



**COUNCIL OF
THE EUROPEAN UNION**

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NOTE

From :	Presidency
To :	Coreper

No. Prop. :	11497/11 DROIPEN 61 COPEN 152 CODEC 1018
No. Prev. doc. :	10064/12 DROIPEN 60 COPEN 116 CODEC 1138

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

At the meeting of Coreper on 23 May 2012, the remaining outstanding issues were discussed. Subsequently, the Presidency revised the text of the draft Directive, making refinements on some points. The text as it results from this revision is set out in the Annex.

The Presidency is of the opinion that the text in the Annex provides a good compromise between the positions of the various delegations. The Presidency considers that the text is not only in line with the European Convention on Human Rights and its case-law, but provides also a good negotiating position of the Council in the upcoming negotiations with the European Parliament. Therefore, the Presidency has decided to submit a clean text to Coreper.

In view of the above, the Presidency recommends Coreper to confirm the text in its current form with a view to allowing the JHA Council to reach a general approach on the text at its meeting on 8 June 2012.

(DRAFT)

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

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

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

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

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

Having consulted the Committee of the Regions ²,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Article 47 of the Charter of Fundamental Rights of the European Union (hereinafter referred to as "the Charter"), Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the ECHR") and Article 14 of the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR") enshrine the right to a fair trial. Article 48 of the Charter guarantees respect for the rights of the defence.
- (2) The principle of mutual recognition of judgments and judicial decisions is the cornerstone of judicial cooperation in criminal matters in the Union.

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

² The CoR decided not to give an opinion.

- (3) Mutual recognition can only operate effectively where there is mutual trust, which requires detailed rules on the protection of procedural rights and guarantees stemming from the Charter, the ECHR and the ICCPR. Common minimum rules should increase confidence in the criminal justice systems of all Member States, which in turn should lead to more efficient judicial cooperation in a climate of mutual trust and to the promotion of a fundamental rights culture in the Union. They should also remove obstacles to the free movement of citizens throughout the territory of the Member States. Such common minimum rules should apply to the right of access to a lawyer and the right to inform a third party upon deprivation of liberty.
- (4) Although the Member States are parties to the ECHR and the ICCPR, experience has shown that this in itself does not always provide a sufficient degree of trust in the criminal justice systems of other Member States.
- (5) On 30 November 2009, the Council adopted the Roadmap for strengthening the procedural rights of suspected and accused persons in criminal proceedings ('the Roadmap')³. In the Stockholm Programme, adopted on 11 December 2009⁴, the European Council welcomed the Roadmap and made it part of the Stockholm Programme (point 2.4.). Taking a step-by-step approach, the Roadmap calls for the adoption of measures regarding the right to obtain translation and interpretation⁵, the right to receive information on rights and information about the charges⁶, the right to receive legal advice and legal aid, the right to communicate with relatives, employers and consular authorities, and establishing special safeguards for suspected or accused persons who are vulnerable. The Roadmap emphasises that the order of the rights is indicative, implying that it may be changed according to priorities. It is designed to operate as a whole; only when all its components are implemented will its benefits be felt in full.

³ OJ C 295, 4.12.2009, p. 1.

⁴ OJ C 115, 4.5.2010.

⁵ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the rights to interpretation and translation in criminal proceedings (OJ L 280, 26.10.2010, p. 1).

⁶ Directive 2011/XXX/EU of the European Parliament and of the Council on the right to information in criminal proceedings.

