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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**

{SEC(2011) 686 final}

{SEC(2011) 687 final}

## EXPLANATORY MEMORANDUM

### 1. INTRODUCTION

1. This proposal for a Directive of the European Parliament and the Council aims to set common minimum standards on the rights of suspects and accused persons in criminal proceedings throughout the European Union to have access to a lawyer and to communicate upon arrest with a third person, such as a relative, employer or consular authority. The proposal is the next step in the series of measures laid down in the Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspects and accused persons in criminal proceedings, appended to the Stockholm Programme approved by the European Council of 10-11 December 2010. The Roadmap invites the Commission to put forward proposals on a 'step-by-step' basis. This proposal should therefore be considered as part of a comprehensive package of legislation to be presented over the next few years, which will provide a minimum set of procedural rights in criminal proceedings in the European Union. The issue of legal aid, which was conflated with that of access to a lawyer in the Roadmap, warrants a separate proposal owing to the specificity and complexity of the subject.
2. The first step is Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation<sup>1</sup>.
3. The second step will be a Directive, currently under negotiation on the basis of a Commission proposal<sup>2</sup>, on the right to information, which will set out minimum rules on the right to receive information on one's rights, and on the charges, as well as on the right of access to the case file.
4. This proposal, similarly to the two previous measures, seeks to improve the rights of suspects and accused persons. Having common minimum standards governing these rights should boost mutual trust between judicial authorities and thus facilitate the application of the principle of mutual recognition. A certain degree of compatibility between the legislation of Member States is pivotal to improve judicial cooperation in the EU.
5. The proposal is based on Article 82(2) of the Treaty on the Functioning of the European Union (TFEU). That Article provides that, *'[t]o the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.'*

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<sup>1</sup> OJ L280, 26.10.2010, p. 1.

<sup>2</sup> COM(2010) 392, 20.7.2010.

*They shall concern:*

*(a) mutual admissibility of evidence between Member States;*

***(b) the rights of individuals in criminal procedure;***

*(c) the rights of victims of crime;*

*(d)[...].'*

6. Article 47 of the Charter of Fundamental Rights of the European Union (the Charter) stipulates the right to a fair trial. Article 48 guarantees the rights of the defence and has the same meaning and scope as the rights guaranteed by Article 6(3) of the European Convention of Human Rights and Fundamental Freedoms (ECHR)<sup>3</sup>. Article 6(3)(b) ECHR stipulates that everyone charged with a criminal offence has the right 'to have adequate time and facilities for the preparation of his defence' while Article 6(3)(c) enshrines the right 'to defend [one]self in person or through legal assistance of [one's] own choosing'. Article 14(3) of the International Covenant on Civil and Political Rights (ICCPR)<sup>4</sup> contains very similar provisions. Both the right of access to a lawyer and the right to communicate upon arrest provide formal safeguards against ill treatment and thus protect against a potential breach of Article 3 ECHR (prohibition of ill treatment). The right to communicate upon arrest promotes the right to respect for private and family life in Article 8 ECHR. The 1963 Vienna Convention on Consular Relations (VCCR)<sup>5</sup> provides that, on arrest or on detention, a foreign national has the right to ask for his consulate to be informed of the detention and to receive visits from consular officials.
7. The Commission carried out an impact assessment to underpin the proposal. The report on the impact assessment is available at <http://ec.europa.eu/governance...>

## **2. BACKGROUND**

8. Article 6(3) of the Treaty on European Union (TEU) provides that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, constitute general principles of EU law. Article 6(1) TEU provides that the European Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007<sup>6</sup>, which has the same legal value as the TFEU and TEU. The Charter is addressed to EU institutions and Member States when they implement EU law, such as in the field of judicial cooperation in criminal matters in the European Union.

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<sup>3</sup> OJ C 303, 14.12.2007, p. 30. Explanations relating to the Charter of Fundamental Rights.

<sup>4</sup> 999 U.N.T.S. 171. The ICCPR is an international convention on civil and political rights opened for signature by resolution of the United Nations General Assembly on 16 December 1966 which has been ratified by, and is thus binding in international law on, all EU Member States.

<sup>5</sup> United Nations, Treaty Series, vol. 596, p. 261.

<sup>6</sup> OJ C 303, 14.12.2007 p. 1.

