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NOTE

from : the incoming Danish Presidency
to : Working Party on Substantive Criminal Law

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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
- Revised text

The incoming Danish Presidency (hereinafter: the Presidency) would like to continue the work on the draft Directive on access to a lawyer. In doing so, the Presidency intends to build further on the excellent work carried out under the Polish Presidency.

Therefore, the Presidency would like to resume the discussions in January 2012 on the basis of the "legacy" document that has been prepared by the Polish Presidency (18215/11), subject to some refinements. These refinements have been indicated in the attached text by underlined characters. The footnotes have also been modified on several points.

2011/0154 (COD)

Proposal for a

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 communicate upon arrest

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

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

Having regard to the opinion of the European Economic and Social Committee¹,

Having regard to the opinion of the Committee of the Regions²,

Acting in accordance with the ordinary legislative procedure,

Whereas:³

- (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.

¹ OJ C , , p. . [opinion asked]

² OJ C , , p. . [opinion asked]

³ The recitals have not yet been examined. Changes are tentative suggestions. Order of recitals is open for discussion.

- (2) The principle of mutual recognition of judgments and judicial decisions is the cornerstone of judicial cooperation in criminal matters in the Union.
- (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. Such common minimum rules should apply to the right of access to a lawyer and the right to communicate upon arrest.
- (4) Although 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')⁴. In the Stockholm Programme, adopted on 11 December 2009⁵, 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 translation and interpretation⁶, the right to information on rights and information about the charges⁷, the right to legal advice and legal aid, the right to communication with relatives, employers and consular authorities, and 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.

⁴ OJ C 295, 4.12.2009, p. 1.

⁵ OJ C 115, 4.5.2010.

⁶ 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).

⁷ 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 the right to communicate upon arrest with a third party in criminal proceedings, excluding administrative proceedings leading to sanctions such as competition or tax 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.
- (6a) Reference to a lawyer in this Directive includes a reference to any person who is qualified (for example by accreditation by an authorised body) to provide legal advice and assistance to suspects or accused persons.** ⁸
- (7) The right of access to a lawyer is enshrined in Article 6 of the ECHR and in Article 14(2) of the ICCPR. The right to communicate with a third party is one of the important safeguards against ill treatment prohibited by Article 3 ECHR and the right to have one's consulate informed of detention builds upon the 1963 Vienna Convention on Consular Relations. This Directive should facilitate the practical application of those rights, with a view to safeguarding the right to fair proceedings.
- (8) The European Court of Human Rights has consistently held that the suspect or accused person should have access to a lawyer at the initial stages of police questioning, and in any event from the start of detention, to protect the right to a fair trial, and in particular the privilege against self-incrimination and to avoid ill treatment.
- (8a) Member States should therefore 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 from the outset of deprivation of 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.**

⁸ UK suggestion (see doc 13899/11, p. 21)

- (8b) **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 does not apply. Questioning by the police or other law enforcement authorities which has as primary⁹ purpose to acquire elements for establishing whether an investigation should be started, is not 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 concerning possible traffic offences, including but not limited to speeding offences and driving under influence of alcohol or drugs.**
- (8c) **An official interview, which can be held at any stage of the proceedings, will normally take place in a police station, but it can also be held in another appropriate place.¹⁰ Questioning by the police or other law enforcement authorities in relation to the commission of a possible criminal act, including immediately after the commission of such an act, e.g when a person has been caught red-handed, and whose primary purpose is relating to safety issues, such as verification of the possession of weapons, should not be deemed as being an "official interview".¹¹**
- (9) **Member States should ensure that suspects and accused persons have the right of access to a lawyer without **undue** delay upon carrying out certain **investigative or other evidence-gathering acts at which the person's presence is required or permitted as a right under national law and where the presence of a lawyer adds value to the proceedings. Member States should determine in their national law which investigative or other evidence-gathering acts are concerned, provided identity parades, at which the suspect or accused person figures among other persons in order to be identified by a victim or witness, as well as confrontations, where a suspect or accused person is confronted with one or more witnesses or victims, and experimental reconstructions of the scene of crime, are included.¹²****

⁹ Replacement of "sole" with "primary" as suggested by UK

¹⁰ UK suggests merging recitals 8b and 8c and deleting the first sentence of 8c.

