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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) 476 final.

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Brussels, 27.11.2013
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COMMISSION STAFF WORKING DOCUMENT

IMPACT ASSESSMENT

Accompanying the

Proposal for Measures on Legal Aid for Suspects or Accused Persons in Criminal Proceedings

{ COM(2013) 824 final }

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EXECUTIVE SUMMARY SHEET

Impact assessment on a Measure on Legal Aid to Suspected and Accused Persons in Criminal Proceedings

A. Need for action

Why? What is the problem being addressed?

Mutual trust between Member States is undermined because there is insufficient protection of the right to legal aid of suspects or accused persons in the EU, despite the existence of common minimum standards stemming from the European Convention on Human Rights (ECHR). This lack of trust weakens judicial cooperation in criminal proceedings. Indeed, the right to legal aid is intrinsically linked to the right to legal assistance, which will become EU law with the adoption of the Directive on the right to access to a lawyer. This is so, since this right cannot be effective for persons without means unless the State provides legal aid ensuring legal assistance free of charge. There are **two main underlying causes** of this problem: 1) Insufficient access to legal aid in proceedings under the European Arrest Warrant (EAW) in the executing and issuing Member States; and 2) Legally aided assistance is not always available at the early stages of the proceedings, especially when a suspect or accused person is in police custody. Two further issues also have the potential to undermine mutual trust: 3) the eligibility criteria for legal aid that severely restrict its availability in practice; and 4) the poor quality of some legal assistance provided through legal aid.

What is this initiative expected to achieve?

The initiative aims to enhance mutual trust between Member States, so as to facilitate judicial cooperation in the EU by guaranteeing EU citizens common minimum standards of protection of the fundamental procedural right of legal aid in criminal proceedings. It will seek to 1) ensure that legal aid is available to persons subjected to an EAW in both the executing and issuing Member States; 2) enable suspects or accused persons who are detained to have access to legally-aided assistance ("emergency legal aid") at the first stages of the procedure; 3) promote effective access to legal aid for suspects or accused persons that do not have sufficient means (means test), where it is necessary in the interests of justice (merits test); 4) have Member States take measures to improve the quality of legally-aided services.

What is the value added of action at the EU level?

There is a need for EU action because 1) The problem has a cross-border dimension; if certain Member States do not respect the fundamental right to legal aid, this creates problems of trust in other Member States and hereby affects the system of mutual recognition and judicial cooperation in the EU; 2) People can be involved in criminal proceedings outside their own Member State, and the needs of these suspects or accused persons must be tackled at EU level. 3) The ECHR already sets some European-wide fair trial standards but its enforcement mechanisms cannot guarantee a sufficient and consistent level of compliance by Member States.

B. Solutions

What legislative and non-legislative policy options have been considered? Is there a preferred choice or not? Why?

Four policy options have been assessed: 1) Retention of *status quo*, which would involve taking no further action on EU level; 2) a soft law option suggesting awareness raising, capacity building, information exchange and development of best practice guidelines; 3) a legal instrument setting minimum qualitative standards through either (a) a recommendation or b) a Directive, or a combination of both; without setting out detailed prescriptive action, but leaving certain discretion to the Member States; 4) The most ambitious and prescriptive option would be to, through a Directive, provide detailed minimum harmonised criteria on access and quality of legal aid, to some extent going beyond ECHR standards.

Who supports which option?

In a Declaration at Council in June 2012, the Member States asked the Commission to present a legislative proposal on legal aid at the earliest. A number of Member States are attached to a binding legal instrument on legal aid (see e.g. FR, SE, BE) and the European Parliament is also in favour of a

legally binding proposal. A number of NGOs and stakeholders such as CCBE, ECBA, Justice, Fair Trials International, Open Society are in favour of EU action. Some Member States (e.g. NL and DE) question the need for action at EU level.

C. Impacts of the preferred option

What are the benefits of the preferred option (if any, otherwise main ones)?

The benefit of the main options is that the right to legal aid for suspects or accused persons would be strengthened. By guaranteeing the protection of the fundamental fair trial rights of suspects or accused persons by strengthening the right to legal aid, mutual trust between Member States will be improved, which will ensure that the mutual recognition instruments and judicial cooperation in the field of criminal law will work smoothly. The main options would improve access to legal aid in European Arrest Warrant proceedings and ensure access to legal aid at the earliest stages of the proceedings. They should also help in making legal aid available to a larger number of persons by widening the eligibility criteria, and improve the quality of legally-aided assistance. While Options 3a and b are less prescriptive, Option 4 would set very high common minimum standards. If action is taken in legally binding form, as suggested in option 3b or 4, there would be a stronger possibility for enforcement and compliance. Would action be taken by a recommendation, this would leave more flexibility for the Member States. A combination of both legally binding and soft law measures could balance the needs for compliance and flexibility on different issues.

What are the costs of the preferred option (if any, otherwise main ones)?

The costs of the different options vary quite considerably. The financial and economic impact of option 2 would be rather limited and is estimated at a maximum of €23 million (mainly costs for training of legal aid providers and decision-makers, borne by Member States' budgets). The cost of ensuring legal aid in EAW proceedings under Policy Options 3a and b would be €0.13-0.24 million; the cost of emergency legal aid would be between €52-81 million. Widening the eligibility criteria would cost an estimated €181-287 million, and improving the quality of legally-aided assistance would cost €13.4 million. These figures add to a total cost of €247-382 million.

Option 4 would be in a higher range at around € 1.5-1.7 billion, mostly due to the costs of widening the eligibility criteria, which would amount to €1.4 billion. Legal aid in EAW proceedings would cost between €0.8-1.1 million; the cost of emergency legal aid would be €180-210 million; and improving the quality of legally-aided assistance would cost €13.4 million.

How will businesses, SMEs and micro-enterprises be affected?

Improving the quality of legally aided assistance by accreditation and training may have impacts on practising lawyers and law firms. No other impacts on business have been identified.

Will there be significant impacts on national budgets and administrations?

Almost all of the costs indicated above will be borne by national authorities. Significant cost savings could result due to fewer challenges to EAWs, and reductions in the lengths of pre-trial detention and trials, as well as the frequency of appeals.

Will there be other significant impacts?

Besides positive social impacts and the furthering of the protection of fundamental rights of persons subject to an EAW and suspects or accused persons in criminal proceedings, the establishment of common minimum standards on the right to legal aid in criminal proceedings will strengthen mutual trust between the judicial systems of the Member States, thereby facilitating the smooth functioning of mutual recognition and judicial cooperation in criminal matters in the EU.

D. Follow up

When will the policy be reviewed?

The Commission envisages carrying out specific empirical studies with an emphasis on data collection 3-5 years into the application of the instrument and on that basis it might review the policy.

COMMISSION STAFF WORKING DOCUMENT

IMPACT ASSESSMENT

Accompanying the

Proposal for Measures on Legal Aid for Suspects or Accused Persons in Criminal Proceedings

1. INTRODUCTION

This impact assessment is for a measure on legal aid for suspects and accused persons in criminal proceedings. This measure aims at setting common minimum rules on the right to receive legal advice fully or partially free of charge. This will strengthen the right to a fair trial in the European Union, ensure that the rights in Directive 2013/48/EU on access to a lawyer will be effective and it will benefit the overall quality of justice in the EU, improve the mutual trust between EU Member States' judicial authorities and thus facilitate judicial cooperation in criminal matters between the Member States.

The right to an effective remedy, to a fair trial and a right of defence are provided for in the Charter of Fundamental Rights of the European Union (EU Charter), Articles 47 and 48, and in Article 6 of the European Convention of Fundamental Rights (ECHR). The **right to legal aid**, i.e. meaning that you can benefit from the assistance of a lawyer in criminal proceedings fully or partially free of charge, is explicitly recognised as an integral part of the right to a fair trial and defense rights.