- (6) This Directive sets out minimum rules on the right of access to a lawyer and on the right to inform a third party upon deprivation of liberty in criminal proceedings and in proceedings for the execution of an European Arrest Warrant. In doing so, it promotes the application of the Charter, in particular Articles 4, 6, 7, 47 and 48, by building upon Articles 3, 5, 6 and 8 of the ECHR, as interpreted by the European Court of Human Rights, which in its case-law sets standards on an ongoing basis on the right of access to a lawyer.
- (7) This Directive also sets minimum rules on the rights for persons who are deprived of liberty to have consular or diplomatic authorities informed of their deprivation of liberty and to communicate with these authorities. These rules build further on provisions of the 1963 Vienna Convention on Consular Relations, in particular Article 36 thereof. This Directive should facilitate the practical application of these provisions.
- (8) Where reference is made to a lawyer in this Directive this should include any person who is qualified in accordance with national law (for example by accreditation by an authorised body) to provide legal advice and assistance to suspects or accused persons.
- (9) In some Member States an authority other than a court having jurisdiction in criminal matters may be competent for imposing sanctions in relation to relatively minor offences. That may be the case, for example, in relation to traffic offences which are committed on a large scale and which might be established following a traffic control, in relation to minor offences which are committed within a prison, or in relation to minor offences committed in a military context and dealt with in first instance by a commanding officer. In such situations, it would be disproportionate to require that the competent authority should ensure all the rights granted under this Directive. Where the law of a Member State provides for the imposition of a sanction regarding minor offences by such an authority and there is a right of appeal or the possibility for the case to be otherwise referred to a court having jurisdiction in criminal matters, this Directive should therefore apply only to the proceedings before that court following such an appeal or referral.

- (10) In some Member States, relatively minor offences, such as minor traffic offences that are committed on a large scale, are considered to be criminal offences. Where, in relation to such an offence, the law of a Member State provides that only a fine may be imposed as the main sanction - that means, independent from any custodial sanction that may be imposed when the fine is not paid - and deprivation of liberty is not possible as such a sanction, this Directive should only apply once the case is before a court having jurisdiction in criminal matters.
- (10a) In some Member States, the law provides that imprisonment can be imposed as a sanction in relation to minor offences, as an alternative for a fine. However, in the systems of these Member States, in practice imprisonment is only imposed under exceptional circumstances, in particular when a person commits the same minor offence very frequently in a short period of time. In the vast majority of cases, it is already clear from the outset that in relation to certain minor offences, no deprivation of liberty will be requested by the prosecution service and imposed by a court having jurisdiction in criminal matters. Where the law of a Member State provides that imprisonment can be imposed as a sanction, but in practice, for example due to officially published guidelines, which are binding for the prosecution service, shall only in very limited cases be requested by the prosecution service and imposed by a court having jurisdiction in criminal matters, this Directive should not apply to cases where it is excluded that the prosecution service will request imprisonment to be imposed.**
- (11) Disciplinary proceedings do not fall within the scope of this Directive as it only applies to 'criminal proceedings' and to European arrest warrant proceedings.
- (12) Member States should ensure that suspects and accused persons have the right of access to a lawyer without undue delay before the person concerned is officially interviewed by the police or other law enforcement authorities and as soon as practicably possible after the person has been deprived of his liberty. In any case, suspects and accused persons should be granted access to a lawyer during criminal proceedings before a court, if they wish to be assisted by a lawyer.

- (13) This Directive gives rights to suspects and accused persons: as long as a person is not, or not yet, suspected or accused of a criminal offence, it should not apply. Questioning by the police or other law enforcement authorities whose primary purpose is to acquire elements for establishing whether an investigation should be started, should not be covered by this Directive. This could be the case, for example, in respect of questions put by police in the course of a road-side check.
- (14) Any person other than a suspect or accused person, such as a witness, who is officially interviewed by the police or other enforcement authority in the context of criminal proceedings, should be granted the rights for suspects and accused persons provided for under this Directive if, in the course of such an interview, he becomes suspected or accused of having committed a criminal offence.
- (15) An official interview means the official questioning by competent authorities of a suspect or accused person regarding his involvement in a criminal offence, irrespective of the place where it is conducted or the stage of the proceedings when it takes place. An official interview should not encompass preliminary questioning by the police or other law enforcement authorities, such as when a person has been caught red-handed, and whose primary purpose is the identification of the person concerned or the verification of the possession of weapons or other similar safety issues.
- (16) In cases where a suspect or accused person is deprived of liberty, Member States should make the necessary arrangements to ensure that the person concerned is in a position to effectively exercise his right of access to lawyer, including by arranging for the assistance of a lawyer when the person concerned does not have one, unless he has waived this right. The relevant arrangements, including those on legal aid if **applicable**, are governed by national law. **Such practical arrangements could imply, inter alia, that the competent authorities arrange for the assistance of a lawyer on the basis of a list of available lawyers from which the suspect or accused person could choose.**

