Proposal for a Directive
on the right to information in criminal proceedings

Briefing on the Commission proposal

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Introduction and Summary

1. JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is also the British section of the International Commission of Jurists.

2. The European Commission has presented a proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings[1] (the Proposal). The proposal forms Measure B in the Roadmap on procedural safeguards in criminal proceedings adopted last year (the Roadmap).[2] JUSTICE and a number of other prominent NGOs issued a '*Joint Position on procedural safeguards*' in July 2009 in support of the Roadmap as a step towards ensuring procedural rights for suspects in criminal cases are recognised and protected uniformly across all member states of the EU.[3] The EU has finally begun to recognise that not only do the member states not give effect to the article 5 and 6 European Convention on Human Rights (ECHR) rights and interpretative jurisprudence of the European Court of Human Rights (ECtHR) in all circumstances, but that the ECHR only provides minimum protection.

3. The ECHR was not designed to provide the necessary mechanism to ensure equality of arms in mutual recognition instruments, nor in a Union which has now grounded its existence on respect for human dignity, freedom, democracy, equality, the rule of law and human rights[4] with an aim of promoting its values and the well-being of its peoples.[5] The Charter of Fundamental Rights (the Charter) was given binding force in the domestic courts and Court of Justice of the European Union when the Lisbon Treaty was ratified. It is incumbent upon the member states to ensure that the EU provides meaningful protection of the rights enshrined in articles 47 and 48 of the Charter. In particular article 48(2) provides:

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[1] COM(2010) 392 final (Brussels, 20 July 2010)

[2] Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C 295, 4.12.2009, p. 1

[3] http://www.justice.org.uk/images/pdfs/Joint%20position%20on%20procedural%20safeguards.pdf

[4] Article 2 TEU

[5] Article 3 TEU

Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

4. Measure A on the right to interpretation and translation has been agreed in both Parliament and the Council and it is hoped that it will be adopted in the next Justice and Home Affairs Council meeting in October. [6]

5. The Proposal aims to facilitate execution and enforcement of judicial decisions in criminal matters by ensuring that suspects receive (1) sufficient information on their rights, preferably in writing, for them to exercise effectively their defence rights and (2) sufficiently detailed information on the case against them in order to enable them to adequately prepare their defence or challenge pre-trial decisions.

6. Research conducted into the protection of procedural rights by member states of the EU has concluded that in the majority, information on procedural rights is only provided orally.[7] This decreases the capacity of the provision of the information to be meaningful and effective. It is concerning that some member states do not inform suspects of certain rights at all: There is no legal obligation to inform the suspect that he has a right to legal advice (partially) free of charge in Belgium, Denmark, Luxembourg or Sweden;[8] of the right to interpretation in 8 member states[9] or the right to translation in 9.[10] In Belgium and Finland there is no legal obligation to inform the suspect that he has a right to remain silent.[11] Whilst 17 member states do provide information on rights in a form akin to a letter or rights,[12] that information varies widely in terms of content, language provision, stage of proceedings when provided (some providing written information at more than one stage) and type of suspect.[13] Only 13 provide information in writing that the suspect is entitled to free legal advice, and the stage of this provision also varies.[14]

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[6] 10984/10 (Brussels, 23 June 2010)

[7] See T. Spronken et al., *EU Procedural Rights in Criminal Proceedings* (Maklu: Antwerp, 2009) and Cape et al. *Effective Criminal Defence in Europe* (Intersentia: Antwerp, 2010)

[8] Spronken (2009), p 62. `

[9] Belgium, Denmark, Estonia, Finland, France, Germany, Italy, Luxembourg, Netherlands, *id*, p. 91.

[10] Denmark, Estonia, Finland, Germany, Italy, Luxembourg, Netherlands, United Kingdom, *id*, p. 87.

[11] *Id*, p 96.

[12] T. Spronken, *EU–Wide Letter of Rights in Criminal Proceedings: Towards Best Practice*, (Draft: unpublished), July 2010

[13] Spronken (2010), pp 40-41 and annexes referred to therein.