Article 47 (3) of the Charter provides that: "*Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.*"

Article 6(3)(c) ECHR states that everyone charged with a criminal offence has the right 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.*"

Effective access to legal representation is paramount to ensure the respect of the presumption of innocence and the rights of the defence as set out in Article 48 of the Charter.

The existence of these common standards in the ECHR has proved not be sufficient to achieve the necessary level of mutual trust between EU Member States that is required for a smooth functioning of the area of justice.¹ In fact, despite common European and international standards², the national rules and practices on legal aid in criminal proceedings still display such divergences so that there are considerable shortcomings in the protection of the right to

¹ See section 4.1.1 infra for further elaboration of this argument.

² See also Article 14 of the International Covenant on Civil and Political Rights and the UN Principles and Guidelines on Access to Legal aid in Criminal Justice Systems, adopted by the United Nations General Assembly in December, 2012.

legal aid. The ability of indigent people who cannot afford to pay for a lawyer themselves to access free, timely and quality legal assistance underpins the equality of arms between defence and prosecution and is a foundation for other essential fair trial rights.

This impact assessment accompanies the Commission's proposal for Measures on legal aid for suspects and accused persons in criminal proceedings.

2. POLICY CONTEXT

Article 82 of the Treaty of the Functioning of the European Union (TFEU) states that the principle of mutual recognition of judgments and judicial decisions should be facilitated by means of minimum rules on procedural rights. Judicial cooperation needs to be founded on mutual trust and confidence between the different judicial systems and the perception that the rights of suspects and accused persons are not respected in every instance has a disproportionately detrimental effect on mutual trust and, in turn, on judicial cooperation.³

In this context, the Stockholm Programme⁴ put a strong focus on the strengthening of the rights of individuals in criminal proceedings. In its point 2.4, the European Council invited the Commission to put forward six proposals contained in the Roadmap on Procedural Rights adopted by the Council of Ministers ("the Roadmap")⁵, setting out a step by step approach to strengthening the rights of suspects and accused persons by setting common minimum standards on fair trial rights. The Roadmap measures deal with distinct procedural rights or set of rights of suspects or accused persons which had been identified by Member States and stakeholders alike as needing to be strengthened by action at EU level, and thus has to be considered as a building-block for a whole edifice. The purpose of the whole exercise of the Roadmap is to ensure the right to a **fair trial**.

Procedural Rights Measures:

- Translation and Interpretation
- Information on Rights and Information about the Charges
- Legal Advice **and Legal Aid**
- Communication with Relatives, Employers and Consular Authorities
- Special Safeguards for Suspected or Accused Persons who are Vulnerable
- Green Paper on Pre-Trial Detention

It was following the proposals of the Commission that a Directive on the right to interpretation and translation and a Directive on the right to information in criminal proceedings and a Directive on access to a lawyer in criminal proceedings have been adopted⁶. Moreover, a Directive establishing minimum standards on the rights, support and protection of victims of crime has been adopted in October 2012⁷.

³ Analysis of the future of mutual recognition in criminal matters in the European Union, by Gisèle Vernimmen-Van Tiggelen (Call for tenders JLS/D3/2007/03/European Commission), 20 November 2008, para 18.

⁴ OJ C 115, 4.5.2010, p. 1.

⁵ OJ C 291, 4.12.2009, p. 1. (Annex I, "the Roadmap")

⁶ Three measures have already been adopted: Directive 2010/64/EU of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings (OJ L 280, 26.10.2010, p.1); Directive 2012/13/EU of the European Parliament and of the Council on the right to information in criminal proceedings (OJ L 142, 1.6.2012, p.1), and Directive 2013/48/EU of the European Parliament and of the Council 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

While the Directive on Access to a Lawyer provides for the substantive right of access to a lawyer, it refers to national law relating to legal aid. The Roadmap provides that the right to legal aid should ensure effective access to the right to legal advice. For persons without means and in certain situations, for example during deprivation of liberty, access to a lawyer cannot be effective unless the State practically and financially provides legal aid ensuring the assistance of a lawyer free of charge. The ability of indigent people who cannot afford to pay for a lawyer themselves to access free, timely and quality legal assistance underpins the equality of arms between defence and prosecution and is a foundation for other essential fair trial rights. A right to legal aid is therefore needed to make the right of access to a lawyer as provided for in the Directive effective⁸ and to strengthen mutual trust.

The right to legal aid to some extent contributes to strengthening the presumption of innocence, in the sense that it enables persons without means to benefit from access to a lawyer, which in its turn contributes to safeguarding the right not to self-incriminate oneself. Yet, by providing access to legal aid in criminal proceedings, one does not in itself strengthen the underlying principle of presumption of innocence and other aspects of it that would be needed to strengthen mutual trust, as is set out in the Impact Assessment on the Presumption of Innocence. In the same spirit, providing a right to legal aid for vulnerable suspects will help furthering their protection by making access to a lawyer effective by providing financial support from the State, but it will not strengthen other procedural safeguards which needs to be improved in order to boast mutual trust with respect to vulnerable persons, as provided for in the Impact Assessment on procedural safeguards for vulnerable persons in criminal proceedings.

consular authorities while deprived of liberty (OJ L 294, 6.11.2013, p. 1).The measure on the protection of vulnerable persons suspected or accused in criminal proceedings, the measure on legal aid (the part of the third measure not included in the Directive on Access to a Lawyer) and presumption of innocence are presented as a package together. As regards the last measure, the Commission published on 14 June 2011 a Green Paper on the application of EU criminal justice legislation in the field of detention to reflect on ways to strengthen mutual trust and the application of the principle of mutual recognition in the area of detention, in accordance with and within the limits of the EU's competence; COM(2011)327 final, published on:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0327:FIN:EN:PDF>.

⁷ Directive 2012/29/EU of 25 October 2012, OJ L 315, 14.11.2012, p.57

⁸ As recognised by the Member States, that when adopting the general approach on Access to a Lawyer Council negotiations made a statement, calling on the Commission to make a legislative proposal on legal aid.

3. PROCEDURE AND CONSULTATION OF INTERESTED PARTIES

3.1. Consultation of stakeholders

General principle and minimum standards for consultation of interested parties have been followed in relation to this initiative.

Stakeholders were consulted on several occasions. The Commission has had regular and frequent bilateral contacts the European Criminal Bar Association (e.g. by participation in their sub-group on legal aid), Open Society Justice Initiative, JUSTICE, Fair Trials International, ICCL-JUSTICIA in the preparation of the impact assessment. They have shared contributions with the Commission in view of the forthcoming measures.⁹

In March 2009, a 2 day expert meeting on procedural rights, including the right to legal aid was organised. In a meeting on 3 June 2013, all interested Member States were consulted in an expert meeting. The Member States had previously, in Council in June 2012, called upon the Commission to present a *legislative proposal* on legal aid at the earliest.¹⁰ The **European Parliament**, in its orientation vote on the Directive on Access to a Lawyer of 12 July 2012, called on the Commission to come up with a *proposal on legal aid*.

In December 2011, the Polish Presidency, in cooperation with the European Commission, the Council of Bars and Law Societies in Europe (CCBE) and The Academy of European Law (ERA) organised a 2-day conference on legal aid in criminal matters. The Conference provided an opportunity for the exchange of views and experiences for experts from a variety of backgrounds – legal practitioners, judges, prosecutors, academics, representatives of EU bodies, NGOs, Council of Europe to examine the problems and possible contents of a future measure.

