

## **ECBA Touchstones - Minimum Standards for the right to Legal Aid (Measure C part 2)**

### **1. General introduction**

#### *1.1 The European Criminal Bar Association*

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 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 practise. 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 are a member of the Justice Forum and we have participated and continue to participate in several European Commission funded projects (e.g. training events for defence lawyers jointly with ERA, networking/legal aid; letter of rights; pre-trial emergency defence; European Arrest Warrant) and we are regularly invited to many EU experts' meetings concerning criminal law issues.

Further information on the ECBA can be found at our website: [www.ecba.org](http://www.ecba.org).

#### *1.2 The Roadmap and Measure C*

Paragraphs 7 and 8 of the Preamble of the Presidency of the Council's proposal for a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings<sup>1</sup> explicitly link effective procedural rights of suspects and defendants in criminal cases to the principle of mutual recognition:

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<sup>1</sup> 1 July 2009, reference 11457/09;; <http://db.eurocrim.org/db/en/vorgang/209/>; adopted by Council Resolution of 30 November 2009 as "Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings", eventually agreed as part of the Stockholm Programme.

*"7. Fostering the protection of procedural rights will also facilitate the application of the principle of mutual recognition of judicial decisions, enshrined in the conclusions of the 1999 Tampere European Council and reaffirmed in the 2004 Hague programme.*

*8. Mutual recognition presupposes that the competent authorities of the Member States trust the criminal justice systems of the other Member States. For the purpose of enhancing mutual trust within the European Union, it is important that there exist European Union standards for the protection of procedural rights."*

The Roadmap itself, adopted by Resolution of the Council of 30 November 2009, firmly links legal aid to the fairness of criminal procedures. The Roadmap provides the following explanation of "Measure C: Legal Advice and Legal Aid":

*"The right to legal advice (through a legal counsel) for the suspected or accused person in criminal proceedings at the earliest appropriate stage of such proceedings is fundamental in order to safeguard the fairness of the proceedings; the right to legal aid should ensure effective access to the aforementioned right to legal advice."*

Legal Advice and Legal Aid have been, and must be seen as inextricably linked. However, in the implementation of Measure C, the right to legal advice and the right to legal aid have been disjoined. Measure C-1, dealing with the right to legal advice and access to a lawyer, is approaching adoption following the conclusion of negotiations between Commission, Council and Parliament regarding the draft directive on the right of access to a lawyer and on the right to communicate upon arrest.<sup>2</sup> In contrast, discussions on Legal Aid (Measure C-2) are now just starting. However, this state of play should not distract from the clear intention in the Roadmap for a robust measure on legal aid that ensures the right to legal advice is effective in practice.

### 1.3 Effective legal assistance

Effective legal assistance to suspects and defendants in criminal cases is in the interest of the judicial process as a whole ("*role of the lawyer*"). The timely and active participation of a defence lawyer in criminal proceedings *is not an obstacle to criminal justice*, but contributes to the effectiveness of criminal justice systems. It ensures the fairness of proceedings because immediate access to legal advice is a pre-condition to exercising one's rights. It helps to achieve a better quality of the process of evidence gathering, and therefore of the evidence

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<sup>2</sup> See the report of the meeting of JHA Counselors held on 23 May 2013, discussing the text of Measure C-1 as provisionally agreed during the 8th trilogue on 15 May 2013, the Commission's press hailing a "breakthrough" in the negotiations between Parliament and the Council on 28 May 2013: [http://europa.eu/rapid/press-release MEMO-13-468 en.htm](http://europa.eu/rapid/press-release_MEMO-13-468_en.htm), and the endorsement of the European Parliament LIBE Committee: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bIM-PRESS%2b20130617IPR12351%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>

obtained, which helps to secure its admissibility. Legal assistance in the first stages of the investigation contributes to preventing miscarriages of justice by *inter alia* preventing undue pressure and ill treatment of suspects. It even contributes to avoiding large numbers of appeals - resulting in a reduction of the costs of criminal proceedings and miscarriages of justice. It facilitates recognition and trust in criminal proceedings throughout Europe - as access to a lawyer from the very beginning of the proceedings meets not only European Convention on Human Rights (ECHR) standards but also the common standards of many EU Member States. Only effective legal assistance can ensure that the decision in a criminal case is based on a fair procedure. And only effective legal assistance - that is: cooperation between defence counsel in the executing State and counsel in the issuing State - can guarantee the expedient resolution of *European Arrest Warrant (EAW) cases*, by resolving the underlying issues in the requesting State in ways official authorities in the executing State can't.<sup>3</sup>

Several studies show that in practice there are difficulties in obtaining and guaranteeing effective legal assistance for suspects and defendants.<sup>4</sup> The reasons for this can be diverse. In some instances suspects are not informed of their defence rights or their right to be assisted by a lawyer. In other instances police influence the suspect or frustrate the possibility for contact between suspect and lawyer in practical ways. In other instances, confidentiality of communication between suspect and lawyer is not guaranteed, which impacts on the freedom of exchange of information between suspect and lawyer, and thus on the effectiveness of the assistance provided. Finally, the inability of the suspect or accused person to pay for a lawyer, combined with failure of a State to provide any or adequate legal aid, can in practice frustrate any theoretical legal right to the assistance of a lawyer.