[14] Spronken (2009) p 63

7. The ECHR does not declare a right to be informed about rights that are held by suspects. However, the ECtHR has indicated in a number of cases that suspects must be informed of their rights. In *Panovitz v Cyprus* the Court held that effective exercise of the rights of the defence imports a positive obligation upon the prosecuting authorities to furnish a suspect with the necessary information to enable them to access legal representation and to actively ensure that a suspect understands he can access a lawyer, free of charge if necessary.[15]

8. With respect to the right to know the reason for which a person is a suspect, articles 5(2) and 6(3)(a) ECHR provide obligations upon the authorities to inform suspects of the nature and cause of the accusation against them. The ECtHR has held that the rationale behind these articles is to ensure that the suspect fully understands the allegations in order to prepare their defence[16] or to challenge their detention.[17] Unsurprisingly all member states accord the right to be informed of the reasons for arrest, but in five there is no legal obligation to inform the suspect of his right to know these reasons.[18]

9. With respect to disclosure, article 6(3)(b) provides that the suspect must be afforded adequate time and facilities for the preparation of his defence. The ECtHR has confirmed that 'adequate facilities' encompass the opportunity to review the results of investigations carried out during the proceedings.[19] Established case law affirms that it is a fundamental aspect of a fair trial that proceedings be adversarial with equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.[20] To accord with these principles, all material evidence in favour or

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[15] *Panovits v Cyprus*, App. no. 4268/04 (judgment 11th December 2008) (ECtHR), para 72 applying *Padalov v Bulgaria,* App. no. 5478/00 (judgment 10th August 2006) (ECtHR), and *Talac Tunc v Turkey,* App. no. 32432/96 (judgment 27th March 2007) (ECtHR)

[16] *Mattoccia v Italy,* App. no. 23969/94 (judgment 25th July 2000) (ECtHR), para 60

[17] *Fox, Campbell and Hartley v UK*, App. nos. 12244/86; 12245/86; 12383/86 (judgment 30th August 1990) (ECtHR); (1991) 13 EHRR, para 40

[18] Germany, Finland, Netherlands, Poland, Spain, see Spronken (2009), pp 92 and 93

[19] See *C.G.P. v Netherlands*, App. no. 29835/96 (judgment 15th January 1997) (ECtHR), and *Galstyan v Armenia*, App. no. 26986/03 (judgment 15th November 2007) (ECtHR), para 84.

[20] *Natunen v Finland,* App. no. 21022/04 (judgment 31st March 2009) (ECtHR); (2009) 49 EHRR 810, para 39, citing *Rowe and Davis v UK,* App. no. 28901/95 (judgment 16th February 2000) (ECtHR); (2000) 30 EHRR 1 and cases therein.

against the suspect must be disclosed.[21] However, there may be circumstances where on national security or public interest immunity or investigatory grounds, it is legitimate for evidence to be withheld. These grounds must be weighed against the interests of the defendant and only be used where strictly necessary.[22] The ECtHR further held in *Edwards* that the opportunity must be available for this refusal to be considered by the national court, which must then decide whether the proceedings as a whole are rendered unfair without the material. It stands to reason that a failure to disclose to the defence material evidence could prevent the accused being able to exonerate himself or have his sentence reduced.[23]

10. Nevertheless, in Estonia, France, Germany and Spain there is no right provided for the suspect to have access to the case file.[24] If there is a right, in six further member states, there is no obligation to inform the suspect as such.[25]

11. The Lisbon Treaty has specifically provided the mandate to establish minimum rules to the extent necessary to facilitate mutual recognition concerning the rights of individuals in criminal proceedings. As the Proposal's preamble demonstrates, given the evidence that individuals are treated very differently according to which member state they are in, mutual recognition is hindered by the uncertainty as to whether fundamental rights will be effectively protected in another member state.[26] We support and welcome the aims of the Commission's Proposal and the three areas it attempts to regularise. As such, we consider that the UK should opt-in to the instrument, though we consider that amendments are necessary.

