



PRACTITIONERS' TOOLS ON EU LAW

LEGAL AID DIRECTIVE

About Fair Trials

Fair Trials is a global criminal justice watchdog with offices in London, Brussels and Washington, D.C., focused on improving the right to a fair trial in accordance with international standards.

Fair Trials' work is premised on the belief that fair trials are one of the cornerstones of a just society: they prevent lives from 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.

Our 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.

In Europe, we coordinate the Legal Experts Advisory Panel – the leading criminal justice network in Europe consisting of over 200 criminal defence law firms, academic institutions and civil society organizations. More information about this network and its work on the right to a fair trial in Europe can be found at: <https://www.fairtrials.org/legal-experts-advisory-panel>

This toolkit is created as a part of the project “Litigating to Advance Defence Rights in Europe” funded by the European Union. The Project acknowledges the enormous potential defence lawyers have to drive the use of EU law to challenge fundamental rights abuses. They operate on the front-line of the justice system, deciding which legal arguments to make and whether to apply EU law. The project aims to strengthen the ability of defence lawyers to effectively engage in litigation at domestic and EU levels where rights have been violated, and use EU law to tackle abuse of fundamental rights in criminal justice systems across the EU.



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CONTENTS

INTRODUCTION	6
A. INTRODUCTORY REMARKS.....	6
1. Background	6
2. Purpose of this toolkit.....	7
3. Scope of this toolkit	7
4. How to use this toolkit.....	8
a. How the content is organised	8
b. Terminology	8
c. A word of caution	9
d. Keep in touch	9
B. SHORT OVERVIEW OF BASIC PRINCIPLES OF EU LAW.....	10
1. Supremacy of EU law	10
2. Direct effect of EU law	10
3. Direct effect of directives.....	10
4. Duty of conforming interpretation	11
5. General principles of EU law.....	12
C. OVERVIEW OF THE DIRECTIVE	13
D. RELATIONSHIP WITH OTHER INSTRUMENTS	16
I. SCOPE OF THE RIGHT TO LEGAL AID IN CRIMINAL PROCEEDINGS AND EAW PROCEEDINGS	18
A. INTRODUCTION.....	18
B. RELEVANT PROVISIONS.....	18
1. Personal scope	18
a. Scope of the right to a lawyer under the Access to a Lawyer Directive	18
b. The person is deprived of liberty	19
c. The person is required under EU or national law to be assisted by a lawyer.....	20
d. The person is required or permitted to attend an investigative or evidence gathering act	20
e. Non-discrimination.....	20
2. Material scope	21
a. The rule: criminal proceedings.....	21
b. The exception: minor offences	22
c. EAW proceedings	24
II. CONTENT OF THE RIGHT TO LEGAL AID	25
A. INTRODUCTION.....	25
B. RELEVANT PROVISIONS.....	25
1. Funding legal services enabling the right of access to a lawyer	25
2. The costs of the proceedings?	26
3. Costs recovery.....	26

III. ACCESS TO THE RIGHT TO LEGAL AID IN CRIMINAL PROCEEDINGS	28
A. INTRODUCTION.....	28
B. RELEVANT PROVISIONS.....	28
1. Conditions to access to legal aid in criminal proceedings	28
a. Means test.....	28
b. Merits test.....	31
2. Timing of provision of legal aid	34
IV. THE RIGHT TO LEGAL AID IN EAW PROCEEDINGS.....	35
A. INTRODUCTION.....	35
B. RELEVANT PROVISIONS.....	35
1. The right to dual representation.....	35
2. Possibility to apply a means test.....	37
V. EFFECTIVENESS AND QUALITY OF LEGAL AID SERVICES AND SYSTEMS.....	38
A. INTRODUCTION.....	38
B. RELEVANT PROVISIONS.....	39
1. Decision making process regarding the granting of legal aid	39
2. Quality of legal aid systems and services.....	41
VI. THE RIGHT TO AN EFFECTIVE REMEDY	45
FINAL REMARKS	46

INTRODUCTION

A. INTRODUCTORY REMARKS

1. Background

The EU Member States began cooperating closely in the field of criminal justice, principally through the European Arrest Warrant ('**EAW**'). Such cooperation relies on the mutual trust between judicial authorities that each will respect the rights of those concerned, in particular as guaranteed by the European Convention on Human Rights ('**ECHR**' or '**the Convention**').

However, cooperation was progressively 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 started in 2009 setting minimum standards for the procedural safeguards of suspects and accused persons to regulate certain aspects of criminal procedure through a programme called the '**Stockholm Roadmap**'.¹

Whilst the original objective of these measures is to ensure mutual trust, the result is a set of directives binding national authorities, courts and tribunals in all criminal proceedings, 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 procedural safeguards for children,⁵ the right to the presumption of innocence and to be present at trial,⁶ and the right to legal aid⁷ (collectively, the '**Roadmap Directives**').

This toolkit focuses on Directive 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 (the '**Directive**'),⁸ which became directly applicable as from the end of the transposition deadline on 25 May 2019.

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 2016/800 of the European parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects and accused in criminal proceedings ([OJ L 132, 21.5.2016, 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 L 65, 11.3.2016, p. 1](#)).

⁷ Directive 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 L 297, 4.11.2016 p.1.](#); corrigendum OJ L91 5.4.2017, p.40).

⁸ Ibid.

This toolkit includes a general approach on how to use the Directive in domestic criminal and EAW proceedings.

2. Purpose of this toolkit

This toolkit is designed to give practical advice, mainly to defence practitioners, on how to use the Directive in criminal proceedings. It is produced as part of Fair Trials' 'Litigating to Advance Defence Rights in Europe' Project (the '**EU Litigation Project**'), which aims to build upon the work of the LEAP network to date in the field of EU criminal law, to strengthen the knowledge and ability of defence practitioners to engage effectively in litigation at the national and European level, and to improve access to justice and enforcement of rights under EU law.

The toolkit is intended to provide practical assistance and to serve as a source of references on the interpretation and application of the key provisions of the Directive. The toolkit compiles the latest relevant developments in the jurisprudence of Court of Justice of the European Union ('**CJEU**') and the European Court of Human Rights ('**ECtHR**') and identifies the key problems as regards the implementation of the Directive across the EU Member States. This toolkit also suggests arguments that can be used by lawyers in domestic criminal proceedings where national law or practice falls short of the standards set by the Directive.

Please refer to the [Using EU law in Criminal Practice Toolkit](#) for a general introduction on how to use EU law in national proceedings. A short overview of the basic principles of EU law is given in Section B of this introduction.

Where questions of EU law are raised in national proceedings, lawyers can ask the national court to make a reference for a preliminary ruling to the CJEU. For further information, please refer to the [CJEU Preliminary Reference Toolkit](#).

Please also feel free to refer to the other materials on EU law produced by Fair Trials, notably:

- The [toolkit on the Access to a Lawyer Directive](#);
- The [toolkit on the Right to Interpretation and Translation Directive](#);
- The [toolkit on the Right to Information Directive](#);
- The [toolkit on the Presumption of Innocence Directive](#);
- The [toolkit on the Charter of Fundamental Rights of the European Union](#);
- The online [legal training on pre-trial detention](#).⁹

3. Scope of this toolkit

The introductory part of this toolkit offers a general overview of the basic principles of European Union ('**EU**') law, including the direct effect of directives and the obligation of conforming interpretation. Parts I and II cover the content of the rights enshrined in the Directive in relation to legal aid in criminal proceedings (I) and legal aid in EAW proceedings (Part II).

⁹ Refer to the section of our website on [EU law materials](#) for upcoming and updated toolkits.

4. How to use this toolkit

a. How the content is organised

Each part of this toolkit starts with a presentation of the main issues. It then details the relevant provisions of the Directive and the related legal arguments before providing specific guidance on how to use them in practice.

As most of the provisions of the Directive leave considerable room for interpretation, we include other legal arguments when presenting the provisions of the Directive. Where possible, we highlight any guidance on interpretation handed down by the CJEU. However, there are currently a limited number of CJEU judgments interpreting the Directive.¹⁰ Therefore, where necessary, we fill in the gaps with additional sources.

In particular, we include relevant references to the Charter of Fundamental Rights of the European Union ('the **Charter**'),¹¹ and in particular Article 47 (the right to an effective remedy and to a fair trial).¹²

We also review Article 6 of the ECHR¹³ and the relevant case-law of the ECtHR. One of the aims of the Directive was to articulate ECtHR standards, as they stood at the time of drafting of the Directive, as standards of EU law binding upon all EU Member States. ECtHR jurisprudence continues to be a relevant source of guidance for the interpretation of the Directive, but only in so far as ECtHR standards do not fall below the scope of rights and limits of derogations set in the Directive.

Much of the law laid down by the Directive still remains open to interpretation; therefore, this toolkit inevitably involves our own reading of the Directive standards. Based upon our understanding of the Directive, we make concrete suggestions as to how to use its provisions in a given case.

In order to distinguish clearly between these different levels of analysis:

Provisions of European Union law or citations from the case-law of the Court of Justice of the European Union appear in green shading, with a double border.

Provisions of the European Convention on Human Rights and citations from case-law of the European Court of Human Rights appear in yellow shading, with a single border. They are presented in italics.

b. Terminology

¹⁰ This Toolkit was published in November 2020. For latest update on these cases see Fair Trials' [Mapping CJEU Case Law on EU Criminal Justice Measures](#) tool.

¹¹ The European Parliament, the Council and the Commission, Charter of Fundamental Rights of the European Union, ([OJ C 326, 26.10.2012, p. 391](#)).

¹² For further information on how to use the Charter, see Fair Trials' [Toolkit on Charter of Fundamental Rights of the European Union](#).

¹³ Council of Europe, [European Convention for the Protection of Human Rights and Fundamental Freedoms](#), as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

We also use the term ‘**lawyer**’ to refer to any legal professional that is entitled in accordance with national law to provide legal assistance and represent suspects or accused persons at any stage of criminal proceedings; this may have the same meaning as ‘**defence attorney**’ or ‘**legal counsel**’ in some jurisdictions.

A ‘**suspect**’ in the context of this toolkit may refer not only to persons who have been recognized as such in accordance with formal procedures under national law, but also cover persons who have not been formally declared suspects but whose ‘**situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him**’.¹⁴

c. A word of caution

This toolkit is drafted based on certain assumptions. As mentioned above, we have sought to identify these clearly in the body of the text. This is both an acknowledgment of the fact that there may be other points of view, and to ensure you are aware that these are inferences which you will need to be happy to stand by if you are going to rely on them in court.