This last barrier to effective legal assistance is not experienced by those citizens of the EU that are affluent enough to pay for a lawyer. This however would seem to be the smaller percentage of the population. The results from the ECBA's own questionnaire and other input from the ECBA's membership suggest that a great majority of suspects and defendants must rely on legal aid for their defence. In that, they are dependent on the different Member States' systems. This means that differences between the Member States' systems of legal aid have an impact on availability and effectiveness of legal assistance, and thereby on the quality of the Member States' judgments in criminal cases, which in turn influences the possibilities for mutual recognition of these judgments. It is for this

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<sup>3</sup> In this way unnecessary deprivation of liberty can be prevented and the costs in terms of time and money of EAW cases can be reduced, as well as enabling genuine cases for non-surrender to be made out. It is for these reasons that the final draft of Measure C-1 provides for this "dual defence" in EAW cases (Article 9, sect. 4 and 5), following the suggestion the ECBA has made since the introduction of the EAW (e.g. see [http://www.ecba.org/extdocserv/ECBA\\_Stat\\_PropMeasureC.pdf](http://www.ecba.org/extdocserv/ECBA_Stat_PropMeasureC.pdf) and *European arrest warrants: Ensuring an effective defence* (JUSTICE, 2012)).

<sup>4</sup> E.g. Spronken et al., *EU Procedural Rights in Criminal Proceedings* (Maklu: 2009), available at: <http://arno.unimaas.nl/show.cgi?fid=16315>; Cape et al., *Effective criminal defence in Europe* (Intersentia: 2010).

reason that the Roadmap states that the right to legal aid should ensure full equality "of effective access to the [...] right to legal advice".

In this position paper, we will use a broad definition of the concept of legal aid. Legal aid is not just the remuneration of lawyers but the system through which the State provides the conditions in which suspects and defendants in criminal cases receive *de facto* assistance of legal counsel, if they are not in a position (due to arrest or detention) or do not have the financial means to arrange for such assistance themselves.<sup>5</sup>

#### 1.4 This position paper – ECBA Touchstones

In part 2 of this paper, we will briefly discuss the international legal framework regarding the right to legal aid. In part 3, we will identify and discuss the challenges – some would say shortcomings – of the current systems in which Member States provide for legal aid. In part 4, on the basis of the difficulties identified in part 3, we will present the minimum standards all national systems should comply with, in order to ensure that effective defence will be provided in practice. In our view, these are the *touchstones* for any suggested EU instrument. Finally, part 5 contains some remarks on the nature of the legal instrument to be used by the EU.

The statements of a factual nature made in this paper are based on a perusal of existing research, complemented with the results of an extensive questionnaire the ECBA sent to practicing criminal defence lawyers all over Europe. Filled out questionnaires have been received back from practitioners in almost all EU Member States. Without claiming statistical validity, this research effort does provide anecdotal evidence on the way in which legal aid works – or does not work – in practice in the different Member States, and what practical barriers exist for lawyers attempting to provide effective legal assistance on a day to day basis.

## **2. International legal framework**

The right to receive free legal assistance has been addressed and laid down in various international legal instruments. In this position paper, we will briefly discuss the relevant case law of the European Court of Human Rights (ECtHR) pursuant to Article 6(3)(c) ECHR. We will also consider the instruments sponsored by the United Nations and the EU Charter of Fundamental Rights. These latter instruments are discussed in more detail in Annex A to this position paper.

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<sup>5</sup> This definition could be broadened to encompass legal assistance to witnesses or victims of crime. However, this position paper focuses on Measure C-2, the rights of suspected or accused persons.

### 2.1 United Nations' sponsored treaties, Principles and Guidelines

Article 14 of the International Covenant on Civil and Political Rights 1966 reads:

[...]

3. 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;

[...]

On 20 December 2012, the General Assembly of the UN adopted the "United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems". In § 1 of Annex A to this position paper, we discuss these Principles and Guidelines in detail.

The ECBA takes the view that *minimum standards* for legal aid in EU Member States must at least be compliant with the Principles and Guidelines on access to legal aid in criminal justice systems as adopted by the General Assembly of the United Nations.

### 2.2 The European Convention on Human Rights 1950

Article 14 of the International Covenant on Civil and Political Rights 1966 largely replicates the content of Article 6 ECHR:

Right to a fair trial

[...]

3. 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;

[...]

