

**MINUTES OF THE TRILOGUE
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drafted by the LIBE Secretariat

Draft Report on the Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the right to information in criminal proceedings

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Introduction

The sixth trilogue was chaired by the rapporteur Birgit Sippel. It started at 11.10 am and ended at 1.40 pm.

The discussion was based on the documents sent by e.mail by the Council Sec Gen on 7/7/2011 in view of this trilogue.

The meeting proceeded on the basis of *'nothing agreed until everything agreed'* and all points on which a provisional consensus was reached are subject to the agreement of the respective institutions.

The following outstanding issues were discussed:

Article 1:

The latest CNS text leaves open the question of charge/accusation. EP insists on accusation, which had already been provisionally agreed with the HU Presidency, whilst CNS insists on charge. EP thinks that accusation is wider whilst CNS thinks that charge is wider.

EP calls for consistency throughout the whole text.

CNS suggests using charge and adding a Recital defining the notion of charge. Ep shows flexibility on this option.

Article 3 - The right to information about rights

The text proposed by CNS is as follows:

Article 3

The right to information about rights

1. Member States shall ensure that any person who is suspected or accused of having committed a criminal offence is provided **promptly, and in any event before being officially interviewed by law enforcement authorities,** with information concerning at least the following procedural rights as they apply under their national law, **(...) in order to allow for their effective exercise**¹:
 - the right of access to a lawyer;
 - any entitlement to legal advice free of charge and the conditions for obtaining it;
 - **the right to be informed of the accusation, in accordance with Article 6 of this Directive;**
 - the right to interpretation and translation;
 - the right to remain silent.
- 1a. (...)
2. The information shall be provided **either orally or in writing and** in simple and accessible language, **taking into account any particular need of vulnerable suspected or accused persons.**

¹ This proposal has to be read in conjunction with the following amendment to recital 18:

(18) The suspected or accused person should be informed in due time by the competent authorities of those rights, provided for under national law, which are essential to safeguard the fairness of the proceedings, be it orally or in writing, as provided for by this Directive. **In order to allow a practical and effective exercise of the rights of the suspected or accused person, the information should be provided as soon as possible in the course of the proceedings, at the latest before the first official interview of the suspected or the accused person by the police or another competent authority.**

Issues discussed:

EP notices that some substantial steps forward have been made notably with regard to the reference to the moment when the rights become applicable.

On the time: EP welcomes the "promptly" but expresses concern on the **officially** interviewed and asks to get back to its initial proposal: *and in any event upon questioning by law enforcement* authorities maybe specifying that this provision refers to questioning at a police station.

CNS insists on officially interviewed offering a Recital to explain the meaning.

At the end EP agreed to propose to Shadows to replace "questioning" with "officially interviewed" with the addition of an explanatory recital.

Subject to the approval of MSs, CNS accepts to replace "*as they apply under national law*" with "*as they are exercised under national law*" as requested by EP. The issue of the "*including*" has not been discussed.

EP stresses that as long as the Directive refers to suspects and accused persons it goes without saying that it should not be applied to witnesses.

Article 4 - The right to written information in the event of deprivation of liberty

CNS proposes the following text:

<i>Article 4</i> <i>The right to written information about rights on arrest</i>	
1.	Member States shall ensure that a person who is [arrested/deprived of liberty] is provided promptly with a written 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 [unless this could directly lead to a risk of harm to the detained person or another person].
2a.	In addition to the information to be given under Article 3, the Letter of rights referred to in paragraph 1 shall contain information about the following rights as they apply under national law: <ul style="list-style-type: none">- the right to access to the materials of the case (...);- the right to have consular authorities informed (...)- the right of access to urgent medical assistance;- for how many hours/days he may be deprived of liberty before being brought before a judicial authority. <p><u>The Letter of rights shall also contain basic information about any possibility to obtain a review of the detention or to ask for provisional release.</u></p>
2.	The Letter of Rights shall be drafted in simple and accessible language. Annex I to this Directive contains an indicative model of such a Letter.
3.	Member States shall ensure that the suspected or accused person receives the Letter of Rights written in a language he understands. 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. EP Paragraph 4 has been deleted but maybe we can accept this Paragraph 3

Issues discussed:

- Long discussion on arrest/deprivation of liberty. At the end EP, stressing the need for consistency throughout the whole text, suggested 2 options:

1) deprived of liberty replaced by "*arrested or detained*"

2) deprived of liberty replaced by "*arrest*" + an explanatory recital

- on keeping the letter of rights in the possession of the suspected/accused person
CNS flexible but issue remains open.

Subject to the approval of MSs, CNS accepts to replace "*as they **apply** under national law*" with "*as they are **exercised** under national law*" as requested by EP. The issue of "***including***" has not been discussed, but remains of vital importance for the EP.

- List of rights: on the right to have consular authorities informed, EP expresses concern on the lack of a reference to a third party, which is the wording used by the Commission in its recent proposal for a Directive on the right to a lawyer in criminal proceedings and on the right to communicate upon arrest. EP suggests using the wording: "*the right to have consular authorities **and another person of his/her choice** informed*". CNS shows flexibility and says it will propose to MSs the wording ***and another person***.

- EP expresses concern that the CNS Paragraph on the review of the detention does not include information on HOW to challenge the lawfulness of the arrest. CNS says that MSs have problems in accepting "*how to*" and "*lawfulness*". EP suggests deleting lawfulness and keeping only "how to challenge the arrest" but CNS does not accept. Finally EP and CNS agree on working in view of finding a solution along the following line: "*basic information on obtaining the review of the detention, provisional release and challenging the arrest*".

