

WORKING DOCUMENT - STATE OF PLAY AFTER THE 3RD TRILOGUE

**Draft Report on the Proposal for a
DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
on THE RIGHT TO INFORMATION IN CRIMINAL PROCEEDINGS**

General issues:

1. Many *linguistic issues* were raised throughout the draft Directive:

- ***charge/accusation***: CNS seems flexible in accepting to replace the wording *charge* with *accusation* throughout the text, as proposed by the EP.

- ***right to access to a lawyer/entitlement to legal advice (Article 3.2)***: CNS and COM both use the wording "access to a lawyer", as the right of access to a lawyer will be the object of measure C of the roadmap. COM prefers CNS structure and suggests using the term legal aid, which will be used later in the roadmap. EP is flexible on wording used by CNS, including the term legal aid. EP evaluates whether to accept the reintroduction of "access to a lawyer".

- ***arrest/deprivation of liberty (Article 4)***: CNS sticks to arrest as in its view deprivation of liberty could cover also victims, witnesses and cover the execution phase. COM suggests "*persons suspected or accused deprived of liberty*". EP sticks to "deprivation of liberty" which would also cover administrative detention but could accept COM's suggestion.

- ***criminal act/offence***: CNS text refers to criminal acts whilst EP text refers to offence. CNS shows flexibility on that but this has not resulted in a change in the text, which in practice has been refused. COM stresses the importance of consistency throughout the whole text.

- ***evidentiary material related to the case (EP)/materials of the case (CNS)(Article 7)***: CNS states that material of the case is wider, COM and EP jurist linguist confirm. EP shows flexibility and could accept "materials of the case".

- ***Gender issue (replacement of "he" with "he or she" throughout the text)***: general agreement that it is something to be dealt with by jurist linguists.

2. ***Definitions/references*** to other legal instruments:

CNS is strongly against inserting in the text definitions or references to other instruments whilst EP would like to have at least:

- *a clear definition of children*, as it is the case for the Directive on trafficking in human beings just adopted and suggested to add in Article 2.2a (child = minor of 18).

As a compromise EP might evaluate to insert the definition of a child into a recital based on recital 24 of COM's proposal;

- *reference to the interpretation/translation Directive* (Article 4.5 of EP text): EP might be flexible on moving the reference to the translation and interpretation directive of Art. 4.5 into a recital;

- *information given to persons who **cannot understand** the language, children, illiterate/disabled persons/blind people* (Article 3.1a EP + 3.1b EP): CNS against as it is contrary to references to other legal instruments or to matters that will be dealt with in other measures of the Roadmap on procedural rights.

COM warns that one of the measures provided for in the Roadmap concerns vulnerable people and would prefer avoiding any definition but supports the concept of "conveying the information";

A possible way forward might be to propose to Council to move the definition of children + the reference to the interpretation/translation + children, illiterate/disabled persons/blind people (Article 3.1a EP + 3.1b EP) Directive in the Recital and ask in return to CNS to move all references to national law in the text in a horizontal recital.

3. Scope of the instrument:

- General provisional agreement on moving the reference to the **European Arrest Warrant** to Article 1 and delete Article 2.

- General provisional agreement on deleting the reference to "*procedural*" rights in Article 1.

A common approach on Article 1.1 might read as follows:

"This Directive lays down rules concerning the right to information about rights in criminal proceedings and rights in proceedings for the execution of a European Arrest Warrant and about the accusation in criminal proceedings."
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- ***The Directive applies to suspected and accused persons on Union territory regardless of their legal status, citizenship or nationality (EP Article 1.2):***

CNS could accept moving this provision to a recital based on Art. 21 of the Charter of Fundamental Rights on non-discrimination.

COM has no strong position but stresses that there is no need for such a provision.

EP insists at least on a recital, which would go beyond Art. 21 of the Charter of Fundamental Rights, also covering the legal status of persons. A Recital simply recalling Article 21 of the Charter would not meet EP's concern.

A possible compromise might be moving Article 2.1 of EP text in a Recital.