The *jurisprudence of the ECtHR* on this provision has been considered in the study *Effective Criminal Defence in Europe*.<sup>6</sup> Article 6(3)(c) ECHR stipulates that a suspect has the right to free legal aid on two conditions, first if he does not have sufficient means to pay for legal assistance, and second when the interests of justice so require. The ECtHR holds that the suspect does not have to prove 'beyond all doubt' that he lacks the means to pay for his defence,<sup>7</sup> and indicates three factors that should be taken into account in determining eligibility<sup>8</sup>:

- The seriousness of the offence and the severity of the potential sentence,
- The complexity of the case, and
- The social and personal situation of the defendant.

The case law shows that the right to legal aid applies at a minimum whenever deprivation of liberty is at stake.<sup>9</sup> Where this is not the case, the complexity of the issue and consequences for the accused person will have a bearing on whether legal aid is required in the interests of justice.<sup>10</sup> Denying legal aid during periods in which procedural acts, including questioning of the applicants and their medical examinations, are carried out is unacceptable according to the ECtHR.<sup>11</sup>

Although the Convention does not explicitly include a requirement to inform suspects and defendants about the right to legal assistance, it follows from *Padolov* and *Panovits* that the judicial authorities must actively and adequately inform suspects in order to enable them to (practically and effectively) receive legal representation.<sup>12</sup> The ECHR allows Member States a certain margin of appreciation in choosing a system to make free legal advice available.

Art. 6 (3)(c) ECHR makes clear that suspects have a right to choose their lawyer if they are paying for the lawyer's services privately, but is ambiguous when legal assistance is to be provided free of charge. The ECtHR has held that the right to choose a lawyer can be subject to limitations, in particular in cases where the state pays for the legal assistance.<sup>13</sup>

A recent and more extensive summary of the ECtHR's case law can be found in *Arrest Rights Brief No.3: The Right to Legal Aid, Open Society Justice*

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<sup>6</sup> E. Cape, Z. Namoradze, R. Smith, T. Spronken (Intersentia: 2010) pp 40 to 42

<sup>7</sup> *Pakelli*, § 34.

<sup>8</sup> ECtHR 24 May 1991, *Quaranta v. Switzerland*, No. 12744/87, § 35.

<sup>9</sup> ECtHR 10 June 1996, *Benham v. the United Kingdom*, No. 19380/92.

<sup>10</sup> See ECtHR, 25 September 1992, *Pham Hoang v France*, No. 13191/87, and 4 January 2008, (Dec.) *Barsom and Varli v Sweden*, Nos. 40766/06 and 40831/06.

<sup>11</sup> ECtHR 20 June 2002, *Berlinski v. Poland*, No. 27715/95 and 30209/96.

<sup>12</sup> ECtHR 10 August 2006, *Padolov v. Bulgaria*, No. 54784/00, § 53-55 and ECtHR 11 December 2008, *Panovits v. Cyprus*, No. 4268/04 § 64.

<sup>13</sup> ECtHR, 25 September 1992, *Croissant v Germany*, No. 13611/88; ECtHR 14 January 2003, *Lagerblom v. Sweden*, No. 26891/95, § 54.

*Initiative*, April 2013, which is available on the web.<sup>14</sup> For ease of reference this document is attached as Annex B to this position paper.<sup>15</sup>

### 2.3 The EU Charter of Fundamental Rights

The EU Charter of Fundamental Rights 2000 (CFR), receiving binding force through the Lisbon Treaty 2009, builds upon the rights enshrined in the ECHR and EU law: Article 47 provides:

[...]

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.

The scope of the Charter is limited to matters of EU competence (article 51), which logically means that each new provision enacted by the EU must comply with the Charter. In § 2 of Annex A to this position paper, we discuss relevant case law of the Court of Justice of the EU on the legal aid provision in article 47 CFR and the Cross Border Council Directive.<sup>16</sup>

### **3. General remarks on Member State's legislation and practices on legal aid**

Existing research demonstrates that the provision of legal aid is the Achilles' heel in many criminal law systems of the EU. *The right to legal aid is not reliably guaranteed in many Member States and it definitely does not ensure effective access to the right to legal advice as demanded in the Road Map (see 1.2), in particular not at the very important stage at the beginning of criminal proceedings, e.g. before or during questioning at police stations. Only a bare*

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<sup>14</sup> <http://www.opensocietyfoundations.org/sites/default/files/arrest-rights-template-legal-aid-20130412.pdf>

<sup>15</sup> For further reference, we would point to the report "*Compliance of legal aid systems with the European Convention on Human Rights in seven EU jurisdictions*", Maria McDonald BL, Justicia European Rights network, [www.ejusticia.net/images/uploads/pdf/Report\\_on\\_Legal\\_Aid\\_Justicia\\_December\\_2012.pdf](http://www.ejusticia.net/images/uploads/pdf/Report_on_Legal_Aid_Justicia_December_2012.pdf), p. 17-31.

