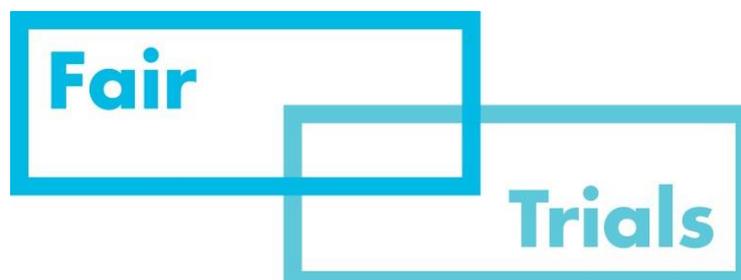


EU DIRECTIVE ON LEGAL AID FOR SUSPECTS AND ACCUSED PERSONS IN CRIMINAL PROCEEDINGS AND FOR REQUESTED PERSONS IN EUROPEAN ARREST WARRANT PROCEEDINGS

TRANSPOSITION TOOLKIT



About Fair Trials

Fair Trials is an international human rights organisation with offices in London, Brussels and Washington, D.C., focused on improving the right to a fair trial in accordance with international standards. Our work is premised on the belief that fair trials are one of the cornerstones of a just society: they prevent lives being ruined by miscarriages of justice, and make societies safer by contributing to transparent and reliable justice systems that maintain public trust. Although universally recognised in principle, in practice the basic human right to a fair trial is being routinely abused. Fair Trials' work combines: (a) helping suspects to understand and exercise their rights; (b) building an engaged and informed network of fair trial defenders (including NGOs, lawyers and academics); and (c) fighting the underlying causes of unfair trials through research, litigation, political advocacy and campaigns.

About the Legal Experts Advisory Panel

The Legal Experts Advisory Panel (or LEAP) is an EU-wide network of experts in criminal justice and human rights which works to promote fair and effective judicial cooperation within Europe. There are currently over 185 organisational members, with representatives from law firms, CSOs, and academic institutions, covering all 28 EU Member States.

Through Fair Trials' coordination, LEAP is able to offer an expert view on a broad range of EU criminal justice topics, while also boosting cooperation between human rights defenders in crossborder work. LEAP's importance has been acknowledged by the EU, which has recognised the network's contribution to EU Justice.

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I. INTRODUCTION

A. Background

1. In the last decade, EU Member States have been cooperating closely on cross-border issues, principally through mutual recognition mechanisms such as the European Arrest Warrant ('EAW'). The effectiveness of such mechanisms depends upon mutual confidence between judicial authorities that each will respect the rights of those concerned, in particular as guaranteed by the European Convention on Human Rights ('ECHR').
2. However, cooperation has been undermined by the fact that judicial authorities called upon to cooperate with one another do not, in reality, have full confidence in each other's compliance with these standards. In order to strengthen the system, the EU has begun imposing minimum standards to regulate certain aspects of criminal procedure through a programme called the 'Procedural Rights Roadmap'.¹
3. Whilst these measures are intended to enhance mutual trust, the result is a set of directives binding national authorities in all cases, including those which have no cross-border element. These cover the right to interpretation and translation,² the right to information,³ the right of access to a lawyer,⁴ the right to legal aid,⁵ the right to presumption of innocence and to be present at trial⁶ the rights of children in criminal proceedings,⁷ and the right to legal aid⁸ (the '**Roadmap Directives**').
4. This Toolkit discusses Directive 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (the '**Directive**'). This Directive is closely linked to the Directive 2013/48 on the right of access to a lawyer (the '**Access to a Lawyer Directive**') and it is intended to render effective the guarantees

¹ Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings ([OJ 2009 C 295, p.1](#)).

² 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 2010 L 280, p. 1](#)).

³ 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 2012 L 142, p. 1](#)).

⁴ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty ([OJ 2013 L 290, p. 1](#)).

⁵ Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings ([OJ 2016 L 297, p.1](#)).

⁶ Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, ([OJ 2016 L 65, p. 1](#)).

⁷ Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, ([OJ 2016 L 132, p.1](#)).

⁸ Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, ([OJ 2016 L297/1, P.1](#)).

recognised for suspects and accused persons under that Directive at the early stages of the proceedings. Furthermore, the Directive foresees that requested persons in EAW proceedings have access to legal aid to ensure the right to dual representation, that is the right to be assisted by a lawyer in both the executing and the issuing Member State.

5. Legal aid is essential to achieving equal access to justice as enshrined in Article 6(3) ECHR. As highlighted by the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (the ‘UN Principles and Guidelines’)⁹ legal aid is a crucial element of a fair criminal justice system that is based on the rule of law. It is a prerequisite for the effective exercise of the right of access to a lawyer enshrined in the Access to a Lawyer Directive for people with insufficient financial resources. Moreover, the provision of legal aid strengthens the equality of arms between defence and prosecution as well as the presumption of innocence of a suspect/accused person. Legal aid has broader benefits for the system as a whole. A functioning legal aid system can reduce the length of time suspects are held in police stations and detention facilities. An effective legal aid system contributes to reducing wrongful convictions, prison overcrowding and congestion in the Courts.

II. OBJECTIVES OF THIS TOOLKIT

6. The deadline for transposition of the Directive into national law is 25 May 2019. Before then, Member States are required to conduct a review of national law in order to assess compliance with the Directive. Fair Trials will be working with LEAP members and other criminal justice experts to ensure that the Directive is both transposed and implemented effectively.
7. This Toolkit aims to help readers identify areas where current or proposed national law fails to meet the requirements of the Directive (read in conjunction with other key international standards) so that these can be addressed in the pre-transposition period, leaving fewer problems for the courts to deal with subsequently. This is an exciting opportunity for practitioners, civil society organisations and any other stakeholders to get involved and actively participate in the process of transposing the Directive via legislative reform and domestic litigation.
8. Fair Trials’ report “Towards an EU Defence Rights Movement”¹⁰ highlights how in recent years, LEAP has contributed to national legislative discussions relating to the implementation of the Roadmap Directives. In Lithuania, a submission made by Fair Trials and Lithuanian LEAP members, in consultation with LEAP member the Human Rights Monitoring Institute, was taken into account and some of the recommended changes were included in the final legislative text.¹¹ In Spain, Fair Trials wrote a joint letter with Rights International Spain and several other NGOs commenting on the draft legislative measure implementing the first two Roadmap Directives. Fair Trials also

⁹ UN General Assembly, *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, 28 March 2013, A/RES/67/187, available at: <http://www.refworld.org/docid/51e6526b4.html>.

¹⁰ LEAP, *Strategies for Effective Implementation of the Roadmap Directives: Towards an EU Defence Rights Movement*, 2015, para 29.

¹¹ Fair Trials and LEAP, *Submission to the Legal Affairs Committee of the Parliament of Lithuania on the transposition of Directive 2012/13/EU on the right to information in criminal proceedings*, 2014, available at: <https://www.fairtrials.org/wp-content/uploads/Lithuania-Parliament-Submission-English1.pdf>.

worked with LEAP member for England & Wales, JUSTICE, to contribute to a government consultation on the implementation of the Right to Information Directive, with some of our recommendations reflected in the adopted measures. This demonstrates that a lot can be achieved in terms of ensuring the effective implementation of the Directive if LEAP and other stakeholders engage actively in the transposition process.

9. This Toolkit provides an overview of the provisions of the Directive relating to the right to legal aid and contains a review of the relevant regional and international standards, as well as, a review of the relevant case-law of the European Court of Human Rights ('**ECtHR**') that will help interpret those provisions. Given that the Directive has not reached its transposition deadline, it does not yet have direct effect in Member States. Nonetheless, as discussed in the 'Using EU Law in Criminal Practice Toolkit' published by Fair Trials in 2015, there are a number of ways in which the Directives can be used in litigation at this stage.¹² Thus, we encourage readers to review this toolkit in conjunction with the 'Using EU Law in Criminal Practice Toolkit'.
10. This Toolkit is an opportunity for Fair Trials and LEAP to gather information from practitioners of the challenges faced day-to-day in practice when defending the right of their client to access legal aid and exercise an effective defence at different stages of the criminal proceedings. Therefore, for each aspect of the right to legal aid covered in the Toolkit, we have included a set of questions regarding the various issues that are at stake when ensuring the effective protection of the right in question, for the reader to reflect on. We are keen to hear about what is working and what is not, how national law-makers, investigative authorities and courts are responding, and what success you are achieving through the ideas and arguments put forward in our Toolkit. We invite readers to get in touch with Fair Trials to share your responses and further thoughts. Fair Trials will also organise a series of meeting to discuss these issues in more detail.
11. It is possible to achieve more through partnerships and discussions with key local stakeholders such as bar associations, police, prosecutors, judiciary, universities, civil society and training bodies. Indeed, we hope that LEAP and all stakeholders within national legal systems can work together in the design of country-specific strategies to addressing the challenges identified through the questions proposed in this Toolkit.
12. In summary, the objectives of this Toolkit are to:
 - A. Provide an overview of Directive's key provisions related to the other Roadmap Directives in place and international standards, as well as relevant jurisprudence from regional courts;
 - B. Provide guidance on how the Directive can be used during the pre-transposition period;
 - C. Encourage LEAP members and their networks to identify problems with national law and practice which the Directive can address; and
 - D. Provide a framework for developing strategies to inform local legal reform and changes in practice in order to transpose and effectively implement the Directive.

¹² See Fair Trials, 'Using EU Law in Criminal Practice' Toolkit, 2014, p 12, available here <https://www.fairtrials.org/wp-content/uploads/Using-EU-law-A2L-FINAL1.pdf>.

III. SCOPE OF THE TOOLKIT

13. This Toolkit covers those aspects of the right to legal aid enshrined in the Directive, specifically (i) the scope of the right to legal aid, ii) the definition of legal aid, iii) the eligibility criteria, iv) the right to access legal aid in EAW proceedings, v) legal aid decision-making, vi) quality of legal aid and training of legal aid providers, vii) remedies available for violations of the right to legal aid, viii) special protections required for vulnerable persons.

IV. THE DIRECTIVE AT A GLANCE

Provisions	What it covers	Particular aspects
Article 1	Subject matter	<ul style="list-style-type: none"> • Lays down minimum rules concerning legal aid for suspects and accused persons in criminal proceedings. • It also applies to requested persons in EAW proceedings. • It complements Directives on Access to a Lawyer and Presumption of Innocence and should not be interpreted in a way that limits the rights provided for in those Directives.
Article 2 Recitals 10 – 16	Scope	<p>The Directive applies to:</p> <ul style="list-style-type: none"> • persons in criminal proceedings who have a right of access to a lawyer and who are: <ul style="list-style-type: none"> (a) deprived of liberty; (b) required to be assisted by a lawyer in accordance with Union or national law; or (c) required or permitted to attend an investigative or evidence-gathering act; • requested persons under EAW, who have the right to access a lawyer, upon arrest by the executing State; • persons who were not initially suspects or accused persons but become so during questioning; • in respect of minor offences: <ul style="list-style-type: none"> a) when the law provides for the imposition of a sanction by an authority other than a court; or b) where deprivation of liberty cannot be imposed as a sanction. • in any event, when a decision on detention is taken, and during detention, at any stage of the proceedings until the conclusion.
Article 3, Recital 8	Definition	<ul style="list-style-type: none"> • ‘Legal aid’ means funding by a Member State of the assistance of a lawyer, enabling the exercise of the right of access to a lawyer.