In the context of the study for the Impact Assessment, wide outreach with Member States' Ministries of Justice, NGOs in the Member States, lawyers' associations and legal aid boards was made in focus groups. In-depth interviews were carried out with lawyers in the bar associations, representatives from stakeholder organisations and Ministries of Justices in all Member States.¹¹ Moreover, focus groups, bringing together representatives from Ministries of Justice, bar associations, academics, judicial staff, and stakeholder organisations were organised in a number of Member States: England & Wales, Germany, Hungary, Spain,

⁹ "The practical operation of legal aid in the EU", Fair Trials International, July 2012, "Compliance of Legal Aid systems with the European Convention on Human Rights in seven jurisdictions" covering Bulgaria, Czech Republic, England & Wales, Germany, Greece, Ireland and Lithuania, Report by Justicia Network, April 2013, Cornerstones on legal Aid, May 2013, ECBA, CCBE Recommendations on Legal Aid, 2013, http://www.cbbe.eu/fileadmin/user_upload/NTCdocument/EN_Legal_Aid_recomm1_1291033916.pdf

¹⁰ In reply, the Commission made the following Declaration: "Il est de l'intention de la Commission de présenter, sur base d'une analyse approfondie des différents systèmes nationaux et de leur impact financier, une proposition d'instrument juridique concernant l'aide juridictionnelle dans le courant de 2013, conformément à la feuille de route visant à renforcer les droits procéduraux des suspects et des personnes poursuivies dans le cadre des procédures pénales."

¹¹ See interview check list, in CSES Study for the Impact Assessment, Appendix D1.

Sweden and France.¹² Moreover, an on-line consultation for legal aid providers in the Member States was carried out.¹³

Given these different consultations, a formal open public consultation did not take place.

In the focus group meetings a large majority supported EU action and found status quo on legal aid in criminal proceedings to be insufficient. Moreover, in a Declaration at Council in June 2012, the Member States asked the Commission to present a legislative proposal on legal aid at the earliest. In the Expert meeting it also appeared that there was support for some action with regard to legal aid.

A number of Member States are attached to a binding legal instrument on legal aid (see e.g. FR, SE, BE) and the European Parliament is also in favour of a legally binding proposal. A number of NGOs and stakeholders such as CCBE, ECBA, Justice, Fair Trials International, Open Society are in favour of EU action with respect to legal aid. Some Member States (e.g. NL and DE) question the need for action at EU level.

3.2. Studies and publications

The Impact Assessment relies on a number of studies carried out from 2007-2013, as well as studies and research from stakeholders and the Reports from the CPT¹⁴ and the 2012 Report of the European Commission for the Efficiency of Justice (CEPEJ) report on the Efficiency of Justice.

An external study to gather evidence for this impact assessment was carried out by the consultants CSES and focused on comparatively studying the legal aid regimes in the 27 Member States and Croatia, identifying the problems and the policy options and costs of the various options.

The Commission's Criminal Justice Programme (JPEN) has funded several relevant studies, in particular the *study on Pre-trial emergency defence* (covering also the question of availability of legal aid pre-trial)¹⁵, a joint study by the NGO JUSTICE, the University of West England and the Open Society Justice Initiative and Maastricht University (2007-2010)¹⁶ (including detailed research on the standards on legal aid in the covered Member States), studies presented in 2012 by Fair Trials International on *Effective Defence Rights in the EU*¹⁷ and on the practical operation of legal aid in the EU¹⁸ and a report from 2013 by the European Rights Network Justicia on *Compliance of Legal Aid systems with the European Convention on Human Rights in seven jurisdictions*.¹⁹

¹² See the reports of the focus groups in the Appendix E, of the CSES Report for the Impact Assessment.

¹³ See Appendix D of the CSES Study for the Impact Assessment.

¹⁴ www.cpt.coe.int/en/visits.htm

¹⁵ The project covers Croatia and 3 Member States: Austria, Germany, Slovenia.

¹⁶ Cape *et al*, *Effective Criminal Defense in Europe*, Intersentia, 2010. The research covers 8 Member States: Poland, Hungary, Belgium, France Italy, Germany, England and Wales, and Finland.

¹⁷ The study is based on an EU wide survey of lawyers on the real barriers to a fair trial to create a picture of the state of fair trial violations including the right to legal aid.

¹⁸ "The practical operation of legal aid in the EU", Fair Trials International, July 2012. www.fairtrials.net/wp-content/uploads/2012/09/Legal_Aid_Report.pdf

¹⁹ "Compliance of Legal Aid systems with the European Convention on Human Rights in seven jurisdictions" covering Bulgaria, Czech Republic, England & Wales, Germany, Greece, Ireland and Lithuania, Report by Justicia Network, April 2013.

Stakeholders have over the last years prepared a number of studies that have been relevant in the preparation of the Impact Assessment. In 2009, research from Maastricht and Ghent universities carried out a comprehensive review of procedural rights in the EU²⁰ for the Commission, including extensive evidence on the legal aid systems. Other relevant studies are: *'European Arrest Warrants: Ensuring an effective defence'*,²¹ *'Effective Criminal Defence in Eastern Europe'*²², *'Improving Pre-trial Justice, The Role of Lawyers and Paralegals'*²³.

3.3. Internal consultation and scrutiny of the impact assessment

An Inter Service Impact Assessment Steering Group was created involving representatives from MARKT, ENTR, BUDG, OLAF, HOME, EMPL, the Legal Service and the Secretariat-General. A first meeting was held on 27 September 2012, based on the Interim Report for the impact assessment study. A second meeting was held 6 May 2013. At the meetings and in subsequent communication with individual DGs, comprehensive feedback was received which has been taken into account throughout this report.

This Impact Assessment was examined by the European Commission's Impact Assessment Board on 3 July 2013. Further to the IAB's recommendations, additional information, explanations and data were provided. The revised report takes on board the recommendations of the IAB and introduced the following main modifications and clarifications:

- The problem definition has been clarified by better explaining the extent of the problems faced by the suspects and accused persons and the existing shortcomings (see Section 4, especially 4.2). It also more clearly explains the general problem and the policy context and relation to the other upcoming roadmap measure (Section 2 and Section 4.1),
- The subsidiarity analysis is strengthened and the report more clearly sets out what rights are not sufficiently addressed on Member State and ECHR level (Section 4.1 and 4.2), what the ECHR standards are (Annex III) and the shortcomings with relying only the ECHR to ensure an effective right to legal aid, as well as reasons for the Member States' reluctance to change legal aid standards (Section 4.1),
- The options and impacts have been better presented and assessed, especially as concerns a possible combination of measure 3(a) and 3(b) (Section 8),
- The financial costs have been broken down and are presented per Member State (see **Annex VI**),
- Member States' opinions have been better integrated and the reasons for reluctance to introduce legal aid minimum standards are also presented (Section 4.1.1). The views of

http://www.eujusticia.net/images/uploads/pdf/Report_on_Legal_Aid_Justicia_December_2012.pdf

²⁰ T. Spronken, G. Vermeulen, D. de Vocht, L. van Puyenbroeck, *EU Procedural Rights in Criminal Proceedings*, JLS 2008/D3/002.

²¹ Study by Justice, September 2012, <http://www.justice.org.uk/data/files/resources/328/JUSTICE-European-Arrest-Warrants.pdf>

²² E. Cape et al, *Effective Criminal Defence in Europe*, Intersentia, 2010. The research covers 8 Member States: Poland, Hungary, Belgium, France Italy, Germany, England and Wales, and Finland.

²³ <http://www.opensocietyfoundations.org/sites/default/files/...improving-pretrial-justice-20120416.pdf>

different categories of stakeholders, including Member States, have been more extensively referred to throughout the Impact Assessment,

- The revised report also include performance indicators and the data collections requests from the Member States (Section 9).

4. PROBLEM DEFINITION

4.1. General problem

An analysis of the legislation in place in the Member States, shows that the right to legal aid in criminal proceedings for suspects and accused persons is insufficient to ensure the right to a fair trial and to ensure that the right of access to a lawyer as provided for in the Directive 2013/48/EU on access to a lawyer is effective. The problem of insufficient protection of the right to legal aid (*see section 4.1.1*) is not sufficiently addressed by the current legal framework and thus, at present the legal framework does not sufficiently foster mutual trust at a level which will ensure the smooth functioning of the mutual recognition instruments in criminal proceedings (*see section 4.1.2*).

