The Directive on the Right to Information

Genesis and Short Description

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eucrim
European Law Forum: Prevention • Investigation • Prosecution

Article

ABSTRACT

On 22 May 2012, the European Parliament and the Council adopted Directive 2012/13/EU on the right to information in criminal proceedings. The directive is the second measure ("measure B") in application of the Roadmap on procedural rights, which was adopted by the Council in 2009.
The directive is evidence that Member States are in favour of measures enhancing the procedural rights of suspects and accused persons in criminal proceedings, contrary to what is sometimes said. Indeed, the directive provides a good example of legislation where the Council, together with the European Parliament, has taken a very much "pro-rights" approach, by establishing even more extensive and protective rights than those proposed by the European Commission.
This article describes the genesis of the directive and provides a short description of its contents.

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S. Cras, L. De Matteis, "The Directive on the Right to Information", 2013, Vol. 8(1), eucrim, pp22–32. DOI: https://doi.org/10.30709/eucrim-2013-004

Published in
2013, Vol. 8(1) eucrim pp 22 – 32
ISSN: 1862-6947
https://eucrim.eu

I. Genesis

1. Roadmap, Commission Proposal, and the "Cross-Border" Issue

Following an initiative launched by the Swedish Presidency in 2009, the work in the European Union on strengthening procedural rights for suspects and accused persons in criminal proceedings has been carried out on the basis of the roadmap, which was adopted by the Council on 30 November 2009. The roadmap provides a step-by-step approach – one measure at a time – towards establishing a full catalogue of procedural rights for suspects and accused persons in criminal proceedings.

After successful negotiations and adoption of the directive on measure A, concerning the right to interpretation and translation in criminal proceedings,[1] a positive mood reigned among the Member States to continue working on the roll-out of the roadmap. The Belgian Presidency, which took office in the second semester of 2010, was very eager to begin working on measure B, concerning a directive on the right to information in criminal proceedings.

Although its services had prepared a proposal for measure B in good time, the Commission hesitated in submitting this proposal to the Council and to the European Parliament. At a certain point, the Belgian Presidency had to insist that Commissioner Reding table the proposal, in order to be able to start work on the new measure in the Council so as to allow the Presidency to achieve concrete results during its term in office.

The Commission's hesitation in submitting the proposal for measure B was apparently due to the fact that lawyers within that institution were considering whether the proposal should be limited to cross-border cases. It is recalled that Art. 82(2) of the Treaty on the Functioning of the European Union (TFEU[2]) states that legislation should only be proposed "to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters *having a cross-border dimension.*" Whereas it was not an issue whether the condition of a "cross-border dimension" was fulfilled in relation to measure A, which covered the more "international" issue of interpretation and translation,[3] the issue seemed more problematic in relation to measure B. In the end, however, the Commission concluded that this measure should cover all criminal proceedings, not simply those with a cross-border dimension, and put its proposal forward on 20 July 2010.

This was certainly a correct conclusion, since it is impossible in practice to make a distinction between (purely) domestic cases and cross-border cases: in practice, it often happens that a case that starts off as a domestic case subsequently turns out to have a cross-border dimension. If in such a case, assuming that it was a purely domestic case, certain procedural rights would not have been given and it would subsequently turn out, in view of the newly "discovered" cross-border dimension of the case, that such rights should have been given from the outset, a legal minefield would be opened. It is therefore necessary to set minimum rules on procedural rights that apply without distinction in criminal proceedings in the Member States, independently of the cross-border nature of the case. It is now hoped that the issue of the cross-border dimension of procedural rights, which had also caused substantial problems during the discussion on the 2004 Commission proposal,[4] will have been definitively settled.

2. Work in the Council on the General Approach

After the Commission had submitted its proposal the Belgian Presidency immediately started work in the Council, making it a high priority for its term in office. The work was carried out by representatives of the 27 Member States in all meeting formats that are available in the Council in the field of criminal justice: by Brussels-based legal representatives meeting as JHA (Justice and Home Affairs) counsellors, by senior officials meeting in CATS,[5] by ambassadors meeting in COREPER,[6] and by the Ministers of Justice meeting in the JHA Council.

Most of the work, however, was carried out by national experts, both in the Working Party for Substantive Criminal Law ("Droipen"[7]) and in meetings of the "Friends of the Presidency". Droipen meetings are the official meetings for experts in substantive criminal law. They usually include full interpretation, which means that approximately 20 languages are available. Such meetings must be organised well in advance, and the interpretation requirement makes them rather costly. The Friends of the Presidency is a hybrid group that adapts its composition in relation to the subject matter. It is composed of at least one representative per Member State, and Member States are free to send to the meeting whomever they want.[8] The advantage of this latter group is that advice by experts is often available and that it can be convened much more flexibly than the Droipen group, since all business is conducted in English and no interpretation is required. The fact that all attendees in the Friends of the Presidency speak the same language also makes it a more informal group, which often facilitates reaching an agreement.

The experts in the Droipen and Friends of the Presidency meetings, who knew each other well from the work on measure A, successfully addressed the difficulties in the Commission proposal. In fact, while the proposal was not very extensive – it only contained 13 articles – it dealt with three particular complexities:

First, the directive on measure B had to "predict the future" to a certain degree, since it would contain a catalogue of rights in respect of which there would be a right to information. Apart from the right to interpretation and translation (measure A), the precise contents of these rights was not yet known when measure B was discussed, since they would be decided at a later stage (e.g., measure C relating to the right of access to a lawyer and measure D relating to the right to communicate with a third person and with consular authorities). It was often said during the work in the Council, and even more so during the negotiations with the European Parliament, that it would have been much better, or at least easier, to decide on measure B when all the other measures of the roadmap had been agreed upon.

