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**NOTE**

From:	Presidency
To:	Delegations
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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 = Outcome of the 3rd trilogue (18 November 2015) and next steps

During the meeting of the FoP (DROIPEN) on 27 November 2015, the Presidency will inform delegations about the outcome of the third trilogue on the Legal Aid Directive that took place on 18 November 2015 in Brussels.

The rapporteur suggested to hold another trilogue in December to continue discussions on other issues than the scope of the Directive, in particular the provisions relating to the EAW. With a view to keeping the dialogue with the EP open, the Presidency is willing to hold this trilogue. In this respect a proposal for observations on Article 5 of the draft Directive to be submitted to the EP on behalf of the Council is found in the Annex.

Delegations are invited to present their views on this proposal.

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**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**

<b>Commission proposal (doc. 17635/13)</b>	<b>Council GA (doc. 6603/15)</b>	<b>Orientation vote LIBE (A8-0165/2015)</b>	<b>Observations Presidency</b>
<b>Article 5</b>			
<b>Legal aid for requested persons</b>	<b>Provisional legal aid and ordinary legal aid in European arrest warrant proceedings</b>	<b>Legal aid for requested persons</b>	
	<b>0a. The executing Member State shall ensure that, as long as a final decision on ordinary legal aid has not been taken in accordance with paragraph 1, requested persons have the right to provisional legal aid in accordance with Article 4(2), 4(3), 4(4a) and 4(5) of this Directive, which shall apply <i>mutatis mutandis</i> to European arrest warrant proceedings in the executing Member State upon arrest pursuant to a European arrest</b>		

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	warrant.		
	<b>0b. Member States shall ensure that provisional legal aid is provided to the extent necessary to allow requested persons to effectively exercise their right of access to a lawyer under Directive 2013/48/EU, in particular having regard to Article 10(2) thereof.</b>		
1. The executing Member State shall ensure that requested persons have the right to legal aid upon arrest pursuant to a European arrest warrant until they are surrendered, or, in cases of non-surrender, until the decision on surrender has become final.	1. The executing Member State shall ensure that requested persons have the right to <b>ordinary</b> legal aid upon arrest pursuant to a European arrest warrant until they are surrendered, or, in cases of non-surrender, until the decision on <b>non</b> -surrender has become final.	1. The executing Member State shall ensure that requested persons have the right to <i><b>provisional and ordinary</b></i> legal aid, <i><b>once a European arrest warrant has been issued</b></i> until they are surrendered, or, in cases of non-surrender, until the decision on surrender has become final. <b>(AM. 42)</b>	Further to the latest discussion with the EP on this issue, the Council acknowledges the possible margin for reaching a common understanding with the EP regarding the kick off moment of the right to legal aid in EAW proceedings. Notably, "upon arrest", which is also in line with Article 10 (1) of Directive 2013/48/JHA, providing for the right to access to a lawyer in the same circumstances. In this respect, the Council would like to recall the arguments on this issue presented in the documentation submitted to the EP in view of the first trilogue. <i>("Extending the scope of this provision to an earlier moment in time - "once a EAW has been issued" raises substantial concerns from legal and practical perspective. It could be understood as giving rise to a right to legal aid in the executing MS even before the warrant is forwarded to that State. In cases where the</i>

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			<i>physical location of the person concerned is unknown and an alert for the requested person is issued in the Schengen Information System, there is not even a potential executing state yet identified at that early stage.")</i>
2. The issuing Member State shall ensure that requested persons, that exercise their right to appoint a lawyer in the issuing Member State to assist the lawyer in the executing Member State, according to Article 10 of Directive 2013/48/EU, have the right to legal aid in that Member State for the purpose of the European arrest warrant proceedings in the executing Member State.	[deleted]	2. The issuing Member State shall ensure that requested persons, that exercise their right to appoint a lawyer in the issuing Member State <b><i>and in any other Member State where evidence-gathering or other investigative acts are being carried out by the competent authorities,</i></b> according to Article 10 of Directive 2013/48/EU have the right to <b><i>provisional and ordinary</i></b> legal aid in that Member State for the purpose of the European arrest warrant proceedings in the executing Member State. (AM. 42)	<p>The Council maintains its position that the strictly ancillary role of the lawyer in the issuing Member State in EAW proceedings, namely "<i>to assist the lawyer in the executing state by providing information and advice</i>", as provided under Article 10 of Directive 2013/48/EU is not entailing a substantial need for ensuring such assistance through legal aid arrangements.</p> <p>In this respect, a distinction is made between the defence lawyer in the issuing state, who would ensure legal assistance and advice to the suspect or accused person in the course of the criminal proceedings once he is surrendered to the issuing State and the lawyer who might be appointed in the issuing state according to Directive 2013/48/EU only for the purposes of the execution of the EAW in the executing state. The appointment of the defence lawyer would be thus covered by the generally applicable legal aid arrangements in the issuing state - the place where the criminal proceedings are taking place.</p> <p>Furthermore, a number of practical issues would arise, if such a proposal would be introduced, e.g. how the payment of the two lawyers would be claimed and organised, how the cost should be distributed (the</p>

