



**JUSTICE**



**International Commission of Jurists, JUSTICE, and Nederlands Juristen Comité  
voor de Mensenrechten**

**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  
COM(2013) 824**

**September 2014**

## SUMMARY OF RECOMMENDATIONS

The following is a summary of the recommendations set out in full on pages 20-23. The rationale for these recommendations is set out on pages 3-19.

- The Directive should apply to suspects or accused persons from the point at which they have a right of access to a lawyer in accordance with Article 3.2 of Directive 2013/48/EU, irrespective of whether they are deprived of liberty.
- Provisional legal aid should not be confined to persons in detention, and should continue until the final decision on legal aid has been taken and comes into effect, and until either a legal aid lawyer has been appointed, or the person has had adequate facilities and a reasonable opportunity to find and engage the services of a lawyer.
- In EAW cases, the right to provisional legal aid should apply to requested persons deprived of liberty in the executing Member State, both with respect to executing state and issuing state legal assistance, pursuant to Article 10 of Directive 2013/48/EU.
- The Directive should require that Member States provide a comprehensive, accessible system of legal aid, administered by an independent, competent authority. Its decisions should be prompt, in writing and be subject to review.
- Choice of lawyer and continuity of legal representation should be guaranteed, in accordance with the wishes of the suspected, accused or requested person.
- Recovery of the costs of provisional legal aid should not be possible as it would seriously inhibit access to legal assistance.
- The eligibility criteria for access to legal aid should be included in the directive, setting out 'means' and 'merits' tests, modeled on paragraph 3 and 4 of the accompanying Recommendation on legal aid.
- The quality of legal assistance should be guaranteed so as to ensure the effective exercise of the rights of the defence. This should require appropriate qualification, training and accreditation of legal aid providers and appropriate remuneration.
- The independence of lawyers and the organisation of the defence should be guaranteed.
- Easily understandable information on legal aid in criminal proceedings should be made available to suspected, accused and requested persons.
- A right to judicial review should be available if access to legal aid is undermined, delayed or denied or if suspected, accused or requested persons have not been adequately informed of their right to legal aid.
- The rights provided by the Directive should be respected and ensured without discrimination of any kind.
- Member States should take special measures to ensure the provision of effective legal aid to suspected, accused or requested children.

## 1. INTRODUCTION

This briefing paper addresses the proposal for a directive on the right to provisional legal aid in criminal proceedings and legal aid in European Arrest Warrant (EAW) proceedings (“the proposed Directive”).<sup>1</sup> The proposed Directive was published by the European Commission on 27 November 2013 as part of a package of measures on criminal procedural rights, which also includes proposals for Directives on the presumption of innocence and the right to be present<sup>2</sup>, and procedural safeguards for children suspected and accused in criminal proceedings.<sup>3</sup> The package also includes Commission Recommendations on the right to legal aid for suspects or accused persons in criminal proceedings<sup>4</sup> and the rights of vulnerable persons suspected or accused in criminal proceedings. This package of proposals would add to measures adopted by the EU between 2010 and 2014 pursuant to the “Roadmap” aimed at strengthening rights in criminal proceedings and promoting fair trial standards.<sup>5</sup> So far, three Directives have been adopted: on the right to interpretation;<sup>6</sup> the right to information;<sup>7</sup> and on the right of access to a lawyer.<sup>8</sup>

The right to legal aid in criminal proceedings is guaranteed under international law as an element of the right to fair trial. It is in many cases essential to the exercise of the right of access to a lawyer and to the right to a defence. The proposed directive on legal aid is therefore closely connected to the already adopted Directive 2013/38/EU on access to a lawyer. The right of access to legal assistance will only be fully protected in EU law if human rights compliant national legislation on the right to legal aid is adopted and implemented in practice.

### **In light of the importance of the right to legal aid for the protection of procedural rights of suspects and accused persons, the International**

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<sup>1</sup> *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, 27 November 2013

<sup>2</sup> *Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings*, COM(2013) 821, 27 November 2013.

<sup>3</sup> *Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings*, COM(2013)822, 27 November 2013.

<sup>4</sup> *Commission recommendation on the right to legal aid for suspects or accused persons in criminal proceedings*, C(2013) 8179, 27 November 2013.

<sup>5</sup> *Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (1)*, 2009/C 295/01, OJ C 295/1, 4 December 2009, adopted under the “Stockholm Programme” of Commission work in the area of Freedom, Security and Justice between 2009 – 2014. For more information see [http://ec.europa.eu/justice/criminal/criminal-rights/index\\_en.htm](http://ec.europa.eu/justice/criminal/criminal-rights/index_en.htm).

<sup>6</sup> *Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings*, OJ L 280/1, 26 October 2010.

<sup>7</sup> *Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings*, OJ L 142/1, 1 June 2012.

<sup>8</sup> *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 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*, OJ L 294/1, 6 November 2013.

**Commission of Jurists (ICJ), JUSTICE and Nederlands Juristen Comité voor de Mensenrechten (NJCM) welcome the initiative to introduce legislation in this area.**

At the outset, however, it is important to note that the proposed Directive's limited scope restricts its capacity to strengthen protection of an individual's effective access to legal aid and thereby to ensure respect for the right to legal representation without discrimination throughout the EU. The proposed Directive makes provision for legal aid only in two limited situations: (1) provisional legal aid in the early stages of criminal proceedings, before a final decision has been made on legal aid for the proceedings as a whole and, if granted, a lawyer appointed (2) legal aid following arrest pursuant to a European Arrest Warrant (EAW), until surrender of the person, or a final decision on surrender.

Key guarantees that would make the right to legal aid effective, including standards for ensuring the quality of legal assistance, and wider criteria for granting legal aid are omitted from the proposed Directive, and instead elaborated in the accompanying, but non-binding, Recommendation on legal aid. This has created a "fragmented" approach<sup>9</sup> in the delivery of strong procedural guarantees that does not instil clarity with regard to EU Member States' obligations to provide legal aid, obligations that are already binding under international human rights law. There is a risk that, without a broadened scope and robust, practical safeguards, the proposed Directive will be an empty shell, legislating for legal aid in limited circumstances only, and falling short of ensuring strong, coherent legal aid systems that would guarantee respect for effective access to a lawyer without discrimination in criminal and EAW proceedings throughout the EU.