Second, compared to measure A, measure B was mostly concerned with early information that was to be given to suspects or accused persons and thus mostly with situations typically occurring in the pre-trial phase. Given that the procedural rules of the Member States regarding the pre-trial phase differ much more from each other than the rules regarding the trial phase, it was necessary to develop more fine-tuned, tailor-made solutions.

Third, a problem was posed by the interaction between, on the one hand, the objective of ensuring efficient conduct of criminal prosecutions (which has lead Member States to establish systems for carrying out investigations without the suspect or accused person, or any third person, being made aware thereof) and, on the other hand, the objective of providing "equality

of arms" to the defence (through the proposed provisions on the right to information about the accusation and the right of access to the materials of the case).

Notwithstanding these particular complexities, on 3 December 2010, the Council reached a general approach on the text of the draft directive and agreed that negotiations with the European Parliament could be initiated on that basis.[9] If one compares the text of the Council's general approach with the text of the Commission proposal, one can see that the Council substantially improved the text on several points by clarifying the wording and by establishing more extensive and protective rights than those proposed by the Commission. This is actually quite remarkable, given that difficult compromises sometimes had to be found between the positions of the various Member States.

3. Negotiations with the European Parliament

The negotiations with the European Parliament started after its Committee on Civil Liberties, Justice and Home Affairs (LIBE) held its orientation vote on 17 March 2011. This orientation vote provided the representatives of the European Parliament with a mandate for negotiations with the Council, which were organised in "trilogue" meetings in the presence of representatives of the Commission, the latter institution acting as "honest broker".

On behalf of the European Parliament, the negotiations were led by Birgit Sippel of the S&D Group,[10] who was the rapporteur on this file. From the Council's side, the negotiations were led by the Hungarian Presidency, which held office in the first semester of 2011, and by the Polish Presidency, which held office in the second semester of 2011.

The negotiations between the Council and the European Parliament on measure B were more complicated than the negotiations on measure A. This seems to have had various reasons:

First, the subject matter of measure B is more difficult than the subject matter of measure A. This came as no surprise, since the order of the measures in the roadmap had been decided in view of their estimated difficulty in reaching an agreement: whereas the "easier" measure (interpretation and translation) was taken care of first, the more difficult measures were put lower down the list. Measure B was therefore considered to be more difficult than measure A from the outset.

Second, while the orientation vote of the European Parliament was clearly inspired by the text of the Council general approach on several points, it significantly departed from that text and even from the original Commission proposal on other points. The orientation vote notably contained some completely new elements as to when the rights foreseen in the draft directive would kick in, and proposed a new "internal logic" of the text. This caused noticeable difficulties in the negotiations.

Third, during the trilogues, the rapporteur of the European Parliament often indicated that, before continuing the negotiations on a certain topic, she wished to discuss that specific topic with the shadow rapporteurs (Members of the European Parliament that follow a specific co-decision file on behalf of political groups other than that of the rapporteur). It was therefore not so easy to do "business on the spot."[11]

Fourth and finally, the work in the Council during the negotiations with the European Parliament – e.g., on which concessions could be made to the European Parliament – was mostly carried

out in meetings of the JHA counsellors. It is understandable that the Presidency decided to choose this format, because the JHA counsellors are more politically driven. However, since experts are not invited to JHA counsellors' meetings, contrary to meetings of Droipen and of the Friends of the Presidency, the specific know-how of the experts who had negotiated the Council general approach was not available at those meetings. Some Member States felt that this made the negotiations more complicated.

Despite the complexity of the negotiations, which took up nine trilogues[12] (measure A: three trilogues), the European Parliament and the Council were able to reach a provisional agreement on the text in November 2011. After legal-linguistic revision of the text and the necessary internal arrangements in the Council and in the European Parliament, the directive was finally adopted on 22 May 2012. It was subsequently published in the Official Journal on 1 June 2012; it is to be transposed into the national legal orders by 2 June 2014.

II. Description of the Directive

1. Introduction

The directive contains two sets of provisions: those on the right to information about rights, on the one hand, and those on the right to information about the accusation and the right of access to the materials of the case, on the other.

The right to information about rights is not foreseen in the European Convention on Human Rights (ECHR). This right can, however, be inferred from the case law of the European Court of Human Rights (ECtHR) on Art. 6 ECHR, according to which the authorities should take a proactive approach towards ensuring that persons facing a criminal charge are informed of their rights.[13] The importance of the right to information about rights can hardly be overestimated: it is not sufficient that suspects or accused persons have procedural rights; they should also be aware of these rights in order to be able to fully exercise them.

The right to information about the accusation ("charge"), which stems from Art. 6(3)(a) ECHR, is fundamental for a person accused of having committed a criminal offence in order to for him to be in a position to prepare his defence. The right of access to the materials of the case ("case file") stems from Art. 5(4) and Art. 6(1) ECHR, as interpreted by the ECtHR. In relation to Art. 6(1), the Court ruled that it is a fundamental aspect of the right to a fair trial that criminal proceedings should be adversarial and that there should be equality of arms between the prosecution and defence. The prosecuting authorities should disclose to the defence all material evidence in their possession for or against the accused.[14] In relation to Art. 5(4), the ECtHR stated that equality of arms is not ensured if the counsel is denied access to those documents in the investigation file that are essential to effectively challenging the lawfulness of his client's detention.[15]

In respect of both sets of provisions, the directive provides considerable added value compared to the ECHR and the case law of the ECtHR, by establishing rights in clear and precise wording in a binding, legislative instrument whose application can be effectively enforced before the European Court of Justice. On several points, the directive gives concrete meaning to the relevant provisions of the ECHR and the case law of the ECtHR; on other points, it goes beyond the ECHR and Strasbourg case law by providing new rights.

