

**STATE OF PLAY AFTER THE TRILOGUE
HELD ON 30/5/2011 IN BRUSSELS**

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

List of Participants at the 2nd trilogue:

Council:

HU Presidency: Peter Csonka
Borbala Garai
Elez Sopia

PL Perm rep Michal Fila
Adrian Chrobot

General Secretariat: Luca De Matteis
Steven Cras

European Commission:

General Secretariat: Mrs Turner

DG JUST: Lotte Knudsen
Mauro Miranda
Caroline Morgan
A.M. Herbowska
Caroline Morgan

European Parliament:

Members: Birgit Sippel Rapporteur (S&D)

Assistants to Members:

Sarah Sy (assistant to MEP Sippel)
Fabian Inson (assistant to MEP Sippel)
Danae Anastopoulos (assistant to MEP Triantaphyllides)
Emily Tullberg (assistant to MEP Ludford)

Political advisors:

SD: Fabrizia Panzetti
EPP: Maria Neag
ALDE: Ottavio Marzocchi
Greens: Wouter van Ballegoij
GUE: Olivier Winant

Administrative staff:

LIBE Secretariat: Claudia Gualtieri

Direction actes législatives: Tuomas Helinko

Introduction

The 4th trilogue was chaired by the rapporteur Birgit Sippel. It started at 3.05 pm and ended at 5.25 pm.

The discussion was based on a consolidated table provided by the CNS in view of the trilogue and on drafting proposals forwarded by the Council Sec Gen the very same day at lunch time.

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.

Articles 1 to 11 of the proposed Directive were discussed.

Article 1 - Objective

A common approach on Article 1 was reached on following wording to be coupled by the recital here below:

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.

Recital:

This Directive should apply to suspected and accused persons regardless of their legal status, citizenship or nationality.

Article 2 - Scope

A provisional agreement was reached on the following wording to be completed by a recital on the definition of children:

1. This Directive applies from the time a person is made aware by the competent authorities of a Member State that he is suspected or accused of having committed a criminal offence until the conclusion of the proceeding, 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. 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.

Recital:

In accordance with the United Nations Convention on the Rights of the Child, a child should mean every person below the age of 18 years under this Directive. In all action relating to children, the child's best interests must be a primary consideration.

Article 3 - The right to information about rights

CNS suggested the following wording:

1. Member States shall ensure that any person who is suspected or accused of having committed a criminal offence is provided *promptly* with information concerning at least the following procedural rights as they apply under their national law, (...) **when those rights become applicable and in order to allow for their effective exercise:**

- 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, as defined by Article 6 of this Directive;**
- the right to interpretation and translation;
- the right to remain silent.

2. The information shall be provided **either orally or in writing and** in simple and accessible language.

EP:

- expresses concern that the reference to "in any event before any questioning by law enforcement authorities begins" is missing;
 - expresses concern that there is no reference to Article 7 attached to the right to be informed of the accusation
 - would like to have including inserted before the reference to national law: procedural rights ***including*** as they apply under their national law;
 - could accept that the reference to the Directive on the right to interpretation/translation is moved into a recital;
 - could accept that the reference to the "conveying the information" is moved to a recital provided that a reference to vulnerable people is in the provision;
- COM supports EP in having including inserted before the reference to national law: "*procedural rights including as they apply under their national law*".

CNS says that there is no more flexibility in Member States.

Possible drafting suggestion:

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 any questioning by law enforcement authorities begins*, with information *concerning at least the following* (procedural) *rights including information on how these rights* apply under their national law. The information on these rights shall be provided in due time to allow their effective exercise.

2. The information on these rights shall be provided **either** orally or in writing and in simple and accessible language *and taking into account particular circumstances of vulnerable people*.

3. The information referred to in paragraph 1 shall include as a minimum:

- the right of access to a lawyer;
- any entitlement to legal aid free of charge and conditions for obtaining it,
- the right to be informed of the accusation, in accordance with Articles 6 *and* 7
- the right to interpretation and translation,
- the right to remain silent.

4. Member States shall ensure that, where the suspected or accused person does not speak or understand the language of the proceedings, he/she receives the information in a language which he /she understands.

Recital:

Member States should ensure that a mechanism is in place to convey the information to a suspected or accused person who is partially sighted or blind or cannot read. In the case of a child, a disabled or illiterate person, information about the accusation should be provided in a manner appropriate to his/her age, level of maturity and intellectual and emotional capabilities.

Recital:

In the implementation of this Directive Member States should ensure that interpretation and translation provided to suspected and accused person meet high quality standards.

Recital (which should replace all references to national law with the exception of the one in Article 3):

In the implementation and practical application of this directive, insofar it does not infringe the Directive itself or the ECHR and the case law of the European Court of human Rights, national law should be taken in due account.

