
The EU Directive on the Right of Access to a Lawyer: A Guide For Practitioners

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Irish Council for
Civil Liberties

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1. INTRODUCTION AND BACKGROUND TO THE DIRECTIVE

The purpose of this publication is to act as guidance for legal practitioners in interpreting and applying the provisions of the *EU Directive on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty* (hereafter Directive on the right of access to a lawyer).

The Directive on the right of access to a lawyer was adopted on the 22 October 2013 and must be transposed into national law by 27 November 2016. The Directive arose out of a Roadmap on procedural rights of suspected and accused persons, which was adopted in 2009 during the Swedish Presidency of the European Union. The aim of the Swedish Roadmap is to strengthen the procedural rights of suspected and accused persons in the EU. It calls for the adoption of a series of measures to safeguard procedural rights in all EU Member States, by setting out common minimum standards for the protection of rights of suspected and accused persons in criminal proceedings. The Swedish Roadmap forms the action plan, in the area of procedural rights, of the Stockholm Programme 2010-2014,¹ which sets out the EU's priorities in the area of justice, freedom and security.

The aim of these common minimum standards is to build on the principle of mutual recognition among EU Member States of judgments, judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension. This principle is enshrined in Article 82(2) of the Treaty on the Functioning of the European Union (TFEU).²

¹ The Stockholm Programme follows on from the Tampere and Hague programmes.

² Treaty of Rome 1957 (renamed Treaty on the Functioning of the European Union 2009). The principle of mutual recognition was reiterated in a number of EU treaties and other measures. See the Maastricht Treaty 1992, Amsterdam Treaty 1997 and the Conclusions of the Council of Ministers meeting in Tampere, Finland 1999 (Tampere Conclusions). See also proposals by the European Commission 2003 on procedural safeguards and draft framework decision by the Commission 2004.

The principle of mutual recognition requires a court in one Member State to recognise judicial decisions and enforce requests for assistance from judicial authorities in other Member States.

Under the Treaty of Lisbon which entered into force in 2009 - and reinforces the principle of mutual recognition - the European Parliament and the Council are given the power to issue Directives establishing minimum rules on the rights of suspected and accused persons in criminal proceedings, and the rights of victims of crime.

The Swedish Roadmap contains a range of measures which aim to foster protection of suspected and accused persons in criminal proceedings.³ The Directive on the right of access to a lawyer falls under Measure C 1: Legal Advice and was adopted on foot of the Swedish Roadmap.⁴

25 Member States will participate in the adoption and application of this Directive. Ireland, the UK and Denmark are not taking part in the adoption of this Directive and at present are therefore not bound by it.⁵ However, Ireland may in future agree to be bound by the Directive.

³ These measures consist of: Measure A: Translation and Interpretation; Measure B: Information on Rights and Information about Charges; Measure C1: Legal Advice; Measure C2: Legal Aid Reform; Measure D: Communication with Relatives, Employers and Consular Authorities; Measure E: Special Safeguards for Vulnerable Persons; Measure F: A Green Paper on the Rights to Review of the Grounds for Detention. The text of the Swedish Roadmap is available at:

<http://www.eujusticia.net/images/uploads/pdf/Swedish_Roadmap_July_09.pdf> (date accessed: 1 December 2014).

⁴ It constitutes Measure C1. The other Directives adopted are the Directive on the right to interpretation and translation (Measure A) and the right to Information (Measure B).

⁵ Recital 58-59 of the Directive.

~~The Directive draws on rights protected in the EU Charter of~~
Fundamental Rights (made binding by the Treaty of Lisbon)⁶ and the European Convention on Human Rights (ECHR),⁷ as interpreted by the Court of Justice of the European Union (CJ EU) and the European Court of Human Rights (ECtHR). The Directive states that the level of protection of rights afforded to suspected and accused persons should never fall below the standards of the EU Charter or the ECHR.⁸ The case law of the ECtHR establishes certain standards regarding the right of access to a lawyer which provide important guidance in the context of the Directive. Relevant case law of the ECtHR is thus referenced throughout this publication.

⁶ Prohibition of torture and inhuman or degrading treatment or punishment (Article 4); the right to liberty and security of person (Article 6); respect for private and family life (Article 7); the right to an effective remedy and the right to a fair trial (Article 47); the presumption of innocence and the rights of the defence (Article 48).

⁷ Prohibition of torture and inhuman or degrading treatment or punishment (Article 3), the right to liberty and security of person (Article 5); the right to a fair trial (Article 6); Article 6(3)(c) provides that a person charged with a criminal offence has the right to defend himself through legal assistance; the right to respect for private and family life (Article 8).

⁸ Recital 54 of the Directive.

2. THE SCOPE OF THE DIRECTIVE

2.1 WHEN DO THE RIGHTS SET OUT IN THE DIRECTIVE APPLY?

According to Article 2, the rights set out in the Directive apply “to suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence, and irrespective of whether they are deprived of liberty”. The Directive applies until such time when there is a final determination of the question whether the suspected or accused person has committed the offence, including, where applicable, sentencing and resolution of any appeal. Special account should be taken of the needs of vulnerable suspected and accused persons in the application of the Directive.⁹

It should be observed that in the case of minor offences such as minor traffic offences, minor offences relating to general municipal regulations and minor public order offences, which provide for the imposition of sanctions by an authority other than the courts and such a sanction may be appealed, the Directive will only apply to the proceedings before the court following the appeal.¹⁰ However, the Directive is applicable in all cases where deprivation of liberty can be imposed as a sanction.¹¹

The Directive confirms that the rights and obligations set out within it, do not affect a Member State’s obligation to guarantee the right to a fair trial under the ECHR in any event.

With regard to European arrest warrant proceedings, the Directive applies from the time of arrest in the executing Member State.¹²

As to the availability of legal aid to support access to a lawyer, Article 11 states that “[t]he Directive is without prejudice to national law in

⁹ Article 13 of the Directive.

¹⁰ Article 2(4)(a) of the Directive.

¹¹ Article 2(4)(b) of the Directive.

¹² Article 2(2) of the Directive.

relation to legal aid, which shall apply in accordance with the Charter and the ECHR.” A subsequent directive will set out the minimum standards with regard to legal aid, in accordance with Measure C2 of the Roadmap.

2.2 WHAT ARE THE RIGHTS OF SUSPECTED AND ACCUSED PERSONS UNDER THE DIRECTIVE?

2.2a The right of access to a lawyer

Article 3(2) of the Directive provides that suspected or accused persons are entitled to have access to a lawyer without undue delay and from whichever of the following points in time is the earliest:

- Before they are questioned by the police or by another law enforcement or judicial authority;
- Upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act;
- Without undue delay after deprivation of liberty; or
- Where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before the court.¹³

¹³ Article 3(2)(a)-(d) of the Directive.

The Directive reflects the case law of the ECtHR on the right to a fair trial (Article 6(1)),¹⁴ regarding access to a lawyer. In particular, in the 2008 case of *Salduz v Turkey*,¹⁵ the ECtHR underlined the importance of early access to legal assistance. The case involved a minor who was arrested and made admissions during interrogations without the presence of a lawyer. The minor later retracted the statement, claiming that it had been obtained under duress. The Grand Chamber of the ECtHR found that the applicant's rights under Article 6(1) and Article 6(3)(c)¹⁶ of the ECHR had been violated due to the applicant's lack of access to legal assistance while he was in police custody. The Court found that "[n]either the assistance provided subsequently by a lawyer nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred during police custody".¹⁷ The Court also stated that "in order for the right to a fair trial to remain sufficiently "practical and effective", Article 6(1) requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police..."¹⁸ The case of *Sebalj v Croatia*¹⁹ clarified that the right extends to legal representation during questioning by the police.