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2. Art. 1 – Subject Matter

According to Art. 1, "*the Directive lays down rules concerning the right to information of suspects or accused persons, relating to their rights in criminal proceedings and to the accusation against them. It also lays down rules concerning the right to information of persons subject to a European Arrest Warrant relating to their rights*."

As in measure A, this directive on measure B does not give a definition of "criminal proceedings": it is again understood that this legal notion should be interpreted in the light of the case law of the ECtHR with respect to the scope of application of Art. 6 ECHR.[16] Taking this into account, the addition of the reference to the European Arrest Warrant (EAW) proceedings was necessary in view of the fact that extradition procedures do not fall within the scope of application of this Convention provision.[17]

Art. 1 stresses that the directive only gives to *suspects or accused persons* a right to be informed about the accusation, not to *requested persons* under EAW proceedings. However, when a requested person is arrested in the executing Member State, the executing judicial authorities are obliged to inform that person of the EAW and its contents, in accordance with Art. 11(1) of the Framework Decision on the EAW;[18] this normally entails that the person is informed about the reason for his arrest and hence is, at least summarily, informed about the accusation against him. When the person is subsequently surrendered to the issuing Member State on the basis of an EAW issued for the purpose of conducting a criminal prosecution, he benefits from the right to be informed about the accusation as a suspect or accused person in criminal proceedings.

It is worth noting that the Council, supported by the European Parliament, modified "*charge,*" as used in the Commission proposal, into "*accusation.*" Recital 14 states, however, that the term "*accusation*" in the directive is meant to describe the same concept as "*charge*" in Art. 6(1) ECHR. This cryptic modification was made since "*charge*" is a term that strictly refers to the common law systems and is difficult to translate with an equivalent term in civil law systems. The "*charge*" in common law systems is a formal act of the police at the onset of investigations; in civil law systems, it does not exist, since the object of the trial (accusation) is defined by a prosecutor (or investigating judge) at a much later stage. Therefore, Member States were afraid that if "*charge*" were to be interpreted in a "common law" sense (rather than in the sense of "being the subject of an ongoing criminal investigation," as used by ECtHR) the right to information would reach too far back (too early and during police proceedings). Therefore, the neutral word "*accusation*" was introduced, albeit with reference, in the recitals, to the ECHR and its case law.

2. Art. 2 – Scope

According to Art. 2, "*the Directive applies from the time persons are made aware by the competent authorities of a Member State that they are 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 suspect or accused person has committed the criminal offence, including, where applicable, sentencing and the resolution of any appeal*."

It was more difficult to reach agreement on the scope of measure B than on that of measure A. This can be explained by the fact that the right to interpretation and translation, the subject matter of measure A, is normally to be applied in the context of criminal proceedings that have already been ongoing for some time, whereas the right to information, the subject matter of measure B, is often to be applied at the very start of the criminal proceedings.

The final text regarding scope in measure B, set out above, is slightly different from the corresponding text in measure A, which contained, after "*made aware,*" the words "*by official notification or otherwise.*"[19] The deletion of these words was apparently motivated by a desire to tighten the scope of measure B, compared to the scope of measure A. It seems however that this difference in the texts does not change the meaning and that both measures A and B have the same wide scope of application.

In this context, it may be observed that under the case law of the ECtHR, the Art. 6 rights should also apply when the suspect has learned about the investigation from a source other than a (official) communication by the investigating authorities (e.g., through a house search, through a seizure, or through the closure of a business during the investigation[20]). Since the level of protection provided by both directives should never fall below the level of protection under the ECHR,[21] as interpreted in the case law of the ECtHR,[22] they should have the same wide scope of application as the ECHR. For this reason, it may be assumed that the scope of application of measures A and B is the same.

Although all Member States could agree to the scope of the directive as it was finally formulated, one Member State[23] asked that a declaration be made stating that the scope of the directive would not constitute a precedent for future measures to be decided on the basis of the roadmap. The negotiations on this declaration were particularly difficult, since many Member States felt that the scope of the directive as agreed was satisfactory and that there should be consistency between the provisions on scope in the various measures of the roadmap. It is therefore understandable that the declaration as it was finally adopted is a typical Brussels compromise with a high level of "constructive ambiguity."[24] The vague wording of the declaration is certainly one of the reasons why it has never been referred to since its adoption.[25]

The question of whether the directive should apply not only to *natural persons* but also to *legal persons* was also discussed. Although the negotiations had clearly been conducted under the presumption that the directive should only apply to natural persons, in the end nothing in this respect was mentioned in the directive.

One could assume that the legal basis of the directive, which is Art. 82(2) TFEU, rules out that the directive applies to legal persons, since it refers to the right of "*individuals*" in criminal proceedings. That is, however, the text of the English language version. The other language versions of the same treaty text provide a more confusing image: while the German language version[26] seems to support the meaning of the English text, other language versions, such as the Dutch[27] and the French,[28] seem to leave it entirely open as to whether the directive can apply to legal persons as well. It will therefore probably be up to the European Court of Justice to decide on this matter.[29]

Finally, in line with measure A, some minor offences have been excluded from the scope of this directive on measure B.[30]

3. Art. 3 – Right to Information about Rights

Arts. 3 and 4 set rules regarding the right to information about rights. Art. 3 provides that Member States should ensure that at least information on certain procedural rights has to be provided to suspects or accused persons promptly, orally or in writing. All suspects and accused persons are covered here, whether deprived of liberty or not, thus including suspects or accused persons who are at large. Art. 4 provides that more extensive information has to be provided, through a written letter of rights, to suspects or accused persons who are arrested or detained.

In Art. 3, the Commission in its proposal suggested stating that suspects or accused persons should be provided with information on four rights: the right of access to a lawyer, free of charge where necessary; 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; and, finally, the right to be brought promptly before a court if the suspected or accused person is arrested.

