

**The ECBA's comments and recommendations
following the Commission's proposals on Legal Aid
(COM(2013) 824 and C(2013) 8179/2)**

Introduction

The European Criminal Bar Association (ECBA) is an association of independent specialist defence lawyers. The association was founded in 1997 and has become the pre-eminent independent organisation of specialist defence practitioners in all Council of Europe countries. We represent over 35 different European countries including all EU Member States. The ECBA's aim is to promote the fundamental rights of persons under investigation, suspects, accused and convicted persons, not only in theory, but also in the daily practice in criminal proceedings throughout Europe.

Through its conferences, website and newsletter the ECBA provides a suitable forum to access absolutely up-to-date information on legal developments. Through the work of its legal development sub-committee, the Association actively seeks to shape future legislation with a view to ensuring that the rights of European citizens in criminal proceedings are enhanced in practice. Through the networking opportunities available with membership, members establish one-to-one contact with other practitioners in other Member States both with a view to the exchange of information and to practical cooperation in specific cases. This experience from comparative jurisdictions shapes and informs the submissions which are made by the Association to the law makers, and ensures that those submissions are given due weight.

We were members of the EU Justice Forum and we participate(d) in several EU-projects (e.g. training events for defence lawyers jointly with ERA, networking/legal aid; letter of rights; pre-trial emergency defence; European Arrest Warrant; translation and interpretation) and we have been regularly invited to many EU experts' meetings concerning criminal law issues.

Further information on the ECBA can be found on our website: www.ecba.org.

Background to the proposals

In the autumn of 2013, Directive 2013/48/EU on the right to access to a lawyer (Measure C-1) was adopted. This Directive provides a right of access to a lawyer from the first stage of police questioning and throughout criminal proceedings until final appeal. Pursuant to the Directive, suspected and accused persons¹ have the right, *inter alia*:

¹ According to Art. 2, Sect. 1 of the Directive on the right of access to a lawyer, the Directive "applies to suspects or

- to consult with a lawyer of their own choosing, without delay, as necessary to effectively exercise their defence rights;
- to only waive that right where they are given clear and sufficient information in simple and understandable language about the right, and consequences of waiver, and to do so voluntarily and unequivocally;
- to receive information to enable access to a lawyer and, where the suspect is detained, to have the necessary arrangements taken to exercise effectively their right of access;
- to have their lawyer present during police questioning, and for the lawyer to be able to participate so as to ensure the fairness of the process;
- to have their lawyer present at certain evidence-gathering acts;
- to confidential communication with their lawyer;
- to obtain legal advice in both the country where a European Arrest Warrant is executed and where it was issued, to assist with their defence against surrender.

Member States agreed in the Directive on the right of access to a lawyer to promote the application of the Charter of Fundamental Rights, in particular Articles 4, 6, 7, 47 and 48 thereof, by building upon Articles 3, 5, 6 and 8 ECHR, as interpreted by the European Court of Human Rights, which, in its case-law, on an ongoing basis, sets standards on the right of access to a lawyer. That case-law provides, *inter alia*, that the fairness of proceedings requires that a suspect or accused person be able to obtain the whole range of services specifically associated with legal assistance. In that regard, the lawyers of suspects or accused persons should be able to secure without restriction, the fundamental aspects of the defence².

The ECBA published its position paper “ECBA Touchstones - Minimum Standards for the right to Legal Aid” in the summer of 2013,³ in anticipation of the proposal for a directive on legal aid.

In November 2013, the Commission published five proposals in the field of procedural safeguards.⁴ Two of those concern the right to legal aid:

- a proposal for a Directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European Arrest Warrant proceedings.⁵ The objective of the Directive on provisional legal aid is to ensure that suspects who are deprived of liberty have access to legal aid to render effective the right of access to a lawyer as granted in Directive 2013/48/EU.⁶

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.”

² Directive 2013/48/EU, Recital 12

³ http://www.ecba.org/extdocserv/projects/legalaid/20130625_ECBA Touchstones Legal Aid.pdf.

