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from : Presidency
to : Working Party on Substantive Criminal Law

No. prev. doc. : 12564/10 DROIPEN 83 COPEN 162 CODEC 727

Subject : Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings

Background

On 20 July 2010 the Commission presented to the European Parliament and to the Council a proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings.¹

On 14-15 September 2010 the Working Party for Substantive Criminal Law has had a first exchange of views on the whole proposal.

On 24 September, an orientation discussion has been held in CATS in order to provide strategic guidance on certain general issues set out in 13683/10 DROIPEN 96 COPEN 193 CODEC 840.

¹ See 12564/10 DROIPEN 83 COPEN 162 CODEC 727.

While taking into account the outcome of discussions in CATS (13945/10 DROIPEN 102 COPEN 200 CODEC 886) and the general views expressed by delegations, a first detailed examination of the proposal took place during the meeting of the Friends of Presidency on 4 October 2010 on the basis of 12564/10 DROIPEN 83 COPEN 162 CODEC 727 and DS 1636/10.

The text of the proposal, as resulting from the latter meeting, is set out in the Annex to this note.

Specific issues

1. The right to information about rights (Art. 3) and the right to access the case-file (Art. 7)

Both issues being referred to CATS on 26 October, the Presidency suggests to discuss them on the basis of document 14909/10 DROIPEN 114 COPEN 216 CODEC 1031.

2. Right to information about the accusation (Art. 6)

Delegations requested a clear differentiation between the stages of the proceedings referred to in Article 6 in order to address the different level of details about the charges that the competent authorities may be in a position to provide.

The Presidency, therefore, proposed a distinction to be drawn between situations falling respectively under Article 5 (2) and Article 6 (3) letter a) of ECHR. However, taking into account the different meaning of the term "charged" across the Member States, the need for identifying a third situation appeared from the discussions.

The notion of "indictment", which derives from the case law of the ECtHR¹ and is already used in the Directive on the right to translation and interpretation, should be understood as the officialisation/formalisation of the accusations against which the person has to defend himself before a court at the trial stage.

In view of the above and taking into account the variety of procedural rules existing in the Member States, the Presidency proposes to use the term "accusation" instead of "charges" in order to provide for a generic notion.

¹ See, *inter alia*, Kamasinski v. Austria, 19 December 1989; Moiseyev v. Russia, 9 October 2008; Ocalan v. Turkey, 12 May 2005.

Proposal for a

DIRECTIVE .../.../EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on the right to information in criminal proceedings

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 Committee¹,

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

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Article 47 of the Charter of Fundamental Rights of the European Union (the Charter), Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Article 14 of the International Covenant on Civil and Political Rights (ICCPR) enshrine the right to a fair trial. Article 48 of the Charter guarantees respect for the rights of the defence.

¹ OJ C , , p. .

² OJ C , , p. .

- (2) Article 6 of the Charter and Article 5 of the ECHR enshrine the rights to liberty and security, the limitations to which may not exceed those permitted by the ECHR in the wording of its Article 5 and inferred from the case-law of the European Court of Human Rights.
- (3) The European Union has set itself the objective of maintaining and developing an area of freedom, security and justice. According to the conclusions of the European Council in Tampere of 15 and 16 October 1999, and in particular point 33 thereof, the principle of mutual recognition should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union, since enhanced mutual recognition of judicial decisions and judgments and the necessary approximation of legislation would facilitate cooperation between authorities and the judicial protection of individual rights.
- (4) On 29 November 2000 the Council, in accordance with the Tampere Conclusions, adopted a programme of measures to implement the principle of mutual recognition of decisions in criminal matters³. The introduction to the programme of measures states that mutual recognition is "designed to strengthen cooperation between Member States" and "to enhance the protection of individual rights".
- (5) Implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States have trust in each other's criminal justice systems. The extent of the mutual recognition exercise is very much dependent on a number of parameters, which include mechanisms for safeguarding the rights of suspects and common minimum standards necessary to facilitate the application of the principle of mutual recognition.
- (6) Mutual recognition can only operate effectively in a spirit of confidence, whereby not only judicial authorities, but all actors in the criminal process see decisions of the judicial authorities of other Member States as equivalent to their own, implying not only trust in the adequacy of one's partners' rules, but also trust that those rules are correctly applied.