12. This briefing is intended to highlight JUSTICE's main concerns regarding the initial draft. Absence of comment upon a certain provision in the Proposal should not be taken as an endorsement of its contents. In particular we consider that:

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[21] *Edwards v UK,* App. no. 13071/87 (judgment 16th December 1992) (ECtHR); (1993) 15 EHRR 417

[22] *Natunen*, para 40

[23] *Natunen,* para 43

[24] Spronken (2009), p 94

[25] Belgium, Denmark, Finland, Luxembourg, Netherlands and the UK, *id*

[26] G. Vernimmen-Van Tiggelen and L. Surano, *Analysis of the future of mutual recognition in criminal matters in the European Union: Final Report,* (IEE/ULB/ECLAN: Brussels, 20 November 2008); N. Long, *Implementation of the European arrest warrant and joint investigation teams at EU and national level* (European Parliament, DG Internal Policies of the Union, Policy Dept C, Citizen's Rights and Constitutional Affairs, January 2009), PE 410.67; Spronken (2009); Cape (2010).

- **The Directive must make provision for the rights apply throughout the proceedings;**
- **Competent authorities must be defined for legal certainty;**
- **Suspects must be informed of their rights orally as well as in writing;**
- **Competent authorities must also ensure that suspects have understood what their rights;**
- **The rights upon which the suspect is informed should include the right to silence;**
- **The obligation to provide the letter of rights must be specified from arrival at the police station;**
- **Where a person is assisted by an interpreter or appropriate adult, the letter of rights must also be provided to them;**
- **The EU model letter of rights should replicate the model in the *EU–Wide Letter of Rights in Criminal Proceedings* project;**
- **The EAW model letter should not treat surrender as a 'right' and should explain that grounds for refusal may be apply;**
- **The Directive must make clear that there is an ongoing duty to provide information about the charge, an initial summary of which ought to be provided in writing like the letter of rights;**
- **Suspects should be provided with copies of the case file, not just be afforded access to it;**
- **A mechanism of verifying notification should be established, most effectively by requiring signature of the suspect upon the letter of rights;**
- **The Preamble should suggest an admissibility hearing for evidence obtained in breach and the right of appeal;**
- **The Directive should list the obligation upon member states to train their authorities is understanding the importance of the duty to inform, and how to ensure suspects understand the information provided.**

Article 2 - Scope

13. We agree that the rights should apply from the moment a person is made aware that they are a suspect and until the resolution of any appeal. However, there will be different obligations upon the competent authorities at each stage of the criminal proceedings. Arresting or detaining police officers must inform suspects of their rights

at that stage. Upon arrival at court, the tribunal has an obligation to remind the suspect what they are entitled to do. For example, at first appearance in the magistrates' court in England and Wales, defendants still have the right to remain silent, legal representation, interpretation, to plead guilty, not guilty or express no plea, all of which should be explained to them. If a person does not have a lawyer on arrival, it is invariably the court usher and/or legal adviser and/or prosecutor who explain these rights to the defendant, but there is no obligation upon them to do so. Continuing the example, appearing before a magistrate, the defendant must be asked whether his representative (if he has one) has explained the nature of the charge to him and that he can obtain credit from a guilty plea were he so to plead. Whilst article 2 of the Proposal suggests the suspect must be informed at these stages, the subsequent articles do not in our view sufficiently allow for this process.

14. The competent authority will also change according these stages. We consider it necessary to define competent authorities for legal certainty. A suggested definition could be:

> Competent authority shall include, but not be limited to, police and investigatory authorities, prosecutors, magistrates, and judges.