9. In 2004, the Commission put forward a comprehensive proposal<sup>7</sup> for legislation covering the most important rights of defendants in criminal proceedings. This proposal was not adopted by Council.
10. On 30 November 2009, the Justice Council adopted a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings<sup>8</sup> calling for the adoption of measures covering the most basic procedural rights, based on a ‘step-by-step’ approach and inviting the Commission to present proposals to this end. The Council recognised that to date, not enough had been done at European level to safeguard the fundamental rights of individuals in criminal proceedings. The full benefit of EU legislation will only be felt once all measures are transposed into legislation. The third and fourth measures in the Roadmap concern the right of access to a lawyer and the right to communicate with a third person, such as a relative, employer or consular authority.
11. The Stockholm Programme, adopted by the European Council of 10-11 December 2009,<sup>9</sup> reaffirmed the importance of the rights of the individual in criminal proceedings as a fundamental value of the European Union and an essential component of mutual trust between Member States and of public confidence in the EU. Protecting individuals’ fundamental rights will also remove obstacles to free movement. The Stockholm Programme cites the Roadmap as an integral part of the multiannual programme and calls on the Commission to present proposals to implement it swiftly.

### 3. THE RIGHT OF ACCESS TO A LAWYER AS ESTABLISHED UNDER THE CHARTER AND THE ECHR

12. Article 6 of the Charter — Right to liberty and security — stipulates that:

*‘Everyone has the right to liberty and security of person.’*

Article 47 of the Charter — Right to an effective remedy and to a fair trial — provides that:

*‘(...) Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented (...).’*

Article 48 of the Charter — Presumption of innocence and right of defence — stipulates that:

*‘2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.’*

Within its scope of application, the Charter guarantees and reflects the corresponding rights enshrined in the ECHR.

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<sup>7</sup> COM(2004) 328, 28.4.2004.

<sup>8</sup> OJ C 295, 4.12.2009, p. 1.

<sup>9</sup> OJ C 115, 4.5.2010.

Article 6 — Right to a fair trial — stipulates that:

*‘(3) Everyone charged with a criminal offence has the following minimum rights:*

*(b) to have adequate time and facilities for the preparation of his defence*

*(c) to defend himself in person or through legal assistance of his own choosing[...]*’

13. A number of recent rulings of the European Court of Human Rights (ECtHR) have clarified the scope of these provisions. The Court has repeatedly held that Article 6 applies to the pre-trial stage of criminal proceedings<sup>10</sup> and that a suspect must be offered the assistance of a lawyer at the initial stages of police questioning<sup>11</sup> and as soon as he is deprived of his liberty, irrespective of any questioning<sup>12</sup>. The Court also ruled that these guarantees must apply to witnesses whenever they are in reality suspected of a criminal offence, as the formal qualification of the person is immaterial<sup>13</sup>. In the case of *Panovits*,<sup>14</sup> the ECtHR found a breach of Article 6 where statements made by the suspect in the absence of his lawyer were used to secure a conviction, even though they were not the sole evidence available. The court found that the lack of legal assistance during an applicant’s questioning constitutes a restriction of his defence rights, in the absence of compelling reasons that do not prejudice the overall fairness of the proceedings<sup>15</sup>. The number of complaints about the right of access to a lawyer has been growing steadily over the last few years. Without proper implementation of the ECtHR's case-law, Member States are likely to incur substantial costs stemming from liquidated damages awarded by the Court to successful applicants<sup>16</sup>.
14. In line with the mandate set out in the Procedural Rights Roadmap, this Directive lays down minimum requirements at EU level governing the right of suspected and accused persons to have access to a lawyer. It thus promotes the application of the Charter of Fundamental Rights, and in particular Articles 6, 47 and 48 therein, by building upon Article 6 ECHR as interpreted by the ECtHR.

#### **4. THE RIGHT TO COMMUNICATE UPON ARREST**

15. A suspected or accused person deprived of his liberty should be entitled to communicate upon arrest with at least one person named by him, such as a family member or employer. Member States should also make sure that the legal representatives of a child suspected or accused of crime are informed as soon as possible that the child has been taken into custody and the reasons why the child has been taken into custody, unless it is contrary to the best interests of the child. This right should only be subject to derogation in very limited circumstances.

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<sup>10</sup> *Salduz v Turkey*, judgment of 27 November 2008, application no. 36391/02, § 50.