In the subsequent case of *Dayanan v Turkey*,²⁰ the ECtHR made clear that "an accused person is entitled, as soon as he or she is taken into custody, to be assisted by a lawyer, and not only while being questioned".²¹ The Court also stated that the lawyer must be able to

¹⁴ Article 6(1) states: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

¹⁵ ECtHR 27 November 2008, *Salduz v Turkey*, No. 36391/02.

¹⁶ Article 6(3)(c) states that everyone who is charged with a criminal offence has the right "to defend himself in person or through legal assistance of his choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require".

¹⁷ *Supra* note 18 at 58.

¹⁸ *Ibid* at 55.

¹⁹ ECtHR 28 September 2011, *Sebalj v Croatia*, No. 4429/09, para. 257.

²⁰ ECtHR 13 October 2009, *Dayanan v Turkey*, No. 7377/03, para. 32. For an overview of further relevant case law see Open Society Justice Initiative, *Template Brief Issue #1: Early Access to Legal Assistance*, pp. 5-6 <<http://www.opensocietyfoundations.org/sites/default/files/legal-tools-early-access-20120424.pdf>> (date accessed: 30 January 2015).

²¹ *Ibid* at 32.

have unrestricted access to “the fundamental aspects of that person’s defence: discussion of the case, organization of the defence, collection of evidence favourable to the accused, preparation of questioning, support of an accused in distress and checking the conditions of detention”.²²

How should access to a lawyer be facilitated?

Under Article 3(4) of the Directive, general information should be made available in order to facilitate the suspected or accused person obtaining a lawyer. This includes for example the provision of information on a website or by way of a leaflet available in police stations. Where the person does not have a lawyer, arrangements should be made by the relevant authorities for the assistance of a lawyer. This could include the arrangement of a lawyer on the basis of a list of available lawyers from which the suspected or accused person can choose one.

What does the right of access to a lawyer entail?

Under Article 3(3)(a), a suspected or accused person has a right to meet privately and communicate with their lawyer, including prior to being questioned by the police, other law enforcement or judicial authorities.

According to Article 3(3)(b), the suspected or accused person has a right to have their lawyer present when being questioned. The lawyer must be able to **participate effectively** when the suspected or accused person is being questioned. Any such participation must be noted.

Recital 25 of the Directive states that **effective participation** means that “the lawyer may inter alia, in accordance with such procedures [under national law], ask questions, request clarification and make statements”.

²²*Ibid.*

Furthermore, Article 3(3)(c) of the Directive provides that Member States must ensure that suspected or accused persons have, at a minimum, the right for their lawyer to attend investigative or evidence-gathering acts which include:

- Identity parades;
- Confrontations; and
- Reconstructions of the scene of a crime.

This right applies where these acts are provided for under national law and if the suspected or accused person is allowed or required to attend one of the acts outlined above.

Similar standards have been set under the ECHR. In the case of *Laska and Lika v Albania*,²³ the ECtHR found that Article 6(1) had been violated as an identification parade had taken place without the applicants' lawyers being present.

What stipulations exist in the Directive for communication between a lawyer and a suspected or accused person?

Article 4 of the Directive places an obligation on Member States to respect the confidentiality of communication between a suspected or accused person and their lawyer. This includes meetings, correspondence, telephone conversations and other forms of communication which are permitted under national law.

The ECHR does not make any explicit guarantee regarding the right of a suspected or accused person to communicate without hindrance with their lawyer. However, in *S v Switzerland*,²⁴ the ECtHR stated "that an accused's right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair

²³ ECtHR 20 April 2010, *Laska and Lika v Albania*, Nos. 12315/04 and 17605/04.

²⁴ ECtHR 28 November 1991, *S v Switzerland*, No. 12629/87, 13965/88. See also ECtHR 16 December 1992, *Niemietz v Germany*, No. 13710/88 and ECtHR 12 May 2005, *Ocalan v Turkey*, No. 46221/99.

trial in a democratic society and follows from Article 6 para. 3(c) of the Convention”.²⁵ In doing so the ECtHR relied on Article 93 of the Council of Europe Standard Minimum Rules of the Treatment of Prisoners which states that:

“Interviews between the prisoner and his legal adviser may be within sight but not within hearing, either direct or indirect, of a police or institution official.”²⁶

In the case of *Brennan v the United Kingdom*²⁷ the ECtHR held “that the presence of the police officer within hearing during the applicant’s first consultation with his solicitor infringed his right to an effective exercise of his defence rights” and Article 6(3)(c) taken in conjunction with Article 6(1) had been violated.²⁸

2.2b The right to have a third person informed of the deprivation of liberty

Article 5(1) of the Directive places an obligation on Member States to ensure that suspected or accused persons who are deprived of their liberty have the right to have at least one person informed of their deprivation of liberty without undue delay. The person to be informed could be a relative or employer for example and may be nominated by the suspected or accused person.

Article 5(2) of the Directive also states that in cases where the suspected or accused person is a child, the holder of parental responsibility is to be informed as soon as possible of the child’s deprivation of liberty and the reasons therefor. If it is contrary to the

²⁵ ECtHR 28 November 1991, *S v Switzerland*, No. 12629/87, 13965/88, para. 48.

²⁶ Council of Europe (Committee of Ministers) Resolution (73)(5) Standard Minimum Rules for the Treatment of Prisoners (Adopted by the Committee of Ministers on 19 January 1973 at the 217th meeting of the Ministers’ Deputies), Article 93.

²⁷ ECtHR 16 October 2001, *Brennan v the United Kingdom*, No. 39846/98, para. 58.

²⁸ *Ibid* at 63.

best interests of the child to inform a holder of parental responsibility, then another appropriate adult must be informed.

2.2c The right to communicate with third persons while deprived of liberty

Article 6 of the Directive provides that Member States must also ensure that a suspected or accused person who is deprived of their liberty has the right and is able to communicate with at least one third person, without undue delay. The person should be nominated by the suspected or accused person and may for example by a relative.

It is left to the discretion of the Member States as to how they may make practical arrangements regarding the right to communicate with third persons, such as in relation to the timing, means, frequency and duration of the communication, and taking into account the need to maintain good order, security and safety where the suspected or accused person is being held.²⁹

2.2d The right to communicate with consular authorities

The right to consular assistance of suspected or accused persons who are deprived of their liberty is enshrined in Article 36 of the Vienna Convention on Consular Relations (1963). Under Article 7(1) of the Directive on access to a lawyer, Member States must ensure that a suspected or accused person who is a non-national, and who is deprived of his/her liberty, has the right to have the consular authorities of his State of nationality informed without undue delay, and to communicate with them if he/she so wishes.

Article 7(1) also states that where a suspected or accused person has two or more nationalities, they may choose which consular

²⁹ Recital 36 of the Directive.

authorities, if any, they wish to have informed and with whom they wish to communicate.

Suspected or accused persons have the right to be visited by their consular authorities, to converse and correspond with them and to have legal representation arranged by them, subject to the agreement of the consular authorities and the wishes of the suspected or accused person (Article 7(2)).