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

CNS proposes the following text:

The right to written information about rights upon [arrest / deprivation of liberty]

1. **Member States shall ensure that** a person **who** is arrested is provided promptly with a **written** Letter of Rights **containing information concerning at least the procedural rights referred to in Article 3(1) as they apply under national law, as well as information on national law on the maximum length of deprivation of liberty before being brought before a judicial authority after arrest.** He shall be given an opportunity to read the Letter of Rights and be allowed, **save for exceptional circumstances**, to keep it in his possession throughout the time he is deprived of his liberty.

2a. In addition to the information to be given under Article 3, the [arrested] person [deprived of liberty] shall be informed about the following rights **and procedures as they apply under national law:**

- the right to access to the materials of the case in accordance with Article 7 (1) of this Directive;

- the right to have consular authorities informed **of the [arrest / deprivation of liberty];**

- the right to receive urgent medical care;

[- any possibility to obtain a review of the detention;]

- for how many hours/days he may be deprived of liberty before being brought before a judicial authority.

3. Member States shall ensure that the suspected or accused person (...) receives the Letter of Rights **written** in a language he understands. (...)

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.

Issues discussed:

- arrest/deprivation of liberty:

CNS for the time being sticks to arrest as in its view deprivation of liberty could cover also victims and witnesses and the execution phase.

COM supports "*persons suspected or accused deprived of liberty*".

EP could accept COM's suggestion.

- reference to **Article 3.1** and not to the whole Directive: CNS flexible in view of deletion. EP could accept it insofar a reference to Article 7 is inserted in Article 3.

- upon questioning at the police station:

CNS does not want this wording.

EP insists

- reference to interpretation/translation Directive

EP shows flexibility and could accept to move it into a recital

Possible drafting suggestion:

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

1. *Where a suspect or accused person is deprived of liberty, he/she shall be provided promptly with a written Letter of Rights containing information concerning at least the (procedural) rights referred to in Article 3(1) (the reference to Article 3.1 might be acceptable to PE as long as Article 3 is linked to Article 7) as they apply under national law, as well as information on national law on the maximum length of deprivation of liberty before being brought before a judicial authority after arrest.* He shall be given an opportunity to read the Letter of Rights and be allowed, *save for exceptional circumstances*, to keep it in his possession throughout the time he is deprived of his liberty.

2. In addition to the information to be given under Article 3, persons deprived of liberty shall be informed at least about the following rights *and procedures as they apply under national law*:

- a) the right to have consular authorities and a third party informed;
- b) the right to receive urgent medical care;
- c) for how many hours/days they may be deprived of liberty before being brought before a judicial authority;
- d) *any possibility to obtain a review of the detention, including provisional release and the time limit to do so according to national law*;

4. Annex I to this Directive contains an indicative model of such written information.

5. In exceptional cases, where information in written form is not available in the appropriate language, the suspected or accused person shall be informed of his rights orally in a language which he/she understands. Written information in a language which he/she understands shall then be given to him/her without undue delay.

6. This article shall apply to all cases where persons are deprived of liberty by public authorities, including upon questioning at a police station.

Recital:

Member States should ensure that suspected and accused persons are provided with accessible information on the maximum period of pre-trial detention applicable to their case.

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

- *who is arrested for the purpose of*: COM supports CNS. EP flexible

- EP strongly against limitation of the scope (*Articles 11, 13.2 and 14 of the EAW FD*), as requested by CNS.

CNS in favour of a positive list

COM supports EP and stresses that no matter the wording but the rights should be in.

CNS will go back to MSs

Possible drafting suggestion:

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

1. 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 setting out the rights of that person as laid down in the Framework Decision 2002/584/JHA, including information on these rights as they apply under national law. Annex II to this Directive contains an indicative model of such Letter. *The Letter of Rights shall be drafted in simple and accessible language.*

Article 6 - The right to information about the accusation

CNS proposal:

Article 6

The right to information about the accusation

1. Member States shall ensure that a person who is arrested is informed of the reasons for his arrest, including the criminal act he is suspected of having committed.
 - 1a. [deleted]
2. Member States shall ensure that a person who is subject to a criminal charge is provided promptly with sufficient information about the [accusation / charge] to safeguard the fairness of the proceedings and effectively exercise his right of defence.
3. At the latest upon submission of the merits of the accusation to a court, the information on the accusation shall be provided in detail and shall include as a minimum:
 - (a) a description of the acts the accused is alleged to have committed, including the 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:

criminal act/offence:

CNS had shown flexibility on that at the previous trialogue but the new text it proposed for this trialogue still contains a reference to "criminal act".
COM, as usual, stresses the importance of consistency throughout the whole text.

arrest/deprivation of liberty:

EP wants deprivation of liberty,

CNS wants arrest

COM prefers deprivation of liberty and warns against lack of consistency

accusation/charge:

EP wants accusation, which would be more consistent with the text,
CNS wants charge and proposes to change into charge also the title that the CNS itself has proposed (!)
COM warns against lack of consistency

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 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. According to COM the text proposed by CNS is not Strasbourg proof.