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			<p>assistance is provided in any event for the purposes of the execution of the EAW in the executing State), how the communication between the 2 legal aid authorities, on the one hand and with the person concerned on the other would be organised, and if ordinary legal aid is involved, how the timing necessary to assess the eligibility of the person for legal aid in the two MSs should be coordinated in order to make the right to legal aid effective, etc.</p> <p>Similarly, the Council maintains its position as regards the proposed extension of the right to legal aid of the requested person to which s/he would be entitled in "any other MS where evidence-gathering or other investigative acts are being carried out".</p> <p>Based on the understanding that the effects of the EIO should also be taken into account when providing for legal aid, the EP proposal seems to address a very specific situation where a requested person under EAW should have a right to legal aid for the purposes of execution of the EAW not only in the issuing, but also in third Member States in very specific circumstances - "where evidence-gathering or other investigative acts are being carried out". The Council raised already concerns related to the consistency with the scope of Article 10 of Directive 2013/48/EU and the right to access to a lawyer stemming from it. In this respect it should be also noted that in the absence of EU minimum rules providing for the right to access to a lawyer in the context of EIO proceedings, the right to</p>

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			<p>legal aid would be only applicable insofar as the national legislations provide for specific rules for access to a lawyer in these circumstances.</p> <p>There is also a number of specific issues that might arise in terms of the implementation of such a provision that in the Council's view might actually impede the effectiveness of the proceedings. Some of those issues were already mentioned in relation to the appointment of a lawyer in the issuing state.</p> <p>Another group of issues of legal and practical nature are linked to the EIO proceedings. In principle in order for the person concerned to be in a position to exercise his defence rights, he should be aware that an EIO has been issued in the margins of criminal proceedings in which he is suspected or accused of having committed a crime. In some cases, where this would undermine the need to ensure confidentiality of an investigation, the suspect or accused persons are not informed immediately about the investigative and evidence gathering acts that are carried out (see Art. 14 (3) in relation to Article 19 (1) of Directive 2014/41/EU (EIO). It is not clear how this aspect should be taken into consideration in light of the EP position?</p> <p>Furthermore, it is difficult to establish on the basis of the EP proposal how the complexity of the proceedings involved should be managed:</p> <ul style="list-style-type: none"> <li>- would the EAW or EIO proceedings have a priority and how should it be determined?</li> <li>- how the surrender of the person would be organised if his presence would be required for the execution of the</li> </ul>

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			<p>EIO in the third MS (for example where a temporary transfer to the executing state of EIO of the person held in custody would be required under Article 23 of Directive 2014/41/EU)? In such a case who would bear the cost of the surrender proceeding?</p> <p>- what would be the link in very practical terms between the EIO proceedings in a third State with the execution of EAW in the executing State, for the purposes of which the requested person would be entitled to a lawyer providing legal aid also in this third State (the executing State of the EIO).</p> <p>The EP proposal makes it possible that only for the purposes of the execution of the EAW the person concerned might have three lawyers appointed in three different MSs. Once again none of those three lawyers would necessarily be the defence lawyer of the person in the underlying criminal proceedings, for the purposes of which his surrender is requested, or for the purposes of which the EIO is issued. In this sense, the Council is not convinced that such a solution would provide for enhanced guarantees of the defence rights of the person concerned.</p>
3. The right to legal aid referred to in paragraphs 1 and 2 may be subject to an assessment of the means of the requested person and/or whether it is in the interests	3. The right to <b>ordinary</b> legal aid referred to in paragraph 1 (...) may be subject to an assessment of the means of the requested person and/or whether it is	<i>3. The assessment of the application for ordinary legal aid submitted by the requested person shall be based on the eligibility criteria as laid down in</i>	

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of justice to provide legal aid, according to the applicable eligibility criteria in the Member State in question.	in the interests of justice to provide <b>ordinary</b> legal aid, according to the applicable eligibility criteria in the <b>executing</b> Member State.	<i>Article 4a, namely an assessment of the financial means of the requested person in Member States in which legal aid is subject to a means test and/or of whether it is in the interests of justice to provide legal aid in the case in question in Member States in which legal aid is subject to a merits test. .(AM. 42)</i>	