



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 11 December 2013

**Interinstitutional File:
2013/0409 (COD)**

**17635/13
ADD 2**

**DROIPEN 160
COPEN 237
CODEC 2931**

COVER NOTE

from: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 28 November 2013

to: Mr Uwe CORSEPIUS, Secretary-General of the Council of the European
Union

No Cion doc.: SWD(2013) 477 final

Subject: Commission Staff Working Document
Executive Summary of the Impact Assessment accompanying the

- Proposal for a Directive of the European Parliament and of the Council on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings
- Commission Recommendation of 27.11.2013 on the right to legal aid for suspects or accused persons in criminal proceedings

Delegations will find attached Commission document SWD(2013) 477 final.

Encl.: SWD(2013) 477 final



Brussels, 27.11.2013
SWD(2013) 477 final

COMMISSION STAFF WORKING DOCUMENT
EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT

Accompanying the document

Directive of the European Parliament and of the Council
on provisional legal aid for suspects or accused persons deprived of liberty and legal aid
in European arrest warrant proceedings

{ COM(2013) 824 final }
{ SWD(2013) 476 final }
{ SWD(2013) 499 final }

COMMISSION STAFF WORKING DOCUMENT

EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT

Accompanying the document

Directive of the European Parliament and of the Council

on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings

1. PROBLEM DEFINITION

The **general problem** addressed in this impact assessment is two-fold: (a) there is insufficient protection of fundamental rights of suspected and accused persons in the EU and (b) there is a need to strengthen mutual trust between Member States as a result of deficient standards on legal aid.

There is currently no EU law instrument that provides a right for suspected and accused persons to legal aid in criminal proceedings. Despite common standards at European level¹ and the fact that all Member States do have a legal aid system, there is a high level of variation between the different Member States' legal aid systems in law and practice. This leads to shortcomings in the protection of right to a fair trial. The limited right to legal aid in some Member States has the potential to undermine mutual trust and mutual judicial cooperation in the area of criminal proceedings and to frustrate the fair trial rights in the Charter of Fundamental Rights of the European Union (the Charter).

The right to legal aid is intrinsically linked to the right to access to a lawyer. For persons without means and in certain situations (*e.g.* during deprivation of liberty), access to a lawyer cannot be effective unless the State practically and financially provides legal aid to ensure legal assistance. While the proposed EU Directive on access to a lawyer², which is pending formal adoption, provides for the substantive right of access to a lawyer, it does not contain any provisions on who pays or provides for the lawyer. Thus, without EU intervention to establish common minimum standards on legal aid, the right of access to a lawyer as provided for in the Directive risks not being practical and effective.

The lack of adequate standards on legal aid affects the mutual trust between judicial authorities and undermines judicial cooperation between Member States. This is detrimental to the mutual recognition of judicial decisions and judgments and other instances of judicial cooperation between Member States and undermines confidence in cross-border instruments. If judicial authorities doubt the compliance with fair trial rights by another jurisdiction and believe that a suspect or accused risks not getting effective access to legal advice because of insufficient legal aid, the requests for judicial cooperation from that jurisdiction can be denied. As the principle of mutual recognition is the cornerstone of the area of Justice, it is necessary to enhance mutual trust for its effectiveness.

¹ Article 47 of the EU Charter on Fundamental Rights and Article 6(3)(c) of the European Convention on Human Rights (ECHR).

² COM(2011) 326 final, 8.6.2011.

The **specific problem** addressed is that there is insufficient access to effective legal aid for suspects or accused persons in the EU, which is detrimental to the mutual trust and the smooth working of the mutual recognition system. There are two underlying causes to this problem:

- Insufficient possibilities to access legal aid in proceedings under the European Arrest Warrant (EAW) in the Member States;
- Legally aided assistance is not always available at the early stages of the proceedings, especially before a decision on legal aid has been made, although the right of access to a lawyer applies from the time a person is made aware by the authorities of being a suspect;

In addition, there are two further issues that also have potential to undermine mutual trust:

- Too restrictive eligibility criteria to qualify for legal aid;
- Shortcomings in quality and effectiveness of legal assistance provided through legal aid schemes.

