a defender and give him the necessary time for the preparation of the defence.

There is a list of defenders which may be appointed by the office in cases where necessary. This list exists at the Bars and the judicial authorities can appoint a defender who has all the obligations stipulated by the law in order to ensure the defence of the suspected or accused person.

- f) i) In your legal order, is there a possibility of making derogations to the right to be assisted by a lawyer before and/or during the questioning? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer?

If the person concerned has a chosen lawyer she will not be questioned without the presence of his lawyer. In the cases where the legal assistance is mandatory, the absence of the lawyer is cause of absolute nullity of the investigative act, including questioning.

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

The absence of the lawyer chosen doesn't prevent the investigative act, if there the evidence that the lawyer was informed about the date and the hour of the investigative act.

3. In your legal order, when a person is stopped on the street by the police and, after having been officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence, is asked by the police to reply to questions concerning the (alleged) crime committed,

a) What kind of questions could be asked to this person? Is it possible to question the person regarding the alleged crime?

In case of flagrant crimes, for example.

The law no. 218/2002 regarding the organization of the Police stipulates in the art. 31 that in carrying out its duties under the law, the police man has the following main rights and obligations:

to lead to police headquarters on those who by their actions endanger the lives of persons, public order or other social values and those suspected of committing illegal acts, whose identity could not be established in conditions of the law. In cases of non-compliance of the police dispositions, the police man is entitled to use force. The checking of the status of these categories of persons and the legal measures, as appropriate, will be made within 24 hours, as an administrative measure;

- b) i) Does this person have the right to be assisted by a lawyer during such questioning?
ii) In the affirmative, in which situations does such a right exist?
iii) If the person has the right to be assisted by a lawyer, may this right be limited to the person contacting the lawyer by phone before questioning starts? If so, please indicate in which situations this may be the case.

The law doesn't ban the assistance by a lawyer. A lawyers registered in bar shall be entitled to represent any person or entity, under a written contract, which becomes fixed date by registration in official records (art. 29 of the Law no. 51/1995 regarding the organisation and the exercise of the lawyer's profession:). However, in practice, is difficult to imagine that the person may have access to a lawyer at this moment, but she can contact a lawyer in order to have legal assistance.

- b) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there an obligation in your legal order for the police or any other competent authorities to facilitate or assist the person in exercising this right?

The law doesn't limit in any manner of having contact with the lawyer: meetings, by phone, by email etc.

- ii) In the affirmative,
- does this obligation exist automatically in all cases, or is it only 'activated' further to a request of the person concerned?

This obligation exists automatically in all cases.

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority?

CPC

Art. 70

(2) Before the questioning of a person who is suspected or accused of an alleged crime, the competent authorities inform that person about the facts which form the object of investigation, which type of offence he is suspected or accused, the right to have a lawyer, the right do not make any statement and he is informed that his statements can be used against him.

NCPC - Law nr. 135/2010

Art. 108

During the pre-trial phase, before the first questioning of the suspected or accused person, the competent authorities inform him about his rights and his obligations and give him a letter of rights that the person has to sign it. If the person can't or refuse to sign it, the competent authorities register it in a report.

CPC – by information.

NCPC – by notification – letter of rights.

- c) i) If the person has a right to be assisted by a lawyer during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?

The judicial authorities inform the lawyer about this investigative act, the date and the hour where it will be performed by telephone, fax, internet or other means, registered in a report by the competent authorities.

CPC Art. 172

The absence of the lawyer doesn't prevent the investigative act, if there the evidence that the lawyer was informed about the date and the hour of the investigative act. The information may be done by telephone, fax, internet or other means, registered in a report by the competent authorities.

NCPC Art. 92

The absence of the lawyer doesn't prevent the investigative act, if there the evidence that the lawyer was informed about the date and the hour of the investigative act. The information may be done by telephone, fax, internet or other means, registered in a report by the competent authorities.

ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

In the cases when the legal assistance is mandatory, if the chosen lawyer is absent to the date established for an investigative act and doesn't ensure a substitute or if he goes out or refuse to perform his duties, the competent authorities design a defender and give him the necessary time for the preparation of the defence.

- d) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there a possibility of making derogations to this right in your legal order? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer or without contact by phone having been made?

No.

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

Evidence-gathering and investigating acts in the pre-trial stage

4. Questions regarding evidence-gathering or investigating acts in the pre-trial stage:

- a) i) In your legal order, does the suspect or accused person have a right for his lawyer to be present at evidence-gathering or investigating acts?

Yes.

ii) In the affirmative, which evidence-gathering or investigating acts are concerned?

CPC

Art. 172

During the pre-trial phase, the lawyer of the suspected or accused person has the right to assist to any investigating act, including evidence-gathering and may submit claims and make memories.

NCPC – Law no. 135/2010

Art. 92

(1) During the pre-trial phase, the lawyer of the suspected or accused person has the right to assist to any investigating act, including evidence-gathering, with the exception of the special supervision or investigative techniques, the cyber search, the corporal search and the vehicle search in case of flagrant crimes and if by the presence of the lawyer could be breached the right of the defence of the other parts in the criminal proceedings. In that case, the questions of the lawyer may be addressed by the competent authorities.

b) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the competent authorities to facilitate or assist the person in exercising this right?

Yes.

ii) In the affirmative, what are the concrete act(s) concerned that have to be taken by the competent authorities?

The competent authorities have the obligation to inform the lawyer about the date and the hour when the investigative act will be performed. If the lawyer doesn't present at the date and the hour when the investigative act is performed, this act will be made.

However, the judicial authorities can not perform more than one investigative act in the same time, in order to ensure the right of the defence.

The judicial authorities inform the lawyer about this investigative act, the date and the hour where it will be performed by telephone, fax, internet or other means, registered in a report by the competent authorities.

CPC Art. 172

The absence of the lawyer doesn't prevent the investigative act, if there the evidence that the lawyer was informed about the date and the hour of the investigative act. The information may be done by telephone, fax, internet or other means, registered in a report by the competent authorities.

NCPC Art. 92

The absence of the lawyer doesn't prevent the investigative act, if there the evidence that the lawyer was informed about the date and the hour of the investigative act. The information may be done by telephone, fax, internet or other means, registered in a report by the competent authorities.

- c) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before starting the evidence-gathering or investigating act?

If the lawyer is informed about the date and the hour, he has to be present at that time.

- ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer? Please specify as appropriate.

d) i) In your legal order, is there a possibility of making derogations to the right of the suspected or accused person for his lawyer to be present at evidence-gathering or investigating act? In other words, if the person concerned wants to be assisted by a lawyer during such acts, is there nevertheless a possibility for the competent authorities to proceed with the evidence-gathering or investigating act without the lawyer being present?
Yes.

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

CPC Art. 172

**The absence of the lawyer doesn't prevent the investigative act, if there the evidence that the lawyer was informed about the date and the hour of the investigative act.
The information may be done by telephone, fax, internet or other means, registered in a report by the competent authorities.**

NCPC Art. 92

**The absence of the lawyer doesn't prevent the investigative act, if there the evidence that the lawyer was informed about the date and the hour of the investigative act.
The information may be done by telephone, fax, internet or other means, registered in a report by the competent authorities.**

Questioning in the pre-trial stage of persons who are initially not suspected or accused of having committed an offence but obtain this status during questioning

5. In your legal order, when a person that is initially not suspected or accused of an alleged crime, such as a witness, is questioned by the police or an investigating judge:

a) Does this person have the right to be assisted by a lawyer during questioning?

There are legal provisions which ensure guaranties to the right of the defence. In this order, the Romanian Constitution the Law no. 51/1995 regarding the organisation and the exercise of the lawyer's profession provide the right of the defence as follows:

Art. 24 of Constitution

(1) The right of the defence is guaranteed.

(2) During the trial, the parties have the right to be assisted by a lawyer, chosen or appointed by the office.

Art. 29 of the Law no. 51/1995:

A lawyers registered in bar shall be entitled to represent any person or entity, under a written contract, which becomes fixed date by registration in official records.

NCPC ART. 10

The right to defense

(1) The parties and the main procedural subjects have the right to defend themselves or be assisted by lawyer.

(2) The parties, the main procedural and lawyer subjects are entitled to adequate time and facilities for the preparation of defense.

(3) The suspect has the right to be informed, before they heard about the offense for which is investigated and legal classification. The defendant has the right to be informed immediately about the offense for which prosecution was moved against him and legal classification.

(4) Before being heard, the suspect and the defendant must be provided as they have the right not to make any statement.

(5) The judicial bodies are required to ensure full and effective exercise of the right to defense by the parties and the main procedural subjects throughout the trial.

(6) The right of defense must be exercised in good faith, according to the purpose for which was recognized by law.

- b) When, during the questioning, such a person becomes suspected or accused of having committed a criminal offence, do the competent authorities have to inform the person concerned of this change of status?

CPC

Art. 70

(2) Before the questioning of a person who is suspected or accused of an alleged crime, the competent authorities inform that person about the facts which form the object of investigation, which type of offence he is suspected or accused, the right to have a lawyer, the right do not make any statement and he is informed that his statements can be used against him.

The suspected or accused person has the right to the silence and the privilege of non-autoincrimination.

If during the questioning, the witness become suspected or accused, the competent authorities have to inform the person concerned of this change of status.

NCPC - Law nr. 135/2010

Art. 108

Before the questioning of a person who is suspected or accused of an alleged crime, the competent authorities inform that person about the facts which form the object of investigation, which type of offence he is suspected or accused, the right to have a lawyer, the right do not make any statement and he is informed that his statements can be used against him.

The suspected or accused person has the right to the silence and the privilege of non-autoincrimination.

During the pre-trial phase, before the first questioning of the suspected or accused person, the competent authorities inform him about his rights and his obligations and give him a letter of rights that the person has to sign it. If the person can't or refuse to sign it, the competent authorities register it in a report.

If during the questioning, the witness become suspected or accused, the competent authorities have to inform the person concerned of this change of status.

- c) If the answer to question b) is positive:
 - i) When precisely do the competent authorities have to inform the person concerned?

The competent authorities have to inform the person concerned from the moment he becomes suspected or accused of having committed a crime.

- ii) In what manner do the competent authorities have to inform the person concerned (notification, information, ...)?

CPC – by information.

NCPC – by notification – letter of rights.

- iii) Do the competent authorities have to stop the questioning?

The person can refuse to make any statement, using the right of silence. If the person becomes suspected or accused of having committed an offence and if he wants to exercise his right to a lawyer, the judicial authorities shall allow him to exercise it and will not continue the questioning.

- iv) Does the person concerned obtain the right to be assisted by a lawyer (when he did not have it before)? If so, as from which moment in time?

Yes, the person obtains the right to be assisted by a lawyer, from the moment he becomes suspected or accused of having committed a crime.

- iv) May the statements made by the person before he was informed of the change of status be used in the ensuing criminal proceedings against him? If so, in which circumstances? Please specify as much as possible.

NCPC– Law nr. 135/2010 introduces expressis verbis the interdiction to use the statement of a witness against him.

Art. 118 – The right of the witness to not autoincriminate him self.

The statement of the witness cannot be used during criminal proceedings against him.

Minor offences

6. Questions regarding exclusions / minor offences:

- a) In your legal order, are there any categories of offences (in particular so-called "minor offences"), in respect of which the right to be assisted by a lawyer does not exist or is restricted, totally or partially, in the pre-trial phase?

In Romanian legal order there are not any categories of minor offences.

Our legal system includes also the contraventions, which have an administrative system of procedure and sanctions, which is different of criminal proceedings.

- b) In the affirmative, please describe the category or categories of exclusions as precisely as possible, defining the category by a common denominator, e.g.
- where the offence is initially dealt with in an administrative manner;
 - where pre-trial detention is not possible in relation to the offence concerned;
 - where deprivation of liberty cannot be imposed as a sanction in relation to the offence concerned;
 - where the fine that may be imposed as a sanction in relation to the offence concerned does not exceed a certain amount;
 - other definition.
- c) In case your legal order contains one or more categories of exclusions: please indicate the consequence of each category of exclusion, e.g. is there a total or partial exclusion from the right to be assisted by a lawyer, does the exclusion entail different modalities for the assistance by a lawyer, etc. ...

Lawyer provided by the State / Payment of lawyer's fees

7. The proposed Directive does not deal with the question of legal aid; even so the Presidency believes that the following questions regarding the payment of a lawyer's fee could have an impact on the formulation and application of the Directive.

With this in mind delegations are kindly invited to respond to the following questions:

- a) i) In your legal order, does an obligation exist for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *but cannot afford to pay a lawyer or cannot afford to pay the lawyer that he has chosen?*

Yes, in our legal system, there are some situations when the State has to provide a lawyer.

- ii) If so, in which situations and under which conditions does such obligation exist? When answering this question, please take into account the situations mentioned under questions 1-4.

CPC Art. 171

(2) During the criminal proceedings, the legal assistance is mandatory when the suspected or accused person is minor, is in a rehabilitation centre or a medical-educational institute (that means sanctions that can be disposed against a minor who committed a crime), when he is deprived of liberty, even in another case, when against him it was disposed the safety measure of medical admission or the safety measure of medical treatment, even in another case or when the competent authorities consider that the suspected or accused person can not being defend him self or in another legal cases.

(3) During the trial, the legal assistance is mandatory in the cases when the sanction for the offence alleged is the prison for life or the prison of 5 years or more.

(4) When the legal assistance is mandatory and the person didn't choose a lawyer, the competent authorities designate a defender.

NCPC - art. 90 establishes the same situations for legal assistance when is mandatory.

In these situations, the suspected or accused person cannot chose a lawyer, the competent authorities make a solicitation to the Bar of lawyer in order to design a defender.

Even in the situations when the legal assistance is mandatory, the suspected or accused person can choose a lawyer on his own, which will be paid by that person. If the person does not choose a lawyer and the legal assistance is mandatory, the competent authorities will design a defender paid by the State. However, if the suspected or accused person is convicted, he will pay the judicial expenses, which include the lawyer's fee.

- b) i) In your legal order, does there exist an obligation for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *even if he could himself afford to pay a lawyer, or the lawyer that he has chosen?*
- ii) If so, in which situations and under which conditions does such obligation exist? When answering this question, please take into account the situations mentioned under questions 1-4.

Even in the situations when the legal assistance is mandatory, the suspected or accused person can choose a lawyer on his own, which will be paid by that person. If the person does not choose a lawyer and the legal assistance is mandatory, the competent authorities will design a defender paid by the State. That defender cannot be chosen by the suspected or accused person. However, if the suspected or accused person is convicted, he will pay the judicial expenses, which include the lawyer's fee.

In this subject, there are some articles in the Law no. 51/1991 regarding the organisation and the exercise of the lawyer's profession:

Art. 41

The lawyer is obliged to provide legal assistance in cases in which it was appointed, by the Bar, whether by the office or without fee.

Art. 58

(1) Dean Bar has the following powers:

c) approves applications for legal aid;

Article 71

(1) In cases prescribed by law, the bars provide legal assistance in the following forms:

a) in criminal cases in which the legal assistance is required under the provisions of the Code of Criminal Procedure;

b) in any other than criminal cases as a way to grant legal aid, under the law;

c) the legal aid lawyer, granted at the request of local public administration bodies.

(2) In exceptional cases, if the indigent person's rights would be prejudiced by delay, dean of the bar may approve the granting of free legal assistance specialist.