4.1.1. *Insufficient protection of fundamental rights of suspected and accused persons*

There is currently no EU law instrument that provides a right for suspected and accused persons to legal aid in criminal proceedings.²⁴ There are, nonetheless, legal aid provisions in all EU Member States, including Croatia, and there are common standards in the form of Article 47 of the EU Charter of Fundamental Rights, which is now legally binding on Member States, to the extent that they implement EU law.²⁵ Moreover, all EU Member States are signatories to the ECHR, with a right to legal aid for suspects and accused persons in criminal proceedings set out in Article 6(3)(c) ECHR. However, these standards do not, on their own, ensure the level of protection that is needed to ensure mutual trust in the EU.

Despite the existence of the ECHR, there is a high level of variation between the different Member States' legal aid systems in law and practice, and there are shortcomings in the protection of the right to a fair trial in a number of Member States, especially as concerns the aspects that are further explored in section 4.2. The limited right to legal aid in some Member States²⁶ has the potential to undermine mutual trust and mutual judicial cooperation in the area of criminal proceedings and to frustrate the fair trial rights of the Charter, Articles 47 and 48.

Insufficient standards across Member States concerning access to legal aid undermine the effectiveness of the right of access to a lawyer, as set out in the Directive on Access to a Lawyer, foreseen for adoption later in 2013. The Commission's decision to not treat the two interrelated questions in the same measure was based on the need to take urgent action for a coherent legislative approach with regard to access to a lawyer, following divergent interpretations and practices in the Member States of the ECtHR *Salduz* ruling.²⁷ Thus, the

²⁴ Directive 2013/48/EU on Access to a Lawyer does not address the issue.

²⁵ Article 6(1) TEU.

²⁶ In the focus groups carried out during the study (organised in England and Wales, Germany, Hungary, Spain, Sweden and France with participants from Ministries of Justice, Civil Society Organisations and Bar Associations), it was revealed that there are concerns among national governments, policymakers and defence practitioners as about the disparity and the effectiveness of fair trials rights, including the right to legal aid, across the EU. See the CSES Study for the Impact Assessment, Appendix E with reports from the focus groups.

²⁷ *Salduz v. Turkey*, ECtHR, Grand Chamber, Judgment of 27 November 2008. It was held that for the right to fair trial to remain sufficiently practical and effective, Article 6 ECHR requires that suspects be given access to a lawyer, appointed by the state if necessary, before they are interrogated by the police. This development has focused legal attention on what happens at the investigatory stage and the risk that the suspect's rights may be

Commission dissociated the question of legal aid to allow more time for preparation and assessment of impacts since the latter is more complex and was in need of a more detailed analysis.

It has continuously been stressed by several Member States and stakeholders during the negotiations of the Directive on Access to Lawyer, that it is difficult to completely dissociate the right of legal aid from the right of effective access to a lawyer and to make provision only for the latter and not the former.²⁸ Without 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. This has also been confirmed in the consultation in focus groups and with stakeholders.²⁹

While all Member States have some system for legal aid in place, their legal aid systems in some Member States fall short of ensuring that the Right of Access to a lawyer becomes effective. The Directive e.g. gives a right to access to a lawyer before the suspect or accused person is questioned by the police or by another law enforcement as well as without delay after any deprivation of liberty. As will emerge from Section 4.2, this right of access to a lawyer is however not supported by a practical right to legal aid in all Member States, permitting to access to right to a lawyer as from this early point in time given for example the delays in deciding on a right to legal aid. The Directive also provides a right of access to lawyer in European Arrest Warrant proceedings in both the executing and the issuing Member State, and there is not a right to legal aid to support this dual representation in all Member States. Moreover, the narrowly defined eligibility criteria in certain Member States exclude persons with insufficient means and where the interests of justice would require representation from the legal aid system (see further on the extent of these problems in the Member States in section 4.2 below).

To ensure a minimum common level of protection there is a therefore need to raise the level of protection in a number of Member States, where the standard is particularly low³⁰. Yet, Member States are not prevented from maintaining or introducing higher standards, as is stated in Article 82(2) TFEU. Any EU action taken with regard to the matter aims at reinforcing the protection of the fundamental right to legal aid in criminal proceedings, and should not be interpreted as lowering standards of protection already in place in the Member States.

unfairly and irretrievably prejudiced if he has no effective access to legal assistance especially before and during his questioning by the police. This clearly brings with it the question of when legal aid is first provided, for without this the right of indigent suspects to legal assistance is an empty one. The *Salduz* ruling has been confirmed in over 100 rulings over the last years.

²⁸ 7 Member States opposed the decoupling of the two measures seen the closely interrelated nature of the two proposals.

²⁹ See CSES Study for the Impact Assessment, Appendix E.

³⁰ See for further details section 4.2 *infra*.

The initiative on the Right to Legal Aid and its relation to the Directive on Access to a Lawyer—completing the picture

The right to access to a lawyer for the suspected or accused person in criminal proceedings at the earliest appropriate stage of such proceedings is one of the most fundamental rights in order to safeguard his rights to a fair trial and right of defence within the criminal proceedings.

The right to legal aid is linked to the right to access to a lawyer. For persons without means and in certain situations, for example during deprivation of liberty, access to a lawyer cannot be effective unless the State practically and financially provides legal aid ensuring the assistance of a lawyer free of charge. While the Directive on Access to a Lawyer provides for the substantive right of access to a lawyer, it refers to national law relating to legal aid. In a Declaration attached to the Directive, the European Parliament and the Council call on the Commission to, at the earliest, present a proposal on legal aid.

Why is the ECHR not a sufficient answer? The existence of a common minimum standard in the ECHR, (as well as the non-binding UN guidelines on legal aid), appears as insufficient to address, on their own, the shortcomings in the protection of the right to legal aid. This is so as the ECHR contains only a very general statement on the right to legal aid in criminal proceedings and leaves a wide margin of how to understand the right to legal aid. Moreover, there is very limited case-law clarifying how to understand an effective right to legal aid. The ECtHR has shown a "hands-off" approach and has been reluctant to intervene into the way Member States ensure the right to legal aid in criminal proceedings, and it has applied a wide margin of appreciation in interpreting Article 6(3)(c) steering clear from clarifying e.g. what would constitute "insufficient means",³¹ While it has provided that there must be right of access to a lawyer from the very beginning of the pre-trial phase in the *Salduz* case, there is not yet any conclusive judgment clarifying that this right must be granted for free, as no such case has yet been brought before the Court. This would, however, be the logical continuation of its case-law and is also how the *Salduz* jurisprudence has been implemented and interpreted in several Member States (see e.g. France and Belgium).

The insufficient protection of the right to legal aid is thus to some extent also due to the fact that case-law is interpreted differently in different Member States. As a case is delivered on the basis of a specific factual situation in a determined Member State, it can lend itself to different interpretations which make it difficult to derive a general rule applicable to other circumstances and Member States.³² The Court has for instance clarified the merits test but as will be clear from Section 4.2, a number of Member States appear to still not comply with the Court's understanding of when it is the interest of justice to provide for legal aid.

This shows that it is problematic to rely on case-law to provide legally certain common minimum standards, as case-law is by its nature piecemeal and reactive. It leaves large room

³¹ This can be compared with its more active role in defining the right of access to a lawyer, see for ECtHR's role in this regard, see *the Commission Staff Working paper, Impact Assessment accompanying the Proposal for a Directive of the European Parliament and of the Council on the Right of Access to a Lawyer and of Notification of Custody to a third person in Criminal Proceedings*, COM (2011) 326 Final.

³² See *Justicia* report, April 2013 supra footnote 19.

for interpretation and can result in very diverging interpretations in the Member States.³³ EU action would provide greater legal certainty by giving more detail, clarity and guidance on the right to legal aid. Such detail could be partly inspired by ECtHR case-law where such exists, for example on the merits test (see **Annex III** and Section 4.2.2).

