



April 13 2015

Joint civil society letter on legal aid

Dear members of the LIBE Committee,

In light of the minimal approach taken by the Council in its General Approach agreed at the end of March on the proposed directive on legal aid (the 'proposed directive'), we encourage the LIBE Committee to ensure the protection of fundamental rights by adopting a strong position on this measure. It is worthy of note that there was not full agreement in Council on its approach: seven Member States, representing almost half the EU population, expressed their 'regret' at the position taken. We are particularly concerned that, despite Council being divided, amendments proposed by some members of the LIBE committee would concede crucial areas of disagreement to the Council majority before trilogues have begun. We therefore encourage the LIBE Committee to resist these amendments, which we believe would unduly weaken the protection of the proposed directive, in line with the recommendations below.

CRIMINAL PROCEEDINGS

A. Scope: the measure should ensure the full effectiveness of the Access to a Lawyer Directive

1. All persons, not just those deprived of liberty, should benefit from provisional legal aid

The LIBE Committee Rapporteur was right to aim for an extension of the measure to cover all suspects irrespective of whether they are deprived of liberty. All suspects enjoy the right to a fair trial, as was recognised in Directive 2013/48/EU (the 'Access to a Lawyer Directive'), which explicitly covers all suspects and accused persons 'irrespective of whether they are deprived of liberty'. The proposed directive should fully mirror this. Legal advice and representation is rendered meaningless unless the accused person has the means to privately engage a lawyer or, where they do not, is supported through legal aid.

The suspect or accused person may be at liberty in the early stages of proceedings, either because they are called to appear before a police or judicial authority but are not detained, or because they

have been initially arrested but not further detained. Investigative acts may be conducted without formally depriving a person of liberty, such as interrogation, identification parades and reconstructions. The suspect is vulnerable to pressure to incriminate themselves during these investigative acts and would benefit from the assistance of a lawyer as much as a person who is detained. The deprivation of liberty criterion also lends itself to circumvention: suspects initially at liberty may find themselves arrested or detained on the basis of incriminatory statements made during questioning, and any protection offered by the proposed directive would be devoid of use as the person would already have suffered irreversible prejudice to their right to a fair trial.

In addition to the circumstances highlighted above, suspects who are released on bail should still be eligible for legal aid. Restricting access limits the right to a fair trial.

It is not sufficient to rely upon Member States' general EU law obligations to ensure the effectiveness of the Access to a Lawyer Directive in the case of persons not deprived of liberty. The Roadmap was specifically adopted in recognition of the fact that Member States' general obligations were insufficient. EU-level action is clearly needed on legal aid to ensure mutual trust, and a limited directive will not achieve this important aim. The proposed directive on legal aid must be seen as inter-connected and aligned with the Access to a Lawyer Directive.

2. Minor offences / proceedings dealt with by authorities other than a court should only be excluded in accordance with the Access to a Lawyer Directive

We oppose those amendments which would limit the application of the proposed directive outright in relation to minor offences in which a sanction is handed out by an authority other than a court. This goes beyond Article 2(4) of the Access to a Lawyer Directive, which provides that in such cases the right of access to a lawyer applies where an appeal is brought before a court. The minor offence exception in the proposed directive should only apply in accordance with the exceptions provided by the Access to a Lawyer Directive. We encourage the LIBE Committee to take a strong position on this, and thereby lend support to the group of Member States which oppose the change to Article 2 in the Council's General Approach. Given the divisions in Council, this is an issue which the Parliament can seek to resolve favourably in trilogues.

3. There should be no restriction for 'short term deprivations of liberty'

As the proposed directive should apply to all persons, irrespective of deprivation of liberty, there is no need to differentiate between different kinds of deprivations of liberty. All suspects and accused persons should be covered. The LIBE Committee should resist amendments purporting to exclude from the scope of the proposed directive situations in which a person's liberty is briefly curtailed. If these situations involve persons not suspected or accused of crimes (e.g. indiscriminate weapons checks, road-side alcohol tests) they do not fall within the ambit of criminal proceedings. Once the person becomes a suspect or accused person, they become 'charged' within the meaning of Article 6 ECHR, should be notified of the suspicion against them and of their procedural rights in accordance with Directive 2012/13/EU (the 'Right to Information Directive'), and have the benefit of the rights under the Access to a Lawyer Directive. As a consequence, the proposed directive should apply in the same way. To the extent that the amendments seek to carve out specific parts of criminal proceedings, such as investigative acts, on the basis that they are not explicitly mentioned in Article 3(3)(c) of the Access to a Lawyer Directive, and exclude them from legal aid protection, this is

inconsistent with the fact that the list in that provision is *not exhaustive* ('as a minimum'): other investigative actions may equally impact upon the person's right to a fair trial, requiring legal assistance, which suspects must be able to obtain. The LIBE Committee should not excuse the Council from the obligation to justify this apparent misreading of the Access to a Lawyer Directive by conceding the point before trilogues have begun. In our view, the activities where access to a lawyer is provided by that Directive should equally define the scope of this proposed directive.

B. No 'interests of justice' test should apply to provisional legal aid

We strongly oppose amendments 59, 60 and 117-119, which replicate the position taken by the Council majority in Article 4(2a) of the General Approach and make *provisional* legal aid, even in cases in which the person is deprived of liberty, subject to a proportionality criterion. This weakens the very core of the Commission's proposal, which was to ensure that, during the protracted assessment of eligibility for legal aid, suspected or accused person would nevertheless receive emergency legal assistance. The amendment would create a broad exception to the exercise of the right of access to a lawyer, negating the concept of provisional legal aid. The Access to a Lawyer Directive (recital 24) envisages the use of telephone legal assistance in less serious cases, recognising that access to a lawyer should always be provided. It is therefore not acceptable to limit the right to access a lawyer by limiting the right to legal aid.

