

**STATE OF PLAY AFTER THE 2ND TRILOGUE
HELD ON 11/5/2011 IN STRASBOURG**

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 3rd trilogue was chaired by the rapporteur Birgit Sippel. It started at 3.25 pm and ended at 6.00 pm.

The discussion was based on a consolidated table provided by the CNS in view of the 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.

Articles 1 to 6 of the proposed Directive were discussed.

Article 1

Article 1.1:

- ***charge/accusation***: CNS accepts to replace the wording ***charge*** with ***accusation***, as proposed by the EP

- addition of "***and proceedings for the execution of a European Arrest Warrant***" in Article 1.1:

EP accepts inserting such wording in Article 1.1., as asked by CNS. In this case Article 2.2 should be deleted.

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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Article 1.2:

CNS against Article 1.2 as proposed by EP. It suggests a Recital with a reference only to nationality, which in its view would cover also status.

EP could be flexible on moving the wording to a Recital but the wording should not change and contain the reference to: *legal status, citizenship and nationality*.

A possible compromise might be moving Article 2.1 of EP text in the following Recital:

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

Article 2

Article 2.1:

- **Gender issue:** general agreement that it is something to be dealt with by jurist linguists.

- **as established by national law:** this wording has been inserted by CNS throughout the whole text.

EP is against.

CNS cannot agree on its deletion while acknowledging that in measure A there is no reference to national law.

COM supports EP on the deletion and stresses that a delegation from the European Commission had met the European Court of Human Rights which expressed deep concern on the multiple references to national law which might entail the application of Article 6 of the ECHR.

A provisional agreement was reached on the following wording:

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.

The idea of grouping all references to national law in a single provision and notably in a Recital was put forward.

Article 2.2a:

- definition of *child*:

CNS against the insertion of definitions and references not strictly linked to the scope of the Directive even in a Recital.

EP stresses that the addition is harmless and that the same provision was inserted in the THB Directive and in the sexual exploitation draft Directive.

COM: not favourable.

No agreement was found.

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 which might be as follows:

"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."

Recital:

For the purposes of this directive, the term 'child' shall mean any person under the age of 18.

Article 2.3/2.2b:

- ***minor offences***: EP and CNS added the same provision.

Article 3

Article 3.1:

- ***promptly***: according to CNS it is redundant. EP insists. COM supports EP.

- ***at the point when those rights become applicable*** (EP Article 3.1/CNS Article 3.1a): was inserted both by CNS and EP.

COM strongly critical on this addition as according to its view this opens the way to an interpretation which would allow Member States to report indefinitely the moment in which information is given. On the contrary all these rights are immediately applicable.

- ***orally or in writing***: CNS shows flexibility on this wording but would like to move it to Paragraph 2:

*"The information on these rights shall be provided **either** orally or in writing and in simple and accessible language".*

EP might accept even if the insertion of "either" changes a bit the meaning.

- ***as they apply under their national law***:

CNS wants this reference and says it is a red line.

EP is against.

COM states that it is not favourable of references to national law because if national law is not compliant to the ECHR standards then the implementation of the Directive would as well not be compliant.

COM suggests coupling promptly with "*including as they apply under national law*".

COM announces it would put forward drafting proposals.

No agreement found.

Article 3.2:

- ***right to access to a lawyer/entitlement to legal advice***: EP flexible on wording used by CNS

- ***right to be informed of the accusation***:

CNS says it is redundant.

EP insists on having it in Article 3 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:

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

EP could accept COM's proposal

- the ***right to remain silent***:

CNS says it would be better to insert the reference to national law at the beginning of the Paragraph, as it proposes.

COM states that in principle it is not favourable of references to national law but in this case it might be acceptable.

EP is flexible on moving the reference to "any implication" or "legal consequences" under national law or other similar wording in the chapeau.

CNS sticks to: "how they apply under their national law".

No agreement found.

Article 3.1a EP + 3.1b EP:

Information given to persons who ***cannot understand*** the language, children, illiterate/disabled persons/blind people:

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.

COM stresses that a measure on vulnerable people will be put forward next year.

EP says it has nothing against a simplified text but wants it into the text.

No agreement found.

<i>Possible drafting suggestion:</i>

Article 3

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 on his rights, including information on how these rights apply under national law (*or in practice*). The information on these rights shall be provided in simple and accessible language and 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.

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

Title:

arrest/deprivation of liberty:

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

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

EP could accept COM's suggestion.

No agreement found.

Article 4.1:

- reference to **Article 3.1** and not to the whole Directive: CNS flexible in view of deletion.

- keep the Letter of rights in his/her possession during detention "***save for exceptional circumstances***":

CNS insists to keep it.

EP strongly against.

CNS cannot provide real justification.

COM supports EP but could accept CNS new wording:

"unless this could directly lead to a risk of harm to the detained person or other person"

- ***upon questioning at the police station:***

CNS does not want this wording.

EP insists.

Article 4.2:

- ***List of rights:***

CNS strongly against the right to c) medical care, d) bail, f) challenge the arrest and g) maximum period of pre-trial detention. Flexible 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.

COM says the more rights are mentioned, the better it is and stresses that according to its view it makes no sense to list a part of rights in Article 3 and a part in Article 4. COM calls for moving the list of rights in Article 3, especially for what concerning the right to access to the material of the case.

COM suggests replacing b) (right to contact relatives, employers and consular authorities) with the following, which would mirror the title of the upcoming Commission proposal on the subject: "*right to contact consular authorities and third parties*".

COM suggests moving d) (right to bail) into "f) *which would become: 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*".

EP could accept COM's suggestion.

CNS reluctant.

Article 4.5: reference to interpretation/translation Directive

CSN against references to measures contained in other legal instruments stressing that it cannot be based on Article 82 TFEU because it refers to the *quality* of the translation and interpretation.

COM supports CNS.

EP shows flexibility but does not give up.

No agreement found.

Possible drafting suggestion:

Article 4

1. Where a suspect or accused person is deprived of liberty, he/she shall be provided with information about his rights promptly in writing (in a Letter of Rights) and shall be allowed to keep the Letter in his/her possession throughout the time during which he/she is deprived of his/her liberty. This provision shall apply to all cases where persons are deprived of liberty by public authorities, including upon questioning at a police station.

2. In addition to the information to be given under Article 3, persons deprived of liberty shall be informed at least about the following :

- a) the right to have consular authorities and third parties informed;
- b) for how many hours/days they may be deprived of liberty before being brought before a judicial authority;
- c) 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;

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

5. In exceptional cases, including 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.

~~(and translation under Directive 2010/64/EU and shall ensure that all translations and interpretation provided meet the quality requirements defined in the same Directive.~~

Recital:

Member States should ensure that suspected and accused persons are provided of medical care throughout the whole criminal proceeding including the execution phase.

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:

- *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 proposes to add to the list also Article 19 of the FD on the EAW.

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

No agreement found.

Possible drafting suggestion:

Article 5

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

General issues:

criminal act/offence: CNS text refers to criminal acts whilst EP text refers to offence. CNS had shown flexibility on that at the previous trialogue but the new table drafted for this trialogue still contains a reference to "criminal act".

COM, as usual, stresses the importance of consistency throughout the whole text.

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.

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

Possible drafting suggestion:

Article 6

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.

Concluding remarks:

The next trilogue is scheduled for **30/5/2011 from 3 to 6 pm in meeting room A3H-1** (Brussels).

An additional trilogue will take place on 1/6/2011. Meeting room to be confirmed.