No agreement found. CNS will go back to MSs

Possible drafting suggestion:

Article 6 (Right to information on the accusation)

1. Member States shall ensure that in order to safeguard the fairness of the criminal proceedings and effectively exercise their defense rights **suspected or accused persons** are provided promptly and in any event before any questioning by the law enforcement authorities, with sufficient information about the nature and cause of the accusation.

2. As soon as persons are **deprived of liberty**, they shall be provided with sufficient information about the reasons for their detention, including information about the accusation.

3. The duty to provide the information according to this provision shall continue throughout the proceedings and include at least:

(a) a description of the circumstances in which the offence is alleged to have been committed, including the time and place, and

(b) the nature and legal classification of the offence as well as the nature of the participation in the offence by the suspected or accused person.

4. The suspected and accused person shall be informed of any changes in the information provided according to this provision.

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

Issues discussed:

- **Information(CNS text)/evidentiary material(EP text)/documents(COM suggestion):** CNS says that information and material are largely equivalent, but there is some material which cannot be given. COM stresses that information is too wide and prefers documents as it is also in line with ECHR jurisprudence. EP of the opinion that information (CSL wording) is not sufficient as the public prosecution service may withhold material.

EP insists on **material of the case**. Whatever is essential to challenge the lawfulness of the arrest shall be disclosed.

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

- **Access to further material should be granted to:**

CNS Article 7.3

EP says it is a red line for it

COM supports

-**Exceptions (Article 7.4):**

- EP of the opinion that CNS wording is too wide, notably when referring to **public interest**. CNS stresses that the word "strictly" ensures that the exceptions are not widely used (!) and says that this wording is needed in order to protect witnesses in danger and undercover agents. EP sticks to its position. 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**: COM supports EP. CNS seems flexible.

- reference **to ECHR**: CNS insists it is covered by its recital 21b. EP flexible on moving it into a recital.

- **Index**: this issue was not discussed. At the previous trilogue, CNS was 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.

Drafting suggestion:

Article 7

1. Where a suspected or accused person is arrested or otherwise detained at any stage of the criminal proceedings, Member States shall ensure that all the material of the case which is relevant for the determination of the lawfulness of the arrest or detention is made available to the arrested or detained person or his/her lawyer.

2. Member States shall ensure that suspected or accused persons or their lawyer are granted access to all the material of the case, for and against the suspected or accused person, in the possession of the competent authorities at the latest once the investigation of the criminal offence is concluded.

3. Access to the material of the case shall be provided free of charge in good time to allow the suspected or accused person to prepare his defence or challenge pre-trial decisions. Any further material shall be made available to the suspected or accused persons. The suspected or accused persons or their lawyer may request that the competent authorities provide a list of the material of the case.

4. Access to certain documents may exceptionally be refused on the basis of a reasoned decision by a competent judicial authority where access to those documents may lead to serious risk to the life or fundamental rights of another person, may prejudice other ongoing investigations or may seriously harm the internal security of the Member State in which the proceedings take place.

5. Member States shall ensure that the limitations on the right of access to the material of the case laid down in this Article do not in any way prejudice the accused persons' effective exercise of the right of defence.

Recital:

Limitations to the right to access to the material of the case should be interpreted strictly and in accordance with the principle of the right to a fair trial as provided for by the ECHR and interpreted by case-law of the European Court of Human Rights.

Article 8- Verification and remedies

Article 8.1: Procedure to ascertain reception of information: EP against limitations of the scope in CNS text (only Articles 4.1, 5 and 6.1a are covered). COM supports EP. CNS says it will go back to MSs on that.

No progress made with regard to the previous trilogue.

Article 9 - Training

EP asks Member States to **take concrete measures to** ensure that relevant officials (...) receive appropriate training. CSL: "Member States shall **request those responsible for the training (...) to provide** appropriate training (...)"

EP insists in having its text, which is stronger. It was noted that the CNS text is the same as in the Interpretation/translation Directive. Going beyond a request would be unacceptable for MSs. This is a red line for CNS.

Article 10 - Non-regression clause

Provisional agreement on the same wording as in the Interpretation/translation Directive:

Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights of the European Union, other relevant provisions of international law or the law of any Member State which provides a higher level of protection.

Article 11 - Implementation

EP accepts the wording "brings into force as proposed by CNS".

Correlation tables: EP insists in having reference to correlation tables in Article 11. CNS extremely reluctant despite the interinstitutional agreement.

Next steps:

The next trilogue is scheduled for **16/6/2011 from 3 to 6 pm - meeting room TBC**

On 6/6/2011 the following meetings will take place in **meeting room S 4.1**:

- meeting with Mr Johan Callewaert (ECHR) will take place from 6 to 7 pm
- shadows' meeting from 7 to 8 pm