³ OJ C 12, 15.1.2001, p. 10.

- (7) 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.
- (8) Strengthening mutual trust requires detailed rules on the protection of the procedural rights and guarantees stemming from the Charter, the ECHR and the ICCPR. In the implementation of this Directive, Member States should not in any event fall below the standards set out in the Convention and the Charter as developed by the case-law of the Court of Justice of the European Union and the European Court of Human Rights.
- (9) Article 82(2) of the Treaty provides for the establishment of minimum rules applicable in the Member States so as to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension. Point (b) of Article 82(2) refers to "the rights of individuals in criminal procedure" as one of the areas in which minimum rules may be established.
- (10) Common minimum rules should lead to increased confidence in the criminal justice systems of all Member States, which in turn should lead to more efficient judicial cooperation in a climate of mutual trust and to the promotion of a fundamental rights culture in the European Union. They should also remove obstacles to free movement of citizens. Such common minimum rules should apply to information in criminal proceedings.

- (11) On 30 November 2009, the Council adopted the Roadmap for strengthening procedural rights of suspected and accused persons in criminal proceedings ("the Roadmap")⁴. Taking a step-by-step approach, the Roadmap calls for the adoption of measures regarding the right to translation and interpretation, the right to information on rights and information about the charges, the right to legal advice and legal aid, the right to communication with relatives, employers and consular authorities, and regarding special safeguards for suspected or accused persons who are vulnerable. The Roadmap emphasises that the order of the rights is indicative only and thus implies that it may be changed according to priorities. It is designed to operate as a whole; only when all its component parts have been implemented will its benefits be felt in full.
- (12) In the Stockholm Programme, adopted on 11 December 2009⁵, the European Council welcomed the Roadmap and made it part of the Stockholm Programme (point 2.4.). The European Council underlined the non-exhaustive character of the Roadmap, by inviting the Commission to examine further aspects of minimum procedural rights for suspected and accused persons, and to assess whether other issues, for instance the presumption of innocence, need to be addressed, in order to promote better cooperation in this area.
- (13) The first measure on the Roadmap is a Directive of the European Parliament and of the Council on the rights to interpretation and to translation in criminal proceedings⁶.

⁴ OJ C 295, 4.12.2009, p. 1.

⁵ OJ C 115, 4.5.2010.

⁶ Directive 2010/xxx/EU of the European Parliament and of the Council on the rights to interpretation and translation in criminal proceedings (8 October 2010).

- (14) This Directive relates to measure B of the Roadmap. It lays down common minimum standards to be applied in the field of information about rights and about the charge to be given to persons suspected or accused of having committed a criminal offence, with a view to enhancing mutual trust among Member States. The Directive promotes the application of the Charter, and in particular its Articles 6, 47 and 48 by building upon Articles 5 and 6 ECHR as interpreted by the European Court of Human Rights. In its Communication "Delivering an area of freedom, security and justice for Europe's citizens", the Action Plan Implementing the Stockholm Programme⁷, the Commission announced the presentation of a proposal on the right to information in 2010.
- (15) This Directive does not apply in proceedings conducted by administrative authorities in relation to the breach of competition legislation, whether national or European, unless the case is brought before a court having jurisdiction in criminal matters.
- (16) The right to information about rights (which is inferred from the case-law of the European Court of Human Rights) should be explicitly established by the Directive. This Directive thus offers protection beyond that currently provided by the ECHR. Information about the charge is a right enshrined in Articles 5 and 6 of the ECHR as interpreted by the European Court of Human Rights and Articles 9 and 14 of the ICCPR. The provisions of this Directive should facilitate the application of those rights in practice, with a view to safeguarding the right to fair proceedings.
- (17) The suspected or accused person should be able to know and understand what his rights are and be in a position to avail himself of those rights before any police questioning. He should be informed promptly and in a language he understands of the nature and cause of any accusation he faces and given information about immediately relevant rights.

⁷ COM(2010) 171, 20.4.2010.