<sup>11</sup> *Ibidem*, § 52.

<sup>12</sup> *Dayanan v Turkey*, judgment of 13 January 2010, application No. 7377/03, § 32.

<sup>13</sup> *Brusco v France*, judgment of 14 October 2010, application No. 1466/07, § 47.

<sup>14</sup> *Panovits v. Cyprus*, judgment of 11 December 2008, application No. 4268/04 § 73-76.

<sup>15</sup> *Ibidem* § 66.

<sup>16</sup> cf. Impact Assessment accompanying this proposal, quoted at § 7, p. 12.

16. Where the detained person is a non-national, it is appropriate for the consular authorities of the person's home state to be informed. Foreign suspects and defendants are an easily identifiable vulnerable group who sometimes need additional protection such as is offered by the 1963 Vienna Convention on Consular Relations (VCCR), which provides that on arrest or on detention, a foreign national has the right to ask for his consulate to be informed of the detention and to receive visits from consular officials.

## **5 SPECIFIC PROVISIONS**

### **Article 1 — Objective**

17. The objective of the Directive is to lay down rules governing the rights of suspected and accused persons and persons subject to an European Arrest Warrant to have access to a lawyer in criminal proceedings against them, and rules governing the right of suspects and accused persons who are deprived of their liberty to communicate upon arrest with a third party.

### **Article 2 — Scope**

18. The Directive applies from the time that a person is made aware by the competent authorities of a Member State, by official notification or otherwise, that he is suspected or accused of having committed a criminal offence until the conclusion of the proceedings (including any appeal).
19. European Arrest Warrant (EAW)<sup>17</sup> proceedings are explicitly covered. The Directive states that the procedural guarantees contained in Articles 47 and 48 of the Charter and Articles 5 and 6 ECHR apply to surrender proceedings based on a European Arrest Warrant.

### **Article 3 — The right of access to a lawyer in criminal proceedings**

20. This Article lays down the general principle that all suspected and accused persons in criminal proceedings should have access to a lawyer as soon as possible, in time and in a manner that allows them to exercise their defence rights. Access to a lawyer must be granted at the latest upon deprivation of liberty, as soon as possible in the light of the circumstances of each case. Irrespective of any deprivation of liberty, access to a lawyer must be granted upon questioning. It must also be granted when there is a procedural or evidence-gathering act requiring or permitting the presence of a suspect or accused person, except where the evidence to be gathered could be altered, removed or destroyed as a result of the passage of time needed for the lawyer to arrive. This reflects ECtHR jurisprudence, which has established that a suspect must be offered the assistance of a lawyer 'already at the initial stages of police interrogation' and as soon as he is deprived of his liberty, irrespective of any questioning.

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<sup>17</sup> Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) (OJ L 190, 18.7.2002 p. 1).

#### **Article 4 — Content of the right of access to a lawyer**

21. This Article sets out the activities that a lawyer representing an accused or suspected person must be entitled to carry out to ensure effective exercise of defence rights, including meeting with the suspect or accused person for an adequate duration and frequency to ensure the effective exercise of the rights of defence; attending any questioning or hearing; subject to the exception set out above where a delay may affect the availability of evidence, attending any investigative or evidence-gathering act for which the applicable national law requires or expressly permits the presence of a suspect or accused person; and accessing the place of detention to check the conditions of detention. The provisions of this Article reflect repeated ECtHR judgments that emphasise that the exercise of defence rights must be effective and identify the activities<sup>18</sup> that a lawyer representing a suspected or accused person must be permitted to carry out.

#### **Article 5 — The right to communicate upon arrest**

22. This Article provides for the right of persons deprived of their liberty in criminal proceedings to communicate as soon as possible upon arrest with one person nominated by them, which is most likely to be a relative or employer, so as to inform him of the detention. Legal representatives of children deprived of their liberty should be notified as soon as possible of the child's custody and the reasons pertaining thereto, unless it is against the best interests of the child. Where it is not possible to communicate with or notify the person designated by the detained person despite best endeavours to do so (for example if the designated person does not answer the telephone), the detained person is to be informed of the fact that the notification did not occur. Any consequences are left to national law. Derogation from this right is only possible in the limited circumstances set out in Article 8. The provisions of this Article reflect the call by the European Commission to make the justice system more child-friendly in Europe<sup>19</sup>, the repeated identification by the Committee for the Prevention of Torture of the right to notification of custody as an important safeguard against ill treatment and the provisions of the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice<sup>20</sup>.

