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NOTE

From:	Presidency
To:	Working Party on Substantive Criminal Law
No. Cion doc.:	17635/13 DROIPEN 160 COPEN 237 CODEC 2931
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 examination of the text / Follow-up to CATS on 2 July 2014

I. INTRODUCTION

1. On 28 November 2013 the Commission submitted to the European Parliament and to the Council 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.¹²
2. The proposal refers to measure C of the Roadmap for strengthening procedural rights of suspected and accused persons in criminal proceedings³ and is closely linked to Directive 2013/48/EU on the right of access to a lawyer.⁴

¹ 17635/13 DROIPEN 160 COPEN 237 CODEC 2931 + ADD 1 + ADD 2 + ADD 3.

² IE and UK decided not to make use of the possibility to "opt-in" in the adoption of the proposed Directive, as referred to in Article 3 of Protocol (nr. 21) to Treaties; DK does not participate in accordance with Article 1 of Protocol (nr. 22) to the Treaties.

³ OJ C 295, 4.12.2009, p. 1.

⁴ OJ L 294, 6.11.2013, p. 1.

3. At its meeting on 2 July 2014, CATS held an orientation debate on the proposal in order to provide guidance to DROIPEN in view of its first meeting, which is scheduled to take place on 25 July 2014. In addition, 11 delegations (AT, BE, CZ, DE, FI, FR, IE, HU, NL, RO, SK) provided (provisional) written comments on the proposal.⁵
4. In the light of the orientation debate held at CATS, some of the issues raised by delegations are presented in more detail below under the section "*Specific Issues*".
5. During the meeting of DROIPEN, the Presidency intends to proceed to a first article-by-article examination of the text by taking into account the specific issues outlined below with a view to submitting drafting suggestions at the meeting in September. The necessary adaptations in the respective recitals will be discussed in conjunction with the running-order of the articles, where needed.

II. SPECIFIC ISSUES

1. Scope of the proposal

1.1. Minor offences

6. Several delegations in CATS requested to exclude minor offences from the scope of the Directive, as this has been done in the other Directives on procedural rights, most recently in Article 2(4) of Directive 2013/48/EU.⁶

⁵ 11477/14 DROIPEN 90 COPEN 185 CODEC 1553

⁶ **Article 2(4) of Directive 2013/48/EU reads as follows:**

"Without prejudice to the right to a fair trial, in respect of minor offences:

(a) where 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, and the imposition of such a sanction may be appealed or referred to such a court; or

(b) where deprivation of liberty cannot be imposed as a sanction;

7. The proposed Directive aims to ensure as a minimum rule that suspects or accused persons are in a position to exercise effectively their defence rights by providing them with access to provisional legal aid at least when they have been arrested, including for the purposes of surrender in EAW proceedings. It could be assumed that only a sufficiently serious offence would give rise to deprivation of liberty and that therefore minor offences fall outside the scope of the Directive.
8. Furthermore, the proposed Directive is closely linked to Directive 2013/48/EU, where under Article 2(4) minor offences are already excluded. Article 2(a) of the current proposal stipulates that the Directive shall apply to "suspects or accused persons in criminal proceedings, who are deprived of liberty and who have a right of access to a lawyer pursuant to Directive 2013/48/EU". It could therefore be concluded that the exclusion of minor offences applies already to the current proposal.

this Directive shall only apply to the proceedings before a court having jurisdiction in criminal matters.

In any event, this Directive shall fully apply where the suspect or accused person is deprived of liberty, irrespective of the stage of the criminal proceedings."

The accompanying recital 16 reads as follows:

"In some Member States an authority other than a court having jurisdiction in criminal matters has competence for imposing sanctions other than deprivation of liberty in relation to relatively minor offences. That may be the case, for example, in relation to traffic offences which are committed on a large scale and which might be established following a traffic control. In such situations, it would be unreasonable to require that the competent authorities ensure all the rights under this Directive. Where the law of a Member State provides for the imposition of a sanction regarding minor offences by such an authority and there is either a right of appeal or the possibility for the case to be otherwise referred to a court having jurisdiction in criminal matters, this Directive should therefore apply only to the proceedings before that court following such an appeal or referral."

The accompanying recital 17 reads as follows:

"In some Member States certain minor offences, in particular minor traffic offences, minor offences in relation to general municipal regulations and minor public order offences, are considered to be criminal offences. In such situations, it would be unreasonable to require that the competent authorities ensure all the rights under this Directive. Where the law of a Member State provides in respect of minor offences that deprivation of liberty cannot be imposed as a sanction, this Directive should therefore apply only to the proceedings before a court having jurisdiction in criminal matters."

9. *In view of the above, it appears that minor offences are de facto already excluded from the scope of the proposed Directive. The Presidency therefore invites delegations to consider whether it is really necessary to provide an explicit exclusion of minor offences in the Directive, or whether it would be sufficient to further clarify the link between the proposed Directive and Directive 2013/48/EU on the right of access to a lawyer in relation to minor offences.*

1.2. The concepts of "deprivation of liberty" and "questioning"

10. At CATS some delegations requested a clarification about the point in time from which the person should be entitled to a right of provisional legal aid.
11. As already explained, the proposal aims to provide effective exercise of the right of access to a lawyer at the early stages of the proceedings, where provisional legal aid should be made available without undue delay (i) after the deprivation of liberty and (ii) before the suspect or accused person is questioned, as provided under Article 4(2).
12. It seems that the interpretation of the notions of "deprivation of liberty" and of "questioning" would need further clarification. As for the first, a possibility could be to make reference to case-law of the Court of Human Rights on the interpretation of Article 5(1)(c) ECHR. In this respect recital 21 ⁷ of Directive 2012/13/EU on the right to information in criminal proceedings could also be considered.