⁴ http://europa.eu/rapid/press-release_IP-13-1157_en.htm

⁵ COM(2013) 824

⁶ Explanatory Memorandum to the Directive on provisional legal aid, para. 6 and 20.

- a Recommendation on the right to legal aid for suspects or accused persons in criminal proceedings. The objective of the Recommendation is to foster certain convergence as regards the assessment of eligibility of legal aid in the Member States, as well as encouraging the Member States to take action to improve the quality and effectiveness of legal aid services and administration.⁷

The ECBA's Touchstones

In its Touchstones on minimum standards for legal aid,⁸ the ECBA emphasised the need to address a number of key issues in legislating for the provision of legal aid. These key issues have also been identified in the “United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems”, which were adopted by the UN's General Assembly on 20 December 2012. An excerpt of these Principles and Guidelines has been attached as Annex A to the ECBA's Touchstones document. These key issues are:

Independence of lawyers

The appointment of defence counsel must be done by an organisation or body that is independent from the police and the judiciary and should be free from governmental, political or financial influence. Appointments should be made on the basis of a duty roster or on the basis of a daily list of available lawyers by rota. This is to enable the necessary trust required of the lawyer-client relationship, and must entail the right to choose legal counsel. At a minimum, this must provide the right to have a different lawyer appointed where the suspected or accused person does not have sufficient trust in their appointed lawyer.

Eligibility for legal aid

Member States must ensure that suspects receive legal aid free of charge from the moment they are arrested and during the period in which they are detained or otherwise deprived of their liberty. To this end, Member States must arrange for a system of duty rosters to ensure that all arrested persons receive immediate legal aid free of charge.

All decisions regarding eligibility for legal aid under the means test, or the establishment of an obligation for a person to financially contribute to the cost of their defence, must be appealable to a court of law.

A threshold for each Member State should be set on the basis of average income *per capita* for that Member State, to establish the level of income below which defendants cannot be

⁷ Explanatory Memorandum to the Directive on provisional legal aid, para. 12.

⁸ Available here http://www.ecba.org/extdocserv/projects/legalaid/20130625_ECBA TouchstonesLegalAid.pdf

expected to contribute to the cost of their defence.

Remuneration and quality

Legal aid should only be provided by qualified practitioners. The required qualifications of legal aid providers should be established and formally laid down.

Remuneration for legal aid cannot be based exclusively on a fixed-fee per case. We have suggested methods to ensure that remuneration levels are sufficient to guarantee the availability of sufficiently qualified practitioners.

Binding legal instrument required

All legal instruments regarding minimum standards on legal aid must be legally binding upon Member States. Non-binding legal instruments would leave open the possibility that some Member States would choose not to bring their legal aid systems up to the standards needed for other Member States to have sufficient trust in the outcome of their legal processes.

It is with these key issues in mind that we have considered the Commission proposals on legal aid. We have further considered both the EP Working Document from the LIBE Committee of March 2014⁹ and all the contributions at the ECBA conference in Warsaw on 26 April 2014, where the subject of legal aid and the Commission's proposals in this area were discussed extensively (http://www.ecba.org/extdocserv/conferences/warsaw2014/Warsaw_DRAFTPROG.pdf).

We set out our comments and recommendations for necessary amendments below.

The proposed Directive on provisional legal aid

The objective of the proposed Directive is to render effective the right of access to a lawyer as granted in Directive 2013/48/EU.¹⁰ To that end, the proposed Directive aims to ensure that suspects who are deprived of liberty have adequate access to legal aid. The aspects of legal aid dealt with in the proposed Directive are limited to those "identified as of particular importance to complement and ensure the effectiveness of the rights in the Directive on access to a lawyer and to improve mutual trust between criminal justice systems."¹¹ In this, the proposed Directive only aspires to regulate that which must at a minimum be regulated in view of the rights granted in Directive 2013/48/EU.

⁹ Document of 14 March 2014, DT\1023349EN.doc; PE530.085v01-00

¹⁰ Explanatory Memorandum to the Proposal para. 6 and 20.

¹¹ Explanatory Memorandum to the Proposal on provisional legal aid, para. 8.