#### **Article 6 — The right to communicate with consular or diplomatic authorities**

23. This Article confirms the right to communicate with consular authorities. It places a duty on Member States to ensure that all foreign detainees are able to have the consular authorities of their State of nationality informed of the detention if they so wish. Derogation from this right is only possible in the limited circumstances set out in Article 8.

#### **Article 7 — Confidentiality**

24. Defence rights are protected by the obligation to ensure that all communications, in whatever form they take, between a suspected and accused person and his lawyer are

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<sup>18</sup> *Dayanan v Turkey*, judgment of 13 January 2010, application no. 7377/03, § 32.

<sup>19</sup> Communication from the Commission on an EU Agenda for the Rights of the Child — COM(2011) 60, 15.2.2011.

<sup>20</sup> Council of Europe Guidelines on child-friendly justice of 17.10.2010.

entirely confidential, with no scope for derogations. The ECtHR identified one of the key factors to a lawyer's effective representation of a client's interests as the principle of protecting the confidentiality of information exchanged between them. It held that confidential communication with one's lawyer is protected by the ECHR as an important safeguard of one's right to defence<sup>21</sup>.

## Article 8 — Derogations

25. The paramount importance of the rights enshrined in this Directive suggests that derogations for Member States should not be possible, in principle. Limited scope for derogations to Article 3, Article 4 paragraphs 1 to 3, Article 5 and Article 6, however, is admitted by the ECtHR jurisprudence as concerns the initial stages of criminal proceedings. The ECtHR has established that, while the right of a person charged with a criminal offence to be effectively defended by a lawyer is not absolute, any exception to the exercise of this right should be clearly circumscribed and strictly limited in time<sup>22</sup> and it must not, in the light of the entirety of the proceedings, deprive the accused of a fair hearing<sup>23</sup>. This provision draws on this jurisprudence by allowing Member States to derogate from the right of access to a lawyer only in exceptional circumstances, subject to necessity and to procedural safeguards. Any derogation must be justified by compelling reasons pertaining to the urgent need to avert danger for the life or physical integrity of one or more people. In addition, any derogation must comply with the principle of proportionality, which implies that the competent authority must always choose the alternative that least restricts the right of access to a lawyer and must limit the duration of the restriction as much as possible. In accordance with ECtHR case law, no derogation may be based exclusively on the type or seriousness of the offence and any decision to derogate requires a case-by-case assessment by the competent authority. In any event, no derogation may have the effect of compromising the fairness of the proceedings and statements made by the person in the absence of a lawyer may never be used as evidence against him. Finally, this provision requires that derogations may only be authorised by a reasoned decision of a judicial authority, which means that the decision cannot be taken by the police or other law enforcement authorities which are not regarded as judicial authorities under national law and the ECHR. The same principle and limitations apply to derogations from the entitlement to communicate upon arrest with a third person.

## Article 9 — Waiver

26. The ECtHR has held that if a waiver is to be effective for ECHR purposes, it must be voluntary, established unequivocally and underpinned by minimum safeguards commensurate to its importance<sup>24</sup>. This jurisprudence is reflected in Article 9, which provides that a waiver (the fact and circumstances of which must be recorded) must be voluntary and unequivocal and be made in full knowledge of its consequences, via

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<sup>21</sup> *Castravet v Moldova*, judgment of 13 March 2007, application no. 23393/05 § 49, *Istratii and others v Moldova*, judgment of 27 March 2007, application nos. 8721/05, 8705/05, 8742/05 §89.

<sup>22</sup> *Salduz v Turkey*, judgment of 27 November 2008, application no. 36391/02, § 55.

<sup>23</sup> *Ibidem* §52.

<sup>24</sup> *Salduz v Turkey*, judgment of 27 November 2008, application no. 36391/02 §59, *Panovits v Cyprus*, judgment of 11 December 2008, application no. 4268/04 §68, *Yoldaş v Turkey*, judgment of 23 February 2010, application no. 27503/04 § 52.



legal advice on such consequences or otherwise. The person must also be able to understand the consequences.