The toolkit is also drafted with lawyers from all EU Member States in mind. Necessarily, it cannot cater for all individual variations in national criminal procedure in the different EU Member States. It cannot take account of existing professional traditions and deontological rules established by national or regional bars. As such, you will need to adapt our suggestions to work within your own local context.

d. Keep in touch

With those qualifications, we encourage you to follow the steps in this toolkit, to try out the arguments we propose and to let us know how you get on by contacting us via the contact details contained in the preface.

We are keen to hear from you about your experience and to share lessons learned from others. We may also be able to offer support and assistance in individual cases.

¹⁴ See ECtHR, [Simeonovi v. Bulgaria](#), App. no.21980/04, Judgment of 12 May 2017, para. 110.

B. SHORT OVERVIEW OF BASIC PRINCIPLES OF EU LAW

1. Supremacy of EU law

The starting point of using EU law in practice is to understand its place in the national legal system: EU law stands higher in the hierarchy of legislative acts than domestic law. This is called the 'principle of supremacy' and it means that in case of contradiction between national law and EU law, the latter takes precedence and under certain conditions can be invoked directly by individuals to claim their rights against the state.

2. Direct effect of EU law

EU law works through a system of 'decentralised' enforcement where the national court is the primary driver of compliance. This system has been the *modus operandi* of EU law ever since the seminal judgment *Van Gend en Loos*,¹⁵ in which the European Court of Justice (now the CJEU) established the principle of 'direct effect'. The idea is that when obligations upon Member States exist to provide rights to individuals, the best way of ensuring compliance is to give the individual the ability to invoke the right directly. This principle was originally recognised for primary law (Treaties) when the obligation in question was 'precise, clear and unconditional' and 'does not call for additional measures' by Member States or the EU. It was then extended to regulations, and subsequently to directives.

3. Direct effect of directives

Directives set objectives for Member States, who can decide by what means to reach them. Therefore, Member States need to give effect to directives by adopting national legislation that transposes the directives into national law. However, provisions of directives can have direct effect too, as was originally established by the CJEU in the *Van Duyn*¹⁶ and *Ratti*¹⁷ cases and more recently in *Difesa*:

(...)[W]herever the provisions of a directive appear (...) to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State (...) A[n EU law] provision is unconditional where it is not subject, in its implementation or effects, to the taking of any measure either by the institutions of the [EU] or by the Member States (...) Moreover, a provision is sufficiently precise to be relied on by an individual and applied by the court where the obligation which it imposes is set out in unequivocal terms (...).¹⁸

Accordingly, a provision of a directive has direct effect and may be invoked in national courts if:

¹⁵ CJEU, [Case 26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration](#), Judgment of 5 February 1963, ECLI:EU:C:1963:1.

¹⁶ CJEU, [Case 41/74 Van Duyn](#), Judgment of 4 December 1974, ECLI:EU:C:1974:133.

¹⁷ CJEU, [Case 148/78 Ratti](#), Judgment of 5 April 1979, ECLI:EU:C:1979:110.

¹⁸ CJEU, [Case C-236/92 Difesa](#), Judgment of 23 February 1994, ECLI:EU:C:1994:60, paras. 8-10.

- 1) The transposition deadline of the directive has passed but the directive has not been implemented or has been implemented incorrectly, or the national measures implementing the directive are not being correctly applied;¹⁹
- 2) It is invoked against a state;
- 3) It gives rights to an individual; and
- 4) It is **unconditional and sufficiently precise**, i.e. it does not require further implementation measures by the EU or the Member State and it is set out in unequivocal terms.

Even if a provision is arguably not 'unconditional and sufficiently precise' because it is phrased in general terms and may require some interpretation, this does not necessarily prevent you from relying on it in national court. The CJEU has recognised that:

- The fact that a provision needs interpreting does not prevent it having direct effect: its meaning and exact scope may be clarified by national courts or the CJEU.²⁰
- The fact that a provision allows for exceptions or derogations from a given obligation in specific circumstances does not make the obligation conditional.²¹
- A provision which 'limits the discretionary power'²² of the Member State or obliges Member States to 'pursue a particular course of conduct'²³ may also be invoked in national courts. An individual may invoke such a provision to argue that the national authorities, in choosing the methods of implementation, have overstepped the limits of their discretion.²⁴

4. Duty of conforming interpretation

Regardless of whether a provision has direct effect, national courts must interpret national law, to the extent possible, in light of the wording and the purpose of a directive in order to ensure its full effectiveness.

The principle that national law must be interpreted in conformity with EU law requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration (...), with a view to ensuring that the directive in

¹⁹ CJEU, [Case C-62/00 Marks & Spencer plc v. Commissioners of Customs & Excise](#), Judgment of 11 July 2002, ECLI:EU:C:2002:435, para. 27.

²⁰ CJEU, [Case 41/74 Van Duyn](#), Judgment of 4 December 1974, ECLI:EU:C:1974:133, para. 14.

²¹ *Ibid.*, para. 7.

²² *Ibid.*, para. 13.

²³ CJEU, [Case 51/76 Verbond van Nederlandse Ondernemingen](#), Judgment of 1 February 1977, ECLI:EU:C:1977:12, para. 23.

²⁴ *Ibid.*, para. 24.

question is fully effective and achieving an outcome consistent with the objective pursued by it.²⁵

In this toolkit we occasionally refer to the preamble of the Directive, called the “**recitals**”, as an interpretative source. Recitals of directives have no legal binding force. They do not, in and of themselves, contain any enforceable rights or obligations and cannot alter the content of substantive provisions.²⁶ However, they explain the background and the objectives of each directive. They are therefore important for understanding the directive and can be used as an interpretative source.

5. General principles of EU law

Article 6(3) TEU explicitly recognises as general principles of EU law ‘fundamental rights, as guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States’.

Developed by the case law of the CJEU, general principles have allowed the CJEU to implement rules in different domains of which the treaties make no mention. They supplement the legal gaps and give legitimacy to the EU legal order, as the embodiment of common values. General principles of EU law may be common to all national legal systems of EU Member States and compatible with EU objectives, or they may be specific to the EU, even if inspired from principles enshrined in certain national legal systems.

The following general principles are key to interpret the Directive:

- **Effectiveness**: although it is for the domestic legal system of each Member State to establish detailed rules in criminal proceedings, national rules cannot make it excessively difficult or impossible in practice to exercise the rights conferred by EU law.²⁷ The CJEU has ruled that “[a]ny provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of European Union law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent European Union rules from having full force and effect are incompatible with those requirements, which are the very essence of European Union law(...)”²⁸

Effective judicial protection: a specific aspect of the general principle of effectiveness is the obligation of domestic Member State courts to ensure that national remedies and

²⁵ CJEU, [Case C-69/10 Samba Diouf](#), Judgment of 28 July 2011, ECLI:EU:C:2011:54, para. 60.

²⁶ The CJEU ruled that the preamble to an EU act has no binding legal force and cannot be validly relied on as a ground for derogating from the actual provisions of the act in question or for interpreting those provisions in a manner clearly contrary to their wording. CJEU, [Case C-134/08 Hauptzollamt Bremen v. J.E. Tyson Parketthandel GmbH hanse j.](#), Judgment of 2 April 2009, ECLI:EU:C:2009:229, para. 16.

²⁷ Ibid.

²⁸ CJEU, [Case C-617/10, Aklagaren v. Hans Akerberg Fransson](#), Judgment of 26 February 2013, ECLI:EU:C:2013:105, para. 46.

procedural rules do not render claims based on EU law impossible in practice or excessively difficult to enforce.²⁹ The CJEU has recognised that this is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 ECHR, and that the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law.³⁰

- **Equality of arms:** the principle of equality of arms is an aspect of the right to a fair trial enshrined in Article 47 of the Charter, which has the purpose of aiming to find a balance between the parties in the proceedings.³¹
- **Equivalence:** it is for the domestic legal system of each Member State to establish detailed rules in criminal proceedings, provided however that the national rules are not less favourable than those governing similar domestic situations.³²
- **Non-discrimination:** Article 2 of the TEU specifies that the non-discrimination principle is one of the fundamental values of the EU. The Charter contains a list of human rights, inspired by the rights contained in the constitutions of the Member States, the ECHR and universal human rights treaties. Under the title “Equality” (Articles 20 to 26), the EU Charter of Fundamental Rights emphasises the importance of the principle of equal treatment in the EU legal order.³³

C. OVERVIEW OF THE DIRECTIVE

Provision	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	Scope	The Directive applies to:
Recitals 10		<ul style="list-style-type: none"> • persons in criminal proceedings who have a right of access to a

²⁹ See in particular the strong statements in this respect in CJEU, [Case C-64/16 Associação Sindical dos Juizes Portugueses](#), Judgment of 27 February 2018, ECLI:EU:C:2018:117, para. 34: “Member States are to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law. It is, therefore, for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in those fields.”

³⁰ Ibid, paras. 35 - 36.

³¹ CJEU, [Case C-199/11 Otis and others](#), Judgment of 6 November 2012, ECLI:EU:C:2012:684, paras. 71-72.

³² See, for instance, [CJEU, Case C-704/1, Nikolay Kolev and Others](#), Judgment of 12 February 2020, ECLI:EU:C:2020:92, para. 49.

³³ Council of Europe, European Court of Human Rights and European Union Agency for Fundamental Rights (FRA), [Handbook on European non-discrimination law](#), 2018.

lawyer and who are:

(a) deprived of liberty;

(b) required to be assisted by a lawyer in accordance with EU 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:
 - 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

- '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.
- 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.

Article 4
Recitals 17
- 19
Legal aid in criminal proceedings

- 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 legal assistance 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:
 - a) at the detention hearing, at any stage of the proceedings; and

			<ul style="list-style-type: none"> 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.
Article 5 Recitals 20 – 23	Legal Aid in European Arrest Warrant Proceedings		<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 them becomes final. • The issuing Member State must ensure that requested persons who exercise their right to appoint a lawyer in the issuing Member State to assist their lawyer in the executing Member State have the right to legal aid in the issuing Member State for the purposes of such proceedings in the executing Member State, in so far as legal aid is necessary to ensure effective access to justice. • 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.
Article 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.

		<ul style="list-style-type: none"> • 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.
Article 8 Recital 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 Recital 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.

D. RELATIONSHIP WITH OTHER INSTRUMENTS

The purpose of the right to legal aid is to guarantee the right to a lawyer, as defined under Directive 2013/48/EU on the right of access to a lawyer (the ‘**Access to a Lawyer Directive**’):³⁴

(1) The purpose of this Directive is to ensure the effectiveness of the right of access to a lawyer as provided for under Directive 2013/48/EU of the European Parliament and of the Council (3) by making available the assistance of a lawyer funded by the Member States for suspects and accused persons in criminal proceedings and for requested persons who are the subject of European arrest warrant proceedings pursuant to Council Framework Decision 2002/584/JHA (4) (requested persons).