In principle, we welcome the provision of concrete rights set out in the Directive, which creates legally binding standards for the most critical stage of legal proceedings. The initial deprivation of liberty, during police detention, is where the person is most vulnerable and where the consequences of their responses to the police can have a significant impact upon the outcome of their case.¹² Likewise, the provision of legal aid in both executing and issuing countries during the surrender process of an EAW is essential to give effect to the rights in Directive 2013/48/EU.

Currently, a number of Member States do not have a functioning system of emergency legal aid, or, as the proposed Directive calls it, 'provisional' legal aid. Adoption of the proposed Directive would oblige these Member States to set up a functioning system which can provide provisional legal aid to persons deprived of liberty in the course of criminal proceedings, or as a result of an EAW, without delay, and in any event before questioning.¹³ For people who live or travel in the EU, the proposed Directive promises a substantial improvement to their ability to effectively exercise their rights in the event that they find themselves the target of a criminal inquiry. In this respect, the ECBA applauds the proposed Directive as a significant step forward, which could lead to a marked improvement in EU citizens' access to legal services in the initial stage of a criminal procedure.

However, in adopting the Roadmap for strengthening rights of suspected and accused persons, the Member States agreed that legal aid should ensure effective access to the right to legal advice. It is therefore disappointing that the Proposal for a directive on legal aid (the proposed Directive) is limited only to provisional legal aid and European arrest warrant cases, rather than expressing concrete proposals for the entirety of the legal proceedings. As the Roadmap and Directive 2013/48/EU acknowledge, mechanisms must exist in order for legal representation to effectively ensure the right to a fair trial. These mechanisms are set out in the Recommendation accompanying the proposed Directive. According to the Explanatory Memorandum, the Recommendation "seeks to foster certain convergence as regards the assessment of eligibility of legal aid in the Member States, as well as encouraging the Member States to take action to improve the quality and effectiveness of legal aid services and administration."¹⁴

While we agree with most of the mechanisms set out in the Recommendation¹⁵, the Commission's decision to relegate such essential elements of the right to legal aid to a non-binding Recommendation cannot be supported. Far from encouraging Member States to make the right of access to a lawyer effective, it entails acceptance on the part of the Commission that Member States are at liberty to choose *not* to follow the Commission's Recommendations.

¹² *Salduz v Turkey* (ECtHR), App. No. 36391/02 (27 November 2008)

¹³ Art. 4(1) and (2) of the Directive.

¹⁴ Explanatory Memorandum to the Directive on provisional legal aid, para. 12.

¹⁵ We note that unfortunately not all of the mechanisms in the Recommendation come up to the standards set out in the UN's Principles and Guidelines on legal aid. To give an example: if the suspect is a minor, the Commission's Recommendation nr. 6 holds that for the purpose of the means test only "the child's own assets should be taken into account and not those of their [its?] parents". The UN Principles and Guidelines however clearly states: "Children are always exempted from the means test;" (Guideline 1, nr. 41(c)). The ECBA believes that the Commission's Recommendations should at least conform with the UN's Principles and Guidelines.

The consequence of this decision becomes apparent if we take into account the Commission's Proposal on the establishment of a European Public Prosecutor's Office.¹⁶ According to the Explanatory Memorandum to the proposed Directive on legal aid:

*"The current proposal will also contribute to strengthening the legal safeguards that protect individuals involved in proceedings conducted by the European Public Prosecutor's Office. The recently presented Proposal for a Council Regulation clarifies that the suspected person has all rights granted by EU legislation as well as other rights which derive directly from the Charter of the Fundamental Rights of the European Union, to be applied in accordance with applicable national law. It explicitly refers to the right to legal aid and by introducing strengthened standards on legal aid, the current proposal also reinforces the procedural safeguards applying in proceedings conducted by the European Public Prosecutor's Office."*¹⁷

Central to the Commission Proposal is that the EPPO shall prosecute in national courts.¹⁸ Article 32, Sect. 2 of that Proposal provides:

Any suspect and accused person involved in the proceedings of the European Public Prosecutor's Office shall, as a minimum, have the following procedural rights as they are provided for in Union legislation and the national law of the Member State:

[...]

(e) the right to legal aid,

[...]

