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**Introduction**

On 18 February 2016, the fifth trilogue with the European Parliament and the Commission took place. The discussions focussed on Articles 5, 4b (which should probably find its place after Article 5), 5a and 5b, and were conducted on the basis of the proposals that the Presidency had submitted following the meeting of the Friends of the Presidency on 12 February 2016.

During the trilogue, it appeared that the European Parliament had not had time enough to duly examine the proposals on Articles 4b, 5a and 5b as submitted by the Presidency. Therefore, it was agreed to hold another trilogue on the basis of the same documentation as for the fifth trilogue. This sixth trilogue was held on 3 March 2016.

During the trilogue, some texts emerged that could possibly form the basis for a compromise between the co-legislators. These texts are set out in the Annex. The Presidency underlined very clearly to the European Parliament that any firm position on these texts is subject to consultation of the Council Working Party.

## **Explanations and Questions**

### **Article 5 : Legal aid in European arrest warrant proceedings**

#### *General observation:*

The references to "provisional" and "ordinary" legal aid have been put in brackets, awaiting a more general discussion on this issue as regards the entire Directive. The Presidency intends to have such discussion at a next meeting of the Friends of the Presidency.

#### *Paragraph 1 (legal aid for the lawyer in the executing State):*

During the fourth trilogue, the rapporteur had indicated that the EP could possibly accept the text as proposed by the Council, provided the Council would accept an explicative recital, of which the text had yet to be determined. The rapporteur has now provided such a text, see the footnote under Article 5(1).

The rapporteur explained that the aim of the recital is to ensure that the text of Article 5(1), in particular the words "upon arrest", will not create a precedent for the other Articles, since legal aid in criminal proceedings should, according to the EP, not only become available "upon arrest", but already earlier and at other moments.

The Presidency considers that the recital as proposed is not harmful and could be accepted, because - in view of its nature and its content - it does not set any concrete obligations.

**Question A: Member States are invited to indicate if they can accept the text of Article 5(1) with the accompanying recital.**

*Paragraph 2 (legal aid for the lawyer in the issuing State):*

The Presidency presented to the EP the objections of the Council about the necessity of providing legal aid to the lawyer in the issuing State, underlining that the role of the lawyer in the issuing State is ancillary to that of the lawyer in the executing State.

The Rapporteur, supported by COM, insisted however that legal aid for the lawyer in the issuing State should be kept, in order to render effective the right of suspects and accused persons to appoint a lawyer in the issuing State, as set out in Article 10 of Directive 2013/48/EU.

With a view to reaching a compromise, a new text proposal was drafted in which it is said that legal aid should (only) be provided in the issuing Member State "insofar such aid is necessary to ensure effective access to justice". These words, which have directly been taken from Article 47(3) of the Charter, introduce a sort of merits-test, which is made clearer in the accompanying recital, where it is said that "*This could be the case when the lawyer in the executing Member State cannot fulfil his or her tasks as regards the execution of a European arrest warrant effectively and efficiently without the assistance of a lawyer in the issuing Member State.*" Hence, the words "insofar such aid is necessary to ensure effective access to justice" create flexibility for the Member States in providing legal aid when they act as issuing Member States.<sup>1</sup>

The Presidency observes that the Charter has the same legal value as the Treaties, and that the Directive should anyway be applied in conformity with the Charter. Hence, whether the proposed text will be laid down in the Directive or not, it seems that the issuing Member States will have the obligation to grant legal aid when it is necessary to ensure effective access to justice.

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<sup>1</sup> During the trilogue, COM reserved its position on this drafting.

In view of the above, the Presidency hopes that the Member States can agree to the text proposed, and so allow that a compromise be reached on this important point.