Principle of confidentiality

8. a) In your legal order, can any derogations be made to the principle of confidentiality of communication between the suspected or accused person and his lawyer?

CPC Art. 172

(4) The person in custody or deprived of liberty has the right to contact his lawyer, with the respect of the confidentiality of the communications.

Art. 89

(2) The person in custody or deprived of liberty has the right to contact his lawyer, with the respect of the confidentiality of the communications and with the respect of the measures of visual supervision, protection and security, without the conversation being intercepted or registered. The evidence obtained with the breach of these dispositions is excluded.

Art. 209

(9) The lawyer of the person placed in custody has the right to communicate directly with her, in conditions which respect the confidentiality.

There are some provisions in this field in the Law. no. 51/1995 regarding the organisation and the exercise of the lawyer's profession:

ART. 11

The lawyer is obliged to observe professional secret regarding any aspect of the case, except as the situations provided by law.

ART. 35

(1) To ensure the professional secret, papers and professional documents which are under the lawyer or in his office shall be inviolable. Searching lawyer, his home or his office or lifting of documents and goods can be made only by the prosecutor, under a warrant issued under the law.

(2) The lawyer's telephone calls can not be heard and recorded, with no technical means and his correspondence professional can not be intercepted and recorded, except the terms and the procedure provided by law.

ART. 36

(1) The contact between the lawyer and his client can not be hindered or controlled, directly or indirectly, of any organ of State.

(2) If the client is deprived of liberty, the custody or administration of the detention is required to arrange for the rights referred to in para. (1).

- c) In the affirmative, in which situations can such derogations be made? Please specify as much as possible, and make a distinction, if appropriate, between oral and written communication, and between communication in the pre-trial phase and in the trial phase.

NCPP – Law no. 135/2010

Art. 139

(4) The rapports between lawyer and his client cannot be the subject of the technical supervision, except the situation when there are data that the lawyer is committing or preparing a serious offence. If during the measure or after the execution of the measure results that the rapport between the lawyer and his client has formed the object of the technical supervision, the evidence obtained cannot be used in the criminal proceedings. That evidence will be destroyed by the prosecutor.

Waiver

9. a) In your legal order, does a suspect or accused person has the right to waive his right to be assisted by a lawyer?

Yes, except the cases when the legal assistance is mandatory.

- b) In the affirmative,

- i) What, if any, information has to be given to the person concerned prior to making the waiver?

CPC

Art. 70

(2) Before the questioning of a person who is suspected or accused of an alleged crime, the competent authorities inform that person about the facts which form the object of investigation, which type of offence he is suspected or accused, the right to have a lawyer, the right do not make any statement and he is informed that his statements can be used against him.

NCPC - Law nr. 135/2010

Art. 108

During the pre-trial phase, before the first questioning of the suspected or accused person, the competent authorities inform him about his rights and his obligations and give him a letter of rights that the person has to sign it. If the person can't or refuse to sign it, the competent authorities register it in a report.

ii) If such information has to be given:

- which person(s) or authorities may / should give that information?

The judicial authorities give that information.

- how is that information to be given (oral, writing,) ? Please specify.

CPC – by information.

NCPC – by notification – letter of rights.

iii) How is the waiver noted/registered? What are the formalities, if any?

The information is registered in a report by the competent authorities.

iv) May a decision to waive the right to a lawyer be revoked, and if so,

- may this be done at any stage of the proceedings?
- are there any (other) limitations to the possibility of revoking a waiver?

The decision to waive the right to a lawyer can be revoked at any stage of the proceedings,, the law doesn't prevent the possibility to have a lawyer if the suspected or accused person wants exercise this right..

c) Are the answers to the questions under a) and b) different if the person concerned is a minor? If so, please specify.

During the criminal proceedings, the legal assistance is mandatory when the suspected or accused person is minor, both in Criminal Procedural Code and the New Criminal Procedural Code.

Remedies

10. a) Does your national law provide for remedies in case of breach of the right of access to a lawyer?

Yes.

- b) In the affirmative:

- i) which are those remedies?

In the cases when the legal assistance is mandatory and the breach of access to a lawyer is sanctioned by absolute nullity. In the other cases, the breach of access to a lawyer is sanctioned by relative nullity.

- ii) do the remedies also include the possibility for the (judicial) authorities to exclude evidence that has been obtained in breach of the right of access to a lawyer?

NCPC provides the possibility to exclude evidence that has been obtained in breach of the right of access to a lawyer. Art. 102 par. (2) the evidence that has been obtained illegally cannot be used in the criminal proceedings.

General concerns regarding the proposed Directive

11. Are there any other aspects of your legal order that could be of importance for the further discussions on this proposed Directive? If so, please highlight them.

SLOVENIA

Questioning of suspects and accused persons in the pre-trial phase

1. In your legal order, when a person that is suspected or accused of having committed a criminal offence is arrested (deprived of liberty) and asked by the police or investigating judge to reply to questions concerning the (alleged) crime committed,

a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?

Yes

ii) In the affirmative: in which situations does this right exist?

This right exists in all phases of the procedure. The suspect has the right to a confidential contact with a lawyer from the first custodial hearing by the police.

iii) If the person has the right to be assisted by a lawyer before questioning, may this right in your legal order be limited to the person contacting the lawyer by phone? If so, please indicate in which situations this may be the case.

No, this right cannot be limited to a telephone conversation with a lawyer.

b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?

Yes.

ii) In the affirmative: is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

Yes, this is true in all situations.

- b) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?

Yes. When suspect is in police custody (art. 157/4 of Criminal Procedure Act), the police shall (at the request of the suspect) help him to retain counsel.

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?

Obligation exists only at the request of the suspect.

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

Police has to acquaint the suspect with the addresses of lawyers. Police also has to enable the suspect telephone conversation with a lawyer or with persons (such as relatives) who can hire a lawyer for him.

- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police or investigating judge to wait until the arrival of the lawyer before the questioning starts?

Yes. Police has to adjourn interrogating him until the arrival of the counsel, but no longer than 2 hours.

ii) In the affirmative, how long (how many hours) do the police or investigating judge have to wait until the arrival of the lawyer?

Police has to wait for 2 hours.

e) i) In your legal order, is there a possibility of making derogations to the right of a person to be assisted by a lawyer before and/or during questioning in the pre-trial phase? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police or investigating judge to proceed with the questioning without the presence of a lawyer, or without the lawyer having been contacted in advance by phone?

No derogations are possible.

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

2. In your legal order, when a person is officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence and is asked to come 'voluntarily' to a police station in order to be questioned by the police in relation to that crime,

a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?
Yes.

ii) In the affirmative: in which situations does this right exist?

This right exists from the pre-trial phase of the criminal procedure.

iii) If the person has a right to be assisted by a lawyer before questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

No, he is not informed about this right in the convocation.

b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?
Yes.

ii) In the affirmative, is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

No exceptions.

iii) If the person has a right to be assisted by a lawyer during questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

No, he is not informed about this right in the convocation.

- c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?

No if he is at liberty to leave the questioning.

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only 'activated' further to a request of the person concerned?
- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?

Yes (Art. 148 of the Criminal Procedure Act).

ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

If the suspect declares that he wants to retain counsel, the interrogation shall be put off until the arrival of the counsel or until the time determined by the police which, nevertheless, may not be shorter than two hours.

- e) i) In your legal order, is there a possibility of making derogations to the right to be assisted by a lawyer before and/or during the questioning? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer?

No.

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

3. In your legal order, when a person is stopped on the street by the police and, after having been officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence, is asked by the police to reply to questions concerning the (alleged) crime committed,

a) What kind of questions could be asked to this person? Is it possible to question the person regarding the alleged crime?

Yes, the person can be questioned regarding the alleged crimes.

b) i) Does this person have the right to be assisted by a lawyer during such questioning?

Yes.

ii) In the affirmative, in which situations does such a right exist?

When in the course of information gathering the police establish that there are grounds to suspect that a particular person (the suspect) has perpetrated or participated in the perpetration of a criminal offence – police has to inform that person, before it starts to gather information from him.

iii) If the person has the right to be assisted by a lawyer, may this right be limited to the person contacting the lawyer by phone before questioning starts? If so, please indicate in which situations this may be the case.

No.

c) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there an obligation in your legal order for the police or any other competent authorities to facilitate or assist the person in exercising this right?

No, since the suspect is not detained.

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?
- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority?

d) i) If the person has a right to be assisted by a lawyer during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?

Yes.

ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

If the suspect declares that he wants to retain counsel, the interrogation shall be put off until the arrival of the counsel or until the time determined by the police which, nevertheless, may not be shorter than two hours.

e) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there a possibility of making derogations to this right in your legal order? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer or without contact by phone having been made?

No.

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

Evidence-gathering and investigating acts in the pre-trial stage

4. Questions regarding evidence-gathering or investigating acts in the pre-trial stage:

- a) i) In your legal order, does the suspect or accused person have a right for his lawyer to be present at evidence-gathering or investigating acts?

Yes.

- ii) In the affirmative, which evidence-gathering or investigating acts are concerned?

Lawyer can be present:

- **at the crime scene examination and questioning of experts;**
- **during the house search;**
- **at the questioning of a witness.**

- b) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the competent authorities to facilitate or assist the person in exercising this right?

No.

- ii) In the affirmative, what are the concrete act(s) concerned that have to be taken by the competent authorities?

- c) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before starting the evidence-gathering or investigating act?

Yes – during a house search; see below ii).

- ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer? Please specify as appropriate.

House search: If the person to whom the search warrant refers demands that his lawyer be present during the search, the start of the search shall be adjourned until the lawyer arrives, but no longer than by two hours.

- d) i) In your legal order, is there a possibility of making derogations to the right of the suspected or accused person for his lawyer to be present at evidence-gathering or investigating act? In other words, if the person concerned wants to be assisted by a lawyer during such acts, is there nevertheless a possibility for the competent authorities to proceed with the evidence-gathering or investigating act without the lawyer being present?

Yes; see below ii).

- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

The list is closed – the derogation is limited to the following house search situations:

a) The authorities can proceed with the evidence-gathering or investigating act without the lawyer being present in case in the following case: If the person to whom the search warrant refers demands that his lawyer be present during the search, the start of the search shall be adjourned until the lawyer arrives, but no longer than by two hours.

b) Police officers may enter and, if necessary, search the dwelling and other premises of a person without a court warrant if:

- if the occupant so desires,
- if someone is calling for help,
- if a perpetrator caught in the act of committing a criminal offence is to be apprehended,
- if the safety of people or property so requires, or
- if a person who must be detained or produced by force under an order of the competent state agency, or a person being prosecuted, is in the dwelling or other premises.

Questioning in the pre-trial stage of persons who are initially not suspected or accused of having committed an offence but obtain this status during questioning

5. In your legal order, when a person that is initially not suspected or accused of an alleged crime, such as a witness, is questioned by the police or an investigating judge:

a) Does this person have the right to be assisted by a lawyer during questioning?

Yes.

b) When, during the questioning, such a person becomes suspected or accused of having committed a criminal offence, do the competent authorities have to inform the person concerned of this change of status?

Yes.

c) If the answer to question b) is positive:

i) When precisely do the competent authorities have to inform the person concerned?

When in the course of information gathering the police establish that there are grounds to suspect that a particular person (the suspect) has perpetrated or participated in the perpetration of a criminal offence, they shall inform that person that he is a suspect.

ii) In what manner do the competent authorities have to inform the person concerned (notification, information, ...)?

With oral notification.

iii) Do the competent authorities have to stop the questioning?

No.

iv) Does the person concerned obtain the right to be assisted by a lawyer (when he did not have it before)? If so, as from which moment in time?

From the point in time when he was informed that he is a suspect. The police have to give such notification when in the course of information gathering the police establish that there are grounds to suspect that a particular person (the suspect) has perpetrated or participated in the perpetration of a criminal offence, they shall inform that person that he is a suspect.

v) May the statements made by the person before he was informed of the change of status be used in the ensuing criminal proceedings against him? If so, in which circumstances? Please specify as much as possible.

No – such statements cannot be used since he was not yet a suspect and therefore not informed about his rights at the time he made the damaging statements.

Minor offences

6. Questions regarding exclusions / minor offences:

a) In your legal order, are there any categories of offences (in particular so-called "minor offences"), in respect of which the right to be assisted by a lawyer does not exist or is restricted, totally or partially, in the pre-trial phase?

No (see Art. 90/2 of Minor offences act, Const. Court Decision Up 120/97).

b) In the affirmative, please describe the category or categories of exclusions as precisely as possible, defining the category by a common denominator, e.g.

- where the offence is initially dealt with in an administrative manner;
- where pre-trial detention is not possible in relation to the offence concerned;
- where deprivation of liberty cannot be imposed as a sanction in relation to the offence concerned;
- where the fine that may be imposed as a sanction in relation to the offence concerned does not exceed a certain amount;
- other definition.

- c) In case your legal order contains one or more categories of exclusions: please indicate the consequence of each category of exclusion, e.g. is there a total or partial exclusion from the right to be assisted by a lawyer, does the exclusion entail different modalities for the assistance by a lawyer, etc. ...

Lawyer provided by the State / Payment of lawyer's fees

7. The proposed Directive does not deal with the question of legal aid; even so the Presidency believes that the following questions regarding the payment of a lawyer's fee could have an impact on the formulation and application of the Directive.

With this in mind delegations are kindly invited to respond to the following questions:

- a) i) In your legal order, does an obligation exist for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *but cannot afford to pay a lawyer or cannot afford to pay the lawyer that he has chosen?*

Yes.

- ii) If so, in which situations and under which conditions does such obligation exist?

When answering this question, please take into account the situations mentioned under questions 1-4.

Free legal aid is granted to persons who cannot, without detriment to their weak economic status and weak economic status of their family, afford the costs of litigation and the costs of providing legal aid.

Except for certain specific criminal offences (criminal Defamation, Exposure of Personal and Family Circumstances, Injurious Accusation), right to free legal aid applies in all criminal procedures as well as in minor offences procedures.

- b) i) In your legal order, does there exist an obligation for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *even if he could himself afford to pay a lawyer, or the lawyer that he has chosen?*

Yes.

- ii) If so, in which situations and under which conditions does such obligation exist?

When answering this question, please take into account the situations mentioned under questions 1-4.

In all situations mentioned under questions 1-4, given these situations are also cases of obligatory defense.

Defense is obligatory in the following cases:

- **in all cases of deprivation of liberty;**
- **in cases when charge sheet is served on suspect for serious crimes;**
- **if the accused is deaf, dumb or otherwise incapable of defending himself successfully;**
- **if criminal proceedings are conducted against the accused for a criminal offence punishable by thirty years of imprisonment;**
- **if he is brought before an investigating judge according to Article 157 of this Act.**

Principle of confidentiality

8. a) In your legal order, can any derogations be made to the principle of confidentiality of communication between the suspected or accused person and his lawyer?

Yes (see below b).

- b) In the affirmative, in which situations can such derogations be made? Please specify as much as possible, and make a distinction, if appropriate, between oral and written communication, and between communication in the pre-trial phase and in the trial phase.

Communications which have been used for a criminal offence are not covered with constitutional protection of confidential relationship between lawyer and clients (Const Court Decision Up-2530/06).

Waiver

9. a) In your legal order, does a suspect or accused person has the right to waive his right to be assisted by a lawyer?

Yes, except in cases of obligatory defence.

- b) In the affirmative,
i) What, if any, information has to be given to the person concerned prior to making the waiver?

