

FAIR TRIALS

Legal Experts Advisory Panel

Position paper on the proposed directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings

February 2015

About Fair Trials and LEAP

Fair Trials is a non-governmental organisation based in Brussels and London that works for fair trial rights according to internationally recognised standards of justice. Our vision is a world where every person's right to a fair trial is respected. Fair Trials pursues its mission by helping people to understand and defend their fair trial rights; by addressing the root causes of injustice through our law reform work; and through targeted training and network activities to equip lawyers to defend their clients' fair trial rights.

Informed by our experience of providing advice and assistance in almost 1,000 cases within the EU in the last four years, and working with the Legal Experts Advisory Panel ("LEAP") – a network of over 130 criminal justice and human rights experts, including defence practitioners, NGOs and academics from all EU Member States – Fair Trials contributed to the negotiations surrounding the adoption of the first three directives adopted under the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (the "Roadmap Directives"). During 2013, Fair Trials organised five meetings in Amsterdam, Budapest, London, Paris and Vilnius at which the challenges surrounding the implementation of the Roadmap Directives were discussed with over 50 members of LEAP. Fair Trials also contributes to the implementation of the Roadmap Directives by training lawyers from all EU Member States.

The **Legal Experts Advisory Panel ("LEAP")**, coordinated by Fair Trials Europe, provides a unique opportunity for strategic networking between criminal justice and human rights experts in Europe, currently bringing together over 130 defence practitioners, NGOs and academics from all 28 EU Member States. Members have in-depth knowledge of Europe's many criminal justice systems and a broad understanding of the many barriers to justice.

LEAP meets regularly to discuss criminal justice issues, identify common concerns, share examples of best practice and identify priorities for reform of law and practice. Since 2011, LEAP and Fair Trials have been working closely together to identify patterns of rights violations and difficulties concerning legal aid. Based on a practitioner's survey of over 100 practitioners from across the EU, a report - *The practical operation of legal aid in the EU* - was published in 2012. Since then, discussions during our meetings in Amsterdam, Budapest, London, Paris and Vilnius have also highlighted issues of concern which experts hope to be addressed in an EU directive on legal aid. Additionally, the need for minimum standards on legal aid was discussed in depth at the last two LEAP Conferences in October 2013 and February 2015.

Views expressed in this report are not the views of individual LEAP members but rather representative of the conclusions reached during LEAP meetings and during bilateral discussion with individual LEAP members. We are grateful to the Criminal Justice Programme of the European Union, the Oak Foundation, the Open Society Foundations and Clifford Chance for their ongoing support of the work of LEAP and Fair Trials.

For further information, contact:

Libby McVeigh, Head of Law Reform, Libby.McVeigh@fairtrials.net, +44 (0) 207 822 2370

Jemima Hartshorn, Law Reform Officer, Jemima.Hartshorn@fairtrials.net, +44 (0) 207 822 2370

Alex Tinsley, Head of EU Office/Law Reform Officer, Alex.Tinsley@fairtrials.net, +322 (0) 743 8593

Executive Summary

1. Fair Trials welcomes the opportunity to comment on the European Commission's proposed directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European Arrest Warrant proceedings ("the Proposed Directive"). We seek to ensure that the negotiations of this crucial measure are informed by the views of the LEAP network of 130 criminal justice experts from across all 28 EU Member States.
2. The Proposed Directive represents a key step forward under the Roadmap for strengthening procedural rights of suspects or accused persons in criminal proceedings ("the Roadmap"). The provision of legal aid for anyone who cannot afford legal representation is necessary to ensure that all suspects and accused persons can enjoy their rights under the Directive on the right of access to a lawyer in criminal proceedings and European arrest warrant Proceedings (the "Access to a Lawyer Directive"), irrespective of their financial resources. Further, the eventual adoption and implementation of a directive on legal aid will help to ensure a level of rights protection that will enhance mutual trust and recognition in judicial cooperation, and promote human rights standards in the EU.
3. However, the Proposed Directive does not assure this level of rights protection at present. Fair Trials and LEAP make the following key recommendations to ensure that the Proposed Directive, informed by the Commission's Recommendation on the right to legal aid, provides an effective level of protection for the right to legal aid which addresses current concerns from across the EU:
 - a. **Scope:** The scope of the "provisional legal aid" and the definition of "legal aid" should be expanded to ensure that the aims of the Proposed Directive are fulfilled (paras 7 to 11). Further, the right to legal aid throughout the criminal proceedings should be guaranteed so as to reflect the scope of the Access to a Lawyer Directive (paras 12 to 15).
 - b. **Right to information:** More detailed obligations for Member States in relation to the provision of information on legal aid should be incorporated (paras 16 to 17).
 - c. **Cost recovery:** Any recovery of the cost of legal aid, whether upon a subsequent finding of ineligibility or of guilt, should be prohibited (paras 18 to 20).
 - d. **Eligibility:** Provisions relating to the operation of means and/or merits tests should be incorporated, in line with the Commission's Recommendation on the right to legal aid for suspects and accused persons in criminal proceedings ("the Recommendation") (paras 21 to 24).
 - e. **Quality:** Amendments are required to ensure that the Proposed Directive imposes obligations relating to remuneration, independence, choice and accreditation in order to guarantee the quality of legal aid representation (paras 25 to 32).
 - f. **Training:** In line with the approach in other directives adopted under the Roadmap, the Proposed Directive should include obligations for Member States to provide training for those responsible for (i) providing information about, (ii) facilitating access to, and (iii) deciding on eligibility for legal aid (para 33).
 - g. **Remedies:** Member States should be obliged to ensure that suspects and accused persons have the right to challenge the failure to uphold their right to legal aid and have access to effective remedies when such challenges are successful (paras 34 to 35).