¹¹ Language contained in this and the following recitals might also be put in the operative part.

¹² FR expressed concerns in respect of this recital, which has not yet been examined.

- (9a) **Member States should not prevent a lawyer, who is present, from attending any other kind of investigative or other evidence-gathering acts at which the person's presence is required or permitted as a right under national law, which could for example be the case in respect of fingerprints, bloodtest, dna-tests, and any kind of searches, including house searches. In these cases, the presence of a lawyer does not have to be guaranteed (and therefore the authorities do not have to wait for the lawyer to arrive, unless otherwise stipulated under national law); however, when a lawyer is present, the authorities may not prevent this lawyer from participating during the said acts, it being understood that this should not prevent the acquisition of evidence.**¹³
- (10) (deleted)
- (10a) **In some Member States an authority other than a court having jurisdiction in criminal matters has competence 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, or in relation to offences which are committed in a prison or in military context**¹⁴. **In such situations, it would be unreasonable to require that the competent authority ensure all the rights under this Directive. Where the law of a Member State provides for the imposition of a sanction regarding minor offences by such an authority and there is 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.**¹⁵

¹³ FR expressed concerns in respect of this recital, which has not yet been examined.

¹⁴ UK suggests deleting the words "*or in military*" and add in exchange the following new text after "context.": "*In addition, some Member States operate within their armed forces a system of military jurisdiction, for example one exercised by commanding officers, to deal with minor examples of criminal offending. This is necessary in order to maintain high standards of discipline amongst members of the armed forces while avoiding the serious effect on operations which can result from the delay involved in bringing the case before a court.*"

¹⁵ UK suggests placing this recital before recital 8.

- (11) **The right of the suspect or accused person to communicate with his lawyer includes the right of the person concerned to meet his lawyer, including where the suspect or accused person is deprived of liberty.** The duration and frequency of **any such** meetings depend on the circumstances of every proceeding, notably on the complexity of the case and the procedural steps applicable. ¹⁶
- [(11a) **Although the right of the suspect or accused person to communicate with his lawyer should not be limited in a general way, as this could prejudice the effective exercise of the rights of defence, Member States may in their national law set limitations on this right in the context of cases concerning minor offences. However, even in those cases, and subject to the derogations set out in this Directive, the suspect or accused person should always have the possibility to communicate with his lawyer by other means, e.g. by making a telephone call.] ¹⁷**
- (11b) **When the lawyer participates in an interview of the investigating authorities with the suspect or accused person, he may, in accordance with national law, ask questions, request clarification and make statements, which shall be recorded in accordance with national law. ¹⁸ This also applies to the European arrest warrant proceedings in the executing state.**

¹⁶ IT expressed concerns on this draft recital, which has not yet been examined.

¹⁷ Some Member States expressed concerns on this draft recital, which has not yet been examined. UK presented the following alternative drafting for a new recital 11, replacing both recitals 11 and 11a :

"Member States should ordinarily ensure that suspects or accused persons have the opportunity to obtain legal assistance by meeting a legal representative in person. However, Member States may in their national law set limitations 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. 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."

¹⁸ Some Member States have expressed concerns about the meaning of "making statements" and whether it could potentially lead to a situation whereby the lawyer routinely speaks on behalf of his client during police questioning.

