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NOTE

From:	Presidency
To:	Council
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Subject:	Proposal for a Directive of the European Parliament and of the Council on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings [First reading] = State of play

I. Background

1. On 30 November 2009 the Council adopted a Roadmap for strengthening procedural rights of suspects and accused persons in criminal proceedings (the Roadmap).¹
2. So far, three measures have been adopted on the basis of the Roadmap: Directive 2010/64/EU on the right to interpretation and translation,² Directive 2012/13/EU on the right to information,³ and Directive 2013/48/EU on the right of access to a lawyer.⁴

¹ OJ C 295, 4.12.2009, p. 1.

² OJ L 280, 26.10.2010, p. 1.

³ OJ L 142, 1.6.2012, p. 1.

⁴ OJ L 294, 6.11.2013, p. 1.

3. On 27 November 2013, the Commission submitted a package consisting of three legislative proposals in order to complete the roll-out of the Roadmap, as integrated in the Stockholm programme:

- a proposal for a Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings;⁵
- a proposal for a Directive on procedural safeguards for children suspected or accused in criminal proceedings;⁶ and
- a proposal for a Directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings.⁷

The last two proposals are accompanied by Commission recommendations.⁸

4. In June 2014, the JHA Council reached a general approach on the proposal for a Directive on procedural safeguards for children.⁹

5. The Italian Presidency started the work on the remaining two proposals: the Directive on the presumption of innocence and the Directive on legal aid. This note is concerned with the proposal on legal aid.

⁵ 17621/13 + ADD 1 + ADD 2 + ADD 3.

⁶ 17633/13 + ADD 1 + ADD 2 + ADD 3.

⁷ 17635/13 + ADD 1 + ADD 2 + ADD 3.

⁸ 17642/13 + 17643/13.

⁹ 10065/14.

6. The proposal for a Directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings refers to measure C of the Roadmap. It is closely linked to Directive 2013/48/EU on the Right of Access to a Lawyer.
7. The proposal aims to establish common minimum rules on the right to provisional legal aid for suspects and accused persons in criminal proceedings and for provisional legal aid and ordinary legal aid for requested persons in European arrest warrant proceedings, thereby rendering effective the right of access to a lawyer, as provided under Directive 2013/48/EU.

II. State of play

8. The Working Group on Substantive Criminal Law (DROIPEN) discussed the proposal on 25 July, 19 September, 21 October and 25 November 2014. CATS held an orientation debate on the draft Directive on 2 July 2014.
9. Among the issues that were examined in the course of those discussions, the following main elements seem to be provisionally endorsed by a majority of delegations at this stage:
 - provisional legal aid should be understood as an emergency mechanism of a temporary nature for access to legal aid, in the sense of state aided assistance by a lawyer;
 - when the person concerned has requested so, such assistance should be granted upon deprivation of liberty and in any event before questioning;
 - provisional legal aid should be provided until the person concerned is released or until a final decision on granting ordinary legal aid has become final;

- if the existing national system for granting ordinary legal aid ensures that the person concerned could receive state aided assistance by a lawyer in the early stages of the proceedings, namely upon deprivation of liberty in in any event before questioning, this should be considered as complying with the obligations imposed by this Directive with respect to provisional legal aid in criminal proceedings or in EAW proceedings;
- certain situations, which although temporarily interfering with the liberty of the person concerned, might not require effective exercise of defence rights and therefore might not result in activating the rights provided under this Directive, e.g. identification checks, preliminary questioning in the course of a random check which might provide indications for the opening of a criminal investigation, should not fall under the scope of the directive; this should be equally the case for certain investigative or evidence-gathering acts, such as taking blood samples, where the national law does not provide the right for a lawyer to attend such investigative or evidence-gathering acts;
- considerable doubts were raised by delegations on the need to keep Article 5(2) of the Commission proposal in the text; it was argued that the strictly ancillary role of the lawyer in the issuing Member State in EAW proceedings, namely to provide *"information and advice"* to the lawyer in the executing state, according to Article 10 of Directive 2013/48/EU does not entail a substantial need for ensuring such assistance through legal aid arrangements; consequently, delegations almost unanimously asked this provision to be deleted.

10. The scope of the Directive, and in particular the scope of the obligation to grant provisional legal aid, as provided under Article 4 of the Commission proposal will need further consideration at technical level. The present state of play of the discussions in this respect is as follows:

11. Some Member States would like the general scope of the Directive to be extended, thus covering also the right to ordinary legal aid of suspected or accused persons in criminal proceedings, which as a general rule could be made subject to an assessment of the means of the person (means test) and/or whether it is in the interests of justice (merits test) to provide legal aid, according to the applicable eligibility criteria in the Member State. It was also suggested that it should be always in the interest of justice to grant the right to legal aid to persons who are suspected or accused of having committed a serious offence.

12. On the other hand, several Member States were upholding the position that granting provisional legal aid for minor offences, such as minor traffic offences or minor public order offences, would be disproportionate and requested that those offences be excluded from the scope of the Directive. It is recalled that in accordance with the already adopted Roadmap instruments, referred to above, those are offences in relation to which the law of a Member State provides for the imposition of a sanction by an authority other than a court having jurisdiction in criminal matters or where deprivation of liberty cannot be imposed as a sanction.

13. Furthermore, some Member States were maintaining that in cases where only short term deprivation of liberty would be concerned (with reference to situations other than those referred to in paragraph 9), the Directive should allow for a possibility of having an assessment whether it would be proportionate to grant provisional legal aid, taking into account the complexity of the case, the seriousness of the alleged offence or the gravity of the potential penalty that could be imposed.

14. In view of the above, the Presidency is of the opinion that work on these issues should continue in order to examine more closely the possible implications of introducing certain adjustments in the scope of the proposed Directive.