Member States may regulate the exercise of the rights in Article 7 in national law or procedures. They must however “enable full effect to be given to the purposes for which these rights are intended” (Article 7(3)).

2.2e European arrest warrant proceedings

What does the right of access to a lawyer entail in European arrest warrant proceedings?

The right of access to a lawyer in the executing Member State

The Directive places an obligation on Member States to ensure that a requested person has the right of access to a lawyer in the executing Member State upon arrest pursuant to the European arrest warrant (Article 10(1)).

Under Article 10(2)(a)-(c) the right of access to a lawyer in the executing Member State includes:

- The right of access to a lawyer in such time and in such a manner so as to allow the requested person to exercise his/her right effectively and in any event without undue delay from the deprivation of liberty;
- The right to meet and communicate with their lawyer; and

-
- The right of the lawyer to be present, and in accordance with the procedures in national law, participates during the hearing of a requested person.³⁰

Article 10(3) also states that the rights outlined in Articles 4, 5, 6, 7 and 9, as discussed above, apply equally in European arrest warrant proceedings.

The right of access to a lawyer in the issuing Member State

According to Article 10(4), where a requested person is deprived of their liberty, the competent authority in the executing Member State must, without undue delay, inform the requested person that they have the right to appoint a lawyer in the issuing Member State. The role of that lawyer is to assist the lawyer in the executing Member State through the provision of information and advice with a view to the effective exercise of the rights of requested persons under Framework Decision 2002/584/JHA.³¹

If the requested person wishes to exercise his/her right to appoint a lawyer in the issuing Member State and does not already have such a lawyer, then the competent authority in the executing Member State must promptly inform the competent authority in the issuing Member State who must then provide the requested person with the necessary information, without undue delay, to facilitate them accessing a lawyer.

³⁰ Where the lawyer participates in the hearing, this shall be noted using the recording procedures in accordance with the national law of the Member State concerned (Article 10(2)(c)).

³¹ 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. Provision of dual representation in EAW cases has been described as imperative, so as to ensure expert knowledge is available to provide the best defence for requested persons in the executing state, see Blackstock, J., *European Arrest Warrants: ensuring an effective defence* [Justice, 2012], pp 13 and 42-44.

3. DEROGATIONS FROM RIGHTS IN THE DIRECTIVE

Certain temporary derogations may be permissible under the Directive where specific conditions are met.

Any derogations must meet the following requirements:

- They must be proportionate and not go beyond what is necessary;
- They must be strictly limited in time;
- They must not be based exclusively on the type or the seriousness of the alleged offence; and
- They must not prejudice the overall fairness of the proceedings.

What derogations are permissible regarding the right of access to a lawyer?

As regards access to a lawyer without undue delay upon deprivation of liberty provided in Article 3(2) of the Directive, Article 3(5) allows for a temporary derogation which may be permissible in exceptional circumstances, where the geographical remoteness of the suspected or accused persons does not make it possible to ensure access to a lawyer without undue delay after the deprivation of liberty. However, such a derogation would only be permissible at the pre-trial stage and would not apply during the questioning of suspects.

Regarding the right to meet in private and communicate with a lawyer (Article 3(a)), the role of the lawyer during questioning (Article 3(b)) and the right of the lawyer to attend certain investigative and evidence-gathering acts (Article 3(c)), Article 3(6)

of the Directive allows for certain temporary derogations that may be permissible in exceptional circumstances, on the basis of compelling reasons, which are:

- There is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person; or
- Immediate action by the investigating authorities is essential in order to prevent substantial jeopardy to criminal proceedings.³²

Any such derogation would only be permissible at the pre-trial stage.

In *Salduz v Turkey*, the ECtHR stated that “[e]ven where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction - whatever its justification - must not unduly prejudice the rights of the accused under Article 6”.³³

In the same case the Court also held that:

“Any exception to the enjoyment of this right should be clearly circumscribed and its application strictly limited in time. These principles are particularly called for in the case of serious charges, for it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies.”³⁴

³² Article 3(6) of the Directive.

³³ *Supra* note 18 at 55.

³⁴ *Ibid* para. 54.

Even where there are exceptional circumstances that permit for denial of access to a lawyer, the ECtHR has stated that any incriminating statements made by an accused in the absence of a lawyer may not be used to obtain a conviction.³⁵

What derogations are permissible regarding the right to have a third person informed of the deprivation of liberty?

Under Article 5(3) of the Directive, a temporary derogation from the right to have a third person informed of deprivation of liberty may be permissible in light of the particular circumstances of a case and based on one of the following compelling reasons:

- Where there is an urgent need to avert serious adverse consequences for the right to life, liberty or physical integrity of a person; or
- Where there is an urgent need to prevent a situation where criminal proceedings could be substantially jeopardised.

According to Recital 35 of the Directive, where the competent authorities envisage making a temporary derogation in respect of a specific third person, “they should firstly consider whether another third person, nominated by the suspect or accused person could be informed of the deprivation of liberty”.

³⁵ ECtHR 18 February 2010, *Zaichenko v Russia*, No. 39660/02.

Where the suspected or accused person is a child and the Member State temporarily derogates from the right to have a holder of parental responsibility or another appropriate adult informed of the deprivation of liberty, then the Member State must ensure that the authority responsible for the protection or welfare of children is informed without undue delay of the child's deprivation of liberty (Article 5(4)).

What derogations are permissible regarding the right to communicate with third persons while deprived of liberty?

Article 6(2) of the Directive allows for Member States to “limit or defer” the exercise of the right to communicate, while deprived of liberty, with third persons. This may be done “in view of imperative requirements or proportionate operational requirements.”

Recital 36 of the Directive states that such requirements should include the need to:

- Avert serious adverse consequences for the life, liberty or physical integrity of a person;
- Prevent prejudice to criminal proceedings;
- Prevent a criminal offence;
- Await a court hearing; and
- Protect victims of crime.

Where the competent authorities envisage limiting or deferring the exercise of the right to communicate with a third person, Recital 36 states that they should first consider whether the suspected or accused person could communicate with another third person, nominated by them.

What derogations are permissible regarding the right to communicate with consular authorities?

The Directive does not make provision for the derogation of the exercise of the right to communicate with consular authorities.

What derogations are permissible in the context of European arrest warrant proceedings?

Articles 5(3)³⁶ and Article 8³⁷ (discussed above) apply equally to European arrest warrant proceedings as to the other rights protected in the Directive.

³⁶ Concerning derogations from the right to have a third person informed of the deprivation of liberty.

³⁷ Concerning general conditions for applying temporary derogations.

4. WAIVER OF RIGHTS

Is a suspected or accused person entitled to waive their rights under the Directive?

The Directive allows for a suspected or accused person to waive their right of access to a lawyer, including in European arrest warrant proceedings,³⁸ but only if certain conditions are met (Article 9(1)(a)-(b)), which are:

- The suspected or accused person has been provided, orally or in writing, with clear and sufficient information in simple and understandable language about the content of the right concerned and the possible consequences of waiving it; and
- The waiver is given voluntarily and unequivocally.

The ECtHR has held that waiver of the right to legal assistance is permissible under the ECHR, but emphasised that certain safeguards are necessary. In *Pishchalnikov v Russia*³⁹ the ECtHR stated that a waiver:

“must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a right. Before an accused can be said to have implicitly, through his conduct, waived an important right under Art. 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be”.⁴⁰

³⁸ See Article 10(3) of the Directive.