Provisions	What it covers	Particular aspects
		<ul style="list-style-type: none"> • Pursuant Recital 8, competent authorities may require that suspects, accused persons or requested persons bear part of the legal aid costs themselves, depending on their financial resources.
<p>Article 4 Recitals 17 – 19</p>	<p>Legal aid in criminal proceedings</p>	<ul style="list-style-type: none"> • Member States must ensure that those who lack sufficient resources to pay for the assistance of a lawyer have the right to legal aid when required in the interests of justice. • In order to decide whether to grant legal aid, Member States may apply a means test, a merits test or both. • For the means test, Member States must take into account objective factors, such as the income, capital and family situation of the person concerned, as well as the cost of the assistance of a lawyer and the standard of living. • For the merits test, Member States must take into account the seriousness of the criminal offence, the complexity of the case and the severity of the sanction at stake. In any event the merits test shall be deemed to have been met in the following situations: <ul style="list-style-type: none"> a) at the detention hearing, at any stage of the proceedings; and b) during detention. • Legal aid must be granted without undue delay, and at the latest before questioning by the competent authority, or before any investigative or evidence gathering acts are carried out. • Legal aid must be granted only for the purposes of the criminal proceedings in which the person concerned is suspected or accused of having committed a criminal offence.
<p>Article 5 Recitals 20 – 23</p>	<p>Legal Aid in European Arrest Warrant Proceedings</p>	<ul style="list-style-type: none"> • The executing Member State must ensure that requested persons have a right to legal aid upon arrest under an EAW until they are surrendered or until the decision not to surrender then becomes final. • The issuing State must ensure that requested persons who exercise their right to appoint a lawyer in the issuing Member State to assist the lawyer in the executing Member State have the right to legal aid in the issuing State for the purposes of such proceedings in the executing State, in so far as legal aid is necessary to ensure effective access to justice.

Provisions	What it covers	Particular aspects
		<ul style="list-style-type: none"> • The right to legal aid in EAW proceedings may be subject to a means test, which shall apply <i>mutatis mutandis</i>.
Article 6 Recital 24	Decisions regarding the granting of legal aid	<ul style="list-style-type: none"> • Decisions on whether to grant legal aid and on the assignment of lawyers must be made without undue delay, by a competent authority. • Member States must take appropriate measures to ensure that the competent authority takes its decisions diligently, respecting the rights of the defence. • Member States must take necessary measures to ensure that suspects, accused persons and requested persons are informed in writing if their request for legal aid is refused in full or in part.
Articles 7 Recitals 25 – 26	Quality of Legal Aid Services and Training	<ul style="list-style-type: none"> • Member States must take necessary measures, including with regard to funding, to ensure that: <ul style="list-style-type: none"> (a) there is an effective legal aid system that is of an adequate quality; and (b) legal aid services are of a quality adequate to safeguard the fairness of the proceedings, with due respect for the independence of the legal profession. • Member States must ensure that adequate training is provided to staff involved in the decision-making on legal aid in criminal proceedings and in EAW proceedings. • Member States shall take appropriate measures to promote the provision of adequate training to lawyers providing legal aid services. • Member States must take measures to ensure that the suspect or accused person can replace the assigned legal aid lawyer, where the specific circumstances so justify.
Articles 8 Recitals 27	Remedies	<ul style="list-style-type: none"> • Member States must ensure that suspects, accused persons and requested persons have an effective remedy under national law in the event of a breach of their rights under this Directive.
Article 9 Recitals 29	Vulnerable persons	<ul style="list-style-type: none"> • Member States must ensure that the needs of vulnerable suspects, accused persons and requested persons are taken into account in the implementation of this Directive.

V. PROVISIONS OF THE DIRECTIVE

A. Scope of the Legal Aid Directive

i. *What the Directive says*

14. Article 2 sets out the scope of the protection granted in the Directive. The right to legal aid applies at all stages of the proceedings, under certain conditions. Recital 9, however, establishes that the Directive does not apply where the person potentially benefiting from legal aid waived their right of access to a lawyer¹³ and has not revoked such waiver.¹⁴ Additionally, the Directive does not apply where a Member State has temporarily applied derogations under the Directive on Access to Lawyer, for the time of such derogation.¹⁵ For reference, the Directive on Access to lawyer allows Member States to derogate from the obligation to ensure that suspects or accused persons have access to a lawyer only in very exceptional circumstances (urgent need to avert risk to the life or integrity of a person; urgent need to protect the investigation; due to geographical remoteness impairing the ability of the lawyer to access his client) and only at the pre-trial stage.¹⁶

Temporal scope

15. The temporal scope of the Directive was broadened with respect to the Commission's initial proposal. The initial proposal only contemplated the right to provisional legal aid, which would cover solely the preliminary stage of criminal proceedings before a final decision on legal aid was taken. In a position paper on the proposed Directive, Fair Trials and LEAP included a recommendation that the scope of the Directive be expanded to cover the provision of legal aid throughout all stages of the criminal proceedings,¹⁷ in line with the scope of the Access to a Lawyer Directive and the United Nations Principles and Guidelines.¹⁸ The European Parliament took on board some of LEAP's suggestions, including this point on the scope of the Directive.

Personal scope

16. Pursuant to section 1 of Article 2, the Directive covers suspects or accused persons in criminal proceedings who benefit from the right of access to a lawyer pursuant to the Directive Access to a Lawyer **and** meet one of the following criteria: 1) are deprived of liberty; 2) are required by law to be assisted by a lawyer in accordance with regional or national law; or 3) are required or permitted to attend an investigative or evidence gathering act, including identity parades, confrontations or reconstructions.¹⁹

17. With regard to the requirement to be deprived of liberty, Recital 15 specifies that, provided they are conducted with due respect to the right to a fair trial, the following situations are not considered a deprivation of liberty: 1) identifying the suspect or accused person; 2) determining

¹³ In accordance with Article 9 or Article 10(3) of Directive on Access to a Lawyer.

¹⁴ Recital 9.

To determine whether a waiver of the right to a lawyer is valid, consult Fair Trials, 'Roadmap Practitioners Tool; Access to a Lawyer Directive', 2016, available at <https://www.fairtrials.org/wp-content/uploads/A2L-Toolkit-FINAL.pdf>.

¹⁵ Recital 9.

¹⁶ Article 3(5) and (6) of Directive on Access to a Lawyer.

¹⁷ Position paper on the proposed directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings, 2015, available at: <https://www.fairtrials.org/wp-content/uploads/Position-Paper-on-Legal-Aid.pdf>.

¹⁸ UNODC, Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, 2013, available at: http://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf.

¹⁹ Article 2 (1).

whether an investigation should be started; 3) verifying the possession of weapons or other similar safety issues; 4) carrying out investigative or evidence-gathering acts such as body checks, physical examinations, blood, alcohol or similar tests, or the taking of photographs or fingerprints; and 5) bringing the suspect or accused person to appear before a competent authority, in accordance with national law.²⁰

18. Concerning the requirement to provide legal aid to a suspect or accused person who is required to participate in an investigative or evidence gathering act, Recital 17 specifies that the Directive only sets out minimum standards. Therefore, Member States maintain a wide discretion to grant legal aid beyond the situations envisaged in the Directive.²¹
19. In the context of EAW proceedings, according to Section 2 of Article 2, the Directive also applies to the requested person upon arrest in the executing Member State.²²
20. Section 3 establishes that the Directive applies also 'to persons who were not initially suspects or accused persons but become suspects or accused persons in the course of the questioning by the police or by another law enforcement authority.'²³ As reflected in the Presumption of Innocence Directive, suspects or accused persons have the right to remain silent and not to incriminate themselves.²⁴ Accordingly, a person who was initially called into questioning but not as a suspect or an accused person, should have the right not to incriminate him or herself and the right to remain silent from the moment he/she is suspected of having committed a crime.²⁵ Therefore, in these situations, the questioning should be suspended immediately in order to notify the person of his/her rights that he/she has become a suspect or an accused person in the police investigation. The questioning may only be restarted after the person has been duly informed of his/her rights, including to legal aid.²⁶

Material scope

21. Section 4 of Article 2 excludes minor offences from the scope of the Directive in specific circumstances. The Directive only applies to the proceedings before a court with jurisdiction in criminal matters where: (a) the law of a Member State provides for the imposition of a sanction by an authority other than a court with jurisdiction in criminal matters, and the imposition of such a sanction may be appealed or referred to such a court; or (b) deprivation of liberty cannot be imposed as a sanction.²⁷
22. Recitals 11 and 12 use the example of traffic-related offences to illustrate the rationale of this exclusion, given that in many Member States, these types of offences are considered criminal offences that are ordinarily punished by a fine (or other penalties but not deprivation of liberty) and dealt with by an authority different to a criminal court such as an administrative or municipal

²⁰ Recital 15.

²¹ Recital 17.

²² Article 2(2).

²³ Article 2 (3).

²⁴ Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence, Article 7.

²⁵ Recital 10.

²⁶ Recital 10.

²⁷ Article 2(4).

authority. However, the law in most Member States allows for the possibility to appeal a decision made in first instance by an administrative court before a criminal court. Thus, according to Article 2(4), legal aid should only be made available in the context of proceedings before the criminal court in the second or third instance but not to the proceedings in the first instance before an administrative court.

ii. International and regional standards

23. Regarding the exclusion of minor offences, international and regional standards provide guidance as to the Directive's possible interpretation. The protection guaranteed under Article 6(3) ECHR applies to 'everyone charged with a criminal offence'.²⁸ The ECtHR has been called upon to interpret what constitutes a 'criminal offence'. National authorities classify offenses under domestic law as criminal, disciplinary or administrative, and in doing so may exclude minor offences from the scope of legal aid. But the national classification does not determine if an offence is 'criminal' or not. In order to decide whether a person can be said to be 'charged with a criminal offence' for the purposes of the guarantees contained in Article 6(3)(c) ECHR, the ECtHR applies the so-called 'Engel criteria'.

ECtHR *Engel* caselaw

The *Engel case*²⁹ concerned action taken against members of the armed forces over an offence of insubordination, classified in the Netherlands as disciplinary in nature. Notwithstanding national classification, the ECtHR established that three factors need to be taken into account to determine whether a matter is 'criminal' and, therefore, whether the accused person must receive the full fair trial protections set out under Article 6 ECHR.³⁰

These factors are:

1. The classification of the offence under national law;
2. The essential nature of the offence. In determining whether the nature of the offence is criminal, the ECtHR considers to whom the law applies and the purpose of the penalty. If the law only applies to a restricted group of people, the offence is more likely to be disciplinary.³¹ However, if the law has a general applicability, it is more likely to be criminal.³² If the penalty is both deterrent and punitive it is deemed to be criminal;³³ and
3. The nature and degree of severity of the penalty that could be imposed having regard, in particular to any loss of liberty, which is a characteristic of criminal liability.³⁴ When the potential penalty is of a pecuniary nature, the ECtHR assesses whether the purpose of the said penalty is

²⁸ ECHR, Article 6(3).