**Question B: Member States are invited to indicate if they can accept the text of Article 5(2) with the accompanying recital.**

*Paragraph 3 (means test):*

This paragraph formerly made reference to both a means test and a merits test. It seems though that the reference to a merits test could be deleted, since all cases where a person has been arrested in view of the execution of a European arrest warrant can only concern serious offences as indicated in the list of Article 2(2) of FD 2002/584/JHA. Moreover, as regards legal aid in the issuing Member State, a sort of merits test is introduced in Article 5(2) with the words "insofar such aid is necessary to ensure effective access to justice".

In the light of the foregoing, the Presidency is of the view that the reference in paragraph 3 to a "means test" could be sufficient.

**Question C: Member States are invited to indicate if they can accept the text of Article 5(3).**

**Article 4b: Timely and diligent decisions by a competent authority**

The EP accepts the text of Article 4b as it stands with a reference to "competent authority". Please note, by the way, that at the request of some Member States in this Article a distinction is made between the decision on granting legal aid, and the decision on the assignment of a lawyer.

In the accompanying recital, the EP and COM would like to put that the competent authority, which takes decisions on granting legal aid, should be an "independent authority competent for taking decisions regarding legal aid, or a court, including a judge sitting alone". The Presidency had the impression, however, that in the past some Member States insisted on the possibility that also the police or the prosecution should be entitled to take decisions on granting legal aid.

For that reason, the Presidency suggested replacing "*which should be* an independent authority" by "*such as* an independent authority". The EP and COM, though, were not happy with that suggestion.

**Question D1: is it necessary or desirable that authorities other than independent authorities (including court and judges), such as the police or the prosecution, should also be able to take decisions on granting legal aid?**

**Question D2: for those Member States who would like to foresee the possibility that also the police or the prosecution should be entitled to take decisions on granting legal aid, what kind of decisions are taken by such authorities? Does such decision imply discretion going beyond the application of national law on mandatory assistance by a lawyer?**

**Question D3: is the text of Article 4b with the accompanying recital acceptable? Please specify if you can only accept the recital with the words "such as", or also with "which should be".**

#### **Article 5a (new): Quality of legal aid services and training**

Paragraph 1: the text refers to the quality of legal aid services, including "funding", in a rather neutral manner. In the view of the Presidency, the paragraph in its current form is acceptable, and the Presidency hopes that Member States will consider the same.

Paragraph 2 is modelled on Article 19(1) of the children Directive.

Paragraph 2a is modelled on Article 19(3) of the children Directive. The last words ("*thus contributing to the effective exercise of the rights of the defence*") could also be put in a recital.

Paragraph 3 is basically the same as discussed during the Working Party of 12 February. The term "duly justified request" confines power on the competent authorities to examine whether a request to replace a lawyer providing legal aid services is justified in the circumstances of the case.

[NB: an alternative drafting has been provided in a footnote under Article 5a(3)(a)]

**Question E: Member States are invited to indicate if they can accept the text of Article 5a.**

### **Article 5b (new): Remedies**

The rapporteur prefers to put all elements on "remedies" together in this Article. This seems to be acceptable.

The word "challenge", which has been copied from Articles 2(5) and 3(5) of Directive 2010/64/EU on the right to interpretation and translation, aims at providing flexibility as regards the precise form of the remedy (for instance, "appeal" seems too narrow). Both rapporteur the Presidency were keen on the possibility that decisions can ultimately be reviewed by a court.

In an explicative recital, the rapporteur would like to lay down that a refusal of legal aid should be interpreted as including the situation where the person in question has not been adequately informed of his right to legal aid. In the view of the Presidency, this is acceptable, but it seems appropriate to include this in a broader recital which also gives some further explanations of a procedural nature: indeed, it seems useful to indicate that Member States could provide that, before submitting their case to a court, the persons concerned should firstly be obliged to follow a procedure, e.g. of an administrative nature, and lodge a complaint within the authority that has taken the contested decision, or which should have taken a decision but has failed to do so.