The right to legal aid is also connected to the Right to Information Directive³⁵ which provides that suspects must be informed of their right to be assisted by a lawyer as well as “any entitlement to free legal advice and the conditions for obtaining such advice”.³⁶

The right to legal aid is also provided under Article 47, third indent, of the Charter:

(...) Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Although the Directive and the Charter provide a right under EU law, it is largely based on ECHR standards at the time of their drafting. These standards, as far as they do not fall below the level of protection afforded by the text of the Directive as interpreted (where relevant) by the CJEU, continue to be relevant for filling the interpretation gaps.

³⁴ Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty ([OJ L 294, 6.11.2013, p. 1–12](#)).

³⁵ 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](#)).

³⁶ Article 3(1)(b) of the Information Directive.

Recitals 10, 14, 17, 23 and 30 of the Directive expressly refer to the ECHR and Charter as minimum levels of protection and stress that the Directive does not limit or derogate from the rights and procedural safeguards guaranteed under these two instruments, as interpreted by the ECtHR and the CJEU. These recitals capture the general tone of the EU directives on procedural safeguards, which aim to build upon and consolidate rights arising from the ECHR as interpreted by the ECtHR and establish them as EU law.

According to the Recital 3 of the Directive:

(3) The third paragraph of Article 47 of the Charter of Fundamental Rights of the European Union (the Charter), Article 6(3)(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR) enshrine the right to legal aid in criminal proceedings in accordance with the conditions laid down in those provisions. The Charter has the same legal value as the Treaties, and the Member States are parties to the ECHR and the ICCPR. However, experience has shown that this in itself does not always provide a sufficient degree of trust in the criminal justice systems of other Member States.

We therefore encourage the use of ECHR and ECtHR case law, and of the Charter and CJEU case law to strengthen your EU law-based arguments under the Directive.

The Charter has the same legal strength as the Treaties and is directly applicable. However, while the Charter cannot be used on its own to invoke rights, it may be used to support the interpretation and application of other EU law such as the Directive. Article 47 (the right to an effective remedy and to a fair trial) and Article 48 (the presumption of innocence and right of defence) will be particularly useful to refer to in arguments based on the Directive before national authorities. For more information on how to use the Charter to support your arguments, see Fair Trials' [Toolkit on Charter of Fundamental Rights](#).

Recital 23 of the Directive also refers to the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems ('**UN Principles and Guidelines**')³⁷.

When implementing this Directive, Member States should ensure respect for the fundamental right to legal aid as provided for by the Charter and by the ECHR. In doing so, they should respect the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.

These soft law principles will also be referred to in this toolkit insofar as they can provide guidance when implementing the Directive.

Finally, and although not referred to in the Directive, this toolkit makes references to the European Commission's Recommendation on the right to legal aid for suspects or accused persons in criminal proceedings of 27 November 2013 when it can provide guidance on interpretation.³⁸

³⁷ United Nations, [UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#), adopted by UN General Assembly Resolution 67/187, December 2012.

I. SCOPE OF THE RIGHT TO LEGAL AID IN CRIMINAL PROCEEDINGS AND EAW PROCEEDINGS

A. INTRODUCTION

The scope of the Directive is conditioned by, but narrower than, the scope of the right to a lawyer under the Access to a Lawyer Directive. It is important to understand the scope of the Directive to challenge restrictive implementation of the right to legal aid in domestic legislation.

This section provides an overview of the scope of application of the Directive, and in particular (1) the personal scope, including its relationship with the Access to a Lawyer Directive; and (2) the material scope.

B. RELEVANT PROVISIONS

1. Personal scope

Article 2 (1) of the Directive sets out the scope of the protection granted in the Directive:

'1. This Directive applies to **suspects and accused persons** in criminal proceedings who have a right of access to a lawyer pursuant to Directive 2013/48/EU and who are:

- (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**, including as a minimum the following: (i) identity parades; (ii) confrontations; (iii) reconstructions of the scene of a crime.' (emphasis added)

According to Article 2(1), the Directive applies to suspects or accused persons in criminal proceedings who benefit from the right of access to a lawyer pursuant to the Access to a Lawyer Directive **and** meet one of the three additional criteria: (a) the persons are deprived of liberty; (b) are required by law to be assisted by a lawyer in accordance with regional or national law; or (c) are required or permitted to attend an investigative or evidence gathering act.

In that sense, the scope of the Directive is narrower than the right to a lawyer under the Access to a Lawyer Directive. The following sections will briefly go over the scope of the right to a lawyer (section a) before discussing the three alternative situations (sections b, c, d).

a. Scope of the right to a lawyer under the Access to a Lawyer Directive

³⁸ European Commission, Recommendation of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings ([OJ C 378, 24.12.2013, p. 11–14](#)).

Under the Access to a Lawyer Directive, the right to a lawyer applies to **suspects or accused persons in criminal proceedings from the time they are** made aware by the competent authorities that they are **suspected** or accused of having committed a crime. It applies **until the conclusion** of the criminal proceedings, i.e. the final determination of the question whether the suspect or accused person has committed offence. This includes also sentencing and, if applicable, subsequent appeals.³⁹

Both Article 2(3) of the Legal Aid Directive and Article 2(3) of the Access to a Lawyer Directive cover the situation of **witnesses who become suspects** during questioning by the police:

'This Directive also applies, under the same conditions as provided for in paragraph 1, to persons who were not initially suspects or accused persons but become suspects or accused persons in the course of questioning by the police or by another law enforcement authority.'

Recital 10 of the Legal Aid Directive and Recital 21 of the Access to a Lawyer Directive explain that a person who was initially called into questioning but not as a suspect or an accused person, should have the right not to incriminate themselves and the right to remain silent from the moment they are suspected of having committed a crime.⁴⁰ Therefore, in these situations, the questioning should be suspended immediately in order to notify the person of their rights that they have 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 their rights, including to legal assistance and to legal aid.

Recital 9 of the Legal Aid Directive recalls **the limits of the Access to a Lawyer Directive**:

'Without prejudice to Article 6 of Directive (EU) 2016/800, this Directive should not apply where suspects or accused persons, or requested persons, have waived their right of access to a lawyer in accordance with, respectively, Article 9 or Article 10(3) of Directive 2013/48/EU, and have not revoked such waiver, or where Member States have applied the temporary derogations in accordance with Article 3(5) or (6) of Directive 2013/48/EU, for the time of such derogation.'

Accordingly, **the Legal Aid Directive does not apply**: (a) where the Access to a Lawyer Directive does **not provide for a right to a lawyer**; (b) where the person **waived** their right to a lawyer and has not revoked such waiver, in accordance with the Access to a Lawyer Directive;⁴¹ (c) where a Member State has temporarily and exceptionally applied **derogations** to the right to a lawyer, in accordance with the Access to a Lawyer Directive.⁴²

b. The person is deprived of liberty

³⁹ Article 2(1) of the Access to a Lawyer Directive. For further details, see Fair Trials' [Toolkit on the Access to a Lawyer Directive](#).

⁴⁰ See also Fair Trials' [Toolkit on the Presumption of Innocence Directive](#).

⁴¹ In accordance with Article 9 or Article 10(3) of Directive on Access to a Lawyer. For more information about waiver of the right of access to a lawyer, see Fair Trials' [Toolkit on the Access to a Lawyer Directive](#), p.34 and ff.

⁴² For more information about derogation of the right of access to a lawyer, see Fair Trials' [Toolkit on the Access to a Lawyer Directive](#), p.43 and ff.

Recital 15 of the Directive provides guidance on the meaning of deprivation of liberty. It specifies that:

‘Provided that this complies with the right to a fair trial, **the following situations do not constitute a deprivation of liberty** within the meaning of this Directive: identifying the suspect or accused person; determining whether an investigation should be started; verifying the possession of weapons or other similar safety issues; carrying out investigative or evidence-gathering acts other than those specifically referred to in this Directive, such as body checks, physical examinations, blood, alcohol or similar tests, or the taking of photographs or fingerprints; bringing the suspect or accused person to appear before a competent authority, in accordance with national law.’

c. The person is required under EU or national law to be assisted by a lawyer

The right to legal aid applies in situations where legal assistance is mandatory, i.e. when the right to legal assistance cannot be waived under EU or national law. As such, the **requirement** to be assisted by a lawyer is different from the **right** to be assisted by a lawyer. Indeed, EU or national law may require suspects or accused persons to be assisted by a lawyer in certain situations, for instance when deprived of liberty, for certain types of offences, or for certain suspects. For instance, mandatory assistance for children can derive from the Directive on procedural safeguards for children suspected or accused in criminal proceedings.⁴³

d. The person is required or permitted to attend an investigative or evidence gathering act

The right to a lawyer and the right to legal aid apply when the person is required or permitted to attend investigative acts under national law, at a minimum for identity parades, confrontations and reconstructions of the scene of a crime. As for the Access to a Lawyer Directive, Recital 17 of the Legal Directive specifies that the Directive only sets out minimum standards. Therefore, Member States maintain a wide discretion to grant legal aid beyond the three situations envisaged in the Directive.

e. Non-discrimination

When applying the Directive, Member States must always have regard to the fundamental principles of non-discrimination as entrenched under Article 2 of the Treaty on European Union and the Articles 20 to 26 of the Charter (title “Equality”).

Recital 29 of the Directive makes clear that the Directive applies regardless of the legal status, citizenship or nationality of the suspect or accused person. It provides that Member States cannot discriminate on grounds such as race, colour, sex, sexual orientation, language, religion, political or other opinion, nationality, ethnic or social origin, property, disability or birth:

‘This Directive should apply to suspects, accused persons and requested persons regardless of their legal status, citizenship or nationality. Member States should

⁴³ This is debated. See notably, Steven Cras, [The Directive on the Right to Legal Aid in Criminal and EAW Proceedings – Genesis and Description of the Sixth Instrument of the 2009 Roadmap](#), Eucrim, 1 April 2017.

respect and guarantee the rights set out in this 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. (...)'

2. Material scope

The Directive applies to suspects and accused persons in (a) criminal proceedings, (b) except for minor offences in certain circumstances.

a. The rule: criminal proceedings

Article 2 (1) of the Directive notes that it applies in “criminal proceedings”:

'This Directive applies to suspects and accused persons in **criminal proceedings** (...)'