In its general approach, the Council refined the text of the Commission, e.g., by splitting the right of access to a lawyer and the right, if any, to legal aid ("*any entitlement to free legal advice and the conditions for obtaining it*"). The Council also transferred certain rights from Art. 3, regarding all suspects or accused persons, to Art. 4, regarding suspects or accused persons who are arrested or detained. For example, it was decided that the right of access to the case file (later called the right of access to the materials of the case, see below) should only apply when the person is arrested or detained. The same holds true for the right to be brought promptly before a court if the suspect or accused person is arrested; it was somewhat remarkable that this right had been contained in Art. 3 in the first place.

Most importantly, however, the Council enlarged the catalogue of rights in Art. 3 by inserting the right to remain silent. This right has always been a key right in criminal proceedings in most EU Member States as well as in other parts of the world: it is probably the most important right in the Miranda rights[31] in the United States ("*you have the right to remain silent and everything you say or do may be used against you in court*"). Moreover, the Commission itself had in 2006 analysed the issue of the right to remain silent in the Green Paper on the presumption of innocence.[32] It is therefore surprising that this right was not contained in Art. 3 of the original Commission proposal for measure B. In any event, it is very appropriate that the Council inserted the right to remain silent in Art. 3. This is also a good example of the Council taking a "pro-rights" approach in this directive.

As a result of these modifications made by the Council and the negotiations with the European Parliament, the final text of Art. 3 states that suspects or accused persons should be provided with information on the following rights: a) the right of access to a lawyer, b) any entitlement to free legal advice and the conditions for obtaining it, c) the right to be informed about the accusation, d) the right to interpretation and translation, and e) the right to remain silent. By establishing this list of rights in respect of which information should be provided, the directive gives concrete meaning to the case law of the ECtHR.[33]

There was a lengthy discussion during the negotiations with the European Parliament about when suspects or accused persons should be informed of their rights. The European Parliament suggested that this should be the case "*at the point when those rights become applicable and in any event upon questioning by law enforcement authorities.*" However, the Council

felt that this was rather vague wording and proposed that information should be provided at the latest before the "*first official interview*" of the suspect or accused person by the police or another competent authority. It turned out to be very difficult, however, to agree on a definition of "*official interview,*" in part because the European Parliament feared, understandably, that the scope of Art. 3 would be substantially reduced by using this concept. In the end, it was therefore decided to retain only the term "*promptly,*" as in the Commission proposal and as used in Art. 6(3)(a) ECHR; a reference to "*official interview*" was nevertheless kept in recital 19.

As vague as the term "*promptly*" may seem, it is important to note that it must be interpreted with respect to the possibility for suspects or accused persons to effectively exercise their procedural rights: the expression, if read in the light of the ECHR standards (which, as mentioned above, sets a minimum level for Member States when implementing the directive), implies that information on procedural rights should be given by the competent authorities as early as necessary (and as early as possible) in order for the subject of the investigation to make adequate choices in the exercise of his defence during the proceedings.

It is furthermore important to note that information regarding procedural rights should be provided "*as they apply under national law.*" This means that the information that has to be provided may differ among the Member States. However, as the roadmap is further rolled out and new directives on procedural rights are adopted and implemented in the Member States, the content of this information will converge little by little. In the short term, for example, the information on the right to interpretation and translation should, to a large extent, be similar in all the Member States in view of the upcoming deadline for the implementation of measure A[34] – although some differences may always exist, since all procedural rights directives based on Art. 82(2) TFEU only provide *minimum* rules.

It can ultimately be observed that, according to Art. 3(2), the information on rights should be provided "*in simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons.*" Recital 26 makes clear that such vulnerable persons can, for example, be children or persons who have a mental or physical impediment. The Council was not very enthusiastic about making a reference in measure B to vulnerable persons: it held that, from a legal drafting point of view, it would be neither elegant nor appropriate to make such a reference, since it is planned that the rights of vulnerable persons will be the subject matter of a specific measure (E) of the roadmap.

But inter-institutional compromises almost never win a beauty contest …

4. Art. 4 – Letter of Rights on Arrest

Art. 4(1) provides that "*Member States shall ensure that suspects or accused persons who are arrested or detained are provided promptly with a written Letter of Rights. They shall be given an opportunity to read the Letter of Rights, and shall be allowed to keep it in their possession throughout the time that they are deprived of liberty*."

Surprisingly, there was almost no discussion in the Council about the proposal of the Commission, revolutionary for some Member States,[35] to provide arrested suspects or accused persons with a written letter of rights. On this point, the directive clearly contains a new right, which is not foreseen in the ECHR, nor in the case law of the ECtHR.

During the negotiations with the European Parliament, however, there was substantial discussion about the question of which persons a letter of rights should be provided to. The Commission had proposed that a letter of rights should be given to all *arrested persons*. The European Parliament, however, requested that a letter of rights be provided to all *persons who are deprived of liberty*. Even though, in the light of the scope of the directive, this could only mean that a letter of rights should be provided to all *suspects or accused persons who are deprived of liberty*, fear prevailed in the Council that this might extend the right too far. For instance, in certain Member States, it is possible that suspects or accused persons who are not arrested can, for a limited time, be deprived of liberty in order to attend certain procedural acts (e.g., assistance in an identity parade). Another example is that of foreigners who are suspected or accused of having committed a criminal offence (e.g., drug dealing) and who do not have identification papers: they can be kept in police custody for a brief period of time in order for their identities to be established. Again, this is not arrest, but deprivation of liberty, and the Council did not want that in those particular situations Member States should be required to provide a letter of rights. In the end, a compromise was found by stating that suspects or accused persons who are arrested or detained should be provided with a letter of rights; recital 21, however, states that the notion of arrested or detained should be understood to refer to any situation where, in the course of the criminal proceedings, suspects or accused persons are deprived of liberty within the meaning of Art. 5(1)(c) ECHR, as interpreted in the case law of the ECtHR.