The suspect shall be informed before information is gathered from him, what criminal offence he is suspected of and the grounds for suspicion, and shall be instructed that he is not obliged to give any statement or answer questions and that, if he intends to plead his case, he is not obliged to incriminate himself or his close relatives or to confess guilt, that he is entitled to have a counsel of his choosing present at his interrogation, and that whatever he declares may be used against him in the trial.

- ii) If such information has to be given:
- which person(s) or authorities may / should give that information?

Police or investigating judge.

- how is that information to be given (oral, writing,) ? Please specify.

With oral notification.

- iii) How is the waiver noted/registered? What are the formalities, if any?

If the suspect states that he does not want to retain counsel, an official note of the statement of the suspect shall be made. The note shall include the legal instruction given, the statement of the suspect and, in the event that the suspect wants to declare himself on the offence, the essence of his statement and comments thereon. The official note shall be read to the suspect and a copy thereof shall be delivered to him; the suspect shall acknowledge the receipt of the copy by his signature. The statement of the suspect may be recorded by a sound and picture recording device after the recording has been announced to the suspect.

- iv) May a decision to waive the right to a lawyer be revoked, and if so,

- may this be done at any stage of the proceedings?

Yes.

- are there any (other) limitations to the possibility of revoking a waiver?

- c) Are the answers to the questions under a) and b) different if the person concerned is a minor? If so, please specify.

A minor shall have an obligatory defence counsel (he cannot waive the right to a lawyer) in the following cases: from the beginning of the preparatory procedure if the criminal offence with which he is charged is punishable by more than three years imprisonment; in case of offences subject to less severe punishment he shall have defence counsel if so determined by the juvenile judge.

Remedies

10. a) Does your national law provide for remedies in case of breach of the right of access to a lawyer?

Yes.

b) In the affirmative:

i) which are those remedies?

a) Evidence which were obtained with a breach of the right of access to a lawyer shall be excluded from the criminal procedure.

b) Breach of the right of access to a lawyer represents grounds on which judgement may be challenged (right of appeal).

ii) do the remedies also include the possibility for the (judicial) authorities to exclude evidence that has been obtained in breach of the right of access to a lawyer?

Yes.

General concerns regarding the proposed Directive

11. Are there any other aspects of your legal order that could be of importance for the further discussions on this proposed Directive? If so, please highlight them.

SLOVAKIA

The General Secretariat has not yet received the replies by the delegation of Slovakia.

FINLAND

Questioning of suspects and accused persons in the pre-trial phase

1. In your legal order, when a person that is suspected or accused of having committed a criminal offence is arrested (deprived of liberty) and asked by the police or investigating judge to reply to questions concerning the (alleged) crime committed,
 - a)
 - i) Does this person have the right to be assisted by a lawyer *before* such questioning?
 - ii) In the affirmative: in which situations does this right exist?

Answer:

A suspected person has the right to a lawyer during the criminal investigation. The competent authorities have to inform a suspected person who has been deprived of liberty of the right to a lawyer without delay after the arrest.

In 2011, the Parliament adopted bills for an overall reform of the legislation on criminal investigations and coercive measures. The new Criminal Investigations Act enters into force in 2014. According to the new provisions a suspected person shall be informed of the right to a lawyer in writing and the competent authorities shall also otherwise see to that the right to a lawyer can be *de facto* exercised if the suspect so wishes.

iii) If the person has the right to be assisted by a lawyer before questioning, may this right in your legal order be limited to the person contacting the lawyer by phone? If so, please indicate in which situations this may be the case.

Answer:

There are no provisions in our legislation on limiting this right to contacting the lawyer by phone.

b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?

ii) In the affirmative: is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

Answer:

The lawyer of the suspected person has the right to be present during the questioning, unless the head of investigation prohibits this for important reasons related to the criminal investigation.

c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?
- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

Answer:

A suspected person who has been deprived of liberty has to be informed of the right to a lawyer without delay after the deprivation of liberty.

According to the new Criminal Investigations Act a suspected person shall be informed of the right to a lawyer in writing and the competent authorities shall also otherwise see to that the right to a lawyer can be *de facto* exercised if the suspect so wishes.

The head of investigation or the prosecutor shall propose to the court that it orders a public defender for the suspect if certain conditions are fulfilled. Such a proposal must be made in cases where the court orders a public defender for the suspect *ex officio* (for example when the suspect cannot be regarded as able to defend himself). See answer to question 7b.

- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police or investigating judge to wait until the arrival of the lawyer before the questioning starts?
- ii) In the affirmative, how long (how many hours) do the police or investigating judge have to wait until the arrival of the lawyer?

Answer:

There is no express provision in the legislation on how long the competent authorities have to wait until the arrival of the lawyer. The main rule is that a suspected person has the right to use a lawyer in the criminal investigation and the lawyer has the right to be present during questioning.

According to the new Criminal Investigations Act the competent authorities shall, taking into account the nature of the offence, the investigation of the offence and the personal circumstances of the suspected person, see to that the right to a lawyer can be *de facto* exercised if the suspect so wishes. This provision means that the extent of the obligation of the competent authorities to ensure the effective exercise of the right to a lawyer depends on the specific circumstances of the case, such as the seriousness of the offence or the urgency of the investigation.

- e) i) In your legal order, is there a possibility of making derogations to the right of a person to be assisted by a lawyer before and/or during questioning in the pre-trial phase? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police or investigating judge to proceed with the questioning without the presence of a lawyer, or without the lawyer having been contacted in advance by phone?
- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

Answer:

The lawyer of the suspected person has the right to be present during the questioning, unless the head of investigation prohibits this for important reasons related to the criminal investigation.

See also answer to question 1 d).

2. In your legal order, when a person is officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence and is asked to come 'voluntarily' to a police station in order to be questioned by the police in relation to that crime,

a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?

ii) In the affirmative: in which situations does this right exist?

Answer:

A suspected person has the right to a lawyer during the criminal investigation. The competent authorities have to inform a suspected person of this right before questioning him.

As an exception to the general rule, this obligation to *inform* the suspected person of his right to a lawyer does not apply to simplified criminal investigations. A simplified criminal investigation may be carried out in a clear and straightforward case where the foreseeable penalty will not be more severe than a fine (so called minor offences).

iii) If the person has a right to be assisted by a lawyer before questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

Answer:

Yes, in practice, a suspected person is informed of the right to use a lawyer during the criminal investigation in the convocation.

b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?

ii) In the affirmative, is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

Answer:

The lawyer of the suspected person has the right to be present during the questioning, unless the head of investigation prohibits this for important reasons related to the criminal investigation.

iii) If the person has a right to be assisted by a lawyer during questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

Answer:

In the convocation, a suspected person is informed of the right to use a lawyer during the criminal investigation.

c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?
- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

Answer:

According to the new Criminal Investigations Act a suspected person shall be informed of the right to a lawyer in writing. The competent authorities shall, taking into account the nature of the offence, the investigation of the offence and the personal circumstances of the suspected person, also otherwise see to that the right to a lawyer can be *de facto* exercised if the suspect so wishes.

The head of investigation or the prosecutor shall propose to the court that it orders a public defender for the suspect if certain conditions are fulfilled. Such a proposal must be made in cases where the court orders a public defender for the suspect *ex officio* (for example when the suspect cannot be regarded as able to defend himself). See answer to question 7b.

- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?
- ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

Answer:

There is no express provision in the legislation on how long the competent authorities have to wait until the arrival of the lawyer. The main rule is that a suspected person has the right to use a lawyer in the criminal investigation and the lawyer has the right to be present during questioning.

According to the new Criminal Investigations Act the competent authorities shall, taking into account the nature of the offence, the investigation of the offence and the personal circumstances of the suspected person, see to that the right to a lawyer can be *de facto* exercised if the suspect so wishes. This provision means that the extent of the obligation of the competent authorities to ensure the effective exercise of the right to a lawyer depends on the specific circumstances of the case, such as the seriousness of the offence or the urgency of the investigation.

- e) i) In your legal order, is there a possibility of making derogations to the right to be assisted by a lawyer before and/or during the questioning? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer?
- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

Answer:

The lawyer of the suspected person has the right to be present during the questioning, unless the head of investigation prohibits this for important reasons related to the criminal investigation.

See also answer to question 1 d).

3. In your legal order, when a person is stopped on the street by the police and, after having been officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence, is asked by the police to reply to questions concerning the (alleged) crime committed,
- a) What kind of questions could be asked to this person? Is it possible to question the person regarding the alleged crime?
- b) i) Does this person have the right to be assisted by a lawyer during such questioning?
- ii) In the affirmative, in which situations does such a right exist?
- iii) If the person has the right to be assisted by a lawyer, may this right be limited to the person contacting the lawyer by phone before questioning starts? If so, please indicate in which situations this may be the case.

- c) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there an obligation in your legal order for the police or any other competent authorities to facilitate or assist the person in exercising this right?
- ii) In the affirmative,
- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?
 - what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority?
- d) i) If the person has a right to be assisted by a lawyer during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?
- ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?
- e) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there a possibility of making derogations to this right in your legal order? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer or without contact by phone having been made?
- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

Answer:

According to the general provision of the Criminal Investigations Act, a suspected person has the right to use a lawyer during the criminal investigation. In principle, the right covers all investigative measures during the criminal investigation. The lawyer of the suspected person has the right to be present during the questioning, unless the head of investigation prohibits this for important reasons related to the criminal investigation.

According to the new Criminal Investigations Act the competent authorities shall, taking into account the nature of the offence, the investigation of the offence and the personal circumstances of the suspected person, see to that the right to a lawyer can be *de facto* exercised if the suspect so wishes. The extent of the obligation of the competent authorities to ensure the effective exercise of the right to a lawyer depends on the specific circumstances of the case, such as the seriousness of the offence or the urgency of the investigation. This means, for example, that the competent authorities may issue speeding tickets without waiting for a lawyer to be present. Also, the urgency of the investigation may require a preliminary interview of the person without a lawyer being present.

Evidence-gathering and investigating acts in the pre-trial stage

4. Questions regarding evidence-gathering or investigating acts in the pre-trial stage:
- a) i) In your legal order, does the suspect or accused person have a right for his lawyer to be present at evidence-gathering or investigating acts?

 - ii) In the affirmative, which evidence-gathering or investigating acts are concerned?

- b) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the competent authorities to facilitate or assist the person in exercising this right?
- ii) In the affirmative, what are the concrete act(s) concerned that have to be taken by the competent authorities?
- c) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before starting the evidence-gathering or investigating act?
- ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer? Please specify as appropriate.
- d) i) In your legal order, is there a possibility of making derogations to the right of the suspected or accused person for his lawyer to be present at evidence-gathering or investigating act? In other words, if the person concerned wants to be assisted by a lawyer during such acts, is there nevertheless a possibility for the competent authorities to proceed with the evidence-gathering or investigating act without the lawyer being present?
- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

Answer:

According to the general provision of the Criminal Investigations Act, a suspected person has the right to use a lawyer during the criminal investigation. In principle, the right covers all investigative measures during the criminal investigation. Therefore, the main rule is that a suspected person has the right for his lawyer to be present at evidence-gathering or investigating acts at which the presence of the suspected person is permitted.

According to the Coercive Measures Act, the person whose premises are being searched or, in his absence, a member of his household who is present, shall be given the opportunity to be present during the search of premises and to summon a witness thereto, provided that this does not cause delay.

According to the new Criminal Investigations Act the competent authorities shall, taking into account the nature of the offence, the investigation of the offence and the personal circumstances of the suspected person, see to that the right to a lawyer can be *de facto* exercised if the suspect so wishes. The extent of the obligation of the competent authorities to ensure the effective exercise of the right to a lawyer depends on the specific circumstances of the case, such as the seriousness of the offence or the urgency of the investigation.

Questioning in the pre-trial stage of persons who are initially not suspected or accused of having committed an offence but obtain this status during questioning

5. In your legal order, when a person that is initially not suspected or accused of an alleged crime, such as a witness, is questioned by the police or an investigating judge:
- a) Does this person have the right to be assisted by a lawyer during questioning?

Answer:

According to the Criminal Investigations Act, the parties of the proceedings have a right to have a lawyer present during the questioning. This provision does not cover witnesses. According to the new Criminal Investigations Act, the competent authorities may allow a person supporting the witness to be present when the witness is being heard in criminal proceedings unless this would prejudice the investigation.

- b) When, during the questioning, such a person becomes suspected or accused of having committed a criminal offence, do the competent authorities have to inform the person concerned of this change of status?

Answer:

Yes, according to the Criminal Investigations Act a person who is subject to criminal proceedings shall be informed of his status in these proceedings and of changes of status as well.

- c) If the answer to question b) is positive:
- i) When precisely do the competent authorities have to inform the person concerned?
- ii) In what manner do the competent authorities have to inform the person concerned (notification, information, ...)?

- iii) Do the competent authorities have to stop the questioning?
- iv) Does the person concerned obtain the right to be assisted by a lawyer (when he did not have it before)? If so, as from which moment in time?
- v) May the statements made by the person before he was informed of the change of status be used in the ensuing criminal proceedings against him? If so, in which circumstances? Please specify as much as possible.

Answer:

If the status of the person changes during the questioning, the change of status has to be taken into account immediately. If a person's status changes from witness to suspect, the competent authorities cannot continue questioning the person as a witness. The statement made by the person is not included in the pre-trial investigation protocol.

In these cases, the person has to be questioned again as a suspected person. All the rights of suspected persons apply to this questioning. This means, for example, that the competent authorities have to inform the person of the right to a lawyer before questioning him.

Minor offences

6. Questions regarding exclusions / minor offences:

- a) In your legal order, are there any categories of offences (in particular so-called "minor offences"), in respect of which the right to be assisted by a lawyer does not exist or is restricted, totally or partially, in the pre-trial phase?
- b) In the affirmative, please describe the category or categories of exclusions as precisely as possible, defining the category by a common denominator, e.g.
 - where the offence is initially dealt with in an administrative manner;

- where pre-trial detention is not possible in relation to the offence concerned;
 - where deprivation of liberty cannot be imposed as a sanction in relation to the offence concerned;
 - where the fine that may be imposed as a sanction in relation to the offence concerned does not exceed a certain amount;
 - other definition.
- c) In case your legal order contains one or more categories of exclusions: please indicate the consequence of each category of exclusion, e.g. is there a total or partial exclusion from the right to be assisted by a lawyer, does the exclusion entail different modalities for the assistance by a lawyer, etc. ...

Answer:

A suspected person has the right to a lawyer during criminal investigation in all criminal cases. As a general rule, the competent authorities have to inform a suspected person of this right before questioning him. However, the obligation to inform the person of his right to a lawyer does not apply to simplified criminal investigations. A simplified criminal investigation may be carried out in a clear and straightforward case where the foreseeable penalty will not be more severe than a fine.

A suspected person who cannot afford to pay for a lawyer has the right to free legal assistance except in a simple criminal case. (See answer to question 7a)

Lawyer provided by the State / Payment of lawyer's fees

7. The proposed Directive does not deal with the question of legal aid; even so the Presidency believes that the following questions regarding the payment of a lawyer's fee could have an impact on the formulation and application of the Directive.

With this in mind delegations are kindly invited to respond to the following questions:

- a) i) In your legal order, does an obligation exist for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *but cannot afford to pay a lawyer or cannot afford to pay the lawyer that he has chosen?*
- ii) If so, in which situations and under which conditions does such obligation exist? When answering this question, please take into account the situations mentioned under questions 1-4.