A. Introduction

1. Fair Trials welcomes the opportunity to comment on the Proposed Directive.¹ We hope to inform the negotiations of this important measure by highlighting the experiences of the LEAP network and outlining how the Proposed Directive could be strengthened to address the practical challenges that suspects and accused persons dependent on legal aid and their legal aid lawyers experience daily across the EU.
2. Police interrogations and criminal proceedings in general are a daunting procedure for every suspect or accused person. Criminal proceedings, especially in their early stages, are characterised by a disparity in power and knowledge of defence rights between the suspects and accused on the one hand, many of whom are less educated or face other challenges; and the police or other authorities on the other hand, who have broad investigative powers and a lot of experience of criminal procedures. Suspects and accused persons at this stage are particularly vulnerable and susceptible to being coerced into waiving their rights without understanding the consequences, into giving confessions, and are at risk of unlawful detention.² The support of an experienced legal representative is fundamental to counter this imbalance by providing informed legal advice and support in the exercise of defence rights. Yet many suspects and accused persons in the EU cannot afford legal presentation and are dependent on state-funded lawyers to exercise their right to a lawyer. Accordingly, the right to legal aid is recognised as a central element of the right to a fair trial at both the regional³ and international level.⁴

“Legal aid is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law. Legal aid is a foundation for the enjoyment of other rights, including the right to a fair trial [...] a precondition to exercising such rights and an important safeguard that ensures fundamental fairness and public trust in the criminal process.”

United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems

¹ EU Commission, 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, COM(2013) 824, available at: http://ec.europa.eu/justice/criminal/files/com_2013_824_en.pdf.

² UNODC, Early access to legal aid in criminal justice processes: a handbook for policymakers and practitioners, 2014, page 1, available at: http://www.unodc.org/documents/justice-and-prison-reform/eBook-early_access_to_legal_aid.pdf.

³ Article 47(3) of the Charter of Fundamental Rights of the European Union states: “Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice”, 30 March 2010, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:en:PDF>. This reflects Article 6(3)(c) of the European Convention on Human Rights (ECHR) which states that everyone charged with a criminal offence has the right to “legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”, 4 November 1950, available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf.

⁴ Article 14(d) of the International Covenant on Civil and Political Rights (ICCPR) clarifies that everyone charged with a criminal offence should be able “defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it”, UN General Assembly, 16 December 1966, available at: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

3. Despite the entrenched status and recognition of the right to legal aid, standards of legal aid provision vary significantly between Member States. This has a major impact on the level of protection of the right to a fair trial. The LEAP network reports that recurring problems concerning legal aid include:
 - a. **Timing:** In many countries, suspects and defendants are simply not guaranteed that a lawyer will be provided and paid to attend his/her preliminary interrogation at the police station;
 - b. **Cost recovery:** The risk of being expected to repay legal aid fees, either when the suspect or accused person is subsequently found (i) not to have met the eligibility test for full legal aid following the provision of provisional legal aid or (ii) guilty, are required to repay their legal fees, which raises concerns that some may feel pressured to waive their right to a lawyer for fear of being unable to pay later;
 - c. **Poor quality:** As legal aid lawyers are often poorly paid (provided with an hourly fee which is much lower than paid by fee-paying clients or a flat rate regardless of the amount of time spent on a case) or only paid years after the proceedings, many lawyers often avoid such cases with an impact on the quality of legal representation which is provided under legal aid schemes;
 - d. **Lack of choice:** In a vast majority of Member States, suspects are not allowed to choose their legal aid lawyer and must accept whoever is appointed;
 - e. **Lack of independence:** In a few Member States, legal aid practitioners are appointed and funded by the police, leading to concerns that their advice may be prejudiced as they are unlikely to be instructed in future if they challenge the investigation;
 - f. **Unwilling waivers:** Practitioners are concerned that in a number of Member States, police pressure suspects and accused persons into waiving the right to a lawyer, or do not adequately inform them of their right to a lawyer and to legal aid; and
 - g. **Complexity of process:** The extent to which the relevant competent authority helps suspects apply for legal aid if they are unable to pay for a lawyer varies considerably. In some Member States, the application process is very bureaucratic, which is particularly problematic for non-nationals who may not understand the documentation required.⁵

4. In seeking to address the problems relating to the provision of legal aid across the EU identified by the LEAP network, we acknowledge that the EU institutions face many challenges. On the one hand, they are required to take into account (i) the rights already agreed the Access to a Lawyer Directive,⁶ adopted in October 2013, which for any suspect or accused person who is unable to afford legal representation will only be enjoyed if a corresponding right to legal aid is guaranteed, and (ii) the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (the

⁵ Fair Trials, *The Practical operation of legal aid in the EU* ("The Practical operation of legal aid in the EU"), July 2012, para. 9, available at: http://www.fairtrials.org/wp-content/uploads/2012/09/Legal_Aid_Report.pdf; and Fair Trials, *Stockholm's Sunset: New Horizons for Justice in Europe*, March 2014, pp. 24-27, available at: <http://www.fairtrials.org/wp-content/uploads/Stockholms-Sunset.pdf>.

