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COMMISSION STAFF WORKING DOCUMENT
SUMMARY OF THE IMPACT ASSESSMENT

accompanying the

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
on the right to information in criminal proceedings

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COMMISSION STAFF WORKING DOCUMENT

SUMMARY OF THE IMPACT ASSESSMENT

1. POLICY CONTEXT AND PROCEDURE

To increase mutual trust, and thus improve the operation of mutual recognition, in November 2009 the European Council adopted the Roadmap on Procedural Rights¹ setting out a step-by-step approach to strengthening the rights of suspects and accused persons:

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| Measures currently envisaged in the Roadmap: |
| Measure A: Translation and Interpretation |
| Measure B: Information on Rights and Information about the Charges |
| Measure C: Legal Advice and Legal Aid |
| Measure D: Communication with Relatives, Employers and Consular Authorities |
| Measure E: Special Safeguards for Suspected or Accused Persons who are Vulnerable |

This Impact Assessment covers Measure B which aims to improve the situation of suspects by ensuring that they receive information about their rights and the case against them in criminal proceedings.

The Impact Assessment is broadly empirical: stakeholders were consulted on several occasions, such as Justice Forum meetings in 2008 and 2009. Recent academic studies have also fed into the IA.

2. THE PROBLEM

2.1. Insufficient information in criminal proceedings

Access to information for suspects and accused persons is a key factor in ensuring fair proceedings. Suspects cannot be presumed to have enough knowledge of their rights (such as the right to legal advice) at the time of arrest to enable them to make effective use of these rights. Provision of information on rights is the gateway to accessing all rights. An accused person also needs to know in detail the case against him and what evidence there is in order to prepare his defence.

Suspects and accused persons do not always receive this information. Member States have different systems for transmitting information; and some is not transmitted at all in some Member States. For instance, in 4 Member States there is no legal obligation to inform a suspect of the right to legal advice and only in ten Member States is a suspect informed about his rights by means of written notification (Letter of Rights). Law and practice vary considerably from one Member State to another as regards information about the case: a written summary may be given or the accused's lawyer may be granted access to the case-file

¹ OJ C 295, 4.12.2009, p. 1.

and may take copies of the relevant parts. In 3 Member States there is no access to the case file and even in those Member States that provide for such access the stage in proceedings at which this is granted varies significantly.

2.1.1. Adverse effects on criminal proceedings and judicial cooperation

Where suspects are not adequately informed, criminal proceedings may be unfair and this can lead to unnecessary costs owing to protracted proceedings, appeals and aborted prosecutions in the Member State where the proceedings take place.

Insufficient information can lead to problems and costs in other Member States where a court in the Member State in which the original criminal proceedings take place seeks cooperation from other Member States. EU instruments to facilitate judicial cooperation between Member States (such as European Arrest Warrant – EAW) rely on the principle of mutual recognition, i.e. the enforcement of a court decision in another Member State without any further review of the decision. Such quasi-automatic recognition requires trust between judges and courts. Where this trust is wanting, mutual recognition will not work; protracted proceedings and delays in the execution of a foreign judicial decision with associated costs will ensue. In a recent UK case allegations that a suspect had been given insufficient information in proceedings in the Member State which had issued an EAW for that person's surrender, are likely to have contributed to surrender proceedings taking more than a year and involving several appeals to higher courts and an application to the European Court of Human Rights with significant cost implications.

2.1.2. Existing legal standards do not offer adequate protection

Currently, there are no sufficiently high and adequately enforced standards. Whilst minimum rights are laid down in the European Convention on Human Rights (ECHR), stakeholders agree that the ECHR and its enforcement mechanism do not, in all cases, offer sufficient protection in relation to the provision of adequate information on rights and charges in particular. This is due to the fact that rights to information under Arts 5 and 6 ECHR does not go far enough and applications to the European Court of Human Rights may take years to be decided and only lead to an *ex post* remedy of limited effectiveness.