Answer:

Yes, a suspected or accused person who cannot afford to pay a lawyer has the right to legal aid. If legal aid is granted to the suspected or accused person, the state pays the fees of the lawyer in full or in part, depending on the available means of the person.

However, legal aid does not cover a lawyer's services in a simple criminal case. According to the Legal Aid Act legal assistance is not granted in a simple criminal case where the prevailing penal practice indicates that the foreseeable penalty will not be more severe than a fine or where, in view of the foreseeable penalty and the results of the investigation of the matter, access by the defendant to justice does not require an attorney.

- b) i) In your legal order, does there exist an obligation for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *even if he could himself afford to pay a lawyer, or the lawyer that he has chosen?*

Answer:

Under certain circumstances, the suspect of a criminal offence has the right to a public defender, as provided in the Criminal Procedure Act. A public defender is appointed regardless of the financial situation of the defendant.

- ii) If so, in which situations and under which conditions does such obligation exist? When answering this question, please take into account the situations mentioned under questions 1-4.

Answer:

The court appoints a public defender for the suspect/defendant *on request* if,

- 1) he is suspected of, or charged with an offence punishable by no less than imprisonment for four months, or an attempt of or participation in such an offence, or**
- 2) he is under arrest or in detention.**

The court *orders* a public defender for the defendant *ex officio* if,

- 1) the suspect is incapable of defending himself,**
- 2) the suspect, who has not retained a defence counsel, is under 18 years of age, unless it is obvious that he has no need of a public defender,**
- 3) the defence counsel retained by the suspect does not meet the qualifications required for such representation, or is incapable of defending the suspect, or**
- 4) there is another special reason for the same.**

Principle of confidentiality

8. a) In your legal order, can any derogations be made to the principle of confidentiality of communication between the suspected or accused person and his lawyer?
- b) In the affirmative, in which situations can such derogations be made? Please specify as much as possible, and make a distinction, if appropriate, between oral and written communication, and between communication in the pre-trial phase and in the trial phase.

Answer:

According to the Detention Act the meetings between the detained person and his lawyer can be supervised, if there is a justified reason to believe that the law would be breached in an unsupervised meeting. However, the conversations between the detained person and his lawyer may not be listened.

In addition, a letter or other mail delivery from a suspect's lawyer may be checked for forbidden items or substances. The contents may be examined where there is reason to suspect that the delivery contains forbidden items or substances. The examination must take place in the presence of the suspected person. However, the contents of the letter may not be read.

Waiver

9. a) In your legal order, does a suspect or accused person has the right to waive his right to be assisted by a lawyer?

Answer:

Yes, this right can be waived except in cases where the court orders a public defender for the suspected or accused person *ex officio*. The court orders a public defender for a person who is incapable of defending himself or a minor, unless it is obvious that he has no need of a public defender. See answer to question 7b.

- b) In the affirmative,
- i) What, if any, information has to be given to the person concerned prior to making the waiver?
 - ii) If such information has to be given:
 - which person(s) or authorities may / should give that information?
 - how is that information to be given (oral, writing, ...) ? Please specify.
 - iii) How is the waiver noted/registered? What are the formalities, if any?
 - iv) May a decision to waive the right to a lawyer be revoked, and if so,
 - may this be done at any stage of the proceedings?
 - are there any (other) limitations to the possibility of revoking a waiver?

Answer:

A suspected person has the right to a lawyer during the criminal investigation. The competent authorities have to inform a suspected person of this right before questioning him. A suspected person who has been deprived of liberty has to be informed of the right to a lawyer without delay after the deprivation of liberty.

The information is given orally by the police or other investigation authorities. According to the new provisions a suspected person has to be informed of the right to a lawyer in writing.

The decision to waive the right to a lawyer may be revoked at any stage of the proceedings. The revocation of the waiver has effect on the proceedings from the point in time at which the revocation was made onwards.

- c) Are the answers to the questions under a) and b) different if the person concerned is a minor? If so, please specify.

Answer:

The court orders a public defender *ex officio*, if the suspected person is a minor and has not retained a defence counsel, unless it is obvious that he has no need of a public defender.

Remedies

10. a) Does your national law provide for remedies in case of breach of the right of access to a lawyer?
- b) In the affirmative:
- i) which are those remedies?
 - ii) do the remedies also include the possibility for the (judicial) authorities to exclude evidence that has been obtained in breach of the right of access to a lawyer?

Answer:

Yes, a suspected person has the right to have the value of the statements obtained in breach of the right of access to a lawyer to be examined by a court. In our legislation, there are no provisions on exclusion of evidence in these cases. It is the duty of the judge to assess the value of the evidence and the seriousness of the breach.

General concerns regarding the proposed Directive

11. Are there any other aspects of your legal order that could be of importance for the further discussions on this proposed Directive? If so, please highlight them.

SWEDEN

Questioning of suspects and accused persons in the pre-trial phase

An initial remark: Hereinbefore it is stated that the questions do not refer to the question how national laws and procedures should actually be, in the light of the European Convention on Human Rights and its case-law. However, in Sweden the European Convention on Human Rights is adopted as national law.

1. In your legal order, when a person that is suspected or accused of having committed a criminal offence is arrested (deprived of liberty) and asked by the police or investigating judge to reply to questions concerning the (alleged) crime committed,
 - a)
 - i) Does this person have the right to be assisted by a lawyer *before* such questioning?
The general provision on this subject states that a suspect, when preparing and conducting his defence may be assisted by a defence counsel. The defence counsel is also granted access to the arrested or detained person. In other words, generally, the answer is yes.
 - ii) In the affirmative: in which situations does this right exist?
As soon as the person is considered to be a suspect.
 - iii) If the person has the right to be assisted by a lawyer before questioning, may this right in your legal order be limited to the person contacting the lawyer by phone? If so, please indicate in which situations this may be the case.
No, a defence counsel for an arrested or detained person can not be denied access to such person.
 - b)
 - i) Does this person have the right to be assisted by a lawyer *during* such questioning?
Yes.

ii) In the affirmative: is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

The general provision on this matter states that the defence counsel may attend questioning if the presence of the defence counsel would not be of detriment to the inquiry. However, when it comes to questioning of the suspect the possibility of restricting this right is extremely limited. There are no explicit exceptions in the Swedish code of judicial procedure but the Parliamentary Ombudsman has declared that the questioning of a suspect without his defence counsel present is allowed only when the behaviour of defence counsel is making the questioning impossible and the defence counsel does not comply with rebukes from the interrogator.

- c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?

Yes.

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?

Automatically.

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

As soon as the person is considered to be a suspect and he or she is heard, that person should be informed about the suspicion and his or her right to be assisted by a defence counsel.

- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police or investigating judge to wait until the arrival of the lawyer before the questioning starts?

There are no explicit provisions on this matter. However there is a general provision stating that in preparing and conducting his or her defence, the suspect may be assisted by a defence counsel.

- ii) In the affirmative, how long (how many hours) do the police or investigating judge have to wait until the arrival of the lawyer?

See above.

- e) i) In your legal order, is there a possibility of making derogations to the right of a person to be assisted by a lawyer before and/or during questioning in the pre-trial phase? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police or investigating judge to proceed with the questioning without the presence of a lawyer, or without the lawyer having been contacted in advance by phone?

Theoretically yes, although the possibilities are extremely limited, see answer on question 1 b ii).

- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

See answer on question 1 b ii).

2. In your legal order, when a person is officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence and is asked to come 'voluntarily' to a police station in order to be questioned by the police in relation to that crime,

a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?
The general provision on this subject states that a suspect, when preparing and conducting his defence may be assisted by a defence counsel. In other words, generally, the answer is yes.

ii) In the affirmative: in which situations does this right exist?
As soon as the person is considered to be a suspect.

iii) If the person has a right to be assisted by a lawyer before questioning, is he informed of this right in the convocation for the questioning? If so, in what way?
As soon as the person is considered to be a suspect and he or she is heard, that person should be informed about the suspicion and his right to be assisted by a defence counsel. There are no provisions in what way the information should be given.

b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?
Yes.

ii) In the affirmative, is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.
See question 1 b ii).

iii) If the person has a right to be assisted by a lawyer during questioning, is he informed of this right in the convocation for the questioning? If so, in what way?
See question 2 a iii).

c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?
Yes.

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?

Automatically.

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

As soon as the person is considered to be a suspect and he or she is heard that person should be informed about the suspicion and his right to be assisted by a defence counsel.

- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?

See question 1 d i).

ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

See above.

- e) i) In your legal order, is there a possibility of making derogations to the right to be assisted by a lawyer before and/or during the questioning? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer?

Theoretically yes, although the possibilities are extremely limited, see question 1 b ii).

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

See answer on question 1 b ii).

3. In your legal order, when a person is stopped on the street by the police and, after having been officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence, is asked by the police to reply to questions concerning the (alleged) crime committed,

a) What kind of questions could be asked to this person? Is it possible to question the person regarding the alleged crime?

All questions are allowed.

b) i) Does this person have the right to be assisted by a lawyer during such questioning?

Yes.

ii) In the affirmative, in which situations does such a right exist?

When that person is considered to be a suspect.

iii) If the person has the right to be assisted by a lawyer, may this right be limited to the person contacting the lawyer by phone before questioning starts? If so, please indicate in which situations this may be the case.

No, the defence counsel is entitled to attend to the questioning.

c) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there an obligation in your legal order for the police or any other competent authorities to facilitate or assist the person in exercising this right?

Yes.

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only 'activated' further to a request of the person concerned?

Automatically.

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority?

As soon as the person is considered to be a suspect and he or she is heard that person should be informed about the suspicion and his right to be assisted by a defence counsel.

- d) i) If the person has a right to be assisted by a lawyer during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?

See question 1 d i).

- ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

See above.

- e) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there a possibility of making derogations to this right in your legal order? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer or without contact by phone having been made?

Theoretically yes, although the possibilities are extremely limited, see question 1 b ii).

- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

See question 1 b ii).

Evidence-gathering and investigating acts in the pre-trial stage

4. Questions regarding evidence-gathering or investigating acts in the pre-trial stage:

- a) i) In your legal order, does the suspect or accused person have a right for his lawyer to be present at evidence-gathering or investigating acts?

If the evidence gathering is not in the form of a questioning there are no provisions on this. (However, the Parliamentary Ombudsman has stated that the provisions regarding the right for the defence counsel to attend to questioning should be equally applied to reconstructions of the crime scene and other such evidence gathering).

- ii) In the affirmative, which evidence-gathering or investigating acts are concerned?

See above.

- b) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the competent authorities to facilitate or assist the person in exercising this right?

Not applicable.

- ii) In the affirmative, what are the concrete act(s) concerned that have to be taken by the competent authorities?

Not applicable.

- c) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before starting the evidence-gathering or investigating act?

Not applicable.

- ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer? Please specify as appropriate.

Not applicable.

d) i) In your legal order, is there a possibility of making derogations to the right of the suspected or accused person for his lawyer to be present at evidence-gathering or investigating act? In other words, if the person concerned wants to be assisted by a lawyer during such acts, is there nevertheless a possibility for the competent authorities to proceed with the evidence-gathering or investigating act without the lawyer being present?

Not applicable.

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

Not applicable.

Questioning in the pre-trial stage of persons who are initially not suspected or accused of having committed an offence but obtain this status during questioning

5. In your legal order, when a person that is initially not suspected or accused of an alleged crime, such as a witness, is questioned by the police or an investigating judge:

a) Does this person have the right to be assisted by a lawyer during questioning?

All persons that are questioned are entitled to be assisted by a counsel. The counsel must meet the requirements of a defence counsel. It doesn't have to be a lawyer.

b) When, during the questioning, such a person becomes suspected or accused of having committed a criminal offence, do the competent authorities have to inform the person concerned of this change of status?

Yes.

c) If the answer to question b) is positive:

i) When precisely do the competent authorities have to inform the person concerned?

The provision states that the obligation to inform occurs when the suspect is heard.

- ii) In what manner do the competent authorities have to inform the person concerned (notification, information, ...)?

There is no provision on this.

- iii) Do the competent authorities have to stop the questioning?

If the suspect so wishes.

- iv) Does the person concerned obtain the right to be assisted by a lawyer (when he did not have it before)? If so, as from which moment in time?

Yes. From the time he becomes suspected.

- v) May the statements made by the person before he was informed of the change of status be used in the ensuing criminal proceedings against him? If so, in which circumstances? Please specify as much as possible.

Yes. In all circumstances.

Minor offences

6. Questions regarding exclusions / minor offences:

- a) In your legal order, are there any categories of offences (in particular so-called "minor offences"), in respect of which the right to be assisted by a lawyer does not exist or is restricted, totally or partially, in the pre-trial phase?

No.

- b) In the affirmative, please describe the category or categories of exclusions as precisely as possible, defining the category by a common denominator, e.g.
- where the offence is initially dealt with in an administrative manner;
 - where pre-trial detention is not possible in relation to the offence concerned;
 - where deprivation of liberty cannot be imposed as a sanction in relation to the offence concerned;

- where the fine that may be imposed as a sanction in relation to the offence concerned does not exceed a certain amount;
- other definition.

Not applicable.

- b) In case your legal order contains one or more categories of exclusions: please indicate the consequence of each category of exclusion, e.g. is there a total or partial exclusion from the right to be assisted by a lawyer, does the exclusion entail different modalities for the assistance by a lawyer, etc. ...

Not applicable.

Lawyer provided by the State / Payment of lawyer's fees

7. The proposed Directive does not deal with the question of legal aid; even so the Presidency believes that the following questions regarding the payment of a lawyer's fee could have an impact on the formulation and application of the Directive.

With this in mind delegations are kindly invited to respond to the following questions:

- a) i) In your legal order, does an obligation exist for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *but cannot afford to pay a lawyer or cannot afford to pay the lawyer that he has chosen?*
- ii) If so, in which situations and under which conditions does such obligation exist?
When answering this question, please take into account the situations mentioned under questions 1-4.

- b) i) In your legal order, does there exist an obligation for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *even if he could himself afford to pay a lawyer, or the lawyer that he has chosen?*
- ii) If so, in which situations and under which conditions does such obligation exist? When answering this question, please take into account the situations mentioned under questions 1-4.

In preparing and conducting his defence, the suspect may be assisted by a defence counsel. In Sweden there are two types of defence counsels. Private defence counsels and public defence counsels. Public defence counsels are appointed by the court and paid for by the state. Private defence counsels are appointed by the suspect and paid for by him. A public defence counsel shall, as a principal rule, be a lawyer who is a member of the Swedish Bar Association. A private defence counsel can be a person deemed suitable by the court, by reason of that person's honesty, knowledge, and earlier activities. He or she shall master the Swedish language and in general be resident in Sweden.

When the preliminary investigation has advanced so far that a person is reasonably suspected of committing the offence, he shall, when he is heard, be notified of the suspicion. At the same time the suspect must be informed that he or she is entitled to appoint a defence counsel during the investigation, and that a public defence counsel can be appointed in certain circumstances. If a suspect under arrest or detained so request, a public defence counsel shall be appointed for him. A public defence counsel shall also be appointed upon request for a person who is suspected of an offence in respect of which a less severe sentence than six months imprisonment is not prescribed.