⁶ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:294:0001:0012:EN:PDF>.

“UN Principles and Guidelines”),⁷ unanimously adopted by the UN General Assembly in 2012 and in relation to which the EU has the opportunity to demonstrate leadership and further its commitment to being “exemplary in ensuring respect for human rights”.⁸ On the other hand, the EU institutions must be mindful of the economic challenges faced by all Member States and must recognise that there are many different approaches to the provision of legal aid and that Member States should, while guaranteeing respect for universal human rights, retain some autonomy and discretion in deciding on the mechanism for such provision.

5. We note that, in balancing these competing demands, the Commission has proposed a measure which addresses what it considers to be the two main underlying causes of the problems relating to legal aid provision across the EU – (i) insufficient access to legal aid in EAW proceedings in both the issuing and executing Member States, and (ii) the failure to provide legal aid representation during the early stages of

GERMANY & ITALY: Legal aid is generally not granted until the first judicial hearing. When a lawyer does attend prior to that time, he or she bears the risk of non-payment if legal aid is later refused.

criminal proceedings, especially when a suspect or accused person is in police custody. Other concerns relating to the provision of legal aid, including the poor quality of legal aid representation and the criteria according to which eligibility for legal aid is assessed, have been addressed in the non-binding the Recommendation,⁹ which was published alongside the Proposed Directive.

6. Our comments and recommendations primarily focus on those amendments to the Proposed Directive which are necessary to ensure that the measure guarantees sufficiently robust protections of the right to legal aid in EAW proceedings and during the earliest stages of criminal proceedings. Given that the Proposed Directive does fall some way short of protecting the full scope of the right to legal aid necessary to complement fully the right to access a lawyer guaranteed under the Access to a Lawyer Directive and of implementing the standards set out in the UN Principles and Guidelines, we also make additional recommendations for the expansion of the scope of the Proposed Directive to ensure that these important further goals are achieved. Our comments and recommendations are summarised as follows:

- a. **Scope:** The scope of “provisional legal aid” and the definition of “legal aid” should be expanded to ensure that the aims of the Proposed Directive are fulfilled (paras 7 to 11). Further, the right to legal aid throughout the criminal proceedings should be guaranteed so as to reflect the scope of the Access to a Lawyer Directive (paras 12 to 15).
- b. **Right to information:** More detailed obligations for Member States in relation to the provision of information on legal aid should be incorporated (paras 16 to 17).

⁷ UNODC, Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, 2013, available at: http://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf.

⁸ The Council of the European Union, EU Strategic Framework on Human Rights and Democracy (“EU Strategic Framework on Human Rights and Democracy”), June 2012, page 2, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf.

⁹ European Commission, Commission Recommendation on the right to legal aid for suspects or accused persons in criminal proceedings, C(2013) 8179/2, available at: http://ec.europa.eu/justice/criminal/files/c_2013_8179_en.pdf.

- c. **Cost recovery:** Any recovery of the cost of legal aid, whether upon a subsequent finding of ineligibility or of guilt, should be prohibited (paras 18 to 20).
- d. **Eligibility:** Provisions relating to the operation of means and/or merits tests should be incorporated, in line with the Commission’s Recommendation (paras 21 to 24).
- e. **Quality:** Amendments are required to ensure that the Proposed Directive imposes obligations relating to remuneration, independence, choice and accreditation in order to guarantee the quality of legal aid representation (paras 25 to 32).
- f. **Training:** In line with the approach in other Roadmap Directives, the Proposed Directive should include obligations for Member States to provide training for those responsible for (i) providing information about, (ii) facilitating access to, and (iii) deciding on eligibility for legal aid (para 33).
- g. **Remedies:** Member States should be obliged to ensure that suspects and accused persons have the right to challenge the failure to uphold their right to legal aid and have access to effective remedies when such challenges are successful (paras 34 to 35).

B. Comments and recommendations

Scope

a) Provisional legal aid

- 7. Suspects and accused persons are especially vulnerable at the beginning of proceedings, as anxiety when facing the potentially overwhelming and even coercive power of the police can lead to incriminating behaviour and statements, if not supported by a legal representative. We therefore welcome the attention given by the Proposed Directive to establishing standards to govern the provision of legal aid during this crucial stage.
- 8. Article 4(2) of the Proposed Directive requires that provisional legal aid should be granted “without undue delay after deprivation of liberty and in any event before questioning”.¹⁰ By restricting access to provisional legal aid in this way, the Proposed Directive fails to protect those who are subject to police questioning or other investigative actions who have not been deprived of liberty, despite their being no less at risk of violations of their right to a fair trial. All suspects and accused persons are vulnerable and at risk of self-incrimination without legal representation during the earliest stages of criminal and EAW proceedings, irrespective of whether or not they have been detained. In order to grant adequate protection of the rights of all who cannot afford legal representation during the critical initial stages of proceedings, provisional legal aid should be available to all suspects and accused irrespective of whether

POLAND:
Access to a legal aid lawyer will not usually occur until first appearance in court (up to 48 hours after arrest). The suspect would have therefore been deprived of legal representation during the initial police questioning, without necessarily having knowledge of their right to silence and right to not incriminate themselves. In addition, because legal aid lawyers receive flat-rate payments, such work is usually undertaken by trainees with very little experience of the criminal justice system.