It may be underlined that whilst Member States are only required to provide a letter of rights to suspects or accused persons who are arrested or detained, they are allowed to provide such a letter of rights in other situations during criminal proceedings, since the directive only sets minimum rules.[36]

The Council and the European Parliament debated at length as to what information the letter of rights should contain. There was general agreement that the letter of rights should at least contain information on the rights mentioned under Art. 3; but which other information, if any, should be provided? The European Parliament presented a "wish list" of seven additional items that the letter of rights should contain; after careful consideration, the Council could accept all of them, albeit often in a modified form.

In the final text, a distinction has been made between additional information on "rights," which were given a place in Art. 4(2) and in respect of which the letter of rights should contain "information," and additional information on "possibilities," which were given a place in Art. 4(3) and in respect of which the letter of rights should contain "basic information."

The additional *rights*, in respect of which the letter of rights should contain information, are the following: a) the right of access to the materials of the case (which is organised in Art. 7 of the directive), b) the right to have consular authorities and one person informed (which is the subject matter of measure D of the roadmap), c) the right of access to urgent medical assistance (although one could question whether this really is a procedural right), and d) the maximum number of hours or days suspects or accused persons may be deprived of liberty before being brought before a judicial authority (this information, which relates to Art. 5(3) ECHR, was also contained in the Council's general approach).

The additional *possibilities*, in respect of which the letter of rights should contain basic information, are the following: any possibility under national law of a) challenging the lawfulness of the arrest; b) obtaining a review of the detention; or c) making a request for provisional release

(e.g., bail, which the European Parliament referred to). As the text says, Member States only have to provide this information if the relevant possibilities exist in their national law. The reference to "basic information" intends to avoid making Member States describe all the details of the relevant procedures. Indeed, it should be sufficient that the suspects or accused persons are aware that the possibilities exist; if desired, they may then seek to obtain more detailed information, e.g., through a lawyer.

With the directive providing minimum rules, Member States may decide to include in the letter of rights information other than that referred to in Arts. 3 and 4, such as information on other rights as they apply in their national law.[37] Member States may, for example, decide to include in the letter of rights information on any right to communicate with third persons while deprived of liberty, or practical information regarding the operation of detention facilities or the place where the person is kept arrested, e.g., the police station.

In accordance with Art. 4(4) and recital 22, the letter of rights should be drafted in simple and accessible language, such that the content of the letter is easily comprehensible. In order to assist national authorities in drawing up their letter of rights at the national level, an *indicative* model of the letter of rights has been provided in Annex I to the directive. In line with a clear request by Member States, it has been made clear in the heading of this Annex that Member States are not bound to use this model.

Art. 4(5) provides that suspects or accused persons should receive the letter in a language that they understand. Where a letter of rights is not available in the appropriate language, suspects or accused persons should be informed of their rights orally in a language that they understand; a written letter of rights, in a language that they understand, should then be given to them without delay. This will normally mean that Member States are required to make the letter of rights available in multiple languages, not only in the 23 official languages of the European Union but also in many other languages. For example, in application of the directive, the Belgian authorities have already prepared a letter of rights in more than 50 different languages, including such exotic languages as Gujarati, Tatar, and Urdu.[38]

Finally, and returning to Art. 4(1), arrested or detained persons who have received a letter of rights as described above may keep it in their possession during the time they are deprived of liberty. This may seem a harmless provision, but it was the subject of a lively debate in the Council. It was put forth that persons might "abuse" the possession of a letter of rights by fixing it in front of the video camera in the prison cell, thereby impeding the authorities from surveying the situation in the cell; it was also observed that persons might decide to eat the letter of rights with a view to committing suicide. In the end, it was decided to address these particular concerns by inserting recital 24, according to which the directive "*is without prejudice to provisions of national law concerning safety of persons remaining in detention facilities*." This should allow national authorities to (temporarily) withdraw the letter of rights from a suspect or accused person if this measure is imperative for reasons of safety.

5. Art. 5 – Letter of Rights in European Warrant Arrest Proceedings

When a requested person who is subject to EAW proceedings is arrested in the executing Member State, he should also be provided with a letter of rights. On this point again, the directive provides a completely new right, which, though logical, is neither foreseen in the ECHR, nor in the case law of the ECtHR. Since the nature of EAW proceedings is different from

the nature of criminal proceedings, the letter of rights that has to be provided in EAW proceedings in the executing Member State is distinct from the letter of rights that should be provided in criminal proceedings. An indicative model for such letter has been set out in Annex II to the directive. The letter of rights provides *inter alia* information on the possibility of the requested person to consent to being surrendered to the issuing Member State (which, it is claimed, "would speed up the proceedings") and on the right to a hearing if the requested person does not consent to surrender.

6. Art. 6 – Right to Information about the Accusation

The input from experts of the Member States is most visible in the reformulation of Arts. 6 and 7, which were greatly improved during the work in the Council and during negotiations with the European Parliament.

Whereas the Commission proposal in Art. 6 contained a general rule on information about the *charge*, in the final text of this article, the right to information about the *accusation*[39] has been clarified and tailor-made to apply to different situations or phases in the criminal proceedings.

A general right to information, and the corresponding obligation for Member States, is described in Art. 6(1). The provision sets out a continuing obligation, during the criminal proceedings, for competent authorities to provide suspects or accused persons with information about the criminal act they are suspected or accused of having committed. Such information should be provided *promptly* and in such *detail* as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence. Recital 28 makes clear that the information should be provided at the latest before the first official interview by the police or another competent authority (such another authority could, for example, be an investigating judge). As a result of the reference to "official interview," which has not been defined in the directive, the Member States have some discretion in determining when the relevant obligation starts to apply. However, "before the official interview" is the latest possible moment in time when the information may be provided; in practice, in order to comply with the necessity to safeguard the fairness of the proceedings, it may be necessary that the information be provided at a much earlier stage. As an example, one might think of a house search conducted against the suspect at the very onset of the investigation: if the search warrant is to be contested by him, it must contain at least basic information (insofar as it is available at the early stage of the proceedings) concerning the offence which is being investigated. Thus, in this example, the suspect should get the information about the criminal act he is suspected of having committed at the time of the house search, without any need to wait for a later interview (which, in many cases, may not even take place).