**Therefore, although the draft Directive in its current form includes important protections, in particular as regards the right to legal aid in the initial stages of the criminal process, the ICJ, JUSTICE and NJCM are concerned that in several respects, it omits adequate protection for effective access to legal aid and to legal advice, rights established by the Charter of Fundamental Rights (CFR) as well as international human rights law standards, including those under the European Convention on Human Rights (ECHR) and jurisprudence of the European Court of Human Rights. The ICJ, JUSTICE and NJCM therefore consider that a number of key provisions set out in the Recommendation, which codifies standards already binding on Member States under international human rights law, must be incorporated into the Directive.**

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<sup>9</sup> See the opinion of MEP Cornelis de Jong, Rapporteur, *DT\1023349EN.doc, Working Document on Provisional Legal Aid for Suspects or Accused Persons Deprived of Liberty and Legal Aid in European Arrest Warrant Proceedings*, 14 March 2014, para. 7.

## 2. THE RIGHT TO LEGAL AID: INTERNATIONAL LAW AND STANDARDS

The right to legal aid in criminal proceedings comprises an element of the right to fair trial as protected in EU and international human rights law:

- Article 47(3) CFR: "Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice".<sup>10</sup>
- Article 6(3)(c) ECHR: "Everyone charged with a criminal offence has the following minimum rights:... (c) to defend himself in person or through 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."<sup>11</sup>
- Article 14(3)(d) International Covenant on Civil and Political Rights (ICCPR): "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:... (d) To be tried in his presence, and to 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;"<sup>12</sup>
- United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Principle 3: "States should ensure that anyone who is arrested, detained or prosecuted with a crime punishable by a term of imprisonment or the death penalty is entitled to legal aid at all stages of the criminal justice process" (para 20) and "regardless of the person's means, if the interests of justice so require, for example given the urgency or complexity of the case or the severity of the potential penalty" (para 21).<sup>13</sup>

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<sup>10</sup> European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, Article 47(3).

<sup>11</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, Article 6(3)(c).

<sup>12</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, Article 14(3)(d).

<sup>13</sup> UN General Assembly, *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems: resolution / adopted by the General Assembly, 28 March 2013, A/RES/67/187*, Principle 3. See further, Guideline 1, on safeguards in the application of a means test to determine eligibility for legal aid.

## **Jurisprudence of the European Court of Human Rights (ECtHR) on the Right to Legal Aid in Criminal Cases**

Article 6(3)(c) ECHR stipulates that a suspect has the right to free legal aid on two conditions, first if he or she does not have sufficient means to pay for legal assistance (the means test), and second when the interests of justice so require (the merits test). The European Court of Human Rights (ECtHR) stated in *Pakelli v Germany* that Article 6(3)(c) does not require a defendant's lack of means to be demonstrated "beyond all doubt." In order to be eligible for financial assistance there need be only "some indication" that an applicant lacks sufficient means and "in the absence of clear indications to the contrary" the means test would be fulfilled.<sup>14</sup>

Three factors should be taken into account when determining the merits test:<sup>15</sup>

- The seriousness of the offence and the severity of the potential sentence,
- The complexity of the case, and
- The ability of the suspect or accused to effectively represent-himself or herself.

In *Pakelli* the Court also determined that the right to defence counsel extends to all hearings where complex points of law are in issue.<sup>16</sup> Moreover, where deprivation of liberty is at stake, the interests of justice in principle call for legal representation.<sup>17</sup>

Whilst under the ECHR, free legal aid must therefore only be provided under certain conditions and whilst the Court has refrained from setting precise standards, it has elaborated, in light of the different European legal traditions, on what is expected from Member States. The Court has repeatedly stated that the mechanisms adopted to ensure provision of free legal assistance must be practical and effective<sup>18</sup> and has underscored that it is important that a system is in place for identifying cases suitable for legal aid.<sup>19</sup> The Court has also emphasised that the regulation of legal aid lawyers in Member States ought to be stringent, as quality and effectiveness should not be allowed to become substandard.<sup>20</sup> In *Artico v Italy* the Court explained that the right in Article 6(3)(c) is about legal assistance and not mere "nomination" of a lawyer, since this does not ensure an effective fulfillment of the right. If they are notified of a difficulty in the provision of legal assistance, the authorities must either replace the lawyer or cause the lawyer to fulfil his or her obligations.<sup>21</sup>

The Court more recently held in *Sialkowska v Poland* that a State is not responsible or accountable for every shortcoming of a legal aid lawyer, as "it is the responsibility of the State to ensure a requisite balance between, on the one hand, effective enjoyment of access to justice and the independence of the legal profession on the other."<sup>22</sup> However, the onus is upon the national authorities to intervene if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention.<sup>23</sup>

<sup>14</sup> *Pakelli v. Germany*, ECtHR, Application No.8398/78, Judgment of 25 April 1983, para. 34.

<sup>15</sup> *Quaranta v. Switzerland*, ECtHR, Application no.12744/87, Judgment of 25 May 1991, paras. 33 – 35.

<sup>16</sup> *Pakelli v. Germany*, ECtHR, Application No.8398/78, Judgment of 25 April 1983, paras. 36 – 39.

<sup>17</sup> *Benham v. United Kingdom*, ECtHR, Application No. 19380/92, Judgment of 10 June 1996, para. 61.

<sup>18</sup> *Airey v. Ireland*, ECtHR, Application No.6289/73, Judgment of 9 October 1979.

<sup>19</sup> *Santambrogio v Italy*, ECtHR, Application No. 61945/00, Judgment of 24 September 2004, para. 54: "permettant de sélectionner les affaires susceptibles d'en bénéficier".

<sup>20</sup> *Pavlenko v. Russia*, Application No.42371/02, Judgment of 1 April 2010.

<sup>21</sup> *Artico v. Italy*, ECtHR, Application No. 6694/74, Judgment of 13 May 1980, para 33.

<sup>22</sup> *Sialkowska v. Poland*, ECtHR, Application No.8932/05, Judgment of 22 March 2007, para. 112.