- (17) In cases where a suspect or accused person is not deprived of liberty, Member States should not prevent a suspect or accused person from exercising his right of access to a lawyer effectively. The person concerned should be able to freely contact, consult or be assisted by that lawyer. The Member State may help the person in obtaining a lawyer, but it would not need to actively pursue that the suspect or accused person who is not deprived of his liberty will be assisted by a lawyer if the person concerned has not himself arranged to be assisted by a lawyer.
- (18) The right of the suspect or accused person to communicate with his lawyer should ordinarily include the opportunity of the person concerned to meet with his lawyer. This Directive does not prevent Member States from setting reasonable limitations in their national law on the right of the suspect or accused person to communicate with his lawyer, including the duration and frequency of any such communications, provided such limitations do not prejudice the effective exercise of the rights of defence. In respect of certain relatively minor cases, such limitations may include restricting the right to obtaining legal assistance by telephone. However, limiting the right in this way should be restricted to cases where there is very limited risk of self-incrimination, such as where the person will not be questioned by police or other law enforcement authorities.
- (19) Member States should determine in their national law in respect of which investigative or other evidence-gathering acts the suspect or accused person has the right for his lawyer to attend. The suspect or accused person has the right for his lawyer to attend at least the following acts, insofar as they are provided for in the national law concerned and insofar the suspect or accused person is required to attend: identity parades, at which the suspect or accused person figures among other persons in order to be identified by a victim or witness; confrontations, where a suspect or accused person is brought together with one or more witnesses or victims when there is disagreement between them on important facts or issues; experimental reconstructions of the scene of crime at which the suspect or accused person is present and where the circumstances of a crime are reconstructed, in order to better understand the manner and circumstances under which a crime was committed and to be able to ask specific questions to the suspect or accused person.

- (20) The practical arrangements for the presence and participation of a lawyer at official interviews and at investigative and other evidence-gathering acts should be left to the Member States, including regarding the question whether, and if so, how long, the competent authorities should wait until the lawyer arrives before starting an interview or an investigative or other evidence-gathering act.
- (21) When the lawyer participates in an interview by the investigating authorities of the suspect or accused person, he may inter alia, in accordance with procedures provided for in national law, ask questions, request clarification and make statements, which shall be recorded in accordance with national law.
- (22) Member States should be permitted to temporarily derogate from the right of access to a lawyer in the pre-trial phase in exceptional circumstances only where there are compelling reasons in the light of the particular circumstances of the case. Such temporary derogations could in particular be justified when there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person, to prevent a substantial jeopardy to ongoing criminal proceedings, or when it is extremely difficult to provide a lawyer due to the geographical remoteness of the suspect or accused person, e.g. in overseas territories or **where the Member State undertakes or participates in military operations outside that Member State**. During such a temporary derogation, the competent authorities may officially interview a suspect or accused person without the lawyer being present, it being understood that the suspect or accused person may avail himself of his right to remain silent, and may also carry out, without the presence of a lawyer, any investigative or other evidence gathering act, **provided that such official interview, or such investigative or other evidence gathering act, is necessary for a proper handling of the criminal proceedings and does not unduly prejudice the rights of the suspect or accused person**.