- (12) Suspects or accused persons deprived of their liberty should have the right to **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.**
- (13) A suspect or accused person who is deprived of his liberty **and who is not a national of the Member State of detention** should also have the right **to communicate with** consular or diplomatic authorities. The right to consular assistance is enshrined by 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 the right on the detained person, subject to their wishes. **This right shall be exercised in conformity with the national law of the Member States, subject to the condition, however, that such national law must enable full effect to be given to the purposes for which this right are intended.** ¹⁹
- (14) Since confidentiality of communication between a suspect or accused person and their lawyer is key to ensuring the effective exercise of the rights of the defence, Member States should 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. **In limited, exceptional circumstances, it should however be possible to make derogations to this principle.**
- [(15) Derogations from the right of access to a lawyer and the right to communicate upon arrest should be permitted only in exceptional circumstances, in line with case law of the European Court of Human Rights, where there are compelling reasons relating to the urgent need to avert serious adverse consequences for the life or physical integrity of another person and where there are no other less restrictive means to achieve the same result, such as, in cases of a risk of collusion, replacement of the lawyer chosen by the suspect or accused person or nomination of a different third party to communicate with.] ²⁰

¹⁹ In view of the wish expressed by some Member States to have here a similar possibility as provided for in Article 36(2) of the Vienna Convention, the Presidency inserted the last sentence, which is based on the said Article of the Vienna Convention.

²⁰ Recital to be put in line with final text of Articles 3, 4, 5 and 8.

- (16) Any such derogation should only lead to a deferral, as limited as possible, of the initial access to a lawyer and should not affect the substance of this right. It should be subject to a case-by-case assessment by the competent judicial authority, which should give reasons for its decision. ²¹
- (17) Derogations should not prejudice the right to a fair trial and in particular should never lead to statements made by the suspect or accused person in the absence of his lawyer to be used to secure his conviction. ²²
- (18) **Without prejudice to national law that requires 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 full knowledge about the content of the right concerned and the possible consequences of waiving it. While 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.**
- (19) Any person heard by the competent authority in a different capacity than that of suspect or accused person, e.g. as a witness, should be given the right of access to a lawyer if the authority considers that he has become a suspect or accused person in the course of the questioning.
- (20) In order to improve the functioning of judicial cooperation in the European 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. ²³

²¹ Recital to be put in line with final text of Article 8.

²² Recital to be put in line with final text of Articles 8 and 13.

²³ OJ L 190, 18.7.2002, p. 1.

- (21) The person subject to a European Arrest Warrant should have the right of access to a lawyer in the executing Member State in order to allow him to exercise his rights effectively under the Council Framework Decision 2002/584/JHA.
- (22) (deleted)
- (23) (deleted)
- (24) In the absence to-date of EU legislative instrument on legal aid, Member States should continue to apply their domestic provisions on legal aid, which should be in line with the Charter, the ECHR and the case-law of the European Court of Human Rights.
- (25) The principle of effectiveness of EU law should require that Member States put in place adequate, effective remedies in the event of a breach to a right conferred upon individuals by Union law.
- (26) (deleted)
- (27) (deleted)
- (27a) Disciplinary proceedings do not fall within the scope of this Directive as it only applies to 'criminal proceedings' and to European arrest warrant proceedings²⁴.**
- (28) 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 in situations not explicitly dealt with in this Directive. 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 Human Rights.

²⁴ Some Member States expressed concerns on this draft recital proposed by UK, which has not yet been examined.

- (29) This Directive upholds the fundamental rights and principles recognised by the Charter of Fundamental Rights of the European Union, 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.
- (30) 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. The Directive ensures that minors cannot waive their rights under this Directive when they lack the capacity to understand the consequences of the waiver. Member States should determine in their national law who is considered to be a minor for the purpose of this Directive. The legal representative 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 representative is contrary to the best interests of the minor, another suitable adult such as a guardian or a relative should be informed instead. **This should be without prejudice to provisions of national law which require that specified authorities with competence for the protection of minors should also be informed of the deprivation of liberty of a minor.**
- (31) 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.
- (32) Since the aim of achieving common minimum standards cannot be achieved by Member States acting unilaterally, either at national, regional or local level, and can only be achieved at European Union level, the European Parliament and the Council may adopt measures in accordance with the principle of subsidiarity as referred to in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in the latter Article, this Directive does not go beyond what is necessary in order to achieve that objective.

- (33) Without prejudice to Article 4 of the Protocol on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, the United Kingdom and Ireland will not participate in the adoption of this Directive and will not be bound by or be subject to its application.²⁵
- (34) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark will not participate in the adoption of this Directive, and is therefore not bound by it or subject to its application,

HAVE ADOPTED THIS DIRECTIVE:

²⁵ 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.