Since the Commission's Recommendation on legal aid is not binding, it does not qualify as "Union legislation" "providing" procedural rights. A suspect prosecuted by the EPPO cannot directly claim any of the "rights" mentioned in the Recommendation on legal aid, since that Recommendation does not have direct effect. The consequence of this is that the right to legal aid in EPPO prosecutions is exclusively governed by the national legislation of the Member State in which the prosecution takes place.

In a Member State that has decided to follow the Commission's Recommendation, the defendant in an EPPO prosecution may receive legal aid by way of an independent legal aid agency, operating a rota system. In Member States that have chosen not to follow the Commission's Recommendation, the defendant may have to face an EPPO prosecution without assistance of a lawyer at all, because no system is in place to make one available. In the ECBA's view, that would be an entirely unfair and arbitrary difference in position between defendants, which can only be prevented by taking away the Member States' freedom to ignore the Commission's Recommendation on legal aid.

¹⁶ Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM (2013) 534 final; 17.7.2013.

¹⁷ Explanatory Memorandum to the Directive on provisional legal aid, para. 13.

¹⁸ Article 27 of the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office.

The same holds true for non-EPPO prosecutions. Mutual recognition of judicial decisions in criminal cases continues to be a problem between Member States due to divergence of criminal justice systems and standards. Member States that provide adequate legal aid, with quality control mechanisms to ensure an effective defence, should and will be less inclined to give full effect to decisions in criminal cases that are based on procedures in other Member States in which the defendant could not and did not receive legal aid.

We fail to see why the standards set out in the Recommendation cannot be incorporated into the Directive to provide enforceable rights to legal aid in all EU Member States and we call upon the Parliament and Council to do so.

With regard to the content of the Directive, we have the following concerns:

Definition of Provisional Legal Aid

The proposed Directive does not clearly define when legal aid should be made available by the Member States. Given its narrow scope, this must be clearly expressed, and in our view, be as wide as possible, to reflect the circumstances following police arrest and remand in custody.

Article 3(b) states that: *“provisional legal aid means legal aid to a person deprived of liberty until the decision on legal aid has been taken.*

In our view, the Directive must make clear that legal aid is available for all persons deprived of liberty by the police following arrest or detention in connection with the investigation of criminal acts, in accordance with Directive 2013/48/EU. This should not end with a ‘decision on legal aid’, but at a procedural stage in the criminal case against the suspected or accused person. This is because an efficient decision maker could make a decision to refuse funding for legal aid while the person is still in police custody and being interrogated by the police.

As set out above, the ECBA believes that all persons deprived of liberty should be entitled to legal aid during proceedings against them. As a minimum, a decision on whether those deprived of liberty are eligible for legal aid should assess only their financial means to pay or contribute to the costs of their legal representation (the means test), and not the merits of legal aid. It will always be in the interests of justice that a person whose liberty is at stake is entitled to legal aid, in accordance with Article 6(3)(c) ECHR.¹⁹ This point of view is also reflected in the UN's Principles on legal aid (Principle 3, nr. 20): *“States should ensure that anyone who is arrested, detained, 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.”*

The means test should only take place following the first court decision concerning the person’s involvement in the alleged offence. Until this stage there is no independent judicial arbiter of the legality of the suspicion against them. As such, the person is particularly vulnerable and they are

¹⁹ Benham v UK (ECtHR) App. No. 19380/92 (10 June 1996)

particularly at risk of self-incrimination.²⁰ It is also very likely that the person will be unable to demonstrate their means in any event. As such we disagree with the definition provided in article 3(b) and with article 4(5) of the proposed Directive.

Independent appointment

Tested against the ECBA's Touchstones, we find that the proposed Directive does not explicitly address the issue of independent appointment of legal aid providers. In the ECBA's Touchstones document, we noted:

"In some jurisdictions, lawyers providing legal aid are appointed by the investigating authorities, which gives rise to concerns regarding the independence of the appointed lawyer and the extent in which the lawyer is prepared to take an adversarial stance against the authority that has appointed him: "There is evidence [...] that the way that legal aid lawyers are appointed creates a relationship of dependency on those who appoint them, with the result that they may be hesitant to zealously defend their clients' interests."²¹ These results correspond with the findings from the ECBA's own questionnaire, filled out by practitioners in almost all EU Member States."