The notion of “criminal proceedings” has an autonomous definition under EU law. Based on ECtHR case law, the CJEU established its own understanding of what constitutes a “criminal proceedings” and in particular **the criminal nature of a penalty**. This means that the qualification of “criminal proceedings” in domestic law can be overridden by EU law. In the landmark case *Akerberg Fransson*, the CJEU held that three criteria are relevant to assess the criminal nature of a penalty:

'The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur.'⁴⁴

These criteria were initially developed by the ECtHR and commonly known as **the “Engel criteria”**. The substantive question in *Akerberg Fransson* was whether the *ne bis in idem* principle permitted the combination of an administrative and a criminal sanction. The Court ruled that administrative sanctions may in fact be criminal depending on the assessment of the *Engel* criteria in each individual case.⁴⁵ Accordingly, proceedings leading to the imposition of a fine which are treated by domestic law as “administrative” may be treated as “criminal” under the CJEU criteria, and therefore lead to the applicability of the Directive (and other EU standards regarding procedural safeguards).

ECtHR case law on this issue is abundant and we invite you to refer to the ECtHR guide on Article 6 for further guidance on the application of the *Engel* criteria.⁴⁶ Here is an illustrative list of administrative offences which have been considered as “criminal offences” by the ECtHR:

⁴⁴ CJEU, [Case C-617/10 Aklaqaren v. Hans Akerberg Fransson](#), Judgment of 26 February 2013, ECLI:EU:C:2013:105, para. 35; see also ECtHR, [Engel and Others v. Netherlands](#), App. nos. 5100/71; 5101/71; 51102/71; 5354/72; 537072, Judgment of 8 June 1976, paras. 82-83.

⁴⁵ CJEU, [Case C-617/10 Aklaqaren v. Hans Akerberg Fransson](#), Judgment of 26 February 2013, ECLI:EU:C:2013:105, para. 36.

⁴⁶ ECtHR, [Guide on Article 6 of ECHR: Right to a fair trial \(criminal limb\)](#), Section “The “criminal” nature of the charge”: the Guide is regularly updated by the Court and currently available in 16 languages.

- road-traffic offences punishable by fines or driving restrictions, such as penalty points or disqualifications,⁴⁷
- minor offences of causing a nuisance or a breach of the peace,⁴⁸
- offences against social-security legislation,⁴⁹
- administrative offence of promoting and distributing material promoting ethnic hatred, punishable by an administrative warning and the confiscation of the publication in question,⁵⁰ and
- administrative offence related to the holding of a public assembly.⁵¹

However, although these offences may be considered as “criminal offences” and in principle fall within the scope of application of the Directive according to Article 2(1) of the Directive, they may also be considered as “minor offences” and therefore be excluded from its material scope according to Article 2(4) of the Directive, as explained in the following section.

b. The exception: minor offences

Article 2(4) of the Directive limits the application of the right to legal aid for minor offences **under specific circumstances** and insofar as the right to a fair trial is respected:

‘Without prejudice to the right to a fair trial, in respect of minor offences:

(a) where the law of a Member State provides for the imposition of a sanction by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed or referred to such a court; **or**

(b) where deprivation of liberty cannot be imposed as a sanction;

this Directive applies **only to the proceedings before a court having jurisdiction in criminal matters.**

In any event, this Directive applies when a **decision on detention** is taken, and during detention, at any stage of the proceedings until the conclusion of the proceedings.’

The Directive firstly excludes from its scope proceedings where a **sanction is imposed by an authority other than a court** having jurisdiction in criminal matters, and the imposition of the sanction can be appealed or referred to such a court with jurisdiction in criminal matters. In such cases, the right to legal aid only arises if/when a court with jurisdiction in criminal matters is seized.

⁴⁷ ECtHR, [Lutz v. Germany](#), App. no. 9912/82, Judgment of 25 August 1987, para. 182; ECtHR, [Schmautzer v. Austria](#), App. no. 15523/89, Judgment of 23 October 1995; ECtHR, [Malige v. France; Marčan v. Croatia](#), App. no. 27812/95, Judgment of 23 September 1998, para. 33; ECtHR, [Igor Pascari v. the Republic of Moldova](#), App. no. 25555/10, Judgment of 30 August 2016, paras. 20-23.

⁴⁸ ECtHR, [Lauko v. Slovakia](#), App. no. 26138/95, Judgment of 2 September 1998; ECtHR, [Nicoleta Gheorghe v. Romania](#), App. no. 23470/02, Judgment of 3 April 2012, paras. 25-26.

⁴⁹ ECtHR, [Hüseyn Turan v. Turkey](#), App. 11529/02, Judgment of 4 March 2008, paras. 18-21, for a failure to declare employment, despite the modest nature of the fine imposed.

⁵⁰ ECtHR, [Balsytė-Lideikienė v. Lithuania](#), App. no. 72596/01, Judgment of 4 November 2008, para. 61.

⁵¹ ECtHR, [Kasparov and Others v. Russia](#), App. no. 21613/07, Judgment of 3 October 2013, paras. 39-45; ECtHR, [Mikhaylova v. Russia](#), App. no. 46998/08, Judgment of 19 November 2015, para. 50-75.

This provision refers to on-the-spot or through-the-post fines – which do not require attendance at the police station, interrogation or attendance at court at all. Recital 11 of the Directive gives the example of traffic-related offences to illustrate the rationale of this exclusion:

'In some Member States an authority other than a court having jurisdiction in criminal matters has competence for imposing sanctions other than deprivation of liberty in relation to relatively minor offences. That may be the case, for example, in relation to **traffic offences** which are committed on a large scale and which might be established following a traffic control. In such situations, it would be unreasonable to require that the competent authorities ensure all the rights under this Directive. Where the law of a Member State provides for **the imposition of a sanction regarding minor offences by such an authority and there is either a right of appeal or the possibility for the case to be otherwise referred to a court having jurisdiction in criminal matters**, this Directive should therefore apply only to **the proceedings before that court** following such an appeal or referral.'

This approach draws from ECtHR case law according to which excluding minor “criminal” offences punished by administrative authorities from the scope of the right to a fair trial (including to legal aid) is not inconsistent with the Convention provided that the person can appeal or challenge the decision before a jurisdiction that does offer the guarantees of Article 6 of the ECHR.⁵²

The second type of exclusion relates to **minor criminal offences for which deprivation of liberty cannot be imposed as a sanction**. In such cases, the right to legal aid only arises if/when a court with jurisdiction in criminal matters is seized. Recital 12 of the Directive also refers to traffic-related offences to illustrate the rationale of this exclusion:

'In some Member States certain **minor offences**, in particular minor traffic offences, minor offences in relation to general municipal regulations and minor public order offences, **are considered to be criminal offences**. In such situations, it would be unreasonable to require that the competent authorities ensure all the rights under this Directive. Where the law of a Member State provides in respect of **minor offences that deprivation of liberty cannot be imposed as a sanction**, this Directive should therefore apply only to the proceedings before a court having jurisdiction in criminal matters.'

The guidance provided by the recitals is limited and further clarification from the CJEU on the application of these exceptions would definitely be welcomed.

The wording of Article 2(4) of the Legal Aid Directive is in fact identical to Article 2(4) of the Access to a Lawyer Directive. The latter was strongly criticised by commentators for unnecessarily reducing the scope of the right to a lawyer in an attempt to accommodate States' concerns about the costs implications of such measure.⁵³

⁵² ECtHR, [Öztürk v. Germany](#), App. no. 8544/79, Judgment of 21 February 1984, para. 56; ECtHR, [A. Menarini Diagnostics S.R.L. v. Italy](#), App. No. 43509/08, Judgment of 27 September 2011; ECtHR, [Flisar v. Slovenia](#), App. no. 3127/09, Judgment of 29 September 2011, para. 33.

⁵³ See notably, Fair Trials, JUSTICE, JUSTCIA-Network, [Joint Statement on the Directive on the Right of Access to a Lawyer and to Communicate Upon Arrest – For Trilogue Discussions on Articles 1 to 6](#), 14 November 2012;

According to these exceptions, legal aid and legal assistance may not be granted in certain situations irrespective of the dramatic consequences that financial or other non-custodial sentences may have on the lives of individuals prosecuted. As research indicates that minor offences are often poverty offences (such as fare evasion or low-level theft),⁵⁴ denying the right to legal aid and legal assistance for such offences, albeit in limited circumstances, significantly undermines the purpose of the Directives in practice.

International bodies have also taken position against this limited scope of application of the right to legal aid. The Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ('CPT') recommended 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.⁵⁵ In its 2011 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."⁵⁶

Finally, it is important to stress that in any event, Article 2(4) of the Directive provides for the application of the Directive **when a decision on detention is taken, and during detention**, at any stage of the proceedings until the conclusion of the proceedings. In this context detention refers to pre-trial detention and not to a custodial sentence.

c. EAW proceedings

Article 2(2) of the Directive provides that the Directive also applies in the context of European Arrest Warrant proceedings to the requested person upon arrest in the executing Member State.

'This Directive also applies, upon arrest in the executing Member State, to requested persons who have a right of access to a lawyer pursuant to Directive 2013/48/EU'.

Amnesty International, [Amnesty International Observations on the Commission's proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest](#), September 2011. Similarly, see Amnesty International and Save the Children, [Joint paper on the proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings](#), December 2014.

⁵⁴ See e.g., Mitali Nagrecha, [The Limits of Fairer Fines: Lessons from Germany](#), Criminal Justice Policy Program at Harvard Law School, June 2020.

⁵⁵ Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, [Report on the visit to the Netherlands carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment \(CPT\) from 10 to 21 October 2011](#), 9 August 2012, para. 18.

⁵⁶ *Ibid.*

II. CONTENT OF THE RIGHT TO LEGAL AID

A. INTRODUCTION

The Directive defines ‘legal aid’ as ‘funding by a Member State of the assistance of a lawyer, enabling the exercise of the right of access to a lawyer.’ This section details the costs which covered by legal aid under the Directive, i.e. costs of the effective assistance of a lawyer (Section B.1.) It then discusses the costs of proceedings (Section B.2.). Finally, it analyses whether States may recover the costs of legal aid (Section B.3).

