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*Committee on Civil Liberties, Justice and Home Affairs*

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## **WORKING DOCUMENT**

on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Cornelis de Jong

On 27 November 2013, the European Commission adopted a 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<sup>1</sup>. Since at this stage, it is not possible for the current legislature to adopt a first reading agreement, this working document tries to capture a first, joint appraisal of the proposal, shared by all shadow rapporteurs, followed by a number of personal observations of the rapporteur.

## **Part I: General appraisal of the proposal**

1. According to Article 82 of the Treaty on the Functioning of the European Union (TFEU), judicial co-operation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions. The implementation of this principle presupposes that Member States put trust in each other's criminal justice systems, including in the manner in which the rights of suspects of accused persons are safeguarded.
2. In practice, however, national practices vary in this respect. Against this background, on 30 November 2009, the Council adopted the Roadmap for strengthening procedural rights of suspected and accused persons in criminal proceedings<sup>2</sup>. The Roadmap identifies as measure C the right to legal advice and legal aid. The right to legal aid is intrinsically connected to the right to access to a lawyer, on which the European Parliament and the Council adopted Directive 2013/48/EU of 22 October 2013. For those who are lacking the necessary financial means, only legal aid can make the right to access to a lawyer effective.
3. The proposal of the Commission is a welcome step in ensuring a minimum level of legal aid in all Member States. It is, however, restricted to the right to provisional legal aid for suspects or accused persons in criminal proceedings who are deprived of liberty, and the right to provisional legal aid and to legal aid for requested persons who are subject to European arrest warrant proceedings. Additional aspects of the right to legal aid have been included in a separate Recommendation of the Commission<sup>3</sup>.
4. The Directive and the Recommendation have to be dealt with together, as it is difficult to discuss the right to provisional legal aid, without also discussing the requirements for being entitled to legal aid, or the quality of legal assistance to be provided. One of the points for discussion by the European Parliament will undoubtedly relate to the precise scope of the two instruments.
5. The right to legal aid is not an easy subject, which may explain why it has taken the Commission a relatively long time, before submitting the current instruments. However, this should not keep the new legislature from dealing with the proposal for a Directive as a matter of priority. The different interpretation of the right to a fair trial, including through legal aid, as recognised, *inter alia*, in Article 47 of the Charter of Fundamental Rights of

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<sup>1</sup> COM(2013)824 final of 27 November 2013.

<sup>2</sup> OJ C 205, 4.12.2009, p. 1.

<sup>3</sup> C(2013)8179/2.

the European Union and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, constitutes an obstacle for fair and effective judicial co-operation in criminal matters. Hence, the remaining measures of the Roadmap and in particular, the draft Directive on Legal Aid, should be adopted as soon as possible.

## **Part II: Personal observations of the rapporteur**

6. The current, fragmented approach followed by the European Commission may reflect the sensitivity of the subject, but it does not increase legal certainty, nor does it make it clear for suspected or accused persons to what extent they will effectively have a right to legal aid and what the quality of the legal assistance will be.
7. The Rapporteur considers that accused, suspected or requested persons may feel inhibited to ask for legal aid, if Member States can recover the costs relating to provisional legal aid from them, if they do not meet the eligibility criteria, as long as no minimum rules have been established for these criteria. It is also unclear how such costs are defined.
8. The eligibility criteria mentioned in the Commission's Recommendation provide some clarity, but do not amount to full harmonisation. That seems justified, since it would simply be impossible and also unnecessary to provide detailed European legislation in this respect, considering the differences between Member States when it comes to the costs of judicial procedures. At the same time, this also means that a general description of the means and merits tests, as included in the Recommendation, or at least elements thereof, could just as well have been incorporated in the Directive. The Rapporteur favours such an approach, especially because of the link with the risk of recovery of the costs relating to provisional legal aid, as mentioned in paragraph 8.
9. The Rapporteur is aware of differences between Member States in respect of the quality of legal assistance offered. This depends, inter alia, on the fees provided to lawyers for legal aid. If these fees are too low, the lawyers will not be willing to devote enough time and efforts to provide for high quality legal aid. Again, considering the differences in income and cost levels between Member States, it is not possible to provide for detailed rules on the level of the fees. However, this makes it all the more important to include at least some safeguards concerning the quality of the legal assistance offered in the Directive.
10. In particular, the provision that the preference and wishes of the suspects or accused persons and requested persons should as far as possible be taken into account with respect to the choice of the legal aid lawyer, merits to be included in the Directive. The same holds for the need for continuity in legal representation, if the suspected, accused or requested person so wishes. Provision should also be made for replacement of the legal aid lawyer, if the suspected, accused or requested person has lost all confidence in the lawyer and can motivate this on verifiable grounds. Currently, such a provision is even missing in the Recommendation.
11. Furthermore, the Rapporteur is not yet convinced of the usefulness of making a distinction between legal aid for persons requested on the basis of a European Arrest Warrant and legal aid for other persons who are standing trial in another Member State than their own.

This way, the latter category of persons could end up with less protection than the former. It is doubtful, whether this will not result in discriminatory practices.

12. Finally, the Rapporteur considers Article 6 of the Directive rather vague: it is difficult for Member States to collect data with regard to the implementation of the Directive for each individual case. The reporting obligation should instead concentrate on the problems encountered with the implementation, either from the perspective of the suspected, accused or requested persons, or from that of the competent authorities.