²⁹ *Engel and Others v. the Netherlands*, 8 June 1976, Series A no. 22.

³⁰ See also McBride, 'Human Rights and Criminal Procedure – the case law of the ECtHR', Council of Europe Publishing, 2009, available at https://www.echr.coe.int/documents/pub_coe_criminal_procedure_2009_eng.pdf.

³¹ *Ezeh and Connors v. the United Kingdom* [GC], 39665/98 and 40086/98, 9 October 2003, paras 101-104.

³² *Ibid.*

³³ *Id.*

³⁴ *Engel and Others v. the Netherlands*, 8 June 1976, paragraph 82.

compensation for damage or a punishment to deter future criminal conduct. It is in the latter case that the offence is considered to be of a criminal nature.³⁵

24. These factors are not cumulative but indicative. The ECtHR gives the least weight to the first factor, namely the national classification of the offence. In light of the case law of the ECtHR, minor offences which may be classified as 'administrative' or 'disciplinary' in national law, could be regarded as 'criminal' on the basis of the above factors for the purposes of the fair trial rights guaranteed by Article 6(3) ECHR.
25. The Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ('CPT') recommends that States abolish systems whereby people who are charged under specific types of criminal offences, such as minor offences, are not entitled to legal aid.³⁶ In its country report of 2011 on the Netherlands, the CPT highlighted that under the Dutch Criminal Code, persons suspected of minor offences were not entitled to legal assistance paid by the Legal Aid Board. The CPT recommended such restriction be removed from the Criminal Code and recalled that "[f]or the right of access to a lawyer to be fully effective in practice, appropriate provision should be made for persons who are not in a position to pay for a lawyer."³⁷

Pre-transposition questions

Do you consider there to be significant limitations in the material or temporal scope of the right to legal aid in your national legal system?

Is legislative reform required in your jurisdiction in order to ensure that the Directive is adequately transposed in relation to the personal scope of the right to legal aid?

In your national legal system, are there any other non-legislative solutions to the problems which you see in practice relating to the applicability legal aid?

Are there any questions relating to the scope of legal aid in connection with the right to access a lawyer and the right to a fair trial which you think could be usefully referred to the CJEU for clarification?

B. Definition of legal aid

- i. What the Directive says

26. Article 3 of the Directive defines legal aid as "funding by a Member State of the assistance of a lawyer, enabling the exercise of the right to access to a lawyer."³⁸ Recital 8 elaborates further that "legal aid should cover the costs of the defence of suspects, accused persons and requested

³⁵ *Ezeh and Connors v. the United Kingdom* [GC], 39665/98 and 40086/98, 9 October 2003, paragraphs 101-104.

³⁶ Report on the visit to the Netherlands carried out by the CPT from 10 to 21 October 2011, paragraph 18.

³⁷ *Ibid.*

³⁸ Article 3 of the Directive.

persons.” These two provisions, however, represent a retraction from the definition contained in the Commission’s Recommendation³⁹ and the text of the draft proposal for a Directive from 2013.⁴⁰ Recital 5 of the draft proposal recognised that legal aid should cover both the cost of the defence and the proceedings. Fair Trials welcomed the inclusion of the much broader description of the scope of the cost which legal aid should cover inasmuch as this would have included experts’ fees, court fees and any other cost which may become payable by the suspect or accused person but are beyond what is necessary to ensure the “exercise of the right of access to a lawyer”. In our position paper we submitted that the definition of “legal aid” in the operative part of the Directive should include both the cost of defence and the proceedings. It is disappointing that not only the final text of the Directive fails to take into consideration our recommendation. As highlighted in our position paper, it is noted that the cost of the defence may be more extensive in adversarial systems where the costs of experts, for example, will be paid for by the court. Therefore, definition contained in the Directive limits the type of cost that may be covered by legal aid which could put the defence at a disadvantage vis-à-vis the prosecution, and ultimately jeopardises the equality of arms guaranteed for all suspects and accused persons across the EU.

27. Recital 8 of the Directive also provides that national authorities ‘should be able to require that suspects, accused persons or requested persons bear part of those costs themselves, depending on their financial resources.’⁴¹ The original text of the Commission’s proposal allowed for the possibility of recovering legal aid costs from suspects or accused persons who were found not to meet the eligibility requirements for ordinary legal aid at a later stage.⁴² In its position paper, Fair Trials and LEAP highlighted serious concerns about allowing cost recovery in respect of legal aid from suspects or accused persons, given that, in the experience of the members of LEAP, the future risk of having to pay the cost of legal services may deter suspects and accused persons from exercising their right to a lawyer at the crucial initial stage of the proceedings. Therefore, in order to ensure that all those who need the assistance of a lawyer at those critical stages of the criminal proceedings are able to access it by exercising their right to legal aid without worrying about whether or not they will be forced to repay the associated costs at a later stage, it is essential that legal aid should be provided irrespective of any eligibility assessment whether contemporaneous or in the future and without any risk of future cost recovery.
28. Furthermore, the Commission’s Recommendation also provided that, where legal aid has been granted through the merits test, those costs may be recovered in the event of a final conviction.⁴³ This was also addressed in our position paper by making it clear that the right to a fair trial and the various aspects it encompasses, belong to all suspects and accused persons irrespective of

³⁹ Commission Recommendation 2013/C 378/03 of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings, available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013H1224\(03\)&from=en](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013H1224(03)&from=en).

⁴⁰ EU Commission, Proposal for a Directive of the European Parliament and of the Council on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings, COM(2013) 824, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013PC0824&from=EN>.

⁴¹ Recital 8 of the Directive.

⁴² EU Commission, Proposal for a Directive of the European Parliament and of the Council on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings, COM(2013) 824, paragraph 31.

⁴³ EU Commission Recommendation 2013/C378/03 of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings, paragraph 13.

their guilt or innocence. We are concerned that the Directive fails to prohibit the possibility under national law for authorities to recover costs upon a finding of guilt.⁴⁴

29. The European Parliament had proposed an amendment to expressly exclude the possibility for Member States to claim costs from the defendant in the event of a conviction. The European Parliament's committee on civil liberties, justice and home affairs ('**LIBE Committee**') conducted an assessment in order to determine if adopting the amendment proposed by the Parliament would have a more positive impact on the fundamental rights of the defendant. The LIBE Committee reached the conclusion that allowing Member States to claim costs from the defendant could have a negative impact on the fundamental rights of the defendant and (citing Fair Trials position paper) may pressure suspects and accused persons to waive their right to a lawyer in face of the risk of having to bear the costs of legal aid.⁴⁵
30. The LIBE Committee recommended that the Commission adopt an amendment whereby Member States may only recover costs of legal aid if it could be established that the person did not meet the eligibility criteria for legal aid or that the person provided false information about his/her financial situation. In the LIBE Committee's view, such amendment would ensure that people would be able to apply for legal aid without fear of being forced to repay the costs at a later stage. This way, the right of access to a lawyer, the right to a fair trial, the right to be presumed innocent and the right to liberty would be strengthened.
31. In Belgium, Bulgaria, England and Wales, Finland, France, Italy and Spain, there is a requirement for reimbursement where a final decision establishes that the person does not meet the eligibility criteria for ordinary legal aid as applicable under national law. Equally, if the suspect/accused person knowingly provided false information, he/she must reimburse the legal aid costs.⁴⁶
32. It is disappointing that, although the operative part of the final Directive as adopted does not include the possibility of recovering legal aid cost, it was not expressly excluded and moreover was kept in the body of the Directive as Recital 8. This leaves the door open for Member States to interpret the Directive as not explicitly prohibiting any cost-recovery, which may lead to the lowering of existing national standards in some cases. However, the Directive must be interpreted in light of the jurisprudence of the ECtHR, which has found in multiple occasions that the requirement to reimburse legal aid costs may violate the right to fair trial in certain situations (see below).

LEAP Survey on cost-recovery (2017)

33. In 2017, Fair Trials surveyed LEAP members in order to identify the existing standards regarding legal aid cost-recovery across the EU. We found that only a handful of countries require those who qualify for legal aid to pay any fees for their legal services, and often such contribution is linked to their income level. In Spain, those receiving legal aid are only responsible for paying 20% of the

⁴⁴ Position paper, 11.

⁴⁵ LIBE Committee, Impact assessment of substantial amendments to a Commission proposal "Provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings", (LIBE Committee's Impact assessment), June 2016, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/581410/EPRS_STU\(2016\)581410_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/581410/EPRS_STU(2016)581410_EN.pdf)

⁴⁶ LIBE Committee Impact Assessment, 17.

costs of having documents notarized; the government pays all other fees and costs associated with legal representation. In the United Kingdom, those who have an annual disposable income over £3,398 must pay part or all of the costs of proceedings in lower level courts, such as magistrates' courts and committal for sentence; however, most, if not all of the costs for more serious crimes which take place in the Crown Court are fully funded by the state. In Sweden, before a person can receive legal aid, they must consult with a lawyer for at least one hour but no more than two hours, and the defendant is responsible for those costs, which are paid directly to the lawyer. Depending on the person's income, then the cost of the consultation can be cut in half. Individuals receiving legal aid are also required to pay "a general fee for legal aid" that varies depending on their income; the maximum that a person may be required to pay is 40% of their legal fees and a minimum of 5,000 SEK. Similarly, the Netherlands requires that the persons who receive legal aid contribute towards the costs of legal representation varying from 198 Euros to 823 Euros, depending on household size and income. Other countries only consider imposing a fee if the person is found guilty (*Croatia, Estonia, Lithuania, Poland and Hungary-only if counsel was appointed under a presumption*).

ii. International and regional standards

34. In view of the definition of legal aid contained in the Directive, which does not expressly exclude cost recovery, it is helpful to turn to international and regional standards which provide broader definitions of legal aid than the Directive and exclude the ability of states to require that the persons benefiting from legal aid contribute to the costs of their legal representation. In this respect, the UN Principles and Guidelines specify that the notion of 'legal aid' should encompass: "legal advice, assistance and representation for persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence [...] that is provided at no cost for those without sufficient means or when the interests of justice so require. Furthermore, 'legal aid' should include the concepts of legal education, access to legal information and other services provided for persons through alternative dispute resolution mechanisms and restorative justice processes."⁴⁷
35. It is also important to note that the Resolution (78)8 of the Committee of Ministers of the Council of Europe of 2 March 1978 on Legal aid and Advice states that legal aid "should provide for all the costs necessarily incurred by the assisted person in pursuing or defending his legal rights and in particular lawyers' fees, costs of experts, witnesses and translations. It is desirable that, where legal aid is granted, there should be exemption from any requirement for security for costs."⁴⁸ Regarding cost recovery, the same resolution specifies that legal aid should be available even where a person is able to pay part of the costs of his proceedings.⁴⁹ In that case, legal aid may be made available with a financial contribution by the assisted person, which must not exceed what that person can pay without causing undue hardship.