A public defence counsel shall also be appointed

- 1. if a defence counsel is needed by the suspect in connection with the inquiry into the offence,**
- 2. if a defence counsel is needed in view of doubt concerning which sanction shall be chosen and there is reason to impose a sentence for a sanction other than a fine or conditional sentence or such sanctions linked together, or**
- 3. if there are otherwise special reasons relating to the personal circumstances of the suspect or the subject of the case.**

The court takes the suspects wishes into consideration when it appoints the public defence counsel.

If the defendant is convicted in a case instituted by the prosecutor, the defendant shall reimburse the state for public funds spent pursuant to the court decision on remuneration for his public defence counsel. The sum that the defendant must pay may be adjusted or waived, if appropriate in light of the defendant's criminality or his personal and financial circumstances.

To summarise. A public defence counsel is paid for by the state. The need for a public defence counsel is not dependent of the suspect's ability to pay himself for a legal counsel, but for example the nature of the crime. If a suspect is convicted of the crime, he may if he has the economic conditions and it is reasonable have to pay back part of the defence costs to the state.

Principle of confidentiality

8. a) In your legal order, can any derogations be made to the principle of confidentiality of communication between the suspected or accused person and his lawyer?
- b) In the affirmative, in which situations can such derogations be made? Please specify as much as possible, and make a distinction, if appropriate, between oral and written communication, and between communication in the pre-trial phase and in the trial phase.

There a different rules between private defence counsels and public defence counsels. There are also specific rules for lawyers appointed by the Swedish Bar Association. Deviations from the principle of confidentiality applies primarily to private defence counsels who are not lawyers appointed by the Swedish Bar Association.

A defence counsel for an arrested or detained person shall not be denied access to such person. A public defence counsel shall be permitted to speak in private with the arrested or detained person. A private defence counsel may speak in private with his client only upon consent of the leader of the inquiry or of the prosecutor, or when the court considers it would neither impede the inquiry nor threaten order and security at the place of detention. Lawyers appointed by the Swedish Bar Association are bound, when good advocate mores so require, to keep confidential what they learn in the exercise of their profession. This does not apply to private defence counsels who are not members of the Swedish Bar Association.

Electronic communication between a suspect or accused person in pre-trial detention and their private defence counsel may be intercepted, if it is necessary for security reasons. Such interception must be notified in advance. A suspect or accused person in pre-trial detention may also be refused to send or receive an item from his private defence counsel if it is necessary for reasons of policy or security.

Waiver

9. a) In your legal order, does a suspect or accused person has the right to waive his right to be assisted by a lawyer?
- b) In the affirmative,
- i) What, if any, information has to be given to the person concerned prior to making the waiver?
 - ii) If such information has be to given:
 - which person(s) or authorities may / should give that information?
 - how is that information to be given (oral, writing, ...) ? Please specify.
 - iii) How is the waiver noted/registered? What are the formalities, if any?
 - iv) May a decision to waive the right to a lawyer be revoked, and if so,
 - may this be done at any stage of the proceedings?
 - are there any (other) limitations to the possibility of revoking a waiver?

- c) Are the answers to the questions under a) and b) different if the person concerned is a minor? If so, please specify.

The concept “waiver” doesn’t exist in Swedish law. However an adult person may, under certain circumstances, refrain from a public defence counsel. Anyone who has a public defence counsel and is convicted of a crime may be liable to repay the cost of the defence counsel. This could be one of the reasons that a suspect doesn’t want a defence counsel. The court makes however an assessment of the needs of a public defence counsel and if the court decides that there is such a need, a public defence counsel will be appointed regardless of whether the suspect wants it or not. The need for a public defence counsel can be reviewed at any time. When it comes to minors a public defence counsel shall be appointed if it is not obvious that there is no need for such a counsel.

Remedies

10. a) Does your national law provide for remedies in case of breach of the right of access to a lawyer?
- b) In the affirmative:
- i) which are those remedies?
 - ii) do the remedies also include the possibility for the (judicial) authorities to exclude evidence that has been obtained in breach of the right of access to a lawyer?

A central procedural rule in Sweden is the principle of free submission and assessment of evidence. The content of this principle is that the court shall determine, after evaluating everything that has occurred in accordance with the dictates of its conscience, what has been proved in the case. There are no formal restrictions of what evidence that may be presented during the trial. The court will evaluate the evidence and will then take into account i.a. the circumstances under which it was obtained. The European convention on human rights is part of Swedish law. Swedish judges therefore have very good knowledge about the convention and the case law of the European Court of human rights case law. When evaluating evidence obtained in breach of for example the right of access to a lawyer, the

court will take into account the convention and the case law of the European court of human rights case law. The effectiveness of rights of the defendant is also provided for by other means forming part of a large and complex set of rules (for example criminalization and disciplinary action for illegitimate investigative measures as well as supervision by the Parliamentary Ombudsman), which are there to ensure that we have effective rights of a suspected or accused person.

General concerns regarding the proposed Directive

11. Are there any other aspects of your legal order that could be of importance for the further discussions on this proposed Directive? If so, please highlight them.

UNITED KINGDOM

Questioning of suspects and accused persons in the pre-trial phase

1. In your legal order, when a person that is suspected or accused of having committed a criminal offence is arrested (deprived of liberty) and asked by the police or investigating judge to reply to questions concerning the (alleged) crime committed,

a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?

A suspect or accused person who has been arrested and held in police custody⁷ is entitled to legal assistance before being questioned by the police subject to the limited derogations that are set out in the answer to 1(e).⁸

ii) In the affirmative: in which situations does this right exist?

A person who is suspected or accused of having committed a criminal offence and is arrested and held in police custody, has the right to have a private consultation with a lawyer before they are questioned in order to obtain evidence of that offence, subject to the limited derogations that are set out in the answer to 1(e).

iii) If the person has the right to be assisted by a lawyer before questioning, may this right in your legal order be limited to the person contacting the lawyer by phone? If so, please indicate in which situations this may be the case.

In England and Wales in most cases the person will have access to free face-to-face legal advice. However, free legal advice will be provided over the telephone if the person is⁹:

- **Detained for a non-imprisonable offence;**
- **Arrested for failing to appear at court pursuant to a warrant and is being held for production before the court (except where the lawyer has clear documentary evidence that would result in the person being released);**
- **Arrested on suspicion of drink driving; or**
- **Detained in relation to breach of police or court bail conditions.**

⁷ Police and Criminal Evidence Act 1984 section 58

⁸ PACE Code C para 6.1

⁹ PACE Code C para 6B2

Attendance by a solicitor in these case, will however be required if certain limited exceptions apply, such as:

- if the police are going to carry out an interview or an identification parade,**
- if the detainee is eligible for assistance from an appropriate adult,**
- if the detainee is unable to communicate over the telephone,**
- if the detainee alleges serious maltreatment by the police.**

A person who wishes to pay for his own legal advice can always request a face to face meeting with his legal representative, subject to the same derogations that are set out in the answer to 1(e).

In Scotland a person who has been arrested or detained for questioning on suspicion of having committed an offence who has requested legal advice, is in the first instance offered a private consultation with a lawyer using a telephone helpline. However, the person has the right to the personal attendance of a lawyer both for a private consultation ahead of questioning and to be present during questioning. This right applies to all persons detained for questioning, regardless of the seriousness of the offence. Legal aid will be available to all for these consultations but the person may subsequently be required to pay a contribution based on ability to pay. These arrangements also apply where a person is asked to come voluntarily to a police station (question 2).

In Northern Ireland all detained persons must be informed of their right to free legal advice and police must act without delay to secure the provision of such advice subject to certain derogations. Generally, advice will involve face to face representation but the detainee has a right to speak with a lawyer on the telephone should this be requested.

- b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?

Yes, such a person may have a lawyer present during the interview¹⁰ subject to the limited derogations that are set out in the answer to 1(e).¹¹

- ii) In the affirmative: is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

All suspected or accused persons who are detained at a police station have the right to be assisted by a lawyer during questioning by the police for the purpose of obtaining evidence about the person's involvement in a criminal offence, subject to the limited derogations that are set out in the answers to 1 (e).

- c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?

Yes.

- ii) In the affirmative,
- does this obligation exist automatically in all cases, or is it only 'activated' further to a request of the person concerned?

The police must inform a person of their right to access legal advice as soon as they arrive at the police station after being arrested and ask whether they wish to exercise that right. If the detainee requests legal advice the police must act without delay to secure it.¹²

¹⁰ PACE Code C para 6.8

¹¹ PACE Code C para 6.6

¹² PACE Code C para 6.5. & Criminal Procedure (Scotland) Act section 15, para 7

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

In England and Wales if the detainee wants to access publicly funded legal advice a police officer (the custody sergeant) will telephone the Defence Solicitor Call Centre who, on the basis of the information provided by the custody sergeant, will determine whether a solicitor should attend or whether legal advice should be provided over the telephone. The scope of the telephone advice scheme is set out in the answer to 1(a)(iii).

If a detainee wants to pay for their own legal advice, he should be given the opportunity to consult a specific solicitor or another solicitor from that solicitor's firm. If this solicitor is unavailable, they may choose up to two alternatives. If these attempts are unsuccessful, the police officer has the discretion to allow further attempts until a solicitor has been contacted and agrees to provide legal advice.¹³ Any request for legal advice and the action taken by the police officer must be recorded.¹⁴

In Scotland if the suspect or accused person knows of a solicitor they wish to use a police officer will arrange for that solicitor to be contacted. If the person does not have a solicitor a police officer will arrange for one to be contacted via the Solicitor Contact Line. These arrangements also apply where a person is asked to come voluntarily to a police station (question 2).

In Northern Ireland if the detainee wants to access legal advice then the police must act without delay to secure it.

- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police or investigating judge to wait until the arrival of the lawyer before the questioning starts?

Yes, subject to the limited exceptions that are set out in the answer to 1(e).

¹³ PACE Code C para 6B2

¹⁴ PACE Code C para 6.16.

ii) In the affirmative, how long (how many hours) do the police or investigating judge have to wait until the arrival of the lawyer?

There is no specified period - it depends on the circumstances of the case. In general a detainee who wants legal advice may not be interviewed for the purpose of obtaining evidence about the offence until they have received such advice unless certain exceptions, listed in the answer to 1(e) apply.

e) i) In your legal order, is there a possibility of making derogations to the right of a person to be assisted by a lawyer before and/or during questioning in the pre-trial phase? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police or investigating judge to proceed with the questioning without the presence of a lawyer, or without the lawyer having been contacted in advance by phone?

Yes

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

The rules for restricting access to legal advice in England and Wales and Northern Ireland are broadly similar across suspects accused of all offences. The general factors which would permit the right to legal assistance to be restricted are set out below.¹⁵ The right to access legal assistance may only be restricted where a police officer of appropriate seniority has reasonable grounds to believe that (broadly speaking) exercising the right immediately:

- **will lead to interference with or harm to evidence connected with an offence**
- **interference with or physical injury to persons;**
- **will lead to the alerting of other persons suspected of having committed an offence but not yet arrested for it;**
- **will lead to a serious loss of, or damage to property**
- **will hinder the recovery of any property obtained as a result of an offence.**

Appropriate safeguards are in place to ensure that any restriction remains proportionate. These include a bar on drawing any adverse inference from an accused’s silence when he has not had the opportunity to consult a lawyer.

Additionally, an interview may proceed in the absence of a lawyer where awaiting his attendance would cause unreasonable delay to the investigation. In such cases, no adverse inference may be drawn from the accused’s silence.

There may also be circumstances in which an interview may proceed in the absence of a lawyer where the accused’s preferred lawyer is unavailable, and the accused refuses to accept advice from a “duty solicitor”. In such cases, adverse inferences may be drawn from silence, as the accused will have had every opportunity to access legal advice.

¹⁵ In addition to the general factors that are listed, when a suspect is detained at a police station in relation to a terrorism offence, a senior police officer may authorise a delay to the right to legal assistance if he has reasonable grounds for believing that doing so would: interfere with the gathering of information about the commission, preparation or instigation of acts of terrorism; or alert a person and thereby make it more difficult to prevent an act of terrorism. This is set out in the Terrorism Act 2000, Paragraph 8, Schedule 8.

Similarly, in Scotland, in exceptional circumstances, which occur rarely, a police officer may delay the suspect's exercise of the right to consult a lawyer so far as it is necessary, in the interest of the investigation or the prevention of crime or the apprehension of offenders, that the questioning of the suspect by a constable begins or continues without the suspect having had a private consultation with a solicitor. ¹⁶In Scotland, in no situation can an adverse inference be drawn from a suspect remaining silent during a police interview. ¹⁷

2. In your legal order, when a person is officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence and is asked to come 'voluntarily' to a police station in order to be questioned by the police in relation to that crime,

a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?

Yes.¹⁸

ii) In the affirmative: in which situations does this right exist?

In England and Wales and Northern Ireland all persons who have been cautioned on suspicion of having committed a criminal offence and who attend the police station voluntarily, have the right to be assisted by a lawyer at public expense before being questioned for the purposes of obtaining evidence of the offence.

iii) If the person has a right to be assisted by a lawyer before questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

Yes.¹⁹ **In England and Wales when a person is invited to attend the interview under caution, before being questioned the person must be told of their right to legal advice and given a notice explaining the arrangements for obtaining advice.**

¹⁶ PACE Code C para 6.5. & Criminal Procedure (Scotland) Act section 15 para 8.

¹⁷ ³ *Robertson v Maxwell* 1951 JC 11

¹⁸ PACE Code C Section 1A.

¹⁹ PACE Code C paragraph 3.21 & 3.22.

In Scotland, the process for explaining the right of a suspect to legal advice (before and during questioning) is the same whether they are detained/arrested or invited voluntarily for questioning, This is done by the police officer going through the questions in the Solicitor Access Recording Form²⁰ with the suspect.

b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?

Yes²¹

ii) In the affirmative, is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

The exceptions set out in the answer to 1(e) do not apply to voluntary interviews at the police station because the person is attending voluntarily and cannot therefore be prevented from seeking legal advice if they wish.

iii) If the person has a right to be assisted by a lawyer during questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

Yes, further to the answer given to 2(a)(ii) suspects or accused persons are informed of their right to be assisted by a lawyer during questioning when they are invited to attend the police station for an interview. In England and Wales and Northern Ireland they are given a notice which explains this right. Further information about what is said in the Notice is given in the answer to question 9.

c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?

Yes.

²⁰ ACPOS Manual of Guidance on Solicitor Access

²¹ PACE Code C paragraph 3.21 & 3.22.

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned.

Whilst a person will be informed of his right to legal advice in every case, steps to facilitate this access will only be taken at the request of the person concerned.

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

In England and Wales when a suspect is being interviewed in a police station and has requested to access publicly funded legal advice, a police officer must telephone the Defence Solicitor Call Centre who will determine whether legal advice should be limited to telephone advice or whether a solicitor should attend, in line with the conditions set out in the answer to 1(a)(ii).

In Scotland the Police call the Solicitor Contact Line which facilitates the provision of advice, either through an Solicitor Contact Line solicitor or through a nominated solicitor. Personal attendances are arranged where requested by the suspect.

- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?

Yes.

- ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

The police will need to wait until the lawyer arrives: because the person is attending the police station voluntarily, a request for legal advice cannot be denied, and police cannot proceed with a voluntary interview without the suspect’s agreement.

i) In your legal order, is there a possibility of making derogations to the right to be assisted by a lawyer before and/or during the questioning? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer?