<sup>16</sup> Council Directive 2003/8/EC of 27<sup>th</sup> January 2003 to improve access to justice in cross border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ (2003) L 26, p 41 and corrigendum OJ (2003) L 32, p 15 (the Council Directive).

majority of EU Member States have a legal aid merits test, and there is a considerable variation as to the content and meaning of means tests. In many states a means test does not exist in a standardised form. Application procedures are often vague and it is frequently not clear how the determining authorities come to their decisions. In ca. fifty per cent of EU Member States the law does not impose a time limit for determining legal aid applications, and many states do not allow for choice where a lawyer is provided under legal aid.<sup>17</sup>

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."<sup>18</sup> These results correspond with the findings from the ECBA's own questionnaire, filled out by practitioners in almost all EU Member States.

Remuneration for defence lawyers providing legal aid services varies widely among EU states, and information provided by Member States' governments on criminal legal aid expenditure indicates that in practice there must be problems in compliance with the requirement of article 6 § 3c ECHR.<sup>19</sup> The available research shows that in most jurisdictions, remuneration for legal aid work is extremely low compared to the private fees charged by lawyers and, in some cases, is hardly remunerated at all. "The remarkable low budgets of some countries raise the question whether despite existing guarantees in the applicable legal framework, it is – in everyday practice – in fact possible to effectuate the right to free legal assistance whenever the interest of justice demand it."<sup>20</sup> The findings from the ECBA's own questionnaire support this conclusion.

Remuneration is inextricably linked with quality of service: "Low remuneration rates and fixed fee schemes do not encourage defence lawyers to participate in legal aid work, or to invest more than minimal time and effort in a criminal case".<sup>21</sup> In some jurisdictions, the result of inadequate remuneration is that legal aid is provided by trainees or young and inexperienced lawyers. More generally, most jurisdictions do not require any special qualifications for lawyers

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<sup>17</sup> Spronken et al., *EU Procedural Rights in Criminal Proceedings* (Maklu: 2009), available at: <http://arno.unimaas.nl/show.cgi?fid=16315>, § 3.2. See also Bowles & Perry, *International comparison of publicly funded legal services and justice systems*, Research Series 14/09 (London: Ministry of Justice, 2009) available at: <http://www.justice.gov.uk/publications/docs/comparison-public-fund-legal-services-justice-systems.pdf>

<sup>18</sup> Cape et al., *Effective criminal defence in Europe* (Intersentia: 2010), p. 592.

<sup>19</sup> See the Report of the European Commission for the Efficiency of Justice (CEPEJ) *European Judicial Systems – 2010*, Council of Europe September 2010, available at: <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1694098&SecMode=1&DocId=1653000&Usage=2>, Chapter 2, and Spronken et al. 2009 (*supra*), at 3.2.3.

<sup>20</sup> Spronken et al. 2009 (*supra*), p. 13.

<sup>21</sup> Cape et al 2010 (*supra*), pp 591 & 592.

acting for the defence, and there are no mechanisms to control and ensure the quality of legal assistance.<sup>22</sup> Again, the findings from the ECBA's own questionnaire fully support these conclusions.

To summarize, the available research and the ECBA's own knowledge-base demonstrate EU-wide issues concerning the rules and procedures regarding eligibility for legal aid and its timeliness, choice of the lawyer and independence and quality of lawyers involved in providing legal aid for indigents. Any legal instrument of the European Union concerning legal aid should effectively address these issues.

#### **4. Touchstones for national legal aid systems**

The Member States have widely differing systems in place. Germany for instance has no legal aid system as such and provides legal counsel through a system of "mandatory defense", but regularly only for the trial stage and not in all cases of deprivation of liberty, e.g. typically never at questioning at police stations prior to issuing a formal arrest warrant by a court. In Poland a judge appoints a lawyer to defendants who don't have the means to pay for their own lawyers, but the proceeding is very lengthy. The Netherlands has a system in which an indigent suspect or defendant can choose a lawyer, who will then be paid by a legal aid board. All these national systems are interwoven with the national rules of criminal procedure. Changing a small rule or provision somewhere in these legal constructs, can have far reaching effect somewhere else in the national legal system. This means that it would be extremely complex, and politically unrealistic, to try to develop a unified, single EU wide system of legal aid – unless the EU itself would take on the responsibility to directly provide legal aid in all stages of the procedure to all EU citizens that need it.

It is feasible, however, to set minimum standards national legislation should comply with. The ECBA considers the following to be essential to all legal aid systems in order to ensure that an effective defence will be provided:

##### **4.1 Choice of lawyer and independent appointment**

A minimum requirement for all legal aid schemes must be that investigating authorities and judges cannot influence the choice of the lawyer that will represent the defendant. This means that the appointment of defense counsel must be done by some organization or body that is independent from the police and the judiciary. Furthermore, the appointments by this body or organization 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.

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<sup>22</sup> Spronken et al. 2009 (*supra*), p. 13; Cape et al 2010 (*supra*), p. 588.