An additional obligation arises when suspects or accused persons are arrested or detained. In this situation, which is described in Art. 6(2), the competent authorities must inform the suspect or accused person of the reason for his arrest or detention. This should include information on the criminal act that he is suspected or accused of having committed. This information may still be incomplete, for instance because the details of the offence are not yet known to the investigators or because certain elements of the provisional accusation on which the arrest is based cannot be disclosed without irreparably harming the investigation (e.g., the identity of an accomplice who is still at large and needs to be apprehended). These aspects are reflected in recital 28, which clarifies that the information on the accusation "*should be given in*

sufficient detail, taking into account the stage of the criminal proceedings when such a description is given" and "*without prejudicing the course of ongoing investigations.*"

A particular obligation arises in the phase which starts, at the latest, upon submission of the merits of the accusation to a court. During this phase, which is described in Art. 6(3), the competent authorities should provide accused persons with detailed information on the accusation, including the nature and legal classification of the criminal offence as well as the nature of participation by the accused person. The nature of the offence could, for example, be a sexual offence, the legal classification could be rape, and the nature of participation of the accused person could be as an accomplice to the main perpetrator. At this stage, the information should be complete and allow the accused person to fully exercise his right of defence throughout the trial stage, which implies full disclosure of the details in order for exculpating evidence to be produced.

During the work in the Council, it was rightly pointed out that information that has been provided under this article could change during the course of the criminal proceedings. It has therefore been set out in Art. 6(4) that suspects or accused persons should be informed *promptly* of any changes in the information provided where this is necessary in order to safeguard the fairness of the proceedings. This provision draws on a steady line of jurisprudence of the ECtHR,[40] which interprets the rights set out in Art. 6(3) letters a) and b) ECHR as requiring the official notification of any relevant change in the accusation, including its legal qualification, in order to grant the accused person the right to present the pertinent legal arguments and, if necessary, evidence, to defend himself against a specific fact. This jurisprudence, naturally, does not require a halt in the procedure every time a development in the evidence effects a minute adjustment to the accusation: the modification must be of such magnitude to imply that, *in abstracto* and *ex ante*, the accused person may be expected to modify his defence accordingly. As with all cases in which the fairness of the proceedings *ex* Art. 6 ECHR is at stake, it will ultimately be for the competent authorities leading the proceedings to evaluate the necessity of informing the person about any modification in the accusation.

It should also be pointed out that the temporal scope of application of Art. 6(4) of the directive is not limited to the trial phase but rather applies throughout the proceedings. This is the result of a compromise between the Council and the European Parliament, the latter having demanded a much wider application of this rule. The provision as it now stands does indeed apply also to the pre-trial stage (within the framework of Art. 2 of the directive); however, the link between the notification of the change in the accusation and the fairness of the proceedings implies that this new information should only be provided when the suspect or accused person must be put in a condition to actively exercise his right of defence. This occurs only in certain moments of the pre-trial stage (e.g., when a person is arrested and must be put in a condition to contest the factual elements at the basis of the detention order): therefore, it should be excluded that any change in the "working hypothesis" of the investigators, before the indictment, always be communicated to the suspect or accused person. This being said, the extension to the pre-trial stage of the right to obtain information about the modification of the accusation goes well beyond the protection provided under the ECHR, as interpreted in the case law of the ECtHR.

7. Art. 7 – Right of Access to the Materials of the Case

In Art. 7 regarding the right of access to the materials of the case, a balance had to be found between, on the one hand, the need to ensure that criminal prosecutions can be conducted efficiently through national systems for carrying out investigations without the suspect or accused person or any other third person being made aware of them and, on the other hand, the wish to ensure equality of arms for the defence, by providing the right to have access to the materials of the case.

Member States' experts considerably modified Art. 7 during the work on the Council's general approach. It subsequently survived the trilogues with the European Parliament almost unchanged. As finally agreed, Art. 7 gives concrete meaning to the case law of the ECtHR in respect of Art. 5(4) and 6(1) ECHR, as mentioned above.[41]

The first change made by the experts concerned the title of the article. The Commission had proposed to refer to the right of access to the *case file*. Some Member States argued, however, that there is no such thing as a case file in their system; therefore, after long discussion, a more neutral term was used, namely the right of access to the *materials of the case*. A reference to the case file was maintained in recital 31.

In Art. 7 itself, the experts made a distinction between access regarding two different types of materials.

Art. 7(1) provides a right of access to "documents" which are essential to allowing arrested *and* detained persons, or their lawyers, to challenge effectively the lawfulness of the arrest or detention. The use of the word "documents," which was discussed at length, is explained in recital 30: it not only comprises documents *strictu senso* but also, where appropriate, photographs and audio and video recordings. It will be for the competent authority, usually a judge, to assess which documents should be considered essential documents for the purposes of this provision. The documents should be made available at the latest before a competent judicial authority is called to decide upon the lawfulness of the arrest or detention in accordance with Art. 5(4) ECHR, and in due time to allow the effective exercise of the right to challenge the lawfulness of the arrest or detention (see recital 30).

