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from: Presidency
to: COREPER

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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

The Presidency has already submitted certain outstanding issues concerning the draft Directive on the right to information in criminal proceedings to the attention of COREPER on 19 May 2011, with a view to obtaining guidance on the way forward in the negotiations with the European Parliament.

Based on the outcome of that meeting, as well as on the outcome of a subsequent meeting of the JHA Counsellors, the Presidency has presented to the European Parliament on 30 May 2011 the compromise proposals on Articles 2, 3 and 6 which have been discussed by this Committee.

The Presidency has noted that the submission of these proposals has allowed substantial steps forward on a number of aspects concerning the draft Directive. There remain, however, certain open issues on which the technical working group of the Council has debated at length and on which the Presidency would like to turn to COREPER for further guidance.

The aim of the present document is to verify the possibility of reaching compromise solutions between the Council's position and the requests for amendment of the European Parliament.

As before, given the fact that the instrument is still subject to debate, the Presidency would like to reassure delegations 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").

1) Information about rights (Article 3)

At its meeting on 19 May 2011 COREPER agreed on a compromise proposal for Article 3 (1) of the Directive, concerning the moment in time when the suspected or accused person should be given by the authorities information about his basic procedural rights. Furthermore, at the meeting of the JHA Counsellors on 30 May, a broader list of the basic rights as contained in the Article gained sufficient support, including - albeit with a revised wording - the right to be informed of the accusation in accordance with Article 6 of the Directive.

At the trilogue on 30 May, the European Parliament suggested three further modifications to the Article:

- a) In paragraph 1, amend the words "concerning at least the following procedural rights as they apply under national law" to read "concerning at least the following procedural rights, **including** as they apply under national law"; in the Parliament's intention this should stress the fact that the suspected or accused person be given simple and specific information about the applicable rules and practises under the national law of the Member State where the proceedings take place.
- b) In paragraph 1, amend the list of rights of which the suspected or accused person should be informed by adding reference to the right of access to the materials of the case;

- c) In paragraph 2, add at the end of the words "taking into account particular circumstances or needs of vulnerable persons". The Parliament would, if this addition were to be accepted and briefly illustrated in a Recital, not insist on any other proposed amendment concerning particular treatment of vulnerable suspects.

If these amendments were considered acceptable, Article 3 of the Directive would then read as follows:

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 with information concerning at least the following procedural rights, ***including*** 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 of access to the materials of the case, as defined by Article 7 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, ***taking into account any particular circumstances or needs of vulnerable persons.***

COREPER is invited to endorse the above compromise wording for Article 3 of the draft Directive.

2) The right to written information upon arrest (Article 4)

a) Definition of situations where the Letter of rights has to be given

In its draft Report, the European Parliament has proposed to amend the wording of Article 4 of the Directive by changing the word "arrest", as used by the Council and Commission to define the situation which gives rise to the obligation of authorities to hand the Letter of rights to the suspected or accused person, into "deprivation of liberty". The Council has however indicated that this expression would excessively widen the scope of application of the letter of rights.

However, in order to partially meet the Parliament's concerns, the Presidency would like to ask delegations to consider using the words "suspected or accused person who is deprived of liberty" instead of the words "person who is arrested", in Article 4 as well as in all other provisions of the Directive dealing with such situation (e.g. Articles 6 (1) and 7 (1)).

b) Content of the Letter of rights

At the meeting of the JHA Counsellors on 30 May the Presidency has proposed to delegations to enlarge the description of the content of the Letter of rights as requested by the European Parliament. The Presidency has taken note of a positive attitude of delegations on the matter; however, most delegations have indicated their will to reflect further on the proposal tabled during the meeting.

In the light of the above points, COREPER is invited to endorse the following compromise wording for the text of Article 4 of the draft Directive:

Article 4

The right to written information about rights

1. Member States shall ensure that a **suspected or accused** person **who is deprived of liberty** is provided promptly with a written Letter of rights (**...**). He shall be given the opportunity to read the Letter of rights and be allowed to keep it in his possession throughout the time he is deprived of his liberty [unless this could directly lead to a risk of harm to the detained person or another person] ¹.

- 2.** In addition to the information to be given under Article 3, the 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 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.** 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.

¹ EP and COM have, for the time being, expressed their opposition to include the words within brackets in the text.

4. 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. ¹

3) Exceptions to the right of access to the materials of the case (Article 7)

At the trilogue on 30 May, the European Parliament has reiterated its suggestion to remove from the text of Article 7 (4) of the draft Directive the reference to the protection of "an important public interest" as possible reason for authorities not to disclose evidentiary materials to the suspected or accused person.

The Presidency has once again stated that this possibility is of paramount importance in order to allow investigative authorities to carry out their work efficiently, while safeguarding the right to fair trial by ensuring that undisclosed material is not used in the court proceedings against the accused. In order to partially meet the concern of Parliament, the Presidency suggests to insert in Article 7 (4) an explicit reference to the possibility that the decision not to disclose certain materials be subject, at some stage of the procedure, to the review of a judicial authority.

In the Presidency's opinion, this possibility of control is already implied by the fact that the non-disclosure is allowed, according to the text of Article 7 (4), only in as far as it "does not prejudice the right to a fair trial": indeed, according to the constant jurisprudence of the European Court of Human Rights, it is only a judicial authority which may decide upon an alleged infringement of the right to a fair trial.

¹ The text in paragraphs (3) and (4) in the proposed text corresponds to that agreed under Article 4 (2) and (3) of the Council general approach.

What is also clear, in the opinion of the Presidency, is that this possibility of review does not entail an obligation of Member States to provide for a specific, immediate appeal procedure when the non-disclosure is decided: the review by a judicial authority may be carried out in accordance with national laws and procedures. In this respect, reference could be made to the wording used in Article 2 (5) of Directive 2010/64/EU on the right to translation and interpretation.

In the light of the above, COREPER is invited to endorse the following compromise text for Article 7 (4):

"4. As an exception to paragraphs 2 and 3, provided that this does not prejudice the right to a fair trial, access to certain materials may be refused if it may lead to serious risk to the life or the fundamental rights of another person or if it is strictly necessary to safeguard an important public interest, such as in the cases where it risks jeopardizing an ongoing investigation, or where it may seriously harm the national security of the Member State in which the proceedings take place. **Member States shall ensure that, in accordance with procedures in national law, the suspected or accused person has the right to challenge a decision not to give access to certain materials.**"

5) Recording the provision of information (Article 8)

While Parliament is ready to accept the structure of Article 8 of the draft Directive as provided for by the Council general approach, it insists on extending the obligation to record - in accordance with procedures under national law – also to information provided according to Articles 3 and 7 of the Directive. In the opinion of Parliament, this modification of Article 8 (1) is necessary in order to allow for verification that information has been duly provided in accordance with all relevant provisions in the Directive.

COREPER is invited to consider the above issue and to endorse the inclusion in Article 8 (1) of the Directive of the mention of Articles 3 and 7.