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THE EUROPEAN UNION**

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Subject: Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings

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**I. INTRODUCTION**

On 20 July 2010 the Commission presented to the European Parliament and to the Council a proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings.<sup>1</sup> This proposal has been discussed on several occasions within the Working Party on Substantive criminal law. During its meeting on 15 November, the Working Party concluded a fourth examination of the Directive. Following this discussion, the Presidency has revised the text which is set out in Annex to this note. Some footnotes in the text have been adapted further to discussions of the JHA Counsellors on 19 November 2010.

CATS is invited to examine the Articles of this Directive in view of their submission to COREPER/Council for a general approach in order to starting the negotiations with the European Parliament.

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<sup>1</sup> See doc. 12564/10 DROIPEN 83 COPEN 162 CODEC 727.

In that regard, the Presidency would like to highlight in particular two outstanding issues for CATS appraisal.

Please note that the present document is a revised version of doc 16371/10, already submitted to CATS; the revised version only contains changes in the Annex with respect to the content of certain footnote, following the meeting of the JHA Counsellors on 19 November 2010.

## **II. OUTSTANDING ISSUES**

### 1. Indicative model of a Letter of Rights (Art. 4 and 5)

In accordance with Article 4 of this Directive, the suspected or accused person who "is arrested" shall receive a written information ("Letter of Rights") about his procedural rights in relation to his deprivation of liberty. Similarly, Article 5 also provides for the right to written information with regard to arrested person for the purpose of the execution of a European Arrest Warrant. Such Letter of Rights shall be drafted in a simple and accessible language so as to be easily understood by a lay person without any knowledge of criminal procedural law. In order to facilitate the elaboration by the Member States of such a Letter of Rights, a model is provided for in Annex I of the Directive.

Delegations are however divided on the need for such an indicative model. While some delegations consider this model as a positive example for the national authorities, others raised some concerns on the misleading value that could be given to this model. In that regard, the CLS stated that although the annex constitutes an integral part of the text, the wording 'indicative' and the corresponding recitals are clear on its non-binding nature.

Following this opinion, it can be assumed that, given its non-binding nature, this model will constitute a positive example for the national authorities that do not already have such a Letter of rights in order to elaborate their own model without causing any problem in respect to the national systems of the Member States. Besides, this model should be considered as an important aspect of this Directive from a symbolic point of view.

**Consequently, CATS is invited to retain this model as an annex of the Directive while insisting on its non-binding nature through the following modifications:**

- The deletion of the footnote 1 set out in the Annex;
- The indication in the heading of the Annex that *“the sole purpose of this model is to present an illustration of a Letter of Rights with a view to helping the national authorities when preparing such a Letter at national level”*; and
- After the first sentence of the model and before the list of rights the addition of the words, *“as they apply under national law:”*

2. Extent of the exceptions referred to in Art. 7(4)

It is stemming from the case law of ECtHR that the prosecution authorities should disclose to the defence all material evidence for or against the accused and that both parties in proceedings must be given opportunity to have knowledge of and comment on the observations and evidence of the other party. The right to full disclosure, however, is not absolute and can be restricted if it pursues a legitimate aim.

Therefore, the current text of the proposal provides for exceptions to the access to the materials of the case which 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. These exceptions are related to:

- the risk of jeopardizing an ongoing investigation;
- the serious risk for the fundamental rights of another person; and
- the risk to seriously harm the national security of the Member States in which the proceedings take place.

While some delegations expressed a preference for a comprehensive list of exceptions, other delegations asked for the insertion of a more general exception related to the protection of an “important public interest”.

This reference to “important public interest”, while often contained to in the case-law of the ECtHR, but in relation of concrete situations, may however be seen as excessively broad if applied as a principle and could therefore undermine the interest of the suspected or accused person to be confronted with a list of predictable exceptions to his rights.

Consequently, it is suggested to focus on an approach consisting of listing objective reasons to deny the access to the materials of the case. However, in order to accommodate the concerns raised by some delegations, the list provided for in this Article could be extended with additional objectives and concrete exceptions.