³⁹ ECtHR 24 September 2006, *Pishchalnikov v Russia*, No. 7025/04 .

⁴⁰ *Ibid* at 76. See also ECtHR 31 March 2009, *Plonka v Poland*, No. 201310/02, and ECtHR 1 April 2010, *Pavlenko v Russia*, No. 42371/02.

Article 9(2) of the Directive states that a waiver may be made orally or in writing. It must be noted, together with the circumstances under which the waiver is given, using the recording procedure in accordance with national law.

According to Article 9(3), Member States must ensure that a suspected or accused person may revoke a waiver at any point during the criminal proceedings and that they are informed about the possibility of doing so. A revocation shall have effect from the moment it is made.

5. REMEDIES

Under Article 12, where the rights under the Directive are breached, suspected or accused persons as well as requested persons in European arrest warrant proceedings, must have an effective remedy under national law.

Member States must make sure that in the assessment of statements made by suspected or accused persons in criminal proceedings or of evidence obtained in breach of the right to a lawyer, or where a derogation from the right was authorised, the rights of the defence and the fairness of the proceedings are respected.

6. CONCLUSION

The Directive on the right of access to a lawyer in criminal proceedings and the right to communicate upon arrest is vital to strengthen the procedural rights of suspected and accused persons in the EU and to achieve full mutual recognition in the area of criminal justice among EU Member States.

Drawing on the standards of the ECHR and the EU Charter of Fundamental Rights, the Directive sets out clear and legally binding standards, applicable across the EU.

Legal practitioners play a critical part in ensuring that the provisions of the Directive are upheld. In this regard the case law of the ECHR, as outlined in this publication, provides important guidance to practitioners in interpreting the text of the Directive.

ANNEX –TEXT OF THE DIRECTIVE

DIRECTIVE 2013/48/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 22 October 2013

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

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION, Having regard to the Treaty on the Functioning of the European Union, and in particular point (b) of Article 82(2) thereof, Having regard to the proposal from the European Commission, After transmission of the draft legislative act to the national parliaments, Having regard to the opinion of the European Economic and Social Committee (1), After consulting the Committee of the Regions, Acting in accordance with the ordinary legislative procedure (2),

Whereas:

- (1) Article 47 of the Charter of Fundamental Rights of the European Union (the Charter), Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR) and Article 14 of the International Covenant on Civil and Political Rights (the ICCPR) enshrine the right to a fair trial. Article 48(2) of the Charter guarantees respect for the rights of the defence.
- (2) The Union has set itself the objective of maintaining and developing an area of freedom, security and justice. According to the Presidency conclusions of the European Council in Tampere of 15 and 16 October 1999, and in particular point (33) thereof, the principle of mutual recognition of judgments and other decisions of judicial authorities should become the cornerstone of judicial cooperation in civil and criminal matters within the Union because enhanced mutual recognition and the judicial protection of individual rights.

(1) OJ C 43, 15.2.2012, p. 51.

(2) Position of the European Parliament of 10 September 2013 (not yet published in the Official Journal) and decision of the Council of 7 October 2013.

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- (3) Pursuant to Article 82(1) of the Treaty on the Functioning of the European Union (TFEU), 'judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions...'
 - (4) The implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States trust in each other's criminal justice systems. The extent of the mutual recognition is very much dependent on a number of parameters, which include mechanisms for safeguarding the rights of suspects or accused persons and common minimum standards necessary to facilitate the application of the principle of mutual recognition.
 - (5) Although the Member States are party to the ECHR and to the ICCPR, experience has shown that that alone does not always provide a sufficient degree of trust in the criminal justice systems of other Member States.
 - (6) Mutual recognition of decisions in criminal matters can operate effectively only in a spirit of trust in which not only judicial authorities, but all actors in the criminal process consider decisions of the judicial authorities of other Member States as equivalent to their own, implying not only trust in the adequacy of other Member States' rules, but also trust that those rules are correctly applied. Strengthening mutual trust requires detailed rules on the protection of the procedural rights and guarantees arising from the Charter, the ECHR and the ICCPR. It also requires, by means of this Directive and by means of other measures, further development within the Union of the minimum standards set out in the Charter and in the ECHR.
 - (7) Article 82(2) TFEU provides for the establishment of minimum rules applicable in the Member States so as to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension. That Article refers to 'the rights of individuals in criminal procedure' as one of the areas in which minimum rules may be established.
 - (8) Common minimum rules should lead to increased confidence in the criminal justice systems of all Member States, which, in turn, should lead to more efficient judicial cooperation in a climate of mutual trust and to the promotion of a fundamental rights culture in the Union. Such common minimum rules should also remove obstacles to the free movement of citizens throughout the territory of the Member States. Such common minimum rules should be established in relation to the right of access to a lawyer in criminal proceedings, the right to have a third party informed upon deprivation of liberty and the right to communicate with third persons and with consular authorities while deprived of liberty.
 - (9) On 30 November 2009, the Council adopted a Resolution on a Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings ('the Roadmap') (1). Taking a step-by-step approach, the Roadmap calls for the adoption of measures regarding the right to translation and

interpretation (measure A), the right to information on rights and information about the charges (measure B), the right to legal advice and legal aid (measure C), the right to communicate with relatives, employers and consular authorities (measure D), and special safeguards for suspects or accused persons who are vulnerable (measure E). The Roadmap emphasises that the order of the rights is only indicative and thus implies that it may be changed in accordance with priorities. The Roadmap is designed to operate as a whole; only when all its components are implemented will its benefits be felt in full.

- (10) On 11 December 2009, the European Council welcomed the Roadmap and made it part of the Stockholm programme — An open and secure Europe serving and protecting citizens (2) (point 2.4). The European Council underlined the non-exhaustive character of the Roadmap, by inviting the Commission to examine further elements of minimum procedural rights for suspects and accused persons, and to assess whether other issues, for instance the presumption of innocence, need to be addressed, in order to promote better cooperation in that area.
- (11) Two measures have been adopted pursuant to the Roadmap to date, namely Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (3) and Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (4).
- (12) This Directive lays down minimum rules concerning the right of access to a lawyer in criminal proceedings and in proceedings for the execution of a European arrest warrant pursuant to Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (5) (European arrest warrant proceedings) and the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty. In doing so, it promotes the application of the Charter, in particular Articles 4, 6, 7, 47 and 48 thereof, by building upon Articles 3, 5, 6 and 8 ECHR, as interpreted by the European Court of Human Rights, which, in its case-law, on an on-going basis, sets standards on the right of access to a lawyer. That case law provides, inter alia, that the fairness of proceedings requires that a suspect or accused person be able to obtain the whole range of services specifically associated with legal assistance. In that regard, the lawyers of suspects or accused persons should be able to secure without restriction, the fundamental aspects of the defence.

(1) OJ C 295, 4.12.2009, p. 1.

(2) OJ C 115, 4.5.2010, p. 1.

(3) OJ L 280, 26.10.2010, p. 1.

(4) OJ L 142, 1.6.2012, p. 1.

(5) OJ L 190, 18.7.2002, p. 1.