Article 5: The right to written information about rights in European Arrest Warrant proceedings

CNS proposes the following text:

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

Member States shall ensure that any person who is arrested for the purpose of the execution of a European Arrest Warrant receives promptly an appropriate Letter of Rights containing information on national law concerning *at least the rights of that person as laid down in Articles 11, 12, 13 (2), 14 and 19 of the* Framework Decision 2002/584/JHA. Annex II to this Directive contains an indicative model of such Letter. **The Letter of Rights shall be drafted in simple and accessible language.**

- EP strongly against limitation of the scope as proposed by CNS.
CNS in favour of a positive limited list shows very little flexibility and says it would propose MSs to accept to insert Article 23.5
At the end EP says it is satisfied by the fact that before the list it is said "*at least*".

Article 6 - The right to information about the accusation

CNS proposes the following text:

Article 6
The right to information about the accusation

1. (ex 2.) Member States shall ensure that a person who is **subject to a criminal charge** is provided promptly, ***and in any event before being officially interviewed by law enforcement authorities***, with information **about** the **accusation/charge** ***in such detail as is necessary*** to safeguard the fairness of the criminal proceedings and effectively exercise his right of defence.
2. (ex 1.) Member States shall ensure that a person who is [arrested/*deprived of liberty*] is informed of the reasons for his [arrest/*deprivation of liberty*], including the criminal act he is suspected of having committed.
 - 1a. *(deleted)*.
3. ***At the latest upon submission of the merits of the accusation to a court***, the information **on the accusation** shall (...) include as a minimum:
 - (a) a description of the acts the accused is alleged to have committed, including time and place and
 - (b) the nature **and legal classification** of the offence, **as well as the nature of participation by the accused person**.
4. ***After submission of the merits of the accusation to a court***, the accused person shall be informed of any changes to the information referred to in paragraph 3, where this is necessary to safeguard the fairness of the proceedings.

Issues discussed:

CNS says it agrees with EP that the 3 steps should be in the following order: 1) general, 2) arrest, 3) upon submission of the merits to the Court.

Step 1: CNS would like to identify the person as "person subject to criminal charge". EP does not agree as this might be rather late in certain legal systems and as this wording is non technical and not compliant with the rest of the Directive which uses the wording "suspected/accused person". At the end CNS and EP agree to work on a wording based on Article 2 along the following line: "*Member States shall ensure that*

when a person is made aware by the competent authorities that he/she is made aware that he is suspected or accused of having committed a criminal offence, he/she is promptly provided with..."

Step 2: arrest/deprivation of liberty: EP shows a lot of flexibility in accepting arrest instead of person deprived of liberty, subject to the addition of an explanatory recital.

Step 3: despite the agreement found at the previous trilogue according to which only the information on the formal legal classification of the offence should be provided at the latest upon submission of the case to the Court, whilst information on the nature and cause of the accusation should be given promptly, CNS text postpones the information on the description of the acts the accused is alleged to have committed including time and place to the submission of the merits of the case to the court. No solution found.

Changes in the information (Article 6.4): EP concerned that changes in the informing in CNS text are provided only "after submission of the merits of the accusation to the court", which, in the EP's view, is too late. At the end CNS shows some flexibility on giving information earlier but only when it is a *substantial change* and *as long as that does not harm the ongoing investigations*. EP rather open on that.

Article 7 - The right to access the material of the case

Text proposed by CNS:

<p><i>Article 7</i> <i>The right to access to the materials of the case</i></p>
<ol style="list-style-type: none">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.2. Member States shall ensure that access is granted at least to all material evidence in the possession of the competent authorities for or against the suspected or accused person to that person or his lawyer to safeguard the fairness of the proceedings and to prepare the defence.3. Without prejudice to paragraph 1, access to the materials referred to in paragraph 2 shall be granted 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. 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.4. As an exception to paragraphs 2 and 3, provided that this does not prejudice the right to a fair trial, access to certain materials may be refused if it may lead to serious risk <i>to the life or</i> fundamental rights of another person or if it is strictly necessary to safeguard an important public interest, such as in the cases where it risks <i>to prejudice</i> an ongoing investigation, or where it may seriously harm the national security of the Member State in which the proceedings take place. <i>Member States shall ensure that, in accordance with procedures in national law, the decision not to disclose certain materials in accordance with this paragraph is taken by a judicial authority or that the suspected or accused person has the right to challenge before a judicial authority a decision not to give access to certain materials.</i>

5. The information or access referred to in this Article shall be provided free of charge.

Issues discussed:

Discussion mainly focused on the definition: *information (CNS text)/all material of the case(EP text)*: at the end CNS accepted to propose to MSs "material of the case" deleting the "**all**" *material of the case*.

Limitations to access to documents:

- CNS prefers "*to prejudice **an** ongoing investigation*" to "*to prejudice **other** ongoing investigations*". EP says it will consider accepting.

- on the redress: CNS refuses any change to its wording as in certain legal systems (UK, IE, FI, MT were mentioned). EP says it will consider using a general reference to "*judicial oversight*" which should replace the alternative between a previous reasoned decision by a judicial authority or the right to challenge the refusal.

Article 8: verification and remedies

Text proposed by CNS:

Article 8

Verification and remedies

1. Member States shall ensure that when information is provided to the suspected or accused person in accordance with Article 4(1), 5 and 6(1a) of this Directive, this will be noted, using the recording procedure in accordance with the law of the Member State concerned.
2. 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 asks the whole Directive to be in the scope of this provision. CNS says it will propose to MSs this solution.

Article 9: training

EP accepts CNS wording

Article 11: correlation tables

EP restated that the provision on correlation table is a red line. CNS still opposed.

Next steps:

Next trilogue will take place on 22/9/2011 from 9 to 12 am.

In the meanwhile services will meet at technical level to work on the drafting.