2.2. Rebalancing EU justice policy and promotion of free movement of EU citizens through strengthening of fundamental rights

Whilst various measures have been taken at EU level to guarantee a high level of safety for citizens (such as the introduction of the EAW), no measures on fair trial standards could be agreed in the past. By adopting the Procedural Rights Roadmap in November 2009, the Council acknowledged the urgent need to take action to strengthen suspects' procedural rights in the EU. The Roadmap paves the way for EU action ensuring fundamental rights protection beyond that offered by the ECHR. This would also give a specific EU meaning to the fair trial safeguards enshrined in Arts 47 and 48 of the Charter of Fundamental Rights of the EU and also contribute towards removing real or perceived obstacles to free movement of citizens as guaranteed by Art 21(2) TFEU.

2.3. Current and prospective scope of the problem

Whilst data on the number of proceedings in which lack of information is complained about is not available, stakeholders report that the problem of insufficient information, whilst not endemic, is acute and not limited to specific Member States. Mutual trust between Member States' judicial authorities is expected to remain at the current insufficient level as it is likely

that instances of Member States' authorities failing to provide suspects or accused persons with information recur. As increased movement of citizens between Member States will lead to a greater need for judicial cooperation and as further EU judicial cooperation measures will have to be implemented and applied in the near future, the need to improve mutual trust will become even more urgent.

2.4. The EU's power to act

Under Art 82(2)(b) TFEU, minimum rules concerning the rights of individuals in criminal proceedings may be adopted by means of directives to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and judicial cooperation in criminal matters having a cross-border dimension. As there are currently wide differences between Member States in terms of the provision of information, it is unlikely that Member States acting individually would be able to establish a sufficiently high standard of provision of information across the EU; this can only be achieved by action taken at EU level.

3. OBJECTIVES

| | | |
|---------------------|--|--|
| General: | <p>To improve judicial cooperation by restoring mutual trust between Member States in the fair operation of the criminal justice systems</p> <p>To ensure a high level of protection of fundamental rights in criminal proceedings, thus fostering free movement of EU citizens throughout the EU</p> | |
| Specific: | <p>To facilitate execution and enforcement of judicial decisions in criminal matters by ensuring that suspects receive sufficient information on their rights, preferably in writing, for them to exercise effectively their defence rights</p> | <p>To facilitate execution and enforcement of judicial decisions in criminal matters by ensuring that accused persons receive sufficiently detailed information on the case against them in order to enable them adequately to prepare their defence or challenge pre-trial decisions</p> |
| Operational: | <p>Information provided to suspects on their fair trial rights should:</p> <ul style="list-style-type: none"> • be in clear language which will be easily understood by the suspect • be provided at first contact with the police • include core rights under the ECHR and CFREU which are applicable on arrest, first interrogation and during detention • be provided in such a way that it is possible to verify that the information has been transmitted | <p>Information provided to accused persons on the charge or accusation should:</p> <ul style="list-style-type: none"> • be sufficiently detailed to allow adequate preparation of the defence or challenge of pre-trial decisions • be provided in a timely fashion and in such a way that the accused understands the case against him • be provided in such a way that it is possible to verify that the information has been transmitted |

4. POLICY OPTIONS AND THEIR IMPACT

- **Retention of the status quo:** This option would involve taking no action at EU level.
- **Policy options A addressing the problem of suspects not always receiving adequate information about rights:**

Non-legislative action:

- **Policy option A1:** EU-wide information campaign on minimum defence rights
- **Policy option A2:** Council Recommendation on good practice on informing suspects and accused persons of their rights

EU legislative action:

- **Policy option A3:** EU-wide duty to inform suspects about their rights by means of Member States' choosing
- **Policy option A4:** EU-wide duty to inform suspects under arrest about their rights by means of a Letter of Rights to be drafted by Member States, containing a common minimum set of rights (ECHR rights and EU law), with Member States to add further rights available under their own legislation
- **Policy option A5:** EU-wide duty to inform suspects under arrest about their rights by means of a Letter of Rights which includes standard EU-wide formulations of minimum rights as set out in an Annex to the Directive

Policy options B addressing the problem of accused persons not always receiving adequate information about the case against them promptly, in detail and in a language they understand:

Non-legislative action:

- **Policy option B1:** Council Recommendation on good practice and training on informing accused persons of the case against them.