First cause – Legal Aid in EAW proceedings: The Directive on Access to a Lawyer will provide a right to *dual representation* in extradition proceedings under the EAW.³ When a person is arrested under an EAW he/she has the right to access a lawyer in the *executing* Member State for the extradition proceedings and the right to appoint a second lawyer in the Member State that *issued* the EAW for liaising with the lawyer in the executing Member State. However, the Directive does not require that such legal assistance is covered by legal aid. No Member State currently grants legal aid for a lawyer in the issuing Member State. The fact that the right to legal aid is still exclusively regulated by national law in the executing and issuing Member States, despite the right to access a lawyer provided by the Directive, will affect the effectiveness of this right and its consistent application. This may prejudice the rights of the defendant in EAW proceedings, cause delays and extra costs and might ultimately undermine the mutual trust necessary for the smooth working of the EAW instrument.

Second cause – Timing: It is of utmost importance to have access to a lawyer as early on as possible in the investigative stages of the proceedings to protect the suspected persons' fair trial rights, to ensure the quality of evidence and the protection against intimidation and ill-treatment. Indeed, the Directive on Access to a Lawyer ensures legal assistance from the moment when someone is made aware by the authorities of being suspected or accused of a criminal offence – but it does not guarantee that such assistance is covered by legal aid. A number of Member States do not have a functioning state sanctioned system in place to ensure that there is effective access to a lawyer free of charge at the earliest stages of the proceedings, especially for detained persons. These shortcomings have been widely recognised by stakeholders⁴ and seriously undermine the core of the right of access to a lawyer.

Third cause – Eligibility: As foreseen in the Charter and the ECHR, Member States may use two conditions to determine whether a person has a right to free legal aid: the person has

³ EAW proceedings are not per se considered as “criminal proceedings” and not covered by the ECHR.

⁴ See e.g. Schumann, Bruckmüller, Soyer, *Pre-Trial Emergency Defence* Intersentia 2012. Cape et al, *Effective Criminal Defence in Eastern Europe*, LARN 2012. See also the FTI Report *Defence Rights in the EU*, October 2012, paras. 71-73 reporting numerous problems with the duty lawyer schemes in the Member States and the recent report by Justicia, p. 46. Conference Report from the Warsaw legal aid conference. See also *Improving pre-trial Justice*, p. 38 by Open Society Institute Sofia 2008, *Report on Civic monitoring of police stations* (with relation to BU).

insufficient means (means test); and the interest of justice requires legal aid (merits test).⁵ There is a wide variation in how the eligibility testing is done in the Member States. There is also a broad divergence in how the criteria of "means" and "merits" are understood. Restrictive eligibility criteria result in many suspects or accused persons without sufficient resources not benefitting from legal aid even when it is in the interest of justice. Consequently, their rights of defence will not be properly guaranteed.

Fourth cause – Quality: The ECtHR has held that the State's obligation to provide free legal assistance is not fulfilled by merely appointing a publicly funded lawyer; it must ensure that the assistance provided by legal aid lawyers is practical and effective, and of a certain quality.⁶ The quality of legally aided assistance can be ensured through: (1) qualification and accreditation; (2) training of lawyers and (3) monitoring of legally aided work. In many Member States, there is little or almost no quality assurance in place.

Who is affected by the measures? Potentially all suspects and accused persons in criminal proceedings in the EU are affected. Around 10 million criminal proceedings take place in the EU every year but there is no data available on the number of proceedings in which a suspect or accused person was denied legal aid. The measures also affect lawyers who provide or could provide legally aided assistance to these persons.

2. ANALYSIS OF SUBSIDIARITY

There is a need for EU action based on the following three factors:

- (1) The problem has a cross-border dimension because if certain Member States do not respect the procedural right to legal aid, this creates problems for other Member States.⁷
- (2) EU citizens can be involved in criminal proceedings outside their own Member State, and the needs of these suspects or accused persons must to be tackled at EU level.
- (3) The ECHR already sets European-wide fair trial standards but its enforcement mechanisms do not guarantee a sufficient and consistent level of protection or compliance by its signatory States, including EU Member States.

3. OBJECTIVES OF EU INITIATIVE

Any measure(s) taken at EU level on legal aid should achieve the following general, specific and operative objectives, which have been developed on the basis of the general and specific problems identified above.