- (18) Information about rights should be given to all suspected and accused persons promptly at the outset of criminal proceedings, be it orally or in writing. Information about rights to be given under this Directive should as a minimum requirement under this Directive include information on the right of access to a lawyer, the right to be informed of the charge and, where appropriate, to be given access to the case-file, the right to interpretation and translation for those who do not understand the language of the proceedings and the right to be brought promptly before a court if the suspected or accused person is arrested. This is without prejudice to information to be given on other procedural rights stemming from the Charter, the ECHR, the ICCPR and applicable EU legislation as interpreted by the relevant courts and tribunals.
- (19) Where a suspected or accused person is arrested, information about these immediately relevant procedural rights should be given by means of a written Letter of Rights drafted in an easily comprehensible manner so as to ensure that he has an actual understanding of his rights. To help Member States design such a Letter of Rights and to promote greater consistency between Member States, a model of the Letter of Rights, which Member States may use, is provided in Annex I to the Directive. This model is indicative and may be subject to review in the context of the report on implementation to be presented by the European Commission pursuant to Article 12 of the Directive and also once all the Roadmap measures have come into force. The actual letter based on this model should also include other relevant procedural rights that apply in Member States.
- (20) A person accused of having committed a criminal offence should be given all the information on the charge necessary to enable him to prepare his defence and to safeguard the fairness of the proceedings.
- (21) The most effective way of ensuring that a suspected or accused person has sufficient information about the charge is to allow him or his lawyer access to the case-file. This access may be restricted where it poses a serious risk to the life of another person or the internal security of the Member State.

- (22) Member States should have a mechanism to verify that the suspected or accused persons have received all the information about rights and about the charge to which they are entitled.
- (23) Adequate training on procedural rights of suspected and accused persons should be provided to the relevant officials in Member States.
- (24) In accordance with the United Nations Convention on the Rights of the Child, a child means every person below the age of 18 years. In all action relating to children, the child's best interests must be a primary consideration.
- (25) 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 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States⁸. To help Member States design such a Letter of Rights and to promote greater coherence between Member States a model form of the Letter of Rights, which Member States may use, is provided in Annex 1 to the Directive. This model form is indicative and may be subject to review in the context of the report on implementation to be presented by the European Commission pursuant to Article 12 of the Directive and also once all the Roadmap measures have come into force.

⁸ OJ L 190 of 18.7.2002, p.1.

- (26) The provisions of this Directive set minimum rules. Member States may extend the rights set out in this Directive in order to provide 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 ECHR, as interpreted in the case-law of the European Court of Human Rights.
- (27) This Directive respects fundamental rights and observes the principles recognised by the Charter. In particular, this Directive seeks to promote the right to liberty, the right to a fair trial, the rights of the defence and the rights of the child. It has to be implemented accordingly.
- (28) 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 the relevant case-law of the European Court of Human Rights.
- (29) 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 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.

- (30) [In accordance with Articles 1, 2, 3 and 4 of 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 of Article 4 of 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]⁹
- (31) In accordance with Articles 1 and 2 of 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 is not taking part in the adoption of this Directive, and is therefore not bound by it or subject to its application,

HAVE ADOPTED THIS DIRECTIVE:

Article 1¹⁰
Objective

The Directive lays down rules concerning the right to information about procedural rights and about the charge in criminal proceedings and proceedings for the execution of a European arrest warrant.

⁹ The final wording of this recital in the Directive will depend on the actual position of the United Kingdom and Ireland taken in accordance with the provisions of protocol (No 21).

¹⁰ The Presidency aligns this provision with Art. 1 of the Directive on the right to translation and interpretation.

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 proceedings for the execution of a European Arrest Warrant.
3. Where the law of a Member State provides for the imposition of a sanction regarding minor offences by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed to such a court, this Directive shall apply only to the proceedings before that court following such an appeal.

(Article 3¹¹)

(The right to information about rights)

[omissis]

¹¹ Taking into account the fact that this issue will be referred to CATS on 26 October, the Presidency suggests to examine this provision on the basis of document 14909/10 DROIPEN 114 COPEN 216 CODEC 1031.