**CATS is invited to agree on this approach, reflected in article 7(4), and, if necessary, to indicate additional exceptions that could be added.**

### 3. Other outstanding issues

In addition to these specific issues, remaining reservations are set out in footnotes of the proposal in the above Annex.

**CATS is invited to examine the remaining reservations as set out in the footnotes of the above Annex with a view to lifting them.**

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2010/0215 (COD)

Proposal for a

**DIRECTIVE .../.../EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**  
**on the right to information in criminal proceedings**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 82(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee<sup>1</sup>,

Having regard to the opinion of the Committee of the Regions<sup>2</sup>,

Acting in accordance with the ordinary legislative procedure,

Whereas <sup>3</sup>:

- (1) Article 47 of the Charter of Fundamental Rights of the European Union (the Charter), Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Article 14 of the International Covenant on Civil and Political Rights (ICCPR) enshrine the right to a fair trial. Article 48 of the Charter guarantees respect for the rights of the defence.

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<sup>1</sup> OJ C , , p. .

<sup>2</sup> OJ C , , p. .

<sup>3</sup> The Recitals have not been discussed.

- (2) Article 6 of the Charter and Article 5 of the ECHR enshrine the rights to liberty and security, the limitations to which may not exceed those permitted by the ECHR in the wording of its Article 5 and inferred from the case-law of the European Court of Human Rights.
- (3) The European Union has set itself the objective of maintaining and developing an area of freedom, security and justice. According to the conclusions of the European Council in Tampere of 15 and 16 October 1999, and in particular point 33 thereof, the principle of mutual recognition should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union, since enhanced mutual recognition of judicial decisions and judgments and the necessary approximation of legislation would facilitate cooperation between authorities and the judicial protection of individual rights.
- (4) On 29 November 2000 the Council, in accordance with the Tampere Conclusions, adopted a programme of measures to implement the principle of mutual recognition of decisions in criminal matters<sup>4</sup>. The introduction to the programme of measures states that mutual recognition is "designed to strengthen cooperation between Member States" and "to enhance the protection of individual rights".
- (5) Implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States have trust in each other's criminal justice systems. The extent of the mutual recognition exercise is very much dependent on a number of parameters, which include mechanisms for safeguarding the rights of suspects and common minimum standards necessary to facilitate the application of the principle of mutual recognition.
- (6) Mutual recognition can only operate effectively in a spirit of confidence, whereby not only judicial authorities, but all actors in the criminal process see decisions of the judicial authorities of other Member States as equivalent to their own, implying not only trust in the adequacy of one's partners' rules, but also trust that those rules are correctly applied.

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<sup>4</sup> OJ C 12, 15.1.2001, p. 10.

- (7) Although Member States are parties to the ECHR and the ICCPR, experience has shown that this in itself does not always provide a sufficient degree of trust in the criminal justice systems of other Member States.
- (8) Strengthening mutual trust requires detailed rules on the protection of the procedural rights and guarantees stemming from the Charter, the ECHR and the ICCPR. In the implementation of this Directive, Member States should not in any event fall below the standards set out in the Convention and the Charter as developed by the case-law of the Court of Justice of the European Union and the European Court of Human Rights.
- (9) Article 82(2) of the Treaty provides for the establishment of minimum rules applicable in the Member States so as to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension. Point (b) of Article 82(2) refers to "the rights of individuals in criminal procedure" as one of the areas in which minimum rules may be established.
- (10) Common minimum rules should lead to increased confidence in the criminal justice systems of all Member States, which in turn should lead to more efficient judicial cooperation in a climate of mutual trust and to the promotion of a fundamental rights culture in the European Union. They should also remove obstacles to free movement of citizens. Such common minimum rules should apply to information in criminal proceedings.
- (11) On 30 November 2009, the Council adopted the Roadmap for strengthening procedural rights of suspected and accused persons in criminal proceedings ("the Roadmap")<sup>5</sup>. Taking a step-by-step approach, the Roadmap calls for the adoption of measures regarding the right to translation and interpretation, the right to information on rights and information about the charges, the right to legal advice and legal aid, the right to communication with relatives, employers and consular authorities, and regarding special safeguards for suspected or accused persons who are vulnerable. The Roadmap emphasises that the order of the rights is indicative only and thus implies that it may be changed according to priorities. It is designed to operate as a whole; only when all its component parts have been implemented will its benefits be felt in full.