<sup>23</sup> *Kamasinski v. Austria*, ECtHR, Application No.9783/82, Judgment of 19 December 1989, para.65; *Sannino v. Italy* ECtHR, Application No. 30961/03, Judgment of 26 April 2006, para.51.

### 3. COMMENTARY ON THE PROPOSED DIRECTIVE

#### ARTICLE 2 (WITH ARTICLE 4): SCOPE OF APPLICATION

##### Right to Legal Aid

Article 2 of the proposed Directive states that it shall apply to "(a) 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; (b) requested persons". Article 4(1) further states that "Member States shall ensure that the following persons, if they so wish, have the right to provisional legal aid; (a) suspects or accused persons in criminal proceedings, *who are deprived of liberty*; (b) requested persons *deprived of liberty* in the executing Member State".

The ICJ, JUSTICE and NJCM are concerned that the proposed Directive on legal aid prescribes a more limited scope of application to free legal assistance than Directive 2013/48/EU on the right of access to a lawyer. Article 2(1) of that Directive provides: "this Directive 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, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence, and irrespective of whether they are deprived of liberty".

Moreover, Article 3(2) of the same Directive states: "Suspects or accused persons shall have access to a lawyer without undue delay. In any event, suspects or accused persons shall have access to a lawyer *from whichever of the following points in time is the earliest*: (a) before they are questioned by the police or by another law enforcement or judicial authority; (b) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with point (c) of paragraph 3; (c) without undue delay after deprivation of liberty; (d) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court".

Therefore, whilst the directive on access to a lawyer applies from the moment the person is made aware of being a suspect or accused person, the proposed Directive on legal aid makes deprivation of liberty a condition for the right to legal aid. For many people in the Member States accused of crime, legal aid will be the mechanism through which the rights contained in the Directive on access to a lawyer are realised. The proposed Directive on legal aid should therefore ensure that the rights provided by the Directive on access to legal aid are effective in practice.

It is therefore of concern that a situation may occur where under Directive 2013/48/EU a suspected or accused person has the right to legal assistance, but only the right to free legal aid when he or she is deprived of liberty. While the apparent reason for this limited scope is that the Directive only provides a requirement to make available provisional legal aid for those people who are deprived of liberty, we do not consider

that this limitation will ensure effective access to legal assistance in accordance with Article 3 of Directive 2013/48/EU. As we set out below, in our view, the proposed Directive must contain clear requirements for the assessment of eligibility within the operative text, as well as mechanisms for the delivery of quality legal aid.

**The ICJ, JUSTICE and NJCM therefore recommend that Articles 2(a) and 4.1 of the proposed Directive be amended to state that the directive applies to suspects or accused persons from the point at which they have a right of access to a lawyer in accordance with Article 3.2 of Directive 2013/48/EU, irrespective of whether they are deprived of liberty.**

### **Provisional Legal Aid**

We welcome the recognition of the Commission that it is in the early phase of the proceedings that people will be most vulnerable and in need of legal aid to be assisted by a lawyer.<sup>24</sup> We also welcome the recognition in Recital (9) of the practical difficulties an arrested person faces when they are about to be questioned by the police but have not received a determination as to whether they are entitled to legal aid. To this end, the creation of provisional legal aid is an important safeguard.

However, we are concerned that, under Article 2 and 4(1), suspects and accused persons who are not held in detention, but who may nevertheless be vulnerable to violations of their right to a fair trial without legal advice, will not be eligible for provisional legal aid. This may include, for example, persons who are summoned to appear voluntarily before a police officer or investigative authority. A suspected person is still vulnerable to self-incrimination when questioned or when other evidence gathering techniques are used to build a case against them. **We therefore recommend that provisional legal aid should encompass circumstances in which a suspect or accused person is not detained, but is entitled to access to a lawyer under Article 3.2 (a) and (b) of Directive 2013/48/EU.**

Furthermore, the proposed Directive states in Articles 3(b) and 4(3) that provisional legal aid will be provided only until the final decision on legal aid has been taken, and in cases in which legal aid has been approved, a lawyer is appointed. In our view, this is insufficiently certain, and may allow for a detained person, or other vulnerable suspect or accused person, to be without the assistance of a lawyer at the important early stages in the case against them. Article 6(3)(c) ECHR as interpreted by the ECtHR<sup>25</sup> makes clear that it will always be in the interests of justice for a person who is deprived of liberty to receive legal aid. Moreover, it has been recognised by the ECtHR, and by the EU in the Directive on the right of access to a lawyer, that the initial stages are crucial for the case against a suspected person and where they are most vulnerable

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<sup>24</sup> *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 , 27 November 2013, Explanatory Memorandum, para 10.

<sup>25</sup> *Benham v. UK*, supra note 16.



to oppression and self-incrimination. **The ICJ, JUSTICE and NJCM therefore recommend that Article 4(3) be amended to read: “Provisional legal aid shall be ensured until the final decision on legal aid has been taken and comes into effect, and where, (a) if legal aid has been granted, the appointment of the lawyer has taken effect, or (b) where legal aid has been denied, the person has had adequate facilities and a reasonable opportunity to find and engage the services of a lawyer”.**

We also agree with the European Criminal Bar Association that, in EAW cases, provisional legal aid should not be limited to legal assistance in the executing state, but cover assistance pursuant to Article 10 of the Directive on the right of access to a lawyer in the issuing state.<sup>26</sup> This is because EAW proceedings adhere to a strict timetable in order to comply with the Framework Decision.<sup>27</sup> While provisional legal aid in the executing state may allow the requested person to partially prepare the case, if evidence under Article 10 is required from the issuing state to present it,<sup>28</sup> this may not be obtainable within the set timetable due to delay in the issuing state decision to grant legal aid. **We recommend that Article 4(1)(b) is amended to state that, in EAW cases, the right to provisional legal aid applies to requested persons deprived of liberty in the executing Member State, both with respect to executing state and issuing state legal assistance, pursuant to Article 10 of Directive 2013/48/EU.**

## **ARTICLES 4 AND 5: MEMBER STATES’ OBLIGATIONS REGARDING LEGAL AID**

The ICJ, JUSTICE and NJCM are concerned at the lack of clarity with regard to the nature of Member States’ obligations pursuant to Articles 4 and 5 on provisional legal aid and legal aid for requested persons. Whilst both articles lay down rights for suspected and accused persons, eligibility for legal aid and the manner and method by which it is effectively delivered are not prescribed anywhere in the proposed Directive.