- (23) Confidentiality of communication between a suspect or accused person and his lawyer is key to ensuring the effective exercise of the rights of the defence. Member States should therefore be required to uphold and safeguard the confidentiality of meetings between the lawyer and the client and of any other form of communication permitted under national law, it being understood that rules on confidentiality under this Directive should be without prejudice to mechanisms in place in detention facilities in order to avoid illicit enclosures being sent to detainees, such as screening correspondence, as long as such mechanisms do not allow the competent authorities to read the communication between the suspect or accused person and his lawyer. However, in limited, exceptional circumstances, it should be possible to temporarily derogate from the principle of confidentiality, unless there would be other, less restrictive means to achieve the same result, such as, in cases of collusion, replacement of the lawyer chosen by the suspect or accused person.
- (24) This Directive should be without prejudice to a breach of confidentiality which is incidental to a lawful surveillance operation by competent authorities. This Directive should also be without prejudice to the work carried out, for example by national intelligence services, to safeguard national security in accordance with Article 4(2) of the Treaty on European Union or that falls within the scope of Article 72 of the Treaty on the Functioning of the European Union, according to which Title V on an area of Freedom, Security and Justice shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

- (25) Suspects or accused persons deprived of their liberty should have the right to have at least one person of their choice, such as a family member or employer, informed of the deprivation of liberty as soon as possible, it being understood that this should not prejudice the due course of the criminal proceedings against the person concerned, nor any other criminal proceedings. Member States shall determine the practical arrangements in relation to the application of this right, it being understood that the suspect or accused person should have the possibility to effectively exercise this right. In limited, exceptional circumstances, however, it should be possible to temporarily derogate from this right when this is justified by compelling reasons in the light of the particular circumstances of the case, in particular when the provision of information could prejudice the due course of the criminal proceedings against the suspect or accused person concerned or of any other criminal proceedings, or when the provision of information could have serious adverse consequences for the safety of a third person.
- (26) A suspect or accused person who is deprived of his liberty and who is not a national of the Member State of arrest or detention should have the right to have consular or diplomatic authorities of his State of nationality informed of the arrest or detention as soon as possible and communicate with the consular or diplomatic authorities, if he so wishes. The right to consular assistance is enshrined in Article 36 of the 1963 Vienna Convention on Consular Relations where it is a right conferred on States to have access to their nationals. This Directive confers a corresponding right on the arrested or detained person, subject to his wishes. This right should be exercised in conformity with the national law of the Member States, subject, however, to the condition that such national law may not render that right ineffective.

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

- (31) In relation to the functioning of judicial cooperation in the Union, certain rights provided for in this Directive should also apply, *mutatis mutandis*, to proceedings for the execution of a European Arrest Warrant according to the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States.⁷
- (32) In proceedings for the execution of a European Arrest Warrant, the competent authority of the executing Member State could ask the competent authority of the issuing Member State for assistance when a requested person wants to make use of his right to have a third person informed of his arrest or detention, and the competent authority of the executing Member State experiences difficulties, e.g. in contacting the third person concerned.
- (33) The surrender procedure is crucial for cooperation in criminal matters between the Member States. Observance of the time limits contained in Council Framework Decision 2002/584/JHA is essential for such cooperation. Therefore, Member States should ensure that application of the rights provided for in this Directive to proceedings for the execution of a European Arrest Warrant shall not jeopardize respecting those time limits.
- (34) The person subject to a European Arrest Warrant should have the right of access to a lawyer in the executing Member State in order to allow him to exercise his rights effectively under the Council Framework Decision 2002/584/JHA. When the lawyer participates in a hearing of the requested person by an executing judicial authority, he may *inter alia*, in accordance with procedures provided for under national law, ask questions, request clarification and make statements. The fact of participation should be recorded in accordance with national law.
- (35) In the absence to-date of a legislative act of the Union on legal aid, Member States should apply their national law in relation to legal aid, which should be in line with the Charter, the ECHR and the case-law of the European Court of Human Rights.

⁷ OJ L 190, 18.7.2002, p. 1.

