The Directive on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings

Steven Cras *

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ABSTRACT

The article traces the genesis, negotiations, and content of Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and European Arrest Warrant (EAW) proceedings. Inspired by Salduz case law, the Directive sets detailed rules on access to a lawyer from the earliest stages of proceedings, including during questioning and investigative acts, and introduces safeguards on confidentiality, derogations, and remedies. It also innovates by granting requested persons in EAW cases the right to appoint a lawyer in the issuing state. The author highlights the political compromises among Member States and with the European Parliament, noting that the Directive constitutes a milestone in the EU roadmap on procedural rights, balancing high protection standards with prosecutorial interests.

AUTHOR

Steven Cras

Political adminstrator
Council of the European Union

CITE THIS ARTICLE

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I. Introduction

On 22 October 2013, the European Parliament and the Council adopted Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European Arrest Warrant (EAW) proceedings. The Directive also addresses the right for suspects and accused persons in criminal proceedings, and for persons subject to EAW proceedings, 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.[1] The part of the Directive regarding the right of access to a lawyer is the core measure of the roadmap for strengthening the procedural rights of suspects and accused persons in criminal proceedings, which was adopted by the Council in 2009. The Directive, which is inspired to a large extent by the *Salduz* case law, is a true milestone that has been welcomed by all stakeholders.

This article describes the genesis of the Directive and provides a description of some of its main elements. The difficulties that some Member States had with the proposal of the Commission are addressed, contributions by the six-monthly rotating Presidency of the Council are described, and the important role played by the European Parliament during the co-decision process leading to the final text of the Directive is highlighted.

II. Genesis of the Directive

1. Background

In 2004, the European Commission submitted a proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union.[2] This proposal aimed to introduce a comprehensive set of common minimum standards and so address the imbalance between, on the one hand, the substantial progress that had been made in the European Union with a view to combating crime and, on the other hand, the procedural rights of suspects and accused persons in criminal proceedings. However, since the Council was unable to reach unanimous agreement, as required under the rules of the Amsterdam Treaty, work on the proposal was abandoned.

Work on the issue of procedural rights was relaunched in 2009 when, on the eve of the entry into force of the Lisbon Treaty, the Council adopted a roadmap for strengthening the procedural rights of suspects and accused persons in criminal proceedings.[3] In contrast to the 2004 Commission proposal, which envisaged creating a comprehensive set of procedural rights, the roadmap is based on the idea that action should be taken following a step-by-step approach, one area at a time. Therefore, the roadmap contains a non-exhaustive list of five measures – A to E – in respect of which the Commission is invited to submit proposals. Since its adoption in 2009, the roadmap constitutes the basis for the work in the European Union on strengthening the procedural rights of suspects and accused persons in criminal proceedings; the roadmap and its genesis were described in more detail in an earlier article published in this journal.[4]

On the basis of the roadmap, the European Parliament and the Council adopted, in 2010, Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings[5] ("measure A"), and, in 2012, Directive 2012/13/EU on the right to information in criminal proceedings[6] ("measure B").

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2. The Salduz judgment

According to the roadmap, measure C was meant to deal with "legal advice and legal aid." The short explanation in the roadmap provided that "the right to legal advice (through a legal counsel) for the suspected or accused person in criminal proceedings at the earliest appropriate stage of such proceedings is fundamental in order to safeguard the fairness of the proceedings; the

right to legal aid should ensure effective access to the aforementioned right to legal advice."

The right to legal advice, and the accompanying right to legal aid, is often considered to be the most important procedural right of suspects and accused persons in criminal proceedings. Differences of opinion between the Member States regarding the rules to be established in this domain were the main reason why the Member States could not reach agreement on the comprehensive Commission proposal of 2004. This is understandable, since the systems of the Member States regarding legal advice are very different, and anything in the European Union that costs money, including the right to legal aid, is always very sensitive. For these reasons – the importance of the rights concerned and the difficulties in reaching agreement in the past – the proposal by the Commission on measure C was awaited with great interest.

There was also considerable interest in the proposal because it would provide an interpretation by the Commission of the judgment of the European Court of Human Rights (ECtHR) in the *Salduz* case.[7] In this judgment of November 2008, the Strasbourg Court ruled that "in order for the right to a fair trial to remain sufficiently practical and effective, Art. 6(1) [of the European Convention on Human Rights (ECHR)] requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right." According to the ECtHR, "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 Art. 6. 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 ground-breaking judgment, which has been confirmed in many subsequent judgments, forced various Member States to amend their national law and practices, as they did not provide access to a lawyer from the first interrogation by the police. For example, in France, the system of *garde à vue*, according to which suspects could be deprived of liberty for two periods of 24 hours with a very limited right of access to a lawyer (only a 30-minute consultation), was deemed not to be in line with the *Salduz* case law. A similar situation arose in Scotland, where the possibility to keep a suspect in custody for six hours without the right of access to a lawyer was considered to be in clear contravention of *Salduz*.

It was not always clear, however, which precise amendments the Member States would need to make in their national legal systems because of *Salduz*, since there was no unequivocal interpretation of this judgment. In fact, the judgment raised various questions: Should access to a lawyer be provided only when the suspect is taken into police custody – as was the case in *Salduz* – or should it also be provided when the suspect is at large but is invited to come to the police station in order to answer some questions? Which reasons qualify as "compelling reasons" that would justify a derogation from the right of access to a lawyer? At which other moments during the criminal proceedings would the suspect have the right of access to a lawyer, and what would the right of access to a lawyer actually entail?

3. The Commission proposal

On 8 June 2011, the Commission presented its proposal for a Directive of the European

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Parliament and of the Council on the right of access to a lawyer and on the right to

communicate upon arrest.[8] In this proposal, the Commission decided to combine one aspect of measure C (legal advice, "C1") with measure D, concerning communication with relatives, employers, and consular authorities. The second aspect of measure C, however, concerning legal aid ("C2"), was not addressed in the proposal.

The Commission was, of course, perfectly free to design its proposal in this manner, as the roadmap itself states that the order of the rights indicated therein is *indicative* and that the explanations provided in the roadmap merely serve to give an indication of the proposed actions. More importantly, the roadmap contains only an *invitation* to the Commission to present proposals; it does not affect the basic right of initiative of the Commission, this institution remaining entirely free to decide not only whether or not to present a proposal but also on the contents of its proposals.[9]

Various Member States criticised the fact that the right to legal aid had not been addressed in the proposal, observing that this right is intrinsically linked to the right to legal advice. The Commission replied that this split had been carried out in order to speed up the process: since the issue of legal aid is very complex and the information available on this issue was very patchy, it would have required much more time to present the proposal if legal aid had been included. According to the Commission, this would not have been appropriate, given the need for action on the substantive right arising from the *Salduz* line of jurisprudence. In the view of the Commission, dealing with the substantive right alone would also put the focus on the complex issue of the interpretation of the *Salduz* case law.