Whilst it is understood that these provisions have been drafted so as to accommodate the different legal traditions within the EU, certain standards have been recognised in international human rights law as universally applicable. Moreover, research conducted amongst EU and potential accession states has found the same institutional and mechanistic problems with the delivery of quality legal aid irrespective of differing legal traditions.<sup>29</sup> Greater clarity as to what the EU expects by way of effective provision of

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<sup>26</sup> European Criminal Bar Association, *Comments and recommendations on the Commission’s proposals on legal aid*, May 2014, available at [http://www.ecba.org/extdocserv/20140512\\_ECBA\\_ComRecLegalAid.pdf](http://www.ecba.org/extdocserv/20140512_ECBA_ComRecLegalAid.pdf).

<sup>27</sup> *Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 2002/584/JHA*, OJ L 190, 18 July 2007, p. 1.

<sup>28</sup> Which is often necessary to assist in the preparation of the defence case, see *European Arrest Warrants: Ensuring an Effective Defence*, Justice – London, United Kingdom, 2012.

<sup>29</sup> Described as the ‘Achilles heel in many criminal law systems in the EU’, see Edward Lloyd-Cape, Zaza Namoradze, Roger Smith, Taru Spronken, *Effective Criminal Defence in Europe*, Intersentia – Mortsel, First Edition, Belgium, 2010, p. 41, (a study that considered the systems in Belgium, England and Wales, Finland, France, Germany, Hungary, Italy,

legal aid would aid the Member States in understanding their obligations and therefore ensure successful implementation of the right to legal aid, as well as coherence in provision of legal aid, across the Member States.

Inspiration can be drawn in this regard from the UN Principles and Guidelines on the Right to Legal Aid, Principle 2 of which reads: "States should consider the provision of legal aid as their duty and responsibility. To that end, they should consider, where appropriate, enacting specific legislation and regulations and ensure that a comprehensive legal aid system is in place that is accessible, effective, sustainable and credible. States should allocate the necessary human and financial resources to the legal aid system".

**The ICJ, JUSTICE and NJCM therefore recommend the inclusion of a new Article requiring the following:**

#### **Article 3A**

- 1. Member states shall ensure that a comprehensive, accessible system is put in place, administered by an independent, competent body, to fulfil obligations under this Directive. Sufficient human and financial resources shall be allocated to ensure the effective operation of the system and an appropriate quality of legal aid.**
- 2. The authority shall make decisions on whether or not to grant legal aid promptly and in accordance with regulations that ensure suspects or accused persons and requested persons are able to effectively prepare their defence.**
- 3. Decisions rejecting in full or in part applications for legal aid shall be given to the suspected, accused or requested person in writing and shall be subject to appeal to an independent judicial authority.**

#### **ARTICLE 4(3): CONTINUITY OF LEGAL REPRESENTATION**

Article 4(3) states that "provisional legal aid shall be ensured until 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". This seems to imply that the provisional legal aid is granted until the decision is made on eligibility, and if the person is indeed granted legal aid, then a *different* lawyer will be appointed.

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Poland and Turkey), a phrase repeated in Ed Cape and Zaza Namoradze, *Effective Criminal Defence in Eastern Europe*, Soros Foundation Moldova LARN, 2012, p. 452 (a study that considered systems in Bulgaria, Georgia, Lithuania, Moldova and Ukraine). Fair Trials International also asked defence lawyers in every member state whether legal aid operated effectively, reported in the 2012 report *The Practical Operation of Legal Aid in the*, available at [http://www.fairtrials.org/wp-content/uploads/2012/09/Legal\\_Aid\\_Report.pdf](http://www.fairtrials.org/wp-content/uploads/2012/09/Legal_Aid_Report.pdf)

The ICJ, JUSTICE and NJCM are concerned that this may lead to situations where a provisional legal aid lawyer will routinely only provide the earliest legal advice. This may not be in the best interests of the suspected or accused person, who would benefit from the advice of a competent and experienced criminal lawyer, or at least firm of lawyers, that has an awareness of all stages of the case concerned.<sup>30</sup> In particular, where vulnerable groups such as children are concerned, a change of lawyer could be a disrupting factor that affects their ability to put forward a defence. The European Parliament LIBE Committee rapporteur on the proposed Directive has proposed inclusion of the “need for continuity in legal representation, if the suspected, accused or requested person so wishes.”<sup>31</sup> We support this proposal. In fact, the Recommendation on legal aid<sup>32</sup> includes provisions on the appointment of legal aid lawyers, stressing the importance of the preference and wishes of the suspected or accused person and the need for continuity in legal representation (if the suspect so wishes), in paragraphs 24 – 26.

**The ICJ, JUSTICE and NJCM therefore suggest the inclusion of provisions in a new Article as follows:**

#### **Article 3B**

**1. Within the legal aid system, including in the system of provisional legal aid, the Member States will ensure as far as possible that:**

**a) The preference and wishes of suspects or accused persons and requested persons are taken into account by the national legal aid systems in the choice of the legal aid lawyer.**

**b) continuity in legal representation, if the suspect or accused or requested person so wishes, shall be ensured.**

**2. The Member States shall put in place transparent and accountable mechanisms to ensure that suspects or accused persons and requested persons can make an informed choice on legal assistance under the legal aid scheme, free from undue influence.**

#### **ARTICLE 4(5): RECOVERY OF COSTS**

Article 4(5) of the proposed Directive states that “Member States shall be able to provide that the costs relating to provisional legal aid can be recovered from suspects

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<sup>30</sup> See Jodie Blackstock, Edward Lloyd-Cape, Jacqueline Hodgson, Anna Ogorodova, Taru Spronken, *Inside Police Custody*, Intersentia – Cambridge, United Kingdom, 2014, Chapter 6. It was found that in France and the Netherlands, the provision of police station advice was often seen as a one off transaction, which did not follow through to court representation, due to the way the duty legal advice systems have developed and lack of specialist criminal defence lawyers. In contrast, in England and Wales, specialist lawyers were organised in larger firms and police station representation was mainly delegated to appropriately qualified representatives. This relieved staff engaged at court of the burden of long shifts at the police station, whilst ensuring continuity of representation within the same firm.