⁴⁷ UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Recital 8.

⁴⁸ Resolution (78) 8 of the Committee of Ministers of the Council of Europe of 2 March 1978 on Legal aid and Advice, available at https://www.euromed-justice.eu/en/system/files/20090128115013_res%2878%298eCoE.pdf.

⁴⁹ Resolution (78) 8 of the Committee of Ministers of the Council of Europe of 2 March 1978 on Legal aid and Advice, paragraph 1.

36. The ECtHR, in respect of Article 6(3)(c), recognises that the right to free legal assistance is not absolute and should be provided only if the accused does not have sufficient means to pay.⁵⁰ The ECtHR therefore allows Member States to claim the costs of legal aid from the accused person or suspect. However, the ECtHR has held that the requirement to reimburse legal aid costs may violate the right to a fair trial in the following situations: 1) where the amount claimed from the applicant is excessive;⁵¹ 2) where the terms of reimbursement are arbitrary or unreasonable;⁵² and 3) where no assessment of the applicant's financial situation has been performed.⁵³ In any event, the ECtHR has made it clear that the burden of proving a lack of sufficient means should be borne by the person who pleads it.⁵⁴

Croissant v. Germany, 25 September 1992, Series A no. 237-B⁵⁵

The applicant had been represented by the three court-appointed lawyers during the whole trial and had been convicted and sentenced to two years and six months' imprisonment; he was also ordered to pay the costs and expenses, including the fees and disbursements of the three court-appointed defence counsels. The applicant complained that the order to pay the costs of the court-appointed lawyers was incompatible with Article 6(3)(c), arguing that, once free legal assistance had been granted, no payment could subsequently be demanded. The ECtHR, however, found that there had been no violation of Article 6(3)(c). The ECtHR held that the lawyers had been appointed in the interests of justice (merits test) and not as a result of an assessment of the financial situation of the accused (means test), in which case the requirement to pay the costs would have been incompatible with Article 6.⁵⁶ The ECtHR held that the national courts were entitled to consider it necessary to appoint the lawyers and that the costs of their legal representation was not excessive. Furthermore, German law provided for mechanisms that could have covered the said costs, partially or in greater part, had the applicant demonstrated that he lacked sufficient means to assume the costs himself.⁵⁷

Morris v. the United Kingdom, no. 38784/97, ECHR 2002-I⁵⁸

The applicant had applied for legal aid to stand trial before a court martial. He had been notified by the legal aid authority that legal aid would be granted subject to a down-payment of GBP 240. The applicant had refused the offer of legal aid and was not, therefore, represented by a solicitor at the court martial. The applicant complained that his rights to legal representation under Article 6(1) and (3)(c) ECHR had been violated. Specifically, he argued that he had been entitled to legal representation but as a result of the unfair army's legal aid system this had been essentially denied to him, given that he had been unable to afford the lump sum required. The ECtHR found no violation of Article 6(1) or

⁵⁰ [Croissant v. Germany](#), 25 September 1992, para 36, Series A no. 237-B; [Orlov v. Russia](#), no. 29652/04, 21 June 2011.

⁵¹ [Croissant v. Germany](#), 25 September 1992, para 36, Series A no. 237-B; [Orlov v. Russia](#), no. 29652/04, para 114, 21 June 2011.

⁵² [Morris v. the United Kingdom](#), no. 38784/97, ECHR 2002-I.

⁵³ [Croissant](#), para 36; [Orlov](#), para 114; [Morris](#), para 89.

⁵⁴ [Croissant](#), para 37.

⁵⁵ [Croissant v. Germany](#), 25 September 1992, Series A no. 237-B.

⁵⁶ *Ibid*, para 36.

⁵⁷ *Id*, para 37.

⁵⁸ [Morris v. the United Kingdom](#), no. 38784/97, ECHR 2002-I.

3(c). It held that the condition to pay a contribution of GBP 240 in order to receive legal aid had not been arbitrary or unreasonable, bearing in mind the applicant's net salary levels at the time.⁵⁹

***Orlov v. Russia*, no. 29652/04, para 114, 21 June 2011⁶⁰**

The Supreme Court appointed a lawyer to provide the application with legal assistance during the appeal proceedings. After the sentence was rendered on appeal reducing the applicant's prison term, the court-appointed lawyer requested payment of her fees. The Supreme Court ordered the applicant to repay the legal fees of the lawyer to the State. The applicant then complained that he had not been given free legal assistance for the appeal proceedings. In contrast to its position in *Croissant* and *Morris*, in this instance the ECtHR found a violation of Article 6(1) and (3)(c) ECHR. The Court found that under the Russian Code of Criminal Procedure, there was no requirement to conduct a "means test" in order to decide whether free legal assistance should be granted, and counsel's fees were treated as "litigation costs" to be borne by the represented person. Therefore, even if a defendant was provided with "free" legal assistance, he or she would still be required to pay for those costs after the trial. Furthermore, the ECtHR noted that, although the costs did not seem excessive, the amount had been set without conducting an assessment of the financial and personal circumstances of the defendant.⁶¹

37. The ECtHR recognises that recovery of legal aid costs may, in certain circumstances, violate the right to a fair trial.

iii. Recommendation

38. Notwithstanding the silence of the Directive on this point, Member States should be encouraged in the process of implementation of the Directive to exclude expressly the ability to recover the costs of legal aid following a subsequent conviction. Member States have accepted such restrictions on their ability to recover costs in relation to the provision of safeguards in previous other Roadmap Directives. For example, the Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings (the '**Interpretation and Translation Directive**') states that "Member States shall meet the costs of interpretation and translation resulting from the application of Articles 2 and 3, irrespective of the outcome of the proceedings."⁶²

39. This provision was motivated by the recognition that allowing for any such cost recovery would impact on the suspect's/accused person's decision to exercise their fair trial rights, and therefore would contravene the principle that states are responsible for protecting and upholding such rights.

Pre-transposition questions

Do you consider there to be particular problems relating to the definition of legal aid in your jurisdiction?

⁵⁹ Ibid, para 89.

⁶⁰ [Orlov v. Russia](#), no. 29652/04, 21 June 2011.

⁶¹ Orlov, para 114.

⁶² Article 4 of the Interpretation and Translation Directive.

Are authorities allowed to recover costs of legal aid from the defendant? If so, in what circumstances is this possible? Do authorities take into consideration the personal circumstances or the financial situation of the applicant in order to determine the amount that can be recovered?

Is legislative reform required in your jurisdiction in order to ensure that the Directive is adequately transposed in relation to the definition of legal aid?

Are there any questions relating to the definition of legal aid in connection with the right to access a lawyer and the right to a fair trial which you think could be usefully referred to the CJEU for clarification?

C. Legal aid in criminal proceedings

i. What the Directive says

40. Article 4 sets out an obligation for Member States to provide legal aid to suspects and accused persons who lack sufficient resources to pay for the assistance of a lawyer when required in the interests of justice. For this, authorities may apply a means test, a merits test or both. In this respect, Recital 17 refers to Article 6(3)(c) ECHR, but goes a step further than the jurisprudence of the ECtHR, which requires that legal aid be provided after applying both the means and the merits test (see below).

41. In order to decide whether a suspect or an accused person lacks sufficient resources (**'means test'**) relevant authorities must take into consideration all relevant and objective factors, such as the income, capital and family situation of the person concerned, the cost of a lawyer and the standard of living in the Member State in question. However, the Directive does not specify who bears the burden of proving that the suspect or accused person has insufficient means, nor the evidentiary threshold that must be met in order to obtain legal aid. Recital 18 leaves it up to Member States to lay down the practical arrangements regarding the provision of legal aid.

42. To determine whether legal aid should be granted in the interests of justice (**'merits test'**), authorities must consider the seriousness of the criminal offence, the complexity of the case and the severity of the sanction at stake. Irrespective of whether these factors concur, legal aid must be provided in the interests of justice in the following situations: 1) where a person is brought before a competent court or judge in order to decide on detention at any stage of the proceedings within the scope of the Directive; and 2) during detention.

43. Legal aid must be granted as early in the proceedings as possible and, in any case, before questioning (by police or any other judicial authority) and before the start of the above-mentioned investigative or evidence gathering acts.

ii. International and regional standards

44. The means test and the merits test are internationally accepted as the appropriate criteria to determine whether a suspect or accused person is eligible to receive legal aid. For example, the International Covenant on Civil and Political Rights (**'ICCPR'**) provides that, in criminal proceedings,

legal aid should be provided “where the interests of justice so require” and legal aid should be free of charge if the person “does not have sufficient means to pay for it”.⁶³

Means test

45. Principle 3 of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems goes beyond the standard in ICCPR, Article 14(3)(d), in encouraging States to provide legal aid regardless of the person’s means if the case is particularly urgent or complex or the potential penalty is severe.⁶⁴
46. Under Guideline 1 of the UN Principles and Guidelines, “[w]henever 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; (e) a court may, having regard to the particular circumstances of a person and after considering the reasons for denial of legal aid, direct that that person be provided with legal aid, with or without his or her contribution, when the interests of justice so require; (f) if the means test is calculated on the basis of the household income of a family, but individual family members are in conflict with each other or do not have equal access to the family income, only the income of the person applying for legal aid is used for the purpose of the means test.”⁶⁵
47. Under Article 6(3)(c) of the ECHR, for legal aid to be granted, two conditions must concur cumulatively: first, the persons concerned must lack sufficient means to pay for legal assistance, and second, the interests of justice must require that they be granted such assistance.⁶⁶ According to the jurisprudence of the ECtHR, when applying the means test, the suspect or accused person bears the burden of proving that they have insufficient means.⁶⁷ However, this does not need to be proved beyond all reasonable doubt.⁶⁸ For example, in *Pakelli v Germany* the ECtHR found that although the applicant had not presented clear evidence that he lacked financial resources, there had been a series of indicators that made it highly probable that he was indeed financially incapable of assuming the cost of his legal assistance.⁶⁹ This approach was followed by the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, in her 2013 Report, where she stated that while “the onus is on the accused to show that he or she lacks sufficient means,

⁶³ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, Article 14(3)(d), United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html>.

⁶⁴ UN Principles and Guidelines, Principle 3.

⁶⁵ UN Principles and Guidelines, Guideline 1, para 41.

⁶⁶ *Quaranta v. Switzerland*, 24 May 1991, para 27, Series A no. 205; *Pham Hoang v. France*, 25 September 1992, para 39, Series A no. 243; *Tsonyo Tsonov v. Bulgaria (no. 3)*, no. 21124/04, para 50, 16 October 2012; *Zdravko Stanev v. Bulgaria*, no. 32238/04, para 36, 6 November 2012.

⁶⁷ *Croissant v Germany*, para 37.