C. No costs recovery for provisional legal aid

The potential risk of being required to repay the cost of legal assistance may deter the suspect from exercising their right to a lawyer at the crucial initial stages of proceedings. The cost of provisional legal aid should therefore not be recoverable and this provision should be deleted. Whilst some LIBE Committee amendments seek to minimise cost recovery to cases where deception has been used by the suspect or accused person, we consider that recovery should be avoided entirely in order to prevent any confusion.

The European Court of Human Rights (ECtHR) has recognised that recovery of legal aid costs upon conviction of the person may, in certain strictly limited situations,¹ not infringe the Convention. However, the ECtHR has also underlined the 'importance of the investigation stage ... as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial ... at the same time, an accused often finds himself in a particularly vulnerable position at that stage of the proceeding' (*Salduz v. Turkey*, paragraph 54). This vulnerability would be compounded by additional uncertainty around looming financial liability. The inclusion of a provision in the proposed directive for recovery of the costs of provisional legal aid would risk irretrievably prejudicing the fairness of proceedings and violating the Convention by inhibiting people from requesting access to a lawyer when it is most needed. The proposed directive should establish a clear right to legal aid which will be easily understood and easily enforced.

¹ These are: (1) There has been an assessment of the person's economic situation and they are able to meet the costs; (2) The amount claimed from the applicant cannot be excessive; (3) The terms of reimbursement cannot be arbitrary or unreasonable; and (4) The terms of the reimbursement must not, on all of the facts, adversely affect the fairness of the proceedings. This includes whether the possibility of reimbursement would make the applicant feel inhibited from asking for legal aid in the first place. See [Croissant v. Germany](#) App. no 13611/88 (25 September 1992) and related case-law.

D. Remedies

Without effective remedies, the rights guaranteed by the Roadmap directives risk being ineffective in practice. The proposal on the Presumption of Innocence and the LIBE Committee's report on the proposal for Safeguards for Children both envisage provisions on remedies. The LIBE Committee should likewise include a provision on remedies in this measure. We believe that infringements of the right to legal aid should, logically, be addressed by remedies at least consistent with those provided for in Article 12 of the Access to a Lawyer Directive, to avoid prejudice to the fairness of the proceedings. It is important that members of the LIBE Committee support those amendments (AMs 75, 145 and 147) providing that if legal aid has been undermined, delayed or denied, or where suspected or accused persons have not been adequately informed of their right to legal aid, a remedy should be available in accordance with general principles of EU law which Member States are bound to observe. The LIBE Committee should then aim for the strongest possible remedies provision in trilogues.

E. A clear message to Council: provisional *and ordinary* legal aid should be guaranteed

We are pleased to see that there is broad support for the Rapporteur's approach aiming for a measure of full scope, including ordinary legal aid. This is essential if the proposed directive is to enable the realisation of the rights conferred by the Access to a Lawyer Directive and other Roadmap Directives. With Council agreed on the narrower approach, it is important that the LIBE Committee take a clear position prior to trilogues. The division between 'provisional' and 'ordinary' legal aid is a useful distinction that builds on the initial Commission proposal whilst ensuring the proposed directive's scope would match that of the Access to a Lawyer Directive. We hope that agreement on a broad provision on ordinary legal aid could be reached, including by moving the merits and means test principles from the Commission's recommendation on legal aid into the proposed directive. This should be acceptable to Member States whilst giving individuals an enforceable EU law right matching their right of access to a lawyer throughout the proceedings. This said, means and merits tests are acceptable only in relation to ordinary legal aid not provisional legal aid. The addition of articles covering eligibility for legal aid, independence, and quality of legal assistance are all critical elements of the right to legal aid and build on standards set out by the ECtHR and relevant international instruments.

EUROPEAN ARREST WARRANT PROCEEDINGS

F. Issuing State Legal Aid

Access to legal representation in the issuing state is in practice critical to obtaining key case information necessary to assess the legal grounds for consent to, or refusal of, surrender in executing state European arrest warrant proceedings. For example, obtaining further information about the criminal act in question to determine whether there is a *ne bis in idem* defence, or verifying that the alleged offence is one of dual criminality. Furthermore, the availability of legal assistance will enable the requested person to reach alternative arrangements, for example, proposing to the issuing judicial authority that it re-suspend a sentence due to facts arising since the issue of the EAW, or proposing the use of more proportionate alternatives such as payment of an outstanding fine, the use of mutual legal assistance or, in due course, European Investigation Orders, avoiding EAW proceedings in the executing state entirely. Without express provision at EU level,

legal aid may be available in the issuing state only following a first appearance by the suspect or accused person in that jurisdiction, and it is important to ensure that the assistance envisaged in the issuing state by the Access to a Lawyer Directive is actually enforceable. We believe that a burden-sharing approach is most appropriate, with the issuing state and executing state bearing their respective costs.

We hope this information is useful and look forward to seeing the LIBE adopting a strong report.

For more information, please contact:

- Jodie Blackstock, JUSTICE (jodie.blackstock@justice.org.uk);
- Kersty McCourt, Open Society Justice Initiative (kersty.mccourt@opensocietyfoundations.org);
- Mark Kelly, Irish Council for Civil Liberties (mark.kelly@iccl.ie);
- Alex Tinsley (Fair Trials Europe / Legal Experts Advisory Panel (alex.tinsley@fairtrials.net)).

**Fair Trials Europe
Legal Experts Advisory Panel
Open Society Justice Initiative
JUSTICE**