Moreover, the absence of any effective enforcement mechanism to oblige and encourage States to change their national laws in the case of breaches of ECtHR decisions also contributes to the limited compliance of the ECHR. The ECtHR can impose damages for the breach in the case at hand, but there are no infringement proceedings or comparable mechanisms, as would be available in the EU system, to make the Member State, or other Member States with similar provisions, comply with a judgment. The high ratio of ‘repetitive decisions’ before the ECtHR in relation to fair trial issues in general (around 70 per cent of the Court’s judgments in 2011³⁴), indeed suggests that Member States are not reforming their national legislation after they are found to be in breach of Article 6 ECHR. There are also limitations for individuals wishing to bring a case before the ECtHR, and the reparations to remedy a violation generally consist of declaratory judgments, coupled with, depending on the circumstances, damages³⁵.

This shortage of strong enforcement powers in the convention system, coupled with the ECtHR’s backlog that poses a serious risk to the effectiveness of the whole ECHR system,³⁶ also adds to the insufficiency of relying only on the ECtHR to ensure sufficient protection of the right to legal aid in the EU criminal justice area as being developed under the Stockholm Programme.

In conclusion, the insufficiency of the ECHR standards alone for providing minimum standards on legal aid for suspects and accused persons mainly lies in the general wording of those standards and the absence of guidance as to effective legal aid is concretely, rather than Member State opposition to what those standards are.

The obligation to provide legal aid flowing from Article 47 of the EU Charter of Fundamental Rights binds the institutions and bodies in all instances, but it only applies to Member States when they are implementing EU law. Thus, in the absence of EU law legislation in the field,³⁷ the Member States are not bound by the provision to provide legal aid in Article 47(3) of the Charter.³⁸ Furthermore even if such a link to EU law could be established, the extent of the application of Article 47 of the Charter and its scope has only been tested to a limited extent by the Court of Justice.³⁹ A clarification of the scope and contents of this principle at EU level

³³ The ECtHR’s judgments, firstly, only slowly build up a clear and consistent jurisprudence, secondly, depend upon the circumstances of particular applications, and, finally, may not even be followed by all national courts. See e.g. Christou *et al*, *European Cross Border Justice: A Case Study of the EAW*, The AIRE Centre, 2010.

³⁴ Leach, ‘On Reform of the European Court of Human Rights’, 6 *European Human Rts L Rev* (2009) 725, at 727/ <http://www.ejil.org/pdfs/21/4/2103.pdf>

³⁵ Article 41 of the Convention.

³⁶ With a reach extending to over 800 million individuals within the jurisdiction of the 47 contracting states to the Convention, the flood of applications lodged in Strasbourg threatens to clog the Court to the point of asphyxiation. There are delays in processing some cases of up to seven years <http://www.ejil.org/pdfs/21/4/2103.pdf>.

³⁷ See, however, *infra* 4.4, baseline scenario, on the effect of the Charter after the adoption of the Directive on Access to a Lawyer.

³⁸ The situation might be different after the adoption of the Directive on Access to a lawyer, see 4.4 *infra*.

³⁹ In a civil context the Court of Justice has interpreted Article 47 extensively and extended access to legal aid to *legal persons*, Case C-279/09 *DEB* [2010] ECR I-13849.

would thus be necessary in order to provide predictability, legal certainty and to meet the policy objectives as concerns legal aid as indicated in the Roadmap.

According to stakeholders, the vast majority of those arrested in the EU have insufficient means to pay for a lawyer; sufficient legal aid is therefore a crucial part of the right to access legal advice and representation.

The reason why some Member States maintain a limited right to legal aid in criminal proceedings in their legislation is partly due to the above-mentioned fact that the guidance in international norms is limited and that it is difficult to subsume what exact requirements there are on the basis of the very limited case-law on the right to legal aid (See *e.g.* **Annex III**). Another reason is related to the costs of ensuring a high level of protection through providing legal aid. It has been noted, however, that while limiting legal aid costs might give an impression of saving costs, this results in indirect costs in other parts of the system that are more difficult to measure and are less visible. These are for example costs of pre-trial detention, the cost of the working of the police and the judicial system.⁴⁰

4.1.2. Insufficient levels of mutual trust and mutual recognition between Member States as a result of deficient standards on legal aid

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 such as the European Arrest Warrant (EAW),⁴¹ the three Framework Decisions on Detention⁴² and the Freezing and Confiscation Framework Decisions⁴³. The underlying idea of the mutual recognition instruments is to ensure fast-track and simple procedures for cross-border law enforcement and cooperation. Such cross-border instruments build on the assumption that each Member State provides a system of justice which guarantees fair trial rights to a fairly similar degree; something that is not the case in practice.

If judicial authorities doubt the compliance with fair trial rights by another jurisdiction and believe that a suspect or accused person might not get, or has not got effective access to legal advice and legal aid, requests for judicial cooperation from that jurisdiction can be denied. This means that a person is not to be surrendered under the EAW, that a court might refuse to

⁴⁰ In France and Belgium the pre-trial detention rates fell by respectively 30% and 20% after introducing similar schemes post-*Salduz*. See further Annex IV.

⁴¹ 2002/584/JHA: Council Framework Decision 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.

⁴² Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, Official Journal L 337, 16/12/2008 P. 0102 – 0122, Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention.

⁴³ Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, OJ 2003 L196 of 1/11/2003, p. 45-55, Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, OJ L 328, 24.11.2006, p. 59–78.

collect evidence requested by judicial authorities in another Member State and that a transfer of a prisoner request is denied as the receiving Member State has doubts as to the fairness of the trial underlying the conviction. As the principle of mutual recognition is the cornerstone of the area of justice, it is necessary to enhance mutual trust for the effective functioning of the area of Freedom, Security and Justice.

The limited number of EAW requests that finally are delayed or unsuccessful does not mean that judicial cooperation runs smoothly or that there is no strain in the confidence and trust that Member States and their citizens place in each other's criminal justice systems.⁴⁴ The limited possibility for refusals in the framework decision itself is justified by the aim of providing a 'fast-track' extradition procedure, but that only works in practice if the standards of protection comply with an adequate minimum level, so that mutual trust is present.

In practice, the system of mutual recognition often works sub-optimally as the swift operation is hampered by numerous challenges and appeals, resulting in additional costs and delays⁴⁵, partially due to long to complex and long drawn investigations into the systems of other Member States in such situations. Annex IX contains several examples of cases where insufficient trust in the respect of fair trial rights by another Member State caused such costs and delays. **Ultimately this situation prejudices the resolution of a cross-border case for all parties involved, be it the suspected or accused, the victims or the general public.**

There are also other indicators of the lack of mutual trust in the fair trial rights of other Member States of the public at large, such as the negative media attention that insufficient or denied access to a lawyer as a result of shortcomings in the legal aid system. This has come to light in a number of cases, which, although being single cases, have adverse effects on the reputation of a Member State and it only takes one case to erode trust.⁴⁶

4.2. Specific problem and its underlying causes

The specific problem identified by stakeholders and in the Study is that there is insufficient access to effective legal aid for suspected and accused persons in the EU, that are detrimental to the mutual trust and the smooth working of the mutual recognition system. There are four underlying issues where there appear to be gaps in the current standards and where an EU initiative could have added value. The two main underlying issues of the problem are:

- Insufficient possibilities to access legal aid in extradition proceedings under the 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 suspected;

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

⁴⁴ There is an estimated 4 to 8% of EAWs the execution of which is refused.

⁴⁵ See e.g. recent research by JUSTICE, 'European Arrest Warrants – ensuring an effective defence', 2012.

⁴⁶ This is illustrated by widely covered cases such as the currently on-going Bulgarian sailors' case, where the Spanish legal system has been criticised in press for ineffective representation under their legal aid system of 21 Bulgarian sailors arrested and on charge of drug trafficking. Legal aid lawyers were appointed but did not meet with their clients. This led the Bulgarian Prime Minister taking action to provide for legal aid. See e.g. http://www.novinite.com/view_news.php?id=142535. There is also the Gary Mann case www.bailii.org/ew/cases/EWHC/Admin/2010/48.html or the Deborah Dark case <http://www.fairtrials.net/cases/deborah-dark/> where EAW's were challenged partly on the basis of insufficient legal representation resulting from allegedly poor legal aid standards.. For the latter, see also section 4.2.4 below.