#### **Article 10 — Persons other than suspects and accused persons**

27. This Article provides protection and remedies for people such as witnesses who, during questioning or a hearing, become suspects or accused persons. This builds on ECtHR jurisprudence that the guarantee of a fair trial, including access to a lawyer, must apply to witnesses whenever they are in reality suspected of a criminal offence, as the formal qualification of the person is immaterial<sup>25</sup>.

#### **Article 11 — The right to a lawyer in European Arrest Warrant proceedings**

28. This Article reflects the mandate in Article 82(2) of the Treaty to adopt directives on minimum rules taking into account ‘the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension.’ Improving the EAW system is a central tenet of the Commission’s third report on implementation of the Council Framework Decision on the EAW<sup>26</sup>. This Article builds on Article 11 of Framework Decision 2002/584/JHA<sup>27</sup> on the European arrest warrant, which states that a person who is arrested for the purpose of execution of a EAW has the right to be assisted by a legal counsel in accordance with the national law of the executing Member State. This provision will not have the effect of compromising mutual recognition; the merit of the case will not be addressed by the lawyer in the issuing Member State at this stage since his role will be limited to enabling the requested person to exercise his rights under the Framework Decision. To this end, the lawyer's function in the issuing Member State will be to provide assistance and information to the lawyer in the executing Member State.

The promotion of mutual trust essential to mutual recognition are achieved by providing that a person arrested pursuant to a EAW must have the fact of his arrest communicated to the issuing Member State and can have his interests furthered by a lawyer in the issuing Member State assisting the lawyer in the executing Member State in order to exercise his rights most effectively in the executing Member State, in line with Council Framework Decision 2002/584/JHA. Such assistance can facilitate effective exercise of the rights of the persons under the Framework Decision in the executing Member State notably the possibility to invoke a ground for non execution of the EAW under Articles 3 and 4, for instance: the assistance of a lawyer in the issuing Member State may be important in order to adduce evidence of a previous judgment which would entail the application of the "ne bis in idem"-principle under Article 3(2). Proceedings for the execution of the EAW will not be delayed since this article is without prejudice to the deadlines set out in the Framework decision. On the contrary, the involvement of a lawyer in the issuing Member State will result in speedier consent since the requested person will receive

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<sup>25</sup> *Brusco v France*, judgment of 14 October 2010, application no. 1466/07, § 47.

<sup>26</sup> Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - COM(2011) 175, 11.4.2011.

<sup>27</sup> OJ L 190, 18.7.2002, p. 1.

fuller information on the procedure in the issuing Member State and on the consequences of his consent.

### **Article 12 — Legal aid**

29. Article 47(3) of the Charter provides that:

*‘Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice’.*

Article 6(3) of the ECHR stipulates that everyone charged with a criminal offence is entitled to free legal assistance *‘if he has not sufficient means to pay for [it], [...] when the interest of justice so requires’.*

Although this Directive does not seek to regulate the issue of legal aid, it lays down a provision requiring Member States to continue to apply their domestic legal aid regimes. These domestic legal aid regimes must be in line with the Charter and the ECHR. In addition, Member States may not apply less favourable conditions to legal aid covering instances where access to a lawyer is granted under this Directive, compared to instances where access to a lawyer was already available under national law.

### **Article 13 — Remedies in the event of breaches of the right of access to a lawyer**

30. This Article reflects ECtHR jurisprudence that the most appropriate form of redress for breaching the ECHR right to a fair trial is to ensure that a suspect or accused person is put, as far as possible, in the position in which he would have been had his rights not been so breached<sup>28</sup>. The ECtHR has ruled that even 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 of the ECHR and such rights will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction<sup>29</sup>. Therefore, this Article bans, in principle, the use of evidence obtained where access to a lawyer was denied save in those exceptional cases where the use of such evidence will not prejudice the rights of the defence.

### **Article 14 — Non-regression clause**

31. The purpose of this Article is to ensure that setting common minimum standards in accordance with this Directive does not have the effect of lowering standards in certain Member States and that the standards set in the Charter and in the ECHR are maintained. Since this Directive provides for minimum rules, in line with Article 82 TFEU, Member States remain free to set standards higher than those agreed in this Directive.

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<sup>28</sup> *Salduz v Turkey*, judgment of 27 November 2008, application no. 36391/02, § 72.