- (36) The principle of effectiveness of Union law should require that Member States put in place adequate, effective remedies in the event of a breach of a right conferred upon individuals by Union law.
- (37) Once a case has been referred to a court having jurisdiction in criminal matters, Member States should ensure that the question as to which value should be given to statements obtained from a suspect or accused person in breach of his right of access to a lawyer, or in cases where a temporary derogation of this right was authorised in accordance with this Directive, should be determined by that court. The court concerned should be responsible for ensuring the overall fairness of the proceedings, in accordance with the applicable national legal procedures.
- (38) This Directive upholds the fundamental rights and principles recognised by the Charter, including the prohibition of torture and inhuman and degrading treatment, the right to liberty and security, respect for private and family life, the right to the integrity of the person, the rights of the child, integration of persons with disabilities, the right to an effective remedy and to a fair trial, the presumption of innocence and the right of defence. This Directive must be implemented according to these rights and principles.
- (39) Member States should ensure that the provisions of this Directive, where they correspond to rights guaranteed by the ECHR, are implemented consistently with those of the ECHR and as developed by case law of the European Court of Human Rights.
- (40) This Directive sets minimum rules. Member States may extend the rights set out in this Directive in order to afford a higher level of protection. The level of protection should never go below the standards provided by the Charter and by the ECHR, as interpreted in the case law of the European Court of Justice and the European Court of Human Rights.

- (41) This Directive promotes the rights of minors and takes into account the Guidelines of the Council of Europe on child friendly justice, in particular its provisions on information and advice to be given to minors. The Directive ensures that suspects and accused persons, including minors, should be provided with adequate information to understand the consequences of waiving a right under this Directive and that the waiver should be given voluntarily and unequivocally. Member States should determine in their national law who is considered to be a minor for the purpose of this Directive. The legal guardian of a suspect or accused minor should always be notified as soon as possible of his deprivation of liberty and the reasons pertaining thereto. If providing such information to the minor's legal guardian is contrary to the best interests of the minor, another suitable adult such as a relative should be informed instead. This should be without prejudice to provisions of national law which require that specified authorities which are responsible for the protection of minors should also be informed of the deprivation of liberty of a minor.
- (42) Since the objectives of this Directive, namely setting common minimum rules for the right of access to a lawyer and the right to have a third person informed of the deprivation of liberty, cannot be sufficiently achieved by the Member States, and can, by reason of the scale of the measure, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve these objectives.
- (43) Without prejudice to Article 4 of the Protocol on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, the United Kingdom and Ireland will not participate in the adoption of this Directive and will not be bound by or be subject to its application.⁸

⁸ UK and IE announced their decision not to opt-in to the Directive, at this stage, in application of Article 3 of Protocol 21 to the Lisbon Treaty, although they may consider opting in at a later stage under Article 4 of the Protocol and are participating fully in the negotiations.

- (44) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark will not participate in the adoption of this Directive, and is therefore not bound by it or subject to its application,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER 1

Objective and Scope

Article 1

Objective

This Directive lays down minimum rules concerning the rights of suspects and accused persons in criminal proceedings and of persons subject to proceedings pursuant to Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States⁹ ("European arrest warrant proceedings") to have access to a lawyer and to have a third party informed of the deprivation of liberty.

⁹ OJ L 190, 18.7.2002, p. 1.

Article 2

Scope

1. This Directive applies to suspects or accused persons in criminal proceedings from the time a person has been officially notified or informed otherwise by the competent authorities of a Member State that he is suspected or accused of having committed a criminal offence. It applies until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspected or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal.
2. This Directive applies to persons subject to European arrest warrant proceedings from the time they are arrested in the executing Member State in accordance with Article 9.
3. Where the law of a Member State provides for the imposition of a sanction regarding minor offences by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed to such a court, this Directive shall apply only to the proceedings before that court following such an appeal.
4. In relation to minor offences, where the law of a Member State provides that only a fine can be imposed as the main sanction and deprivation of liberty cannot **or shall not** be imposed as such a sanction, this Directive shall only apply once the case is before a court having jurisdiction in criminal matters.¹⁰

¹⁰ This paragraph should be read in conjunction with recital 10 [and new recital 10a].