General:	<ul style="list-style-type: none"> • To guarantee for EU citizens an effective high-level standard of protection of fundamental procedural rights in criminal proceedings. • To enhance mutual trust thus facilitating mutual recognition of judgments and judicial decisions in the EU and improving judicial cooperation in the EU.
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⁵ The ECHR and the Charter contains a cumulative means and a merits test and you need to qualify under both to obtain legal aid. It is thus accepted that there are situations where a suspected person with insufficient resources does not qualify for legal aid, for example because of the non-complexity of the case or because the non-seriousness of the sanction which can be imposed.

⁶ *Pavlenko v. Russia*, Application no. 42371/02, judgment of 4 October 2010, para. 99.

⁷ For example, if a judicial authority is requested to execute a court ruling from another Member State where standards are not adequate, it may either refuse to do so, or may request additional information which would result in delayed execution.

Specific:	<ul style="list-style-type: none"> • To ensure that suspected and accused persons, have access to and are afforded adequate legal aid throughout criminal proceedings, at a level that ensures an enhanced mutual trust. • To ensure that the right of access to a lawyer, as provided for by the Directive on the Right of Access to a Lawyer, for suspected and accused persons and persons subject to EAW proceedings is made effective through ensuring legal aid.
Operational:	<ol style="list-style-type: none"> 1) To ensure that legal aid is available to persons subjected to an EAW, 2) To ensure access to legally aided assistance ("emergency defence") at the first stages of the proceedings, 3) To ensure effective access to legal aid for suspected and accused persons that do not have sufficient means (means test), and where it is necessary to ensure effective access to justice (merits test), 4) To ensure that Member States take measures to improve the quality of legally aided services.

4. POLICY OPTIONS

Four main policy options were considered in detail:

Option 1 - Status quo	Retention of <i>status quo</i>. No action at EU level.
Option 2 – Low level of obligation	Non-legislative action: Actions on capacity building, information provision, exchange of best practices between the Member States (forming expert group to compile best practices into practitioners' guidelines).
Option 3 – Medium level of obligation	Legal instrument: Sub-option 3(a) through a Recommendation; Sub-option 3(b) through a Directive; or a combination of both: Partly setting minimum qualitative standards as provided by ECHR and the Charter, partly seeking to enhance predictability and raising national standards. The legal instrument would in particular include provisions ensuring that suspects and accused may benefit from legal aid in EAW proceedings and at the first stages of the procedure. However, there would be no detailed prescriptive action, leaving Member States' discretion for implementation. These two sub-options may be combined by providing for some elements in a binding legal instrument re, while providing for other elements in a non-binding instrument.
Option 4 – High level of obligation	Legal instrument: Through a Directive providing detailed minimum harmonised criteria on access and quality of legal aid, to some extent going beyond the qualitative standards set out in the ECHR.

5. ASSESSMENT OF IMPACTS

5.1. Effectiveness in achieving policy objectives

- **Option 1:** The insufficient access to legal aid would remain the same or worsen.

- **Option 2:** Low incentive for Member States to improve access to legal aid, given the absence of legislative action.
- **Option 3(a)** – Recommendation: Medium impact as this option will contribute to the achievement of the general objectives. However, given the non-binding nature of this instrument, there is a risk that this option would not have any tangible impact since it might not be implemented fully by all Member States.
- **Option 3(b)** – Directive: High impact as this option will lead to a significant improvement through legally binding and enforceable common minimum standards on legal aid.
- **Option 4:** Very high impact as it would have all the strength of the legislative instrument (binding nature, high enforceability) and would have a significant positive impact on meeting the policy objective, but it will put a high burden on Member States. It will significantly improve mutual trust and cooperation.

5.2. Impact on Fundamental Rights

- **Option 1:** No impact since access to legal aid will continue to be protected at Member State level, through ECHR and the Charter, and the current problems of limited protection would continue.
- **Option 2:** Low impact since the enhancement of the fair trial and defence rights will depend on how Member States will comply with best practice examples or guidelines, how information on legal aid will be diffused and how the training is carried out.
- **Option 3(a)** – Recommendation: Positive but low-medium impact on fundamental rights and depending on Member States' implementation. Some improvement expected in fair trial and defence rights, but the absence of an enforcement method might only slightly improve the situation.
- **Option 3(b)** – Directive: High impact as this option would have the same positive impact as option 3(a) but through a legally binding measure.
- **Option 4:** Significant positive impact on the fundamental rights of suspects and accused persons.