⁶⁸ *Pakelli v. Germany*, 25 April 1983, para 34, Series A no. 64

⁶⁹ *Pakelli v Germany*.

he or she need not, however, do so 'beyond all doubt'; it is sufficient that there are 'some indications' that this is so."⁷⁰

Pakelli v. Germany, 25 April 1983, Series A no. 64.⁷¹

The applicant had applied for legal aid in order to be represented in court by a lawyer of his own choosing. The Federal Court refused the request because, under German law, there was no requirement for him either to appear in person or to be represented by a lawyer at that stage of the proceedings. In appealing this decision the applicant's lawyer alleged that he had lacked the means to pay for defence counsel of his own choosing and that given the seriousness of the consequences faced by the defendant in the event of a final conviction, he was entitled to legal aid in the interests of justice. The court refused the applicant's appeal and argued that that there was nothing to substantiate the applicant's assertion that he did not have sufficient means to pay for legal assistance of his own choosing. The ECtHR held that it was difficult to assess whether the applicant lacked sufficient means to pay for his legal assistance at the time when the proceedings took place. However, it found that there had been some indications that this was so in view of the evidence that the applicant's lawyer had attempted to present to demonstrate the lack of financial resources, which included a certificate of indigence and a declaration of income and assets. Although the ECtHR recognised that such evidence might not have been sufficient to prove beyond all doubt that the applicant was indigent at the relevant time, the ECtHR was satisfied that the willingness of the applicant to present the said evidence and the absence of clear indications to the contrary, indicated that the applicant lacked indeed sufficient means. Therefore, the ECtHR found a violation of Article 6 (3)(c).

48. However, neither the ECtHR nor other international courts have provided a definition of the term 'sufficient means'. The ECtHR has held that national courts must consider all the evidence regarding the circumstances and the personal situation of the applicant in order to determine whether a defendant's financial circumstances justify granting legal aid,⁷² but also any evidence contradicting the applicant. In addition, Resolution (78) 8 of the Council of Europe on Legal aid and Advice stated that when deciding whether legal aid should be provided, states must take into account the applicant's financial resources and obligations as well as the anticipated costs of the proceedings. Additionally, the Resolution establishes that "[i]t should be possible for legal aid to be obtained in the course of the proceedings, if there is a change in the financial resources or obligations of the litigant or some other matter arises which requires the granting of legal aid."⁷³

Merits test

49. The ECtHR also provides guidance on when legal aid should be provided in the interests of justice (merits test). National courts should consider the following three factors: 1) the seriousness of the offence and the severity of the potential sentence;⁷⁴ 2) the complexity of the case;⁷⁵ 3) the

⁷⁰ UN Human Rights Council, Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, 15 March 2013, A/HRC/23/43, para 54.

⁷¹ *Pakelli v. Germany*, 25 April 1983, Series A no. 64.

⁷² *Pakelli v Germany*, para 34.

⁷³ Resolution (78) 8 of the Committee of Ministers of the Council of Europe of 2 March 1978 on Legal aid and Advice, available at https://www.euromed-justice.eu/en/system/files/20090128115013_res%2878%298eCoE.pdf.

⁷⁴ *Quaranta v. Switzerland*, 24 May 1991, para 33, Series A no. 205.

⁷⁵ *Quaranta*, para 34.

defendant's social and personal situation.⁷⁶ Although all three factors should be taken into account, it suffices that one of them concurs in a particular case in order to justify the granting of legal aid.

50. With regard to severity of the potential sentence, the ECtHR has held that legal aid may be provided in the interests of justice where deprivation of liberty is at stake, if the defendant cannot pay for it himself.⁷⁷
51. When assessing the complexity of the case, the ECtHR has found that legal aid should be provided in the interests of justice in cases where, although the applicants were educated persons who could understand the proceedings, they lacked the legal training that is essential to enable them to present and develop appropriate arguments to counter complex pleading, that only an experienced counsel could undertake.⁷⁸
52. Furthermore, the ECtHR has found that it is not necessary for the person to prove beyond reasonable doubt that the quality of his/her defence was impaired by the decision to refuse legal aid, but it is sufficient that they are able to provide indicators that the presence of an experienced lawyer would have been necessary.⁷⁹
53. Lastly, when assessing the defendant's social and personal situation, the ECtHR takes into consideration a number of factors, such as the employment situation,⁸⁰ criminal records, nationality, drugs addiction, situation of dependence, etc.⁸¹ The interests of justice test indicates that free legal assistance may be required for persons considered vulnerable, such as children, persons with mental health problems and refugees.

Zdravko Stanev v. Bulgaria, no. 32238/04, 6 November 2012⁸²

The applicant lodged a complaint before the ECtHR claiming that his right to an effective defence had been violated and that he had been denied legal aid. The applicant had been convicted of an offence, fined €250 and ordered to pay €8,000 in damages. He complained that he was unemployed and had no income to be able to afford to appoint a lawyer. He further complained that the interests of justice required that defence counsel be appointed on his behalf because the offence he had been charged with was serious and carried a sentence of up to two years' imprisonment. Finally, he argued that the proceedings were sufficiently complex to require the appointment of counsel by the court. In order to decide whether there had been a violation of Article 6(3)(c), the ECtHR assessed the concurrence of the above-mentioned factors. First, the ECtHR found that given the situation of unemployment of the applicant, it was clear that he lacked sufficient means. Secondly, in order to determine whether legal aid should have been granted in the interests of justice, the ECtHR noted that the applicant had initially been at risk of a prison sentence, which under the ECtHR's case law is serious enough to require the

⁷⁶ *Quaranta*, para 35.

⁷⁷ *Benham v. the United Kingdom*, 10 June 1996, paras 60-61, Reports of Judgments and Decisions 1996-III.

⁷⁸ *Pham Hoang v. France*, para 40.

⁷⁹ *Artico v. Italy*, 13 May 1980, para 35, Series A no. 37.

⁸⁰ *Zdravko Stanev*.

⁸¹ *Quaranta*, para 35.

⁸² *Zdravko Stanev v. Bulgaria*, no. 32238/04, 6 November 2012.

provision of legal aid during the proceedings. Although he was eventually not deprived of liberty, he was sentenced to pay a fine and damages, which together were of a significant amount in view of his precarious financial situation. Thirdly, the ECtHR noted that although the applicant was educated, he lacked the necessary legal training to allow him to defend himself effectively given the complexity of the proceedings, which involved issues regarding rules on admissibility of evidence, rules of procedure and the meaning of intent. The ECtHR held that a qualified lawyer would undoubtedly have been in a position to plead the case with greater clarity and to counter more effectively the arguments raised by the prosecution. Therefore, the ECtHR found that there had been a violation of Article 6(3)(c) ECHR.

54. A number of international instruments recognise that the right to legal aid may continue to apply during the appellate stage of criminal proceedings, in the interests of justice. Article 15 of the ICCPR guarantees the right of convicted persons to have the conviction and sentence reviewed "by a higher tribunal according to law".⁸³ In *Maurice Thomas v. Jamaica*, the Human Rights Committee ('HRC') held that the refusal to grant the defendant legal aid to prepare an appeal of a conviction essentially denied the defendant the opportunity to pursue further legal remedies, in violation of ICCPR Article 14(3)(d).⁸⁴ Equally, the ECtHR established that legal aid should be granted during the appeal proceedings where free legal assistance had been provided up until then and the interests of justice so require, after taking into account the 'seriousness of the matter at stake' and the 'nature of those proceedings.'⁸⁵

iii. Recommendation

55. The Directive goes a step beyond the standard of the ECtHR when determining whether the suspect or accused person is eligible for legal aid. Whilst the ECtHR requires the application of both the means and the merits test, the Directive, in line with the UN Principles and Guidelines requires that competent authorities to grant legal aid after applying either the means or the merits test, or both, depending on the practice of each Member State.

56. However, Recital 18 leaves it up to Member States to lay down the practical arrangements regarding the provision of legal aid. Such arrangements will have an important impact in practice on the ability to exercise effectively the right to legal aid. National authorities should be encouraged to implement a process which is not overly burdensome upon applicants, such that they may be discouraged from applying for legal aid or that those who require it most, such as indigent persons, may not have the ability, in practice, to apply for legal aid.

Pre-transposition questions

Do you consider there to be particular problems relating to the application of the means/merits test in your jurisdiction? What are the key drivers of those problems?

Are there any problems associated with the burden of the proof when deciding on the eligibility criteria?

⁸³ HRC, *Douglas Gentles and Kerr v Jamaica*, Communication No 352/1989, 1990, para 11.2, available at <http://hrlibrary.umn.edu/undocs/html/vws352.htm>.

⁸⁴ HRC, *Damian Thomas v. Jamaica*, Communication No 800/1998, 26 May 1999, para 6.4, available at <http://hrlibrary.umn.edu/undocs/session65/view800.htm>.

⁸⁵ *Maksimenko v. Ukraine*, no. 39488/07, para 24, 20 December 2011.

How are the costs associated with the application for legal aid covered?

Is legislative reform required in your jurisdiction in order to ensure that the Directive is adequately transposed in relation to the means/merits test? Are there any other non-legislative solutions to the problems which you see in practice relating this aspect?

Are there any questions relating to the means/merits test which you think could be usefully referred to the CJEU for clarification?

D. Legal aid in European Arrest Warrant proceedings

1) What the Directive says

57. Article 5 of the Directive addresses the right to legal aid in EAW proceedings. It establishes that requested persons have a right to legal aid upon arrest until they are surrendered, or until the decision not to surrender them becomes final. Equally, legal aid should be made available for requested persons, who in the exercise of their right to dual representation in accordance with the Access to a Lawyer Directive, appoint a lawyer in the issuing state to assist the lawyer in the executing state.⁸⁶

58. Under Article 10(4) and (5) of the Access to a Lawyer Directive, the competent authority of an executing state is required, without undue delay, to inform an individual arrested pursuant to an EAW of their right to appoint a lawyer in both the issuing and executing states. If the requested person chooses to exercise his/her right to legal representation in the issuing state, the competent authority of the executing state has to liaise with its counterparts in the issuing state, which must in turn provide the requested person the necessary information to facilitate their access to a lawyer.

59. Although the Access to a Lawyer Directive does not regulate the right to legal aid for the purposes of ensuring dual representation in EAW proceeding,⁸⁷ Article 5(2) of the Directive establishes unequivocally that requested persons have the right to legal aid in the issuing Member State for the purpose of conducting a criminal prosecution in the executing Member State, in so far as legal aid is necessary to ensure effective access to justice. This would be the case where the lawyer in the executing Member State cannot fulfil his or her tasks as regards the execution of an EAW effectively and efficiently without the assistance of a lawyer in the issuing Member State.⁸⁸ *A sensu contrario*, Article 5 does not entail an obligation for Members States to provide legal aid to the person subjected to an EAW when the requested person is wanted in the executing State only to serve a sentence.

60. The role of the lawyer in the issuing state is “to assist the lawyer in the executing Member State by providing that lawyer with information and advice with a view to the effective exercise of the rights of requested persons” under the EAW Framework Decision.⁸⁹ Fair Trials identified possible ways in which the lawyer in the issuing state could assist the requested person in order to exercise an effective defence in the executing state. The lawyer in the issuing state might be able to provide

⁸⁶ Article 5(2) of the Directive.