CHAPTER 2

Right of access to a lawyer

Article 3

The right of access to a lawyer in criminal proceedings

1. Member States shall ensure that suspects and accused persons have the right of access to a lawyer in such a time and manner so as to allow the person concerned to exercise his rights of defence practically and effectively.
2. The suspect or accused person shall have access to a lawyer without undue delay. In any event, the suspect or accused person shall have access to a lawyer from the following moments in time, whichever is the earliest:
 - (a) before he is officially interviewed by the police or other law enforcement or judicial authorities;
 - (b) upon the carrying out by investigative or other competent authorities of an investigative or other evidence-gathering act in accordance with paragraph 3(c);
 - (c) as soon as practicably possible after the deprivation of liberty;
 - (d) in due time before the suspect or accused person, who has been summoned to appear before a court having jurisdiction in criminal matters, appears before that court.

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

- (a) Member States shall ensure that a suspect or accused person has the right to communicate with the lawyer representing him, including prior to an official interview with the police or other law enforcement or judicial authorities. The duration, frequency and means of communications between the suspect or accused person and his lawyer may be regulated in national law and procedures, provided that the suspect or accused person is able to exercise his rights of defence effectively;
- (b) Member States shall ensure that the suspect or accused person has the right for his lawyer to be present and, in accordance with procedures in national law, participate when he is officially interviewed. When a lawyer participates during an official interview this shall be recorded in accordance with national law;
- (c) Member States shall determine in their national law in respect of which investigative or other evidence-gathering acts the suspect or accused person has the right for his lawyer to attend, provided that this does not unduly delay these acts and that it does not prejudice the acquisition of evidence.

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

- i) identity parades;
- ii) confrontations;
- iii) experimental reconstructions of the scene of crime.¹¹

¹¹ Provision to be read in conjunction with recital 19.

4. Notwithstanding provisions of national law concerning the mandatory presence of a lawyer, in all cases where the suspect or accused person is deprived of liberty, Member States shall make the necessary arrangements to ensure that a suspect or accused person is in a position to effectively exercise his right of access to a lawyer, unless he has waived this right in accordance with Article 8.

In cases when a suspect or accused person is not deprived of liberty, Member States shall not prevent a suspect or accused person from exercising his right of access to a lawyer.

5. In exceptional circumstances and in the pre-trial stage only Member States may temporarily derogate from the application of the rights provided for in this Article when this is justified by compelling reasons in the light of the particular circumstances of the case.¹²

¹² Provision to be read in conjunction with recital 22.

Article 4

Confidentiality

1. Member States shall guarantee the confidentiality of communication between a suspect or accused person and his lawyer, including meetings, correspondence, telephone conversations and any other forms of communication permitted under national law.
2. ¹³ In exceptional circumstances only Member States may temporarily derogate from paragraph 1, when, in the light of the particular circumstances, this is justified by one of the following compelling reasons: ¹⁴
 - (a) there is an urgent need to prevent serious crime; or
 - (b) there is sufficient reason to believe that the lawyer concerned is involved in a criminal offence with the suspect or accused person.

¹³ Provision to be read in conjunction with recital 23.

¹⁴ Provision to be read in conjunction with recital 24.

CHAPTER 3

Right to inform third persons and communicate with consular authorities

Article 5

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

1. Member States shall ensure that a suspect or accused person who is deprived of his liberty has the right to have at least one person, such as a relative or employer, named by him, informed of the deprivation of liberty without undue delay, if he so wishes.
2. If the person is a minor, Member States shall ensure that the minor's legal guardian is informed as soon as possible of the deprivation of liberty and of the reasons pertaining thereto, unless it would be contrary to the best interests of the minor, in which case another suitable adult shall be informed.¹⁵
3. Member States may temporarily derogate from the application of the rights set out in paragraphs 1 and 2 when this is justified by compelling reasons in the light of the particular circumstances of the case.¹⁶

Article 6

The right to communicate with consular or diplomatic authorities

Member States shall ensure that a suspect or accused person who is deprived of his liberty and who is a non-national has the right to have consular or diplomatic authorities of his Member State of nationality informed of the deprivation of liberty as soon as possible and to communicate with the consular or diplomatic authorities, if he so wishes. Member States may set the terms of such communication, provided the person concerned is able to exercise his right effectively.¹⁷

¹⁵ Provision to be read in conjunction with recital 41.