5.3. Social Impacts

- **Option 1:** No impact.
- **Option 2:** Positive but limited impact through awareness raising, capacity building and training.
- **Option 3(a)** – Recommendation: If properly implemented by Member States, this option will have positive social impacts (e.g. equal access to justice by ensuring legally aided assistance and improved quality of legally aided assistance).
- **Option 3(b)** – Directive: High impact as this option would have the same positive impact as option 3(a) but through a legally binding measure.
- **Option 4:** High social impacts as it will widen access to legal aid and consequently the possibility to a fair trial for indigent suspected and accused persons.

5.4. Impact on domestic justice systems

- **Option 1:** No impact – national systems may evolve towards more convergence following ECtHR jurisprudence not in the short to medium term.
- **Option 2:** The overall impact will be limited since the actions are non-binding and do not directly aim at achieving common minimum standards throughout the EU.
- **Option 3(a)** – Recommendation: Due to its non-binding nature, it is difficult to foresee the impact, which depends on Member States' willingness to comply. If properly implemented, this option would require changes in Member States' systems that currently have low standards on legal aid.

- **Option 3(b)** – Directive: Medium-High impact as this option would require legislative reforms in a number of Member States but allowing for certain flexibility through generally worded obligations.
- **Option 4**: Most significant impacts on the domestic justice systems since the judiciary would have all the necessary tools to uphold the right to legal aid at a high standard. Significant legislative reforms would need to be carried out to all Member States' legal aid systems to comply with the instrument.

5.5. Financial and economic impact

- **Option 1**: There are no immediate financial burdens associated with this option.
- **Option 2**: The costs for this option will be limited and will be borne by both the Member States and the EU. The total maximum financial costs are estimated to be approximately **€23 million**.
- **Option 3(a)** – Recommendation: If Member States comply with the recommendation, the costs would be the same as under option 3(b).
- **Option 3(b)** – Directive: Total costs are expected to be in the **medium range** of the four options and will mostly be borne by public administrations at local and national level. Total costs range from **€ 247 to 382 million**. They would comprise the costs for the following measures:
 - Legal aid in EAW proceedings: **€0.13-0.24 million (EU wide/year)**
 - Emergency defence system: **€52-81 million (EU wide/year)**
 - Common minimum eligibility criteria: **€181-287 million (EU wide/year)**
 - Quality control: **€13.4 million (EU wide/year)**
- **Option 4**: Total costs are expected to be the **highest** of the four options and will mostly be borne by public administrations at local and national level. Total costs range from **€1,594 to 1,716 million**. They would comprise the costs for the following measures:
 - Legal aid in EAW proceedings: **€0.8-1.1 million (EU wide/year)**
 - Emergency defence system: **€180-210 million (EU wide/year)**
 - Common minimum eligibility criteria: **€ 1.4 billion** (plus €2 million for mandatory legal aid for children) **(EU wide/year)**
 - Quality control: **€13.4 million (EU wide/year)**

For options 3 and 4 the costs do not take into account possible cost savings resulting from a reduction in current costs of ECtHR and domestic appeals, re-trials, aborted proceedings due to inadequate legal representation.

6. COMPARISON OF OPTIONS/PREFERRED OPTION

There is no preferred option.

7. MONITORING AND EVALUATION

If the preferred option is legislative action in form of a Directive, the timeframe for transposition of the Directive by Member States will be 18 months from its entry into force. Member States should be asked to collect reliable data to assist in this process as there is currently a lack of such data. If the preferred option is action in form of a Recommendation, the Commission would assess its implementation four years from the publication at the latest.

Moreover, the Commission envisages carrying out a specific empirical study with emphasis on data collection 3-5 years into the application of each instrument of the Roadmap on Procedural Rights. In order to gain in-depth quantitative and qualitative insights into the effectiveness of the proposals, specific indicators for legal aid will be used.