¹⁰ See note 1 above, Proposed Directive.

they have been deprived of their liberty.

9. Article 4(3) of the Proposed Directive provides that provisional legal aid should conclude when “the final decision on legal aid has been taken and comes into effect, or, where the suspects or accused persons are granted legal aid, the appointment of the lawyer has taken effect”.¹¹ We share the concerns of JUSTICE, ICJ and NJCM that this may result in suspects and accused persons finding themselves without any legal representation during the early stages of proceedings while they are at their most vulnerable.¹² Adequate opportunity should always be given to those who are not subsequently granted legal aid to find replacement representation before provisional legal aid representation concludes.

10. Finally, Article 4(1) provides that provisional legal aid is provided only to “requested persons deprived of liberty in the **executing Member State**”¹³ (emphasis added) but not in the issuing Member State. In many EU Member States, legal aid is not granted until charge or a first judicial hearing, which will not be reached before surrender has taken place. Yet, access to legal representation in the issuing state is in practice critical to obtaining key case information necessary to challenge surrender pursuant to an EAW and to assess the legal grounds for extradition and aspects that might bar surrender, for example if a disproportionate European Arrest Warrant (“EAW”) has been issued. The involvement of a lawyer in the issuing state is essential not only to ensuring that the rights of the requested person are protected throughout the proceedings but also to avoiding the costs of extradition when the case can be brought to a swift conclusion whether through surrender or not.

Case study
Alan Hickey was wanted under an EAW to serve trial in Belgium, while he was serving a prison sentence in France for people-trafficking. He was given little information about the charges in Belgium. He was extradited to Belgium, where the court found his extradition breached double jeopardy rules. This procedure and court cost could have been avoided with effective dual representation.

Recommendation: *The scope of provisional legal aid should be expanded so as to (i) include suspects, accused persons and requested persons who have not been deprived of liberty, (ii) conclude only once the appointment of a legal aid lawyer has taken place or, where legal aid has been denied, the suspect or accused person has had the opportunity to find and appoint a lawyer, and (iii) cover legal representation in the issuing Member State as well as in the executing Member State.*

¹¹ *Ibid.*

¹² ICJ, JUSTICE, NJCM, *Briefing on the European Commission Proposal for a Directive on Provisional Legal Aid for Suspects or Accused Persons Deprived of Liberty and Legal Aid in European Arrest Warrant Proceedings*, September 2014, available at: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/09/ICJUSTICENJCM-Briefing-Legal-Aid-Directive-04092014.pdf>

¹³ See note 1 above, Proposed Directive.

b) Definition of “legal aid”

11. Article 3(1) defines “legal aid” as “funding and assistance from the Member State ensuring the exercise of the right of access to a lawyer”.¹⁴ This implies that the only costs to be covered by Member States are the costs of the legal representation (ie. fees) of suspects and accused persons who are entitled

IRELAND: Some forensic experts refuse to give evidence in legal aid cases, as they may not receive adequate payment from the Ministry of Justice for their services.

to legal aid (whether provisional or otherwise). Recital 5, however, recognises that legal aid should cover “the costs of the defence and the proceedings for suspects or accused persons in criminal proceedings and requested persons in European arrest warrant proceedings”.¹⁵ This is a far broader description of the scope of the costs which legal aid should cover and would include expert fees, court fees and any other costs which may become payable by the suspect or accused person but are beyond what is necessary to ensure “the exercise of the right of access to a lawyer”.¹⁶ While it is noted that the costs of the defence may be more extensive in adversarial systems compared to inquisitorial systems where the costs of experts, for example, will be paid for by the court, the definition of “legal aid” should be expanded to ensure that equality of arms is guaranteed for all suspects and accused persons across the EU.

Recommendation: *The definition of “legal aid” in Article 3(1) should be expanded to include “the costs of the defence and the proceedings” which is broader than the current drafting which includes only the costs to ensure “the exercise of the right of access to a lawyer”.*

c) Ordinary legal aid

12. While we recognise that the Proposed Directive represents the Commission’s attempt to find a pragmatic compromise between (i) a measure which guarantees the right to legal aid in all circumstances required to make effective the enjoyment of the right to access a lawyer under the Access to a Lawyer Directive for suspects and accused persons who cannot afford to pay for legal representation, and (ii) a measure which is palatable to Member States who are concerned about minimising financial impact and maximising their flexibility in managing the provision of legal aid, Fair Trials and LEAP had hoped for the Proposed Directive to provide a broader scope of protection than is provided in the current draft.