- ***Moment in which the rights granted by the Directive become applicable***: there is a common understanding on the fact that different information should be given depending on the different stages of the proceeding but no agreement on when the single stages should start and on what information should be given.

EP insists in keeping the text as simple as possible i.e. in having only two stages: 1) general provision + 2) suspected or accused persons deprived of liberty. This would also mirror the ECHR.

In addition EP cannot accept that the last stage in CNS text is "***upon submission of the merits of the case***" as it is too late.

On that CNS expresses the opinion that before the indictment is drafted it makes no sense to provide the suspect with the type and legal classification of the offence.

EP, on the contrary, is of the opinion that the suspect should immediately be given this kind of information and that the information should be updated in the course of the proceeding if need be.

COM supports EP on that and warns against too many stages that might complicate the understanding of the provision and warns against wording which might be non compliant with the ECHR.

No agreement found but there was a common understanding on the need to increase the amount of information given stage by stage.

Orally or in writing: EP agrees to move the provision "orally or in writing" to Art.3 paragraph 2, as proposed by CNS.

- ***minor offences***: EP and CNS added the same provision providing that when the sanction is applied by an authority other than a court having jurisdiction in criminal matters, the Directive does not apply.

4. Scope of the right to information in general (Article 3):

- ***right to be informed of the accusation***: CNS says it is redundant to insert it in Article 3.

EP insists on having it in Article 3 or 4 stressing that one thing is the right of being informed of the accusation, as stated in Article 6, and another thing is the right of being aware of the right to be informed of the accusation.

COM supports EP and suggests using the following wording, which the EP could accept:

"- the right to be informed of the accusation, in accordance with Articles 6 and 7"

- the ***right to remain silent***: general agreement on the need to have it in Article 3, despite the fact that CNS would like to add a reference to national law in the first part of the Article whilst EP would like to have it together with the reference to the right to remain silent.

COM prefers a horizontal provision under Art. 3.1 as there may be consequences also for other rights.

EP shows flexibility on introducing a general reference under Art.3.1 along the following line: "with information on how the rights apply in practice".

5. Scope of the right to information in case of deprivation of liberty (Article 4):

-CNS strongly against inserting in this provision the right to c) medical care d) bail and the right to be informed on how to f) challenge the arrest and g) maximum period of pre-trial detention.

CNS shows flexibility on e) how long somebody can be deprived of liberty before being brought in front of a judge. With regard to b), CNS could accept only the reference to consular authority.

EP is flexible on introducing the wording "consular authorities and third parties", as suggested by COM.

COM says the more rights are mentioned, the better it is and stresses that despite the fact that the right to silence is not in the Roadmap, CNS has no problem in inserting it in the Directive.

COM also reminds that the right to medical care is strictly linked to ill treatment and torture.

COM says that the use of the term "bail" is unfortunate as it refers to US law, but the notion would be correct and therefore d) could be rephrased.

The following wording was suggested: "how to challenge the arrest and how to obtain a review of their detention, ***including provisional release*** and the time limits for doing so provided under national law" under Art. 4.2d.

- CNS is willing to narrow down the exception on keeping the letter of rights in his possession throughout the time of deprivation of liberty from "save for exceptional circumstances" to "unless this could directly lead to a risk of harm to the detained person or another person".

EP strongly opposes the exception.

6. Scope of the right to information in case of European Arrest Warrant (Article 5):

- EP strongly against any limitation of the scope. CNS offers a provision covering at least the rights laid down in Articles 11, 13.2, 14 ***and 19*** of the

EAW FD. CNS does not include Art. 12 of the EAW FD as it is not a right in every MS. A reference to Art. 13.1 is not appropriate according to CNS, as it is a waiver of a right.

COM says listing Articles is acceptable only if the list is complete, i.e. covers all relevant Articles in the EAW FD.

7. Right to information about the accusation (Art. 6):

- stages of the proceeding/need to adapt the type of information given: there is a common understanding on the fact that different information should be given depending on the different stages of the proceeding but no agreement on when the single stages should start and on what information should be given.