4. Negotiations under the Polish Presidency – Criticism of the proposal by Member States

In the Council, the negotiations on the proposal started under the Polish Presidency in July 2011. Soon the acronym "A2L" was used in order to identify the file, although one also continued to make reference to "measure C" (although, strictly speaking, it was now measure "C1 + D").

During the first meetings, various Member States complained that the Commission proposal was too ambitious; it was stressed that the proposal went far beyond the requirements of the ECHR, as interpreted in the case law of the ECtHR.[10]

In a unique move on the eve of the meeting of the Justice and Home Affairs ("JHA") Council in October 2011, five Member States (Belgium, France, Ireland, the Netherlands, and the United Kingdom) submitted a letter at ministerial level in which they voiced their misgivings regarding the proposal.[11] During the meeting itself, the opposition was led by Mr. Kenneth Clarke, the UK Secretary of Justice, who forcefully but eloquently criticized the proposal. Clarke denounced the lack of balance in the proposal between the interests of suspects and accused persons, on the one hand, and the interests of the State in prosecuting crime, on the other. Clarke signalled that the latter interests were often equivalent to the interests of victims of crime, which the Union should also protect.

Clarke indicated that the ambitious character of the Commission proposal text had led the UK to decide not to make use of the possibility foreseen in Art. 3 of Protocol 21 to the Lisbon Treaty to opt-in to the proposal for a Directive. His Irish colleague, Mr. Alan Shatter, announced the same decision for his country. This meant that both Member States, who had opted-in to measures A and B from the outset of the negotiations on these Directives, would remain outside the application of the Directive on measure C, unless they decided to opt-in at a later stage after adoption of the Directive. In order to maintain the possibility of such an opting-in at a later stage, both Member States remained closely associated with the negotiations in the Council on the

proposal for measure C, in particular during the first year of the negotiations (until the general approach was reached).

The Polish Presidency, eager to achieve concrete results during its term in office, made remarkable efforts in autumn 2011 in order to reach agreement within the Council on the text of the Directive. This did not appear possible, however, mainly because the French government indicated that it did not want any sensitive decision to be taken in the months preceding the 2012 French Presidential elections, which were held in spring 2012.[12] As a result, only a progress report was presented at the meeting of the JHA Council in December 2011.[13]

5. Negotiations under Danish Presidency – General approach

The Danish Presidency took over in January 2012. Wanting to make a fresh start on the file, it presented a revised text[14] and launched a questionnaire[15] in order to better understand the particularities in the various Member States. The replies to the questionnaire[16] also contributed to promoting mutual understanding among the Member States concerning each other's positions.

The Danish Presidency tried to find a text that would be acceptable to all Member States, including the UK and Ireland. This was not an easy task, as the positions of the 27 Member States differed considerably, but the Danes made tremendous efforts and found solutions for most problems. The efforts of the Danish Presidency were remarkable, since Denmark did not have an immediate "personal" interest in the file – in accordance with Art. 1 of Protocol 22 to the Lisbon Treaty, this Member State does not participate at all in measures in the area of freedom, security and justice.

In June 2012, the text of the Directive, as it resulted from the discussions in the Working Party and Coreper, was submitted to the JHA Council in Luxembourg with a view to reaching a general approach (the provisional agreement in the Council that forms the basis for negotiations with the European Parliament). In the days before the Council meeting, although it became clear that some Member States – such as Portugal and Italy – would most likely not subscribe to the text, it seemed that a qualified majority of Member States would be able to agree to the text and thus allow a general approach to be reached, in particular since Ms. Christiane Taubira, the new French Minister of Justice, had indicated that the new French government would take a flexible position on the text.

This situation changed, however, on the eve of the Council meeting, when Mr. Alberto Ruiz-Gallardón, the Spanish Minister for Justice, withdrew Spain's support for the text, claiming that the standards set out in the Directive would not be high enough. During a tense Council meeting, the Danish Presidency, with the help of the Commission, tried to win the support of the opposing Member States to agree to the text as a basis for negotiations with the European Parliament. After long discussions, Spain and Italy ultimately did support the text, since they too felt that the time was ripe to start negotiations with the European Parliament. In a joint declaration[17] with the Commission, however, they made it clear that the current text did not meet their expectations as regards the protection of fundamental rights and procedural guarantees, and they requested the Presidency to take full account of their concerns during the upcoming negotiations with the European Parliament. While this declaration paved the way for a general approach in the Council, it immediately triggered concerns by some Member States, which were happy with the text as it was.[18]

On a more positive note, the UK and Irish Ministers stated that, if the text were more or less to remain, they would most likely opt-in to the Directive. This was a very different tone from the one that was voiced in the meeting of the JHA Council in October 2011. All in all, if there was one thing that emerged from this Council meeting, it was that the Member States were very divided on how the Directive should "look." This division among the Member States did not constitute a very favourable position for the Presidency of the Council to

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start the negotiations with the European Parliament in the context of the co-decision process (ordinary legislative procedure of Art. 294 TFEU).

6. Negotiations with the European Parliament and in the Council under the Cyprus and Irish Presidencies

The negotiations between the Council and the European Parliament started in July 2012, after the LIBE Committee of the European Parliament had adopted its orientation vote on the basis of a report presented by rapporteur Oana Antonescu (PPE, Romania).[19] In its vote, the LIBE Committee generally kept very close to the original proposal of the Commission while adopting amendments steering the text in a "pro-rights" direction on some points, e.g., the issue of confidentiality. As a result, at the beginning of the negotiations, the positions of the Council and the European Parliament were very far apart.

In the first phase of the negotiations, under the Cyprus Presidency, both co-legislators notably tried to explain their own positions and to understand the positions of the other party. With the help of the Commission, attempts were made to find compromise solutions.[20] While substantial progress was made under the Cyprus Presidency, it appeared impossible to reach an agreement during its term in office, since some controversial issues – such as derogations, confidentiality, and the EAW – were still outstanding.

The Irish Presidency installed two very skilled negotiators to "crack the last nuts." Clever drafting was done,[21] and subtle pressure was exercised on some Member States in order to persuade them to accept solutions that were acceptable to most other Member States. On the side of the European Parliament, the rapporteur managed to steer a middle course between the pragmatism needed to reach agreement and the pressure exercised upon her by all kinds of lobby groups (ECBA, CCBE, Justicia, Open Justice, Fair Trials International, Amnesty International, etc).