Article 3 – The right to information about rights

15. Article 3 sets out that information about rights should be provided. We consider it important for the article to clarify *how and by whom* this should be done. The way article 3(1) has been drafted suggests that the information will only be provided in writing. It was made clear in *Panovits*, who was a juvenile, that in order to be effective, the authority must ensure that the suspect understands their rights. This was reiterated in *Plonka v Poland*[27] where the suspect's vulnerability, due to being an alcoholic and having drunk prior to arrest, had to be taken into account when apprising her of her rights.

16. The duty to apprise suspects of their rights, particularly where vulnerable, is not discharged simply by producing a letter of rights as this will not be sufficient to ensure that the right is understood. There is also a danger that authorities will simply rely on

[27] *Plonka v Poland,* App. no. 20310/02 (judgment 31 March 2009) (ECtHR), para 38

the letter of rights as an adequate method of notification, which is borne out by recent research.[28] The letter of rights is a simple mechanism to ensure that essential rights are communicated. It should not aim to include all the procedural rights a suspect has under national law as this would make it a very complex document.[29] Authorities must explain the rights orally, *and* provide a letter of rights on which the rights are recorded to discharge their obligation effectively. The Explanatory Memorandum observes this at paragraph 16,[30] but paragraph 22 then states that information should be given orally *or* in writing. In order to distinguish between article 3 and article 4 (where the right to *written information about arrest* is specified), in our view, article 3(1) should be amended to read as follows:

> Member States shall ensure that any person who is suspected or accused of having committed a criminal offence is told promptly what his procedural rights are in simple and accessible language.

17. Furthermore, it is necessary for the article to indicate that the authority must ensure, so far as is practicable, that the suspect understands the rights that have been explained. Article 4(3) provides that where the suspect is a child, the information in the letter of rights must be provided orally in a manner adapted to their age and capacity. This indication ought to be present in article 3.

18. Article 3(2) provides the minimum rights that must be included in the information provided. These rights are phrased as if they relate to the point of initial arrest and detention. Further to paragraph 12 above, we consider it necessary for the sub-article to indicate that these minimum rights apply throughout the proceedings. This is possible by replacing the word 'arrested' with 'detained', since the right to be brought promptly before a court applies throughout detention pending conviction.[31]

19. We welcome the minimum rights set out in article 3(2). Distinctly absent from this list, however, is the right to remain silent. Since almost all member states afford the right

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[28] See interviews conducted with defence lawyers across member states which have a letter of rights in Spronken (2010), pp 37-39

[29] The Roadmap asserts in Measure B that a person suspected of a crime should get information on their *basic* rights in writing

[30] See note 1 above

[31] Article 5(3) as interpreted in *Wemhoff v Germany*, App. no. 2122/64 (judgment 27th June 1968) (ECtHR); (1968) 1 EHRR 55

to remain silent,[32] and already include it in written information[33] we consider that the rights here should include this crucial safeguard. The right should also be listed in the letter of rights pursuant to article 4 below.

Article 4 – The right to information about rights on arrest

20. The provision of a letter of rights will make it far easier for suspects to understand, recall and assert their rights whilst in custody and prior to receiving the assistance of a lawyer and we welcome the provision for this in article 4.

21. Whilst the article states that a person arrested in the course of criminal proceedings shall be promptly provided with a letter of rights, it is not clear how this will practically apply. Clearly police officers will be unable to carry multiple language versions of these letters with them when they are on patrol. 'Arrest' is also a term which may preclude suspects receiving this letter until a later stage in some member states (for example, 'arrest' in Scotland occurs only after 6 hours of detention). Practically in our view, the letter of rights must be made available immediately upon the suspect being brought to a police station. Because there may be some delay in arrival at the police station, the duty we suggest must apply in article 3 to orally inform the suspect of their rights, is all the more important.

22. The acknowledgment in article 4(3) that language, age and other vulnerabilities may prevent comprehension of the letter is equally welcome. In these circumstances the suspect should be accompanied by an interpreter and/or an appropriate adult as necessary. The article should require the competent authority to furnish these individuals with the letter of rights to enable them to assist the suspect effectively.