This independent organization or body could in certain jurisdictions be (a branch of) the national bar association. Preferably, however, such a body is established for the express purpose of providing legal aid, with the safeguards for its independence enshrined in the law that establishes this body. This body could also be entrusted with other responsibilities in the field of legal aid, such as establishing the eligibility for legal aid and, in cooperation with national bar associations, in setting standards for training of legal aid providers.

This suggestion reflects UN Principles and Guidelines on Access to Legal Aid in Criminal Proceedings, Guideline 11 (cited in Annex A to this paper).

The independent appointment of defence counsel serves the essential relationship of trust between the suspect or defendant and his or her lawyer. Without a basic level of trust, it is impossible for defence counsel to get the cooperation from the client that counsel needs to effectively advise and defend the client. It is for this reason that absolute confidentiality of all communications between client and lawyer must be guaranteed. Further, the establishment of the required relationship of trust is facilitated if the defendant has a say in the choice of the lawyer that is to be appointed to him. The suspect or defendant should have at least a right to put forward the names or to propose lawyers as preferred defence counsel to the body that is to make the appointment. The choice of the suspect or defendant should be considered but cannot be followed in all cases, for instance if the lawyer does not agree to take over the case (in compliance with his or her professional duties). As an absolute minimum, suspects and defendants must be entitled to have a different lawyer appointed, if they have insufficient trust or confidence in their appointed counsel.

#### 4.2 Immediate appointment at deprivation of liberty

EU Member States can apply a means test and/or a merits test for establishing whether suspects or defendants qualify for legal aid free of charge. However, in certain situations citizens of the EU cannot and should not be made to wait until eligibility has been established. In these situations, legal aid must be provided irrespective of the determination of eligibility.

Following the *Salduz* judgement of the ECtHR<sup>23</sup>, Article 3, sect. 2 a) and c) of the draft directive on the right of access to a lawyer (Measure C-1) provides that access to a lawyer must be granted *before* a suspect or a defendant is questioned by the police and, without undue delay, from the deprivation of liberty. Several studies have shown that immediate access to legal advice in these situations is crucial to the fairness of the procedure.<sup>24</sup>

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<sup>23</sup> ECtHR, 27 November 2008, *Salduz v Turkey*, No. 36391/02

<sup>24</sup> In addition to the studies already referenced, we point to the EU funded two-year study on pre-trial emergency defence (PED), carried out by the Austrian Bar Association, in cooperation with the ECBA

This means that, regardless of the eventual outcome of any means and/or further merits test, Member States must ensure that suspects receive legal aid free of charge from the moment they are deprived of their liberty and during the entire period in which they are (formally) arrested, detained or otherwise deprived of their liberty (e.g. from the moment one is brought in police custody without a possibility to leave voluntarily). To this end, Member States must arrange for a system of duty rosters, preferably administered and managed by the independent legal aid body referenced above, in para. 4.1, which system must ensure that all arrested persons receive immediate legal aid free of charge.

This necessarily includes persons arrested on a European Arrest Warrant in the executing State. On notification of the arrest to the issuing State, the duty extends to the issuing State of an EAW which should immediately appoint a domestic lawyer as if the arrest had taken place in the issuing State.

We believe, these suggestions for minimum standards reflect UN Principle 3 and Guidelines 1 and 4 (cited in Annex A to this paper).

#### 4.3 Eligibility

EU Member States can apply a means test and/or a merits test for establishing whether suspects or defendants qualify for legal aid free of charge. Denmark and Germany for instance exclusively apply a merits test. France and Belgium exclusively apply a means test. Other Member States (Spain, the Netherlands) use a combination of means and merits tests.

Merits tests echo in a very direct way the requirement of Article 6, para. 3 (c) ECHR, which provides that everyone charged with a criminal offence has the right to free legal assistance “when the interests of justice so require”. *What* the “interests of justice” require has been clarified by the ECtHR, see paragraph 2.2 above. Furthermore, since the Salduz judgement of the ECtHR and the new Directive (Measure C-1), it can now be considered European *ius commune* that justice and a fair procedure require that a suspect must have access to legal assistance from the start of any deprivation of liberty and before he is questioned by the police (Article 3, Sect. 2 (a) and 3 of the new Directive - Measure C-1). In any case it is in the interests of justice, and a merits test must ensure, that a suspect who is currently deprived of liberty is always provided with a lawyer free of charge (without any means test). In all other instances, a merits test must ensure that anyone charged with a criminal offence punishable by a term of imprisonment is entitled to legal aid.

A means test can be applied, to establish if and to what extent a defendant must be expected to contribute to the cost of his defense. In the course of such a means test, a defendant can be required to provide information on his income and assets. This information gathering procedure must contain

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and universities of Graz, Vienna, Ljubljana and Zagreb. See: Schumann/Bruckmüller/Soyer (Eds.), *Pre-trial Emergency Defence; Assessing pre-trial access to legal advice*, Neuer Wissenschaftlicher

sufficient safeguards to preserve the defendant's right not to incriminate himself. Furthermore, 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 his defense, must be appealable to a court of law.