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 States²⁶ ("European arrest warrant proceedings") to have access to a lawyer and to have a third party informed of the deprivation of liberty.

Article 2

Scope

1. This Directive applies to suspects or accused persons in criminal proceedings from the time a person has been **officially notified or informed otherwise**²⁷ 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. **Article 11**²⁸ of this Directive applies to persons subject to European arrest warrant proceedings from the time they are arrested in the executing State.²⁹

²⁶ OJ L 190, 18.7.2002, p. 1.

²⁷ The words "*in any other way*" have been replaced by "*otherwise*", which is more in line with the original draft. Some Member States requested inserting the word "*officially*" before "*informed*". Some other Member States, on the contrary, prefer the original text, which was in line with the agreed text in measure B. COM insists that access to a lawyer should be provided from the earliest moment possible in the proceedings and including suspects and accused persons that are not deprived of liberty. The text as it currently stands might provide a good compromise between the positions of the Member States.

²⁸ Further to a suggestion by the COPEN Working Party, it has been specified that only Article 11 applies to EAW proceedings. Subsequently, further to comments from delegations, cross references have been made to other Articles in Article 11(3). It has to verified if this solution is entirely satisfactorily.

²⁹ DE has a scrutiny reservation on this paragraph.

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.

[30]

³⁰ BE, FR, LU and NL requested for an extension of the exclusion of minor cases. DE expressed concerns on such extension.

NL suggested the following text: *"This Directive does not apply to any questioning or hearing of the suspect or accused person by the police or other law enforcement authorities about his engagement in a minor offence."* Reference is made to the observations presented by this delegation (see doc 13899/11, pages 14 and 15).

LU proposed to set a limit at penalties of 500 euros.

FR suggested the following text: *"This Directive shall not apply to any questioning of a suspect or accused person by the police where the offence is not punishable by a sentence of imprisonment"*.

In doc 18215/11, footnote 6, the following alternative drafting has been suggested: *"This Directive does not apply to any questioning or hearing of a suspect or accused person by the police or other law enforcement authorities in the pre-trial phase about the engagement of the person concerned in an offence for which according to national law pre-trial detention is not possible"*.

The Presidency invites delegations to consider the following two options for a new paragraph 2(4):

- a) *"This Directive does not apply in the pre-trial phase when deprivation of liberty is not a possible sanction according to national law."*
- b) *"This Directive does not apply to any questioning or hearing of a suspect or accused person by the police or any other law-enforcement authorities in the pre-trial phase about the engagement of the person concerned in an offence for which according to national law there is no deprivation of liberty possible and any fine related to the offence does not exceed 250 euro."*

The right of access to a lawyer ³² in criminal proceedings

1. Member States shall ensure that suspects and accused persons **have the right of access ³³ to a lawyer when the interest of justice so requires, ³⁴ in such a time and manner as to allow the person concerned to exercise his rights of defence ³⁵.**
- 2. ³⁶ In accordance with paragraph 1, the suspect or accused person shall have access to a lawyer without undue delay from the following moments in time, whichever is the earliest: ³⁷**
 - (a) before **he** is officially interviewed by the police or other law enforcement authorities; ³⁸
 - (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);** ³⁹

³¹ All Member States have a scrutiny reserve on this Article, which was redrafted after the last Working Party. Further to a suggestion by DE, which was agreeable to all Member States except EL, EE, ES and IT, former Article 4 has been merged into this Article 3.

³² IE, supported by UK and several other Member States, suggested to replace "*right of access to a lawyer*" with "*right to legal assistance*". IE observed that the Roadmap does not use the expression "*right of access to a lawyer*", but "*right to legal advice (through a legal counsel)*", and that Article 6 ECHR provides that a person has the right to defend himself in person or through "legal assistance".

³³ The phrase "*shall ensure that (...) are granted access to a lawyer*" has been replaced with the phrase "*shall ensure that (...) have the right of access to a lawyer*" in order to ensure consistency with other provisions of the Directive, which provide rights for the suspects and accused persons.