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

4.2.1. *Insufficient possibilities to access legal aid in extradition proceedings under the EAW in the Member States*

The Directive 2013/48/EU on access to a lawyer provides a right to *dual representation* in extradition proceedings under the European Arrest Warrant (EAW).⁴⁷ As such proceedings are not considered as “criminal proceedings”, they are not covered by the ECHR, but they are covered by the Charter of Fundamental Rights. Without EU action, there would not be any common minimum standards on the right to legal aid in EAW proceedings.

When a person is arrested on foot of an EAW he/she has the right to access a lawyer in the executing Member State for the extradition proceedings.⁴⁸ With the entry into force of the Directive on Access to a Lawyer, there will also be a right to have a second lawyer in the Member State that issued the EAW. The role of this lawyer in the course of the EAW proceedings in the executing state is ancillary, and aims at assisting the lawyer in the executing Member State, for example by providing information about the legal situation and the case-file in the issuing state. Access to a lawyer and legal aid in respect of the criminal proceedings underlying the EAW in the issuing state will be determined by the rules applicable in that Member State.

The Directive on Access to a Lawyer does not address the issue of legal aid and thus, it does not provide for a right to legal aid to be assisted by a lawyer in the executing or issuing Member State. At present, no Member State appears to provide the right to obtain legal aid for a lawyer in the *issuing* Member State for liaising with the lawyer in the executing state, as such a right of access to a lawyer does not exist.⁴⁹

While the substantive issue of the right of access to a lawyer in EAW proceedings is addressed in the Directive on Access to a Lawyer and reflects the acceptance of its added value for the need to boost mutual trust in the EU, the fact that the entitlement to legal aid is still lacking in some executing and issuing Member States will affect the effectiveness of this right and its consistent application. This has been underlined by a large number of practitioners in the stakeholder consultations.⁵⁰ While the Directive on Access to a Lawyer ensures that there is access to a lawyer, this right will not be effective and available to everyone unless legal aid is provided.

A consequence of the absence of legal aid in the issuing Member State is that the lawyer in the executing Member State is unable to ascertain if the correct procedure was followed and whether there are grounds to refuse the EAW according to Articles 3-4 of the Framework Decision. To render the right of access to a lawyer in EAW proceedings effective by also

⁴⁷ On the need to have dual representation in EAW proceedings, see the Impact Assessment on Access to a Lawyer, “Commission Staff Working paper, Impact Assessment accompanying the Proposal for a Directive of the European Parliament and of the Council on the Right of Access to a Lawyer and of Notification of Custody to a third person in Criminal Proceedings”, COM (2011) 326 Final, p 17 ff.

⁴⁸ The EAW Framework Decision provides that the person would have access to a lawyer only if domestic law so provides.

⁴⁹ In some executing member states (DK, UK and IE), it can be possible to have legal advice in the issuing Member State at occasions, if this is seen as expert legal advice needed for the proceedings. See CSES Study for the Impact Assessment, Section 3.2.1.4.

⁵⁰ See CSES Study for the Impact Assessment, Section 3.2.1.4.

providing legal aid is important, as allowing the lawyer in the state of execution to establish the circumstances of the EAW reduces the likelihood of inappropriate or erroneous EAW requests improves the cooperation from the individual and saves police and court time, as if the defence lawyer in the executing state does not have sufficient information about the situation in the issuing state, he will be very likely to advise his client to resist the EAW request.

It has also generally been noted that ensuring legal advice in the issuing Member State, free of charge where need be, can save Member States costs.⁵¹ A person who gets legal advice in the executing and issuing Member States might agree to extradition, and is less likely to appeal against the extradition, something that delays the process and hampers the effective and smooth working of the EAW system. The unavailability of legal aid in both the issuing and the executing state of an EAW can prejudice the rights of the defendant in extradition proceedings and undermine the mutual trust necessary for the smooth working of this instrument.

European Arrest Warrant: need for legally-aided assistance in both executing and issuing Member State

Alan Hickey, a lorry driver, was convicted in France of people-trafficking and sentenced to serve 18 months in prison in December 2009. While in prison in France, Alan found out that Belgium had issued a European Arrest Warrant against him. Alan was not given clear information about the Belgian charges and was concerned that they related to the same matter for which he had been sentenced in France. This should be a bar to extradition on “double jeopardy” grounds. However, Alan’s extradition was ordered before further information could be gathered from Belgium.

Once in Belgium, Alan’s concerns about double jeopardy were vindicated. The judge at Alan’s trial found that some of the Belgian charges arose from the same events for which he had been convicted in France. Alan pleaded guilty to the other offence and was given a suspended sentence. **Alan’s extradition in breach of the double jeopardy rule could have been avoided if he had been provided with effective legal representation and legal aid in both France and Belgium from the start.**

4.2.2. Timing: Legally-aided assistance is not always available at the early stages of the proceedings

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 person's fair trial rights, such as the right to remain silent and not to self-incriminate oneself.⁵² The ECtHR⁵³ has underlined

⁵¹ See Impact Assessment on Access to a Lawyer, “Commission Staff Working paper, Impact Assessment accompanying the Proposal for a Directive of the European Parliament and of the Council on the Right of Access to a Lawyer and of Notification of Custody to a third person in Criminal Proceedings”, COM (2011) 326 Final, and CSES Study for the Impact Assessment on the Directive Access to a Lawyer, Section 3.2.1.4.

⁵² *Dayanan v. Turkey* Application No. 7377/03, judgment of 13 October 2009. *Berlinski v Poland*, Application No.s 27715/95 and 30209/96), judgment of 20 June 2002. Also the UN principles explicitly requires Member States to ensure that effective legal aid is provided promptly at all stages of criminal proceedings, see principle 7, at para 27 and Guideline 4, at para 44 (c).

⁵³ In *Salduz* (para 54), the ECtHR underlines “; the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial (..). At the same time, an accused often finds himself in a particularly vulnerable position at that stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence. In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task it is, among other things, to help to ensure respect of the right of an accused not to incriminate himself. (...) Early access to a lawyer is part of the procedural

the importance of early access to legal advice seen the specific vulnerability of the suspect, accentuated if he is deprived of liberty. Early access to legal advice also safeguards against intimidation and physical ill-treatment.⁵⁴ Indeed, by implementing the ECtHR's *Salduz* ruling in the EU, Directive 2013/48/EU on access to a lawyer provides a right of access to a lawyer from the moment when someone becomes suspected or accused of a criminal offence and thus before police interrogation.⁵⁵ Several Member States, e.g. Belgium and France, have implemented the *Salduz* jurisprudence ensuring that legally aided assistance is available for persons deprived of liberty from the very start of the detention and before any questioning. In only one jurisdiction (UK) does the legal aid system cater for providing legally-aided assistance at the early stages for all persons, *whether they are deprived of liberty or not*, when they are being heard in a police station.

In a number of Member States (10 MS – AT, NL, BE, CZ, LU, MT, SE, IE, FR, SK), the right to legal aid arises at the latest at the moment of initial detention.⁵⁶ There is thus a right for persons *deprived of liberty* to have access to legal aid. To ensure that the legal aid is available in practice at the first hours of detention, several of these Member States have set in place “emergency defence mechanisms” so that advice by sufficiently qualified legal aid providers is available before questioning, at times and in locations where suspects are being held, for example by a duty solicitor scheme operated by the bar association and without first carrying out an eligibility testing.⁵⁷ This seems to ensure that the right of access to a lawyer is rendered effective on the early stages, also for persons deprived of liberty.