No. Because the person is attending voluntarily, he cannot be prevented from seeking legal advice if this is requested, and the police cannot proceed with a voluntary interview without the suspect's agreement.

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

3. In your legal order, when a person is stopped on the street by the police and, after having been officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence, is asked by the police to reply to questions concerning the (alleged) crime committed,

a) What kind of questions could be asked to this person? Is it possible to question the person regarding the alleged crime?

England and Wales:

Following a decision to arrest²², the police must not ask a person any questions to obtain evidence about the relevant offence except at a police station or other authorised place of detention, unless the consequent delay in reaching the police station would be likely to:

(a) lead to:

- **interference with, or harm to, evidence connected with an offence;**
- **interference with, or physical harm to, other people; or**
- **serious loss of, or damage to, property;**

²² PACE Code C paragraph 11.1.

- (b) lead to alerting other people suspected of committing an offence but not yet arrested for it; or**
- (c) hinder the recovery of property obtained in consequence of the commission of an offence.**

For example, for safety reasons the police may want to ask a suspected or accused person whether they are carrying a dangerous weapon or, in relation to terrorism investigations, if they are aware of the presence and location of substances or devices which may cause a risk to public safety.

Interviewing in any of these circumstances must stop once the relevant risk has been averted and the necessary questions have been put in order to attempt to avert that risk.²³

If the police stop a driver on suspicion of driving under the influence of alcohol or drugs they are permitted to ask relevant questions (without the presence of a lawyer) to enable preliminary testing to be carried out at the scene.²⁴ This is due to the fact that delay in conducting such tests, (which would inevitably result if the presence of a lawyer was required) can compromise evidence.

If such a driver is arrested and taken to or is otherwise at a police station, a hospital or elsewhere, police may require breath, blood, urine, impairment or saliva testing. The police are permitted to ask relevant questions (without the presence of a lawyer) to ensure the validity of that evidence for the same reasons as above.

²³ PACE Code C Section 11.1.A

²⁴ Section 6 of the Road Traffic Act 1988.

In Scotland,²⁵ the position is broadly similar. The point at which access to a solicitor should be made available in Scotland was considered recently by the Supreme Court in the cases of *Ambrose v Harris*, *HMA v G* and *HMA v M*. The Supreme Court held that in principle the line as to when access to legal advice must be provided before the person is questioned should be drawn as from the moment that he has been taken to into police custody, or when his freedom of action has been significantly curtailed. Freedom of action will be significantly curtailed when the accused is in effective police custody. At this point questioning should cease and access to a lawyer should be provided.

b) i) Does this person have the right to be assisted by a lawyer during such questioning?

Lawyers will not be provided by the State on the street. If the person is cautioned but not arrested, they must be told that they are free to leave and they cannot be compelled to remain to be questioned²⁶. As such they cannot be prevented from seeking legal advice if they wish and police cannot proceed with a voluntary interview without the suspect's agreement.

If the person is arrested he would normally be taken immediately to the police station for questioning.

ii) In the affirmative, in which situations does such a right exist?

Not applicable.

iii) If the person has the right to be assisted by a lawyer, may this right be limited to the person contacting the lawyer by phone before questioning starts? If so, please indicate in which situations this may be the case.

Not applicable.

²⁵ ACPOS Manual of Guidance on Solicitor Access

²⁶ PACE Code C paragraph 3.21, & 10.2.

- e) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there an obligation in your legal order for the police or any other competent authorities to facilitate or assist the person in exercising this right?

Not applicable.

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?
- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority?

Not applicable.

- d) i) If the person has a right to be assisted by a lawyer during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?

ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

Not applicable.

- e) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there a possibility of making derogations to this right in your legal order? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer or without contact by phone having been made?

Not applicable

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

Not applicable.

Evidence-gathering and investigating acts in the pre-trial stage

4. Questions regarding evidence-gathering or investigating acts in the pre-trial stage:

- a) i) In your legal order, does the suspect or accused person have a right for his lawyer to be present at evidence-gathering or investigating acts?

Yes, but only for the evidence gathering or investigating acts listed below.

ii) In the affirmative, which evidence-gathering or investigating acts are concerned?

In England and Wales and Northern Ireland the suspect or accused person has a right for his lawyer to be present at the following acts:

The taking of intimate samples^{27 28}

Identification parades²⁹

Video identification³⁰

Group identifications with the consent of the suspect.^{31 32}

Confrontation by a witness for identification purposes.³³

In Scotland lawyers have the right to attend identification parades and video identification. In Scotland lawyers may only attend the taking of an intimate sample with the consent of the police. In Scotland group identifications and confrontations are not used.

²⁸ PACE Code D, para 6.3 (b)

²⁹ PACE Code D Annex B, part (a) para (1).

³⁰ PACE Code D para 3.17

³¹ **Group identifications take place outside a police station in a public place where other people are either passing by or waiting around informally in groups, so that the suspect is able to join them and be capable of being seen by the witness at the same time as the others in the group.**

³² PACE Code D para 3.17

³³ PACE Code D Annex D para 4.

b) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the competent authorities to facilitate or assist the person in exercising this right? **Yes, as set out in the answer to question 1(c).**

ii) In the affirmative, what are the concrete act(s) concerned that have to be taken by the competent authorities?

Please refer to the answer to question 1.c.ii .

c) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before starting the evidence-gathering or investigating act? **Please refer to the answer to question 4(d)(ii).**

ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer? Please specify as appropriate.

d) i) In your legal order, is there a possibility of making derogations to the right of the suspected or accused person for his lawyer to be present at evidence-gathering or investigating act? In other words, if the person concerned wants to be assisted by a lawyer during such acts, is there nevertheless a possibility for the competent authorities to proceed with the evidence-gathering or investigating act without the lawyer being present?

Yes.

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

The extent to which a suspect or accused person is entitled to legal assistance during evidence gathering procedures depends on the procedure in question. In England and Wales, the position is as follows:

- **Where a suspect or accused person in police detention is required to give an intimate or non-intimate sample, he is entitled to legal advice³⁴. The right to access legal advice may only be restricted in accordance with the answer given to question 1(e).**
- **Where a suspect or accused person participates in an identification parade³⁵, he must be given a “reasonable” opportunity to have a solicitor or friend present. An identity parade at which the witness is screened from the suspect or accused person may only take place when a lawyer is present or where the procedure is video-recorded.**
- **When a witness participates in a video identification³⁶, the suspect or accused person must be given a reasonable opportunity to have a friend or solicitor review the images before they are put to a witness.**
- **A suspect or accused person who agrees to participate in a group identification procedure must be given a reasonable opportunity to have a solicitor or friend present³⁷.**
- **Where a suspect or accused person participates in a confrontation by a witness, this must take place in the presence of the suspect’s solicitor, interpreter or friend unless this would cause unreasonable delay.**

³⁴ PACE Code C, para 17.6(d)

³⁵ PACE Code D Annex B, part (a) para (1).

³⁶ PACE Code D, Annex A, paragraph 7 para 3.17

³⁷ PACE Code D, Annex C, paragraph 13. Group identifications take place outside a police station in a public place where other people are either passing by or waiting around informally in groups, so that the suspect is able to join them and be capable of being seen by the witness at the same time as the others in the group.

In Scotland a memorandum of understanding is being established under the police station duty scheme to set targets for time taken to attend.

Questioning in the pre-trial stage of persons who are initially not suspected or accused of having committed an offence but obtain this status during questioning

5. In your legal order, when a person that is initially not suspected or accused of an alleged crime, such as a witness, is questioned by the police or an investigating judge:

a) Does this person have the right to be assisted by a lawyer during questioning?

Legal advice is not provided by the State for persons who are not suspected or accused of having committed an offence. However, a person, not suspected or accused of having committed a criminal offence, who voluntarily assists the police with their enquiries, cannot be prevented from accessing legal advice at any time.

e) When, during the questioning, such a person becomes suspected or accused of having committed a criminal offence, do the competent authorities have to inform the person concerned of this change of status?

If the competent authorities wish to put questions the answers to which might provide grounds for suspicion then the police must “caution” that person, and he will be informed of his right to access free legal advice³⁸. If the decision is made to arrest the person any further questioning must be under caution. However, if the police do not arrest the person and do not wish to ask further questions there is no obligation to inform the person of the change of status and he will be free to leave.

³⁸ PACE Code C para 3.21

- c) If the answer to question b) is positive:
- i) When precisely do the competent authorities have to inform the person concerned?

Where there are grounds to suspect that the person has been involved in an offence, and the police want to ask questions of that person in relation to the offence³⁹.

- ii) In what manner do the competent authorities have to inform the person concerned (notification, information, ...)?

By the words of the caution, the reasons/grounds for the arrest and nature of the offence and the explanation and notice about their right to legal advice which the suspect must be given. As set out in the answer to question 1.

In Scotland, if during a police interview a witness became a suspect the police would need to tell the person their status had changed and caution them. The police would then go through the Solicitor Access Recording Form procedure.

- iii) Do the competent authorities have to stop the questioning?

Yes, until such time that the suspect has been given the relevant information and their right to legal advice has been explained and they have been asked whether they wish to exercise it as explained in question 1.

- iv) Does the person concerned obtain the right to be assisted by a lawyer (when he did not have it before)? If so, as from which moment in time?

A person who attends a police station voluntarily who is not yet a suspect has the right to access legal advice at any time but is not provided with a lawyer. At the point that a volunteer becomes a suspect, where the person is cautioned he will be informed of his right to a lawyer.

³⁹ PACE Code C para 10.1

- v) May the statements made by the person before he was informed of the change of status be used in the ensuing criminal proceedings against him? If so, in which circumstances? Please specify as much as possible.

Yes. In the UK decisions on admissibility of evidence are made by the trial judge having regard to the overall fairness of the proceedings.

Minor offences

6. Questions regarding exclusions / minor offences:

- a) In your legal order, are there any categories of offences (in particular so-called "minor offences"), in respect of which the right to be assisted by a lawyer does not exist or is restricted, totally or partially, in the pre-trial phase?

Yes.

- b) In the affirmative, please describe the category or categories of exclusions as precisely as possible, defining the category by a common denominator, e.g.

- where the offence is initially dealt with in an administrative manner;
 - where pre-trial detention is not possible in relation to the offence concerned;
 - where deprivation of liberty cannot be imposed as a sanction in relation to the offence concerned;
 - where the fine that may be imposed as a sanction in relation to the offence concerned does not exceed a certain amount;
- other definition.

In England and Wales, there are certain minor offences which may be dealt with by the issue of a Penalty Notice by the police. These offences include minor traffic offences, being drunk and disorderly and dropping litter. Such a notice may be issued where the police suspect a person of having committed one of these offences. On payment of the Penalty Notice, no further action will be taken against the person.

However, such a person may opt to be tried in court instead of accepting the Penalty Notice. Ordinarily, if such a person opts to be tried in court and is convicted, he will be ordered to pay a fine in excess of the penalty amount.

The rules for questioning, and providing legal advice to, a person suspected of an offence which may be dealt with by way of a Penalty Notice are the same as for any other suspect (as set out in the responses above). However, owing to the process for issuing a Penalty Notice, many persons suspected of such an offence will not be provided with legal advice by the state, as they will not have entered police custody. But such persons may not be prevented from accessing legal advice at their own cost.

In Scotland, there are 2 types of disposal where the right to legal advice, may not trigger at the time (although the person charged can seek their own legal advice if they wish). The 2 disposals are:

- 1. police fixed penalty notices (£40) (typically on the spot penalties) which are used for anti-social behaviour. The person charged can be reject the charge – in these circumstances the Crown can chose to prosecute, in which case there is a right to legal advice.**
- 2. Fiscal fines which are used for less serious summary business (up to £300, 50 hour work order, and £5,000 compensation to victim). Similarly, The person fined can reject the fine – in these circumstances the Crown can chose to prosecute, in which case there is a right to legal advice.**

Northern Ireland

A range of out of court diversions are also available to police in Northern Ireland. This includes a discretionary disposal, an informed warning, a restorative caution, a caution or a fixed penalty notice. Such disposals would only apply to minor infringements and would not generally require the involvement of a lawyer.

In the United Kingdom, the armed forces maintain a distinct system of Service law to ensure operational effectiveness and to ensure that the service disciplinary system operates effectively anywhere in the world. Persons subject to Service law who are alleged to have committed a Service offence may be investigated and charged; if charged a person may be brought before their commanding officer at summary hearing (for certain offences) or before the Court Martial. Summary Hearings deal with offences that are generally minor in nature; however the commanding officer can hear criminal conduct offences such as, assault, theft and possession of a controlled drug.

Summary hearings enable the commanding officer to exercise immediate and effective authority in all situations including on operations. An accused person may elect to be tried by Court Martial rather than have the case heard by the commanding officer. This ensures that the system is compliant with the European Convention on Human Rights.

A summary hearing is an inquisitorial process. There is no prosecutor and in a contested summary hearing the role of the officer hearing the charge is to determine the facts of the case, based on evidence heard from the accused and any witnesses. The accused is not able to be legally represented at the hearing. Legal advice can be sought before the hearing, but no legal aid is provided

Lawyer provided by the State / Payment of lawyer's fees

7. The proposed Directive does not deal with the question of legal aid; even so the Presidency believes that the following questions regarding the payment of a lawyer's fee could have an impact on the formulation and application of the Directive.

With this in mind delegations are kindly invited to respond to the following questions:

- a) i) In your legal order, does an obligation exist for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *but cannot afford to pay a lawyer or cannot afford to pay the lawyer that he has chosen?*

Yes

- ii) If so, in which situations and under which conditions does such obligation exist? When answering this question, please take into account the situations mentioned under questions 1-4.

England and Wales and Northern Ireland

Access to a lawyer is provided free of charge in the police station.

In proceedings before a court, an accused may be eligible for legal aid to prepare their defence and represent them in a magistrates' court and the Crown Court. To qualify for this, their case has to meet both a means and a merits ('interests of justice') test. In the magistrates' court, if the client passes the merits and the means test they will receive free legal aid. In the Crown Court, if a client passes the 'interests of justice' test they will automatically be entitled to legal aid, however, following a test of the persons financial means, around 1 in 4 clients have to contribute towards their defence costs. The type of proceedings a client is facing in the Crown Court will determine how the means test will be applied. This is different from the magistrates' court scheme where those who fail the means test must pay privately for all the cost of their representation.

In applying the 'interests of justice' test, the court takes a number of factors into consideration, including whether the charge is so serious that, if convicted, the defendant is likely to be imprisoned or suffer a loss of livelihood. Other relevant circumstances and factors which are taken into account include the complexity of the case and the capacity of the individual to represent themselves, for example, if they are unable to follow proceedings because of an inadequate knowledge of English.

Scotland

Criminal legal assistance helps people who have been charged with a criminal offence to get legal advice and “representation” to put their case in court. The cost of this is met from public funds through the Scottish Legal Aid Board. There are however, circumstances when a contribution would be payable.

If the police keep a person in custody, they will appear before a sheriff or magistrate in court on the first court day after their arrest. They may, if they wish, use the duty solicitor. A duty solicitor is always available at every sheriff and district court in Scotland. The person has the right to use the duty solicitor, regardless of their financial circumstances. He or she can represent the person at their first appearance in court and, if they plead guilty, deal with any follow-up hearings until the end of the case. The person will not have to apply for legal aid for this, and they won't have to pay for using the duty solicitor.