We would suggest that the Commission set a threshold for each Member State on the basis of average income per capita for that Member State, to establish the level of income below which defendants cannot be expected to contribute to the cost of their defense. These thresholds should be revised annually. We accept that this a very complex test; It needs to take account of the costs of living in each Member State before determining the threshold. In doing so it must deduct the costs of dependents, outstanding fines, loans and living expenses, and allow for other reasonable expenses to be taken into account. Any test, whilst contemplating the average length of a case, must be revisable according to lengthier proceedings. It must also not provide a singular cut off, but provide increments to enable contributions according to means. It must be appealable to a court of law. A means test must not set its threshold of eligibility so high that those who cannot afford to pay for a lawyer are excluded from legal assistance. The Commission is in an ideal position to facilitate this.

#### 4.4 Quality

As a minimum standard, legal aid should only be provided by qualified practitioners. Qualifications may vary with the assistance provided, so that for instance providing first legal aid in police stations would require a different set of qualifications than supreme court litigation. However, it is imperative that the required qualifications for each type of legal aid are established and formally laid down, and that the compliance of legal service providers with these qualifications is monitored. This responsibility can be delegated to the independent legal aid body referenced above, in para. 4.1, in cooperation with national bar associations.

As is apparent from the research discussed in para. 3 above, adequate levels of remuneration are prerequisites for sufficient quality in service providers. "If you pay peanuts, you'll get monkeys." Since all cases differ, remuneration for legal aid cannot be based exclusively on the basis of a fixed-fee per case. The remuneration must reflect and be proportionate to the extent of the work involved, and the factual and legal complexity of the case. Activity above what would be considered normal in a "benchmark-case" of the same type and seriousness – e.g. more court-appearances, a larger case-file, interviewing more witnesses, etc. – should lead to increased remuneration for that case. Remuneration levels should be sufficient to ensure effective legal assistance in practice – not just a theoretical right.

We believe these suggestions for minimum standards reflect UN Principles 2 and 13 and Guidelines 12 and 13 (cited in Annex A to this paper).

## **5. The type of legal instrument to be used**

As mentioned above, providing legal rights to only that percentage of EU citizens that are affluent enough to be able to pay for it does not improve mutual trust within the European Union. The Roadmap states: "The right to legal aid should ensure full equality of access to the [...] right to legal advice". From these premises, it is clear that any legal instrument regarding minimum standards on legal aid must be legally binding upon the 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 that Member States' legal processes. In this respect, a non-binding instrument equates to no instrument at all.

If you have any further questions, please don't hesitate to contact us ([www.ecba.org](http://www.ecba.org)):

Prof Dr Holger Matt, Chair of ECBA: [kanzlei@dr-matt.de](mailto:kanzlei@dr-matt.de)

Dr Dian Brouwer, ECBA Board Member and Co-Chair of the ECBA Working Group on Legal Aid: [dian.brouwer@cms-dsb.com](mailto:dian.brouwer@cms-dsb.com)

Marie Anne Sarlet, ECBA Secretariat: [secretariat@ecba.org](mailto:secretariat@ecba.org)

## **Annex A:** **International legal framework**

The right to receive (free) legal assistance has been addressed and laid down in various international legal instruments. In the position paper itself, we have discussed the case law of the ECtHR on the basis of Article 6 of the ECHR. In this Annex, we will discuss the instruments sponsored by the United Nations (§ 1), and the EU Charter of Fundamental Rights (§ 2).

### **1 United Nations' sponsored treaties, Principles and Guidelines**

Article 14 of the International Covenant on Civil and Political Rights 1966 reads:

#### **Article 14**

[...]

3. 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;

[...]

On 20 December 2012, the General Assembly of the UN adopted the “United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems”.

According to its pre-amble,

*“The General Assembly,*

[...]

1. *Notes with appreciation the work of the open-ended intergovernmental expert group on strengthening access to legal aid in criminal justice systems at its meeting held in Vienna from 16 to 18 November 2011 to develop a set of principles*

and guidelines on access to legal aid in criminal justice systems;

2. *Adopts* the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, annexed to the present resolution, as a useful framework to guide Member States on the principles on which a legal aid system in criminal justice should be based, taking into account the content of the present resolution and that all elements of the annex will be applied in accordance with national legislation;

3. *Invites* Member States, consistent with their national legislation, to adopt and strengthen measures to ensure that effective legal aid is provided, in accordance with the spirit of the Principles and Guidelines, bearing in mind the diversity of criminal justice systems among different countries and regions around the world and the fact that legal aid is developed in accordance with the overall balance of the criminal justice system, as well as the circumstances of countries and regions;

4. *Encourages* Member States to consider, where appropriate, the provision of legal aid and to provide such aid to the maximum extent possible”

From the Principles adopted by the General Assembly, the following would seem relevant in considering the minimum standards for legal aid in the EU:

**Principle 2. Responsibilities of the State**

15. 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.