<sup>31</sup> See note 10 above, para. 11.

<sup>32</sup> *Commission recommendation on the right to legal aid for suspects or accused persons in criminal proceedings*, C(2013) 8179, 27 November 2013

or accused persons and requested persons who do not meet the eligibility criteria for legal aid as applicable under national law”.

The ICJ, JUSTICE and NJCM are seriously concerned at the implications of this provision for effective access to provisional legal aid, without discrimination. The potential for Article 4(5) to undermine effective and consistent protection of access to a lawyer across EU Member States is particularly significant given the lack of eligibility criteria for legal aid in the Directive.<sup>33</sup> Furthermore, the UN Committee against Torture has considered that laws requiring an accused person to reimburse the costs of legal aid are in certain circumstances contrary to the right of access to a lawyer.<sup>34</sup>

It is well settled, including within the EU<sup>35</sup>, that suspects or accused persons are particularly vulnerable to oppression and self incrimination, at the earliest stages, including because the evidence obtained may often be determinative of the case against them. In order for the trial to be fair, access to a lawyer must be provided<sup>36</sup> from the moment a suspect is taken into police custody or pre-trial detention.<sup>37</sup> Given the pressure of the circumstances in which the suspect finds themselves<sup>38</sup>, should a suspect be offered legal aid, but told that they may be expected to pay the cost of it later, the prospect of such financial liability is likely to guide their choice, potentially inhibiting them from acquiring immediate legal assistance. In comparison with the Directive on the Right to Interpretation, where costs cannot be recovered from the suspected or accused person,<sup>39</sup> the current text of Article 4(5) imposes an unacceptable barrier on access to legal aid.

Recovery of costs also goes against the principle, acknowledged by the Directive, that given the immediacy of the investigative stages imposed upon the suspect, it is essential that legal aid is available to them. Recital 10 states that provisional legal aid should be provided to the extent necessary and not limited in any way that prevents the effective exercise of the right of access to a lawyer. This should be unconditional.

**The ICJ, JUSTICE and NJCM therefore recommend that Article 4(5) be deleted, as it would seriously inhibit effective access to legal assistance.**

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<sup>33</sup> MEP Cornelis de Jong, *supra*, para. 7.

<sup>34</sup> Committee Against Torture, *Concluding Observations on Latvia*, UN Doc CAT/C/CR/31/3 (2004), para.6.(h).

<sup>35</sup> Proposed Directive Provisional Legal Aid and Legal Aid in EAW Proceedings, Explanatory Memorandum, paras. 10, 25.

<sup>36</sup> *Salduz v. Turkey*, ECtHR, Application No.36391/02, Judgment of 27 November 2008, paras. 50 – 55; *John Murray v. the United Kingdom*, ECtHR, Application No. 18731/91, Judgment of 8 February 1996, paras. 62 – 70.

<sup>37</sup> *Dayanan v. Turkey*, ECtHR, Application No. 7377/03, Judgment of 13 October 2009, paras. 31 – 32.

<sup>38</sup> *Inside Police Custody*, pp. 274-282 records that there are many competing concerns already facing a suspect when deciding whether to request legal assistance, such as the delay in getting out of police custody that might ensue, whether it would make them look guilty, whether they should confess. Often this is influenced by the scant information provided to them as to the role of a lawyer during police detention.

<sup>39</sup> *Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings*, 20 October 2010, Article 4.

## 4. ADDITIONAL SAFEGUARDS

As set out above, assessing the Proposed Directive in the light of international and European human rights standards on legal aid, it is clear that a number of essential safeguards that ensure the effective access to legal assistance, are lacking. These include provisions on:

1. Eligibility criteria for legal aid
2. Quality of legal assistance
3. Independence of lawyers (principle of non-interference)
4. Access to remedies
5. Non-discrimination
6. Legal aid for children

### 1: ELIGIBILITY CRITERIA

In the interests of legal certainty, and in light of European and international standards, it is problematic that eligibility criteria for legal aid (other than provisional legal aid) are contained solely in the non-binding Recommendation. In particular in light of the provision on recovery of cost in Article 4(5) of the proposed directive, lack of clarity on the eligibility criteria, and lack of minimum rules on these criteria seriously obstructs suspected or accused persons from requesting legal aid, out of fear that they may not be able to pay back the costs. The Recommendation articulates the means and merits tests set out in international law, as noted above, and goes on to specify in commendable detail how these tests should be applied.

Given that all Member States of the EU, as parties to the ECHR and ICCPR, already have an international legal obligation to provide legal aid in accordance with the means and merits tests (see above), these tests should be set out in the operative part of the Directive so as to provide concrete, practical standards as between EU Member States. **The ICJ, JUSTICE and NJCM recommend that at a minimum, articles modelled on paragraphs 3 and 4 of the Recommendation that set out the 'means' and 'merits' tests should be included in the Directive. In addition, to foster clarity, further detail as to what these tests entail should be agreed and codified in the Directive, reflecting the tests articulated in the Recommendation.**

#### Article 3C Eligibility for Legal Aid

- 1. Member States shall take appropriate measures to ensure that those who are eligible are provided with access to legal aid.**
- 2. Suspects or accused persons and requested persons shall be granted access to legal aid if:**
  - a. They lack sufficient financial resources to meet all or part of the costs of their defence (means); or**
  - b. The interests of justice so require (merits)**

- 3. Lack of means shall be assessed on the basis of all relevant and objective factors including income, capital, family situation, standard of living, the circumstances of the case and the cost of legal representation.**
- 4. Merits shall be assessed on the basis of the urgency, complexity and seriousness of the case, and the social and personal situation of the suspect or accused or requested person. Where the suspected offence carries a custodial sentence the interests of justice shall be satisfied.**

## **2: QUALITY OF LEGAL AID**

The proposed Directive's strength in protecting the right to legal aid and legal assistance would be significantly enhanced if there were an obligation for the State to put in place a mechanism that ensures the quality of legally-aided representation, so that it is consistent with and safeguards the right to effective assistance of counsel without discrimination.<sup>40</sup>

As the jurisprudence of the ECtHR cited above indicates, whilst a Member State is not responsible for all actions of the appointed legal aid lawyer, the obligation to provide legal aid goes beyond mere nomination of a lawyer and requires further measures to ensure effective access to legal assistance.