B. RELEVANT PROVISIONS

1. Funding legal services enabling the right of access to a lawyer

Article 3 of the Directive specifies that:

‘For the purposes of this Directive, ‘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.**’
(emphasis added)

Legal aid must cover sufficient legal services to enable an accused person to exercise their right to a lawyer. The scope of this right is defined in the Access to a Lawyer Directive⁵⁷, and has been interpreted by ECtHR case law. Notably, in *Beuze v. Belgium*, the ECtHR outlined the content of the right and the aims pursued by the right to a lawyer which include:

- fulfil the aims of Article 6 of the ECHR and prevent miscarriages of justice;
- provide a counterweight to the vulnerability of suspects in police custody;
- assist the accused in dealing with increasingly complex legislation on criminal procedure;
- ensure respect for the right of suspect or accused person not to incriminate themselves.⁵⁸

Fulfilling the aims of Article 6 of the ECHR implies a series of rights aside from the effective assistance of a lawyer, including the time and facilities to prepare a defence, equality of arms and the right to a hearing.⁵⁹ The Court held that assigning a lawyer does not in itself ensure the effectiveness of the assistance afforded by the counsel.⁶⁰ To that end, some minimum requirements must be met:

First, (...) suspects must be **able to enter into contact with a lawyer from the time when they are taken into custody.** (...) The lawyer must be able to confer with his or her client in private and receive **confidential** instructions. (...)

⁵⁷ See also Fair Trials’ [Toolkit on the Access to a Lawyer Directive](#).

⁵⁸ ECtHR, *Beuze v Belgium*, App. no. 71409/10, Judgement of 9 November 2018, paras 125-130.

⁵⁹ For more information on these rights under the EU Charter, see also Fair Trials’ [Toolkit on the Charter of Fundamental Rights of the European Union](#).

⁶⁰ ECtHR, *Beuze v Belgium*, App. no. 71409/10, Judgement of 9 November 2018, para.132.

Secondly, (...) suspects have the right for their **lawyer to be physically present** during their initial police interviews and whenever they are questioned in the subsequent pre-trial proceedings (...). Such physical presence must enable the lawyer to provide assistance that is **effective and practical** rather than merely abstract (...), and in particular to **ensure that the defence rights of the interviewed suspect are not prejudiced (...)**.⁶¹

The Court also highlighted the importance of a “whole range of services specifically associated with legal assistance: discussion of the case, organisation of the defence, collection of exculpatory evidence, preparation for questioning, support for an accused in distress, and verification of the conditions of detention (...).”⁶²

Accordingly, Article 3 of the Directive requires legal aid lawyers to be funded to perform the full range of services detailed under the Access to a Lawyer Directive and related case law. We invite you to refer to these requirements to assess whether the legal aid system enables or limits access to a lawyer.

2. The costs of the proceedings?

Court fees and other costs incurred during the proceedings (including, for example, expert fees) are not expressly covered by the Directive. International and regional standards provide further guidance on this issue.

Resolution (78) 8 of the Council of Europe 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”.⁶³

Similarly, the UN Principles and Guidelines require that “the budget for legal aid should cover the full range of services...[and] adequate special funding should be dedicated to defence expenses such as expenses for copying relevant files and documents and collection of evidence, expenses related to expert witnesses, forensic experts and social workers, and these persons’ travel expenses.”⁶⁴

The principle of equality of arms and the right to have time and facilities to prepare a defence (under Article 6 of the ECHR and Article 47 of the Charter) also call for these costs to be covered by legal aid. For example, if the prosecution has access to expert witnesses whereas the defence cannot resort to experts’ assistance to prepare for trial because their costs are not covered, the legal aid system may tip the balance in favour of the prosecution.

3. Costs recovery

The operative part of the Directive neither expressly allows nor prevents States from recovering their costs from legal aid beneficiaries– for instance after the proceedings.

⁶¹ Ibid., para.132-134 (emphasis added).

⁶² Ibid., para 136.

⁶³ Committee of Ministers of the Council of Europe, [Resolution \(78\) 8 on Legal aid and Advice](#), 2 March 1978, 284th meeting of the Ministers’ Deputies.

⁶⁴ Guideline 12 of the UN Principles and Guidelines.

Under ECtHR case law, 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;⁶⁵
- 2) where the terms of reimbursement are arbitrary or unreasonable;⁶⁶ and
- 3) where no assessment of the applicant's financial situation has been performed.⁶⁷

⁶⁵ ECtHR, [Croissant v. Germany](#), App. no. 13611/88, Judgement of 25 September 1992, para. 36; ECtHR, [Orlov v. Russia](#), App. no. 29652/04, Judgement of 21 June 2011.

⁶⁶ ECtHR, [Morris v. the United Kingdom](#), App. no. 38784/97, Judgement of 26 February 2002.

⁶⁷ ECtHR, [Croissant v. Germany](#), App. no. 13611/88, Judgement of 25 September 1992, para 36; ECtHR, [Orlov v. Russia](#), App. no. 29652/04, Judgement of 21 June 2011; ECtHR, [Morris v. the United Kingdom](#), App. no. 38784/97, Judgement of 26 February 2002.

III. ACCESS TO THE RIGHT TO LEGAL AID IN CRIMINAL PROCEEDINGS

A. INTRODUCTION

Article 4 of the Directive sets out an obligation for Member States to provide legal aid to suspects and accused persons who lack sufficient resources and gives States wide discretion as to the way in which they organise their legal aid system and guarantee the enforceability of the right to legal aid.

This section sets out the conditions to access legal aid in criminal proceedings and in particular the scope of the means and merits test provided by the Directive. The section then discusses when in criminal proceedings legal aid should be granted.

B. RELEVANT PROVISIONS

1. Conditions to access to legal aid in criminal proceedings

Article 4(1) of the Directive requires Member States to provide legal aid to persons suspected or accused of a crime who lack sufficient resources and when the interests of justice require it:

‘Member States shall ensure that suspects and accused persons who **lack sufficient resources** to pay for the assistance of a lawyer have the right to legal aid when the interests of justice so require.’ (emphasis added)

The Directive reiterates Article 47 of the Charter, which provides:

‘(...) Legal aid shall be made available to those who **lack sufficient resources** in so far as such aid is necessary to ensure effective access to justice.’ (emphasis added)

The same approach is enshrined in Article 6(3)(c) of the ECHR:

“to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require (...)”

Article 4(2) of the Directive gives Member States wide discretion as to the way they assess whether a person qualifies for legal aid. States may either use a means test, a merits test, or both.:

‘Member States may apply a means test, a merits test, or both to determine whether legal aid is to be granted in accordance with paragraph 1.’

a. Means test

Under a means test, the authorities determine whether a person has ‘sufficient means’ to afford the assistance of a lawyer.

Factors to take into account

The Directive does not provide a definition of “sufficient means.” Instead, Article 4(3) of the Directive requires States that use a ‘means test’ to take into account “**all relevant and objective factors**” to determine whether a person has the ‘sufficient means’ to afford the assistance of a lawyer and accordingly whether they are entitled to legal aid. It specifies a **non-exhaustive list** of factors that includes the person’s income, capital, family situation, as well as the costs of the assistance of a lawyer and the standard of living.

‘Where a Member State applies a **means test**, it shall take into account all relevant and objective factors, **such as the income, capital and family situation** of the person concerned, as well as the **costs of the assistance of a lawyer** and the **standard of living** in that Member State, in order to determine whether, in accordance with the applicable criteria in that Member State, a suspect or an accused person lacks sufficient resources to pay for the assistance of a lawyer.’ (emphasis added)

These factors are derived from the ECtHR case law which requires States to consider all the evidence regarding the circumstances and the personal situation of the applicant in order to determine whether a defendant lacks “sufficient means”.⁶⁸

As pointed out, the list of factors the Directive is **not exhaustive**. We argue that the payment of costs of proceedings should also be taken into account. In that sense, Resolution (78) 8 of the Council of Europe on Legal aid and Advice states 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.”⁶⁹

Critically, States should ensure that the way they assess these factors are **not discriminatory**. For example, where the household income is considered, the court must assess whether that person has access to their partner’s income in practice. This can be a particular problem in relation to domestic violence, for which the EU Commission’s Recommendation on Legal Aid provides:

‘Where the household income of families is taken into account in the means test, 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 should be used’.⁷⁰

⁶⁸ ECtHR, [Pakelli v Germany](#), App. no. 8398/78, Judgement of 25 April 1983, para 34; ECtHR, [Zdravko Stanev v. Bulgaria](#), App. no. 32238/04, Judgment of 6 November 2012.

⁶⁹ Committee of Ministers of the Council of Europe, [Resolution \(78\) 8 on Legal aid and Advice](#), 2 March 1978, 284th meeting of the Ministers’ Deputies.

⁷⁰ European Commission, Recommendation of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings ([OJ C 378, 24.12.2013, p. 11–14](#)), para. 7. See also, UN Principles and Guidelines, Guideline 1, para 41.

Burden of proof

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 to obtain legal aid.

ECtHR caselaw provides that the suspect or accused person bears the burden of proving that they have insufficient means.⁷¹ However, this does not need to be proved beyond all reasonable doubt.⁷² 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 financially incapable of assuming his legal costs.⁷³ The ECtHR was satisfied that the willingness of the applicant to present evidence and the absence of clear indications to the contrary were sufficient to conclude that he lacked sufficient means to pay for a private lawyer:

*'Admittedly, these particulars are not sufficient to prove beyond all doubt that the applicant was indigent at the relevant time; however, having regard to his offer to the Federal Court to prove his lack of means and in the absence of clear indications to the contrary, they lead the Court to regard the first of the two conditions contained in Article 6 para. 3 (c) (...) as satisfied.'*⁷⁴

The principle of effectiveness

In applying the means test, it is relevant to refer to the general EU law principle of effectiveness. According to this principle, legislative, administrative or judicial practices that impair the effectiveness of rights under EU law are incompatible with those rights.⁷⁵ The CJEU stressed that any restrictions on fundamental rights must respect the essence of the particular right, pursue an objective of general interest and be proportionate:

*'[I]t is settled case-law that fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to **objectives of general interest** pursued by the measure in question and that they do **not** involve, in the light of the objectives pursued, a **disproportionate and intolerable interference** which impairs the very substance of the rights guaranteed (...)' (emphasis added)*⁷⁶

Accordingly, a means test that excessively restricts the right to legal aid and hence the right to the effective assistance of a lawyer would violate the Directive. In this respect, the CJEU ruled that conditions to access legal aid which illegitimately or disproportionately limit the right to legal aid

⁷¹ ECtHR, *Croissant v. Germany*, App. no. 13611/88, Judgement of 25 September 1992, para. 37.

⁷² ECtHR, *Pakelli v Germany*, App. no. 8398/78, Judgement of 25 April 1983, para. 34.

⁷³ Ibid. See also, 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.

⁷⁴ ECtHR, *Pakelli v Germany*, App. no. 8398/78, Judgement of 25 April 1983, para. 34.

⁷⁵ CJEU, *C-617/10 - Aklaqaren v Hans Akerberg Fransson*, Judgement of 26 February 2013, ECLI:EU:C:2013:105, para. 46.