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<sup>5</sup> OJ C 295, 4.12.2009, p. 1.

- (12) In the Stockholm Programme, adopted on 11 December 2009<sup>6</sup>, the European Council welcomed the Roadmap and made it part of the Stockholm Programme (point 2.4.). The European Council underlined the non-exhaustive character of the Roadmap, by inviting the Commission to examine further aspects of minimum procedural rights for suspected and accused persons, and to assess whether other issues, for instance the presumption of innocence, need to be addressed, in order to promote better cooperation in this area.
- (13) The first measure on the Roadmap is a Directive of the European Parliament and of the Council on the rights to interpretation and to translation in criminal proceedings<sup>7</sup>.
- (14) This Directive relates to measure B of the Roadmap. It lays down common minimum standards to be applied in the field of information about rights and about the charge to be given to persons suspected or accused of having committed a criminal offence, with a view to enhancing mutual trust among Member States. The Directive promotes the application of the Charter, and in particular its Articles 6, 47 and 48 by building upon Articles 5 and 6 ECHR as interpreted by the European Court of Human Rights. In its Communication "Delivering an area of freedom, security and justice for Europe's citizens", the Action Plan Implementing the Stockholm Programme<sup>8</sup>, the Commission announced the presentation of a proposal on the right to information in 2010.
- (15) This Directive does not apply in proceedings conducted by administrative authorities in relation to the breach of competition legislation, whether national or European, unless the case is brought before a court having jurisdiction in criminal matters.
- (16) The right to information about rights (which is inferred from the case-law of the European Court of Human Rights) should be explicitly established by the Directive. This Directive thus offers protection beyond that currently provided by the ECHR. Information about the charge is a right enshrined in Articles 5 and 6 of the ECHR as interpreted by the European

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<sup>6</sup> OJ C 115, 4.5.2010.

<sup>7</sup> Directive 2010/64/EU of the European Parliament and of the Council on the rights to interpretation and translation in criminal proceedings (20 October 2010).

<sup>8</sup> COM(2010) 171, 20.4.2010.



Court of Human Rights and Articles 9 and 14 of the ICCPR. The provisions of this Directive should facilitate the application of those rights in practice, with a view to safeguarding the right to fair proceedings.

- (17) The suspected or accused person should be able to know and understand what his rights are and be in a position to avail himself of those rights before any police questioning. He should be informed promptly and in a language he understands of the nature and cause of any accusation he faces and given information about immediately relevant rights.
- (18) Information about rights should be given to all suspected and accused persons promptly at the outset of criminal proceedings, be it orally or in writing. Information about rights to be given under this Directive should as a minimum requirement under this Directive include information on the right of access to a lawyer, the right to be informed of the charge and, where appropriate, to be given access to the case-file, the right to interpretation and translation for those who do not understand the language of the proceedings and the right to be brought promptly before a court if the suspected or accused person is arrested. This is without prejudice to information to be given on other procedural rights stemming from the Charter, the ECHR, the ICCPR and applicable EU legislation as interpreted by the relevant courts and tribunals.
- (19) Where a suspected or accused person is arrested, information about these immediately relevant procedural rights should be given by means of a written Letter of Rights drafted in an easily comprehensible manner so as to ensure that he has an actual understanding of his rights. To help Member States design such a Letter of Rights and to promote greater consistency between Member States, a model of the Letter of Rights, which Member States may use, is provided in Annex I to the Directive. This model is indicative and may be subject to review in the context of the report on implementation to be presented by the European Commission pursuant to Article 12 of the Directive and also once all the Roadmap measures have come into force. The actual letter based on this model should also include other relevant procedural rights that apply in Member States.

