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Introduction

At the meeting of the Friends of the Presidency on 16 March 2016, Articles 5, 4b (which should probably find its place after Article 5), 5a and 5b, as well as the additional proposals of the European Parliament on the European Investigation Order, were discussed.

Further to this meeting, the Presidency had informal contacts with the European Parliament. On the basis of both the outcome of the meeting of 16 March and the said informal contacts, the Presidency submits in the Annex revised texts for Articles 5, 4b, 5a and 5b.

The Presidency is confident that the texts as set out in the Annex could be acceptable for the European Parliament. The Presidency therefore urges Member States to examine these texts in a spirit of compromise, so as to be able to make progress in this file.

Explanations and Questions

Article 5 : Legal aid in European arrest warrant proceedings

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

During the meeting on 16 March, a very large majority of Member States indicated that they could accept Article 5(1), with the accompanying recital, as it stands. The text seems also acceptable to the EP. The Presidency therefore considers that there is provisional agreement on this issue.

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

During the meeting on 16 March, a majority of Member States indicated that they could accept the compromise text presented by the Presidency. A number of Member States, though, stated that they could not (yet) accept this text.

At the meeting on 16 March, the Presidency invited the Member States which still had concerns regarding this text if they could re-examine their position and join the majority view.

In support of the current text, the Presidency would like to advance the following arguments:

- 1) A provision on legal aid for the lawyer in the issuing Member State is politically very important, both for the European Parliament and for the Commission.
- 2) In budgetary terms, granting - in certain circumstances - legal aid to the lawyer in the issuing Member State is not a major issue. The additional costs are minor, as has also been indicated in the impact assessment of the Commission.
- 3) On the other hand, it cannot be excluded that in individual cases granting legal aid to the lawyer in the issuing Member State can be very important for the person concerned.

- 4) The compromise text of the Presidency states 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, leave a certain flexibility for the Member States in providing legal aid when they act as issuing Member States, as was also confirmed by the Council Legal Service during the meeting on 16 March. The Presidency observes by the way 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, it does not seem to make a big difference whether the proposed text will be laid down in the Directive or not.

In view of the above, the Presidency hopes that the Member States which still have doubts can now also agree to the text of Article 5(2), with the accompanying recital, as it currently stands. A positive stand from the Council on this point will make it easier for us to be "tough" on other issues.

Can Member States accept the text of Article 5(2)?

Paragraph 3 (means test):

During the meeting on 16 March, a very large majority of Member States indicated that they could accept Article 5(3) as it stands. The text seems also acceptable to the EP. The Presidency therefore considers that there is provisional agreement on this issue.

Article 4b: Timely and diligent decisions by a competent authority (to be placed after Article 5)

During the meeting on 16 March, a very large majority of Member States indicated that they could accept Article 4b(1) as it stands.

The only outstanding issue concerns the accompanying recital. The text of this recital has been modified in the light of the discussions at the meeting on 16 March 2016, and seems now also acceptable to the EP.

The revised recital states that the competent authority should be an "*independent authority competent for taking decisions regarding legal aid, or a court, including a judge sitting alone*". It is however added that "*in urgent situations, the involvement of the police and the prosecution should also be possible when this is necessary for granting legal aid timely*". Some examples of "timely" could be added, e.g. "at the latest before questioning" (in criminal proceedings) or "upon arrest" (as regards legal aid to the lawyer in the executing Member State).

Article 4b(2) was formerly placed in Article 5a(1) but seems better placed here. It is likely that the text of this provision is acceptable to the EP.

Can Member States accept the text of Article 4b?

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

At the meeting on 16 March, it appeared that this Article is acceptable to a (large) majority of Member States. Further to the comments made at that meeting, the text has been refined on some points.

Can Member States accept the text of Article 5a?

Article 5b (new): Remedies

At the meeting on 16 March, it appeared that Article 5b(1) is acceptable to a majority of Member States. The rapporteur indicated that he prefers putting the text of the accompanying recital as an additional second paragraph, which seems acceptable to the Presidency.

Can Member States accept the text of Article 5b?

Comments regarding the additional proposals of the European Parliament to deal with certain investigative measures in the context of European Investigation Order proceedings

As Member States will remember, the European Parliament 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 (see doc. 6904/16).

At the meeting on 16 March, a lot of Member States voiced concerns concerning these proposals of the European Parliament. The Presidency communicated these concerns to the rapporteur of the European Parliament. He indicated that the European Parliament wants to await the position of the Commission before possibly revising its own position in this matter.

The Commission informally indicated to the Presidency that it intends to make (preliminary) observations regarding its position on the proposals of the European Parliament at the next meeting of the Working Party, which is scheduled to take place on 4 April. The Presidency suggests awaiting those observations and take the discussion from there.

Concluding remarks

The Presidency hopes that delegations can show flexibility in respect of the above issues (Articles 5, 4b, 5a and 5b) so that the texts can be provisionally agreed, pending agreement on the rest of the Directive (the Presidency understands that Member States will only be able to commit themselves to any texts in the context of an overall package).

The prospects for the future currently stand as follows: in mid-April, the first provisional results of the impact assessment of the European Parliament will be made available to the rapporteur. On this basis, the rapporteur and the shadow-rapporteurs will hold a strategic meeting, possibly on 19 April, in order to define the strategy of the EP for the remainder of the Directive (scope, legal aid in criminal proceedings, etc). The rapporteur will inform the Presidency of the outcome of this strategic meeting. Subsequently, at the meeting of the Friends of the Presidency on 27 April, the Presidency intends discussing that outcome with the Member States.

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.¹

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.²

¹ 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.

² 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 (...) 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.

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

1. 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.³
2. **Member States shall take necessary measures to ensure that suspects or accused persons in criminal proceedings, and requested persons in European arrest warrant proceedings, are informed in writing when their application for legal aid is rejected in full or in part.**

³ 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** an independent authority competent for taking decisions regarding legal aid, or a court, including a judge sitting alone. **In urgent situations the involvement of the police and the prosecution should however also be possible when this is necessary for granting such aid timely. A body or organisation, such as a bar-organisation, could be involved in the assignment of lawyers.***

Article 5a: Quality of legal aid services and training

1. Member States shall take the necessary action, including with regard to funding, with the aim to ensure
 - a) that there is an effective and qualitative legal aid system; and
 - b) that legal aid services are of a quality that is adequate to safeguard the fairness of the proceedings, with due respect for the independence of the legal profession.⁴
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.
3. 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.
4. Member States shall take necessary measures to ensure that suspects or accused persons in criminal proceedings, and requested persons in European arrest warrant proceedings, have the right, **upon their request**, to have the lawyer providing legal aid services assigned to them replaced, **when this is justified in specific circumstances**.⁵

⁴ 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.

⁵ Accompanying recital:

Suspects or accused persons in criminal proceedings, and requested persons in European arrest warrant proceedings, should have the right to have the lawyer providing legal aid services assigned to them replaced when this is justified in specific circumstances, for example in the case of a demonstrable failing of the lawyer or dissatisfaction with the method of working or the opinion of the lawyer.

Article 5b: Remedies

1. 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 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.
2. **Member States may provide that such remedies be preceded by a procedure under which the person concerned firstly has to lodge a complaint within 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.**⁶

⁶ Accompanying recital:

There should be an effective remedy under national law in the event of a breach of the 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. The remedy could be preceded by a procedure, for example of an administrative nature, under which the person concerned firstly has to lodge a complaint within the authority that has taken the contested decision, or which should have taken a decision but failed to do so.