

**PROPOSAL TO THE SHADOW RAPPORTEURS FOR THE EP'S POSITION IN VIEW OF THE
2ND TRILOGUE
Right to Information in Criminal Proceedings
2nd Trilogue – 18th April 2011**

Article 6 - The right to information about the accusation

- **General issue: terminology. Criminal offence (EP&COM) vs criminal act (CSL).** COM sees the risk of falling below ECHR and prefers the term "criminal offence". *EP insists on maintaining "criminal offence".*

- **General issue: scope of the article: EP foresees a three step approach:**
 - 1) in case of deprivation of liberty (CSL: arrest), info on reasons of detention, including accusation (CSL: criminal act). CSL wants to keep the reference to arrest since the term "deprivation of liberty" goes beyond the scope and the legal basis of the Directive (see Art. 4).

 - 2) when suspect or accused (CSL: only when officially interviewed in the course of criminal proceeding - i.e. limits the scope), info on the accusation (CSL: criminal act)

 - 3) in case of official charge, info on nature and cause of accusation when official defence can begin according to national law (CSL text: sets a horizontal point in time for the exercise of the right in par. 2).

- **General issue: point in time for the exercise of this right:** EP sets a time limit only in case of charge: when national laws set the beginning of the defence. CSL sets a horizontal point in time for all cases: at the latest upon submission of accusation merits to court. EP also provides for information to be updated all through the proceeding.

- **General issue: content of the information.** EP and COM include info on the offence, while CSL limits it to the criminal act allegedly committed. EP and CSL substantially coincide in including info on natural and legal classification of the offence. *Proposal: stick to EP mandate.*

Article 7- The right to access the evidentiary material related to the case

- **General issue: "evidentiary material related to the case" (EP) vs. "materials of the case" (CSL):** CSL wants to keep its text as it is broader than EP's wording. *EP insists on maintaining "evidentiary material related to the case".*

EP position

- Art. 7.1. Where a suspected or accused person is arrested at any stage of the criminal proceedings, Member States shall ensure that **evidentiary material for and against the suspected or accused person in the possession of the competent authorities**, which *is* relevant for the determination of the lawfulness of the arrest or detention, **is made available to the arrested person or his lawyer.**

Council text

- Art. 7.1. Where a (...) person is arrested **and detained** at any stage of the criminal proceedings, Member States shall ensure that **all information related to the specific case in the possession of the competent authorities and which is essential to effectively challenge according to national law the lawfulness of the arrest or detention, is made available** to the arrested person or his lawyer.

- Art. 7.1: "Where a (...) person is arrested **and detained** at any stage of the criminal proceedings" (CSL). CSL uses the term "arrested and detained" instead of "suspected and arrested" (COM+EP). In order to provide consistency, "*suspected and accused person*" should be maintained throughout the text.

"all information related to the specific case in the possession of the competent authorities and which is essential to effectively challenge according to national law the lawfulness of the arrest or detention, is made available"(Art. 7.1 CSL version)

→ "information"(CSL wording) not sufficient as prosecution may withhold material. EP insists on evidentiary material related to the case. Whatever is essential to challenge the lawfulness shall be disclosed, when the person is informed about the arrest.

→ CSL inserted a reference to national law and replaced the term "*determination of the lawfulness*" with "*effectively challenge according to national law the lawfulness*" Proposal: Ask Council for explanations.

- **General issue: Extent of the right of access (Art. 7.2):** CSL asks EP to keep CSL's approach with regards to the extent of the right of access. EP widens access to "**all the evidentiary material related to the case**". Proposal: Stick to EP mandate for the moment
- **General issue: Moment when the access must be granted (Art. 7.3):** "*in good time to allow the suspected or accused person to prepare his defence or challenge pre-trial detention*" (EP+COM) / " in **due** time to allow **the effective exercise of the right of defence and at the latest upon submission of the merits of the accusation to the judgement of a court**"(CSL). Proposal: Stick to EP mandate for the moment
- CSL's addition under Art. 7.3: "**Where further material evidence comes into the possession of the competent authorities, access shall be granted to it in due time to allow for it to be considered.**" EP considers this to be self-evident and clear.
- **General issue: Refusal of access (Art. 7.4):** EP allows "**exceptionally**" for refusal "**on the basis of a reasoned decision by a competent judicial authority**" / CSL deletes "**competent judicial authority**" as in some Member States it is not a judicial authority which allows access. EP insists on maintaining "**competent judicial authority**" as a minimum.
 - CSL is willing to accept EP's addition of "**to the life or fundamental rights**"
 - "**These limitations ... Human Rights**": CSL asks EP to keep this sentence in a recital. EP could accept it as a compromise
 - "**important public interest**": CSL strongly advises EP to consider maintaining the reference since this wording comes directly from the ECHR case-law. The added value of

public interest and national security in contrast to internal security is questionable. *EP is against widening the scope of exceptions.*

Member States shall ensure that the limitations on the right of access to the evidentiary material related to the case laid down in paragraph 2 do not in any way prejudice the accused persons' effective exercise of the right of defence (EP's addition Art. 7.2a).

- CSL says EP's Art. 7.2a is already covered by Paragraph 4, first sentence of CSL text ("**provided that this does not prejudice the right to a fair trial**"). COM asks if limitations in Art. 7.2a/b refer to paragraph 4. *Proposal: maintain EP position for the moment*

Art. 7.2b. Member States shall ensure that an effective remedy exists before an impartial tribunal to challenge the decision not to allow access to certain evidentiary material related to the case (EP's addition Art. 7.2b).

- CSL invites EP to consider the fact that this concern is already covered by article 8.2 of the draft Directive. *Proposal: maintain EP position for the moment*

Article 8- Verification and remedies

- **General issue: Procedure to ascertain reception of information (Art. 8.1):** EP: "a procedure is in place to ascertain whether a suspected or accused person has received all information relevant to him/*her* in accordance with **this Directive**". *EP opposes CSL's limitation of the scope to Article 4(1), 5 and 6(1a) of this Directive.*
- Art. 8.1a: EP position is in substance in conformity with CSL text. However CSL asks EP to insert a reference to the lawyer of the suspected or accused person: "*Member States shall ensure that a suspected or accused person or his lawyer has the right to challenge, in accordance with procedures in national law, the possible failure or refusal of the competent authorities to provide the information in accordance with this Directive*". EP could accept as a compromise this insertion.

Article 9- Training

- EP requires Member States to "**take concrete measures to ensure that relevant officials in police services, judicial staff involved in criminal proceedings, prosecutors and judges will receive appropriate training (...)**". CSL: "Member States shall **request those responsible for the training of judges, prosecutors, police and judicial staff involved in criminal proceedings to provide appropriate training with respect to the objectives of this Directive(...)**". CSL asks EP to consider keeping CSL version, since it is inspired by the wording of the corresponding provision in the Directive on the right to translation and interpretation in criminal proceedings. *Proposal: stick to EP mandate.*

Article 10- Non-regression clause

- Art. 10.1. EP adds the Charter: "*Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that **are** ensured under the ECHR, the Charter, under the ICCPR and (...)*". CSL deletes the "International Covenant on Civil and Political Rights (ICCPR)". COM can accept EP changes. *Proposal: stick to EP mandate.*