13. Article 2 of the Access to a Lawyer Directive confirms that it applies:

“to suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities of a Member State [...] that they are suspected or accused of having committed a criminal offence, and irrespective of whether they are deprived of liberty. It applies until the conclusion of the proceedings, which is understood to mean the final determination of

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

*the question whether the suspect or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal.*¹⁷

14. Further, Article 3 of the Access to a Lawyer Directive provides a long list of occasions during the criminal proceedings when the suspects and accused persons should be granted access to a lawyer, and Article 10 does the same for requested persons in EAW proceedings.¹⁸ Finally, the UN Principles and Guidelines state that “States should ensure that anyone who is detained, arrested, suspected of, or charged with a criminal offence punishable by a term of imprisonment or the death penalty is entitled to legal aid at all stages of the criminal justice process”.¹⁹ The Proposed Directive currently falls a long way short of providing legal aid in all circumstances where the EU Member States have agreed that legal representation is necessary in order to protect the rights of the suspect or accused person. The Commission’s Recommendation does, however, have a broader scope, stating in Paragraph 2 that “[s]uspects and accused persons in criminal proceedings should have a right to legal aid from the time they are suspected of having committed a criminal offence. This right should apply until the conclusion of the proceedings”.²⁰
15. Given that the concerns regarding access to legal aid which are raised repeatedly by the LEAP network are not restricted to the earliest stages in the criminal proceedings nor to EAW proceedings, we would ultimately hope to see this broader scope incorporated into legislation which is binding on all EU Member States, whether through inclusion in the Proposed Directive or in a further measure proposed in response to the Commission’s review after 48 months of the extent to which the objectives of the Recommendation are being met (as proposed under Recital 17 of the Recommendation).²¹

Recommendation: *The scope of the Proposed Directive should be expanded to cover the provision of legal aid throughout all stages of the criminal proceedings, in line with the scope of the Access to a Lawyer Directive and the UN Principles and Guidelines.*

Right to information

16. In order to ensure practical and effective enjoyment of the right to legal aid, all suspects and accused persons must be informed of such right in a manner which they fully understand. While the Directive on the right to information in criminal proceedings (“Information Directive”)²² requires that suspects and accused persons must be notified of “any entitlement to free legal advice and the conditions for obtaining such advice”²³ both orally and in writing, LEAP members have expressed concerns that further care is required to ensure that those who need legal aid fully understand the nature and extent of the right, particularly given the complexity of the application process in many Member States.

¹⁷ See note 6 above, Access to a Lawyer Directive.

¹⁸ *Ibid.*

¹⁹ See note 7 above, UN Principles and Guidelines, Principle 3.

²⁰ See note 9 above, Recommendation.

²¹ *Ibid.*

²² Directive 2012/13/EU of the European Parliament and Council of 22 May 2012 on the right to information in criminal proceedings, Art. 3(1)(b), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:142:0001:0010:en:PDF>.

²³ *Ibid.*

17. Paragraph 5 of the Recommendation sets out further detail on the extent of the information which should be provided to suspects and accused persons regarding the right to legal aid²⁴ and the guarantees currently set out in the Proposed Directive would be strengthened by the inclusion of this drafting. This should not be treated as duplication, but rather as an elaboration of the right set out in the Right to Information Directive in response to subsequent developments under the Roadmap.

Recommendation: Paragraph 5 of the Recommendation should be incorporated into the Proposed Directive to ensure that Member States provide suspects and accused persons with all information necessary for them to practically and effectively enjoy the right to legal aid.

Cost recovery

18. Given that LEAP members believe the future risk of having to repay the cost of legal services may deter suspects and accused persons from exercising their right to a lawyer at the crucial initial stage of proceedings,²⁵ we are concerned about any provision that allows for cost recovery for provisional legal aid from the accused person or suspect. The Proposed Directive explicitly allows for cost recovery of provisional legal aid where the suspect or accused person is subsequently found not to meet the eligibility requirements for ordinary legal aid. In order to ensure that all those who need legal aid at those critical early stages of the criminal proceedings are able to enjoy their right to legal aid without worrying about whether or not they will be forced to repay the associated costs at a later stage, we consider that provisional legal aid should be provided irrespective of any eligibility assessment whether contemporaneous or in the future and without any risk of future cost recovery.

19. LEAP members have also raised concerns about legal aid systems in which cost recovery is permitted where the suspect or accused person is subsequently convicted. The right to a fair trial, and its constituent elements, belongs to all suspects and accused persons irrespective of their guilt or innocence. As such, the Proposed Directive should prohibit any provision of national law which permits the recovery of legal aid costs upon a finding of guilt.

BULGARIA & DENMARK: *If the defendant is found guilty of the crime, under state-funded legal aid representation, he or she must repay legal costs as determined by the trial judge.*

20. Member States have previously accepted restrictions on their ability to recover costs in relation to the provision of safeguards in previous Roadmap Directives. For example the Directive on the right to interpretation and translation in criminal proceedings (“the Interpretation and Translation Directive”)²⁶ states that “Member States shall meet the costs of interpretation and

²⁴ See note 9 above, Recommendation.

²⁵ See, for example, Fair Trials International, Communiqué issued after the meeting “Defence Rights in Europe”, 10 May 2013, Vilnius, Lithuania, para 69, available at: <http://www.fairtrials.org/wp-content/uploads/LT-ADR-Communiqu%C3%A9.pdf>.