<sup>29</sup> *Salduz v Turkey*, judgment of 27 November 2008, application no. 36391/02, § 55.

## **Article 15 — Transposition**

32. This Article requires that Member States must implement the Directive by xx/xx/20xx and, by the same date, transmit the text of the provisions transposing it into national law to the Commission.

## **Article 16 — Entry into force**

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

## **6. SUBSIDIARITY PRINCIPLE**

34. The objective of the proposal cannot be sufficiently achieved by Member States alone, since there is still significant variation in the precise method and timing of the right of access to a lawyer in criminal proceedings across the European Union. As the aim of the proposal is to promote mutual trust, only action taken by the European Union will establish consistent common minimum standards that apply throughout the whole of the European Union. The proposal will approximate Member States' procedural rules regarding the time and manner of access to a lawyer for suspects and accused persons and for persons subject to an EAW, the aim being to enhance mutual trust. The proposal therefore complies with the subsidiarity principle.

## **7. PROPORTIONALITY PRINCIPLE**

35. The proposal complies with the proportionality principle in that it does not go beyond the minimum required in order to achieve the stated objective at European level and what is necessary for that purpose.

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**

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) 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<sup>30</sup>,

Having regard to the opinion of the Committee of the Regions<sup>31</sup>,

Acting in accordance with the ordinary legislative procedure,

Whereas:

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

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<sup>30</sup> OJ C , , p. .

<sup>31</sup> OJ C , , p. .

- (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')<sup>32</sup>. In the Stockholm Programme, adopted on 11 December 2009<sup>33</sup>, 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 interpretation<sup>34</sup>, the right to information on rights and information about the charges<sup>35</sup>, 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;
- (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;
- (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;
- (9) A similar right to the presence of a lawyer should be granted every time that national law expressly allows or demands the presence of the suspected or accused person at a procedural step or evidence gathering such as a search; in these cases, in fact, the presence of the lawyer can strengthen the rights of the defence without affecting the need to preserve the confidentiality of certain investigative acts, since the presence of the person excludes the confidential nature of the acts in question; this right should be without prejudice to the need to secure evidence which by its very nature is liable to be

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<sup>32</sup> OJ C 295, 4.12.2009, p. 1.

<sup>33</sup> OJ C 115, 4.5.2010.

<sup>34</sup> Directive 2010/64/EU of the European Parliament and of the Council on the rights to interpretation and translation in criminal proceedings of 20 October 2010 (OJ L 280, 26.10.2010, p. 1).

<sup>35</sup> Directive 2011/XXX/EU of the European Parliament and of the Council on the right to information in criminal proceedings.

altered, removed or destroyed if the competent authority was to wait until the arrival of a lawyer;

- (10) To be effective, access to a lawyer should entail the possibility for the lawyer to carry out all the wide range of activities which pertain to legal counselling, as the European Court of Human Rights has held. This should include active participation in any interrogation or hearing, meetings with the client to discuss the case and prepare the defence, the search for exculpatory evidence, support to a distressed client and control of detention conditions;
- (11) The duration and frequency of meetings between the suspect or accused person and their lawyer depend on the circumstances of every proceeding, notably on the complexity of the case and the procedural steps applicable. It should therefore not be limited in a general way, as this could prejudice the effective exercise of the rights of defence;
- (12) Suspects or accused persons deprived of their liberty should have the right promptly to communicate upon arrest with a person of their choice, such as a family member or employer, in order to inform them of the detention;
- (13) Suspects or accused persons deprived of their liberty should also have the right to communicate with any relevant 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;
- (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. Confidentiality should not be subject to any exception;
- (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;
- (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;
- (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;