¹⁶ Provision to be read in conjunction with recital 25.

¹⁷ Provision to be read in conjunction with recital 26.

CHAPTER 4

Derogations and waiver

Article 7

General conditions for applying temporary derogations¹⁸

1. Any temporary derogation under Articles 3(5), 4(2) and 5(3),
 - (a) shall not go beyond what is necessary;
 - (b) shall be limited in time as much as possible;
 - (c) shall not be based exclusively on the type of the alleged offence; and
 - (d) shall not prejudice the overall fairness of the proceedings.
2. Temporary derogations under Articles 3(5) and 4(2) may only be authorised by a duly reasoned decision taken on a case-by-case basis, either by a judicial authority, or by another competent authority on condition that the decision may be subject to judicial review.

¹⁸ Provision to be read in conjunction with recital 27.

Article 8

Waiver

1. Without prejudice to national law requiring the mandatory presence or assistance of a lawyer, Member States shall ensure that, in relation to any waiver of a right referred to in Articles 3 and 9 of this Directive:
 - (a) the suspect or accused person has been provided with sufficient information so as to allow him to have adequate knowledge about the content of the right concerned and the possible consequences of waiving it; and ¹⁹
 - (b) the waiver is given voluntarily and unequivocally.
2. The waiver and the circumstances under which it was given shall be noted, using the recording procedure in accordance with the law of the Member State concerned. ²⁰
3. Member States shall ensure that a waiver can be subsequently revoked at any point during the criminal proceedings. In case of revocation this Directive shall apply from the point in time when the waiver was revoked. In exceptional cases during the trial stage, the consequences of a revocation may be subject to judicial discretion. ²¹

¹⁹ Provision to be read in conjunction with recital 28.

²⁰ Provision to be read in conjunction with recital 29.

²¹ Provision to be read in conjunction with recital 30.

CHAPTER 5

European Arrest Warrant proceedings

Article 9

The right of access to a lawyer in European Arrest Warrant proceedings

1. Member States shall ensure that a person requested for surrender in accordance with Council Framework Decision 2002/584/JHA has the right of access to a lawyer upon arrest pursuant to the European Arrest Warrant in the executing Member State.
2. With regard to the content of the right of access to a lawyer, the requested person shall have the following rights in the executing Member State:
 - the right of access to a lawyer in such a time and manner so as to allow him to exercise his rights effectively and in any event as soon as practically possible after the deprivation of liberty;
 - the right to communicate with the lawyer representing him. The duration, frequency and means of communications between the requested person and his lawyer may be regulated in national law and procedures, provided the requested person has the possibility to exercise his rights under Council Framework Decision 2002/584/JHA effectively;
 - the right for his lawyer to be present and, in accordance with procedures in national law, participate during a hearing of the requested person by the executing judicial authority. When the lawyer participates during the hearing this shall be recorded in accordance with national law.
3. The rights provided for in this Directive under Articles 4, 5, 6, 8, 11 and - when a temporary derogation under Article 4(2) or Article 5(3) is applied - Article 7 shall apply, *mutatis mutandis*, to European arrest warrant proceedings, as well as Article 3(4).

CHAPTER 6

General and final provisions

Article 10

Legal aid

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

Article 11

Remedies

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

Article 12

Non-regression clause

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

Article 13

Transposition²²

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

Article 14

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

²² It was generally agreed that it would be appropriate for the European Parliament and the Council to make a declaration along the following line upon the adoption of the Directive:
*"Article 47 of the Charter of Fundamental Rights of the European Union provides that legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.
The Roadmap on procedural rights underlines that the right to legal aid should ensure effective access to the right to legal advice.
Having regard to these provisions, considering the need for all persons to have an effective access to justice and emphasizing the importance of ensuring equal access to justice for all citizens, the European Parliament and the Council call on the Commission to present a proposal on legal aid at the earliest."*

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

Article 15

Addressees

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

Done at Brussels,

For the European Parliament
The President

For the Council
The President