23. Since the annexes provide only model letters of rights, we believe it is appropriate for the EU model to replicate the model provided in the *EU–Wide Letter of Rights in Criminal Proceedings* project. The information contained in the model is the result of detailed research, considering many letters of rights in operation across the EU together with the jurisprudence of the ECtHR, and other international human rights

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[32] Save for France and Luxembourg, Spronken (2009), p 97 (Malta not replying)

[33] Save for Belgium, Ireland, Italy, Latvia, Slovakia and Sweden, Spronken (2010), p 22

standards.[34] Furthermore, the majority of these rights are recognised to some extent in all member states in any event. If the EU is to strive for the improvement of procedural safeguards, presenting best practice in its fullest form in the Model letter of rights is an essential starting point.

24. The model for European arrest warrant cases in Annex II is right to replicate the content of the letter of rights and to explain the process of surrender under the scheme. However, we are concerned by the assertion in paragraph D that agreeing to surrender is a 'right' and should 'speed the process up'. Whilst this may be one consideration for the person deciding whether to consent to surrender, the primary consideration for them should be whether there are legitimate grounds for refusal. The length of time spent challenging a request should not influence a genuine reason to refuse. In our view, the sentence should be removed and the paragraph re-titled simply 'Surrender'. We do no think it is appropriate to couch consent to surrender in terms of a 'right', this is misleading and confusing in the context of the procedural safeguards phrased as 'rights' in the rest of the letter. We do welcome the recommendation of seeking the advice of a lawyer before deciding whether to surrender as this is crucial to any decision, but it should be followed by an explanation that there may be reasons why surrender is not appropriate in their case.

Article 6 – the right to information about the charge

25. The information that should be provided to a suspected person will vary according not only to the particular circumstances of the alleged offence, but the stage of the proceedings in issue. It may not be possible, or expedient, for investigating authorities to provide full details of the allegations at the time of arrest and interrogation, but by the time the matter is brought to court for prosecution proceedings to begin, full details will be available. Article 6 ECHR and the ECtHR's jurisprudence demonstrates that it is necessary to provide all the information upon which the prosecution intends to rely to the defendant at this stage, in order to ensure equality of arms and the preparation of an effective defence. This information will be more extensive than the indicative list in article 6(3) and include the evidence upon which the allegations are

[34] See chapters 3 and 4 considering the International Covenant on Civil and Political Rights, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN standard minimum rules for the treatment of prisoners, the European Prison Rules, and the Vienna Convention on Consular Relations.

based – witnesses, documents, photographs, forensic analysis. The instrument must make clear that the obligation to inform the suspect about the charge is ongoing throughout the proceedings. In doing so, article (3) should specify: 'The information to be given *at the time of arrest* shall include…' A new sub-article (4) should specify the ongoing duty to provide information as it is obtained.

26. The article does not specify *how* this information is to be communicated. For the same reasons that a letter of rights is necessary to ensure suspects understand their rights, in our view, the information about the charge must also be provided in writing as well as orally. This obligation is distinct from the article 7 right to access the case file, which may not be practical at the outset of the proceedings. It should entail a summary of the information upon which the suspicion is based in order for the suspect to begin to gain an appreciation of the allegations against them.

Article 7 – The right of access to the case file

27. As indicated above, and distinct to the obligation to inform the suspect of the nature of the charge against them, it is imperative that the suspect is able to review the evidence upon which the allegations are made. The Proposal refers to allowing 'access' to the case file. The Explanatory Memorandum expands upon this at paragraph 32, where it suggests that access should not be limited to a one-off inspection but where necessary further inspection should be granted and where voluminous, an index should be prepared to enable the suspect to decide which documents he wishes to see. In our view the proposal does not go far enough to enable effective quality of arms; if a suspect is to be able to fully prepare their defence, subject to any public interest immunity arguments, they must be given *all* material which the prosecution intends to rely upon at trial and evidence in favour of the suspect.