³⁴ The reference to "interest of justice" has been inspired by Article 6(3) under c) ECHR and by a suggestion by DE.

³⁵ This paragraph includes former Article 4(1).

³⁶ Former paragraph 1 has been divided in two paragraphs so as to enhance clarity.

³⁷ The Presidency acknowledges and underlines that this Directive is about minimum rules, but has nevertheless deleted the words "*at least*", since the "*minimum rules*" character of this Directive is already made clear by the legal basis (Article 82(2) TFEU).

³⁸ Paragraph to be read in conjunction with recital 8a and following.

³⁹ Paragraph to be read in conjunction with recital 9. The text of former Article 3(2), which was heavily contested by several Member States, has been reflected in recital 9a. FR maintains a reservation on this provision, and on Article 3(3)(c). EL is opposed to this paragraph.

- (c) from the outset of deprivation of liberty, including detention;⁴⁰
- (d) **from the moment the person is summoned to appear before a court having jurisdiction in criminal matters**⁴¹.

3. The right of access to a lawyer shall entail the following⁴²:

- (a) Member States shall ensure that a suspect or accused person can communicate with the lawyer representing him. The duration and frequency⁴³ 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 shall have the possibility to exercise his rights of defence effectively;**⁴⁴
- (b) Member States shall ensure that the suspect or accused person has the right for his lawyer to be present **and participate** when he is officially interviewed. When a lawyer participates during an official interview this shall be recorded in accordance with national law;⁴⁵

⁴⁰ UK suggested putting "*from the outset of deprivation of liberty at a police station or similar place of detention*".

⁴¹ Addition inserted following a NL suggestion. UK has raised concerns in this regard.

⁴² As explained by the UK in doc 16644/11 there are cases where communication with a lawyer before an official interview can take place by phone (minor cases where there is very little risk of self-incrimination). In this light, it has been suggested that wording along the following line could be considered to be included in paragraph 3 of this Article: "*In minor cases [to be determined in national law], Member States may provide that the suspect or accused person can receive legal advice by phone prior to any official interview, if he wishes to receive such advice*". See also tentative recital 11a and the relating footnote.

⁴³ FR suggests that it should be possible to regulate also the *means* of communication in national law and procedures.

⁴⁴ Former Article 4(5) – modified in the light of the discussions. Paragraph to be read in conjunction with recital 11 as modified.

⁴⁵ Paragraph to be read in conjunction with recitals 11a and 11b. EL is opposed to this paragraph and to recital 11b.

(c) ⁴⁶ Member States shall ensure that the suspect or accused person has the right for his lawyer to attend **certain** investigative or other evidence-gathering acts at which the person's presence is required or permitted as a right under national law, **provided that this does not unduly delay these acts** and does not prejudice the acquisition of evidence. **The investigative or other evidence-gathering acts which are concerned by this provision shall be determined by the Member States in their national law, but shall at least include:**

i) **identity parades ;**

ii) **confrontations ;**

iii) **experimental reconstructions of the scene of crime** ⁴⁷.

4. Member States may derogate from this Article in exceptional circumstances only when this is justified by compelling reasons in the light of the particular circumstances of the case, 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. ⁴⁸

⁴⁶ Paragraph to be read in conjunction with recital 9. See also recital 9a.

⁴⁷ UK observes that experimental reconstructions of the scene of crime are basically intended to question the suspect of accused person "*in situ*" and may therefore be duplicating the provisions on official interviewing.

⁴⁸ EL opposes any derogation to Article 3. UK and some other delegations, on the contrary, oppose a closed list of compelling reasons. The suggestion was made to put the words "*such as relating*" instead of "*pertaining*", or to put a full stop after "*particular circumstances of the case*" and mention some examples in the recitals. FR requested that a derogation should also be possible if it would be impossible to provide access because of geographical distance (e.g. when in overseas operations or in *territoires d'outre mer*) .

Article 4⁴⁹

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.