However, in 12 Member States (BG, CY, DE, EE, EL, FI, HU, IT, PL, PT, RO, SI), there are shortcomings regarding ensuring an effective access to a lawyer free of charge at the earliest stages of the proceedings for persons who do not already have a lawyer. In 10 of these Member States, the right arises at the point of arrest or formal charge (CY, DE, EE, EL, FI, IT, PL, PT, SI, RO) (see further Annex VIII). This point in time often occurs after the right of access to a lawyer has materialised and moreover, the practical arrangement for a legal aid lawyer is often considerably delayed, as the appointment is made for example during the first court appearance, also in cases of deprivation of liberty⁵⁸ which is likely to be after

safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination (...).

⁵⁴ The CPT and SPT have repeatedly emphasised the importance of legal aid as a fundamental safeguard against intimidation, ill-treatment or torture and have identified that the period immediately following deprivation of liberty as the one where the risk of ill-treatment is the greatest. See e.g. Report on the visit to Austria carried out by the CPT from 13 to 23 April 2004 CPT/inf (2005) 13 at para 26; Report on the visit to Bulgaria carried out by the CPT from 10 to 21 September 2006 CPT/Inf (2008) 11, at para. 27; Report on the visit to Hungary carried out by the CPT from 30 March to 8 April 2005, CPT/Inf (2006) 20, at para. 23; Report on the visit to Poland carried out by the CPT from 26 November to 8 December 2009 CPT/Inf (2011) 20, at para. 26.

⁵⁵ See Article 3(4) and Recital 29: "In cases where a suspect or accused person is deprived of liberty, Member States should make the necessary arrangements to ensure that the person concerned is in a position to effectively exercise his right of access to lawyer, including by arranging for the assistance of a lawyer when the person concerned does not have one, unless he has waived this right."

⁵⁶ Detention is understood as the moment where a person's freedom of action has been significantly curtailed as defined in the case, *Zaichenko* Application No. 39660/02, judgment of 18 February 2010, para 48. Arrest can arise later, and sometimes is seen as the point in time when the more formal decision on detention is taken, e.g. by a judge.

⁵⁷ In only one jurisdiction (UK) the legal aid system caters for providing legally-aided assistance at the early stages for all persons, *whether they are deprived of liberty or not*, when they are being heard in a police station

⁵⁸ See CSES Study for the Impact Assessment, Sections 2.4 and 3.2.2, with examples from Latvia. See also Schumann, Bruckmüller, Soyer, *Pre-Trial Emergency Defence* Intersentia 2012 at p. 38 "Even where the law provides for legal assistance from the beginning a variety of practices and procedures means that access to legal assistance is not available in practice to those who cannot pay privately".

questioning. This means that the right of access to a lawyer is only provided after a decision on legal aid is made and at a stage which is likely to be considerably later than the moment when someone becomes suspected or accused of a criminal offence and thus should be afforded right of access to a lawyer (see e.g. DE and PL where the judge makes the decision on legal aid at the first hearing); SI, where it is at the pre-trial questioning before the court; HU where it has been reported to be sufficient to send a fax to a legal aid lawyer to satisfy the obligation to provide legal aid or LV, where the law states that legal aid should not be given later than three days after detention)⁵⁹.

These shortcomings have been widely recognised by stakeholders.⁶⁰ Moreover, a number of reports by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) have in recent years illustrated how deficiencies in the legal aid systems of several Member States in practice hampers the access to legal assistance of suspects and accused persons at the early stages of the proceedings.⁶¹

This seriously undermines the core of the right of access to a lawyer as prescribed in the Directive 2013/48/EU on access to a lawyer and risks undermining mutual trust especially for EU citizens that are detained in other Member States. Without ensuring practical access to legally-aided services at their very first contact with authorities, suspected or accused persons, particularly when they are deprived of liberty, will risk being unrepresented during the most crucial first pre-trial stages. This phase includes the first interrogations at the police station until the formal decision on legal aid is made, the latter often being delayed due to time-consuming means testing.⁶² Unless there is EU action ensuring that there is a right to legal aid that makes the right to access to a lawyer practically feasible at those early stages of the proceedings, the right of access to a lawyer will be merely illusory for those that have insufficient means and that do not already have a lawyer.

In **Latvia**, Section 66 Criminal Procedure Law provides “*From the moment when a person is notified that he or she is recognised as a suspect, such person shall have the (right)... to utilise legal assistance ensured by the State if he or she with his or her own funds is unable to enter into an agreement with a defence counsel.*” Legally aided assistance should furthermore be provided not later than within three working days after the suspect’s detention. However, the CPT report referred to allegations made to the investigating team of detained suspects having “***no contact with their state-funded lawyers until the first court hearing.***”

In **Poland**, there is in theory a right to legal assistance from initial detention. Before a lawyer can be appointed, the procedure requires an application for means-tested legal aid and this must be filed with the court hearing the case or sent to the court’s address by registered mail. As a result, it can in some situations take up to three weeks for the legal aid lawyer to be appointed. The following presents an example of the practical implications of this:

On June 2, 2012, Mr. X was visited in his family home by the ABW (National Security Agency). The

⁵⁹ See CSES IA Study, section 2.4 and 3.2.2.

⁶⁰ 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, para. 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).

⁶¹ See CPT reports concerning Austria, Denmark, Greece, Latvia, Poland and the Slovak Republic. See also Open Society Institute Sofia 2008, *Report on Civic monitoring of police stations*. See further Annex VIII.

⁶² See Justicia Report, 2013 cited at footnote 19 stating that Regulation might be warranted in providing for the limited provision of free legal aid pending the determination of the legal aid assessment. Legislative action, in the form of an EU Directive, would be best placed to apply such a principle across all Member States, pp. 46-48.

ABW detained him, questioned him and presented him to a prosecutor. The prosecutor and the ABW interviewed Mr. X several times during the initial phase. Mr. X appeared without a lawyer even though he was entitled to a state appointed lawyer because he had no means to appoint one himself. During these interviews, Mr. X made extensive self-incriminating statements. The Prosecutor – within 48 hours of the initial detention – filed a motion to the Regional Court to have Mr. X subject to pre-trial detention for 3 months. At the Court hearing Mr. X was not represented by a lawyer and the Court decided to detain Mr. X in pre-trial detention. Mr. X got access to a lawyer 2 months after his initial detention.

4.2.3. Restrictive eligibility criteria to qualify for legal aid

Article 6.3 (c) ECHR states that everyone charged with a criminal offence has the right 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 47 (3) of the Charter provides that: "*Legal aid shall be made available to those who **lack sufficient resources** insofar as such aid is **necessary to ensure effective access to justice.***"

Member States use two conditions to determine whether a person has a right to free legal aid: the person has insufficient means (**means test**); and/or the interest of justice requires legal aid (**merits test**). There is a wide variation in how the eligibility testing is done in the Member States.

The differences between Member States' systems as regards eligibility criteria are as follows: 13 Member States have only a means test, 3 Member States have only a merits test (DE, SE, DK) and 12 apply both a means and a merits test.⁶³ The fact that Member States operate different models of eligibility is not in itself incompatible with the ECHR and the Charter.⁶⁴ This initiative does not aim at providing a harmonised EU model for eligibility testing, but to ensure that there is a sufficient level of protection to guarantee mutual trust when the Member State operates the model chosen. However, there is a broad divergence in how the interest of justice and the criterion of "insufficient resources" are understood in the Member States.

Means test: There is no guidance from the ECtHR as how to understand 'lack of sufficient resources'. Instead, the ECtHR has highlighted the need to take all particular circumstances in of each case into account when determining the financial circumstances.⁶⁵ Also the UN Guidelines highlight the importance of not applying too restrictive or arbitrary means testing.

The threshold set by the Member States operating a means test ranges from countries where the threshold of earnings is set so low so that less than 10% of the total population in principle qualify for legal aid, while in other Member States, 80-90% of the population would meet the means test, were they to be suspected or accused of a criminal offence.⁶⁶ The exact difference between the Member States' systems in this respect are further outlined in **Annex VI** and **VII**.

Interest of justice test / merits test: One of the issues relating to legal aid where there is guidance from the ECtHR is in relation to how one should understand the interest of justice

⁶³ For details, see Annex VII.