²⁶ European Parliament and Council, Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings, Art. 4, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:280:0001:0007:en:PDF>.

translation resulting from the application of Articles 2 and 3, irrespective of the outcome of the proceedings.”²⁷ This has been motivated by the recognition that any such cost recovery would impact on the suspect’s/accused person’s decision to exercise their rights, and contravene the principle that states are responsible for protecting and upholding rights.

Recommendation: Article 4(5) of the Proposed Directive should be deleted, and a prohibition of any cost recovery of legal aid following a subsequent conviction should be included.

Eligibility for legal aid

21. The Proposed Directive does not, at present, address the crucial question of how eligibility for legal aid should be determined. While an eligibility assessment is irrelevant in relation to a large part of the current measure’s scope (i.e. provisional legal aid, which should be provided without any assessment of eligibility) the decision which brings provisional legal aid to an end will require an assessment of eligibility and this should therefore be covered by the Proposed Directive. Further, the Proposed Directive covers ordinary legal aid in EAW Proceedings, which will inevitably be dependent upon some form of eligibility decision. Finally, should the scope of the Proposed Directive be expanded, as we recommend, to include ordinary legal aid in criminal proceedings, the need for guidance on eligibility criteria becomes all the more pressing.
22. The eligibility criteria for legal aid vary greatly between the Member States. In Hungary only 0.1%, in Slovenia 2% and Italy 6% of all suspects in criminal cases qualify for legal aid after a combined means and merits test. By contrast, suspects and accused persons are entitled to legal aid in 71% of criminal cases in Ireland.²⁸ We recognise that the vast differences in Gross Domestic Product, cost of living and salary levels across Member States make it difficult to define EU-wide criteria for the assessment of eligibility for legal aid. We also note that Member States adopt different approaches to the type of criteria which should be taken into consideration, with some using merits tests, others using means tests and some countries combining these tests.²⁹ Whatever the mechanism for assessment employed, it is critical that anyone who cannot afford to pay for legal representation meets the eligibility threshold in circumstances where it would be unjust for them to face criminal proceedings without legal representation. Further, while it is not necessary for all countries to adopt the same mechanisms for provision of legal aid, the enormous disparity in who is accessing legal aid in practice is a serious threat to mutual recognition and to the mutual trust that underlies it.
23. Section 2 of the Recommendation³⁰ provides guidance on the nature of the means and/or merits tests forming the basis of eligibility assessments which reflects the obligations of all EU Member States under the ECHR and the ICCPR (as further developed in the UN Principles and

²⁷ *Ibid.*

²⁸ EU Commission, Staff working document impact assessment (“Impact Assessment”), Accompanying the Proposal for Measures on Legal Aid for Suspects or Accused Persons in Criminal Proceedings, COM(2013) 824, 27 November, 2013, Annex VI, available at:

<http://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:52013SC0476&from=EN>.

²⁹ 12 Member States apply a means test, in three Member States only a merits test is applied, 11 Member States apply a combination of both tests, see above note 27, Impact Assessment, Annex VII.

³⁰ See note 9 above, Recommendation.

Guidelines).³¹ For the reasons set out above, the rights protected under the Proposed Directive will be further strengthened by the inclusion of paragraphs 3, 4 and 6-13 of the Recommendation.

LITHUANIA: Legal aid lawyers earn €11.58 per hour before tax. There is also a limit on how many hours can be billed at certain stages of the criminal proceedings.

24. Given the severity of the impact of extradition on requested persons, we submit that it will always be in the interests of justice for legal aid to be provided in EAW proceedings. As such, it should never be necessary to assess the merits of providing legal aid in such cases. While a means assessment may be appropriate, we would question (a) whether this is workable in practice for often non-national requested persons, and (b) whether the costs of administering a means test, the delays incurred and the burden of dealing with unrepresented requested persons will actually produce any cost-saving.³²

Recommendation: *The provisions in the Recommendation on the means and merits tests (paragraphs 3, 4 and 6-13) should be incorporated into the Proposed Directive. In relation to EAW proceedings, the Proposed Directive should provide that for the purpose of determining whether or not a requested person is entitled to legal aid, a merits test should never be necessary.*

Quality

a) Remuneration

25. LEAP members have reported that in many EU countries remuneration for legal aid lawyers is very low (50 % or less of what a privately instructed lawyer would earn per hour) or awarded as a flat rate without consideration of the complexity of the case and the full range of costs (eg. including travel costs and fees for waiting time at court and in police station) which must be covered. We are told by LEAP members that the fixed rate for some cases is so low that lawyers make a net loss overall. In addition, we are told that the remuneration levels for legal aid work generally fail to take into account the importance of continual professional development which often requires participation in costly training programmes.
26. Given the significant differences between EU Member States in terms of salary levels, minimum wage and the fee thresholds for lawyers, we recognise that it would not be appropriate for the EU to dictate specific guidance on the levels of remuneration to which legal aid lawyers should be entitled. However, the remuneration provided to legal aid lawyers must be sufficient to ensure that the rights of the suspect or accused person are not compromised simply by virtue of not being able to afford private legal representation, and that the EU should legislate accordingly.
27. We therefore encourage the EU institutions to incorporate into the Proposed Directive guidance on the remuneration of legal aid lawyers which:

³¹ See note 7 above, UN Principles and Guidelines, Guideline 1.