- 2.⁵⁰ In exceptional circumstances only, Member States may derogate from paragraph 1,
 - (a) where this is justified by a **compelling** need to prevent a serious crime;
 - (b) when there is a **serious** threat to **prison** safety or security; or
 - (c) when there is sufficient reason to believe that the lawyer concerned is involved in a **serious** criminal offence with the suspect or accused person.⁵¹

⁴⁹ Further to a suggestion by HU, this Article on confidentiality (formerly numbered 7) has been placed here, directly after Article 3, which seems a more suitable place.

⁵⁰ Various delegations are still scrutinising this paragraph, which has been further refined in view of comments by delegations. EL and some other Member States are against any exception to the principle of confidentiality.

⁵¹ HU, NL and RO requested to delete the words "*with the suspect or accused person*". Other delegations considered that that would open up the provision too much, and vowed support for the text as it currently stands.

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 as soon as possible, **if he so wishes**.
- 2.⁵² If the person is minor ⁵³ Member States shall ensure that the minor's legal **guardian** is informed as soon as possible of the deprivation of liberty and the reasons pertaining thereto, unless it would be contrary to the best interests of the minor, in which case another suitable adult shall be informed. ⁵⁴ ⁵⁵
- 3.⁵⁶ Member States may derogate from paragraphs 1 and 2 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. ⁵⁷

⁵² Some Member States requested to delete this paragraph and deal with it in the future measure on vulnerable persons (measure "E"). COM, supported by a majority of Member States, pleaded however to keep this provision in the text, as an exception to other provisions, so as to fill this gap in legal protection.

⁵³ Some Member States and COM prefer reverting to "*child*". On the other hand, it was observed that the term "child" was replaced by the term "minor", since it seems better suited in the context of suspects and accused persons. In the EU legal instruments, "child" refers rather to a victim and not to a perpetrator. Moreover, it seems that the understanding of what a minor is should be left to the Member States, since there are different ages of criminal liability under the national laws and it seems difficult, and probably not desirable, to harmonise this element in this Directive. To be noted also that there is no definition of "child" neither in measure A nor measure B of the Roadmap.

⁵⁴ See also recital 30 regarding informing an "institution for the protection of minors", which was inserted following a suggestion by CZ.

⁵⁵ FR requested to delete the words "*and the reasons pertaining thereto*" as well "*as in which case another suitable adult shall be informed*".

⁵⁶ EL and some Member States would like to delete this paragraph, but a majority of delegations is in principle happy with the text.

⁵⁷ Some Member States noted that even when there are no criminal proceedings (yet) against the suspect or accused person concerned, nor any other criminal proceedings, there may be a necessity to derogate, e.g. to prevent a serious crime to take place. DE would like to add a reference to the specific needs of the minor.

Article 6

The right to communicate with consular or diplomatic authorities

Member States shall ensure that suspects or accused persons who are deprived of their liberty and who are non-nationals have the right to have consular or diplomatic authorities of their State of nationality informed of the detention as soon as possible and to communicate with the consular or diplomatic authorities, **if he so wishes.** ⁵⁸

Article 7

Confidentiality

[renumbered as new Article 4]

⁵⁸ This amendment has not been discussed at the meeting of the Working Party and may therefore be subject to further examination. SE, supported by some other Member States, stated that it should be possible to make derogations to the right of the person concerned to communicate with the consular or diplomatic authorities. Alternatively, the suggestion was made to add at the end of this paragraph the words: "*Member States may set the terms of such communication.*"

General conditions for applying derogations⁶⁰

1. Any derogation **under Articles 3(3), 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;⁶¹
 - (d) shall not extend to the trial stage, [**except when the derogation is based on Article 4(2) under b)**]⁶²; and
 - (e) shall not prejudice the **overall** fairness of the proceedings.

2. Derogations **under Articles 3(3) and 4(2)** may only be authorised by a duly reasoned decision taken on a case-by-case basis by a judicial authority, or by another competent authority on condition that the decision **shall**⁶³ **be** subject to judicial **review**⁶⁴.

⁵⁹ EL, IT and MT, who are opposed to any derogations, expressed concerns on this Article. UK, on the other hand, considers that more attention should be paid to the practical consequences of limiting the derogations.