EU legislative action:

- **Policy option B2:** EU-wide duty to inform accused persons about the case against them by means of Member States' choosing
- **Policy option B3:** EU-wide duty to inform accused persons of the case against them including granting them (or their lawyer) access to the case-file

5. COMPARISON OF POLICY OPTIONS

The tables below set out a comparison of the relative rating of the policy options against the specific and operational objectives. The options are classified according to their potential to meet the objectives defined in part 3. Ratings for expected effectiveness in achieving the objectives are given equal weight in the final sum.

Options A5 and B3 demonstrate the highest potential and are therefore preferred options.

Table 5.1 - Comparison of ratings of policy options A:

| Objectives/cost | Status quo | A1 | A2 | A3 | A4 | A5 |
|---|------------|----|----|-----|------|-------|
| To ensure that suspects receive sufficient information to be able to exercise them efficiently | 0 | √ | √√ | √√√ | √√√√ | √√√√√ |
| To provide information in clear language which will be easily understood by the suspect | 0 | √ | √√ | √√√ | √√√√ | √√√√√ |
| To provide information at first contact with the police and include core rights under the ECHR and the CFREU which are applicable on arrest, first interrogation and during detention | 0 | √ | √√ | √√ | √√√√ | √√√√√ |
| To ensure a means of verifying that the information has been transmitted | 0 | √ | √ | √√ | √√√√ | √√√√√ |
| To improve Member States' confidence in the fair operation of the criminal justice systems throughout the | 0 | √ | √ | √√ | √√√√ | √√√√√ |

Table 5.1 - Comparison of ratings of policy options A:

| Objectives/cost | Status quo | A1 | A2 | A3 | A4 | A5 |
|--|------------|---|--|--|---|--|
| EU | | | | | | |
| Total score: | 0 | 5 | 8 | 12 | 20 | 25 |
| Financial burden per MS ² | - | 100.000 € - 10 million € (overall costs for EU) | <u>One-off set-up:</u> 0 € - 2.5 million € <u>Operational per year:</u> 0 € - 4.6 million € | <u>One-off set-up:</u> 0 € - 2.5 million € <u>Operational per year:</u> 5,000 € - 4.6 million € | <u>One-off set-up:</u> 15,000 € - 2.5 million € <u>Operational per year:</u> 5,000 € - 4.6 million € | <u>One-off set-up:</u> 5,000 € - 2.5 million € <u>Operational per year:</u> 5,000 € - 4.6 million € |
| Potential costs savings in MS in which criminal proceedings take place | - | low | low | low to medium | medium | medium to high |

Table 5.2 – Comparison of ratings of policy options B:

| Objectives/cost | Status quo | B1 | B2 | B3 |
|---|------------|----|-----|-------|
| To ensure that the accused receives sufficiently detailed information on the case to enable them adequately to prepare their defence or challenge pre-trial decisions | 0 | √√ | √√√ | √√√√√ |

² Range based on model calculation for those MS most likely to incur implementation costs due to current practice diverging from the one envisaged in the option. **Due to lack of available statistical data, figures on operational costs do not take into account the *current* level of operational costs so that the *added* financial burden of implementation of the option cannot be calculated with precision but can be expected to be a fraction of the indicative figure presented here.**