However, if they want a solicitor other than the duty solicitor to represent them at their appearance in court, they have the right to ask one to do so but they may have to pay for this themselves. Any solicitor who acts for them and is to be paid from public funds must be on the Criminal Legal Assistance Register. If they choose a solicitor rather than using the duty solicitor, they will be able to tell the person whether they are registered to provide criminal legal assistance. All duty solicitors are registered. If no solicitor in the area will take the case, the person should contact The Scottish Legal Aid Board. The solicitor may be able to give the person “advice and assistance” to help them prepare for their court appearance.

What happens then will depend on:

- whether the person pleads guilty or not guilty; and**
- whether the charges against them are “summary” or “solemn”.**

If the person decides to plead guilty, the duty solicitor will continue to act for them until the case is finished. They will not have to pay anything for this. If a person pleads guilty, they cannot get full criminal legal aid to use their own solicitor to represent them. The solicitor may however, be able to use “advice and assistance” to give them help and advice about the case. He or she can also help by writing to the court on their behalf, but cannot represent them in court under advice and assistance. Because this is advice and assistance and not legal aid, the solicitor may sometimes have to ask the person for a contribution towards this work,

If the person decides to plead not guilty, they can apply for criminal legal aid. How they do this depends on the seriousness of the charges. The person’s solicitor can tell them whether they have to apply to the Board for legal aid or whether the court will decide.

For summary (non-jury) cases, the person should apply to the Board for legal aid within 14 days of pleading not guilty. The solicitor will have to do this for the person. The decision will depend on whether:

(a) the Board considers that they could pay their own legal costs without suffering undue hardship – this will depend on their financial circumstances, and on the likely cost of the case;

(b) they may be able to be able to get help with the costs of the case from someone else – for example, from insurance or a union;

(c) it is in the interests of justice for them to be granted legal aid. This includes questions such as –

- are they likely to go to prison or lose them their job if they are found guilty?**

- will the case be complicated to argue in court because the evidence is difficult?**

- can they understand the proceedings?**

- is it in someone else’s interests for them to be represented in court?**

- does the person have a defence?**

- b) i) In your legal order, does there exist an obligation for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *even if he could himself afford to pay a lawyer, or the lawyer that he has chosen?*

Yes.

- ii) If so, in which situations and under which conditions does such obligation exist?

When answering this question, please take into account the situations mentioned under questions 1-4.

In England and Wales when a suspect or accused person is questioned at a police station, either under arrest or having gone there voluntarily to answer questions concerning an alleged criminal offence, or is present at the evidence-gathering and investigating acts (as listed in the response to question 3) they are eligible for publicly funded legal advice regardless of their ability to pay for it. In the circumstances outlined in the answer to 1(a)(iii) legal advice is given over the telephone.

In Scotland free, non-means tested legal aid is available to people who have been detained in a police station and accused of murder, attempted murder or culpable homicide.

In Northern Ireland people who have been detained a police station can obtain free legal advice.

Principle of confidentiality

8. a) In your legal order, can any derogations be made to the principle of confidentiality of communication between the suspected or accused person and his lawyer?

Across the UK the law is very clear that confidentiality of the lawyer/client relationship is an important principle. However very limited exceptions to confidentiality are permitted.

- b) In the affirmative, in which situations can such derogations be made? Please specify as much as possible, and make a distinction, if appropriate, between oral and written communication, and between communication in the pre-trial phase and in the trial phase.

Written communication to prisons at the pre-trial and trial phases to prisons.⁴⁰

In England, Wales and Northern Ireland, correspondence to an accused person detained in prison from their legal advisor may be opened, but not read, if the governor has reasonable cause to believe that it contains an illicit enclosure. Correspondence to an accused person detained in prison from their legal advisor may be opened, read and stopped if the governor has reasonable cause to believe its contents endanger prison security or the safety of others or are otherwise of a criminal nature. A prisoner shall be given the opportunity to be present when any such correspondence is opened and shall be informed if it or any enclosure is to be read or stopped.

In Scotland, correspondence to an accused person detained in prison from their legal advisor may be opened and read if the governor has reasonable cause to believe its contents endanger prison security or the safety of others or are otherwise of a criminal nature. Where the contents of any such correspondence are found to endanger prison security or the safety of others or are otherwise of a criminal nature, the correspondence can be withheld from the prisoner.

⁴⁰ Prison Rules 1999 – Rule 39

Covert surveillance in premises where legally privileged communication takes place between a suspect or accused person and their lawyer, at a time when they are being used for this purpose, is only permitted in a very restricted range of cases, such as where there is a threat to life or limb, or to national security, The surveillance must reasonably be regarded as likely to yield intelligence necessary to counter the threat and any covert surveillance must be proportionate to what is sought to be achieved. The conduct of covert surveillance of legally privileged information is limited in law to intelligence and law enforcement agencies investigating national security or serious crime and is subject to enhanced authorisation procedures. In addition, prior approval must be given by the Secretary of State (for intelligence agencies) or an independent Surveillance Commissioner (for law enforcement agencies).⁴²

Waiver

9. a) In your legal order, does a suspect or accused person has the right to waive his right to be assisted by a lawyer?

Yes.

- b) In the affirmative,
- i) What, if any, information has to be given to the person concerned prior to making the waiver?
 - ii) If such information has be to given:
 - which person(s) or authorities may / should give that information?
 - how is that information to be given (oral, writing,) ? Please specify.

⁴¹ Court Surveillance and Property Interference. Revised Code of Practice Pursuant to section 71 of the Regulation of Investigatory Powers Act.

⁴² In England and Wales, Scotland and Northern Ireland, in very exceptional circumstances, relating to suspects or accused persons who have been detained in relation to committing a terrorist offence, a senior police officer may direct that they, should only be allowed to consult a solicitor in the sight and hearing of a uniformed police officer, not connected with the particular investigation. This is set out in the Terrorism Act 2000 – Schedule 8, para 9.

iii) How is the waiver noted/registered? What are the formalities, if any?

When a person is brought to a police station under arrest or is arrested at the station having gone there voluntarily a police officer must inform them that they may at any time consult and communicate privately with a solicitor and that free independent legal advice is available. In England and Wales a poster advertising the right to legal advice must be prominently displayed in the charging area of every police station. Upon arrest, detainees are given a copy of the “Notice of Rights and Entitlements” which contains the following information about the right to access legal advice:

- a lawyer can help and advise them about the law;
- if they want legal advice the police are not usually allowed to ask them questions until they have spoken to their solicitor and the solicitor can be present at any questioning.
- that asking to speak to a solicitor does not make it look like they have done anything wrong.
- Legal advice is free and that the Defence Solicitor Call Centre and duty solicitors are independent services and have nothing to do with the police ; and
- That if they tell the police that they don't want legal advice but then change their mind, they can tell the police who will then help them to contact a solicitor.

If, on being informed, or reminded of this right, the detainee declines to speak to a solicitor in person, the officer should point out that the right includes the right to speak to a solicitor on the telephone. If the detainee continues to waive this right the officer should ask them why and any reasons should be recorded in writing on the custody record or the interview record as appropriate. Once it is clear a detainee does not want to speak to a solicitor in person or by telephone they should cease to be asked their reasons.

In Northern Ireland police are required to provide a detained person with a ‘Notice of Rights and Entitlements’ which states that the person has the right to speak to a solicitor and apply for legal aid.

In Scotland, the Solicitor Access Recording Form is used to record if a suspect wishes to waive their right to legal advice. It does not note the suspect’s reasons for waiving.

The Scottish position in relation to waiver has been recently considered in the Supreme Court in *McGowan v B* [2011] UKSC 54;. When an accused having been informed of his rights, states that he does not want to exercise them, his express waiver of those rights will normally be held to be effective. The minimum guarantees are that he has been told of his right and that the waiver was freely and voluntarily made.

- iv) May a decision to waive the right to a lawyer be revoked, and if so,
 - may this be done at any stage of the proceedings?
 - are there any (other) limitations to the possibility of revoking a waiver?

A person who has waived the right to legal advice may revoke this at any time during police questioning.

During the trial, there is no general rule that an accused is able to revoke a waiver. Much will depend on the circumstances of the case, and whether the judge conducting the trial considers that allowing an accused to revoke the waiver is in the interests of justice.

- c) Are the answers to the questions under a) and b) different if the person concerned is a minor? If so, please specify.

England and Wales and Northern Ireland

In the case of a minor, an appropriate adult⁴³ should consider whether legal advice from a solicitor is required. If the minor indicates that they do not want legal advice, the appropriate adult has the right to ask for a solicitor to attend if this would be in the best interests of the person. However, the detained person cannot be forced to see the solicitor if he is adamant that he does not wish to do so.⁴⁴

In Scotland, police will only discuss access to legal advice for suspects who are minors (those under 16 or 16/17 year olds under supervision) with their responsible adult. For minors, the right to legal advice can only be waived with the agreement of their responsible adult.

⁴³ An appropriate adult is a person whose role it is to the minor's parent, guardian or a social worker, or some other responsible person over the age of 18 who is not employed by the police.

⁴⁴ PACE Code C, para 6.5a

Remedies

10. a) Does your national law provide for remedies in case of breach of the right of access to a lawyer?

Yes

- b) In the affirmative:
- i) which are those remedies?
 - ii) do the remedies also include the possibility for the (judicial) authorities to exclude evidence that has been obtained in breach of the right of access to a lawyer?

Yes - In the UK decisions on admissibility of evidence are made by the trial judge having regard to the overall fairness of the proceedings. Depending on the circumstances of the case, a judge may decide not to admit evidence which has been obtained in the absence of legal advice. Courts must ensure the overall fairness of proceedings to ensure compliance with the fair trial guarantees of the Article 6 of the European Convention on Human Rights. The parties to proceedings have recourse to a number of mechanisms to ensure that a trial is conducted fairly, whilst the judiciary have a broad array of powers at their disposal to achieve this. Accused persons have the right to appeal and apply for the judicial review of certain types of decision.

Complaints about police conduct can be made to an independent body. In England and Wales this is explicitly set out in the Notice of Rights and Entitlements that is given to arrested people in police stations.

General concerns regarding the proposed Directive

11. Are there any other aspects of your legal order that could be of importance for the further discussions on this proposed Directive? If so, please highlight them.

Role of a solicitor during a police interview

In England and Wales and Northern Ireland, during a police interview of a suspected or accused person the solicitor may intervene in order to seek clarification, challenge an improper question to their client or the manner in which it was put, advise their client not to reply to particular questions, or if they wish to give their client further advice. The solicitor may be required to leave the interview if their conduct is such that the interviewer is unable properly to put questions to the suspect. If this happens, the suspect will be given the opportunity to consult another solicitor before the interview continues and that solicitor should be given the opportunity to be present at the interview.⁴⁵

The use of accredited representatives.

In England and Wales “accredited representatives” commonly provide legal advice to suspects and accused persons at a police station, but are unable to participate in the later stages of proceedings. Accredited representatives will have received legal training and are regulated by a statutory body (the Legal Services Commission) but are not fully qualified lawyers. They usually operate under the supervision of a law firm and are generally used in cases of less serious offending.

⁴⁵ PACE Code C, paras 6.9, 6.10, 6D & 6E.

Questioning by enforcement authorities other than the police.

In the UK, enforcement authorities such as the Department for Work and Pensions and the Health and Safety Executive can question people ‘voluntarily’ in relation to criminal offences such as benefit fraud. Suspects or accused persons are sent a letter inviting them to attend an interview under caution. The letter explains to suspects that as they are to be interviewed under caution about their suspected involvement in a criminal offence they ought to consider obtaining legal advice prior to or during the interview under caution.

When a suspect or accused person is questioned voluntarily outside a police station in relation to a criminal offence, they may be eligible to legal aid subject to a test of their financial means.

CROATIA

Questioning of suspects and accused persons in the pre-trial phase

1. In your legal order, when a person that is suspected or accused of having committed a criminal offence is arrested (deprived of liberty) and asked by the police or investigating judge to reply to questions concerning the (alleged) crime committed,
 - a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?
- **Yes**
 - ii) In the affirmative: in which situations does this right exist?
- **In all cases of interrogation of person**
 - iii) If the person has the right to be assisted by a lawyer before questioning, may this right in your legal order be limited to the person contacting the lawyer by phone? If so, please indicate in which situations this may be the case.
- **No**
 - b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?
- **Yes**
 - ii) In the affirmative: is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.
The lawyer can be present in every case when the defendant is being interrogated.
 - c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?
- **Yes**

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only 'activated' further to a request of the person concerned?

-In all cases

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

The interrogating authority shall allow the defendant to retain a defence counsel of his own choice and shall therefore recess the interrogation until the arrival of the defence counsel at the latest up to three hours from the moment when the defendant stated he would like to retain a defence counsel of his own choice and that he would like him to be present at interrogation. If the circumstances indicate that the selected defence counsel cannot arrive within this term, the interrogating authority shall allow the defendant to retain a defence counsel from the list of attorneys on duty which is compiled according to the law. If the defendant did not retain a defence counsel from the list referred, and it is the case of mandatory defence, the president of the court shall, by virtue of the office, upon the request of the court or the State Attorney, appoint a defence counsel to represent him.

i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police or investigating judge to wait until the arrival of the lawyer before the questioning starts?

- Yes

ii) In the affirmative, how long (how many hours) do the police or investigating judge have to wait until the arrival of the lawyer?

- 3 hours

d) i) In your legal order, is there a possibility of making derogations to the right of a person to be assisted by a lawyer before and/or during questioning in the pre-trial phase? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police or investigating judge to proceed with the questioning without the presence of a lawyer, or without the lawyer having been contacted in advance by phone?

- **No**

ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

2. In your legal order, when a person is officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence and is asked to come 'voluntarily' to a police station in order to be questioned by the police in relation to that crime,

a) i) Does this person have the right to be assisted by a lawyer *before* such questioning?

- **Yes**

ii) In the affirmative: in which situations does this right exist?

- **In every case**

iii) If the person has a right to be assisted by a lawyer before questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

The person is always informed of his right to be assisted by a lawyer. Together with the summons to the first interrogation, the written Instruction of rights is delivered to the person. The Instruction of rights must contain, amongst other things, the notification that he has the right to retain a defence counsel of his own choice, or, when provided by this Act, a defence counsel shall be appointed to him by the virtue of the office.

- b) i) Does this person have the right to be assisted by a lawyer *during* such questioning?

Yes

ii) In the affirmative, is this true in all situations, or are there exceptions for certain cases? If there are such exceptions, please list them.

In all situations.

iii) If the person has a right to be assisted by a lawyer during questioning, is he informed of this right in the convocation for the questioning? If so, in what way?

Together with the summons to the first interrogation, the written Instruction of rights is delivered to the person. The Instruction of rights must contain, amongst other things, the notification that he has the right to retain a defence counsel of his own choice, or, when provided by this Act, a defence counsel shall be appointed to him by the virtue of the office.

- c) i) If the person has a right to be assisted by a lawyer before and/or during questioning, is there an obligation in your legal order for the police or any other competent authority to facilitate or assist the person in exercising this right?

Yes

ii) In the affirmative,

- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?

Yes, in all cases

- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority in accordance with this obligation?