**Question F: Member States are invited to indicate if they can accept the text of Article 5b, together with the accompanying recital by the Presidency.**

**Article 2(1c) and 5bis: additional proposals by the rapporteur to deal with certain investigative measures in the context of European Investigation Order proceedings**

The rapporteur would like to enlarge the scope of the Directive by providing that legal aid should be granted in certain specific cases where investigative or other evidence-gathering measures are carried out under Directive 2014/14/EU on the European Investigation Order. To that end, a new Article 2(1c) would refer to a new Article 5bis, in which some investigative or other evidence-gathering measures are listed in respect of which legal aid should be provided.

**Question G: Member States are invited to indicate what they think of the proposals of the rapporteur. Could they be acceptable?**

**Concluding remarks**

The Presidency hopes that delegations can show flexibility in respect of the above issues (in particular Articles 5, 4b, 5a and 5b). The Presidency considers that Articles 5, 4b, 5a and 5b, as they currently stand, should not pose a too big obstacle for Member States.

The Presidency recalls in this context that in order to reach an agreement, all parties will have to make compromises: in the view of the Presidency, it would be very helpful if from the side of the Council we could move on the points listed in this paper, which seem least problematic for us, so that we can be more firm on the other articles.

**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**

**Article 5 : Legal aid in European arrest warrant proceedings**

1. The executing Member State shall ensure that requested persons have the right to [provisional and ordinary] legal aid upon arrest pursuant to a European arrest warrant until they are surrendered, or, in cases of non-surrender, until the decision on **non-surrender** has become final. <sup>2</sup>
  
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, **in accordance with Article 10(4) and (5) of Directive 2013/48/EU**, have the right to [provisional and ordinary] legal aid in that Member State for the purpose of the European arrest warrant proceedings in the executing Member State, **insofar as such aid is necessary to ensure effective access to justice.** <sup>3</sup>

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<sup>2</sup> Accompanying Recital:

*Given the specificity of European arrest warrant proceedings, the interpretation of the provisions of this Directive relating solely to requested persons under Framework Decision 2002/584/JHA should take into account this specificity and not prejudice in any way the interpretation of the remaining provisions of this Directive.*

<sup>3</sup> Accompanying Recital:

*In European arrest warrant proceedings, requested persons should be entitled to [provisional and ordinary] legal aid in the executing Member State. In addition, requested persons, who exercise the right to appoint a lawyer in the issuing Member State in accordance with Directive 2013/48/EU, should have the right to [provisional and ordinary] legal aid in that Member State and funded by that State for the purpose of the European arrest warrant proceedings in the executing Member State, insofar as such aid is necessary to ensure effective access to justice, as stipulated in Article 47 of the Charter. This could be the case when the lawyer in the executing Member State cannot fulfil his or her tasks as regards the execution of a European arrest warrant effectively and efficiently without the assistance of a lawyer in the issuing Member State. Any decision as regards granting legal aid in European arrest warrant proceedings in the issuing Member State should be taken by an authority that is competent for taking decisions on legal aid in that State.*



3. The right to [provisional and ordinary] legal aid referred to in paragraphs 1 and 2 may be subject to an assessment of the means of the requested person (...), according to the applicable criteria in the Member State **in question**.<sup>4</sup>

**Article 4b: Timely and diligent decisions by a competent authority** (this new Article 4b should be placed after Article 5)

**Decisions on whether or not to grant legal aid, and the assignment of lawyers, shall be made without undue delay by a competent authority. Member States shall take appropriate measures to ensure that any such authority takes its decisions diligently, and in respect of the rights of defence.**<sup>5</sup>

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<sup>4</sup> This provision could be accompanied with a general or specific claw-back provision, allowing Member States to recover legal aid that has been unduly provided.