Art. 7(2) provides a right of access to "material evidence" to which arrested and detained persons, or their lawyers, should have access in order to challenge the merits of the accusation. The right of access concerns all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, and to which these persons or their lawyers should have access in order to safeguard the fairness of the proceedings and to prepare the defence. The concept of "material evidence" is wider than that of the documents referred to under Art. 7(1), since recital 31 states that it should *include* materials *such as* documents and, where appropriate, photographs, and audio and video recordings; it therefore covers all items in the hands of the authorities that may be used as evidence, including hard or real evidence (e.g., objects which have been seized, the *corpus delicti*, etc.). In accordance with Art. 7(3), access to material evidence should be granted in due time and at the latest upon submission of the merits of the accusation to the judgment of a court. Once again, the directive defines only the latest possible moment at which access must be granted; the concrete circumstances of the case may require that access be given long before that moment (e.g., when a piece of evidence is subject to irreversible modifications requiring that examination by the defence be granted in advance). It will be for the competent authority, normally a judge, to

establish in each specific case at which concrete moment in time access to material evidence should be granted.

Art. 7(4) provides an exception to the right of access to material evidence: access to certain materials may be refused if such access may lead to a serious threat to the life or the fundamental rights of another person, or if such refusal is strictly necessary to safeguard an important public interest, e.g., in cases where access could prejudice an ongoing investigation or seriously harm the national security of the Member States in which the criminal proceedings are being carried out. Recital 32 stresses that any refusal of access must be weighed against the rights of the defence of the suspect or accused person and that restrictions should be interpreted strictly and in accordance with the right to a fair trial under the ECHR.

Finally, Art. 7(5) provides that access shall be provided free of charge.[42] Art. 7(5) is incidentally the only provision in the directive regarding costs. The application of the other provisions of the directive should, in principle, not entail any extra costs for Member States – if one discounts the costs for producing the letter of rights foreseen in Art. 4 (which will, in most cases, only have to be borne once, when drafting the letter and having it translated in the most commonly used languages). This being said, the rights to information may of course indirectly invoke extra costs for the Member States. Indeed, when suspects or accused persons are more aware of their rights (e.g., the right to obtain a written translation of a document), they are inclined to make use of these rights more frequently, which often do entail costs for Member States.

8. Other Articles

Art. 8(1) states that, when information is provided in accordance with Arts. 3-6, this should be noted using the recording procedure specified in the law of the Member State concerned. According to Art. 8(2) and recital 36, in case a competent authority fails or refuses to provide information or to give access to certain materials of the case in accordance with this directive, the suspect or accused person or his lawyer should be able to challenge this failure or refusal.

The directive contains in Arts. 9 and 10 provisions on training and non-regression that are identical to those in measure A.

In accordance with Art. 11, the Member States have to transpose the directive into their legal orders by 2 June 2014. It is expected that this will not lead to too many difficulties, since the Member States have unanimously agreed to the directive and since the directive in general does not require Member States to make substantial changes to their legal orders.

Art. 12 requires the Commission to submit by 2 June 2015 a report assessing the extent to which Member States have taken the necessary measures in order to comply with the directive. In this report, the Commission can also propose changes to the indicative model for a letter of rights as set out in Annex I to the directive, see recital 22.

III. Concluding Remarks

The directive on the right to information in criminal proceedings constitutes an important step towards establishing a full catalogue of procedural rights for suspects or accused persons in criminal proceedings. The directive ensures that suspects or accused persons are made aware

of their procedural rights and provides important rules on the right to information about the accusation and on the rights of access to materials of the case.

The Commission had submitted a prudent and, in some points, very general proposal, but, in the course of the work in the Council and during the negotiations with the European Parliament, the text has been made more ambitious and precise: it has substantially improved and gained in added value.

In a number of areas, the directive now gives a concrete meaning to general indications contained in the ECHR and, notably, in the case law of the ECtHR: such is the case, for example, as regards the right to information about rights and the right of access to the materials of the case. In other areas, the directive goes well beyond the minimum standards of the ECHR and Strasbourg case law by providing completely new rights, such as the provisions concerning a written letter of rights upon arrest (also in the execution of a European Arrest Warrant) and, in the extension to the pre-trial stage, the right to obtain information about the modification of the accusation.

In all these cases, the directive is a good example of how EU law can foster the protection of fundamental rights in compliance with the mission of the European Union to create for its citizens an area of freedom, security and justice, as set out in Art. 3(2) of the Treaty on European Union.