- (18) The suspect or accused person should be allowed to waive the right to a lawyer, as long as they are fully aware of the consequences of the waiver, notably because they have met with a lawyer before making this decision and have the necessary capacity to understand these consequences and provided that the waiver is given freely and unequivocally. The suspect or accused person should be able to revoke the waiver at any time in the course of the proceedings;
- (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 immediately given access to a lawyer if the authority considers that he has become a suspect in the course of the questioning, and any statements made before he became a suspect or an accused person should not be used against him;
- (20) In order to improve the functioning of judicial cooperation in the European Union, the 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<sup>36</sup>;
- (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) That person should also have the possibility to have a lawyer in the issuing Member State to assist the lawyer in the executing Member State in specific cases during the surrender proceedings without prejudice to the deadlines set out in Council Framework Decision 2002/584/JHA; that lawyer should be able to assist the lawyer in the executing Member State when exercising the person's rights under the Council Framework Decision 2002/584/JHA in the executing State, in particular in respect of the grounds of refusal under its Articles 3 and 4; since the European Arrest Warrant is predicated upon the principle of mutual recognition, this should not entail any right to question the merits of the case in the executing Member State; as there is no incompatibility between defence rights and mutual recognition; enhancing fair trial rights both in the executing and in the issuing Member State will boost mutual trust;
- (23) In order to make the right of access to a lawyer in the issuing Member State effective, the executing judicial authority should promptly notify the issuing judicial authority of the arrest of the person and of his request to have access to a lawyer in the issuing Member State;
- (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. Whenever new domestic provisions, enacted to implement this Directive, grant a broader right of access to a lawyer than was previously available under national law, the rules currently in place on legal aid should apply with no distinction between the two situations;

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<sup>36</sup> OJ L 190, 18.7.2002, p. 1.

- (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) The European Court of Human Rights has consistently held that any adverse consequences deriving from a breach of the right to a lawyer must be undone by placing the person in the same position they would have found themselves had the breach not occurred. This may require retrial or equivalent measures if a final conviction was made in breach of the right to a lawyer;
- (27) Since the European Court of Human Rights has established that irretrievable damage to the rights of the defence results from the use of an incriminating statement made by the suspect or accused person without access to a lawyer, Member States should be required in principle to prohibit the use of any statements given in breach of the right of access to a lawyer as evidence against the suspect or accused person unless the use of such evidence would not prejudice the rights of the defence. 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 or to avoid the perpetration of other offences or serious adverse consequences for any person;
- (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;
- (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 the child 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 children cannot waive their rights under this Directive when they lack the capacity to understand the consequences of the waiver. Legal representatives of a suspect or accused child should be always notified as soon as possible of his custody and be informed about the reasons for the custody, unless it is against the best interests of the child;
- (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) [In accordance with Articles 1, 2, 3 and 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 have notified their wish to participate in the adoption and application of this Directive] OR [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]<sup>37</sup>;
- (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:

*Article 1*  
**Objective**

The Directive lays down rules concerning the right of suspects and accused persons in criminal proceedings and of persons subject to proceedings pursuant to Council Framework Decision 2002/584/JHA to have access to a lawyer and to communicate upon arrest with a third party.

*Article 2*  
**Scope**

1. This Directive applies from the time a person is made aware by the competent authorities of a Member State, by official notification or otherwise, that he is suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspected or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal.
2. This Directive applies to persons subject to proceedings pursuant to Framework Decision 2002/584/JHA, from the time they are arrested in the executing State.

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<sup>37</sup> The final wording of this recital in the Directive will depend on the position of the United Kingdom and Ireland taken in accordance with the provisions of protocol (No 21).

### *Article 3*

#### **The right of access to a lawyer in criminal proceedings**

1. Member States shall ensure that suspects and accused persons are granted access to a lawyer as soon as possible and in any event:
  - (a) before the start of any questioning by the police or other law enforcement authorities;
  - (b) upon carrying out any procedural or evidence-gathering act at which the person's presence is required or permitted as a right in accordance with national law, unless this would prejudice the acquisition of evidence;
  - (c) from the outset of deprivation of liberty.
2. Access to a lawyer shall be granted in such a time and manner as to allow the suspect or accused person to exercise his rights of defence effectively.

### *Article 4*

#### **Content of the right of access to a lawyer**

1. The suspect or accused person shall have the right to meet with the lawyer representing him.
2. The lawyer shall have the right to be present at any questioning and hearing. He shall have the right to ask questions, request clarification and make statements, which shall be recorded in accordance with national law.
3. The lawyer shall have the right to be present at any other investigative or evidence-gathering act at which the suspect or accused person's presence is required or permitted as a right, in accordance with national law, unless this would prejudice the acquisition of evidence.
4. The lawyer shall have the right to check the conditions in which the suspect or accused person is detained and to this end shall have access to the place where the person is detained.
5. The duration and frequency of meetings between the suspect or accused person and his lawyer shall not be limited in any way that may prejudice the exercise of his rights of defence.