- (20) A person accused of having committed a criminal offence should be given all the information on the charge necessary to enable him to prepare his defence and to safeguard the fairness of the proceedings.
- (21) The most effective way of ensuring that a suspected or accused person has sufficient information about the charge is to allow him or his lawyer access to the case-file. This access may be restricted where it poses a serious risk to the life of another person or the internal security of the Member State.
- (22) Member States should have a mechanism to verify that the suspected or accused persons have received all the information about rights and about the charge to which they are entitled.
- (23) Adequate training on procedural rights of suspected and accused persons should be provided to the relevant officials in Member States.
- (24) In accordance with the United Nations Convention on the Rights of the Child, a child means every person below the age of 18 years. In all action relating to children, the child's best interests must be a primary consideration.
- (25) The rights provided for in this Directive should also apply, *mutatis mutandis*, to proceedings for the execution of a European Arrest Warrant according to the Council Framework 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States<sup>9</sup>. To help Member States design such a Letter of Rights and to promote greater coherence between Member States a model form of the Letter of Rights, which Member States may use, is provided in Annex 1 to the Directive. This model form is indicative and may be subject to review in the context of the report on implementation to be presented by the European Commission pursuant to Article 12 of the Directive and also once all the Roadmap measures have come into force.

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<sup>9</sup> OJ L 190 of 18.7.2002, p.1.

- (26) The provisions of this Directive set minimum rules. Member States may extend the rights set out in this Directive in order to provide a higher level of protection in situations not explicitly dealt with in this Directive. The level of protection should never go below the standards provided by the ECHR, as interpreted in the case-law of the European Court of Human Rights.
- (27) This Directive respects fundamental rights and observes the principles recognised by the Charter. In particular, this Directive seeks to promote the right to liberty, the right to a fair trial, the rights of the defence and the rights of the child. It has to be implemented accordingly.
- (28) Member States should ensure that the provisions of this Directive, where they correspond to rights guaranteed by the ECHR are implemented consistently with those of the ECHR and as developed by the relevant case-law of the European Court of Human Rights.
- (29) Since the aim of achieving common minimum standards cannot be achieved by Member States acting unilaterally, either at national, regional or local level, and can only be achieved at Union level, the European Parliament and the Council may adopt measures in accordance with the principle of subsidiarity as referred to in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in the latter Article, this Directive does not go beyond what is necessary in order to achieve that objective.
- (30) In accordance with Articles 1, 2, 3 and 4 of Protocol on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, the United Kingdom and Ireland have notified their wish to participate in the adoption and application of this Directive.
- (31) In accordance with Articles 1 and 2 of Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Directive, and is therefore not bound by it or subject to its application,

HAVE ADOPTED THIS DIRECTIVE:

*Article 1*

**Objective**

The Directive lays down rules concerning the right to information about procedural rights in criminal proceedings and proceedings for the execution of a European arrest warrant and about the charge in criminal proceedings.

*Article 2*

**Scope**

1. This Directive applies from the time a person<sup>10</sup> is made aware by the competent authorities of a Member State, by official notification or otherwise<sup>11</sup>, that he is suspected or accused of having committed a criminal offence until the conclusion of the proceedings, 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. (...)

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<sup>10</sup> During the Working Party on 15 November, the CLS raised the question whether legal persons are included in the scope of the Directive. Following this request, the Commission referred to relevant case law of the ECJ concerning the possibility to limit the scope of legal instruments to natural persons and indicated that the main purpose of its proposal was to protect fundamental rights of individuals suspected or accused in the course of criminal proceedings. However, taking into account the fact that it is stemming from the case law of ECtHR that Article 6 of the ECHR applies to legal persons, the Presidency proposed to precise this in a recital which could read as following:

*"Where applicable, subject to the nature of the measures provided for by this Directive, its provisions should apply not only to natural persons but also to legal persons, in so far as these may, according to the national law of each Member State, be subject to criminal proceedings."*

The proposal to include legal persons in the scope of the instrument has been opposed by CZ, DE, IE, FI, PL, SE, UK; it has been accepted by ES, FR; LT, RO expressed flexibility on this issue; NL entered a scrutiny reservation. CLS has indicated that they would prefer a provision listing precisely which of the rights provided for in the Directive are applicable to legal persons.