³² The question of means-testing for legal aid in the executing state in EAW proceedings was addressed in Rt Hon Sir Scott Baker's Review of the UK's Extradition Arrangements, September 2011, page 17, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117673/extradition-review.pdf.

- a. requires consideration to be given, when determining the level of remuneration, to the costs incurred by such lawyers over and above the fees for the particular hours when they are meeting with or representing the suspect or accused person, including fees for waiting times, travel costs and training fees; and
- b. ensures that any fixed fee regime for legal aid representation includes flexibility sufficient to allow an increase in the fee where necessary to reflect the complexity and/or length of a particular case.

Recommendation: *The Proposed Directive should set out guidance to ensure the adequate remuneration of legal aid lawyers, referring to the range of costs which must be taken into account when determining fee schedules and the need for fixed fee regimes to be sufficiently flexible to reflect the complexity and length of each case.*

b) Independence

28. Quality and effective legal presentation is dependent on the willingness of the lawyer to question the lawfulness of police investigation methods, to challenge courts decisions and pursue his/her client’s interest. The lawyer must be acting solely on behalf of the suspect or accused person and have no conflicting interests. The LEAP network informs us, however, that in practice the independence of legal aid lawyers is compromised in some Member States where the police are responsible for their appointment and choose those lawyers with whom they have a close and effective working relationship.³³ Under such circumstances the quality of the defence might be limited as the lawyers may be less willing to fight for their clients’ rights as they do not want to threaten the relationship with their “employer” as they are dependent upon them for future appointments.

HUNGARY: *Legal aid practitioners are appointed and funded by the police. In some police stations the same lawyer will be appointed in up to 70% of all cases of mandatory legal presentation. These lawyers may not be properly independent, as the police provide a major part of their income; nevertheless, the suspect must accept the appointed lawyer.*

29. In line with Principle 12 of the UN Principles and Guidelines, which states that “States should ensure that legal aid providers are able to carry out their work effectively, freely and independently”³⁴, we encourage the EU institutions to incorporate into the Proposed Directive an obligation for Member States to ensure that the appointment of legal aid representatives is made by an authority which is independent from those with responsibility for conducting the investigation and with an interest in the outcome of the case. Given the wide range of mechanisms currently employed across the EU, the precise method for ensuring such independence should be left to Member States to determine.

Recommendation: *The Proposed Directive should include an obligation for Member states to ensure that the appointment of legal aid representatives is made by an independent authority with no interest in the outcome of the case.*

³³ See note 5 above, The Practical operation of legal aid in the EU, para 22.

³⁴ See note 7 above, UN Principles and Guidelines.

c) Choice of legal aid representative

30. A trusting relationship between defence lawyer and suspect/accused person is essential for an effective defence, as the ECtHR held in *Michaud v France*.³⁵ In *Artico v Italy*, the ECtHR found that if a lawyer does not or is unable to fulfil his or her duties, “the authorities must either replace him or cause him to fulfil his obligations”.³⁶ We have learnt from the LEAP network that these rights are currently not guaranteed in many Member States.³⁷ We therefore hope that amendments to the Proposed Directive will take into account ECtHR jurisprudence that specifies that suspects/accused persons have the right firstly to choose, and secondly to change their lawyer at any stage of the proceedings if certain criteria are met.³⁸

ENGLAND & WALES:
Suspects are not always informed about their right to appoint a new lawyer if they are not satisfied with the quality of legal advice provided.

Recommendation: *The Proposed Directive should include an obligation for Member States to ensure that suspects and accused persons have the right both to choose their own legal aid representative and to request and be granted a replacement whenever a lawyer does not or is unable to fulfil his or her duties.*

d) Accreditation of legal aid representatives

31. The Recommendation recognises that training of legal aid lawyers will be necessary in order “to ensure high quality legal advice and assistance”³⁹ and suggests that Member States should encourage the development of training programmes which meet this need.⁴⁰ It also proposes that legal aid lawyers should be specifically accredited and that such accreditation should require continuous professional training.⁴¹
32. Given the concerns raised by the LEAP network about the poor quality of legal aid representation in Member States across the EU, we encourage the EU institutions to incorporate provisions on training and accreditation in the Proposed Directive in recognition of the unavoidable fact that a suspect or accused person represented by a poorly trained legal aid representative who is unable to assist them in enjoying their right to a fair trial might as well have no legal representation at all. This could be achieved in a way which does not compromise the independence of lawyers, for

³⁵ *Michaud v France*, Appl. No. 12323/11, 6 December 2012, para 118, available at: [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115377#{"itemid":\["001-115377"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115377#{).

³⁶ *Artico v Italy*, Appl. No. 6694/74, 13 May 1980, para 33, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57424>.

³⁷ Fair Trials International, Communique issued after the meeting “Defence Rights in Europe”, 20 September 2013, Amsterdam, Netherlands, para 63, available at: <http://www.fairtrials.org/wp-content/uploads/Amsterdam-ADR-Communique.pdf>.