On 28 May 2013, the negotiating parties reached provisional agreement on a final compromise text on the draft Directive. On 4 June 2013, Coreper approved the final compromise text and authorised its President to send the habitual letter to the European Parliament,[22] stating that, should the European Parliament adopt its position at first reading, in accordance with Art. 294(3) TFEU, in the exact form as set out in the final compromise text, the Council would, in accordance with Art. 294(4) TFEU, approve the Parliament's position, and the act shall thus be adopted in the wording corresponding to the Parliament's position.

Subsequent to an examination from a jurist's-linguist's point of view, the plenary session of the European Parliament approved the text of the Directive on 10 September 2013, and the Council did the same on 6 October 2013. After signature on 23 October 2013, the Directive was published in the Official Journal on 6 November 2013.[23] According to its Art. 15, Member States are obliged to transpose the Directive into their national legal systems by 27 November 2016.

In the *Official Journal*, the Directive takes up 11.5 pages, of which two-thirds (7.5 pages) consist of 59 recitals accompanying the mere 18 articles. These figures – few articles, many recitals – indicate that it was not easy for the legislators to reach agreement on the Directive; when it is difficult to reach agreement on the operative part of a text, solutions are often sought in the recitals.

III. Description of the Directive

The Directive can be described along four lines of difficulties that appeared during the negotiations between the Member States, and between the Council and the European Parliament. They concern the difficulty relating to the interpretation of the concept of the right of access to a lawyer (A), the difficulty relating to the

fact that, on several points, the Directive has a far-reaching effect on the national legal systems (B), the difficulty relating to the safeguards that should apply regarding derogations and confidentiality (C), and the difficulty relating to the changes in respect of the EAW system (D).

1. Difficulty relating to the interpretation of the concept of the right of access to a lawyer

a) Opportunity and guarantee approach

The legal systems of the Member States as they stood at the time of the discussions in the Council varied considerably as regards the idea of what is meant by the "right of access to a lawyer" and, more importantly, as regards the practical implications of this right.

In most Member States, including Germany, Austria, and Poland, the right of access to a lawyer refers to the *opportunity* for a suspect or accused person to be assisted by a lawyer at specific moments during the criminal proceedings (before or during questioning by the police or by other law enforcement or judicial authorities, during certain investigative acts, during the trial, etc.). In these Member States, when a suspect or accused person has the right of access to a lawyer, this basically means that the person is entitled to have a lawyer and that the State will not prevent this lawyer from being present at the said moments during the criminal proceedings. The issue of the funding of the lawyer in these Member States is independent from the opportunity to be assisted by a lawyer; while a suspect or accused person may have the right of access to a lawyer, he may not have the possibility to effectively exercise this right, as there might be no legal aid available if the person concerned doesn't have the means to pay the lawyer himself.

In some other Member States, however, such as Belgium, France, and the United Kingdom, the right of access to a lawyer is intrinsically linked to the funding of the lawyer. When a suspect or accused person has the right of access to a lawyer, the system of the Member State ensures that there is legal aid available if the person concerned cannot pay the lawyer himself. The right of access to a lawyer thus *guarantees* that the suspect or accused person is assisted by a lawyer.

The difference between the systems of these two sets of Member States meant that their representatives had different approaches during the negotiations in the Council. The Member States with the "opportunity approach" could be relatively generous in allowing for a broad scope regarding the right of access to a lawyer, since such a right would not automatically imply costs for the Member States concerned. The Member States with the "guarantee approach," however, were vigilant in keeping the scope of the right of access to a lawyer narrow, since each broadening of this right would imply extra costs to their legal aid systems. Understandably, it was also the latter set of Member States which had the greatest difficulties with the fact that the Commission proposal, contrary to the indications in the Roadmap, did not address the issue of legal aid.[24]

b) Solution: a provision on the level of obligations

The difference in approach between the two sets of Member States characterised the discussions in the Council for a long time, most notably under the Polish and Danish Presidencies. The latter, however, managed to find a compromise solution between the two positions by inserting a provision in the text (Art. 3.4) regarding the level of obligations that the Member States would have.

It was decided to differentiate between two situations, namely when the suspect or accused person is at large (not deprived of liberty) and when this person is deprived of liberty. If the suspect or accused person is not deprived of liberty, e.g., when he is invited by means of a letter to present himself at a police station to

answer some questions, the Member States must endeavour to make general information available in order to facilitate the obtaining of a lawyer by the suspect or accused person. Such information can, for instance, be made available on a website or by means of a leaflet that is available at police stations. However, it is clarified in recital 27 that the Member States do not need to take active steps to ensure that a suspect or accused person who is not deprived of liberty be assisted by a lawyer if he has not made arrangements himself to be assisted by a lawyer. The suspect or accused person concerned should be able to freely contact, consult with, and be assisted by a lawyer. This low level of obligations for situations in which the person concerned is not deprived of liberty is clearly inspired by the *opportunity* approach.

If suspects or accused persons are deprived of liberty, e.g., when they have been arrested and brought to the police station, the level of obligations resting on the Member States is higher. In such a situation, in fact, the Member States must make the necessary arrangements to ensure that suspects or accused persons are in a position to effectively exercise their 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. It is clarified in recital 28 that 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. This higher level of obligations for situations in which the person concerned is deprived of liberty is clearly inspired by the *guarantee* approach.

It must be underlined that the concept of the right of access to a lawyer as such remains the same throughout the Directive; its nature does not depend on whether the suspect or accused person is deprived of liberty or not. However, the practical consequences of the right are different in the two situations. One could say that the basic nature of the concept of the right of access to a lawyer is "opportunistic," in that the suspect or accused person is entitled to have a lawyer and that the State will not prevent the lawyer from being present at specific moments during the criminal proceedings, but that it comes with more "guarantee" obligations for Member States when the suspect or accused person is deprived of liberty.

2. Difficulty of reaching agreement on the proposal because of potential far-reaching effects for the national legal systems

a) Minor offences

The issue of minor offences was discussed at length during the negotiations in the Council and during the negotiations with the European Parliament. In both measures A and B, certain minor offences had been excluded from the scope, since it was felt that Union law should not be concerned with small offences: *de minimis non curat lex*. There was also a policy line behind the exclusion of minor offences, as there is clearly a trade-off between strong defence rights and a (slightly) narrower scope excluding certain minor offences: if minor offences are excluded, it is easier to insist on a set of strong defence rights in relation to more serious offences.