Principle 13 of the UN Principles and Guidelines on Access to Legal Aid, which addresses competence and accountability of legal aid providers, lays down the obligation for States to "ensure that all legal aid providers possess education, training, skills and experience commensurate with the nature of their work, including the gravity of the offences dealt with, and the rights and needs of women, children and groups with special needs".

Again, provisions about the quality legal aid are already set out in paragraphs 17 and 18 of the Recommendation. They state that "legal assistance provided under legal aid schemes should be of high quality in order to ensure the fairness of proceedings" and "systems to ensure the quality of legal aid lawyers should be in place in all Member States." Likewise, "mechanisms should be in place that allow the competent authorities to replace legal aid lawyers or require them to fulfil their obligations, if those lawyers fail to provide adequate legal assistance."<sup>41</sup> Subsequent paragraphs set out accreditation and training requirements. This reflects the considerable research demonstrating that without training requirements, an effective defence can be denied to suspects and accused persons and requested persons by lawyers undertaking legal aid work.<sup>42</sup> It is insufficient to suggest this in a Recommendation only.

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<sup>40</sup> *Artico v. Italy*, ECtHR, Application No. 6694/74, Judgment of 13 May 1980, para 33.

<sup>41</sup> Recommendation, paras. 17 and 18.

<sup>42</sup> See note 33 above. In particular, *Inside Police Custody* has recommended 'Appropriate laws, regulations, organisational structures, and procedures should be introduced to ensure the timely provision of legal advice and assistance to suspects in police custody, by lawyers with sufficient knowledge and skills to provide effective advice and

The Directive on the right to interpretation and translation recognised this, and requires services to be of “sufficient quality to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence”<sup>43</sup> and require that concrete measures be taken by Member States to ensure the services meet that standard.<sup>44</sup>

The ICJ, JUSTICE and NJCM consider that without a provision demanding quality of legal aid representation, the Directive falls below international standards.

Moreover, the European Parliament LIBE Committee Rapporteur on the proposed directive has observed that the quality of lawyers is likely to depend upon their fees,<sup>45</sup> but the differences between Member States make it impossible to provide for detailed rules on remuneration. He nevertheless concludes that at least some safeguards concerning the quality of the legal assistance offered are necessary, in the absence of set fees.

We agree with the ECBA that remuneration must reflect and be proportionate to the extent of the work involved, and the factual and legal complexity of the case.<sup>46</sup> This should be articulated in the Directive.

**The ICJ, JUSTICE and NJCM therefore propose the inclusion of the following article:**

**Article 3D:**

**Quality of Legal Aid**

- 1. Legal assistance provided under legal aid schemes shall be of a quality sufficient to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence.**
- 2. Member States shall ensure that all legal aid providers possess education, training, skills and experience commensurate with the complexity and nature of each case to which they are assigned.**

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assistance’, as well as mechanisms for a duty scheme that selects appropriate lawyers to provide prompt advice and continuity of counsel if the suspect so wishes, see recommendation 8.3.4, p 455. The study goes on to set out recommendations for appropriate training for lawyers to raise awareness of and develop skills in respect of the law governing the right to legal assistance and the broad and active role of lawyers in advising and assisting suspects during police detention, see recommendation 8.3.7, p 456. See also *European Arrest Warrants: Ensuring an effective defence*, which concludes at p. 40 that “Despite the EAW having been in force for eight years, in most member states, defence lawyers are generally not well equipped to deal with them” and recommends training be provided for EAW cases given their complex, comparative and speedy nature, see pp. 11 and 12.

<sup>43</sup> Directive 2010/64/EU, Articles 2(8) and 3(9).

<sup>44</sup> *Ibid.*, Article 5.

<sup>45</sup> Report of LIBE Rapporteur, *supra*, para. 10.

<sup>46</sup> European Criminal Bar Association, *Touchstones – Minimum standards for the right to legal aid (Measure C part 2)*, June 2013, available at [http://www.ecba.org/extdocserv/projects/legalaid/20130625\\_ECBA Touchstones Legal Aid.pdf](http://www.ecba.org/extdocserv/projects/legalaid/20130625_ECBA Touchstones Legal Aid.pdf)

- 3. A system of accreditation for legal aid lawyers shall be put in place and maintained in each Member State.**
- 4. Legal aid lawyers shall receive appropriate continuous professional training to ensure their skills remain adequate.**
- 5. Legal aid fees paid to lawyers must reflect the nature and complexity of the work involved, the specific needs of the client and be proportionate to the length of the proceedings.**

### **3: INDEPENDENCE AND NON-INTERFERENCE**

Another cornerstone of effective provision of quality legal aid is ensuring the independence of the legal aid system and of the lawyers who deliver it. Principle 12 of the UN Principles and Guidelines on Access to Legal Aid provides that states should ensure that legal aid providers are able to carry out their work independently, without hindrance harassment or improper interference. The ECtHR has emphasized that “it is the responsibility of the State to ensure a requisite balance between, on the one hand, effective enjoyment of access to justice and the independence of the legal profession on the other.”<sup>47</sup> This is necessary so that lawyers are able to act in the best interests of their clients rather than in accordance with the priorities or dictates of officials of the State, thereby providing an independent and effective defence and maintaining fair proceedings.<sup>48</sup> We note that paragraph 28 of the explanatory memorandum envisages that Member States may limit the duration and frequency of communication with a lawyer. We emphasise that any such limitations must not prejudice the independence of the lawyer concerned, the quality or effectiveness of the legal assistance provided, and must respect the right to adequate time and facilities for the preparation of the defence, without discrimination.

**The ICJ, JUSTICE and NJCM therefore suggest the inclusion of an article on the principle of independence and non-interference, modelled on the UN Principles on Legal Aid, Principle 2, paragraph 16, which states that “The State should not interfere with the organization of the defence of the beneficiary of legal aid or with the independence of his or her legal aid provider”.**

### **4: RIGHT TO INFORMATION**

Directive 2012/13/EU on the right to information provides in Article 3(1)(b) that suspects or accused persons have the right to be provided promptly with information on “any entitlement to free legal advice and the conditions for obtaining such advice.”<sup>49</sup> The right to information on how to gain access to legal aid is also included in the

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<sup>47</sup> *Sialkowska v. Poland*, ECtHR, Application No. 8932/05, Judgment of 22 March 2007, para. 112.