Table 5.2 – Comparison of ratings of policy options B:

| Objectives/cost | Status quo | B1 | B2 | B3 |
|--|-------------------|---|--|---|
| To provide information in a timely fashion, in such a way that the accused understands the case against him | 0 | √ | √√√ | √√√√ |
| To ensure a means of verifying that the information has been transmitted | 0 | √ | √√ | √√√ |
| To improve Member States' confidence in the fair operation of the criminal justice systems throughout the EU | 0 | √ | √√√ | √√√√√ |
| Total score: | 0 | 5 | 11 | 17 |
| Financial burden per MS ³ | - | <u>One-off:</u> 0 € - 2.6 million € <u>Operational:</u> 270,000 € - 21 million € | <u>One-off:</u> 0 € - 2.6 million € <u>Operational:</u> 1000,000 € - 30 million € | <u>One-off:</u> 9,000 € - 2.6 million € <u>Operational:</u> 270,000 € - 21 million € |
| Potential costs savings in MS in which criminal proceedings take place | - | low | low | medium |

³ The caveat in footnote 2 applies.

6. THE PREFERRED OPTION

The preferred option is a **combination of options A5 and B3**:

Adoption of a Directive which obliges Member States to ensure

- that suspects and accused persons under arrest are informed of their rights in the criminal proceedings by means of a Letter of Rights in a language they understand as drawn up by Member States containing a standard EU-wide formulation of the minimum fair trial rights as set out in an Annex to the Directive and, where available, further rights pursuant to Member States' respective laws, and
- that suspects and accused persons are informed of the case against them which has to include granting them (or their lawyer) access to the case file free of charge.

6.1. EU added value and proportionality of the preferred option

The preferred option creates new, EU-wide uniform duties (use of a Letter of Rights and access to the case-file). This harmonising effect marks the preferred option's effectiveness in ensuring the provision of adequate information and in promoting trust in the fairness of proceedings in other Member States. Whilst options A5 and B3 create new duties they do so only in relation to the core subject-matter of this measure: the right to information. They do not create new rights unrelated to the provision of information.

Both aspects of the preferred option are proportionate: although both are likely to require a number of Member States to introduce changes to their criminal procedure laws, there is no other effective means of ensuring that suspects receive comprehensive information.

6.2. Financial impact on Member States

The main financial impact of **option A5** is one-off set-up/inception costs incurred for the introduction of Letter of Rights schemes. These consist primarily of the costs of drafting the Letters, translating them and training police officers and, if necessary, prosecutors and judges. These costs are likely to range from 10,000 € to 2.5 million € per Member State (model calculations for Malta provide a range of 10,600 € - 70,000 € and for France of 655,000 € - 2.5 million €). It is likely that the actual costs will tend towards the bottom of the costs ranges. The effect of option A5 on operational costs per Member State depends primarily what information on rights is already provided to suspects and the time this takes. Budgetary implications on Member States already operating Letter of Rights schemes are likely to be minimal. For those that currently inform suspects orally about their rights, the effect on per case costs will depend on the level of detail of the oral information currently provided.

As for **option B3** most Member States will incur negligible one-off costs only when implementing the Directive, as they already allow access to the case-file. Thus, one-off costs for introducing access to the case file are expected only for those 3 Member States that currently do not provide for such a right. These costs are likely to result mainly from training police officers, prosecutors and judges and will range from 9,000 € to 2.6 million € per Member State. Whilst the precise impact of this option on operational costs cannot be predicted, it is likely that even for those 3 Member States that will have to introduce the right, the impact on operational costs will very limited.

7. MONITORING AND EVALUATION

Providing for a robust monitoring and evaluation mechanism is crucial to ensure that the rights envisaged are complied with in practice as well as in legislation. The Commission envisages carrying out a specific empirical study with emphasis on data collection 3-5 years into the implementation of the proposal to gain in-depth quantitative and qualitative insights into the effectiveness of the proposal. Once all Roadmap Measures are in place, it will be essential to evaluate each Measure in context as well as the efficiency of the Roadmap as a whole.