EP is willing to consider avoiding the inclusion of the words "***in accordance with Article 4 of this Directive***" in Art. 6.1b. CNS is of the opinion that there is no such obligation in Article 4, therefore the reference is unclear and against the principle of legal security.

EP does not like the fact that the last stage in CNS text is "***upon submission of the merits of the case***" as it is too late. On that CNS expresses the opinion that before the indictment is drafted it makes no sense to provide the suspect with the type and legal classification of the offence.

EP, on the contrary, is of the opinion that the suspect should immediately be given this kind of information and that the information should be updated in the course of the proceeding if need be.

COM supports EP on that and warns against too many stages that might complicate the understanding of the provision.

There is however a common agreement on the need to increase the amount of information given stage by stage.

CNS asks EP to consider keeping the following compromise text for Art. 6. 3: "***3. The information referred to in paragraph 2 shall be provided in detail at the latest upon submission of the merits of the accusation to a (...) court and shall include:...***"

- and any change thereof: it seems that there is a general agreement on the fact that information on changes in the accusation and its classification should be provided to the suspect/accused but no agreement on how to express the concept in the provision.

COM stresses that degree of participation is the correct wording "and any change thereof" should be added also in Article 6 a).

CNS asks EP to consider the following compromise text, taking into account also the content of Amendment 20 §3 "(b) the nature and legal classification of the offence, ***as well as the degree of participation by the suspected or accused person***".

Concerning the last part of the EP amendment, CNS suggests to add a new paragraph to this Article to read as follows: "***4. After submission of the merits of the accusation to a court, the suspected or accused person***

shall be informed of changes to the information referred to in paragraph 3 where this is necessary to safeguard the fairness of the proceedings".

8. Right to access to "evidence" (Art. 7):

- **definition of what should be the object of the access:** Information (CNS text)/evidentiary material (EP text)/documents (COM suggestion).

EP shows flexibility using the term "materials of the case".

- **For and against the suspected or accused person:** in both the EP and the CNS text: general agreement on the idea.

- Exceptions to the right to access (Article 7.4):

EP of the opinion that CNS wording is too wide, notably when referring to **public interest**.

COM supports EP and says that derogations should be as clear and narrow as possible and that public interest is much wider than internal security (COM's proposal). COM supports reference to fundamental rights (in both EP + CNS texts).

- reference **to judicial authority:** CNS against. COM supports EP.

- reference **to ECHR:** CNS insists it is covered by its recital 21b. EP insists to keep it in the text.

- **Index:** CNS against the index (both in COM's proposal and EP text) saying that if certain evidence is not disclosed, it makes no sense to tell the suspect/accused that there is some evidence that is not disclosed.

EP + COM of the opposite opinion.

Alternative wording such as "list of documents" were discussed without any positive outcome.

9. verification and remedies (Article 8):

Procedure to ascertain reception of information (Article 8.1):

divergences between CNS, which would like to limit the scope to Articles 4.1, 5 and 6.1a of the Directive, and EP which would like the provision to cover the whole Directive. COM supports EP.

- EP provisionally accepts the **inclusion of lawyer** in Article 8.2.

10. training (Article 9):

EP would like to have a stronger provision, CNS opposes and stresses that consistency requires having the same wording as in the Interpretation/translation Directive. Going beyond a request would be unacceptable for Member States. This is a red line for CNS.

COM informs it is preparing a communication on judicial training and suggests the wording "training being offered" or "made available".

In order to partially meet the concerns of the EP, CNS proposes to amend recital 23 to read as follows: "(23) Without prejudice to judicial independence and differences in the organization of the judiciary across the Union, ***Member States should provide or encourage the provision of*** adequate training with respect to the objectives of this Directive (...) to the relevant officials in Member States."

11. *Non regression clause (Article 10):*

EP would like to have a reference to the ***Charter***, as it is the case in the Interpretation/translation Directive. CNS is willing to accept the amendment of EP with reference to the mention of the Charter.