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- (13) Without prejudice to the obligations of Member States under the ECHR to ensure the right to a fair trial, proceedings in relation to minor offending which take place within a prison and proceedings in relation to offences committed in a military context which are dealt with by a commanding officer should not be considered to be criminal proceedings for the purposes of this Directive.
- (14) This Directive should be implemented taking into account the provisions of Directive 2012/13/EU, which provide that suspects or accused persons are provided promptly with information concerning the right of access to a lawyer, and that suspects or accused persons who are arrested or detained are provided promptly with a written Letter of Rights containing information about the right of access to a lawyer.
- (15) The term ‘lawyer’ in this Directive refers to any person who, in accordance with national law, is qualified and entitled, including by means of accreditation by an authorised body, to provide legal advice and assistance to suspects or accused persons.
- (16) In some Member States an authority other than a court having jurisdiction in criminal matters has competence for imposing sanctions other than deprivation of liberty in relation to relatively minor offences. That may be the case, for example, in relation to traffic offences which are committed on a large scale and which might be established following a traffic control. In such situations, it would be unreasonable to require that the competent authorities ensure all the rights under this Directive. Where the law of a Member State provides for the imposition of a sanction regarding minor offences by such an authority and there is either a right of appeal or the possibility for the case to be otherwise referred to a court having jurisdiction in criminal matters, this Directive should therefore apply only to the proceedings before that court following such an appeal or referral.
- (17) In some Member States certain minor offences, in particular minor traffic offences, minor offences in relation to general municipal regulations and minor public order offences, are considered to be criminal offences. In such situations, it would be unreasonable to require that the competent authorities ensure all the rights under this Directive. Where the law of a Member State provides in respect of minor offences that deprivation of liberty cannot be imposed as a sanction, this Directive should therefore apply only to the proceedings before a court having jurisdiction in criminal matters.

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- (18) The scope of application of this Directive in respect of certain minor offences should not affect the obligations of Member States under the ECHR to ensure the right to a fair trial including obtaining legal assistance from a lawyer.
- (19) Member States should ensure that suspects or accused persons have the right of access to a lawyer without undue delay in accordance with this Directive. In any event, suspects or accused persons should be granted access to a lawyer during criminal proceedings before a court, if they have not waived that right.
- (20) For the purposes of this Directive, questioning does not include preliminary questioning by the police or by another law enforcement authority the purpose of which is to identify the person concerned, to verify the possession of weapons or other similar safety issues or to determine whether an investigation should be started, for example in the course of a road-side check, or during regular random checks when a suspect or accused person has not yet been identified.
- (21) Where a person other than a suspect or accused person, such as a witness, becomes a suspect or accused person, that person should be protected against self-incrimination and has the right to remain silent, as confirmed by the case-law of the European Court of Human Rights. This Directive therefore makes express reference to the practical situation where such a person becomes a suspect or accused person during questioning by the police or by another law enforcement authority in the context of criminal proceedings. Where, in the course of such questioning, a person other than a suspect or accused person becomes a suspect or accused person, questioning should be suspended immediately. However, ... questioning may be continued if the person concerned has been made aware that he or she is a suspect or accused person and is able to fully exercise the rights provided for in this Directive.
- (22) Suspects or accused persons should have the right to meet in private with the lawyer representing them. Member States may make practical arrangements concerning the duration and frequency of such meetings, taking into account the circumstances of the proceedings, in particular the complexity of the case and the procedural steps applicable. Member States may also make practical arrangements to ensure safety and security, in particular of the lawyer and of the suspect or accused person, in the place where such a meeting is conducted. Such practical arrangements should not prejudice the effective exercise or essence of the right of suspects or accused persons to meet their lawyer.

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- (23) Suspects or accused persons should have the right to communicate with the lawyer representing them. Such communication may take place at any stage, including before any exercise of the right to meet that lawyer. Member States may make practical arrangements concerning the duration, frequency and means of such communication, including concerning the use of video- conferencing and other communication technology in order to allow such communications to take place. Such practical arrangements should not prejudice the effective exercise or essence of the right of suspects or accused persons to communicate with their lawyer.
- (24) In respect of certain minor offences, this Directive should not prevent Member States from organising the right of suspects or accused persons to have access to a lawyer by telephone. However, limiting the right in this way should be restricted to cases where a suspect or accused person will not be questioned by the police or by another law enforcement authority.
- (25) Member States should ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when they are questioned by the police or by another law enforcement or judicial authority, including during court hearings. Such participation should be in accordance with any procedures under national law which may regulate the participation of a lawyer during questioning of the suspect or accused person by the police or by another law enforcement or judicial authority, including during court hearings, provided that such procedures do not prejudice the effective exercise and essence of the right concerned. During questioning by the police or by another law enforcement or judicial authority of the suspect or accused person or in a court hearing, the lawyer may, inter alia, in accordance with such procedures, ask questions, request clarification and make statements, which should be recorded in accordance with national law.
- (26) Suspects or accused persons have the right for their lawyer to attend investigative or evidence-gathering acts, insofar as they are provided for in the national law concerned and in so far as the suspects or accused persons are required or permitted to attend. Such acts should at least include 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 where there is disagreement between them on important facts or issues; and reconstructions of the scene of a crime in the presence of the suspect or accused person, in order to better understand the manner and circumstances under which a crime was committed and to be able to ask specific questions to the suspect or accused person. Member States may make practical arrangements concerning the presence of a lawyer during investigative or evidence-gathering acts. Such practical arrangements should not prejudice the effective exercise and essence of the rights concerned. Where the lawyer is present during an investigative or evidence-gathering act, this should be noted using the recording procedure in accordance with the law of the Member State concerned.

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- (27) Member States should endeavour to make general information available, for instance on a website or by means of a leaflet that is available at police stations, to facilitate the obtaining of a lawyer by suspects or accused persons. However, Member States would not need to take active steps to ensure that suspects or accused persons who are not deprived of liberty will be assisted by a lawyer if they have not themselves arranged to be assisted by a lawyer. The suspect or accused person concerned should be able freely to contact, consult and be assisted by a lawyer.
- (28) Where suspects or accused persons are deprived of liberty, Member States should make the necessary arrangements to ensure that such persons are in a position to exercise effectively the right of access to a lawyer, including by arranging for the assistance of a lawyer when the person concerned does not have one, unless they have waived that right. Such 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. Such arrangements could include those on legal aid if applicable.
- (29) The conditions in which suspects or accused persons are deprived of liberty should fully respect the standards set out in the ECHR, in the Charter, and in the case-law of the Court of Justice of the European Union (the Court of Justice) and of the European Court of Human Rights. When providing assistance under this Directive to a suspect or to an accused person who is deprived of liberty, the lawyer concerned should be able to raise a question with the competent authorities regarding the conditions in which that person is deprived of liberty.
- (30) In cases of geographical remoteness of the suspect or accused person, such as in overseas territories or where the Member State undertakes or participates in military operations outside its territory, Member States are permitted to derogate temporarily from the right of the suspect or accused person to have access to a lawyer without undue delay after deprivation of liberty. During such a temporary derogation, the competent authorities should not question the person concerned or carry out any of the investigative or evidence-gathering acts provided for in this Directive. Where immediate access to a lawyer is not possible because of the geographical remoteness of the suspect or accused person, Member States should arrange for communication via telephone or videoconference unless this is impossible.
- (31) Member States should be permitted to derogate temporarily from the right of access to a lawyer in the pre-trial phase when there is a need, in cases of urgency, to avert serious adverse consequences for the life, liberty or physical integrity of a person. During a temporary derogation on that ground, the competent authorities may question suspects or accused persons without the lawyer being present, provided that they have been informed of their right to remain silent and can exercise that right, and provided that such questioning does not prejudice the

rights of the defence, including the privilege against self-incrimination. Questioning may be carried out for the sole purpose and to the extent necessary to obtain information that is essential to avert serious adverse consequences for the life, liberty or physical integrity of a person. Any abuse of this derogation would in principle irretrievably prejudice the rights of the defence,