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1. Directive 2010/64/EU, OJ L 280, 26.10.2010, p.1. On this directive, see Steven Cras and Luca De Matteis, "The Directive of the right to interpretation and translation: genesis and description" in EUCRIM 2010 (4), p. 153.↩
2. Together with the Treaty on European Union, the TFEU was amended (established) by the Lisbon Treaty.↩
3. It happens very often, of course, that interpretation and translation is needed in purely domestic cases, simply because the suspect or accused person, while being a national of the Member State in which the criminal proceedings are conducted, does not (sufficiently) understand the language of the criminal proceedings.↩
4. COM(2004) 328 final, Council doc 9318/04.↩
5. "CATS" stands for "Coordinating Committee in the area of police and judicial cooperation in criminal matters", the follow-up of the Art. 36 Committee (*Comité Article Trente-Six*) that was created by the Amsterdam Treaty (and which in its turn was the successor of the Coordinating Committee referred to in Article K4 of the Maastricht Treaty).↩
6. Permanent Representatives Committee.↩
7. Droipen is the abbreviation of droit pénal (criminal law).↩
8. For practical reasons, though, some Member States - in particular the smaller ones - often tend to send Brussels-based (JHA) counsellors to meetings of the Friends of the Presidency.↩
9. Council doc 17503/10.↩
10. S&D is the Group of the Progressive Alliance of Socialists and Democrats in the European Parliament.↩
11. In measure B, in fact, rapporteur Ms. Sippel seemed to work on the basis of case-by-case *ex ante* mandates by the shadow rapporteurs. This is a different approach than that taken for measure A, where it appeared that rapporteur Baroness Sarah Ludford (ALDE - Group of the Alliance of Liberals and Democrats for Europe) negotiated with the Council more directly, apparently working on the basis of *ex post* approval by the shadow rapporteurs (negotiations "*ad referendum*"). This difference in approach between the rapporteurs in measures A and B might be a question of personality or negotiation style, but it might also have to do with the fact that the "honeymoon feeling" about the European Union finally legislating in the field of procedural rights had dissipated.↩
12. Council doc 16342/11.↩
13. See, e.g., *Padalov v. Bulgaria*, 10 August 2006, par. 52-54; *Talat Tunç v. Turkey*, 27 March 2007, par. 61; *Panovits v. Cyprus*, 11 December 2008, par. 73. See also the explanatory memorandum to the Commission proposal.↩
14. See, e.g., Jasper v. United Kingdom, 16 February 2000, par. 51; Edwards v. United Kingdom, 27 October 2004, par. 46-48.↩
15. Schöps v. Germany, 13 February 2001, par. 44; Mooren v. Germany, 9 July 2009, par. 124.↩
16. See Cras and De Matteis, op.cit., p. 157, where reference is made to the following case law: *Engel and others v. the Netherlands*, 8 June 1976, par. 70-81; *Öztürk v. Germany*, 21 February 1984, par. 53; *Campbell and Fell v. the United Kingdom*, 28 June 1984, par. 70; *Garyfallou AEBE v. Greece*, 24 September 1997, par. 33.↩
17. H. v. Spain, 15 December 1983.↩
18. OJ L 190, 18.7.2002, p.1.↩
19. In its general approach, the Council had even agreed putting "*made aware by official notification or otherwise, as established under national law.*" These last words were inserted at the last minute of the negotiations on the Council general approach, but they had the potential – and probably intended – consequence of substantially reducing the scope of the directive. It was therefore fortunate that they were eliminated during the negotiations with the European Parliament.↩

20. See Cras and De Matteis, op.cit., p. 157, where reference is made to the case of De Weer v. Belgium, 10 March 1977 (Commission Decision, plenary).↩
21. See Art. 10 in measure B; Art. 8 in measure A.↩
22. See also recital 40 of the directive.↩
23. France, see Council doc 18702/11 (not classified).↩
24. The declaration is set out in Council doc 18702/11 : "*The provisions of the Directive on the right to information in criminal proceedings do not necessarily constitute a precedent in the framework of discussions concerning other proposals for measures contained in the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings. However, overall consistency with the remaining measures provided for by the Roadmap shall be ensured.*"↩
25. Another reason may that the new French government, which came into power after the elections in Spring 2012, takes a more pro-rights approach.↩
26. "die Rechte des Einzelnen im Strafverfahren"↩
27. "de rechten van personen in de strafvordering"↩
28. "les droits des personnes dans la procédure pénale"; although all language versions of the Treaty are equally authentic, the fact that the text was originally drafted in the French language, under the Presidency of Valéry Giscard d'Estaing, might carry some weight in this matter.↩
29. It may be interesting to note in this context that, in the fairly recent DEB case (C-279/09, DEB Deutsche Energiehandels- und Beratungsgesellschaft, mbH, judgment of 22 December 2010, in particular point 59), the European Court of Justice concluded that the principle of effective judicial protection, as enshrined in Art. 47 of the Charter, must be interpreted to mean that it is not impossible for *legal persons* to rely on this principle.↩
30. See Cras and De Matteis, op.cit., p. 157.↩
31. The concept of "Miranda rights" was enshrined in U.S. law following the 1966 Miranda v. Arizona Supreme Court decision, which found that the Fifth and Sixth Amendment rights of Ernesto Arturo Miranda had been violated during his arrest and trial for domestic violence. According to the ruling, "...*The person in custody must, prior to interrogation, be clearly informed that he or she has the right to remain silent, and that anything the person says will be used against that person in court; the person must be clearly informed that he or she has the right to consult with an attorney and to have that attorney present during questioning, and that, if he or she is indigent, an attorney will be provided at no cost to represent her or him.*"↩
32. COM(2006) 174 final. Section 2.5 is on the right to silence.↩
33. See the case-law cited in footnote 17.↩
34. The deadline for the implementation of measure A (Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings) was 27 October 2013.↩
35. According to the Commission's Impact Assessment accompanying the proposal, 11 Member States were already operating a letter-of-rights system before the proposal was submitted.↩
36. This has also been indicated in the heading of Annex I to the directive: "*The Member State's Letter of Rights must be given upon arrest or detention. This however does not prevent Member States from providing suspects or accused persons with written information in other situations during criminal proceedings.*"↩
37. See also recital 22 and the heading of Annex I to the directive.↩
38. http://justice.belgium.be/fr/themes_et_dossiers/services_du_spf/telecharger_des_documents/declaration_de_droits/1/↩
39. See above under Art. 1 for an explanation of why this change in terminology, from charge to accusation, was implemented.↩
40. See, e.g., Pélissier and Sassi v. France, 25 March 1999, par. 51; I.H. v. Austria, 20 April 2006, par. 30; Drassich v. Italy, 11 December 2007, par. 31.↩
41. See the ECtHR case-law mentioned in footnotes 18 and 19.↩
42. In accordance with recital 34, however, the persons concerned or their lawyers, may be sent a bill for the costs of photocopies or stamps.↩

* Authors statement

The authors, who have written this article on their personal title, would like to thank Caroline Morgan and Signe Öhman for their inspiration and critical comments on an earlier draft; all errors in the article should, however, be attributed to the authors only.

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The project is co-financed by the Union Anti-Fraud Programme (UAFP), managed by the European Anti-Fraud Office (OLAF).

Co-funded by the European Union