In measures A and B, the minor offences that had been excluded were those offences that are dealt with in the first instance by an authority other than a court having jurisdiction in criminal matters; only when the case comes before such a court, would the Directive concerned apply. This exclusion therefore concerned offences that are dealt with in first instance by a prosecutor, the police, or some administrative authority.

From the beginning of the negotiations on measure C, however, Luxembourg indicated that the exclusion of minor cases as contained in measures A and B would not be sufficient in the context of this new measure, which is more far-reaching and (financially) intrusive. Luxembourg explained that almost all sanctions in its country are imposed by a court, including sanctions for minor traffic offences, such as speeding and parking

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offences, and sanctions for infringements of municipal regulations, such as mowing the lawn late in the evening. The exclusion as contained in measures A and B, which hinges on the authority imposing the sanction, would therefore be of no use to Luxembourg. In order to be put in the same position as the other Member States, Luxembourg requested that minor offences as qualified under its law also be excluded from the scope of the Directive. Hence, in the general approach, an exclusion was made for "minor offences, in respect of which the law of the Member State provides that deprivation of liberty *cannot* be imposed as a sanction."

Following up on the Luxembourg position, the Netherlands indicated that it wanted to extend the exclusion for minor offences. The Netherlands explained that a number of relatively minor offences in its country are considered to be a criminal offence. These include public drunkenness, employing the emblem of the Red Cross without being entitled to do so, minor offences in municipal regulations, such as nudism in non-designated public spaces, and minor traffic offences, such as speeding, ignoring traffic lights, and tailgating. These offences are nearly always sanctioned by a fine but, as an alternative to a fine, deprivation of liberty can be imposed. Published guidelines for the prosecution service, however, which have the status of "law" in the Netherlands, prescribe that (short periods of) deprivation of liberty should only be requested – and are therefore only likely to be imposed – in exceptional circumstances. Following a request by the Netherlands, in the general approach, the exclusion suggested by Luxembourg was therefore extended to read "minor offences, in respect of which the law of the Member State provides that deprivation of liberty cannot *or shall not* be imposed as a sanction."

While the exclusion requested by Luxembourg was generally felt to be acceptable, several Member States expressed misgivings about the extension of the exclusion for minor offences as proposed by the Netherlands. In the negotiations with the European Parliament, the Presidency also had a hard time defending the Dutch position, since MEPs rightly pointed out that the exclusion as requested by the Netherlands was not watertight: it all depended on a practice in the Netherlands that the prosecution would not request deprivation of liberty to be imposed for certain minor offences. However, it was not excluded that, at the end of the day, the judge would decide to impose deprivation of liberty (e.g., when a person has committed the same minor offence multiple times). If, in such a situation, the person had not been granted access to a lawyer in the pre-trial phase, he might have made self-incriminating statements without having had access to a lawyer. During a talk with the juris-consult of the European Parliament, who underlined the strength of the position of the co-legislator, the Netherlands also began to appreciate that, although the risk of persons ultimately being deprived of liberty without having had access to a lawyer was low in their jurisdiction, because of the guidelines for the prosecution, the exclusion for minor offences as proposed by them might be applied on a very wide basis in other Member States. As a result, the Netherlands decided to give up its position, and only the Luxembourg exclusion for minor offences was added to the text, see Art. 2.4 under (b).

While, as a result of the Luxembourg request, the exclusion for minor offences was slightly broadened, thus marginally weakening the protection of suspects and accused persons, the provision on minor offences was strengthened on another point. In fact, it had emerged in the course of the discussions that, in certain circumstances, a person who had (allegedly) committed an offence falling under the exclusion for minor offences, as contained in measures A and B, could nevertheless be deprived of liberty. This situation, which could for instance happen in Sweden,[25] was of great concern to the European Parliament, which – understandably – felt that the Directive should always apply to suspects and accused persons who are deprived of liberty. Therefore, a new paragraph was inserted in Art. 2.4, which clearly states that the Directive shall, in any event, fully apply where the suspect or accused person is deprived of liberty, irrespective of the stage of the criminal proceedings.

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b) Questioning

For some Member States, it was difficult to agree to the provisions on questioning of suspects and accused persons, because the new *Salduz*-inspired rules would result in far-reaching consequences for their legal systems. Two of the Member States affected by these rules were France and, to an even greater extent, Belgium.

In France, the system of *garde à vue* allows the police to deprive suspects of their liberty for a maximum of two periods of 24 hours in order to, *inter alia*, question the suspect in the context of the criminal investigation. Suspects used to have a very limited right of access to lawyer when they were placed in *garde à vue* (only a 30-minute consultation with their lawyer was allowed). This changed, however, after the *Salduz* judgment and, notably, after the French legislator adopted a law reforming the system of *garde à vue*.[26] This legislation was scheduled to enter into force on 1 June 2011 but, in a judgment of 15 April 2011, the *Cour de Cassation* ruled that the legislation should enter into force with immediate effect. Under the new law, when suspects are placed in *garde à vue,* they have the right of access to a lawyer at all times during questioning. However, the fact that France just before the start of the negotiations on the proposal for a Directive had enacted a new law, which was not as detailed as the proposal of the Commission, made it difficult for this Member State to show flexibility on the text, since, understandably, it was reluctant to change its law again after such short period of time.

Belgium was the Member State that had the most serious problems with the provisions in respect of allowing a lawyer to be present during questioning of a suspect or accused person. Belgium has a classic inquisitorial system, in which the examining judge leads the criminal investigation. The role of this examining judge, who is considered to be independent and impartial, is to lead the investigation "*à charge et à décharge*" (looking both for incriminating and exculpatory evidence). Both public prosecutor and examining judge have the obligation to ensure the legality of the manner in which evidence is gathered. In principle, the pre-trial stage is of a non-adversarial nature. Therefore, in Belgium, an official interview of a suspect or accused person is normally organised on a non-adversarial basis without the possibility for the suspect or accused person to have access to a lawyer. However, when adversarial questioning is required, the questioning is organised in such a manner that the lawyer can be present.

Under *Salduz* and in the proposal of the Commission, however, no distinction is made between questioning on an adversarial basis, on the one hand, and questioning on a non-adversarial basis, on the other hand. As a rule, a suspect or accused person should always have the right of access to a lawyer prior to and during all questioning by the police or by another law enforcement authority or judicial authority. A large majority of Member States and the European Parliament agreed to this rule, and it has now been set out in Arts. 3.2 under (a) and 3.3 under (a) and (b) of the Directive. Hence, as a result of the Directive, the inquisitorial Belgian system will have some elements of the adversarial common law system, in which defence lawyers "oppose" the prosecution. This fundamental change to its system led Belgium to abstain from voting at the time when the Directive was adopted (all other Member States voted in favour).