<sup>48</sup> United Nations Basic Principles on the Role of Lawyers, principles 1, 3, 15.

<sup>49</sup> *Directive 2012/13/EU on the right to information in criminal proceedings*, 22 May 2012, Article 3(1)(b).



indicative model letter of rights annexed to Directive 2012/13/EU.<sup>50</sup>

Whilst the right to information regarding legal aid is therefore already guaranteed in these instruments, it is not elaborated. It is important that the suspect is not only informed of his or her rights, but of how to exercise them in practice. The Recommendation on legal aid<sup>51</sup> recognises this and includes at paragraph 5 the suggestion that information on how and where to apply for legal aid, as well as transparent criteria for eligibility are made available, together with information concerning the complaint procedure for when legal aid is denied or legal assistance is insufficient.

The inclusion of such information in the Directive would strengthen the suspected, accused and requested persons' understanding of their right to legal aid and therefore access to legal assistance.

**The ICJ, JUSTICE and NJCM therefore recommend the inclusion in the Directive of the following:**

#### **Article 5A**

##### **Right to Information**

**1. Member States shall ensure that suspects, accused and requested persons are provided with easily understandable information concerning the right to legal aid in criminal proceedings**

**2. Such information shall include:**

- a. Transparent criteria on eligibility for legal aid;**
- b. When and how they can apply for legal aid;**
- c. How to complain against the denial or delay of access to legal aid or deficiencies in legal assistance provided by a legal aid lawyer.**

## **5: RIGHT TO LEGAL REMEDY BEFORE A COMPETENT BODY**

Unlike many other comparable Directives, and most recently, the Roadmap Directives on the right to information and the right of access to a lawyer<sup>52</sup>, this proposed Directive does not make express provision for a remedy clause. This is surprising given the existing obligation under the CFR and the prominence placed by the Commission on ensuring effective remedies in its Communication on the EU Justice Agenda for 2020, where it stated that "[t]here are no rights without effective remedies. The EU should

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<sup>50</sup> Ibid., Annex 1.

<sup>51</sup> Commission recommendation on the right to legal aid for suspects or accused persons in criminal proceedings, C(2013) 8179, 27 November 2013.

<sup>52</sup> Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142/1, 1 June 2012, Article 8; 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 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, OJ L 294/1, 6 November 2013, Article 12.

pursue its efforts to ensure the respect of the right to an effective remedy before a tribunal in case of violation of EU law (Article 47 of the Charter)."<sup>53</sup>

The right to an effective remedy in this regard would provide a mechanism for redress for an individual deprived of or denied legal aid, or who receives a service that is insufficient. This right is recognised in Principle 9 of the UN Principles and Guidelines on Legal Aid, which provides that "States should establish effective remedies and safeguards that apply if access to legal aid is undermined, delayed or denied or if persons have not been adequately informed of their right to legal aid."<sup>54</sup> It would also reflect the ECHR right to review of administrative decisions that effect civil rights and obligations (Article 6 ECHR) as well as the right to an effective remedy for violations of human rights (Article 13 ECHR) and equivalent rights under Article 14 and Article 2.3 of the ICCPR.

Again, the Recommendation does acknowledge the right by providing in paragraph 15 that "suspects or accused persons and requested persons should have a right to review decisions rejecting their application for legal aid in full or in part," and paragraph 16 requires that where applications are rejected the reasons should be provided in writing.<sup>55</sup>

Paragraph 15 does not stipulate which body will provide the review, however the ICJ, JUSTICE and NJCM consider that in order to provide adequate safeguards, the right to *judicial* review is of paramount importance as a denial of sufficient legal aid may lead to the denial of an effective defence.

**We recommend that the Directive include the following:**

#### **Article 5B**

**Member States shall ensure that suspects, accused and requested persons have a right to judicial review if access to legal aid is undermined, delayed or denied or if they have not been adequately informed of their right to legal aid.**

## **6: NON-DISCRIMINATION**

Ensuring equal access to a legal defence, without discrimination, is an underlying purpose of legal aid. Non-discrimination is a well-established and universal human rights doctrine, found in virtually every legislative instrument relating to fundamental rights, but absent in the proposed Directive. Such provision would be in line with

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<sup>53</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *The EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union*, COM(2014) 144 final, 11 March 2014, para. 4.1 (ii).

<sup>54</sup> UN General Assembly, *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems: resolution adopted by the General Assembly*, 28 March 2013, A/RES/67/187, Principle 6.

<sup>55</sup> *Commission recommendation on the right to legal aid for suspects or accused persons in criminal proceedings*, C(2013) 8179, 27 November 2013, Section 2, paras. 15 and 16.

Article 21(1) CFR which prescribes that “Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.” Article 14 ECHR also provides that all the rights set forth in the Convention shall be “secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”<sup>56</sup> Principle 6 of the UN Principles and Guidelines on Access to Legal Aid further obliges States to prohibit discrimination in access to legal aid for all persons.

**The ICJ, JUSTICE and NJCM therefore recommend that Recital 18 be amended as follows:**

**This Directive should apply equally to suspects or accused persons regardless of their legal status, citizenship or nationality, sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation or any other status.**

## **7: LEGAL AID FOR CHILDREN**

The UN Principles and Guidelines on Legal Aid provide that children should have access to legal aid under the same or more lenient conditions as adults (Principle 22), as well as that States should ensure special measures for children including the right of a child to have counsel assigned in his or her own name (Guideline 10) They further stipulate that the best interests of the child should be a primary consideration in legal aid decisions affecting children, that legal aid for children should be accessible and age appropriate, and that it should be responsive to the specific legal and social needs of the child (Principle 11). Children are an especially vulnerable group of suspects and accused persons, and their immediate access to a lawyer should be ensured.