<sup>5</sup> Accompanying recital:

*Without prejudice to provisions of national law concerning the mandatory presence of a lawyer, decisions on whether or not to grant legal aid should be made without undue delay by a competent authority, **[which should be] [such as]** an independent authority competent for taking decisions regarding legal aid, or a court, including a judge sitting alone. Decisions on the assignment of lawyers should also be made without undue delay by such a competent authority, although the choice as to which **specific** lawyer should be assigned could also be left to, for example, a bar-association.*

## **Article 5a (new): Quality of legal aid services and training**

- 1. In order to ensure the effectiveness and quality of legal aid, and with due respect for the independence of the legal profession, Member States shall take the necessary action, including with regard to the funding of legal aid systems, to ensure that legal aid services are of a quality that is adequate to safeguard the fairness of the proceedings.<sup>6</sup>**
  
- 2. Member States shall ensure that adequate training is provided to staff involved in the decision-making on legal aid in criminal proceedings and in European arrest warrant proceedings.**
  
- 2a. With due respect for the independence of the legal profession and for the role of those responsible for the training of lawyers, Member States shall take appropriate measures to promote the provision of adequate training to lawyers providing legal aid services [thus contributing to the effective exercise of the rights of the defence<sup>7</sup>].**
  
- 3. Member States shall take necessary measures to ensure that suspects or accused persons in criminal proceedings, and requested persons in European arrest warrant proceedings,**
  - (a) have the right to have the lawyer providing legal aid services assigned to them replaced, upon their duly justified request;<sup>8</sup>**
  - (b) are informed in writing when their application for legal aid is rejected in part or in full.**

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<sup>6</sup> Accompanying recital:

*Where legal aid has been granted to a suspect or accused or requested person, one way of ensuring the effectiveness and quality of that legal aid is to facilitate continuity in legal representation for that suspect or accused persons. In that respect, Member States should facilitate continuity of legal representation throughout the criminal proceedings, including - where relevant - European arrest warrant proceedings.*

<sup>7</sup> These latter words could perhaps better be inserted in a recital.

<sup>8</sup> Alternative drafting:

*a) have the right, upon their request, to have the lawyer providing legal aid services assigned to them replaced, when this is justified in the circumstances of the case;*

## **Article 5b (new): Remedies**

**Member States shall ensure that suspects and accused persons in criminal proceedings, as well as requested persons in European arrest warrant proceedings, have an effective remedy under national law in the event of a breach of their rights under this Directive. Such a remedy shall include the right to challenge not only a decision refusing legal aid in full or in part, but also an undue delay in taking a decision on legal aid, before a court.<sup>9</sup>**

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<sup>9</sup> Accompanying recital (rapporteur):

*Wherever reference is made to refusal in full or in part of access to legal aid, it should be interpreted as including the situation in which suspects, accused or requested persons have not been adequately informed of their right to legal aid.*

Accompanying recital (Presidency suggestion, with insertion of text proposed by the rapporteur):

*Suspects and accused persons in criminal proceedings, as well as requested persons in European arrest warrant proceedings, should have an effective remedy under national law in the event of a breach of their rights under this Directive. Such a remedy should include the right to challenge, before a court, not only a decision refusing legal aid in full or in part, but also an undue delay in taking a decision on legal aid. A decision refusing legal aid includes the situation in which the person concerned has not been adequately informed of the right to legal aid. Member States could provide that such remedies be preceded by a procedure, for example of an administrative nature, under which the person concerned should firstly lodge a complaint with the authority that has taken the contested decision, or which should have taken a decision but failed to do so, before the person has the right to submit the case to a court.*

**Additional proposals by the rapporteur to deal with certain investigative measures in European Investigation Order proceedings:**

**Article 2**

**1(c) (new) suspects or accused persons subject to certain investigative measures carried out in accordance with Directive 2014/41/EU, as referred to in Article 5bis.**

**Article 5bis**

**In case of European Investigation Order proceedings, Member States where investigative measures are carried out, shall ensure that suspects or accused persons have, as a minimum, the right for legal aid during the following investigative or evidence-gathering acts:**

- (i) questioning, including by means of the specific investigative measures provided under Articles 22 and 23 of the Directive regarding the European Investigation Order in criminal matters;**
- (ii) identity parades;**
- (iii) confrontations;**
- (iv) reconstructions of the scene of a crime.**