16. 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.  
[...]

**Principle 3. Legal aid for persons suspected of or charged with a criminal offence**

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.

21. Legal aid should also be provided, 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.  
[...]

**Principle 7. Prompt and effective provision of legal aid**

27. States should ensure that effective legal aid is provided promptly at all stages of the criminal justice process.

28. Effective legal aid includes, but is not limited to, unhindered access to legal aid providers for detained persons, confidentiality of communications, access to case files and adequate time and facilities to prepare their defence.

**Principle 13. Competence and accountability of legal aid providers**

37. States should put in place mechanisms to ensure that all legal aid providers possess education, training, skills and experience that are commensurate with the nature of their work, including the gravity of the offences dealt with [...].

From the Guidelines the General Assembly adopted, the following would seem relevant in the context of defining EU minimum standards for legal aid:

**Guideline 1. Provision of legal aid**

41. 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;
  - (b) The criteria for applying the means test are widely publicized;
  - (c) Persons urgently requiring legal aid at police stations, detention centres or courts should be provided preliminary legal aid while their eligibility is being determined. Children are always exempted from the means test;
  - (d) Persons who are denied legal aid on the basis of the means test have the right to appeal that decision;
- [...]

**Guideline 4. Legal aid at the pretrial stage**

44. To ensure that detained persons have prompt access to legal aid in conformity with the law, States should take measures:

- [...]
- (f) To request bar or legal associations and other partnership institutions to establish a roster of lawyers and paralegals to support a comprehensive legal system for persons detained, arrested, suspected or accused of, or charged with a criminal offence, in particular at police stations;
  - (g) To ensure that every person charged with a criminal offence has adequate time, facilities and technical and financial support, in case he or she does not have sufficient means, to prepare his or her defence and is able to consult with his or her lawyer in full confidentiality.

**Guideline 11. Nationwide legal aid system**

[...]

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 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;

[...]

**Guideline 12. Funding the nationwide legal aid system**

60. Recognizing that the benefits of legal aid services include financial benefits and cost savings throughout the criminal justice process, States should, where appropriate, make adequate and specific budget provisions for legal aid services that are commensurate with their needs, including by providing dedicated and sustainable funding mechanisms for the national legal aid system.

[...]

**Guideline 13. Human resources**

63. States should, where appropriate, make adequate and specific provision for staffing the nationwide legal aid system that are commensurate with their needs.

64. States should ensure that professionals working for the national legal aid system possess the qualifications and training appropriate for the services they provide.

65. Where there is a shortage of qualified lawyers, the provision of legal aid services may also include non-lawyers or paralegals. At the same time, States should promote the growth of the legal profession and remove financial barriers to legal education.

[...]

**2. The EU Charter of Fundamental Rights**

The EU Charter of Fundamental Rights 2000 (CFR), receiving binding force through the Lisbon Treaty 2009, builds upon the rights enshrined in the ECHR and EU law: Article 47 provides:

[...]

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.

The scope of the Charter is limited to matters of EU competence (article 51), which logically means that each new provision enacted by the EU must comply with the Charter. The legal aid provision in article 47 CFR was considered recently by the CJEU in *DEB*.<sup>25</sup> The case concerned whether a company could attract the legal aid provision in article 47 in a civil dispute and the court concluded this was possible. The Court considered the scope of the Charter and its relationship with the ECHR. It then went on to consider the principles set out in the jurisprudence of the ECHR. Notwithstanding that the case concerned a civil dispute, the propositions apply equally to criminal cases:

- 35 As regards the Charter, Article 52(3) thereof states that, in so far as the Charter contains rights which correspond to those guaranteed by the ECHR, their meaning and scope are to be the same as those laid down by the ECHR. According to the explanation of that provision, the meaning and the scope of the guaranteed rights are to be determined not only by reference to the text of the ECHR, but also, *inter alia*, by reference to the case-law of the European Court of Human Rights. The second sentence of Article 52(3) of the Charter provides that the first sentence of Article 52(3) is not to preclude the grant of wider protection by EU law (see, to that effect, Case C-400/10 PPU *McB* [2010] ECR I-0000, paragraph 53).
- 36 As regards in particular Article 47(3) of the Charter, the last paragraph of the Explanation relating to Article 47 mentions the judgment in *Airey v. Ireland* of 9 October 1979 (Eur. Court H.R., Series A, No 32, p. 11), according to which provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy. No indication is given as to whether such aid must be granted to a legal person or of the nature of the costs covered by that aid.
- 37 That provision must be interpreted in its context, in the light of other provisions of EU law, the law of the Member States and the case-law of the European Court of Human Rights [...]
- 42 Similarly, the inclusion of the provision relating to the grant of legal aid in the article of the Charter relating to the right to an effective remedy indicates that the assessment of the need to grant that aid must be made on the basis of the right of the actual person whose rights and freedoms as guaranteed by EU law have been violated, rather than on the basis of the public interest of society, even if that interest may be one of the criteria for assessing the need for the aid [...]