<sup>11</sup> FR, PT and MT proposed the deletion of the words "or otherwise". During the discussions in CATS on 24 September 2010, the need for consistency with measure A of the roadmap has however been underlined.

- 3.<sup>12</sup> 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.

*Article 3<sup>13</sup>*

**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 with information concerning at least the following procedural rights as they apply under their national law:
- the right of access to a lawyer;
  - the conditions to obtain access to a lawyer free of charge<sup>14</sup>;
  - the right to interpretation and translation;
  - the right to remain silent.

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<sup>12</sup> This paragraph will be complemented by the corresponding recital to be found in the Directive on the right to interpretation and translation:

*“In some Member States an authority other than a court having jurisdiction in criminal matters has competence for imposing sanctions in relation to relatively minor offences. That may be the case, for example, in relation to traffic offences which are committed on a large scale and which might be established following a traffic control. In such situations, it would be unreasonable to require that the competent authority ensure all the rights under this Directive. Where the law of a Member State provides for the imposition of a sanction regarding minor offences by such an authority and there is either a right of appeal or the possibility for the case to be otherwise referred to a court having jurisdiction in criminal matters, this Directive should therefore apply only to the proceedings before that court following such an appeal or referral.”*

<sup>13</sup> FR has a scrutiny reservation on this Article.

<sup>14</sup> DE asked for the insertion of the words “if applicable”. In order to accommodate these delegations, COM proposed the following wording : “Any entitlement to legal advice free of charge and the conditions for obtaining it”.

- 1a<sup>15</sup>. The information referred to in paragraph 1 shall be provided (...)when these rights become applicable in the course of the proceedings and in due time to allow their effective exercise.
2. The information shall be provided in simple and accessible language<sup>16</sup>.

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<sup>15</sup> In order to meet the concerns of certain delegations as to the extent of the obligation to inform the suspected or accused person in the course of the proceedings, the following Recital will be inserted:  
*"The suspected or accused person should be informed by the competent authorities of those rights which are essential to safeguard the fairness of the proceedings, as provided for by this Directive. In order to allow a practical and effective exercise of those rights, this information should be provided in due time with respect to the moment when the rights first become applicable in the course of the proceedings, for instance before first police questioning. Once the information about a particular right has been provided, it is understood that the competent authorities should not be required to reiterate it, unless the specific circumstances of the case or the specific rules laid down in national law so require."*

<sup>16</sup> PL while agreeing on the objective pursued by this sentence, asked for the deletion of this wording in the text and proposed to move it in a recital. SE, ES, COM, EE, AT, SI opposed this opinion. NL considered this wording essential in Article 4. In order to reassure delegations on the fact that this provision can be implemented by different means including non legislative measures, the following recital is proposed :  
*"Member States should undertake all the necessary action to provide the suspected or accused person with information on his rights in a simple and accessible language. A practical and effective implementation of this could be achieved by different means including non legislative measures such as appropriate training for the competent authorities or by a Letter of Rights drafted in a simple and non technical language so as to be easily understood by a lay person without any knowledge of criminal procedural law."*  
NL proposed the following alternative wording for this recital: *"Member States should undertake all the necessary action to comply with this Directive. A practical and effective implementation of some of the provisions such as the obligation to provide the suspected or accused person with information on his rights in simple and accessible language could be achieved by different means including non legislative measures such as appropriate training for the competent authorities or by a Letter of Rights drafted in a simple and non technical language so as to be easily understood by a lay person without any knowledge of criminal procedural law."*

## Article 4

### The right to written information about rights on arrest

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 (...) <sup>17</sup>. He shall be given an opportunity to read the Letter of Rights and be allowed, save for exceptional circumstances<sup>18</sup>, to keep it in his possession throughout the time he is deprived of his liberty.
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<sup>19</sup>.
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.<sup>20</sup>
4. (...)