⁸⁷ Access to Lawyer Directive, Recital 48.

⁸⁸ Recital 21.

⁸⁹ Council Framework Decision 2002/584/JHA, of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Article 11.

information about the prosecution’s case that is of relevance to the EAW proceedings; to provide information about the criminal justice system and the laws of the issuing state that helps the requested person challenge his/her surrender (i.e. information about prison conditions and/or advice on local legal provisions that affect the requested person’s right to a fair trial under Article 6 ECHR); to advocate for the withdrawal of the EAW and/or by facilitating alternatives to the EAW; and to advise on the likely impact of the requested person’s EAW proceedings on his/her criminal proceedings.⁹⁰

61. Section 3 of Article 5 establishes that Member States may apply the means test in accordance with Article 4(3) (see further above) when deciding whether to grant legal aid in the context of EAW proceedings.⁹¹

Pre-transposition questions

Do you consider there to be particular problems relating to the right to legal aid in EAW proceedings in your jurisdiction? What are the key drivers of those problems?

Is the right to dual representation recognised in your jurisdiction? Are there any mechanism available to ensure legal aid is accessible to the requested person both at the executing and the issuing State?

Is legislative reform required in your jurisdiction in order to ensure that the Directive is adequately transposed in relation to the right to legal aid in EAW proceedings? Are there any other non-legislative solutions to the problems which you see in practice relating this aspect?

Are there any questions relating to the right to legal aid in EAW proceedings in connection with the right to dual representation on which you think the CJEU could usefully be asked to provide clarity?

E. Legal Aid Decision-making

i. What the Directive says

62. Pursuant to Article 6 of the Directive, competent authorities must make decisions on whether to grant legal aid and on the assignment of lawyers without undue delay and in a diligent manner, respecting the rights of the defence. Decisions refusing legal aid in full or in part must be notified in writing to the person who requested it.⁹²

63. The term ‘competent authority’ is described in Recital 24 as ‘an independent authority that is competent to take decisions regarding the granting of legal aid, or a court, including a judge sitting alone.’ Recital 24 recognises that in some urgent situations it might be necessary that the decision be made by the police or the prosecution in order to ensure that legal aid is provided without undue delay.

ii. International and regional standards

⁹⁰ See Fair Trials Online Training on “Cross-border cases and Human Rights”, available at <https://www.fairtrials.org/fair-trials-defenders/legal-training/online-training/cross-border-cases-and-human-rights-course-outline/>.

⁹¹ Article 5(3).

⁹² Article 6 (2).

64. The requirement to notify the decision in writing stems from the jurisprudence of the ECtHR that establishes that the decision on whether or not to grant legal aid must not be arbitrary,⁹³ and should include the reasons for a refusal and be provided within sufficient time so as not to deprive an applicant of the right to access the courts.⁹⁴ The authority responsible for deciding upon the allocation of legal aid must offer “substantial guarantees to protect them from arbitrariness.”⁹⁵ According to the ECtHR, a decision on legal aid may be considered arbitrary when 1) the decisions to refuse legal aid cannot be appealed; 2) or the eligibility criteria for the legal aid is unclear; 3) or the composition of the decision-making authority is likely to be biased.⁹⁶

Tabor v. Poland, no. 12825/02, 27 June 2006

In this case, the ECtHR found a violation of Article 6 when a Regional Court in Poland refused to grant legal assistance to the applicant for the purposes of legal representation in the cassation proceedings without invoking any reasons for it. The ECtHR held that although the Regional Court was not obliged to give any reasons for such a refusal under national law, the absence of written grounds for this decision made it difficult for the ECtHR to understand the reasons for which the Regional Court considered that the grant of legal aid was not justified in the circumstances of the case, which appeared to meet all the eligibility criteria under national law. Furthermore, the ECtHR noted that the decision to refuse legal aid had been issued one month after the expiration of the deadline prescribed for lodging a cassation appeal had expired. As a result, the applicant was left without any realistic opportunity of seeking legal assistance of his choice for the lodging of a cassation appeal, it being recalled that professional legal representation was obligatory. Therefore, the ECtHR concluded that the manner in which the relevant court handled the applicant’s request for legal aid was not compatible with the requirement of due diligence.

65. To ensure the practical and effective enjoyment of the right to legal aid, all suspects and accused persons must be informed of such a right in a manner which they fully understand. The Directive on the Right to Information provides that suspects and accused persons must be notified of ‘any entitlement to free legal advice and the conditions for obtaining such advice’ both orally and in writing.⁹⁷ The UN Principles and Guidelines establish that to prevent arbitrariness, the eligibility criteria for legal aid services, as well as the procedure to gain access to them should be publicly available and easily accessible by all.⁹⁸

66. The Commission’s Recommendation on Legal Aid sets out the obligation to provide information on the right to legal aid as well as the means to access it to suspects or accused persons and requested persons: ‘information on how and where to apply for such aid, transparent criteria on when a person is eligible for legal aid, as well as information on the possibilities to complain in circumstances where access to legal aid is denied or a legal aid lawyer provides insufficient legal assistance.’⁹⁹

⁹³ [Tabor v. Poland](#), no. 12825/02, para 44-46, 27 June 2006; [Wersel v. Poland](#), no. 30358/04, para 52-54, 13 September 2011.

⁹⁴ *Ibid*, para 44-46.

⁹⁵ [Anghel v. Italy](#), no. 5968/09, para 51, 25 June 2013.

⁹⁶ [Santambrogio v. Italy](#), no. 61945/00, paras 54-55, 21 September 2004.

⁹⁷ Directive 2012/13 of the European Parliament and of the Council of 22 May 2012 of 22 May 2012 on the right to information in criminal proceedings, Article 3 (1)(b).

⁹⁸ UN Principles and Guidelines, Guideline 2.

⁹⁹ Commission Recommendation of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings, Section 2 (5).

67. With regards to the right to be notified of the decision to refuse legal aid, the Commission's Recommendation states that notification should be made promptly within a time frame that allows suspects or accused persons and requested persons to effectively and concretely prepare their defence.¹⁰⁰ 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. This provision is in line with the case-law of the ECtHR, which has found violations of Article 6(3)(c).

iii. Recommendation

68. National authorities must take into consideration their obligations under the Right to Information Directive 2012/13/EU and the Commission's Recommendation on the right to legal aid,¹⁰¹ and ensure that the obligation to inform persons about the right to legal aid meets the standards set forth in those instruments.

Pre-transposition questions

Do you consider there to be particular problems relating to how decisions on legal aid are made in your jurisdiction? What are the key drivers of those problems?

Does the law in your jurisdiction establish requirements on how decisions on legal aid must be notified to the applicant?

Are there any questions relating to the legal aid decision making on which you think the CJEU could usefully be asked to provide clarity?

F. Quality of legal aid services and training

1) What the Directive says

69. Article 7 addresses the issue of quality-control mechanisms for legal aid. It establishes the obligation for Member States to take necessary steps, including with regard to funding, to ensure that the legal aid system and the associated services provided thereafter are effective and of an adequate quality to safeguard the fairness of the proceedings, with due respect to the independence of the legal profession.

70. Article 7 (2) also provides that adequate training should be provided to staff involved in legal aid decision-making. Recital 26 establishes that 'Member States should request that those responsible for the training of judges provide such training to courts and judges that take decisions regarding the granting of legal aid.' Additionally, training should be provided to lawyers providing legal aid services, and those benefiting from legal aid should be able to replace the legal aid lawyer assigned to them where justified under the specific circumstances.

ii. International and regional standards

¹⁰⁰ Commission Recommendation of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings, Section 2 (14).

¹⁰¹ EU Commission Recommendation 2013/C378/03 of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings.

71. The Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, stated in her report of 2013 that for legal aid to be considered effective, it should include, but is not limited to, 'unhindered access to legal aid providers, confidentiality of communications, access to information and to case files, and adequate time and facilities to prepare legal cases, as well as the provision of legal advice and education, and mechanisms for alternative dispute resolution.'¹⁰²
72. The effectiveness of legal aid should be further ensured through the 'institutionalization of services so that their provision may be evaluated, organized and monitored. The providers of legal aid should, moreover, be held accountable for the services they offer as a means to ensure the quality of legal advice, counsel and representation, and proper and adequate access to the court system.'¹⁰³ In this respect, the Commission's Recommendation on Legal Aid of 2013 establishes that Member States should put in place systems or quality-control mechanisms to ensure the quality of legal aid lawyers and to 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.¹⁰⁴
73. Member States are encouraged, under the 2013 Recommendation, to ensure that staff involved in the decision-making on legal aid and lawyers who provide legal aid services in criminal proceedings receive appropriate training in order to ensure high quality legal advice and assistance. Specifically, whilst the Recommendation encourages that 'the accreditation of legal aid lawyers should as far as possible be linked with an obligation to undergo continuous professional training', the Special Rapporteur recommends that States require the completion of minimum qualifications and training for professionals and paralegals working for the legal aid system.¹⁰⁵
74. The Special Rapporteur highlighted in her report that for legal aid to be effective, states might have to be required to make appropriate budget provisions for legal aid services in order to ensure quality standards are met.¹⁰⁶ Specifically, Guideline 12 of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems recommends that States take all appropriate measures to establish a legal aid fund to finance legal aid schemes [...] to support legal aid provision by legal or bar associations, support university clinics, and sponsor non-governmental and other organizations, including paralegal organizations, in providing legal aid services throughout the country.' Equally, the funding allocated for suspects or accused persons should cover all the expenses that are relevant to an effective defence, 'such as copying relevant files and documents, collection of evidence, expenses related to expert witnesses, forensic experts and social workers, and travel expenses. Payments should be timely.'¹⁰⁷

¹⁰² Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, Report of 2013 on legal aid, 23rd session of the HRC, A/HRC/23/43, para 41, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/119/35/PDF/G1311935.pdf?OpenElement>.

¹⁰³ Ibid, paragraph 42.

¹⁰⁴ EU Commission Recommendation 2013/C378/03 of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings, Section 3.

¹⁰⁵ Ibid.

¹⁰⁶ Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, Report of 2013 on legal aid, 23rd session of the HRC, A/HRC/23/43, para 73, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/119/35/PDF/G1311935.pdf?OpenElement>.

¹⁰⁷ UN Principles and Guidelines, Guideline 12.