As we set out above, this finding requires a mechanism to guarantee the independent appointment of lawyers, and the right of the person to choose their lawyer.

We note that the Recommendation on the right to legal aid does address the issue of independent appointment: Paragraph 14 states that decisions whether or not to grant legal aid "should be made promptly by an independent competent authority." Likewise, Paragraph 21 reads: "Staff involved in the decision-making on legal aid in criminal procedures should receive appropriate training", which the ECBA views as a necessary safeguard for independence in appointing legal aid providers. Paragraphs 24 to 26 make provision for a person to be enabled to choose their lawyer.

The ECBA considers that the Directive should provide for the independence of the appointment procedure of legal aid providers, and the right to choose a lawyer so far as possible, and not leave this to the Recommendation.

This would accord with the Commission's intention, as explained in paragraph 27 of the Explanatory Memorandum, which calls for the establishment of "duty lawyer schemes" and "emergency defence services". This would also accord with the UN's Guidelines on legal aid (Guideline 11, nr. 59): *"To ensure the effective implementation of nationwide legal aid schemes, States should consider establishing a legal aid body or authority to provide, administer, coordinate and monitor legal aid services. Such a body should:*

(a) Be free from undue political or judicial interference, be independent of the Government in decision-making related to legal aid and should not be subject to the direction or control or

²⁰ Salduz, *ibid.*

²¹ Cape et al., *Effective criminal defence in Europe* (Intersentia: 2010), p. 592

financial intimidation of any person or authority in the performance of its functions, regardless of its administrative structure;

(b) Have the necessary powers to provide legal aid, including but not limited to the appointment of personnel; the designation of legal aid services to individuals; the setting of criteria and accreditation of legal aid providers, including training requirements; the oversight of legal aid providers and the establishment of independent bodies to handle complaints against them; and the assessment of legal aid needs nationwide; and the power to develop its own budget;"

Legal aid in the issuing Member State of an EAW

The proposed Directive provides that both issuing and executing Member States must ensure that a requested person has the right to legal aid upon arrest pursuant to a European arrest warrant (EAW) (Article 5).

However, the right of a requested person to receive provisional legal aid is limited to arrest in the executing Member State only.²²

The purpose of "dual representation" – that is: legal aid in both executing and issuing Member States – is that it opens a channel of communication through which the arrested person may resolve the issues that gave rise to the EAW, or alternatively provide guarantees for their voluntary appearance in the issuing Member State. This communication may even lead to withdrawal of the EAW, which would reduce the burden on the criminal justice system in the executing state, in terms of both costs and detention of the requested person.

These benefits can only be gained if the requested person, and their legal aid lawyer in the executing state, can promptly communicate with a counterpart in the issuing state. All possible benefits of the right to legal assistance in the issuing state provided by Directive 2013/48/EU will be lost if the arrested person has to wait for a decision on an application for legal aid in the issuing Member State, since such a decision could take weeks, or even months.

The practical arrangements for obtaining legal aid should also be taken into account: it is almost impossible for an EU-citizen detained in one Member State to fulfil the administrative requirements necessary to apply for legal aid in another Member State. How is the detained person to provide, for instance, documentation on his income or assets to a legal aid authority in another country, if he doesn't have access to his personal administration or his personal e-mailbox because he is detained under an EAW in another Member State?

It is therefore necessary that the proposed Directive provides that from the moment of arrest under an EAW the requested person also has the right to *provisional* legal aid in the issuing Member State.

As such, we do not agree with article 5(3) of the proposed Directive, which would allow an

²² It follows from para. 35 of the Explanatory Memorandum that the proposed Directive would limit the right to provisional legal aid to the executing Member State.

assessment of means *and* merits for legal aid in both the executing and issuing states. As set out above, the interests of justice will always require legal aid where the person's liberty is at stake. An EAW cannot be issued unless a person's liberty is at stake.²³ Article 5(3) as drafted may therefore violate Article 6 ECHR and Article 47 of the Charter of Fundamental Rights. The possibility of recovery of such legal aid on a merits test should only be reviewed where the person is surrendered to the issuing state, and then in accordance with Article 6(3)(c) ECHR.