⁶⁰ Further to a suggestion by DE, this Article now only sets general conditions for applying derogations which are set out on a "tailor made basis" in other provisions of this Directive.

⁶¹ A policy decision still has to be made on the question whether this condition also has to apply to derogations made under Article 4(2).

⁶² The words between brackets aim at allowing derogations to the principle of confidentiality in view of a serious threat to prison safety or security. The Presidency wonders whether these words are really necessary. On the other hand, UK considers that the requirement not to extend to the trial stage should be abandoned all together. DE has a scrutiny reservation on point d). COM requested the words "*except when the derogation is based on Article 4(2) under b)*" to be deleted.

⁶³ The Presidency modified "*may*" into "*shall*", following a suggestion by EL.

⁶⁴ CZ suggested modifying "*subject to judicial review*" into "*subject to judicial supervision*", NL suggested putting "*subject to supervision by a judicial authority*", and FR has a scrutiny reservation on the use of the "*judicial authority*".

Article 9

Waiver

1. Without prejudice to national law that requires the mandatory presence or assistance of a lawyer, Member States shall ensure that, in relation to any waiver of a right referred to in **Article 3** of this Directive:
 - (a) the suspect or accused person has **been provided with sufficient information so as to allow him to have** full knowledge about the content of the right concerned and the possible consequences of waiving it; and ⁶⁵
 - (b) the waiver is given voluntarily and unequivocally.
2. The waiver and the circumstances in which it was given shall be recorded in accordance with the law of the Member State concerned.
3. Member States shall ensure that a waiver can be subsequently revoked at any stage of the proceedings ⁶⁶, in which case this Directive shall apply from the point in time at which the revocation was made onwards.

(⁶⁷)

⁶⁵ Provision to be read in conjunction with recital 18 as modified.

⁶⁶ Despite the redrafting of this paragraph, EL and RO consider that the revocation of the waiver could lead to substantial problems in court proceedings. Fearing abuse, they would like this paragraph to be tightened, e.g. by adding after the word "*proceedings*" the following: ", *at least until the start of the proceedings in court,*".

⁶⁷ BE suggested to stipulate that a child cannot waive any right under this Directive.

Persons other than suspects and accused person

When a person other than a suspect or accused person is questioned by the police or other enforcement authorities and, during such questioning, such person becomes suspected or accused of having committed a criminal offence, the competent authorities will immediately inform that person thereof, thus triggering the application of the rights set out in this Directive in accordance with Article 2.^{69 70}

⁶⁸ Further to a call from a large majority of Member States, former paragraph 2 of this Article has been deleted. COM opposed such deletion.

⁶⁹ This Article formerly read as follows:

"Member States shall ensure that any person other than a suspect or accused person who is heard by the police or other enforcement authority in the context of a criminal procedure will be granted the rights provided under this Directive for suspects and accused persons if, in the course of questioning, interrogation or hearing, he becomes suspected or accused of having committed a criminal offence."

In respect of this former text, CY, FR, LT, LV, LU, MT, NL, PT, SK, FI, SE, UK suggested deleting it or transferring the text into the recitals (if current recital 19 is not yet sufficient), since the provision would only state the obvious and could lead to confusion when kept in the operative part of the text. COM, supported by EL and several other delegations, would like to keep it in the operative part of the text, as this is a scenario that often happens in practice.

In order to enhance the added value of this Article and make it compatible with Article 2, the Presidency has replaced the old text with the current text.

⁷⁰ NL suggested to point out in the recitals that the purpose of Article 10 is to make sure that a witness who in the course of his interrogation by the police or other enforcement authority becomes suspected of having committed a criminal offence, is entitled to the rights of suspects and accused persons laid down in this Directive. According to NL, Article 10 does not lay down a right to legal assistance for witnesses as such. This means, inter alia, that when the witness is interrogated by the trial judge in criminal proceedings against another person, and this witness starts making self-incriminating statements, this does not activate an obligation to grant access to a lawyer in the criminal proceedings against that other person and – for that purpose – postpone the hearing of the case against that other person.