Article 4

The right to written information about rights on arrest

1. Where a person is arrested by the competent authorities of a Member State [...], he shall be promptly provided with information about his procedural rights in writing (Letter of Rights). He shall be given an opportunity to read the Letter of Rights and be allowed to keep it in his possession throughout the time he is deprived of his liberty.
2. The Letter of Rights shall be drafted in simple and accessible language and shall include at least that information referred to in Article 3(3), as well as the information about the right to take proceedings by which the lawfulness of his detention shall be decided speedily by a court¹². Annex I to this Directive contains an indicative model of such a Letter.
3. Member States shall ensure that, where the suspected or accused person does not speak or understand the language of the proceedings, he receives the Letter of Rights in a language he understands. Member States shall ensure that a mechanism is in place to convey the information to a suspected or accused person who is partially sighted or cannot read. Where the suspected or accused person is a minor, special attention shall be given by competent authorities to ensure his comprehension of the Letter of Rights.¹³
4. Where a Letter of Rights is not available in the appropriate language, the suspected or accused person shall be informed of his rights orally in a language he understands. A Letter of Rights in a language he understands shall then be given to him without undue delay.

¹² Taken into account comments made by delegations, the Presidency suggests rewording this obligation according to Article 5.4 ECHR and moving it from Article 3 (3) to Article 4.

¹³ The Presidency proposes to employ the term “minor” instead of “child” for greater clarity; consequently, Recital (24) should be deleted.

Article 5

The right to written information about rights in European Arrest Warrant proceedings

Member States shall ensure that any person subject to proceedings for the execution of a European Arrest Warrant receives promptly an appropriate Letter of Rights setting out the rights of that person as laid down in the Framework Decision 2002/584/JHA. Annex II to this Directive contains an indicative model of such Letter.

Article 6¹⁴

The right to information about the accusation

1. Member States shall ensure that a person who is arrested is provided with information about the reasons for his arrest and the facts held against him. The information provided shall be sufficient to allow the suspected or accused person to effectively challenge the lawfulness of the arrest or detention.
2. (ex 1.) Member States shall ensure that a [...] ¹⁵ person who faces a criminal charge is provided with sufficient information about the accusation to safeguard the fairness of the criminal proceedings and effectively exercise his right of defence.
3. In an indictment, the information on the accusation shall include:
 - (a) a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the suspected or accused person and
 - (b) the nature and legal classification of the offence.

¹⁴ See cover note.

¹⁵ Since the Directive's scope is already defined by Article 1 and 2 as applying to a "suspected or accused person", the Presidency suggests avoiding any unnecessary repetition of those terms in the other Articles.

4. (ex 2.)The information required pursuant to this Article shall be delivered promptly and in a language that the suspected or accused person understands. Where the suspected or accused person is a minor, special attention shall be given by competent authorities to ensure his comprehension of the accusations against him.

(Article 7¹⁶)

(The right to access to the case-file)

[omissis]

Article 8

Verification and remedies

1. Member States shall ensure that the fact of having provided information to the suspected or accused person in accordance with this Directive is recorded ¹⁷.
2. Member States shall ensure that a suspected or accused person has an effective remedy, in accordance with procedures in national law, in instances where he does not receive this information.
3. Where the notification of rights is made orally in accordance with Article 4(4), it shall be recorded in such a manner as to allow verification of the content of the notification.

¹⁶ Taking into account the fact that this issue will be referred to CATS on 26 October, the Presidency suggests to examine this provision on the basis of document 14909/10 DROIPEN 114 COPEN 216 CODEC 1031.

¹⁷ In order to avoid administrative burden that could be entailed by the word 'procedure', it is proposed to simply refer to an obligation to record the fact of having provided information to the suspected or accused person.

Article 9

Training

Without prejudice to judicial independence and differences in the organisation of the judiciary across the Union, Member States shall ensure that relevant officials in police and judicial authorities receive appropriate training in relation to the obligations laid down in Articles 3 to 8. [...]

Article 10

Non-regression clause

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

Article 11

Implementation

1. Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive by ¹⁸ 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 on the occasion of their official publication.
Member States shall determine how such reference is to be made.

¹⁸ 24 months after publication of this Directive in the *Official Journal*.

Article 12

Report

The Commission shall, by¹⁹ submit a report to the European Parliament and to the Council, assessing the extent to which the Member States have taken the necessary measures in order to comply with this Directive, accompanied, if necessary, by legislative proposals.