- (32) Member States should also be permitted to derogate temporarily from the right of access to a lawyer in the pre-trial phase where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings, in particular to prevent destruction or alteration of essential evidence, or to prevent interference with witnesses. During a temporary derogation on that ground, the competent authorities may question suspects or accused persons without a lawyer being present, provided that they have been informed of their right to remain silent and can exercise that right, and provided that such questioning does not prejudice the rights of the defence, including the privilege against self-incrimination. Questioning may be carried out for the sole purpose and to the extent necessary to obtain information that is essential to prevent substantial jeopardy to criminal proceedings. Any abuse of this derogation would in principle irretrievably prejudice the rights of the defence.
- (33) Confidentiality of communication between suspects or accused persons and their lawyer is key to ensuring the effective exercise of the rights of the defence and is an essential part of the right to a fair trial. Member States should therefore respect the confidentiality of meetings and other forms of communication between the lawyer and the suspect or accused person in the exercise of the right of access to a lawyer provided for in this Directive, without derogation. This Directive is without prejudice to procedures that address the situation where there are objective and factual circumstances giving rise to the suspicion that the lawyer is involved with the suspect or accused person in a criminal offence. Any criminal activity on the part of a lawyer should not be considered to be legitimate assistance to suspects or accused persons within the framework of this Directive. The obligation to respect confidentiality not only implies that Member States should refrain from interfering with or accessing such communication but also that, where suspects or accused persons are deprived of liberty or otherwise find themselves in a place under the control of the State, Member States should ensure that arrangements for communication uphold and protect confidentiality. This is without prejudice to any mechanisms that are in place in detention facilities with the purpose of avoiding illicit enclosures being sent to detainees, such as screening correspondence, provided that such mechanisms do not allow the competent authorities to read the communication between suspects or accused persons and their lawyer. This Directive is also without prejudice to procedures under national law according to which forwarding correspondence may be rejected if the sender does not agree to the correspondence first being submitted to a competent court.

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- (34) 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 that is carried out, for example, by national intelligence services to safeguard national security in accordance with Article 4(2) of the Treaty on European Union (TEU) or that falls within the scope of Article 72 TFEU, pursuant to which Title V on an area of Freedom, Security and Justice must 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.
- (35) Suspects or accused persons who are deprived of liberty should have the right to have at least one person, such as a relative or an employer, nominated by them, informed of their deprivation of liberty without undue delay, provided that this does not prejudice the due course of the criminal proceedings against the person concerned or any other criminal proceedings. Member States may make practical arrangements in relation to the application of that right. Such practical arrangements should not prejudice the effective exercise and essence of the right. In limited, exceptional circumstances, however, it should be possible to derogate temporarily from that right when this is justified, in the light of the particular circumstances of the case, by a compelling reason as specified in this Directive. When the competent authorities envisage making such a temporary derogation in respect of a specific third person, they should firstly consider whether another third person, nominated by the suspect or accused person, could be informed of the deprivation of liberty.
- (36) Suspects or accused persons should, while deprived of liberty, have the right to communicate without undue delay with at least one third person, such as a relative, nominated by them. Member States may limit or defer the exercise of that right in view of imperative requirements or proportionate operational requirements. Such requirements could include, inter alia, the need to avert serious adverse consequences for the life, liberty or physical integrity of a person, the need to prevent prejudice to criminal proceedings, the need to prevent a criminal offence, the need to await a court hearing, and the need to protect victims of crime. When the competent authorities envisage limiting or deferring the exercise of the right to communicate in respect of a specific third person, they should first consider whether the suspects or accused persons could communicate with another third person nominated by them. Member States may make practical arrangements concerning the timing, means, duration and frequency of communication with third persons, taking account of the need to maintain good order, safety and security in the place where the person is being deprived of liberty.

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- (37) The right of suspects and accused persons who are deprived of liberty to consular assistance is enshrined in Article 36 of the 1963 Vienna Convention on Consular Relations where it is a right conferred on States to have access to their nationals. This Directive confers a corresponding right on suspects or accused persons who are deprived of liberty, subject to their wishes. Diplomatic authorities may exercise consular protection where such authorities act as consular authorities.
- (38) Member States should clearly set out in their national law the grounds and criteria for any temporary derogations from the rights granted under this Directive, and they should make restricted use of those temporary derogations. Any such temporary derogations should be proportional, should be strictly limited in time, should not be based exclusively on the type or the seriousness of the alleged offence, and should not prejudice the overall fairness of the proceedings. Member States should ensure that where a temporary derogation has been authorised under this Directive by a judicial authority, which is not a judge or a court, the decision on authorising the temporary derogation can be assessed by a court, at least during the trial stage.
- (39) Suspects or accused persons should be able to waive a right granted under this Directive provided that they have been given information about the content of the right concerned and the possible consequences of waiving that right. When providing such information, the specific conditions of the suspects or accused persons concerned should be taken into account, including their age and their mental and physical condition.
- (40) 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.
- (41) Where a suspect or accused person revokes a waiver in accordance with this Directive, it should not be necessary to proceed again with questioning or any procedural acts that have been carried out during the period when the right concerned was waived.
- (42) Persons subject to a European arrest warrant ('requested persons') should have the right of access to a lawyer in the executing Member State in order to allow them to exercise their rights effectively under Framework Decision 2002/584/JHA. Where a lawyer participates in a hearing of a requested person by an executing judicial authority that lawyer may, inter alia, in accordance with procedures provided for under national law, ask questions, request clarification and make statements. The fact that the lawyer has participated in such a hearing should be noted using the recording procedure in accordance with the law of the Member State concerned.

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- (43) Requested persons should have the right to meet in private with the lawyer representing them in the executing Member State. Member States may make practical arrangements concerning the duration and frequency of such meetings, taking into account the particular circumstances of the case. Member States may also make practical arrangements to ensure safety and security, in particular of the lawyer and of the requested person, in the place where the meeting between the lawyer and the requested person is conducted. Such practical arrangements should not prejudice the effective exercise and essence of the right of requested persons to meet with their lawyer.
- (44) Requested persons should have the right to communicate with the lawyer representing them in the executing Member State. It should be possible for such communication to take place at any stage, including before any exercise of the right to meet with the lawyer. Member States may make practical arrangements concerning the duration, frequency and means of communication between requested persons and their lawyer, including concerning the use of videoconferencing and other communication technology in order to allow such communications to take place. Such practical arrangements should not prejudice the effective exercise and essence of the right of requested persons to communicate with their lawyer.
- (45) Executing Member States should make the necessary arrangements to ensure that requested persons are in a position to exercise effectively their right of access to a lawyer in the executing Member State, including by arranging for the assistance of a lawyer when requested persons do not have one, unless they have waived that right. National law should govern such arrangements, including those on legal aid if applicable. They could imply, *inter alia*, that the competent authorities arrange for the assistance of a lawyer on the basis of a list of available lawyers from which requested persons could choose.
- (46) Without undue delay after being informed that a requested person wishes to appoint a lawyer in the issuing Member State, the competent authority of that Member State should provide the requested person with information to facilitate the appointment of a lawyer in that Member State. Such information could, for example, include a current list of lawyers, or the name of a lawyer on duty in the issuing State, who can provide information and advice in European arrest warrant cases. Member States could request that the appropriate bar association draw up such a list.
- (47) The surrender procedure is crucial for cooperation in criminal matters between the Member States. Observance of the time-limits contained in Framework Decision 2002/584/JHA is essential for such cooperation. Therefore, while requested persons should be able to exercise fully their rights under this Directive in European arrest warrant proceedings, those time-limits should be respected.