Article 11⁷¹

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

1. Member States shall ensure that any person subject to proceedings pursuant to Council Framework Decision 2002/584/JHA has the right of access to a lawyer promptly 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, this person shall have the following rights in the executing Member State⁷²:
 - the right of access to a lawyer in such a time and manner as to allow him to exercise his rights effectively;
 - **the right to communicate with the lawyer representing him, if he so wishes. The duration and frequency of communications between the suspect or accused person and his lawyer may be regulated in national law and procedures, provided the suspect or accused person shall have the possibility to exercise his rights of defence under Council Framework Decision 2002/584/JHA effectively;**
 - **the right for his lawyer to be present when he is officially interviewed, if he wishes to be assisted by a lawyer. Member States shall ensure that the suspect or accused person has the right for his lawyer to participate during the official interview which shall be recorded in accordance with national law.**
3. **The rights provided for in this Directive under Articles 4, 5, 6, 8, 9 and 13 shall also apply, *mutatis mutandis*, to European arrest warrant proceedings.**⁷³

⁷¹ DE, supported by COM, has a scrutiny reserve on the deletion of (former) paragraphs 3, 4 and 5, regarding the right to a lawyer in the issuing State. COM insisted that the innovative provisions of paragraphs 3, 4 and 5 have the potential to bring added value to the EAW system. Delegations are reminded that these paragraphs were deleted following a request by a large majority of delegations in CATS.

⁷² These rights have been aligned to the rights in Article 3.

⁷³ NL considers that the question whether reference should be made through this paragraph to other articles and, if so, which articles, should be dealt with by the COPEN Working Party after agreement has been reached on the other articles.

Article 12

Legal aid

This Directive is without prejudice to domestic provisions on 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 13

Remedies

1. Member States shall ensure that a suspected or accused person has an effective remedy in instances where his right of access to a lawyer has been breached.⁷⁴

- 2.⁷⁵ **When criminal proceedings have been initiated and the case has been referred to a court having jurisdiction in criminal matters**, Member States shall ensure that the question of which value to 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 derogation to this right was authorised in accordance with this Directive, shall be determined by **that** court being responsible for ensuring the overall fairness of the proceedings, in accordance with national legal procedures.⁷⁶

⁷⁴ COM observed that the deletion of Articles 10(2) and 13(2) and the dilution of Article 13(3) would remove the key in the Commission's proposal to making the rights of the Directive effective.

⁷⁵ Some Member States have a scrutiny reservation on this paragraph.

⁷⁶ This text was acceptable to various Member States (DE, CZ, LV, LU, NL, AT, RO, SI and SE and FI). Some other Member States (EL, FR, IE, IT, LT, PT) wondered what the added value would be of this text, which has been substantially modified compared to the original Commission text. The suggestion was made to put the text in the recitals or delete it entirely. COM and LV proposed to put "judicial authority" instead of "court". It was observed that the added value of this provision lies in the fact that the issue of assessing the value of statements obtained in breach of the right of access to a lawyer is addressed, which will contribute to enhancing mutual trust among judicial authorities.

Article 14

Non-regression clause

Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards enshrined in the Charter of Fundamental Rights of the European Union, the European Convention of Human Rights and Fundamental Freedoms, other relevant provisions of international law or the laws of any Member State that provides a higher level of protection.

Article 15

Transposition⁷⁷

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*] ⁷⁸ at the latest.
2. They shall communicate the text of those provisions and a correlation table between those provisions and this Directive to the Commission.
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.

⁷⁷ Irrespective as to whether or not this can be solved in the text of the Directive, BE requested that it would be provided that the rules of this Directive would only start to apply at the same time as the rules of the future Directive on legal aid.

⁷⁸ Further to a request by BE, CZ, FR, LV, LU, NL and AT, and in view of the substantial modifications that are likely to be made in national law because of this Directive, 36 months have been put instead of the original 24.

Article 16

Entry into force

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

Article 17

Addressees

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

Done at Brussels,

For the European Parliament

The President

For the Council

The President