⁷⁶ CJEU, *C-418/11 - Texdata Software GmbH, Judgement* of 26 September 2013, ECLI:EU:C:2013:588.

may amount to an infringement of the essence of the right to legal aid and violate Article 47(3) of the Charter:⁷⁷

'The principle of effective judicial protection, as enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, **may include the right to be exempted from payment of procedural costs and/or fees due for obtaining the assistance of a lawyer [...].** [I]t is for the national court to ascertain **whether the conditions for grant of such aid constitute a restriction of the right of access to courts and tribunals which infringes the very essence of that right, whether they pursue a legitimate aim and whether there is a reasonable degree of proportionality between the means used and the aim pursued.**' (emphasis added, our translation)⁷⁸

Similarly, the CJEU held that:

'As is apparent from well-established case-law on the principle of effectiveness, the **detailed procedural rules** governing actions for safeguarding an individual's rights under EU law **must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (...).**

(...)

In that connection, it is for the national court to ascertain whether the conditions for granting legal aid constitute a limitation on the right of access to the courts which undermines the very core of that right; whether they pursue a legitimate aim; and whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which it is sought to achieve.⁷⁹

In this case, the CJEU held that the principle of effectiveness applied in the context of legal aid may cover a dispensation to advance payment of the costs of proceedings and/or the assistance of a lawyer.

b. Merits test

Article 4(2) of the Directive allows Member States to apply a test based on merits, either alternatively or additionally to the means test. Under a merits test, the authorities assess whether the circumstances of the case requires legal aid to be granted.

Factors to take into account

According to Article 4(4) of the Directive, Member States must take into account the following three factors when applying a merit test:

- i. seriousness of the criminal offence;
- ii. the complexity of the case; and
- iii. the severity of the sanction at stake.

⁷⁸ CJEU, [C-156/12 GREP GmbH v Freistaat Bayern](#), Judgment of 13 June 2012.

⁷⁹ CJEU, [C-279/09 - DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland](#), Judgment of 22 December 2010, para. 28 and 60 (emphasis added).

'Where a Member State applies a **merits test**, it **shall** take into account the **seriousness of the criminal offence, the complexity of the case and the severity of the sanction at stake**, in order to determine whether the interests of justice require legal aid to be granted. (...)⁸⁰

In contrast with Article 4(3) which provides a non-exhaustive list of factors to consider for the means test, this list is exhaustive. However, the ECtHR also recognises a fourth criterion: the **defendant's social and personal situation**.⁸¹ As the Directive only sets the minimum standards to be respected and does not limit the rights granted by the ECHR as interpreted by the ECtHR, Member States must also take into account this criterion when applying the Directive.

The Directive does not provide much guidance regarding the **severity of the criminal offence** criterion. As mentioned earlier, minor offences are deemed outside the scope of the Directive in certain circumstances.⁸² Accordingly, Recital 13 of the Directive recognises that the merits test may not be met for certain minor offences:

'The application of this Directive to **minor offences** is subject to the conditions set out in this Directive. Member States should be able to apply a means test, a merits test, or both in order to determine whether legal aid is to be granted. **Provided that this complies with the right to a fair trial, the merits test may be deemed not to have been met in respect of certain minor offences.**'

Regarding the **complexity of the case**, the ECtHR found that legal aid should be provided to individuals who lack the necessary legal training to effectively represent themselves. Even where applicants are educated persons who could understand the proceedings, the fact that they lack legal training to tackle the complexity of the proceedings usually require them to be assisted.⁸³ In *Beuze v. Belgium*, the ECtHR recognised the increasingly complex nature of criminal proceedings and its impact on the vulnerability of suspects:

*'The Court has also recognised that the vulnerability of suspects may be amplified by increasingly complex legislation on criminal procedure, particularly with regard to the rules governing the gathering and use of evidence (...).*⁸⁴

With regard to the **severity of the potential sentence**, the ECtHR held that legal aid may be provided in the interests of justice where deprivation of liberty is at stake.⁸⁵ That is the case even if the person is ultimately not deprived of liberty.⁸⁶ Such approach is based on the assumption that other penalties, such as fines, are less severe. That is of course questionable, in certain circumstances, when a person is particularly poor and facing high fines and costs.⁸⁷

⁸⁰ Emphasis added.

⁸¹ ECtHR, *Quaranta v Switzerland*, App. no. 12744/87, Judgment of 24 May 1991, para. 35.

⁸² See above Part I, Section 2.B. on the scope of the right to legal aid, p. 21

⁸³ ECtHR, *Pham Hoang v. France*, App. no. 13191/87, Judgment of 25 September 1992, para. 40. ECtHR, *Zdravko Stanev v. Bulgaria*, App. no. 32238/04, Judgment of 6 November 2012.

⁸⁴ ECtHR, *Beuze v Belgium*, App. no. 71409/10, Judgment of 9 November 2018, para 127.

⁸⁵ ECtHR, *Benham v. the United Kingdom*, App. no. 19380/92, Judgment of 10 June 1996, paras. 60-61.

⁸⁶ ECtHR, *Zdravko Stanev v. Bulgaria*, App. no. 32238/04, Judgment of 6 November 2012.

⁸⁷ See for instance, Mitali Nagrecha, *The Limits of Fairer Fines: Lessons from Germany*, Criminal Justice Policy Program at Harvard Law School, June 2020.

Finally, and importantly, the ECtHR recognised a fourth criterion: **the defendant’s social and personal situation**.⁸⁸ When assessing the defendant’s social and personal situation, the ECtHR takes into consideration a number of factors, such as the employment situation, criminal records, nationality, drugs addiction and dependency.⁸⁹ In *Quaranta v. Switzerland* the ECtHR specifically considered the vulnerability of the defendant:

‘Such questions, which are complicated in themselves, were even more so for Mr Quaranta on account of his personal situation: a young adult of foreign origin from an underprivileged background, he had no real occupational training and had a long criminal record. He had taken drugs since 1975, almost daily since 1983, and, at the material time, was living with his family on social security benefit.’⁹⁰

Although not expressly required by Article 4(4) of the Directive, taking into account the defendant’s social and personal situation is an obligation under the ECtHR case law. In addition, Article 9 of the Directive requires States to take into account the particular needs of vulnerable suspects and accused persons when implementing the Directive. Accordingly, a means or merits test that does not take into account the personal situation and vulnerability of suspect and accused persons would violate both Article 9 of the Directive and Article 6 of the ECHR.

Time of assessment

Under ECtHR case law, the merits test and in particular the situation of the person must be assessed both when the decision on the application for legal aid is handed down, and also when the court rules on the merits of the case.⁹¹

Burden of proof

When assessing whether there was a violation of the right to legal aid and to the effective assistance of counsel applying the merits test, the ECtHR has held that it is not necessary for the suspect to prove beyond reasonable doubt that the quality of their defence was impaired by lack of legal aid. Instead, it is sufficient to show that the presence of an experienced lawyer would have been necessary.⁹² When applying the merits test, the deciding factor is whether it appears “plausible in the particular circumstances” that a lawyer would have been of assistance.⁹³

Safety net regarding detention

Article 4(4) of the Directive also provides a safety net. Regardless of any other consideration such as the severity of the sentence or the complexity of the case, Article 4(4) considers that the merits test is met in certain situations:

‘(...) In any event, the merits test shall be deemed to have been met in the following situations:

⁸⁸ ECtHR, *Quaranta v Switzerland*, App. no. 12744/87, Judgment of 24 May 1991, para. 35.

⁸⁹ ECtHR, *Zdravko Stanev v. Bulgaria*, App. no. 32238/04, Judgment of 6 November 2012.

⁹⁰ ECtHR, *Quaranta v Switzerland*, App. no. 12744/87, Judgment of 24 May 1991, para. 35.

⁹¹ ECtHR, *Granger v. the United Kingdom*, App. no. 11932/86, Judgment of 28 March 1990, para. 46.

⁹² ECtHR, *Artico v. Italy*, App. no. 6694/74, Judgment of 13 May 1980, para. 35, Series A no. 37.

⁹³ ECtHR, *Artico v. Italy*, App. no. 6694/74, Judgment of 13 May 1980, paras. 34-35; ECtHR, *Alimena v. Italy*, App. no. 11910/85, Judgment of 19 February 1991, para. 20.

- (a) where a suspect or an accused **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 this Directive; and
- (b) **during detention.**'

2. Timing of provision of legal aid

As for the right to a lawyer under the Access to a Lawyer Directive,⁹⁴ legal aid should be provided at the earliest stage of the investigation, usually in police stations, before the first interview. Article 4(5) of the Directive provides:

'Member States shall ensure that legal aid is granted **without undue delay, and at the latest before questioning** by the police, by another law enforcement authority or by a judicial authority, or before the investigative or evidence-gathering acts referred to in point (c) of Article 2(1) are carried out.'

If States are unable to grant legal aid at this stage, Recital 19 of the Directive requires them to have some provisional or emergency legal aid available:

'The competent authorities should grant legal aid without undue delay and at the latest before questioning of the person concerned by the police, by another law enforcement authority or by a judicial authority, or before the specific investigative or evidence-gathering acts referred to in this Directive are carried out. If the competent authorities are not able to do so, they should at least grant emergency or provisional legal aid before such questioning or before such investigative or evidence-gathering acts are carried out.'

⁹⁴ See Fair Trials' [Toolkit on the Access to a Lawyer Directive](#).

IV. THE RIGHT TO LEGAL AID IN EAW PROCEEDINGS

A. INTRODUCTION

In the context of European Arrest Warrant ('EAW') proceedings, the Access to a Lawyer Directive foresees a clear role for lawyers in the issuing state. The rights to be informed, advised, and defended by a lawyer in criminal proceedings are extended to EAW proceedings. As such, EU law establishes the right to 'dual' legal representation, namely, the right to a lawyer in both the executing and the issuing Member States.⁹⁵ Accordingly, the right to legal aid exists in EAW proceedings, in both the issuing and the executing states.

Irrespective of whether the person can afford a lawyer, systemic implementation and practical problems exist with the appointment of lawyers in the issuing Member State. Authorities simply inform the requested persons of their right to access a lawyer, but provide no practical assistance; leaving it for the requested persons, their relatives or the lawyer of the executing state to make the necessary arrangements to find a lawyer in the issuing Member State.⁹⁶

B. RELEVANT PROVISIONS

1. The right to dual representation

The right to legal aid in EAW proceedings mirrors the right to a lawyer in EAW proceedings under the Access to a Lawyer Directive.⁹⁷ Article 5 of the Directive therefore imposes legal aid obligations on both the issuing and executing Member States.