⁷ **Recital 21 of Directive 2012/13/EU reads as follows:** "References in this Directive to suspects or accused persons who are arrested or detained should be understood to refer to any situation where, in the course of criminal proceedings, suspects or accused persons are deprived of liberty within the meaning of Article 5(1)(c) ECHR, as interpreted by the case-law of the European Court of Human Rights".

13. This means that certain situations do not fall under the scope of the Directive. More specifically, those would be situations which, although related to short-term interferences with personal freedoms 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, etc. In this respect, the Presidency suggests to consider recital 20⁸ of Directive 2013/48/EU on the right of access to a lawyer. The latter could be instrumental also in clarifying the notion of "questioning".
14. Another situation that might be examined in defining the concepts of "deprivation of liberty" and "questioning" is when the person did not appear before the court for questioning although he was under a legal obligation to do so and as a consequence he was escorted to the court by the police.
15. *The Presidency invites delegations to consider introducing certain adaptations in the text in line with the above observations.*

1.3. The concept of provisional legal aid

16. Some delegations in CATS stated that their existing national systems concerning legal aid would give adequate protection of the defence rights in criminal proceedings in compliance with the ECHR standards, also as regards *provisional* legal aid. As a consequence, they asked that account would be taken of their specific situations, so that they would not have to introduce new provisions in their national law on this point.

⁸ **Recital 20 of Directive 2013/48/EU reads as follows:** "For the purposes of this Directive, questioning does not include preliminary questioning by the police or by another law enforcement authority the purpose of which is to identify the person concerned, to verify the possession of weapons or other similar safety issues or to determine whether an investigation should be started, for example in the course of a road-side check, or during regular random checks when a suspect or accused person has not yet been identified."

17. The Presidency is of the view that it would be appropriate to allow for certain flexibility in the Directive in this respect. Therefore, a legal aid system that provides access to legal aid at the early stages of the criminal proceedings, namely before the questioning of the person upon arrest, should be sufficient. In other words, it would not be necessary to make available provisional (emergency) legal aid before the final decision on legal aid is taken, if the requirement to provide access to legal assistance upon arrest could be fulfilled through the actual decision on legal aid.
18. *In view of the above, delegations are invited to consider the possibility of introducing further clarification in the text on the scope of the obligation regarding the right to provisional legal aid under the proposed Directive. Specific drafting suggestions will be discussed in the following meeting.*

2. The principle of dual defence in EAW proceedings

19. In Article 5, the Commission proposes establishing rules on legal aid in relation to EAW proceedings following the rules as set up in Article 10 of Directive 2013/48/EU concerning the right of access to a lawyer in the executing and in the issuing Member States.
20. According to Article 5(2) of the proposal, when the requested person has exercised the right to appoint a lawyer in the issuing Member State, as provided under Article 10(4) of Directive 2013/48/EU, the issuing Member State has to ensure access to its legal aid system, if the requested person so wishes and subject to the specific eligibility criteria in the national law, for the purposes of the EAW proceedings in the executing Member State.

21. It is recalled that in accordance with Directive 2013/48/EU, the role of the lawyer in the issuing Member State in EAW proceedings is strictly ancillary and is limited to providing the lawyer in the executing Member State with "*information and advice*", e.g. on the law in the issuing Member State or the circumstances of the case (see Article 10(4) of Directive 2013/48/EU).
22. At CATS a number of delegations raised concerns as regards Article 5(2) of the proposal related to the practical implementation of the provision, as well as to the ensuing additional burden for the legal aid systems in the Member States. It was also felt that this might hinder the effectiveness of the EAW proceedings given the need to comply with strict deadlines for the execution of the requests.
23. Following the CATS meeting, the Presidency took informal contacts with the Commission to seek further clarification on this issue. The Commission submitted the following considerations:
- the EAW is the flagship of mutual recognition instruments and its proper functioning is crucial to ensure an area of freedom, security and justice in the EU. The Directive on access to lawyer provides for assistance by a lawyer in the issuing MS and it is a major component of the Directive.
 - it is of utmost importance that this lawyer can be paid by legal aid as otherwise the right to dual defence will risk not bringing effective assistance for requested persons, as they may not be able to exercise in practice their right to access to a lawyer.
 - the issuing MS should bear the costs for legal aid that is provided in the issuing Member State for assistance to the lawyer in the executing Member State. Since it has issued the EAW that would only be fair.

- concerning the practicalities of granting legal aid in the issuing MS in dual defence cases, this depends on the system in the MS. The granting of legal aid should of course not delay the proceedings. As it is a lawyer to lawyer contact that is at the basis of the dual defence, the legal aid application in the issuing MS can be made by the lawyer in the issuing MS. This issue can be further explored in the working party. The role of the lawyer in the issuing MS is limited to helping the lawyer in the executing MS and the cost is therefore limited, as appears from the Impact Assessment.

24. The Presidency is of the opinion that the further work on the issue of granting access to legal aid in the issuing state in EAW proceedings would benefit from a proper discussion in the Council preparatory bodies.
25. *In view of the above, delegations are invited to express their views on the approach that should be followed so as to ensure that suspects and accused persons can effectively exercise their right of dual defence in EAW proceedings, as provided under Art. 10 of Directive 2013/48/EU, including notably when the person concerned does not dispose of sufficient means to pay for legal assistance.*

III. CONCLUSION

26. Delegations are invited to indicate their position on the specific provisions of the proposal, as well as to express their views on the issues outlined above.