### *Article 5*

#### **The right to communicate upon arrest**

1. Member States shall ensure that a person to whom Article 2 refers and who is deprived of his liberty has the right to communicate with at least one person named by him as soon as possible.
2. Where the person is a child, Member States shall ensure that the child's legal representative or another adult, depending on the interest of the child, 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 child, in which case another appropriate adult shall be informed.

#### *Article 6*

### **The right to communicate with consular or diplomatic authorities**

Member States shall ensure that persons to whom Article 2 refers, 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.

#### *Article 7*

### **Confidentiality**

Member States shall ensure that the confidentiality of meetings between the suspect or accused person and his lawyer is guaranteed. They shall also ensure the confidentiality of correspondence, telephone conversations and other forms of communication permitted under national law between the suspect or accused person and his lawyer.

#### *Article 8*

### **Derogations**

Member States shall not derogate from any of the provisions of this Directive save, in exceptional circumstances, from Article 3, Article 4 paragraphs 1 to 3, Article 5 and Article 6. Any such derogation:

- (a) shall be justified by compelling reasons pertaining to the urgent need to avert serious adverse consequences for the life or physical integrity of a person;
- (b) shall not be based exclusively on the type or seriousness of the alleged offence;
- (c) shall not go beyond what is necessary;
- (d) shall be limited in time as much as possible and in any event not extend to the trial stage;
- (e) shall not prejudice the fairness of the proceedings.

Derogations may only be authorised by a duly reasoned decision taken by a judicial authority on a case-by-case basis.

#### *Article 9*

### **Waiver**

1. Without prejudice to national law that requires the mandatory presence or assistance of a lawyer, any waiver of the right to a lawyer referred to in this Directive shall be subject to the following conditions:

- (a) the suspect or accused person has received prior legal advice on the consequences of the waiver or has otherwise obtained full knowledge of these consequences;
  - (b) he has the necessary capacity to understand these consequences and
  - (c) 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.

#### *Article 10*

#### **Persons other than suspects and accused persons**

1. 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 is granted access to a lawyer if, in the course of questioning, interrogation or hearing, he becomes suspected or accused of having committed a criminal offence.
2. Member States shall ensure that any statement made by such person before he is made aware that he is a suspect or an accused person may not be used against him.

#### *Article 11*

#### **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 State:
  - 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 meet with the lawyer representing him;
  - the right that his lawyer is present at any questioning and hearing, including the right to ask questions, request clarification and make statements, which shall be recorded in accordance with national law;
  - the right that his lawyer has access to the place where the person is detained in order to check the conditions of detention.

The duration and frequency of meetings between the person and his lawyer shall not be limited in any way that may prejudice the exercise of his rights under Council Framework Decision 2002/584/JHA.

3. Member States shall ensure that any person subject to proceedings pursuant to Council Framework Decision 2002/584/JHA, upon request, also has the right of access to a lawyer promptly upon arrest pursuant to a European Arrest Warrant in the issuing Member State, in order to assist the lawyer in the executing Member State in accordance with § 4. This person shall be informed of that right.
4. The lawyer of this person in the issuing Member State shall have the right to carry out activities limited to what is needed to assist the lawyer in the executing Member State, with a view to the effective exercise of the person's rights in the executing Member State under that Council Framework Decision, in particular under its Articles 3 and 4.
5. Promptly upon arrest pursuant to a European Arrest Warrant, the executing judicial authority shall notify the issuing judicial authority of the arrest and of the request by the person to have access to a lawyer also in the issuing Member State.

#### *Article 12*

#### **Legal aid**

1. 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.
2. Member States shall not apply less favourable provisions on legal aid than those currently in place in respect of access to a lawyer provided pursuant to this Directive.

#### *Article 13*

#### **Remedies**

1. Member States shall ensure that a person to whom Article 2 refers has an effective remedy in instances where his right of access to a lawyer has been breached.
2. The remedy shall have the effect of placing the suspect or accused person in the same position in which he would have found himself had the breach not occurred.
3. Member States shall ensure that statements made by the suspect or accused person or evidence obtained in breach of his right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 8, may not be used at any stage of the procedure as evidence against him, unless the use of such evidence would not prejudice the rights of the defence.

*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*  
**Transposition**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [24 months after publication of this Directive in the *Official Journal*] 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.

*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*