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<sup>17</sup> ES and RO entered reservations on the deletion of the reference to “the right to judicial remedy to challenge the lawfulness of the detention”.

<sup>18</sup> In order to meet concerns expressed by the UK, the following Recital will be inserted :

*“Under exceptional circumstances, when necessary to safeguard the safety of the person under arrest or another person, competent authorities may decide (...) not to allow the arrested person to keep in his possession the Letter of Rights, provided that he has been fully informed about its content.”.*

<sup>19</sup> FR, LT, NL, LV, AT, PT, IE suggested deleting the Annex; SE, DE, IT, HU, RO, SI and COM opposed this proposal. The CLS stated that although the annex constitutes integrally part of the text, the wording ‘indicative’ and the corresponding recitals are clear on the non-binding nature of it.

<sup>20</sup> The reference to persons partially sighted or who cannot read and minors has been deleted. It is suggested to insert the following recital: *“When providing the suspected or accused person with information in accordance with this Directive, competent authorities should pay particular attention to suspected or accused person who cannot understand or follow the content or the meaning of the information, owing, for example, to their young age, mental or physical condition”.*

## Article 5

### **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 the Framework Decision 2002/584/JHA<sup>21</sup>. Annex II to this Directive contains an indicative model of such Letter<sup>22</sup>.

## 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. Member States shall ensure that a person who is officially interviewed<sup>23</sup> as a suspected or accused by the police or another competent authority in the course of a criminal proceeding is informed of the criminal act he is suspected of having committed.
2. Member States shall ensure that a person who is subject to a criminal charge is provided promptly with sufficient information on the nature and cause of the accusation to safeguard the fairness of the criminal proceedings and effectively exercise his right of defence.

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<sup>21</sup> DE, FI, MT and NL suggested to limit this paragraph to Articles 11, 13(2) and 14 of the FD on the EAW. COM advised against it, with support of IE, IT, RO, SE. The question arises if others Articles of the FD on the EAW should be mentioned such as articles 12 and 19 on the possibility of provisional release and hearing; IE opposed this extension.

<sup>22</sup> NL, DE and MT suggested deleting the Annex; SE, FI, IT, SI and COM opposed this proposal.

<sup>23</sup> CZ opposes the use of the word "interviewed" in the text.



3. The information referred to in paragraph 2<sup>24</sup> shall be provided in detail at the latest upon submission of the merits of the accusation to the judgement of a court and shall include:
- (a) a description of the acts the accused is alleged to have committed, including (...) time and place (...) and
  - (b) the nature of the offence, including its legal classification.
4. (...)

#### Article 7

### **The right to access to the materials of the case**

0. (...)<sup>25</sup>
1. Where a person is arrested and detained at any stage of the criminal proceedings, Member States shall ensure that information<sup>26</sup> related to the specific case in the possession of the competent authorities and which is essential to effectively challenge<sup>27</sup> according to national law the lawfulness of the arrest or detention, is made available to the arrested person or his lawyer.

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<sup>24</sup> SE suggested amending the words "referred to in paragraph 2" to read "on the nature and cause of the accusation".

<sup>25</sup> Paragraph 0 will be moved to the recitals: "For the purpose of this Directive (...), access to the materials of the case should include at least access to the material evidence, for or against the suspected or accused person, in the possession of the competent authorities in relation to the specific criminal case. Such information may be contained in a case file or otherwise held by competent authorities in any appropriate way in accordance with national law." UK, MT and CZ suggested to define material evidence in accordance with national law.

<sup>26</sup> COM, supported by IT and SI, is of the opinion that this notion of "information" is too limited compared to the case law of the ECtHR., PL, PT, UK, CZ, LV, ES and MT opposed this opinion. COM proposed to precise that it should be "document"; FR supported this proposal but expressed flexibility; IE proposed to use the words "*information or document*".

<sup>27</sup> FR entered a reservation.