75. The low remuneration of legal aid lawyers across all Member States has been identified by LEAP members as one of the main reasons for the overall unsatisfactory quality of legal aid services across the EU. As expressed in Fair Trials' position paper, the remuneration provided to legal aid lawyers must be sufficient to ensure that the rights of the suspect or accused person are not compromised simply by virtue of not being able to afford private legal representation, and the EU should legislate accordingly.¹⁰⁸

LEAP members have reported that in many EU countries, remuneration for legal aid lawyers is very low (50 % or less of what a privately instructed lawyer would earn per hour) or awarded as a flat rate without consideration of the complexity of the case and the full range of costs (eg. including travel costs and fees for waiting time at court and in police station). LEAP members report that the fixed rate for some cases is so low that legal aid lawyers make a net loss overall. In addition, remuneration levels for legal aid work generally fail to take into account the importance of continual professional development which often requires participation in costly training programmes. For example:

- ➔ In Lithuania, in 2014 legal aid lawyers earn 11.58 euros per hour before tax, and there was a limit on how many hours can be billed at certain stages of the criminal proceedings. Although salaries have increased slightly since, the rates continue to be unsatisfactorily low.
- ➔ In the Netherlands, the average fee is of approximately 100 euros/hour when visiting a client in the police station. The average rate for non-legal aid lawyers is between 250 and 300 euros/hour. This scheme has two shifts per day (from 7am to 1.30 pm and from 1.30pm till 8pm). A duty lawyer has one shift every two months.
- ➔ In Cyprus, lawyers are paid the very minimum and there are often major delays in payments. Also, the lawyer often does not receive payment for services offered before the beginning of trial because the Registrar calculates expenses from when the procedure came before the Court.

76. The HRC recommended that "legal aid should enable counsel to prepare his client's defence in circumstances that can ensure justice", which include "provision for adequate remuneration for legal aid."¹⁰⁹ Both the UN Subcommittee on Prevention of Torture and the CPT have highlighted numerous concerns about national legal aid bodies that are understaffed and under-resourced. They have both highlighted that low fees for services have a discouraging effect on legal aid lawyers, as they generate an excessive workload that is not compatible with the effective defence of the interests of persons deprived of their liberty.¹¹⁰

¹⁰⁸ Position paper, 13.

¹⁰⁹ HRC, Communication No 250/1987, *Carlton Reid v Jamaica*, para 13 .

¹¹⁰ Fifth Annual Report on the SPT covering the period January-December 2011, 19 March 2012, UN Doc CAT/C/48.3, para 79, available at http://www2.ohchr.org/english/bodies/cat/opcat/docs/CAT-C-48-3_en.pdf; See also Report on the visit to Croatia carried out by the CPT from 1 to 9 December 2003, CPT/Inf (2007), para 24, available at <http://www.cpt.coe.int/documents/hrv/2007-15-inf-eng.pdf> ; Report on the visit to Croatia carried out by CPT from 4 to 14 May 2007, CPT/Inf (2008), para 19, available at <http://www.cpt.coe.int/documents/hrv/2008-29-inf-en.pdf> ; Report on the visit to Hungary carried out by the CPT from 5 to 16 December 1999, CPT/Inf (2001), para 32, available at <http://www.cpt.coe.int/documents/hun/2001-02-inf-eng.pdf> ; Report on the visit to Hungary carried out by the CPT from 30 March to 8 April 2005, CPT/Inf (2006), para 23, available at <http://www.cpt.coe.int/documents/hun/2006-20-inf-eng.pdf> ; Report on the visit to Poland carried out by the CPT from 4 to 15 October 2004, CPT/Inf (2006) para 21, available at <http://www.cpt.coe.int/documents/hun/2006-20-inf-eng.pdf>.

iv. Recommendations

77. We maintain our recommendation made in respect of the draft Directive that national authorities, when transposing and implementing the Directive, should give due consideration to the costs incurred by legal aid lawyers over and above the fees for the specific hours when they are meeting with or representing the suspect or accused person, including fees for waiting times, travel costs and training fees.

78. Moreover, we recommend that any fixed fee regime for legal aid representation includes sufficient flexibility to allow for an increase in the fee where necessary to reflect the complexity and/or length of a particular case.¹¹¹

Pre-transposition questions

Do you consider there to be particular problems relating to the quality of legal aid in your jurisdiction? What are the key drivers of those problems?

Is legislative reform required in your jurisdiction in order to ensure that the Directive is adequately transposed in relation to the quality of legal aid system and legal aid services? Are there any other non-legislative solutions to the problems which you see in practice relating this aspect?

Are there any questions relating to the quality of legal aid on which you think the CJEU could usefully be asked to provide clarity?

G. Remedies for breaches of the right to legal aid

i. What the Directive says

79. Article 8 requires Member States to ensure that remedies are available under national law when the right to legal aid under the Directive has been violated¹¹². Recital 27 adds that an “effective remedy should be available where the right to legal aid is undermined or the provision of legal aid is delayed or refused in full or in part.”¹¹³

80. Similarly to each of the previous Roadmap Directives, the Directive fails to explain how Member States should ensure that the rights of the defence and fairness of the proceedings are to be protected via an adequate remedy, leaving it to the discretion of the Member States to decide what the appropriate remedy should be.

ii. International and regional standards

81. As stated in Fair Trials position paper, there should be minimum standards regarding remedies where provision of legal aid is “undermined, delayed or denied or if persons have not been adequately informed of their right to legal aid” as set out in Principle 9 of the UN Principles and Guidelines. This should also include remedies for situations in which explanations about eligibility

¹¹¹ Fair Trials Position paper, 14.

¹¹² Article 8.

¹¹³ Recital 27.

or cost recovery provisions are unclear or portrayed in ways that tend to induce waivers of the right to access a lawyer.¹¹⁴

82. Under the UN Principles and Guidelines, such remedies may include a prohibition on conducting procedural actions, release from detention, exclusion of evidence, judicial review and compensation.¹¹⁵ In this regard, the ECtHR has consistently held that the most appropriate form of redress for a violation of the right to a fair trial is to ensure that suspects or accused persons, as far as possible, are put in the position in which they would have been had their rights not been disregarded.¹¹⁶ However, this remedial approach is bound to vary depending on the nature of the violation in question, the stage of the proceedings in which the violation is identified and the outcome of the proceedings.
83. Regarding the nature of the breach, a failure or delay in providing legal aid before or during the police interrogation which leads the suspect or accused to make incriminating statements might require a completely different remedy to that required for a failure to provide legal aid during the accused's trial.
84. With regard to violations of the right to legal aid during the investigative pre-trial phase, given that the right to legal aid under the Directive was recognised to ensure the effectiveness of the right to access to a lawyer as provided under the Access to a Lawyer Directive, such breach would require the exclusion of any evidence given in absence of a lawyer under the *Salduz* doctrine.¹¹⁷
85. With regard to violations of a right to legal aid during the trial proceedings, the failure to provide legal aid during trial might lead the accused to decide to represent himself, which could subsequently result in a conviction. An appropriate remedy in this instance might be ordering a retrial. Furthermore, failure to provide legal aid in preparation for a detention hearing, might lead to suspect or accused be ordered to remain in detention for prolonged periods of time. An appropriate remedy in this situation could be the release of the suspect or accused person from detention.
86. The stage at which the violation is occurs should also inform the type of remedy that is appropriate for violations of the right to legal aid. For example, a violation of the right to legal aid at the pre-trial stages might have different consequences than during trial or appeal proceedings. The earlier that a violation of Article 6(3)(c) ECHR is discovered, the more likely it is that it may be possible to provide an effective remedy within the course of the investigation and trial.
87. In this respect, it is helpful to note that the Court of Justice of the EU ('**CJEU**') clearly established the EU law principle of "effective judicial protection of individual rights under EU law" which requires that not only the CJEU but also national courts together ensure an effective remedy and a fair trial when rights are violated, in direct reference to Article 47 of the EU Charter of

¹¹⁴ Fair Trials & LEAP, Initial Observations on the European Parliament's Draft Report on the Proposed Directive on Legal Aid, December 2014.

¹¹⁵ UN Principles and Guidelines.

¹¹⁶ *Salduz v Turkey* [GC], no. 36391/02, ECHR 2008.

¹¹⁷ See Access to Lawyer Directive, Practitioners Toolkit, available at <https://www.fairtrials.org/wp-content/uploads/A2L-Toolkit-FINAL.pdf>.

Fundamental Rights ('CFR') on the right to an effective remedy and to a fair trial.¹¹⁸ In the Case C-64/16 of *Associação Sindical dos Juizes Portugueses*¹¹⁹, the principle of effective judicial protection of individuals' rights under EU law enshrined in Article 19 Treaty on the European Union ('TEU') gives concrete expression to the value of the rule of law stated in Article 2 TEU, by entrusting the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals. In that regard, Member States are required to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law (including therefore in criminal justice): "the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law [...]".¹²⁰

88. In order to decide what is an appropriate remedy for different breached of the right to legal aid, we refer the reader to our previous practitioner's toolkits on "Using EU Law in Criminal Practice"¹²¹ and on the "Access to a Lawyer Directive".¹²² Fair Trials relies on the following assumptions in these Toolkits, which are also relevant in the context of the Directive analysed in the present toolkit:

- Whilst the provisions in the specific Directives differ in the extent of approximation they bring about, all reflect the general assumption that EU law rights must be effectively protected through judicial remedies.
- In order to be legally effective, a judicial remedy offered in respect of a violation of one of the Directives needs to be such as to achieve the purpose pursued, which with all the Directives is to ensure the fairness of the proceedings.
- Accordingly, the remedy which you should be seeking is one within the context of the criminal proceedings, which has the ability to recognise a given act (e.g. a police questioning conducted in violation of obligations in the Directives) as inconsistent with a right under the Directives and take action to redress any prejudice this has caused to the fairness of the proceedings.

Pre-transposition questions

What remedies, if any, exist in law for violations of the right to legal aid in your jurisdiction?

Do those remedies have the effect of putting the suspect or accused person in the position in which they would have been had their rights not been disregarded?

Do you consider there to be particular problems relating to the remedies for violations of the right to legal aid in your jurisdiction? What are the key drivers of those problems?

Is legislative reform required in your jurisdiction to ensure that the Directive is adequately transposed in relation to the rights to remedy? Are there any other non-legislative solutions to the problems which you see in practice?

¹¹⁸ Charter of Fundamental Rights of the European Union, C 326/39, 26 October 2012, Article 47, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012P/TXT&from=EN>.

¹¹⁹ Case C-64/16, *Associação Sindical dos Juizes Portugueses*, 27 February 2018, [EU:C:2018:117](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62016J0064&from=EN).

¹²⁰ *Ibid*, para 36.

¹²¹ Fair Trials, 'Using EU Law in Criminal Practice' Toolkit, 2015, p. 8-9, available <https://www.fairtrials.org/wp-content/uploads/Using-EU-law-A2L-FINAL1.pdf>.

¹²² Fair Trials, 'Roadmap Practitioners Tool; Access to a Lawyer Directive', 2016, available at <https://www.fairtrials.org/wp-content/uploads/A2L-Toolkit-FINAL.pdf>.

Are there any questions relating to the right to a remedy for breaches of the right to legal aid on which you think the CJEU could usefully be asked to provide clarity?

H. Legal aid of vulnerable suspect

i. What the Directive says

89. Article 9 of the Directive requires Member States to take into account the particular needs of vulnerable suspects, accused persons and requested persons in the implementation of the Directive.