Judicial review of decisions on legal aid

The proposed Directive provides no remedies for persons who have been denied legal aid. The ECBA's Touchstones consider that all decisions regarding the eligibility for legal aid under the means test, or the establishment of an obligation to financially contribute to the cost of a person's defence, must be appealable to a court of law.

However, paragraph 15 of the Recommendation states that defendants should have a right to review of decisions of full or partial rejection of their application for legal aid. The difference between the "right to review" in the Commission's Recommendation and the "appeal to a court of law" in the ECBA's Touchstones is not semantic. An administrative, bureaucratic or political "review" of a decision on legal aid, does not provide sufficient safeguards to a person denied legal aid, and would even undermine the right to legal aid provision through an "independent competent authority," which paragraph 14 of the Recommendation requires.

The Directive must provide for judicial review of a refusal to provide legal aid. Moreover, paragraph 15 of the Recommendation must be amended to reflect the fact that review of the independent authority's decision must be by an independent court of law.

Effect of seizures and freezing orders on legal aid

Finally, we raise an important issue that has not been addressed in the Commission's proposals, but needs resolution.

Increasingly, suspects in criminal cases are confronted with seizure of their assets in preparation of forfeiture proceedings in respect to alleged proceeds of crime. These seizures or freezing orders may encompass – and often do encompass – *all* the assets of the defendant. Due to such seizures, the defendant is unable to pay for a lawyer. Legal aid authorities, on the other hand, reason that the defendant has assets to their name, therefore does not satisfy the "means-test" for legal aid, and thus rule that the defendant is not eligible for legal aid. The practical result is that the defendant cannot obtain legal aid, yet cannot afford to pay for a lawyer because of the freezing order.

According to the UN's Guidelines on legal aid (Guideline 1, nr. 41), defendants that find themselves

²³ Pursuant to article 2 Framework Decision 2002/584/JHA on the European arrest warrant and surrender procedures between Member States

in such circumstances should receive legal aid: *"Whenever States apply a means test to determine eligibility for legal aid, they should ensure that:*

(a) Persons whose means exceed the limits of the means test but who cannot afford, or do not have access to, a lawyer in situations where legal aid would have otherwise been granted and where it is in the interests of justice to provide such aid, are not excluded from receiving assistance;"

This dilemma might be resolved if legal aid authorities were required to disregard frozen or seized assets in all decisions on the eligibility for legal aid, with the provision that where assets are released or unfrozen, the defendant will reimburse the legal aid authority for the costs for the legal aid they have received.

In conclusion

The ECBA believes that a significant step is being made by the proposed Directive on provisional legal aid. However, the right to provisional legal aid granted in the Directive is insufficient due to the fact that all essential elements and parameters of that right have been relegated to a non-binding Recommendation. Who is to appoint the provisional legal aid lawyer? How can it be guaranteed that such appointments are made independent from the police and the judiciary and independent from governmental, political or financial influence? What qualifications should the provisional legal aid provider have and who will monitor quality of service? What levels of remuneration are necessary to guarantee sufficient availability of suitably qualified lawyers for provisional legal aid schemes? In the Commission's proposals, the answers to these questions are left to the full discretion of the Member States. This means that the Commission apparently accepts that the substance of the "right" to provisional legal aid may differ significantly from Member State to Member State, and that Member States can even effectively render the said "right" illusory by, for instance, allowing the police to appoint provisional legal aid lawyers without sufficient qualifications. It is for this reason, more than anything else, that the ECBA believes that the essential elements and parameters of the right to (provisional) legal aid must be laid down in the Directive.

If you have any further questions, please do not hesitate to contact us:

Prof Dr Holger Matt, ECBA Chair: Kanzlei@dr-matt.de

Dr Dian Brouwer, Chair of the ECBA Legal Aid working group: Dian.brouwer@cms-dsb.com

ECBA Secretariat Marie Anne Sarlet: secretariat@ecba.org