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<sup>28</sup> 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.<sup>29</sup>
4. As an exception to paragraph 3, if strictly necessary and without prejudice to the right to a fair trial, access to certain materials may be refused where such access may jeopardize an ongoing investigation, may lead to serious risk for the fundamental rights of another person or may seriously harm the national security of the Member State in which the proceedings take place<sup>30</sup>.
5. The information or access referred to in this Article shall be provided free of charge<sup>31 32</sup>.

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<sup>28</sup> MT entered a reservation on the word “suspected”.

<sup>29</sup> UK suggested to insert the following sentence: “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.”; DE, IE, FI, NL, SI supported this proposal. PT and COM entered a scrutiny reservation on this point.

<sup>30</sup> UK, FI, NL, SE, CZ, IE, MT, CY and EE asked for the insertion of a more general exception related to the « important public interest ». IT, ES, DE, SI, FR and COM strongly opposed this proposal. Some delegations proposed to insert a reference to adequate safeguards to protect the interest of the accused.

<sup>31</sup> In order to meet the concerns of several delegations on the issue of gratuity of access to the case-file, the Presidency suggests the following text for a Recital:

*“Consultation of the materials of the case, as provided for by this Directive, should be provided free of charge. This is without prejudice to provisions of the national laws of the Member States requiring payment of any fees for copies to be extracted from the case file or for the sending costs to the person concerned or his lawyer.”*

<sup>32</sup> In some Member States, the obligation to grant access to the case-file is not always fulfilled through direct consultation but by providing indirect access through copies or information about its content. This will be reflected in the following recital:

*“Access to the materials of the case may be provided directly, by allowing consultation of the materials or documents contained therein, or indirectly, by providing copies or information about its contents, if so required by national law.”*

## 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<sup>33</sup>, 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 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<sup>34</sup>.
3. (...)

## Article 9<sup>35</sup>

### Training

Without prejudice to judicial independence and differences in the organisation of the judiciary across the Union, 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.

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<sup>33</sup> A list approach was inserted following a proposal from DE and NL supported by AT, FI, MT, UK., , LT, PL, RO, SI and COM opposed it. As a compromise, the Presidency suggests to extend the list of the Articles as shown in the text; this proposal has been declared acceptable by DE, LT, SE, SI and PL. SI also asked to include Article 3 in the list of provisions. PT entered a scrutiny reservation on this proposal.

<sup>34</sup> The following recital should be inserted:  
“A suspected or accused person or his lawyer should have 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. That right does not entail the obligation for Member States to provide for a separate mechanism or complaint procedure in which such failure may be challenged.” MT suggested moving the second sentence in this Recital to an Article in the operative part of the text.

<sup>35</sup> NL suggested to insert a recital in line with the recital proposed in footnote 16 on Articles 3 (2) and 4 (2) concerning the requirement of simple and accessible language, stating that the implementation of this Article may be achieved through non-legislative measures.

*Article 10*

**Non-regression clause**

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, (...) other relevant provisions of international law or (...) the law of any Member States which provide a higher level of protection.

*Article 11*

**Transposition**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by... .
2. Member States shall transmit the text of those measures to the Commission.
3. When Member States adopt those measures they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

*Article 12*

**Report**

The Commission shall, by .....<sup>36</sup> submit a report to the European Parliament and to the Council, assessing the extent to which the Member States have taken the necessary measures in order to comply with this Directive, accompanied, if necessary, by legislative proposals.

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<sup>36</sup> 36 months after publication of this Directive in the *Official Journal*.

*Article 13*

**Entry into force**

This Directive shall enter into force on the twentieth day following (...) its publication in the *Official Journal of the European Union*.

*Article 14*

**Addressees**

This Directive is addressed to the Member States in accordance with the Treaties.

