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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: - Outstanding issues

At its meeting on 3 December 2011 the Council (Justice and Home Affairs) reached a general approach on the text of the proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings. The outcome of that meeting is set out in doc 17503/10 DROIPEN 147 COPEN 280 CODEC 1465.

On 17 March 2011 the LIBE Committee of the European Parliament held an orientation vote approving draft amendments to the Commission proposal. Subsequently, the Presidency has entered into negotiations with the European Parliament and the Commission (“trilogues”) with a view to reaching an agreement in first reading on the text of the Directive. Trilogues have taken place on 5 and 18 April and on 11 May 2011. Each time, the Presidency has sought guidance from delegations on the continuation of the negotiations in meetings of the Friends of the Presidency or of the JHA Counsellors.

Following the last trilogue held on 11 May in Strasbourg, the Presidency has taken note of the fact that on certain key issues the European Parliament, together with the European Commission, have expressed a strong position against the general approach reached by Council, requiring substantial amendments with respect to the text resulting from the JHA Council in December 2010. These points have been extensively dealt with, both in the course of the discussions leading up to the general approach of the Council and in the technical meetings prior to the trilogues.

The Presidency would therefore like to turn now to COREPER for guidance on these issues, in order to verify the possibility of reaching a compromise solution with a view to advancing in the negotiations on the draft instrument.

Delegations are invited to show flexibility, while considering at the same time that any provisional agreement on these issues will have to be confirmed against the results of future negotiations with the co-legislator (“nothing is agreed until everything is agreed”). Indeed, any compromise proposal to the European Parliament on the issues set out in these notes will be part of a "package", it being understood that the Presidency will continue to insist on maintaining the text of the general approach on the other remaining issues.

1) Scope of application of the Directive (Article 2)

In the general approach reached at the meeting of the JHA Council in December 2010, Member States had agreed to a definition of the moment from which the rights set out in the Directive should apply on the basis of the following wording of Article 2 (1):

*“This Directive applies from the time a person is made aware by the competent authorities of a Member State, by official notification or otherwise, **as established by national law**, that he is suspected or accused of having committed a criminal offence until the conclusion of the proceedings... [omissis]”*

Both the European Parliament and the Commission have voiced strong opposition to the use of the phrase “*as established by national law*” as highlighted in the text. In their opinion, this expression would limit the temporal scope of application of the instrument beyond the limits defined by the ECHR and the jurisprudence of the European Court of Human Rights. Furthermore, in their opinion, this limitation appears even more unreasonable in the light of the circumstance that the words “as established by national law” do not appear in the corresponding provision dealing with the temporal scope of application of the right to translation and interpretation in criminal proceedings as defined by Article 1 (2) of Directive 2010/64/EU.

The Presidency has put forward the argument that the nature of the rights defined by this latter Directive and by the proposal currently under discussion is different, justifying a difference in treatment. This argument has however not been accepted by the co-legislator and the Commission.

In order to advance in the negotiations on this key point, the Presidency would like to invite delegations to accept as a compromise proposal the following wording for Article 2 (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 proceedings... [omissis]”

In the opinion of the Presidency, this formulation would partially meet the concerns of the Parliament and of the Commission, maintaining at the same time a margin of flexibility in view of the future implementation of the instrument under national law as requested by the delegations which have asked for the addition of the phrase “*as established by national law*” to the Article in question.

2) The moment in which to provide information about procedural rights (Article 3)

Article 3 of the draft Directive provides for an obligation for authorities to provide information about basic procedural rights to the suspected or accused person in the course of the proceedings. In the Council's general approach, the moment in the proceedings in which such information should be provided is defined in Article 3 (1a) as follows:

“1a. 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.”

The European Parliament, supported by the Commission, strongly insists on reintroducing the word “*promptly*” in the definition of the moment in time when the information should be provided, as well as on moving the reference to such moment in the first paragraph of the Article in order to stress the importance of timely information. The word promptly was indeed contained in the original Commission proposal and, in the opinion of the European Parliament, is needed to convey the principle that information on procedural rights should be provided to the suspected or accused person at the earliest possible moment in the proceedings.

The Presidency has until now opposed to this request arguing that the definition provided by the general approach is more precise and, indeed, reduces the margin of discretion of authorities at the advantage of the suspected or accused person.

However, given the insistence of the European Parliament and of the Commission on this point, in order to advance in the negotiations the Presidency would like to invite delegations to consider accepting the following compromise proposal for a revised wording of Article 3 (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 due time to allow their effective exercise:** [omissis]”*

If accepted, this proposal would entail the deletion of the current paragraph 1a of the Council general approach.

3) The right to information about the accusation (Article 6)

In the course of the discussions leading to the general approach adopted by Council in December 2010, the provision of Article 6 on the right of the suspected or accused person to be informed of the accusation had been reformulated with respect to the structure adopted in the original Commission proposal. Indeed, in the general approach, the obligation of authorities was defined differently in accordance with the different phases of the criminal proceedings: upon arrest (paragraph 1); upon questioning (paragraph 2); as a general duty valid throughout the proceedings (paragraph 3); as a more stringent duty at the trial stage of the proceedings (paragraph 4).

The European Parliament strongly opposes this approach, maintaining that this differentiation of the authorities' obligation is unjustified in the light of the principles enshrined in the ECHR and that the text contained in the general approach is overly complicated and could give rise to uncertainties during the implementation of the instrument by Member States. The European Parliament advocates the reduction of the cases to two: a more restricted duty of information upon arrest and a wider general obligation valid throughout the proceedings. The Commission supports the European Parliaments arguments on this matter.

The Presidency has explained that the different extent of the authorities' obligation to inform the suspected or accused person about the details of the accusation is necessary to take into account the peculiarities of each phase of the criminal procedure and of each national legal system. This explanation was rejected.

The European Parliament has also insisted on including in this Article a provision dealing with the obligation of judicial authorities to inform the accused person of any change in the accusation which may arise in the course of the trial phase of the proceedings.

In order to partially meet the concerns of the co-legislator, the Presidency would therefore invite delegations to consider the following compromise wording for Article 6 of the Directive:

“Article 6

The right to information about the accusation

1. *Member States shall ensure that a suspected or accused person is provided promptly with sufficient information about the accusation to safeguard the fairness of the proceedings and effectively exercise his right of defence.*
2. *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.*
3. *At the latest upon submission of the merits of the accusation to a court, the information referred to in paragraph 1 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 degree of participation by the suspected or accused person.*

4. *After submission of the merits of the accusation to a court, the suspected or 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.”*

The above provision would reduce the complexity of the structure; at the same time, maintaining in paragraph 1 a reference to the need to “safeguard the fairness of the proceedings” implies that the duty to provide this information varies according to the different phases of the proceedings. This concept could be clarified in an appropriate recital.

COREPER is invited to consider the above issues in order to provide guidance in view of the future negotiations with the European Parliament on the draft Directive.