Article 13

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 14

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament

The President

For the Council

The President

¹⁹ 36 months after publication of this Directive in the *Official Journal*.



Indicative¹ model Letter of Rights for suspected and accused persons on arrest:

If you are arrested by the police you have the following rights:

- A. to be informed of what offence you are suspected**
- B. to the assistance of a lawyer**
- C. to an interpreter and translation of documents, if you do not understand the language**
- D. to know for how long you can be detained**

You are entitled to keep this Letter of Rights with you during your detention.

A. Information on the suspicion

You have the right to know why you are suspected of having committed a criminal offence immediately after deprivation of liberty, even if the police do not question you.

You or your lawyer can ask to see the parts of the case-file relating to your arrest and detention or be informed about their content in detail.

¹ To be complemented with other relevant procedural rights applicable in Member States.

B. Help of a lawyer

You have the right to speak to a lawyer before the police start questioning you.

- If you ask to speak to a lawyer, it does not make you look like you have done anything wrong.
- The police must help you to get in touch with a lawyer.
- The lawyer is independent from the police and will not reveal any information you give him without your consent.
- You have the right to speak with a lawyer in private, both at the police station and/or on the telephone.
- If you are not able to pay for a lawyer the police have to provide you with information about free or partially free legal assistance.

C. Help of an interpreter

- If you do not speak or understand the language, an interpreter will be called for you. The interpreter is independent from the police and will not reveal any information you give him without your consent.
- You can also ask for an interpreter to help you to talk to your lawyer.
- The help of an interpreter is free of charge.
- You have the right to receive a translation of any order by a judge allowing your arrest or keeping you in custody. You may also ask to have other essential documents in the investigation translated.

D. How long can you be deprived of your liberty?

- If you are not released, you must be brought before a judge within *² hours after you have been deprived of your liberty.

² (...)

- The judge must then hear you and can decide whether you are to be kept in custody or released. You have the right to receive a translation of the judge's decision if he decides that you will remain in custody.
 - You have the right to ask for your release at any time. Your lawyer can advise you on how to proceed.
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Indicative¹ model Letter of Rights for persons arrested on the basis of a European Arrest Warrant:

If you are arrested by the police on the basis of a European Arrest Warrant you have the following rights:

- A. to know why you have been arrested**
- B. to the assistance of a lawyer**
- C. to an interpreter and translation of documents, if you do not understand the language**
- D. to be informed of your right to agree to surrender**
- E. to a hearing if you do not agree to surrender**
- F. to be released once the relevant deadline has passed**

You are entitled to keep this Letter of Rights with you during your detention.

A. Right to know what you are arrested for

– You have a right to know why you are sought by another country.

¹ To be complemented with other relevant procedural rights applicable in Member States.

B. Help of a lawyer

- You have the right to see a lawyer. The police must help you to get in touch with a lawyer.
- The lawyer is independent from the police and will not reveal any information you give him without your consent.
- You have the right to speak with a lawyer in private, both at the police station and/or on the telephone.
- If you are not able to pay for a lawyer the police have to provide you with information about free legal assistance.

C. Help of an interpreter

- If you do not speak or understand the language, an interpreter will be called for you. The interpreter is independent from the police and will not reveal any information you give him without your consent.
- You can also ask for an interpreter to help you to talk to your lawyer.
- The help of an interpreter is free of charge.
- You have the right to receive a translation of any order by a judge allowing your arrest or keeping you in custody. You may also ask to have other essential documents in the investigation translated.

D. Your right to agree to surrender

- You have the right to agree to being surrendered under a European Arrest Warrant. This should speed the procedure up.
- If you agree to be surrendered, it may be difficult to change this decision at a later stage. You should speak to a lawyer before deciding whether or not to agree to surrender.

E. Your right to a hearing

- If you do not consent to be sent to the Member State seeking you, you are entitled to go before a judge and to explain why you don't consent.

F. Right to be released once the relevant deadline has passed

- As a general rule you have to be surrendered within 10 days of a court giving a final decision that you should be surrendered. If you have not been surrendered after 10 days, the authorities normally have to release you. However, there are some exceptions to this rule, so you should speak to a lawyer about this.
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