³⁸ In *Croissant v Germany*, Appl. No. 13611/88, 25 September 1992, para 29, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57736>, the ECtHR held that “when appointing defense counsel, the courts must certainly have regard to the accused’s wishes, but these can be overridden when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice”.

³⁹ See note 9 above, Recommendation, para 22.

⁴⁰ *Ibid.*

⁴¹ See note 9 above, Recommendation, para 23.

example by giving responsibility to an independent body which does not undermine the independence of the legal profession.

Recommendation: *The Proposed Directive should oblige Member States to ensure that a system of training and accreditation for legal aid lawyers is established and maintained which does not undermine the independence of the legal profession.*

Training

33. EU legislation governing the provision of legal aid will only be implemented effectively if all authorities involved in its application are made aware of the obligations it contains and trained in its application. Based on their observations on the implementation of previous Roadmap Directives, LEAP members have raised the concerns that, despite the wording of the respective measures being transposed into domestic legislation, the new legislation is not being implemented correctly as the actors involved remained uninformed of changes in legal provisions and protection, due to lack of training.⁴² It is therefore disappointing that the Proposed Directive does not include a provision that obliges national authorities to provide training to their staff, such as judges, police and prosecutors, in line with the other Roadmap Directives.⁴³ We note that the Recommendation provides some useful drafting in this regard, requiring in paragraph 21 that “[s]taff involved in the decision-making on legal aid in criminal proceedings should receive appropriate training”.⁴⁴

Recommendation: *The Proposed Directive should oblige Member States to provide training on the requirements of the Proposed Directive to those responsible for providing information to suspects and accused persons about their legal aid entitlements, to those responsible for facilitating the access of suspects and accused persons to legal aid representation and to those responsible for making decisions as to whether a particular suspect or accused person is eligible for legal aid.*

Remedies

34. The Proposed Directive lacks any provision on remedies for the violation of the right to legal aid. Clarity on remedies is, however, essential to ensure the effective implementation of the measure. The absence of clear remedy provisions in the Roadmap Directives that have already been adopted has been identified by LEAP members as a hindrance to the ability of suspects and accused persons to enjoy the rights which those measures guarantee. LEAP members have identified that national law provisions vary greatly with regards to remedies for violations of fair trial rights, and are often only applied with restraint. Member States are therefore not

⁴² Fair Trials International, Communiqué issued after the meeting “Defence Rights in Europe”, 10 May 2013, Vilnius, Lithuania, para. D(a), available at: <http://www.fairtrials.org/wp-content/uploads/LT-ADR-Communiqu%C3%A9-.pdf>.

⁴³ See for example: the Right to Information Directive Art. 9, see note 22 above; the Interpretation and Translation Directive, Art.6, see note 26 above.

⁴⁴ See note 9 above, Recommendation.

adequately incentivised to comply with the obligations under these crucial measures and the protection of the rights of suspects and accused persons is not enhanced.

35. We therefore encourage the EU institutions to include in the Proposed Directive an obligation on Member States to establish a system by which suspects and accused persons can challenge the failure to guarantee the rights under the Proposed Directive, such as a right of appeal against a decision refusing the grant of legal aid, and access adequate remedies where such a challenge is successful. The UN Principles and Guidelines recognises the various ways in which the right to legal aid may be violated, suggesting in Principle 9 that “States should establish effective remedies and safeguards that apply if the access to legal aid is undermined, delayed or denied or if persons have not been adequately informed of their right to legal aid,”⁴⁵ and we recommend that the Proposed Directive is amended to include a similar approach. Remedies should be tailored to the specific violation and could include financial compensation, the prohibition of subsequent procedural action, release from pre-trial detention and/or exclusion of evidence obtained directly and indirectly from the violation in question.⁴⁶

Recommendation: *The Proposed Directive should require Member States to ensure that suspects and accused persons have the right to challenge the failure to uphold their right to legal aid and access to effective remedies where any such challenge is successful.*

C. Conclusion

36. The importance of a robust EU directive on legal aid is clear, and the negotiation of the Proposed Directive provides an opportunity for the EU to demonstrate leadership on this global issue in line with the objectives of the EU Strategic Framework and Action Plan on Human Rights and Democracy.⁴⁷ Currently many suspects and accused persons in the European Union cannot exercise their right to access a lawyer as protected by the Access to a Lawyer Directive. The Access to a Lawyer Directive will only be effectively implemented if a complementing measure on legal aid is drafted and adopted.
37. The Proposed Directive is a positive and first move towards a comprehensive and effective instrument to protect the fair trial rights of suspects and accused persons across the EU by safeguarding, to some extent, the right to legal aid. We urge the EU institutions to work together to adopt an effective directive on legal aid which addresses the full range of problems associated with domestic legal aid provision across the EU, fulfils its purpose by increasing mutual trust and enables every suspect and accused person to enjoy their right of effective access to a lawyer.

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⁴⁵ See note 7 above, UN Principles and Guidelines.

⁴⁶ See note 7 above, UN Principles and Guidelines, Guideline 2(e).

⁴⁷ See note 8 above, EU Strategic Framework on Human Rights and Democracy.



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