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<sup>25</sup> Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* (22 December 2010)

- 45 Review of the case-law of the European Court of Human Rights shows that, on several occasions, that court has stated that the right of access to a court constitutes an element which is inherent in the right to a fair trial under Article 6(1) of the ECHR (see, inter alia, Eur. Court H.R., judgment in *McVicar v. the United Kingdom* of 7 May 2002, ECHR 2002-III, § 46). It is important in this regard for a litigant not to be denied the opportunity to present his case effectively before the court (Eur. Court H.R., judgment in *Steel and Morris v. the United Kingdom* of 15 February 2005, ECHR 2005-II, § 59). The right of access to a court is not, however, absolute.
- 46 Ruling on legal aid in the form of assistance by a lawyer, the European Court of Human Rights has held that the question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, inter alia, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent himself effectively (Eur. Court H.R., judgments in *Airey v. Ireland*, § 26; *McVicar v. the United Kingdom*, §§ 48 and 49; *P., C. and S. v. the United Kingdom* of 16 July 2002, ECHR 2002-VI, § 91, and *Steel and Morris v. the United Kingdom*, § 61). Account may be taken, however, of the financial situation of the litigant or his prospects of success in the proceedings (Eur. Court H.R., judgment in *Steel and Morris v. the United Kingdom*, § 62).
- 47 As regards legal aid in the form of dispensation from payment of the costs of proceedings or from provision of security for costs before an action is brought, the European Court of Human Rights has similarly examined all the circumstances in order to determine whether the limitations applied to the right of access to the courts had undermined the very core of that right, whether those limitations pursued a legitimate aim and whether there was a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved (see, to that effect, Eur. Court H.R., judgments in *Tolstoy-Miloslavsky v. the United Kingdom* of 13 July 1995, Series A No 316-B, §§ 59 to 67, and *Kreuz v. Poland* of 19 June 2001, ECHR 2001-VI, §§ 54 and 55).
- 48 It is apparent from those decisions that legal aid may cover both assistance by a lawyer and dispensation from payment of the costs of proceedings.
- 49 The European Court of Human Rights has also held that, although a selection procedure for cases may be established in order to determine whether legal aid may be granted, that procedure must operate in a non-arbitrary manner (see, to that effect, Eur. Court H.R., judgment in *Del Sol v. France* of 26 February 2002, § 26; decision in *Puscasu v. Germany* of 29 September 2009, p. 6, last paragraph; judgment in *Pedro Ramos v. Switzerland* of 14 October 2010, § 49).

In this regard, the CJEU highlighted the need to ensure effective access to justice and to consider each case on its own merits. Decisions of the CJEU are of course binding upon the member states and the institutions. This interpretation of article 47 must therefore influence any directive which is adopted concerning legal aid provision.

The Court had the jurisdiction to consider the case in *DEB* due to Council Directive 2003/8/EC of 27<sup>th</sup> January 2003 to improve access to justice in cross border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ (2003) L 26, p 41 and corrigendum OJ (2003) L 32, p 15 (the Council Directive). The Member States have therefore already accepted the need for common standards on legal aid in civil disputes having cross border implications. Whilst the procedural aspects differ to what is required in a criminal instrument, the recitals acknowledge certain principles which are common across all proceedings:

(5) This Directive seeks to promote the application of legal aid in cross-border disputes for persons who lack sufficient resources where aid is necessary to secure effective access to justice. The generally recognised right to access to justice is also reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union.

(6) Neither the lack of resources of a litigant, whether acting as claimant or as defendant, nor the difficulties flowing from a dispute's cross-border dimension should be allowed to hamper effective access to justice.

(10) All persons involved in a civil or commercial dispute within the scope of this Directive must be able to assert their rights in the courts even if their personal financial situation makes it impossible for them to bear the costs of the proceedings. Legal aid is regarded as appropriate when it allows the recipient effective access to justice under the conditions laid down in this Directive.

(11) Legal aid should cover pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings, legal assistance in bringing a case before a court and representation in court and assistance with or exemption from the cost of proceedings.

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**Annex B:**

**Summary of the ECtHR's case law on legal aid**

For purposes of easy reference, we consider the publication by the *Open Society Justice Initiative*, which summarizes and discusses the ECtHR's case law on legal aid, as attachment of this ECBA document:

Arrest Rights Brief No.3: The Right to Legal Aid, *Open Society Justice Initiative*, April 2013, <http://www.opensocietyfoundations.org/sites/default/files/arrest-rights-template-legal-aid-20130412.pdf>