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- (48) Pending 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.
- (49) In accordance with the principle of effectiveness of Union law, Member States should put in place adequate and effective remedies to protect the rights that are conferred upon individuals by this Directive.
- (50) Member States should ensure that in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their right to a lawyer, or in cases where a derogation from that right was authorised in accordance with this Directive, the rights of the defence and the fairness of the proceedings are respected. In this context, regard should be had to the case-law of the European Court of Human Rights, which has established that the rights of the defence will, in principle, be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction. This should be without prejudice to the use of statements for other purposes permitted under national law, such as the need to execute urgent investigative acts to avoid the perpetration of other offences or serious adverse consequences for any person or related to an urgent need to prevent substantial jeopardy to criminal proceedings where access to a lawyer or delaying the investigation would irretrievably prejudice the on-going investigations regarding a serious crime. Further, this should be without prejudice to national rules or systems regarding admissibility of evidence, and should not prevent Member States from maintaining a system whereby all existing evidence can be adduced before a court or a judge, without there being any separate or prior assessment as to admissibility of such evidence.
- (51) The duty of care towards suspects or accused persons who are in a potentially weak position underpins a fair administration of justice. The prosecution, law enforcement and judicial authorities should therefore facilitate the effective exercise by such persons of the rights provided for in this Directive, for example by taking into account any potential vulnerability that affects their ability to exercise the right of access to a lawyer and to have a third party informed upon deprivation of liberty, and by taking appropriate steps to ensure those rights are guaranteed.
- (52) 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 the right to a fair trial, the presumption of innocence and the rights of the defence. This Directive should be implemented in accordance with those rights and principles.

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- (53) 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.
- (54) This Directive sets minimum rules. Member States may extend the rights set out in this Directive in order to provide a higher level of protection. Such higher level of protection should not constitute an obstacle to the mutual recognition of judicial decisions that those minimum rules are designed to facilitate. The level of protection should never fall below the standards provided by the Charter or by the ECHR, as interpreted by the case-law of the Court of Justice and of the European Court of Human Rights.
- (55) This Directive promotes the rights of children and takes into account the Guidelines of the Council of Europe on child friendly justice, in particular its provisions on information and advice to be given to children. This Directive ensures that suspects and accused persons, including children, are provided with adequate information to understand the consequences of waiving a right under this Directive and that any such waiver is made voluntarily and unequivocally. Where the suspect or accused person is a child, the holder of parental responsibility should be notified as soon as possible after the child's deprivation of liberty and should be provided with the reasons therefor. If providing such information to the holder of parental responsibility is contrary to the best interests of the child, another suitable adult such as a relative should be informed instead. This should be without prejudice to provisions of national law which require that any specified authorities, institutions or individuals, in particular those that are responsible for the protection or welfare of children, should be informed of the deprivation of liberty of a child. Member States should refrain from limiting or deferring the exercise of the right to communicate with a third party in respect of suspects or accused persons who are children and who are deprived of liberty, save in the most exceptional circumstances. Where a deferral is applied the child should, however, not be held incommunicado and should be permitted to communicate, for example with an institution or an individual responsible for the protection or welfare of children.
- (56) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory document (1), Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.

(1) OJ C 369, 17.12.2011, p. 14.

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- (57) Since the objectives of this Directive, namely setting common minimum rules for the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings and the right to have a third person informed of the deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, cannot be sufficiently achieved by the Member States, but can rather, by reason of the scale of the measure, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 TEU. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (58) In accordance with Articles 1 and 2 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the TEU and to the TFEU and without prejudice to Article 4 of that Protocol, those Member States are not taking part in the adoption of this Directive and are not bound by it or subject to its application.
- (59) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the TEU and to the TFEU, Denmark is not taking part in the adoption of this Directive, and is not bound by it or subject to its application, have adopted this directive.

Article 1

Subject matter

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 Framework Decision 2002/584/JHA ('European arrest warrant proceedings') to have access to a lawyer, to have a third party informed of the deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

Article 2

Scope

1. This Directive applies to suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence, and irrespective of whether they are deprived of liberty. It applies until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect 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 (requested persons) from the time of their arrest in the executing Member State in accordance with Article 10.
3. This Directive also applies, under the same conditions as provided for in paragraph 1, to persons other than suspects or accused persons who, in the course of questioning by the police or by another law enforcement authority, become suspects or accused persons
4. Without prejudice to the right to a fair trial, in respect of minor offences:
 - a) Where the law of a Member State provides for the imposition of a sanction by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed or referred to such a court; or
 - b) Where deprivation of liberty cannot be imposed as a sanction;

This Directive shall only apply to the proceedings before a court having jurisdiction in criminal matters. In any event, this Directive shall fully apply where the suspect or accused person is deprived of liberty, irrespective of the stage of the criminal proceedings.

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 time and in such a manner so as to allow the persons concerned to exercise their rights of defense practically and effectively.
2. Suspects or accused persons shall have access to a lawyer without undue delay. In any event, suspects or accused persons shall have access to a lawyer from whichever of the following points in time is the earliest:
 - a) Before they are questioned by the police or by another law enforcement or judicial authority;
 - b) Upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with point (c) of paragraph 3;
 - c) Without undue delay after deprivation of liberty;
 - d) Where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court.
3. The right of access to a lawyer shall entail the following:
 - a) Member States shall ensure that suspects or accused persons have the right to meet in private and communicate with the lawyer representing them, including prior to questioning by the police or by another law enforcement or judicial authority;
 - b) Member States shall ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when questioned. Such participation shall be in accordance with procedures under national law, provided that such procedures do not prejudice the effective exercise and essence of the right concerned. Where a lawyer participates during questioning, the fact that such participation has taken place shall be noted using the recording procedure in accordance with the law of the Member State concerned;

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- c) Member States shall ensure that suspects or accused persons shall have, as a minimum, the right for their lawyer to attend the following investigative or evidence-gathering acts where those acts are provided for under national law and if the suspect or accused person is required or permitted to attend the act concerned:
- i) Identity parades;
 - ii) Confrontations;
 - iii) Reconstructions of the scene of a crime.
4. Member States shall endeavor to make general information available to facilitate the obtaining of a lawyer by suspects or accused persons.
5. Notwithstanding provisions of national law concerning the mandatory presence of a lawyer, Member States shall make the necessary arrangements to ensure that suspects or accused persons who are deprived of liberty are in a position to exercise effectively their right of access to a lawyer, unless they have waived that right in accordance with Article 9
6. In exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of point (c) of paragraph 2 where the geographical remoteness of a suspect or accused person makes it impossible to ensure the right of access to a lawyer without undue delay after deprivation of liberty.
7. In exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of the rights provided for in paragraph 3 to the extent justified in the light of the particular circumstances of the case, on the basis of one of the following compelling reasons:
- (a) Where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;
 - (b) Where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings.