The right to legal aid in the executing state

Article 5(1) provides the right to legal aid in the executing state:

'The executing Member State shall ensure that requested persons have a right to legal aid upon arrest pursuant to a European arrest warrant until they are surrendered, or until the decision not to surrender them becomes final.'

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 a lawyer in both the issuing and executing states. If the arrested person chooses to exercise their 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, and the latter must in turn provide the requested person the necessary information to facilitate their access to a lawyer. This requires effective legal aid systems and communication between Member States.

⁹⁵ See also European Commission, [Commission Notice — Handbook on how to issue and execute a European arrest warrant](#), 6 October 2017 (OJ C 335, 6.10.2017) Section 11.3.

⁹⁶ European Union Agency for Fundamental Rights (FRA), [Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings](#), Report, 2019, pp 64-65.

⁹⁷ Article 10 of the Access to a Lawyer Directive. See Fair Trials' [Toolkit on the Access to a Lawyer Directive](#), p. 22 and ff.

The right to a lawyer in the issuing state

Article 5(2) of the Directive establishes that requested persons also have the right to legal aid in the issuing Member State **for the purpose of participating in a criminal prosecution** in the executing Member State and in so far as legal aid is **necessary to ensure effective access to justice**.

The issuing Member State shall ensure that requested persons who are the subject of European arrest warrant proceedings for the purpose of conducting a criminal prosecution and who exercise their right to appoint a lawyer in the issuing Member State to assist the lawyer in the executing Member State in accordance with Article 10(4) and (5) of Directive 2013/48/EU have the right to legal aid in the issuing Member State for the purpose of such proceedings in the executing Member State, in so far as legal aid is necessary to ensure effective access to justice.

Article 5(2) 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 issuing State **only to serve a sentence**.

Recital 21 of the Directive explains what can be considered **necessary to ensure effective access to justice**:

'Requested persons should have the right to legal aid in the executing Member State. In addition, requested persons who are the subject of European arrest warrant proceedings for the purpose of conducting a criminal prosecution and who exercise their right to appoint a lawyer in the issuing Member State in accordance with Directive 2013/48/EU should have the right to legal aid in that Member State for the purpose of such proceedings in the executing Member State, in so far as legal aid is necessary to ensure effective access to justice, as laid down in Article 47 of the Charter. **This would be the case where the lawyer in the executing Member State cannot fulfil his or her tasks as regards the execution of a European arrest warrant effectively and efficiently without the assistance of a lawyer in the issuing Member State.** Any decision regarding the granting of legal aid in the issuing Member State should be taken by an authority that is competent for taking such decisions in that Member State, on the basis of criteria that are established by that Member State when implementing this Directive.'

The EAW Framework Decision adds that 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".⁹⁸ In practice, there are numerous ways in which a lawyer in the issuing state could assist in order to exercise an effective defence in the executing state. The lawyer in the issuing state might be able to, amongst other things:

- provide information about the prosecution's case that is of relevance to the EAW proceedings;

⁹⁸ Council of the European Union, Council Framework Decision 2002/584/JHA, of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the framework decision ([OJ L 190, 18.7.2002, p. 1-20](#)), Article 11.

- provide information about the criminal justice system and the laws of the issuing state that helps the requested person challenge their 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 of the ECHR);
- advocate for the withdrawal of the EAW and/or by facilitating alternatives to the EAW; and/or
- advise on the likely impact of the requested person's EAW proceedings on criminal proceedings.⁹⁹

2. Possibility to apply a means test

Article 5(3) of the Directive establishes that Member States may apply the means test in accordance with Article 4(3) of the Directive (see further above Section III. *Access to the right to legal aid in criminal proceedings*) when deciding whether to grant legal aid in the context of EAW proceedings:

'The right to legal aid referred to in paragraphs 1 and 2 may be subject to a means test in accordance with Article 4(3), which shall apply mutatis mutandis.'

Difficulties in proving a lack of sufficient means may be exacerbated in the context of EAW proceedings, when evidence of indigency is located in another country.

⁹⁹ See Fair Trials' [Online Training on Cross-border cases and Human Rights](#).

V. EFFECTIVENESS AND QUALITY OF LEGAL AID SERVICES AND SYSTEMS

A. INTRODUCTION

Although legal services are provided by private agents – lawyers – it is the responsibility of Member States to ensure the effectiveness of the right to a lawyer and the right to legal aid. The effectiveness of the right to legal aid depends largely on the legal aid system, appointment and quality control processes put in place by Member States.

Research has shown that whilst the law in many Member States “provides that suspects who are arrested or detained have a right of access to a lawyer at the investigative stage, (...) a relatively small proportion of arrested and/or detained suspects actually have a lawyer during their initial detention.”¹⁰⁰ This is due to a variety of reasons, including systemic issues in appointing lawyers, and in particular legal aid lawyers, in due time. They also include a lack of clarity about eligibility to legal aid, indigent suspect’s fear of paying costs for their defence and the lack of an effective duty scheme of legal aid.

Member States have adopted varied systems to guarantee early access to a lawyer, including in legal aid cases. Examples include:

- providing a suspect in custody with a list of legal aid lawyers;
- a centralised appointment system co-ordinated with the bar association whereby police, lawyers and investigating judges are connected by phone or via sophisticated online platforms; and
- systems allowing for continued representation by a duty lawyer throughout the criminal proceedings, although others do not.

According to the Inside Police Custody Study published in 2018: “transposition [of the Directive] will require extensive modification of laws and procedures in some of the countries; in a number of countries in the study, the lack of an effective legal aid scheme is one of the reasons why, in practice, very few suspects have a lawyer at the investigative stage unless they pay privately”.¹⁰¹

Articles 6 and 7 of the Directive provide obligations for Member States with respect to the effectiveness and quality of legal aid systems and services. There is a clear link between the effectiveness and fairness of the decision-making process and the quality of legal aid systems and services. This section addresses both issues.

¹⁰⁰ JUSTICIA Network, [Inside Police Custody 2](#), December 2018, p. 47

¹⁰¹ *Ibid.*, p. 45.

B. RELEVANT PROVISIONS

1. Decision making process regarding the granting of legal aid

Article 6 of the Directive requires due process and transparency in decision making regarding granting of legal aid. It draws in part from the ECtHR case law, according to which a legal aid system must ensure: that decisions on granting legal aid are taken by a competent and independent authority; that suspects and accused persons receive a decision in writing denying access to legal aid; and that there is a right to appeal the decision refusing legal aid. The Directive also requires states to take into account the specific vulnerability of suspects and accused persons, particularly with respect to how legal aid is requested.

Article 6 of the Directive provides:

‘1. Decisions on whether or not to grant legal aid and on the assignment of lawyers shall be made, without undue delay, by a competent authority. **Member States shall take appropriate measures to ensure that the competent authority takes its decisions diligently, respecting the rights of the defence.**

2. Member States shall 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.**’

Independence of the competent authority

Legal aid systems must ensure that decisions on granting legal aid are taken by a competent and independent authority. Recital 24 of the Directive provides:

‘Without prejudice to provisions of national law concerning the mandatory presence of a lawyer, a competent authority should decide, without undue delay, whether or not to grant legal aid. The competent authority should be an **independent authority** that is **competent** to take decisions regarding the granting of legal aid, **or a court**, including a judge sitting alone. In urgent situations the **temporary involvement** of the police and the prosecution should, however, also be possible in so far as this is necessary for granting legal aid in a timely manner.’

The authority responsible for deciding the allocation of legal aid must offer “substantial guarantees to protect [...] from arbitrariness.”¹⁰² A decision on legal aid may be considered arbitrary when the composition of the decision-making authority is likely to be biased.¹⁰³ In that respect, Recital 24 of the Directive 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.

Guideline 11 of the UN Principles and Guidelines provides useful guidance in that respect.

¹⁰² ECtHR, [Anghel v. Italy](#), App. no. 5968/09, Judgement of 25 June 2013, para 51.

¹⁰³ ECtHR, [Santambrogio v. Italy](#), App. no. 61945/00, Judgement of 21 September 2004, para 55; ECtHR, [Essaadi v. France](#), App. no. 49384/99, Judgement of 26 September 2002.

Guideline 11 of the UN Principles and Guidelines

To ensure the effective implementation of nationwide legal aid schemes, States should consider establishing a legal aid body or authority to provide, administer, coordinate and monitor legal aid services. Such a body should:

- (a) Be free from undue political or judicial interference, be independent of the Government in decision-making related to legal aid and not be subject to the direction, control or financial intimidation of any person or authority in the performance of its functions, regardless of its administrative structure;
- (b) Have the necessary powers to provide legal aid, including but not limited to the appointment of personnel; the designation of legal aid services to individuals; the setting of criteria and accreditation of legal aid providers, including training requirements; the oversight of legal aid providers and the establishment of independent bodies to handle complaints against them; the assessment of legal aid needs nationwide; and the power to develop its own budget;
- (c) Develop, in consultation with key justice sector stakeholders and civil society organizations, a long-term strategy guiding the evolution and sustainability of legal aid;
- (d) Report periodically to the responsible authority.

Information about the right to legal aid

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 orally and in writing of 'any entitlement to free legal advice and the conditions for obtaining such advice'.¹⁰⁴ 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 such services should be publicly available and easily accessible by all.¹⁰⁵ The Commission's Recommendation on Legal Aid sets out the obligation to provide information on the right to legal aid as well as how suspects or accused persons and requested persons access it:

'[i]nformation 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.'¹⁰⁶

¹⁰⁴ 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](#)), Article 3 (1)(b).

¹⁰⁵ UN Principles and Guidelines, Guideline 2.

¹⁰⁶ European Commission, Recommendation of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings ([OJ C 378, 24.12.2013, p. 11–14](#)), Section 2 (5).

Written decision

The ECtHR has held that the decision on whether or not to grant legal aid must not be arbitrary.¹⁰⁷ 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.¹⁰⁸ With regards to the right to be notified of the decision to refuse legal aid, the Commission's Recommendation on Legal Aid 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.¹⁰⁹ Suspects or accused persons and requested persons should also have a right to review decisions rejecting their application for legal aid in full or in part.

Vulnerable persons

Granting of legal aid should not be made dependent on a formal request by persons who are particularly vulnerable. Recital 18 of the Directive provides:

'Member States should lay down practical arrangements regarding the provision of legal aid. Such arrangements could determine that legal aid is granted following a request by a suspect, an accused person or a requested person. **Given in particular the needs of vulnerable persons, such a request should not, however, be a substantive condition for granting legal aid.'**

The obligation for States to be pro-active in granting legal aid to vulnerable persons also derives from Article 9 of the Directive which provides:

'Member States shall ensure that the particular needs of vulnerable suspects, accused persons and requested persons are taken into account in the implementation of this Directive.'