90. Moreover, the Directive is stated to apply to suspects, accused persons and requested persons regardless of their legal status, citizenship or nationality. Member States are therefore required to respect and guarantee the rights set out in the Directive without any discrimination based on any ground such as race, colour, sex, sexual orientation, language, religion, political or other opinion, nationality, ethnic or social origin, property, disability or birth.¹²³

ii. International and regional standards

91. When transposing the Directive, Member States must have due regard for the special needs of vulnerable suspects under EU law, the ECHR and other relevant international standards, including the UN Principles and Guidelines, which provide specific provisions for women, children and groups with special needs.

92. Under the EU Commission's Recommendation of 2013 on the procedural safeguards of vulnerable suspects (the '**Vulnerable Suspects Recommendation**'), Member States are encouraged to strengthen the procedural rights of all suspects or accused persons who are not able to understand and to effectively participate in criminal proceedings due to age, their mental or physical condition or disabilities. This has particular relevance with regard to the right to information and the right to information on legal aid, and the right to access a lawyer.

93. Under the Access to a Lawyer Directive, suspects or accused persons can waive their right to a lawyer, in which case, as discussed above, they have no right to benefit from the right to legal aid under this Directive. However, under the Vulnerable Suspects Recommendation, Member States must not allow vulnerable persons to waive their right to a lawyer. Therefore, once vulnerability has been identified, legal aid should be granted automatically in the interests of justice. This is in line with the case-law of the ECtHR, which in *Biba v. Greece*, found that the complexity of the proceedings, coupled with the fact that the applicant was a foreign national who did not speak Greek or know the Greek judicial system, meant that the "interests of justice" required granting him legal assistance.¹²⁴ At the very least, in order to assess the validity of the waivers of the right to a lawyer made by a vulnerable suspect, the same level of scrutiny should be applied than when it concerns children.

¹²³ Recital 29.

¹²⁴ [Biba v. Greece](#), no. 33170/96, 26 September 2000, paragraph 29.

94. When giving information about legal aid to a vulnerable person or when notifying them about a decision on legal aid, regard must be given to the Vulnerable Suspects Recommendation which requires that the said information be given also to an ‘appropriate adult’ and/or ‘legal representative’ nominated by the vulnerable person or by the competent authorities to assist that person, who must also be present in the police station and during court hearings.¹²⁵

Pre-transposition questions

To what extent is the Vulnerable Suspects Recommendation implemented in your jurisdiction?

Is legislative reform required in your jurisdiction to ensure that the Directive is adequately transposed in relation to vulnerable suspects? Are there any other non-legislative solutions to the problems which you see in practice?

How is vulnerability identified in practice, and by whom?

Are there any questions relating to the right to a remedy for breaches of the right to legal aid on which you think the CJEU could usefully be asked to provide clarity?

VI. USING A DIRECTIVE BEFORE ITS TRANSPOSITION DEADLINE

95. The Directive entered into force on 14 November 2016 (twenty days after the date of its publication in the Official Journal of the EU). However, at the time of publication of this Toolkit, the deadline for transposition into national law (25 May 2019) is still distant. As such, the Directive is not yet binding on Member States and enforceable through the EU law principle of direct effect in national courts.
96. However, in this section we explain how the Directive may still have legal effect in the national context during the pre-transposition period. We review below some relevant case-law before setting out examples from three Member States in which the Roadmap Directives have been used in litigation, as you may wish to do with the Directive.

A. CJEU jurisprudence

97. The CJEU has confirmed that, while Directives do not have direct effect prior to the transposition deadline, they are not completely without effect before that time. In *Kolpinguis*,¹²⁶ the CJEU confirmed that the duty of conforming interpretation could commence following the adoption of a directive and was not necessarily contingent upon the transposition deadline having been reached. In *Wallonie*,¹²⁷ the CJEU was asked whether Member States were precluded from

¹²⁵ Recommendation on Vulnerable Suspects, paragraphs 8 -10.

¹²⁶ Case 80/86 *Kolpinguis Nijmegen*, [ECLI:EU:C:1987:431](#).

¹²⁷ Case C-129/96 *Inter-Environnement Wallonie ASBL v Région wallonne* ([ECLI:EU:C:1997:216](#)).

adopting measures contrary to a directive during the period prescribed for its transposition. The CJEU said:

- It is during the transposition period that the Member States must take the measures necessary to ensure that the result prescribed by the directive is achieved at the end of that period.
- During that period they must refrain from taking any measures liable seriously to compromise the result prescribed.

98. These same foundations were then applied in subsequent cases developing the *Wallonie* principle, including the case of *Adelener*,¹²⁸ which raised the question of the role of courts in interpreting legislation prior to the implementation deadline. The CJEU said:

- Given that all the authorities of the Member States are subject to the obligation to ensure that provisions of Community law take full effect, the obligation to refrain from taking measures that could potentially compromise the objective of a directive applies also to national courts.
- From the date upon which a directive has entered into force, the courts of the Member States must refrain as far as possible from interpreting domestic law in a manner which might seriously compromise, after the period for transposition has expired, attainment of the objective pursued by that directive.

99. In *Mangold*,¹²⁹ the CJEU gave a ruling which is considered controversial. The CJEU found that where a directive provides a more detailed articulation of a principle which is already established in EU law (in the case of *Mangold*, this was the principle of non-discrimination on the ground of age), then that EU law principle must be upheld irrespective of whether the transposition deadline of the directive in question has passed. Given that the Directive provides detailed guidance for Member States on the implementation of a fundamental right already protected in Article 48 of the EU Charter of Fundamental Freedoms, then a similar approach might apply.

B. Some pre-deadline ideas

100. We think it will, realistically, be challenging to obtain positive results on the basis of the Directive prior to its transposition deadline (the same goes for other directives which may in due course be adopted further to the Roadmap). We propose some arguments below, though we would say clearly that some of these are very far-reaching.

Arguments based on the Wallonie doctrine

→ The national authorities, both the investigative ones and the courts, are bound by the obligation now articulated in Article 4(3) TEU to ‘take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties’, which includes the Directive. The obligations under Article 288 to achieve the objectives of that directive have already come into being by virtue of that measure entering into force.

¹²⁸ Case C-212/04 *Adeneler* [ECLI:EU:C:2006:443](#).

¹²⁹ Case C-144/04 *Werner Mangold v Rüdiger Helm* [ECLI:EU:C:2005:709](#).

- Arguably, relying on *Kolpinguis*, the duty of national courts to interpret national legislation in conformity with a directive arises prior to a directive's transposition deadline, so if the national law can be interpreted and applied in line with the Directive, it should be.
- More clearly established is the obligation of the Member State to refrain from taking, prior to the transposition deadline of a directive, measures liable seriously to compromise the achievement of the latter's objectives after that deadline (*Wallonie*). This includes the courts, which are bound to refrain from adopting interpretations of national law in this period which would mean the results would not be achieved following the transposition deadline.
- Whilst the *Wallonie* case-law plainly refers to legislative measures, arguably, measures of a more particular nature (such as investigative actions) should also be avoided in the period prior to the transposition deadline of the Directive if they are liable seriously to compromise the objectives of the latter. So, in particular, if a person is to be questioned, doing so in a manner contrary to the Directive (e.g. by using unlawful powers of compulsion to elicit confessions against the right to not to incriminate oneself) would be to take a positive action such as to compromise the fairness of the proceedings, contrary to the objective of the Legal Aid Directive.

Arguments based on the Mangold doctrine

- The right to be presumed innocent until proven guilty is an aspect of the right to a fair trial commonly recognised by all the constitutions of the Member State, and may be considered a general principle of EU law. This is confirmed by the Charter, of which Articles 47 and 48 protect the right to a fair trial and defence rights. The fact that the Directive confers a specific set of rights for enforcing the latter does not detract from the existence of the norm of primary law itself.
- The Charter right/general principle are already within the scope of EU law by virtue of the Directive, and although specific measures have not been taken yet to implement the latter, the Charter / general principle can nevertheless be relied upon by the individual, and conflicting national legislation set aside (indeed, if it conflicts it will have to be changed in the implementation process anyway).

CJEU reference?

- Seek a reference to the CJEU asking about the effects of the *Wallonie* and *Mangold* case-law in the context of criminal cases, in particular as to the extent to which a 'result' contrary to the Directive should be understood as including a conviction and application of penalties based on actions incompatible with the Directive, even though these are taken on the basis of measures applicable prior to the adoption of legislation implementing the latter.

Arguments based on ECHR effects

- Depending on the status of the ECHR in your jurisdiction, you may wish to argue that national laws are inconsistent with the ECHR. The Directive simply clarifies, codifies, and makes subject to EU law enforcement mechanisms obligations which exist anyway in the ECHR, and those obligations can therefore be invoked as ECHR norms in the manner foreseen by the national constitutional arrangements. For instance, if the national law generally permits the application of irrebuttable presumptions of facts or law with regards to certain criminal offences, you can say that – as clarified by the Directive – the ECHR standards clearly establish that these presumptions must be rebuttable; they should be applied on a case-by-case basis; and authorities should always strike a

balance between the importance of what is at stake and the rights of the defence, so the courts should attach consequences to the inconsistency with the ECHR in accordance with the applicable constitutional arrangements.

VII. CONCLUSION

101. This Toolkit is intended to serve as a guide for practitioners, civil society organisations and any other actors as they get involved and participate in the process of transposing the Directive via legislative reform and domestic litigation. It provides an overview of the relevant provisions of the Directive and an examination of the relevant international standards and the case-law of the ECtHR that should be used to interpret the Directive during the pre-transposition phase. The purpose is to provide guidance on how the Directive can be used during the pre-transposition period. It encourages LEAP members and their networks to identify problems with national law and practice which the Directive can address, with a view to provide a framework for developing strategies to inform reform in law and practice in order to transpose and effectively implement the Directive.
102. This Toolkit will be circulated to thousands of lawyers across Europe, all of whom are invited to:
- Contact us, let us know how you are getting on with the transposition of the Directive in their respective jurisdictions.
 - Let us know if courts issue positive decisions in light of the Directive. These can be of use to people in other countries.
 - If questions of interpretation arise, consider the CJEU route: see the Using EU law toolkit, our 2014 paper on strategic approaches to the CJEU¹³⁰ and our online training video on the preliminary ruling procedure in criminal practice.¹³¹
 - Visit our website www.fairtrials.org regularly for updates on key developments relating to the Directives, and news about in-person trainings.
 - Come to us if you don't get anywhere with the courts, because we can explore other options like taking complaints to the European Commission.
 - Get involved with pushing the issues in the domestic context: see our paper Towards an EU Defence Rights Movement¹³² for concrete ideas on articles, litigation, conferences etc.

¹³⁰ Fair Trials, Strategic approaches to litigation before the CJEU on the Roadmap Directives and EAW, 2014, available at <http://www.fairtrials.org/wp-content/uploads/140818-CJEU-meeting-report.pdf>.

¹³¹ Available at <http://www.fairtrials.org/fair-trials-defenders/legal-training/online-training/>.

¹³² LEAP, Strategies for Effective Implementation Of the Roadmap Directives: Towards an EU Defence Rights Movement, 2015, available at <https://www.fairtrials.org/wp-content/uploads/5A-IMPLEMENTATION-MOVEMENT-PAPER.pdf>.