28. It is not clear why the Proposal does not oblige the member states to provide copies of the evidence in the case file to enable effective defence. Spronken's research indicates that 19 member states already provide written versions of parts of the case-file.[35] Notwithstanding our view that providing copies of the evidence is imperative, providing meaningful access to the case file without copying the materials is

[35] Spronken (2009) p 95: BE, BG, CY, DE, DK, FI, EL, IT, LV, LT, LU, NL, PL, PT, RO, SK, SE,SI,UK

practically onerous; the file must be made available to the suspect and/or his representative, requiring facilities in which to view it. Whilst it is being reviewed the investigating or prosecuting authorities cannot use it. If the file is complex, many visits to review it will be necessary. It will be very difficult for the suspect and their representative to remember the information contained in the file. Where there are photographs and forensic analysis it will be impossible to take accurate notes. Even a small file will require the taking of lengthy notes which will cost a disproportionate amount of money, irrespective of whether the suspect has received legal aid or is paying privately. By copying the evidential parts of the file (i.e. the non-sensitive material) these practical disadvantages can be avoided.

Article 8 – Verification and remedies

29. Whilst we welcome the Proposal's attempt to ensure the rights provided are enforced, the mechanism suggested for doing so is very vague. In order to accord with the subsidiarity principle, we understand that it is not possible to specify detailed procedural requirements. Nevertheless, the Explanatory Memorandum provides a suggested route at paragraph 33 where it proposes a form for the suspect to sign or a note in the custody record. We would suggest that requiring a signed statement that the suspect has received *and understood* their rights is the most sensible mechanism of verifying notification. The previous proposal for an instrument on procedural safeguards included at article 14(4):[36]

> Member States shall require that both the law enforcement officer and the suspect, if he is willing, sign the Letter of Rights, as evidence that it has been offered, given and accepted. The Letter of Rights should be produced in duplicate, with one (signed) copy being retained by the law enforcement officer and one (signed) copy being retained by the suspect. A note should be made in the record stating that the Letter of Rights was offered, and whether or not the suspect agreed to sign it.

[36] Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union COM(2004) 328 final

If member states accept the introduction of a letter of rights as necessary we do not consider an instruction such as the above to interfere disproportionately with domestic procedure. It is also appropriate to suggest in the Preamble that notification about charges and disclosure can be verified by a signed statement of the suspect, since Recital 22 currently simply replicates article 8(3).

30. Equally, article 8(2) simply asserts the right to an effective remedy where the suspect is not notified of their rights. The ECtHR has often grappled with what an effective remedy for breach of an article 6 right might entail but has held that admission of evidence obtained in breach may amount to unfairness on the facts of a particular case.[37] The Preamble should also assert in Recital 22 that an effective remedy could involve an admissibility hearing before a judge and the opportunity to appeal.

Article 9 – Training

31. We welcome the provision on training in the Proposal since this is essential to ensure that authorities are aware of their obligations to ensure rights are effectively provided for. The training will need to ensure that authorities understand the value of these rights, a problem evident in Spronken's research,[38] know how to make sure the rights are understood, and are able to recognise signs of vulnerability and language difficulties. Where suspects do not speak the national language and are provided with a letter of rights, it will be necessary to ensure that officers are familiar with the format of those forms so that they can respond to any consequential request from the suspect. This would be aided by ensuring that all rights are numbered uniformly in the letters irrespective of language. Training will also have to encompass an assessment for disclosure officers on what information must be made available to the defence. The Directive should list these training requirements.

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[37] *Schenk v Switzerland*, App. no. 10862/84, (judgment 12th July 1988) (ECtHR); (1988) 13 EHRR 242 at paras 46-48 but see *Salduz v Turkey,* App. no. 36391/02, (judgment 27th November 2008) (ECtHR, GC); (2009) 49 EHRR 19 where a systemic rule preventing interview with legal representation and subsequent reliance on that evidence irretrievably prejudiced the fairness of the trial

[38] Spronken (2010), p 41