*Done at Brussels,*

For the European Parliament

For the Council

*The President*

*The President*

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**Indicative<sup>1</sup> model Letter of Rights for suspected and accused persons on arrest:**

**If you are arrested by the police you have the following rights:**

- A. to be informed of what offence you are suspected**
- B. to the assistance of a lawyer**
- C. to an interpreter and translation of documents, if you do not understand the language**
- D. to know for how long you can be detained**

**You are entitled to keep this Letter of Rights with you during your detention.**

**A. Information on the suspicion**

- You have the right to know why you are suspected of having committed a criminal offence immediately after deprivation of liberty, even if the police do not question you.
- You or your lawyer can ask to see the parts of the case-file relating to your arrest and detention or be informed about their content in detail.

**B. Help of a lawyer**

- You have the right to speak to a lawyer before the police start questioning you.

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<sup>1</sup> To be complemented with other relevant procedural rights applicable in Member States.

- If you ask to speak to a lawyer, it does not make you look like you have done anything wrong.
- The police must help you to get in touch with a lawyer.
- The lawyer is independent from the police and will not reveal any information you give him without your consent.
- You have the right to speak with a lawyer in private, both at the police station and/or on the telephone.
- If you are not able to pay for a lawyer the police have to provide you with information about free or partially free legal assistance.

### **C. Help of an interpreter**

- If you do not speak or understand the language, an interpreter will be called for you. The interpreter is independent from the police and will not reveal any information you give him without your consent.
- You can also ask for an interpreter to help you to talk to your lawyer.
- The help of an interpreter is free of charge.
- You have the right to receive a translation of any order by a judge allowing your arrest or keeping you in custody. You may also ask to have other essential documents in the investigation translated.

### **D. How long can you be deprived of your liberty?**

- If you are not released, you must be brought before a judge within \*2 hours after you have been deprived of your liberty.
- The judge must then hear you and can decide whether you are to be kept in custody or released. You have the right to receive a translation of the judge's decision if he decides that you will remain in custody.
- You have the right to ask for your release at any time. Your lawyer can advise you on how to proceed.

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<sup>2</sup> (...)



**Indicative<sup>1</sup> model Letter of Rights for persons arrested on the basis of a European Arrest Warrant:**

**If you are arrested by the police on the basis of a European Arrest Warrant you have the following rights:**

- A. to know why you have been arrested**
- B. to the assistance of a lawyer**
- C. to an interpreter and translation of documents, if you do not understand the language**
- D. to be informed of your right to agree to surrender**
- E. to a hearing if you do not agree to surrender**
- F. to be released once the relevant deadline has passed**

**You are entitled to keep this Letter of Rights with you during your detention.**

**A. Right to know what you are arrested for**

- You have a right to know why you are sought by another country.

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<sup>1</sup> To be complemented with other relevant procedural rights applicable in Member States.



## **B. Help of a lawyer**

- You have the right to see a lawyer. The police must help you to get in touch with a lawyer.
- The lawyer is independent from the police and will not reveal any information you give him without your consent.
- You have the right to speak with a lawyer in private, both at the police station and/or on the telephone.
- If you are not able to pay for a lawyer the police have to provide you with information about free legal assistance.

## **C. Help of an interpreter**

- If you do not speak or understand the language, an interpreter will be called for you. The interpreter is independent from the police and will not reveal any information you give him without your consent.
- You can also ask for an interpreter to help you to talk to your lawyer.
- The help of an interpreter is free of charge.
- You have the right to receive a translation of any order by a judge allowing your arrest or keeping you in custody. You may also ask to have other essential documents in the investigation translated.

## **D. Your right to agree to surrender**

- You have the right to agree to being surrendered under a European Arrest Warrant. This should speed the procedure up.
- If you agree to be surrendered, it may be difficult to change this decision at a later stage. You should speak to a lawyer before deciding whether or not to agree to surrender.

## **E. Your right to a hearing**

- If you do not consent to be sent to the Member State seeking you, you are entitled to go before a judge and to explain why you don't consent.

## **F. Right to be released once the relevant deadline has passed**

As a general rule you have to be surrendered within 10 days of a court giving a final decision that you should be surrendered. If you have not been surrendered after 10 days, the authorities normally have to release you. However, there are some exceptions to this rule, so you should speak to a lawyer about this.

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