Belgium and the other Member States, however, were able to maintain a certain control over the way in which lawyers can participate during questioning. The European Parliament, relying *inter alia* on the judgment of the ECtHR in *Dayanan*,[27] insisted that lawyers should be able to participate *actively* during questioning: they should not just be given a seat in the corner of the room without the right to say anything. The Member States, however, wanted to ensure that lawyers would respect certain rules of conduct during questioning, in order to avoid the risk that the criminal investigation would be jeopardized. A compromise was found by stating, in Art. 3.3 under (b) of the Directive, that suspects or accused persons have the right for their lawyer to participate actively during questioning – they may *inter alia* ask questions, request clarification, and make statements[28] – while clarifying that such participation should be in accordance with procedures under

national law, provided that such procedures do not prejudice the effective exercise and essence of the right concerned. During the negotiations, the example was given that the procedures could mean that lawyers may only ask questions after the competent authorities had posed their questions.

c) Witnesses becoming suspects

Another difficulty concerned the situation in which a person is questioned as a witness but becomes a suspect during questioning. This situation often occurs in practice: persons who are questioned as a witnesses can start making self-incriminating statements, as a result of which they become suspected of having committed a criminal offence themselves. It is generally held that the police and other law enforcement authorities should not prolong questioning after the change of identity from "witness" to "suspect" has taken place without giving the person concerned the safeguards of a suspect or accused person. It should be noted, however, that it is not always easy to determine the exact moment when the change of identity actually takes place, since it basically concerns a change in the "mind-set" of the interrogators.

The Commission, in a clear reference to the *Brusco* judgment of the ECtHR,[29] proposed that a witness,[30] who is heard by the police or by another enforcement authority in the context of a criminal procedure, should be granted access to a lawyer if, in the course of questioning, he becomes suspected of or accused of having committed a criminal offence. The Commission also proposed that Member States should ensure that any statement made by such a person before he is made aware that he is a suspect or an accused person may not be used against that person.[31]

During the negotiations in the Council, Member States expressed substantial misgivings about the proposals of the Commission, which they felt were intrusive and went beyond the scope of the Directive. As to the latter criticism, it was observed that, in accordance with Art. 2.1, the Directive only applies when persons are *made aware* that they are suspected or accused of having committed a criminal offence. This element, which requires action on the part of the competent authorities, allows the Member States to maintain a certain control over the application of the Directive, and it was therefore understandable that the Member States did not want to give this up as regards witnesses becoming suspects.

A solution was found by stating, in Art. 2.3, that the Directive applies "under the same conditions as provided for in paragraph 1" to witnesses who, in the course of questioning by the police or by another law enforcement authority, become suspects or accused persons. As a result, Art. 2.3 does not have any real effect in substance, as it basically confirms that the Directive only applies to persons from the time 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. Given that the situation in *Brusco* is very common in practice, however, it was felt that an explicit reference to this situation in the Directive would be appropriate.

The added value, in fact, lies in recital 21, according to which, in the course of questioning, a witness becomes a suspect or accused person, either questioning should be suspended immediately or the questioning may be continued, on the condition, however, that the person concerned has been made aware that he is a suspect or accused person and is able to fully exercise the rights provided for in the Directive, in particular the right of access to a lawyer. Moreover, in such a situation, the person should be informed, in accordance with Directive 2012/13/EU, that he has the right of access to a lawyer as well as, *inter alia*, the right to remain silent.

The fact that this "rule" was placed in recital 21 and not in the operative part of the Directive, is part of the final compromise between the Council and the European Parliament. As a consequence of this placement, however, it appears that the rule does not have direct effect.

d) Investigative and other evidence-gathering acts

The issue of the right of access to a lawyer during investigative and other evidence-gathering acts was the subject of a lot of discussion, in particular during the initial negotiations in the Council. The Commission's proposal provided that suspects or accused persons should have the right of access to a lawyer "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."[32]

In the Council, it was observed that this text would go so far as to prevent Member States from carrying out routine acts, such as taking fingerprints of suspects or accused persons, without the presence of a lawyer. In the months following the presentation of the proposal, Commissioner Viviane Reding often found herself in a defensive position when she was asked questions about this specific provision, which Member States perceived as an illustration of the lack of balance in the Commission proposal.

In view of these misgivings, some Member States requested the deletion of the entire provision relating to investigative and other evidence-gathering acts, not least because it could give rise to several practical problems: What would be the situation, for instance, when a suspect or accused person has the right of access to a lawyer in respect of an investigative act, such as a house search, but the lawyer concerned does not turn up on time? Do the authorities then have to wait to carry out the house search until the lawyer arrives? The Commission, however, supported by several other Member States, considered that the Directive would not be complete without a provision on the right of access to a lawyer during investigative and other evidence-gathering acts.

The Polish Presidency proposed a clever compromise solution, which was ultimately accepted by the Council and the European Parliament. The solution consisted in establishing a list of investigative and other evidence-gathering acts at which suspects or accused persons should, *as a minimum*, have the right of access to a lawyer. Member States who so wish could then decide to also provide this right in respect of other such acts. The minimum list as finally agreed in Art. 3.3 under (c), which was established taking account of the case law of the ECtHR,[33] comprises the following acts: *identity parades*, at which the suspect or accused person appears 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 with 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 pose specific questions to the suspect or accused person.[34]

In contrast to other relatively routine acts, such as fingerprints, blood samples, DNA tests as well as searches of premises, land, and means of transport, the above-mentioned three investigative or evidence-gathering acts are normally prepared in advance, which should allow lawyers to be present in time.[35] The presence of a lawyer at these acts will have added value by ensuring that they are carried out fairly.

e) Remedies – use of evidence

The other element of the Commission proposal relating to witnesses, namely that (incriminating) statements made by witnesses who become suspects may not be used against them, was very much contested by a group of Member States who also contested the proposal of the Commission on the issue of remedies. The Commission had proposed that statements made by a suspect or accused person or evidence obtained in breach of his right to a lawyer may not be used as evidence against him, unless the use of such evidence would not prejudice the rights of the defence.[36]

While some Member States, could agree to these proposals, as they have strict rules prohibiting any use of illegaly obtained statements or evidence for a conviction in their national laws (e.g., Italy), the opposing Member States felt that the proposals were too intrusive, since, in their opinion, it should be left to the judge in each case to decide whether or not and, if so, to what extent such statements or evidence could be used for a conviction. Sweden, which forcefully led the opposing Member States, repeatedly explained that it wanted "to keep its system," namely the system based on the principle of free submission and assessment of evidence, which would be in the interest of having courts rendering just and materially correct judgments. This crusade paid off because, in the final text of the Directive, Art. 12 on remedies is only a shadow of the corresponding text in the Commission proposal.