**The ICJ, JUSTICE and NJCM therefore recommend that the Directive recognize, in a recital, the obligation of Member States to take special measures to ensure the provision of effective legal aid to children suspected or accused in criminal proceedings. Furthermore, any provision on the “means” test in the Directive should stipulate that when the applicant is a child, only their own assets should be taken into account in the assessment of means.**

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<sup>56</sup> *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, Article 14.

## **8. RECOMMENDATIONS**

The ICJ, JUSTICE and NJCM make the following recommendations:

### ***Scope of application***

Articles 2(a) and 4.1 of the proposed Directive should be amended to state that the directive applies to suspects or accused persons from the point at which they have a right of access to a lawyer in accordance with Article 3.2 of Directive 2013/48/EU, irrespective of whether they are deprived of liberty. Provisional legal aid should encompass circumstances in which a suspect or accused person is not detained, but is entitled to access to a lawyer under Article 3.2 of Directive 2013/48/EU.

Article 4(3) should be amended to read: "Provisional legal aid shall be ensured until the final decision on legal aid has been taken and comes into effect, and where, (a) if legal aid has been granted, the appointment of the lawyer has taken effect, or (b) where legal aid has been denied, the person has had adequate facilities and a reasonable opportunity to find and engage the services of a lawyer".

Article 4(1)(b) should be amended to state that, in EAW cases, the right to provisional legal aid applies to requested persons deprived of liberty in the executing Member State, both with respect to executing state and issuing state legal assistance, pursuant to Article 10 of Directive 2013/48/EU.

### ***Comprehensive, Accessible System***

A new Article 3A should be included, to provide that:

- A. Member states shall ensure that a comprehensive, accessible system is put in place, administered by an independent, competent body, to fulfil obligations under this Directive. Sufficient human and financial resources shall be allocated to ensure the effective operation of the system and an adequate quality of legal aid.
- B. The authority shall make decisions on whether or not to grant legal aid promptly and in accordance with regulations that ensure suspects or accused persons and requested persons are able to effectively prepare their defence.
- C. Decisions rejecting in full or in part applications for legal aid shall be given to the suspected, accused or requested person in writing and shall be subject to appeal to an independent judicial authority.

### ***Continuity of Legal Representation***

**A new Article 3B, should provide that:**

- 1. Within the legal aid system, including in the system of provisional legal aid, the Member States will ensure as far as possible that:
  - a) The preference and wishes of suspects or accused persons and requested persons are taken into account by the national legal aid systems in the choice of the legal aid lawyer.**
  - b) Continuity in legal representation, if the suspect or accused or requested person so wishes, shall be ensured.****
- 2. The Member States shall put in place transparent and accountable mechanisms to ensure that suspects or accused persons and requested persons can make an informed choice on legal assistance under the legal aid scheme, free from undue influence.**

### ***Recovery of Costs***

**Article 4(5) should be deleted, as it would seriously inhibit effective access to legal assistance.**

### ***Eligibility Criteria***

**At a minimum, articles modelled on paragraphs 3 and 4 of the Recommendation that set out the 'means' and 'merits' tests should be included in the Directive. In addition, to foster clarity, further detail as to what these tests entail should be agreed and codified in the Directive, reflecting the tests articulated in the Recommendation.**

**These provisions should be incorporated as follows:**

#### **Article 3C**

##### **Eligibility for Legal Aid**

- 1. Member States shall take appropriate measures to ensure that those who are eligible are provided with access to legal aid.**
- 2. Suspects or accused persons and requested persons shall be granted access to legal aid if:
  - a. They lack sufficient financial resources to meet all or part of the costs of their defence (means); or**
  - b. The interests of justice so require (merits)****
- 3. Lack of means shall be assessed on the basis of all relevant and objective factors including income, capital, family situation, standard of living, the circumstances of the case and the cost of legal representation.**
- 4. Merits shall be assessed on the basis of the urgency, complexity and seriousness of the case, and the social and personal situation of the**

suspect or accused or requested person. Where the suspected offence carries a custodial sentence the interests of justice shall be satisfied.

### ***Quality of Legal Aid***

A new article should be included on quality of legal aid:

#### **Article 3D**

##### **Quality of Legal Aid**

- 1. Legal assistance provided under legal aid schemes shall be of a quality sufficient to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence.**
- 2. Member States shall ensure that all legal aid providers possess education, training, skills and experience commensurate with the nature of their work and with the complexity and nature of each of the cases to which they are assigned.**
- 3. A system of accreditation for legal aid lawyers shall be put in place and maintained in each Member State.**
- 4. Legal aid lawyers shall receive appropriate continuous professional training to ensure their skills remain adequate.**
- 5. Legal aid fees paid to lawyers must reflect the complexity of the work involved and be proportionate to the nature and complexity of the case, the specific needs of the client, as well as to length of the proceedings.**

### ***Independence of Lawyers***

A new article should be included on the principle of independence and non-interference, modelled on the UN Principles on Legal Aid, Principle 2, paragraph 16, which states that "The State should not interfere with the organization of the defence of the beneficiary of legal aid or with the independence of his or her legal aid provider".

### ***Right to Information***

Include a new article should be included on the right to information

#### **Article 5A**

##### **Right to Information**

- 1. Member States shall ensure that suspects, accused and requested persons are provided with easily understandable information concerning the right to legal aid in criminal proceedings**
- 2. Such information shall include:**
  - a. Transparent criteria on eligibility for legal aid;**
  - b. When and how they can apply for legal aid;**
  - c. How to complain against the denial or delay of access to legal aid**

or deficiencies in legal assistance provided by a legal aid lawyer.

### ***Remedies Clause***

A new article should be included on remedies:

#### **Article 5B**

**Member States shall ensure that suspects, accused and requested persons have a right to judicial review if access to legal aid is undermined, delayed or denied or if they have not been adequately informed of their right to legal aid.**

### ***Non-Discrimination***

**Recital 18 should be amended as follows: "This Directive should apply equally to suspects or accused persons regardless of their legal status, citizenship or nationality, sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation or any other status."**

### ***Legal Aid for Children***

**The Directive should recognise, in a recital, the obligation of Member States to take special measures to ensure the provision of effective legal aid to children suspected or accused in criminal proceedings. Furthermore, any provision on the "means" test in the Directive should stipulate that when the applicant is a child, only their own assets should be taken into account in the assessment of means.**