The interrogating authority shall allow the defendant to retain a defence counsel of his own choice and shall therefore recess the interrogation until the arrival of the defence counsel at the latest up to three hours from the moment when the defendant stated he would like to retain a defence counsel of his own choice and that he would like him to be present at interrogation. If the circumstances indicate that the selected defence counsel cannot arrive within this term, the interrogating authority shall allow the defendant to retain a defence counsel from the list of attorneys on duty which is compiled according to the law. If the defendant did not retain a defence counsel from the list referred, and it is the case of mandatory defence, the president of the court shall, by virtue of the office, upon the request of the court or the State Attorney, appoint a defence counsel to represent him.

- d) i) If the person has a right to be assisted by a lawyer before and/or during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?

Yes

- ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?

3 hours

- e) i) In your legal order, is there a possibility of making derogations to the right to be assisted by a lawyer before and/or during the questioning? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer?

No

- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

3. In your legal order, when a person is stopped on the street by the police and, after having been officially notified or informed otherwise that he is suspected or accused of having committed a criminal offence, is asked by the police to reply to questions concerning the (alleged) crime committed,

If there are grounds for suspicion that a criminal offence subject to public prosecution has been committed, the police shall have the right and duty to take necessary measures aimed at discovering the perpetrator of the criminal offence, preventing the perpetrator or accomplice from fleeing or going into hiding; to discover and secure traces of the offence and objects of evidentiary value, and to gather all information which could be useful for successfully conducting criminal proceedings. The police authorities shall be entitled to send persons found at the place of the commission of a criminal offence to the State Attorney or to hold them until his/her arrival (for not more than six hours). The police authority shall be entitled to arrest a person against whom the ruling for compulsory appearance or a ruling on pre-trial detention or investigative detention is being executed; a person against whom there are grounds for suspicion of having committed a criminal offence subject to public prosecution and if any of the grounds exist for ordering investigative detention; a person who is caught in the act of committing an offence subject to public prosecution.

- a) What kind of questions could be asked to this person? Is it possible to question the person regarding the alleged crime?

While conducting the inquiries, the police authorities may not examine citizens in the role of defendants, witnesses or expert witnesses. Police gather information and formal interrogation is done by the public prosecutor, including the rights of access to a lawyer.

- b) i) Does this person have the right to be assisted by a lawyer during such questioning?
ii) In the affirmative, in which situations does such a right exist?
iii) If the person has the right to be assisted by a lawyer, may this right be limited to the person contacting the lawyer by phone before questioning starts? If so, please indicate in which situations this may be the case.
- c) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there an obligation in your legal order for the police or any other competent authorities to facilitate or assist the person in exercising this right?
ii) In the affirmative,
- does this obligation exist automatically in all cases, or is it only ‘activated’ further to a request of the person concerned?
- what are the concrete act(s) concerned that have to be taken by the police or by any other competent authority?
- d) i) If the person has a right to be assisted by a lawyer during questioning, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before the questioning starts?
ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer?
- e) i) If the person has a right to be assisted by a lawyer during questioning, or by making a telephone call before questioning starts, is there a possibility of making derogations to this right in your legal order? In other words, if the person concerned wants to be assisted by a lawyer, is there nevertheless a possibility for the police to proceed with the questioning without the presence of a lawyer or without contact by phone having been made?
ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

Evidence-gathering and investigating acts in the pre-trial stage

4. Questions regarding evidence-gathering or investigating acts in the pre-trial stage:

- a) i) In your legal order, does the suspect or accused person have a right for his lawyer to be present at evidence-gathering or investigating acts?

After the receipt of the order for investigation, the defendant may propose to the State Attorney to conduct evidence collecting actions. If the State Attorney accepts the proposal of the defendant, he shall conduct the relevant evidence collecting action. If the State Attorney does not agree with the proposal of the defendant, he shall within eight days deliver the proposal to the investigating judge and notify the defendant thereof in writing. The investigating judge shall decide on the proposal of the defendant by an order. The accused person and its lawyer will be informed in time about the time and place of conducting evidence collecting actions.

- ii) In the affirmative, which evidence-gathering or investigating acts are concerned?

After the receipt of the order for investigation, the defendant may propose to the State Attorney to conduct evidence collecting actions. If the State Attorney accepts the proposal of the defendant, he shall conduct the relevant evidence collecting action. If the State Attorney does not agree with the proposal of the defendant, he shall within eight days deliver the proposal to the investigating judge and notify the defendant thereof in writing. The investigating judge shall decide on the proposal of the defendant by an order. The accused person and its lawyer will be informed in time about the time and place of conducting evidence collecting actions.

- b) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the competent authorities to facilitate or assist the person in exercising this right?
- ii) In the affirmative, what are the concrete act(s) concerned that have to be taken by the competent authorities?

- c) i) If the person has a right for his lawyer to be present at evidence-gathering or investigating acts, and the person wants to exercise this right, is there an obligation in your legal order for the police to wait until the arrival of the lawyer before starting the evidence-gathering or investigating act?
- ii) In the affirmative, how long (how many hours) does the police have to wait until the arrival of the lawyer? Please specify as appropriate.
- d) i) In your legal order, is there a possibility of making derogations to the right of the suspected or accused person for his lawyer to be present at evidence-gathering or investigating act? In other words, if the person concerned wants to be assisted by a lawyer during such acts, is there nevertheless a possibility for the competent authorities to proceed with the evidence-gathering or investigating act without the lawyer being present?
- ii) In the affirmative, is there a closed list of situations in which derogations can be made, or an open list? If there is a closed list, please list all the situations. If there is an open list, please specify the conditions under which derogations can be made.

Questioning in the pre-trial stage of persons who are initially not suspected or accused of having committed an offence but obtain this status during questioning

5. In your legal order, when a person that is initially not suspected or accused of an alleged crime, such as a witness, is questioned by the police or an investigating judge:

- a) Does this person have the right to be assisted by a lawyer during questioning?

If witness is not injured party, there is no need for the lawyer. But if the witness is injured party he has a right to be assisted by a lawyer during the criminal proceeding.

- b) When, during the questioning, such a person becomes suspected or accused of having committed a criminal offence, do the competent authorities have to inform the person concerned of this change of status?

Yes

- c) If the answer to question b) is positive:
- i) When precisely do the competent authorities have to inform the person concerned?

Immediately when the witness becomes the suspect.

- ii) In what manner do the competent authorities have to inform the person concerned (notification, information, ...)?

They have to inform him of change to his position and read him his rights as a suspect.

- iii) Do the competent authorities have to stop the questioning?

Yes

- iv) Does the person concerned obtain the right to be assisted by a lawyer (when he did not have it before)? If so, as from which moment in time?

Yes, immediately after he was informed that he became a suspect.

- v) May the statements made by the person before he was informed of the change of status be used in the ensuing criminal proceedings against him? If so, in which circumstances? Please specify as much as possible.

No.

Minor offences

6. Questions regarding exclusions / minor offences:

- a) In your legal order, are there any categories of offences (in particular so-called "minor offences"), in respect of which the right to be assisted by a lawyer does not exist or is restricted, totally or partially, in the pre-trial phase?

- No

- b) In the affirmative, please describe the category or categories of exclusions as precisely as possible, defining the category by a common denominator, e.g.
- where the offence is initially dealt with in an administrative manner;
 - where pre-trial detention is not possible in relation to the offence concerned;
 - where deprivation of liberty cannot be imposed as a sanction in relation to the offence concerned;
 - where the fine that may be imposed as a sanction in relation to the offence concerned does not exceed a certain amount;
 - other definition.
- c) In case your legal order contains one or more categories of exclusions: please indicate the consequence of each category of exclusion, e.g. is there a total or partial exclusion from the right to be assisted by a lawyer, does the exclusion entail different modalities for the assistance by a lawyer, etc. ...

Lawyer provided by the State / Payment of lawyer's fees

7. The proposed Directive does not deal with the question of legal aid; even so the Presidency believes that the following questions regarding the payment of a lawyer's fee could have an impact on the formulation and application of the Directive.

With this in mind delegations are kindly invited to respond to the following questions:

- a) i) In your legal order, does an obligation exist for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *but cannot afford to pay a lawyer or cannot afford to pay the lawyer that he has chosen?*

- **Yes**

ii) If so, in which situations and under which conditions does such obligation exist?
When answering this question, please take into account the situations mentioned under questions 1-4.

After the indictment is confirmed, when the defense is not obliged, at the request of the defendant, attorney will be appointed at the expense of budget funds, if, according to his wealth defendant can not pay the costs of defense, and the procedure is conducted for a criminal offense which is punishable by imprisonment.

b) i) In your legal order, does there exist an obligation for the State to provide a lawyer, or pay the fees of the lawyer chosen by the suspected or accused person, when the latter has the right to be assisted by a lawyer and wants to exercise that right, *even if he could himself afford to pay a lawyer, or the lawyer that he has chosen?*

Yes

ii) If so, in which situations and under which conditions does such obligation exist?
When answering this question, please take into account the situations mentioned under questions 1-4.

The defendant must have the defence counsel present at his first interrogation:

- 1) if the defendant is mute, deaf, deaf-blind or otherwise incapable of defending himself;
- 2) if the proceeding is conducted for the criminal offence for which a regular proceeding is prescribed.

The defendant must have the defence counsel present:

- 1) if the defendant remained without a defence counsel because the right of the defence counsel to action and representation has been deprived by a decision
- 2) from the time the investigation is initiated for an offence punishable by long-term imprisonment to when the final ruling is rendered;
- 3) if the defendant is in pre-trial detention or investigative detention, he must have a defence counsel as soon as detention is imposed;
- 4) in cases of bringing an order on the suspension of investigation regulated by this Act
- 5) from the time the indictment is served to when the final ruling is rendered for the criminal offence punishable by imprisonment for a term of ten years or longer,

- 6) when negotiating on terms of plea, agreeing sanctions and signing declaration for adjudication based on agreement,
- 7) from the time the ruling on the trial in absence is rendered ,
- 8) when the hearing is held while the defendant is absent due to incompetence to participate which he himself caused;
- 9) after preferring the indictment in proceedings with the defendant who is mentally disturbed;
- 10) in other cases regulated by the CPA.

When in the case of mandatory defence the defendant fails to retain or remains without a defence counsel, the president of the court shall, by virtue of the office, upon the request of the court or the State Attorney, appoint a defence counsel to represent him. The ruling to assign a defence counsel is not subject to an appeal.

If the court appoints the defence counsel, the fees and necessary expenses of the defence counsel shall be paid from the budget funds.

Principle of confidentiality

8. a) In your legal order, can any derogations be made to the principle of confidentiality of communication between the suspected or accused person and his lawyer?

Yes

- c) In the affirmative, in which situations can such derogations be made? Please specify as much as possible, and make a distinction, if appropriate, between oral and written communication, and between communication in the pre-trial phase and in the trial phase.

According to the CPA the arrested person shall have the right to communicate freely and without obstructions with his defence counsel as soon as the arrested person retained a defence counsel, or as soon as the decision on assigning a defence counsel is made. The State Attorney may order by a decision to monitor the communication between the arrested person and the defence counsel, and shall notify the arrested person and the defence counsel thereof by submitting the decision before the communication is initiated. The communication may be terminated if:

- 1) the arrested person is violating order and safety;
- 2) it is attempted to commit criminal offences of concealing (Article 236 and 279 of the Penal Code) or aiding the perpetrator after the criminal offence is committed (Article 301 of the Penal Code);

3) it is attempted to tamper the criminal proceedings by influencing witnesses, expert witnesses, co-principals or accessories after the fact.

The arrested person may, within two hours, file an appeal against the decision of the State Attorney on supervision referred to in paragraph 2 of this Article to the investigating judge. The investigating judge shall review the appeal within six hours. An appeal against this decision shall not stay its execution.

If the defendant is in pre-trial detention or investigative detention, the defence counsel may communicate with him orally or in writing without supervision.

Upon the request of the State Attorney, the investigating judge may decide to monitor letters, messages and conversation between the defendant and the defence counsel, before the indictment is raised:

1) in proceedings for the following criminal offences referred to in the Penal Code: murder (Article 90), homicide (Article 91), kidnapping (Article 125), murder of the highest state officials (Article 138), kidnapping of the highest state officials (Article 139), anti-state terrorism (Article 141), criminal offences against values protected by international law (Chapter XIII), counterfeiting of money (Article 274) and concealing illegally obtained money (Article 279);

2) in proceedings for criminal offence for which there are grounds for suspicion that they were committed by a group of people or a criminal organization and there is a probability that a conversation with the defence counsel would lead to concealing criminal offences, aiding perpetrators after the offence is committed or if there are circumstances which indicate that the defendant may repeat the offence, finish the attempted offence or commit a felony.

The investigating judge shall render a decision on supervision in the form of a ruling. The ruling on supervision shall be served to the defendant and the defence counsel before the implementation of supervision. An appeal against this ruling shall not stay its execution. Supervision referred to in paragraph 2 of this Article may last no longer than two months from the beginning of investigative detention.

Waiver

9. a) In your legal order, does a suspect or accused person has the right to waive his right to be assisted by a lawyer?

Yes, if it is not case of mandatory defence.

- b) In the affirmative,
i) What, if any, information has to be given to the person concerned prior to making the waiver?

The instruction on the rights of the defendant must contain the notification on the following:

- 1) why is he charged and which are the basic suspicions against him, if he had not beforehand received the order on conducting the investigation;**
- 2) that he is not obliged to present his defence nor is he obliged to answer the questions;**
- 3) that according to the provisions of Article 184 paragraph 2 item 1 of this Act he has the right to inspect the files and objects that may be used as evidence**
- 4) that he has the right to retain a defence counsel of his own choice, or, when provided by this Act, a defence counsel shall be appointed to him by the virtue of the office.**

The instruction on the rights must be delivered with:

- 1) the search warrant and temporary seizure of objects;**
- 2) the summons to the first interrogation;**
- 3) the order on conducting the investigation;**
- 4) the summons for the evidentiary hearing;**
- 5) the ruling on investigative detention.**
- 6) the order for identification**
- 7) the order to perform expertise on defendant**

The State Attorney or the authority conducting the action shall deliver the instruction on the rights. When prescribed by this Act, the competent body shall by virtue of the office verify whether the defendant received the instruction on the rights before the commencement of the action and if it is determined that the instruction on the rights was not given, the proceedings shall be recessed, it shall first be ordered to deliver the instruction, and only then the proceedings shall be continued.

- ii) If such information has be to given:
- which person(s) or authorities may / should give that information?
The authority conducting the action (police, state attorney...).

 - how is that information to be given (oral, writing,) ? Please specify.
In writing, but there is a duty to explain oral if not understood.
- iv) How is the waiver noted/registered? What are the formalities, if any?

The defendant who has been instructed on his rights shall be invited to explicitly declare oneself whether he will retain a defence counsel of his own choice. The defendant's statement shall be entered into the record.

- iv) May a decision to waive the right to a lawyer be revoked, and if so,
- Yes**
- may this be done at any stage of the proceedings?
Yes

 - are there any (other) limitations to the possibility of revoking a waiver?
No
- c) Are the answers to the questions under a) and b) different if the person concerned is a minor? If so, please specify.
If suspect or accused person is minor, defence is mandatory.

Remedies

10. a) Does your national law provide for remedies in case of breach of the right of access to a lawyer?

Yes

b) In the affirmative:

i) which are those remedies?

Appeal

ii) do the remedies also include the possibility for the (judicial) authorities to exclude evidence that has been obtained in breach of the right of access to a lawyer?

Yes

General concerns regarding the proposed Directive

11. Are there any other aspects of your legal order that could be of importance for the further discussions on this proposed Directive? If so, please highlight them.