In the light of the above, it is hoped that the Member States and the Court of Justice of the European Union will give substantial emphasis to Art. 12.1, according to which Member States should ensure that suspects and accused persons have an *effective* remedy under national law in the event of a breach of the rights under this Directive. This rule is complemented by Art. 12.2, containing the obligation for Member States to ensure that, in the assessment of statements or evidence obtained in breach of the right of access to a lawyer, the rights of the defence and the fairness of the proceedings are respected. Both obligations should be read in the light of recital 50, which reiterates the observation of the ECtHR in the *Salduz* judgment, according to which 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.

3. Difficulty of reaching agreement on the proposal because of differing opinions on applicable safeguards regarding derogations to the right of access to a lawyer and the principle of confidentiality

The question of whether the Member States should be allowed to derogate from the right of access to a lawyer and from the principle of confidentiality of communication between the suspect or accused person and his lawyer – and, if so, to what extent – caused a division not only between the Member States but also between the Council, on the one hand, and the European Parliament, on the other.

It was interesting to note that, in the Council, southern European Member States that had in the past suffered from dictatorial or military regimes (Italy, Portugal, Spain) were fiercely opposed to allowing the State to make derogations from the right of access to a lawyer and to the principle of confidentiality. These Member States understandably wanted to avoid the negative experiences of the past, where the rights of individuals were often disrespected, by not allowing the State to make any derogations and therefore, at least on paper, excluding abuse. In essence, these Member States wanted to ensure that no infringements to the rights of individuals could occur. Northern Member States, however, probably having more confidence in the State and its institutions, felt that it should be possible to make derogations in certain well-defined circumstances, e.g., when making a derogation would be essential in order to avoid substantial prejudice to criminal proceedings.

a) Derogations from the right of access to a lawyer

In its proposal, the Commission suggested that Member States should be allowed to derogate from the right of access to a lawyer but only when such derogation is justified by compelling reasons pertaining to the urgent need to avert serious adverse consequences for the life or physical integrity of a person. During the negotiations in the Council, various (Northern) Member States felt that this condition relating to life and limb, as proposed by the Commission, was too restrictive. They considered that "compelling reasons" as such should be enough to derogate from the right of access to a lawyer, and they referred in this context to the *Salduz* judgment, where the ECtHR had stated that denial of access to a lawyer could be justified for "compelling reasons," without any further qualification or condition. In the general approach, this line of reasoning

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was adhered to, although Portugal opposed it, and Italy and Spain, supported by the Commission, made clear that they would seek improvements to the text during the negotiations with the European Parliament.

During these negotiations, the European Parliament insisted from the outset that it would not accept that derogations from the right of access to a lawyer be made on the wide ground of compelling reasons only. Hence, a solution was sought by defining the compelling reasons more clearly and thereby limiting the possibilities of making derogations. In the end, agreement was reached by authorising derogations for compelling reasons relating to life and limb, as proposed by the Commission (but complemented with a reference to the liberty of the person), and for compelling reasons relating to situations where immediate action by the investigating authorities is imperative in order to prevent substantial jeopardy to the criminal proceedings ("ticking bomb exception"), see Art. 3.6.

The European Parliament, however, was only able to accept the derogations for these compelling reasons under strict conditions. Indeed, it was agreed in Art. 3.6 and recital 38 that derogations could only be made in exceptional circumstances and only at the pre-trial stage, that they should be temporary and strictly limited in time, that they should not be based exclusively on the type or seriousness of the alleged offence and should not prejudice the overall fairness of the proceedings, and that they should be proportionate and only be applied to the extent justified in the light of the particular circumstances of the case. Moreover, it was decided to insert extra guarantees for the use of the derogations in recitals 31 and 32 by stating that the competent authorities may only question suspects or accused persons without the lawyer being present if these persons 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. It was further clarified that questioning may be carried out for the sole purpose and to the extent necessary to obtain information that is essential to averting serious adverse consequences for the life, liberty, or physical integrity of a person or to obtain information that is essential to preventing substantial jeopardy to criminal proceedings. In line with *Salduz*, it was also underlined that any abuse of these derogations would, in principle, irretrievably prejudice the rights of the defence.

Last but not least, recital 38 instructs Member States to make restricted use of the derogations. In the corridors, the Member States discreetly remarked that this instruction was clearly superfluous because, in view of the many conditions and "belts and braces" that had now been attached to the derogations, it would be very difficult for Member States to make any derogation whatsoever from the right of access to a lawyer.

It should be noted, finally, that Art. 3.5 contains a specific derogation related to the geographical remoteness of a suspect or accused person. This derogation was inserted at the request of France, which feared that, if a suspect or accused person was deprived of liberty in a place where no lawyer could be made available on short notice, e.g., in French Guyana or on a military nuclear vessel in the Indian Ocean, it would not be able to fully comply with Art. 3.2 under (c) of the Directive, according to which suspects or accused persons have the right of access to a lawyer "without undue delay after deprivation of liberty." In the application of this specific derogation, however, Member States may only buy time: they may neither question the suspect or accused person nor carry out any of the investigative or evidence-gathering acts indicated in Art. 3.3 under (c) of the Directive, see recital 30.

b) Confidentiality

The way in which confidentiality of communication between a suspect or accused person and his lawyer should be treated was probably the most difficult issue of the entire Directive. According to the case-law of the ECtHR,[37] one of the key elements of effective representation of a client's interests by his lawyer is the principle that the confidentiality of information exchanged between them must be protected. According to the Strasbourg Court, the privilege of confidential communication encourages open and honest communica-

tion between clients and lawyers, and it is protected by the ECHR as an important safeguard of the right of defence. In the *Campbell* judgment,[38] however, it seemed that the ECtHR indicated that exceptions to this rule may be permissible, because the Court had stated that "the lawyer-client relationship is, *in principle*, privileged."

In its proposal for a Directive, the Commission had suggested that Member States should ensure that the confidentiality of communication between the suspect or accused person and his lawyer be guaranteed. [39] No derogations were envisaged.

During the negotiations in the Council, various Member States asked for the possibility to include derogations in the text. They referred to the *Campbell* judgment and indicated that they had a practice that allows certain exceptions to the principle of confidentiality, in particular in the situation when there is an urgent need to prevent serious crime, notably terrorism, and in the situation when there is a suspicion that the lawyer is colluding with the suspect or accused person in a criminal offence. In the general approach, it was therefore envisaged that, in these two situations, Member States should be allowed to make derogations from the principle of confidentiality of communication between a suspect or accused person and his lawyer.[40] Some Member States, however, supported by the Commission, expressed serious concerns in this regard.

