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**NOTE**

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by :	Presidency
to :	Article 36 Committee
Subject :	Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings: - General issues

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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 refers to "measure B" of the Roadmap for strengthening procedural rights of suspected and accused persons in criminal proceedings (the Roadmap) approved by the JHA Council on 23 October 2009<sup>2</sup> and included in the Stockholm Programme (section 2.4.), as adopted by the European Council in December 2009.

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

<sup>2</sup> See doc. n. 14552/1/09 REV 1 DROIPEN 125 COPEN 197.

On 14-15 September 2010 the Working Party for Substantive Criminal Law has had a first exchange of views on the whole proposal. Before going into detailed discussion on this initiative, the Presidency would like to submit certain general issues to the Article 36 Committee in order to give strategic guidance to the experts.

## **1. Scope of the Directive**

The scope of the Directive is dealt with under Article 2 of the Commission proposal. It stipulates that the Directive applies from the moment that a person is made aware by the competent authorities of a Member State, by official notification or otherwise, that he is suspected or accused of having committed a criminal offence until the conclusion of the proceedings (including any appeal).

This approach is consistent with the respective provision of the draft Directive on the right to interpretation and to translation in criminal proceedings. This instrument, constituting measure "A" of the Roadmap, has been agreed between representatives of the European Parliament and the Council. During the Plenary session on 14-17 June 2010, the European Parliament adopted amendments corresponding to this agreement. The proposal will be submitted to the JHA Council on 7-8 October for adoption.

The Presidency considers that the various measures outlined in the Roadmap, although formally independent from each other, should form part of a coherent system of protection of the rights of individuals in criminal proceedings. To this end, wherever possible, provisions concerning similar concepts used in the different instruments should be worded in a consistent manner in order to facilitate the future process of implementation and interpretation of the instrument. This would be beneficial for both the legislators and practitioners.

To the same end, it may be necessary to consider the possible exclusion from the scope of the Directive of proceedings related to relatively minor offences, such as those related to road traffic, which in certain Member States may lead to the imposition of a criminal sanction by an authority other than a criminal court (typically, a police authority), with the possibility for the person concerned to ask for a review by a criminal court. In these cases, the agreement on the Directive on translation and interpretation foresees that the procedural rights which are the object of the instrument should apply only to the phase of the procedure which takes place before a court.

*Taking into account the need to ensure consistency between the different measures of the Roadmap CATS is invited:*

*- to confirm the scope of application of the Directive which is defined as the moment a person is made aware by the competent authorities of a Member State, by official notification or otherwise, that he is suspected or accused of having committed a criminal offence until the conclusion of the proceedings (including any appeal);*

*- to examine whether it is necessary to exclude from the scope of this Directive proceedings regarding relatively minor offences in which a criminal sanction may be imposed by an authority other than a criminal court.*

## **2. Right to information in favour of a suspected or accused person who is not placed under arrest.**

The Commission proposal distinguishes between a general and a specific obligation of information to the suspected or accused persons with respect to their procedural rights.

Firstly, according to Article 3, a general obligation is placed upon competent authorities to provide the suspected or accused person "promptly" with "information on his procedural rights". As contemplated above, this obligation arises "from the time a person is made aware by the competent authorities of a Member State, by official notification or otherwise, that he is suspected or accused of having committed a criminal offence".

Secondly, a specific obligation is laid down under Article 4 to provide the suspected or accused person who "is arrested" with a written information ("Letter of rights") about his procedural rights in relation to his detention.

The proposal, therefore, defines the moment in which the "specific" right to information under Article 4 becomes applicable in a precise manner (by referring to the moment of arrest), whereas no precise definition is given of the moment when the "general" right to information under Article 3 becomes applicable. Indeed, this moment may vary according to the circumstances of the case and the specificities of each criminal proceeding.

While this characteristic may lead to uncertainty as to the moment from which the obligation under Article 3 arises and must be fulfilled by the competent authorities of Member States, on the other hand it may be argued that it provides for the necessary degree of flexibility in order to adapt the right to information to the specific circumstances of the case, taking into consideration the protection of the right to fair trial of the suspected or accused person and the necessities of each particular criminal proceeding.

*With a view to facilitating the examination of this issue by the Working Party, CATS is invited to provide guidance on the moment from which the right to information under Article 3 becomes applicable taking into account that a certain level of flexibility should be maintained according to the circumstances of the case.*

### **3. Right to access to the case-file (Article 7)**

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.

There should be also an opportunity for the suspected to acquaint himself, for the purposes of preparing his defence, with the results of investigations carried out throughout the proceedings. In cases relating to the proceedings for the review of detention pending trial the Court ruled that the Principle of equality of arms requires access for the defence to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of the pre-trial detention.

The right to full disclosure, however, is not absolute and can be restricted if it pursues a legitimate aim.

According to the proposal submitted by the Commission, the suspected or accused person or his legal counsel should be granted a degree of access to the relevant material gathered by competent authorities in view of the decisions to be taken in the criminal proceedings against him (Article 7). These are the materials which are contained in the "case-file" or otherwise kept in the possession of the authorities in conformity with the legal system of each Member State.

In the proposal submitted by the Commission the right to access to the case-file is granted to different extents according to different phases in the procedure: according to par. 1, when the suspected or accused person is arrested he (or his legal counsel) should be granted access to "those documents which are relevant for the determination of the lawfulness of the arrest or detention"; according to par. 2, once the investigation is concluded, the right to access should extend to the entire case-file, with certain exceptions which refer to the safety of third persons or the internal security of the Member State.

*CATS is invited to confirm the distinction between the two different phases in the procedure defined respectively in Article 7.1 and 7.2 with regard to the different extent of the right to access to the case-file.*

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