2. Quality of legal aid systems and services

Article 7(1) of the Directive provides an obligation to ensure the quality of legal aid systems and services:

'Member States shall take necessary measures, including with regard to funding, to ensure that: (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. [...]'

The obligation under article 7(1) refers to the effectiveness of the system which must be of adequate quality to ensure the protection of the right to a fair trial or "the fairness of the proceedings". The

¹⁰⁷ ECtHR, [Tabor v. Poland](#), App. no. 12825/02, Judgement of 27 June 2006, paras. 44-46; ECtHR, [Wersel v. Poland](#), App. no. 30358/04, Judgement of 13 September 2011, para 52-54.

¹⁰⁸ Ibid, para 44-46.

¹⁰⁹ European Commission, Recommendation of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings ([OJ C 378, 24.12.2013, p. 11-14](#)), Section 2 (14).

Directive provides some guidance, in line with the ECtHR case law, on how to protect individuals from arbitrary decisions to grant or refuse legal aid. This aspect of quality is dealt with above in relation to decision making. This aside, the Directive does not provide any guidance except that the system must enable the person to exercise their fair trial rights.

The only specific quality criterion identified by the Directive is the continuity of legal representation. Recital 25 of the Directive provides:

'Where legal aid has been granted to a suspect, an accused person or a requested person, one way of ensuring its effectiveness and quality is to facilitate continuity in his or her legal representation. In that respect, Member States should facilitate **continuity of legal representation throughout the criminal proceedings**, as well as — where relevant — in European arrest warrant proceedings.'

Recent research has documented the importance of the principle of continuity of representation in four EU states: "[t]he results in general highlighted that continuity of representation strengthens the relationship and mutual trust between client and lawyers and saves time in preparing for a case."¹¹⁰ The UNODC has also provided guidance to ensure the quality of legal aid systems in criminal justice.¹¹¹

Quality control and standards

Article 6(4) provides:

'Member States shall take the necessary measures to ensure that suspects, accused persons and requested persons have the right, upon their request, to have the lawyer providing legal aid services assigned to them replaced, where the specific circumstances so justify.'

The Directive does not define what constitutes 'quality' legal aid services, except for the objective of legal aid which is to guarantee access to a lawyer in its full extent. The ECtHR case law does not provide much assistance in that respect.

The ECtHR has underlined that assigning a lawyer to represent a person does not in itself guarantee the effective assistance of a lawyer.¹¹² It defined the aims and content of the right to a lawyer in *Beuze v. Belgium*.¹¹³ According to the ECtHR, a State is liable under Article 6 § 3 c) only if it has not intervened despite State authorities (including courts and tribunals) having been sufficiently informed of the failure of a lawyer.¹¹⁴ In such cases, States have an obligation to intervene by (i)

¹¹⁰ *Survey on Best Practice Standards of Legal Aid in Criminal Proceedings*, "Enhancing the Quality of Legal Aid – General Standards for Different Countries": <http://qualaid.vgtpt.lt/en/outcomes>

¹¹¹ United Nations Office on Drugs and Crime (UNODC), *Ensuring Quality of Legal Aid Services in Criminal Justice Processes*, 2019, p. 8.

¹¹² *Siałkowska v. Poland*, para. 110 and 116s

¹¹³ ECtHR, *Beuze v Belgium*, App. no. 71409/10, Judgement of 9 November 2018, paras 132-136.

¹¹⁴ ECtHR, *Artico v. Italy*, App. no. 6694/74, Judgement of 13 May 1980; ECtHR, *Daud v. Portugal*, Judgement of 21 April 1998, para. 38.

replacing the lawyer¹¹⁵ or (ii) enabling or encouraging the lawyer to carry out their work to an appropriate standard.¹¹⁶ This case law underlines the obligation on states to put in place mechanisms to control the quality of legal aid assistance (in particular) and systems to intervene effectively.

In that regard, the Commission's Recommendation on Legal Aid 2013 also establishes that Member States should put in place systems to ensure the quality of legal aid lawyers and to allow competent authorities to replace legal aid lawyers or require them to fulfil their obligations, if those lawyers fail to provide adequate legal assistance.¹¹⁷

The UN has published extensive guidance on this topic.¹¹⁸ The Special Rapporteur on the independence of judges and lawyers underlines that the effectiveness of legal aid should be 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".¹¹⁹

Training

Adequate training should be provided to staff involved in legal aid decision-making. Article 7(2) and (3) of the Directive provide:

'2. Member States shall ensure that adequate training is provided to staff involved in the decision-making on legal aid in criminal proceedings and in European arrest warrant proceedings.

3. With due respect for the independence of the legal profession and for the role of those responsible for the training of lawyers, Member States shall take appropriate measures to promote the provision of adequate training to lawyers providing legal aid services.'

Recital 26 of the Directive specifies:

'Adequate training should be provided to staff involved in the decision-making on legal aid in criminal proceedings and in European arrest warrant proceedings. Without prejudice to the judicial independence and differences in the organisation of the judiciary across the Member States, 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.'

¹¹⁵ ECtHR, [Artico v. Italy](#), App. no. 6694/74, Judgement of 13 May 1980.

¹¹⁶ ECtHR, [Goddì c. Italy](#), App. no. 8966/80, Judgement of 9 April 1984, para. 31.

¹¹⁷ European Commission, Recommendation of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings ([OJ C 378, 24.12.2013, p. 11–14](#)), Section 3.

¹¹⁸ United Nations Office on Drugs and Crime (UNODC), [Ensuring Quality of Legal Aid Services in Criminal Justice Processes](#), 2019, p. 8.

¹¹⁹ *Ibid*, para. 42.

Member States are encouraged, under the 2013 Commission Recommendation, to ensure that both 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, 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”.¹²⁰

Lawyers’ Fees

Article 7(1) of the Directive provides an obligation to ensure the quality of legal aid systems and services including by allocating sufficient funding:

‘Member States shall take necessary measures, including with regard to funding, to ensure that [...]’

Fees paid to legal aid lawyers have a direct impact on quality of legal services.¹²¹ 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. 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”.¹²²

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. The UN Human Rights Committee recommended that “legal aid should enable counsel to prepare his client’s defence in circumstances that can ensure justice”, which includes “provision for adequate remuneration for legal aid”.¹²³ Other human rights bodies have 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.¹²⁴

¹²⁰ European Commission, Recommendation of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings ([OJ C 378, 24.12.2013, p. 11–14](#)).

¹²¹ United Nations Human Rights Committee, [Special Rapporteur on the independence of judges and lawyers, Gabriela Knaut](#), Report of 2013 on legal aid, 23rd session of the HRC, A/HRC/23/43, para 73.

¹²² UN Principles and Guidelines, Guideline 12.

¹²³ United Nations Human Rights Committee, [Carlton Reid v. Jamaica](#), Communication No 250/1987, para 13.

¹²⁴ United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture, [Fifth Annual Report on the SPT covering the period January-December 2011](#), 19 March 2012, UN Doc CAT/C/48.3, para. 79. See also CPT, [Report on the visit to Croatia carried out by the CPT from 1 to 9 December 2003](#), CPT/Inf (2007), para. 24; CPT, [Report on the visit to Croatia carried out by CPT from 4 to 14 May 2007](#), CPT/Inf (2008), para 19; CPT, [Report on the visit to Hungary carried out by the CPT from 5 to 16 December 1999](#), CPT/Inf (2001), para. 32; CPT, [Report on the visit to Hungary carried out by the CPT from 30 March to 8 April 2005](#), CPT/Inf (2006), para. 23; CPT, [Report on the visit to Poland carried out by the CPT from 4 to 15 October 2004](#), CPT/Inf (2006) para. 21.

VI. THE RIGHT TO AN EFFECTIVE REMEDY

Article 8 of the Directive provides:

'Member States shall 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'.

Recital 27 of the Directive provides:

'The principle of effectiveness of Union law requires that Member States put in place adequate and effective remedies in the event of a breach of a right conferred upon individuals by Union law. 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.'

Article 47 of the EU Charter of Fundamental Rights also puts a clear obligation on EU Member States to ensure an effective remedy for infringement of rights protected by EU law. The CJEU clearly established the EU law principle of "effective judicial protection of individual rights under EU law". It requires that both the CJEU and national courts must implement an effective remedy and a fair trial when rights are violated, directly referring to Article 47 of the EU Charter of Fundamental Rights.¹²⁵

Similarly to each of the previous Roadmap Directives, the Directive however 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 at the discretion of the Member States to decide what the appropriate remedy should be. As stated in Fair Trials' position paper, there should be minimum standards regarding remedies where the 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 or cost recovery provisions are unclear or portrayed in ways that tend to induce waivers of the right to access a lawyer.¹²⁶

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.¹²⁷ 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.¹²⁸ 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.

¹²⁵ Article 47 of the Charter.

¹²⁶ Fair Trials & LEAP, Initial Observations on the European Parliament's Draft Report on the Proposed Directive on Legal Aid, December 2014.

¹²⁷ UN Principles and Guidelines.

¹²⁸ ECtHR, [Salduz v. Turkey](#), App. no. 36391/02, Judgment of 27 November 2008.

FINAL REMARKS

The right to legal aid is an essential safeguard in criminal proceedings, which enables the exercise of other fair trial rights, in particular the right to a lawyer. The lawyer's presence at the initial stages of the criminal process serves as a 'gateway' to other rights and helps prevent prejudice to the suspect's defence. The Directive provides for the right to free legal assistance for persons who do not have the means to afford a lawyer. For most suspects and accused persons, the right to legal aid is a necessary precondition of all the rights that derive from the right to a lawyer.

The transposition of the Directive in the law of Member States has broadly been completed. However, as shown by [Fair Trials' research](#), the [Implementation report](#) and [FRA's report on rights in practice](#), there are still many outstanding issues that undermine the effectiveness of the right to legal aid.

It is the role of practitioners to use the Directive and to make sure that it is enforced by domestic courts across the EU. We hope that this toolkit will support the efforts of lawyers across Europe, all of whom are invited to:

We hope that this toolkit will support the efforts of lawyers across Europe and invite you to:

- [Contact us](#) for assistance, support and comparative best practice on the Directive.
- Let us know if courts (be they apex or first-instance) issue positive decisions applying 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 [Preliminary reference Toolkit](#) and our online training [video on the preliminary ruling procedure in criminal practice](#).
- Visit our website www.fairtrials.org regularly for updates on key developments relating to the Directives, and news about in-person trainings and [updates on relevant case-law](#).
- 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 Movement](#)" for concrete ideas on articles, litigation, conferences etc.