Article 4 *Confidentiality*

Member States shall respect the confidentiality of communication between suspects or accused persons and their lawyer in the exercise of the right of access to a lawyer provided for under this Directive. Such communication shall include meetings, correspondence, telephone conversations and other forms of communication permitted under national law.

Article 5 *The right to have a third person informed of the deprivation of liberty*

1. Member States shall ensure that suspects or accused persons who are deprived of liberty have the right to have at least one person, such as a relative or an employer, nominated by them, informed of their deprivation of liberty without undue delay if they so wish.
2. If the suspect or accused person is a child, Member States shall ensure that the holder of parental responsibility of the child is informed as soon as possible of the deprivation of liberty and of the reasons pertaining thereto, unless it would be contrary to the best interests of the child, in which case another appropriate adult shall be informed. For the purposes of this paragraph, a person below the age of 18 years shall be considered to be a child.
3. Member States may temporarily derogate from the application of the rights set out in paragraphs 1 and 2 where justified in the light of the particular circumstances on the case of the basis of one of the following compelling reasons.
 - a) Where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;
 - b) Where there is an urgent need to prevent a situation where criminal proceedings could be substantially jeopardised.
4. Where Member States temporarily derogate from the application of the right set out in paragraph 2, they shall ensure that an authority responsible for the protection or welfare of children is informed without undue delay of the deprivation of liberty of the child.

Article 6 *The right to communicate, while deprived of liberty, with third persons*

1. Member States shall ensure that suspects or accused persons who are deprived of liberty have the right to communicate without undue delay with at least one third person, such as a relative, nominated by them.

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2. Member States may limit or defer the exercise of the right referred to in paragraph 1 in view of imperative requirements or proportionate operational requirements.

Article 7

The right to communicate with consular authorities

1. Member States shall ensure that suspects or accused persons who are non-nationals and who are deprived of liberty have the right to have the consular authorities of their State of nationality informed of the deprivation of liberty without undue delay and to communicate with those authorities, if they so wish. However, where suspects or accused persons have two or more nationalities, they may choose which consular authorities, if any, are to be informed of the deprivation of liberty and with whom they wish to communicate
2. Suspects or accused persons also have the right to be visited by their consular authorities, the right to converse and correspond with them and the right to have legal representation arranged for by their consular authorities, subject to the agreement of those authorities and the wishes of the suspects or accused persons concerned.
3. National law or procedures may regulate the exercise of the rights laid down in this Article, provided that such law or procedures enable full effect to be given to the purposes for which these rights are intended.

Article 8

General conditions for applying temporary derogations

1. Any temporary derogation under Article 3(5) or (6) or under Article 5(3) shall:
 - a) Be proportionate and not go beyond what is necessary;
 - b) Be strictly limited in time;
 - c) Not be based exclusively on the type or the seriousness of the alleged offence;
and
 - d) Not prejudice the overall fairness of the proceedings.
2. Temporary derogations under Article 3(5) or (6) may be authorized only by a duly reasoned decision taken on a case-by-case basis, either by a judicial authority, or by another competent authority on condition that the decision can be submitted to judicial review. The duly reasoned decision shall be recorded using the recording procedure in accordance with the law of the Member State concerned.

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3. Temporary derogations under Article 5(3) may be authorized only on a case-by-case basis, either by a judicial authority, or by another competent authority on condition that the decision can be submitted to judicial review.

Article 9

Waiver

1. Without prejudice to national law requiring the mandatory presence or assistance of a lawyer, Member States shall ensure that, in relation to any waiver of a right referred to in Articles 3 and 10:
 - a) The suspect or accused person has been provided, orally or in writing, with clear and sufficient information in simple and understandable language about the content of the right concerned and the possible consequences of waiving it; and
 - b) The waiver is given voluntarily and unequivocally.
2. The waiver, which can be made in writing or orally, shall be noted, as well as the circumstances under which the waiver was given, using the recording procedure in accordance with the law of the Member State concerned.
3. Member States shall ensure that suspects or accused persons may revoke a waiver subsequently at any point during the criminal proceedings and that they are informed about that possibility. Such a revocation shall have effect from the moment it is made.

Article 10

The right of access to a lawyer in European arrest warrant proceedings

1. Member States shall ensure that a requested person has the right of access to a lawyer in the executing Member State upon arrest pursuant to the European arrest warrant.
2. With regard to the content of the right of access to a lawyer in the executing Member State, requested persons shall have the following rights in that Member State:
 - a) The right of access to a lawyer in such time and in such a manner as to allow the requested persons to exercise their rights effectively and in any event without undue delay from deprivation of liberty;
 - b) The right to meet and communicate with the lawyer representing them;

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- c) The right for their lawyer to be present and, in accordance with procedures in national law, participates during a hearing of a requested person by the executing judicial authority. Where a lawyer participates during the hearing this shall be noted using the recording procedure in accordance with the law of the Member State concerned.
 3. The rights provided for in Articles 4, 5, 6, 7, 9, and, where a temporary derogation under Article 5(3) is applied, in Article 8, shall apply, *mutatis mutandis*, to European arrest warrant proceedings in the executing Member State.
 4. The competent authority in the executing Member State shall, without undue delay after deprivation of liberty, inform requested persons that they have the right to appoint a lawyer in the issuing Member State. The role of that lawyer in the issuing Member State is to assist the lawyer in the executing Member State by providing that lawyer with information and advice with a view to the effective exercise of the rights of requested persons under Framework Decision 2002/584/JHA.
 5. Where requested persons wish to exercise the right to appoint a lawyer in the issuing Member State and do not already have such a lawyer, the competent authority in the executing Member State shall promptly inform the competent authority in the issuing Member State. The competent authority of that Member State shall, without undue delay, provide the requested persons with information to facilitate them in appointing a lawyer there.
 6. The right of a requested person to appoint a lawyer in the issuing Member State is without prejudice to the time-limits set out in Framework Decision 2002/584/JHA or the obligation on the executing judicial authority to decide, within those time-limits and the conditions defined under that Framework Decision, whether the person is to be surrendered.

Article 11

Legal aid

This Directive is without prejudice to national law in relation to legal aid, which shall apply in accordance with the Charter and the ECHR.

Article 12

Remedies

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

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2. Without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in criminal proceedings, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 3(6), the rights of the defence and the fairness of the proceedings are respected.

Article 13

Vulnerable persons

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

Article 14

Non-regression clause

Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the Charter, the ECHR, or other relevant provisions of international law or the law of any Member State, which provides a higher level of protection.

Article 15

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 27 November 2016. They shall immediately inform the Commission thereof.
2. When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The Member States shall lay down the methods of making such a reference.
3. Member States shall communicate to the Commission the text of the measures of national law, which they adopt in the field covered by this Directive.

Article 16

Report

The Commission shall, by 28 November 2019, submit a report to the European Parliament and to the Council, assessing the extent to which the Member States have taken the necessary measures in order to comply with this Directive, including an evaluation of the application of Article 3(6) in conjunction with Article 8(1) and (2), accompanied, if necessary, by legislative proposals.

Article 17

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 18

Addresses

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

Done at Strasbourg, 22 October 2013.

For the European Parliament

The President

M. SCHULZ

For the Council

The President

V. LEŠKEVIČIUS

NOTES



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