The European Parliament, supported by the Commission, very much insisted on having an absolute rule on confidentiality, without any derogations. After extensive discussions, in which all options were examined – including the "nuclear" option of deleting the provision on confidentiality altogether – the Irish Presidency presented a compromise for a new text for Art. 4 that was acceptable to all Member States and the European Parliament.

The Presidency observed that the Commission proposal and the general approach required Member States to "guarantee" the confidentiality of communication between a suspect or accused person and his lawyer. According to the Presidency, however, it would be impossible in practice for Member States to guarantee such confidentiality, since the communication between a suspect or accused person and his lawyer might not be under the control of the Member States (for example, if the communication takes place during a meeting in the lawyer's office), and the breach of confidentiality may come about via the lawyer himself or by accident (documents sent to the wrong address). The Presidency therefore considered that what is intended is that Member States should "respect" the confidentiality of communication between the lawyer and the suspect or accused person, in the sense that Member States should honour this confidentiality and refrain from interfering with it. The Presidency noted that the term "respect" had been used in this sense in several other EU instruments, and it is clarified in recital 33 that this entails an active obligation for Member States to "ensure that arrangements for communication uphold and protect confidentiality."[41]

The Presidency also observed that, while it would be uncertain if any or all of the derogations contained in the general approach would pass the scrutiny of the ECtHR, it seemed appropriate to clarify which communication falls under the principle of confidentiality by adding the words "in the exercise of the right of access to a lawyer provided for under this Directive." As a result, the text of Art. 4 came to read as follows: "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."

This text without derogations is accompanied by two recitals, which seek to clarify the situations in which the Directive would not apply, in order to give the Member States some margin for manoeuvre. Recital 33 explains *inter alia* that a colluding lawyer is not considered to be operating in the exercise of the right of access

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to a lawyer provided for under the Directive. In this way, there is some reference, albeit in a recital, to the situation of a colluding lawyer as covered in the corresponding derogation in the general approach. Recital 34 states that the Directive is without prejudice to a breach of confidentiality, which is incidental to a lawful surveillance operation by competent authorities, and without prejudice to the work that is carried out, for example, by national intelligence services to safeguard national security in accordance with Art. 4(2) of the Treaty on European Union (TEU) or that falls within the scope of Art. 72 TFEU. This addresses to a large extent the derogation in the general approach relating to the situation when there is an urgent need to prevent serious crime, particularly terrorism. The text of the Irish Presidency thus satisfied both the European Parliament and the Member States – or it left them at least equally dissatisfied, thus constituting a fair compromise.

4. Difficulty of reaching agreement on the proposal in view of substantial changes to the EAW system

Like measures A and B, measure C on the right of access to a lawyer was not only meant to provide procedural rights for suspects and accused persons but also for persons that are subject to EAW proceedings ("requested persons"). Art. 11.2 of Framework Decision 2002/584/JHA[42] provides that requested persons who are arrested for the purpose of execution of an EAW have the right to be assisted by a legal counsel. Therefore, the right of access to a lawyer already exists in the *executing* State. The big novelty of the Commission proposal was also to provide the right of access to a lawyer in the *issuing* State. The lawyer in the issuing State should assist the lawyer in the executing State with a view to the effective exercise of the rights of the requested person in the executing State. The Commission explained that the lawyer in the issuing State is often in a much better position to obtain and verify factual information and to provide advice on the law in the issuing State; this may help the lawyer in the executing State to defend the interests of the requested person and may also lead to a quick "resolution" of the EAW, e.g., through a voluntary return of the person concerned or a withdrawal of the EAW where warranted.

In the first months of the negotiations in the Council, however, a large majority of Member States opposed the idea of granting access to a lawyer in the issuing State. Member States felt that the system of the EAW was working well and that any modification would lead to the risk of jeopardizing the system in its entirety. It was also believed that granting access to a lawyer in the issuing State could prolong the surrender procedure, and could bring about substantial costs for the Member States. The Polish Presidency therefore decided to delete the paragraphs concerned from the Commission proposal, which was also in line with clear guidance from the Council preparatory bodies.[43]

During the negotiations with the European Parliament, however, the issue was back on the table. EP rapporteur Oana Antonescu made it a priority on her "wish list," and she was supported in this position by the shadow rapporteurs, the Commission, and various lobby groups. The latter even organised special studies and conferences in order to underline the importance of dual representation for requested persons.[44] In the end, the Council reluctantly gave in and agreed to granting the right of access to a lawyer in the issuing State as well, but only after having ensured that the tasks of this lawyer were clearly limited to providing the lawyer in the executing State with "information and advice" (Art. 10.4). The Council also insisted on clarifying in the operative part of the text (Art. 10.6) that the provisions on the lawyer in the issuing State were without prejudice to the (strict) time limits set out in Framework Decision 2002/584/JHA. In addition, the Irish Presidency succeeded in replacing the expression "right of *access*" to a lawyer in the issuing Member State with the expression "right to *appoint*" a lawyer in the issuing Member State (Arts. 10.4, 10.5, and 10.6). The difference between these two expressions is, however, far from clear.

IV. Measure D

The Directive also includes measure D of the roadmap, by providing rules on the right to have a third person informed of deprivation of liberty (Art. 5); on the right to communicate, while deprived of liberty, with third persons (Art. 6); and on the right to communicate with consular authorities (Art. 7). Although these articles also needed substantial negotiation before they could be agreed upon, they were relatively uncontroversial compared to the rules on the right of access to a lawyer.

V. Conclusion

The Directive on the right of access to a lawyer is the core measure of the roadmap on strengthening the procedural rights of suspects and accused persons in criminal proceedings. Building on the case law of the ECtHR, in particular the *Salduz* judgment, the Directive provides detailed rules on the right of access to a lawyer for suspects and accused persons in criminal proceedings and for requested persons in EAW proceedings.

Although defence lawyers and human rights lobby groups may have wanted an (even) more ambitious text, it seems that there is general satisfaction with the result achieved. Indeed, the Directive sets a high level of protection for suspects and accused persons in criminal proceedings and for requested persons in EAW proceedings, while taking due account of the interests of the State in prosecuting crime – which, as noted, are often interests that correspond to the interests of victims of crime.

The European Parliament, supported by the Commission and by some Member States, played an important role in "upgrading" the text of the Directive, in particular if the final text is compared with the text of the general approach. Nevertheless, one has to realise that in the "game" of the co-decision process, the Council is used to setting the standards in the general approach lower than it can actually accept, in order to be able to "give something away" to the European Parliament.

Attention should now be focused on the implementation of the Directive by the Member States. Crafting a good Directive is one thing, but it is at least as important that the Directive be implemented and applied in a manner that is faithful to the letter and the spirit thereof. Herein lies an important task, not only for the Commission but also for the national courts and the Court of Justice of the European Union, since it is very likely that lawyers representing suspects and accused persons across Europe will rely on the Directive. It will probably lead to a considerable body of jurisprudence on access to a lawyer at both the domestic and Union levels.

A last issue concerns the question of whether the United Kingdom and Ireland will opt-in to the measure on the basis of Art. 4 of Protocol 21 to the Lisbon Treaty. Whereas an opt-in by the UK seems unlikely in the context of the current political climate in London, an opt-in by Ireland – which very diligently led the final negotiations in the Council and with the European Parliament – is still not ruled out. While recognising the rules of *Europe à la carte* as created by the Lisbon Treaty, one could admit that such an opt-in by Ireland – but also by the UK and, if it would have been possible, by Denmark – would to a certain extent be "fair," since it would ensure that the same minimum standards that apply in 25 Member States in respect of British and Irish citizens would also apply in the UK and Ireland as regards citizens of the other Member States.

1. OJ L 294, 6.11.2013, p. 1.↩
2. COM (2004) 328 final. Council doc. 9318/04.↩
3. Resolution of the Council of 30 November 2009, O.J. C 295, 4.12.2009, p. 1.↩
4. See Cras and De Matteis, "The Directive on the right to interpretation and translation in criminal proceedings", eucrim 2010/4, p. 153.↩

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5. O.J. L 280, 26.10.2010, p. 1. See on this Directive the article mentioned in the previous footnote.↩
6. O.J. L 142, 1.6.2012, p. 1. See on this Directive Cras and De Matteis, "The Directive on the right to information", eucrim 2013/1, p. 22.↩
7. ECtHR, Salduz v. Turkey, judgment of 27 November 2008, in particular point 55. This judgment has been confirmed in various other subsequent judgments. Note that all case law of the ECtHR can be found on the ECHR HUDOC search portal, see http://cmiskp.echr.coe.int/tkp197/search.asp.↩
8. The Commission proposal is set out in Council doc. 11497/11.↩
9. It being understood that, in the field of judicial cooperation in criminal matters, a quarter of the Member States can also present a legislative initiative, see Art. 76 TFEU.↩
10. Some people had the impression that the Commission had made such an ambitious proposal because its proposal for the previous measure (B) had generally been considered too weak – the text of the Directive on the right to information was therefore made more "pro-rights" during the negotiations in the Council and with the European Parliament (e.g., the Council added the right to remain silent to the rights about which the suspect or accused person has the right to be informed).↩
11. Council doc. 14495/11.↩
12. The 2012 French Presidential elections were held on 22 April and 6 May 2012 (in some overseas territories, one day earlier in each case).↩
13. Council doc. 18215/11.↩
14. Council doc. 18240/11.↩
15. Council doc. 5219/12.↩
16. Council doc. 5897/12 + ADD 1 + ADD 2.↩
17. Council doc. 10908/12, p. 3.↩
18. For instance, representatives from the Netherlands stated that the exclusion for minor offences, as agreed in the text of the general approach, was very important to them.↩
19. Vote taken on 10 July 2012, inter-institutional file 2011/0154 (COD).↩
20. A lot of (informal) work was carried out in the Brussels café "Karsmakers," which is the reason why some people call this Directive the "Karsmakers Directive".↩
21. The finishing touch on new texts was usually made in the bar of the Brussels Metropole hotel, where the President of the Council Working Party used to stay.↩
22. ST 10190/13.↩
23. O.J. L 294, 6.11.2013, p. 1.↩
24. It should be noted that, on 27 November 2013, after the adoption of the Directive on the right of access to a lawyer, the Commission presented a proposal for a Directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European Arrest Warrant proceedings, see Council docs. 17635/13 + ADD 1 + ADD 2 + ADD 3.↩
25. Under Swedish law, in the exceptional situation where a suspect is unknown and refuses to say who he is or where he lives, or if he doesn't have a residence in Sweden and there is a risk that he will flee or otherwise evade legal proceedings or punishment, deprivation of liberty can be used no matter what kind of offence the person is suspected of.↩
26. Law 2011-392, JORF n° 0089 of 15 April 2011.↩
27. ECtHR, Dayanan v. Turkey, judgment of 13 October 2009. See, most notably, point 32, where the possible activities of a lawyer are listed: "Indeed, the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention."↩
28. See recital 25.↩
29. ECtHR, Brusco v. France, judgment of 14 October 2010. See, in particular, as from point 47.↩
30. In fact: "any person other than a suspect or accused person." In practice, mainly witnesses are concerned.↩
31. See Art. 10 of the Commission proposal.↩
32. See Art. 3(1) under (b) of the Commission proposal.↩
33. For identity parades, see ECtHR, Mehmet Şerif Öner v. Turkey, judgment of 13 September 2011, points 21 and 22; for reconstructions of the scene of a crime, see ECtHR, Shabelnik v. Ukraine, judgment of 19 February 2009, point 57, and ECtHR, Karadag v. Turkey, judgment of 29 June 2010, points 46-48. Confrontations were added because they are considered to be the same, in essence, as questioning, save that they are conducted in the presence of one or more witnesses or victims.↩
34. See recital 26.↩
35. See recital 26. Member States can address the situation of lawyers not arriving on time in the practical arrangements that they can make.↩
36. See Art. 13 of the Commission proposal.↩
37. See e.g. ECtHR, Castravet v. Moldova, judgment of 13 March 2007, in particular point 49.↩
38. ECtHR, Campbell v. the United Kingdom, judgment of 25 March 1992, point 46.↩
39. Text slightly paraphrased. See Art. 7 of the Commission proposal for the full text.↩
40. See Council doc. 10908/12, Art. 4.2.↩
41. See, e.g., Directive 2011/95/EU (Art. 21.1) and Directive 2009/140/EC (Art. 1.1.b), as well as, precisely on confidentiality, Regulation (EC) No 1829/2003 (Art. 31.7).↩
42. Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, O.J. L 190, 18.07.2002, p. 1.↩
43. Council doc. 18215/11, points 30-32.↩

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44. See, e.g., the study by Justice, "European Arrest Warrants – Ensuring an effective defence", September 2012, http://www.justice.org.uk/data/files/resources/328/JUSTICE-European-Arrest-Warrants.pdf↩

Author statement

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