⁶⁴ 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.

⁶⁵ *Kreuz v Poland*, Application no. 28249/95, judgment of 19 June 2001.

⁶⁶ See Table in Annex VII.

test. In *Quaranta* (1991)⁶⁷ it was held that there are three factors to take into account, and consider together, but one of the three can on its own warrant legal aid: (1) the seriousness of the offence and the severity of the potential sentence;⁶⁸ (2) the complexity of the case; and (3) the personal situation of the defendant (for example vulnerable groups).⁶⁹ In the case *Benham* (1996), the Court held that "where the *deprivation of liberty is at stake*, in principle, the interests of justice call for legal representation." In that case the suspect risked a prison sentence of a maximum of 3 months.

The interest of justice test is more flexible than the means test and it is therefore more difficult to *prima facie* appreciate what percentage of the population qualifies under it. An analysis of the legislation in the Member States applying a merits test yet shows that the test is designed very restrictively in a number of Member States. Looking at the length of the custodial sentence that one must risk to incur in order to fulfil the interests of justice test, in a number of Member States it is considered to be in the interest of justice to provide legal aid only for custodial sanctions that are rather long (see. e.g. 1 year for DE and CY, 3 years for AT, 5 years for EL, HU, RO)⁷⁰. This would appear to go against the principle set out in the *Benham* case which states that legal aid should in principle be provided in any case where deprivation of liberty is at stake.

Overall differences in the granting of legal aid between the Member States' systems: The share of criminal cases where a suspected or accused person is granted legal aid vary between 0.1% to 73 % in the 27 Member States (except DK) (average is 27 %) (see table in Annex VII). The very low percentage of cases that benefit from legal aid in certain Member States (e.g. HU, IT, CY, SI) shows that the threshold to qualify for the means test is set so low,⁷¹ that persons that lack sufficient resources still will not qualify for legal aid, and that in a number of Member States, a suspected person will only meet the interest of justice test for the most serious offences.

Thus, the restrictively set criteria to benefit for legal aid, both as regards the means test and the merits test, may result in suspected or accused persons without sufficient resources and when it is in the interest of justice as defined by the ECtHR, still do not benefit from legal aid. This has consequences on mutual trust and mutual recognition.

Benham v United Kingdom

The applicant, Stephen Benham, became liable to pay a community charge known as the 'poll tax'. The applicant did not pay the amount owed, and bailiffs visited his parents' house (where he was living), but were told that he had no goods of any value there or elsewhere which could be seized by them and sold in order to pay the debt.

Under the relevant regulations, the authorities were empowered to apply to a magistrates' court for an order committing to prison a person who was found to have insufficient goods on which to levy

⁶⁷ *Quaranta v Switzerland*, ECtHR. Judgment of 24 May 1991

⁶⁸ See e.g. *Pham Hoang v France*, ECtHR, Judgment of 25 September 1992, at para 40, *Barsom and Varli v Sweden*, ECtHR (dec.) Decision of 4 January 2008.

⁶⁹ The ECtHR will take into account education, social background and personality of the applicant and assess them with regard to the complexity of the case. See e.g. *Quaranta v Switzerland*, ECtHR. Judgment of 24 May 1991 at para 35.

⁷⁰ See Annex VII.

⁷¹ See CSES Study for the Impact Assessment, Section 4.3.1: "*in a number of jurisdictions, academics, practitioners (and in some cases Ministries of Justices as well) expressed the view that the existing threshold was too low, effectively preventing some suspects/accused who do not have sufficient means to have access to legal aid.*"

outstanding community charge.

The charging authority applied for such an order, and on 25 March 1991 Mr Benham appeared at the Poole Magistrates' Court for the inquiry required by the regulations. He was not assisted or represented by a lawyer, although he was eligible for legal advice and assistance before the hearing. The applicant was convicted by the magistrates. He faced a possible maximum penalty of three months' imprisonment, and was ordered to be detained for thirty days (the case was however overturned on appeal).

The applicant submitted that the interests of justice required that he ought to have been represented by a legal aid lawyer when he appeared before the magistrates.

The ECtHR affirmed that “*where deprivation of liberty is at stake, the interests of justice in principle call for legal representation... In this case, Mr Benham faced a maximum term of three months' imprisonment... In view of the severity of the penalty risked by Mr Benham and the complexity of the applicable law, the Court considers that the interests of justice demanded that, in order to receive a fair hearing, Mr Benham ought to have benefited from free legal representation during the proceedings before the magistrates.*”⁷²

4.2.4. Shortcomings in quality and effectiveness of legal assistance provided through legal aid schemes

ECtHR has held that the State's obligation to provide free legal assistance is not fulfilled by merely appointing a publicly funded lawyer⁷³ but it must ensure that the assistance provided by legal aid lawyers is practical and effective, and of a certain quality. While the relation between a lawyer and the client is independent of the State, it has been held that national courts have a duty to determine whether the assistance by state-appointed counsel is sufficient to secure the fair trial guarantees,⁷⁴ and the State bears responsibility in ensuring quality and should intervene where failure to provide effective representation is manifest.⁷⁵

Research has shown the damaging effect of poor legal advice to the credibility of the legal aid system, both with respect to emergency defence services and ordinary legal assistance.⁷⁶ In the Warsaw conference on the EU measure on legal aid, the low quality of legally-aided assistance and how to improve the situation was discussed.⁷⁷

⁷² *Benham v. United Kingdom* (application no. 19380/92), judgment of 10 June 1996, paragraphs 61 and 64.

⁷³ *Pavlenko v. Russia*, Application no. 42371/02, judgment of 4 October 2010, para. 99 “*assigning counsel does not in itself ensure the effectiveness of the assistance this counsel may provide to his client*”. See also *Falcao dos Santos v Portugal*, ECtHR, judgment of 3 July 2012, paras 12-18. In *Artico v. Italy*, Series A no. 37, judgment of 12 May 1980 the ECtHR held that if the State only needed to appoint a lawyer “it would lead to results that are unreasonable and incompatible with (...) Article 6 ECHR (...) and in many instances free legal assistance might prove to be worthless.”

⁷⁴ *Pavlenko v. Russia*, Application no. 42371/02, judgment of 4 October 2010.

⁷⁵ The State's responsibility is of course not unlimited. In *Imbriosca*, the Court held that “*A State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes States are required to intervene only if a failure is manifest or sufficiently brought to their attention*”.

⁷⁶ See J. Hodgson & J. Blackstock, *Legal Aid, Improving the quality and effectiveness of advice*, empirical research how to design legal aid schemes to ensure quality and competence of legal advice. In fact, suspects receiving inadequate legal advice are poorly served and a subsequent challenge of any procedural irregularity is made almost impossible as the courts assume that suspects with an adviser present has his rights protected. It has been argued that it is better to have no legal advice than poor legal advice by insufficiently trained or qualified lawyers, as with no legal advice, it is easier to challenge evidence.

⁷⁷ See Conference Report from the Polish Presidency's conference on Legal Aid in Criminal Proceedings in the EU, December 2011.

Nonetheless, in many Member States, there is little or almost no quality assurance in place.⁷⁸ 12 Member States require some *special qualification or accreditation*⁷⁹ to provide legally aided assistance, while in others it is sufficient to be a qualified lawyer (without specific knowledge of criminal law). This means that in a number of Member States you can be assisted e.g. by someone who has no or limited experience in criminal law matters and usually deals with family or property law. The problem of competence of legal aid providers has been substantiated in stakeholder reports.⁸⁰

In ca. 2/3 of the Member States there is *some method of monitoring the performance of legal aid lawyers* with the aim to ensure the quality of the work (in 9 Member States legal aid lawyers are supervised by a professional association, in 8 Member States legal aid lawyers are supervised by the State or the courts, sometimes alongside professional organisations, and in 3 Member States there is peer review monitoring). Yet, in 8 Member States there is no formal supervision, apart from possibility of appeals or complaints (BG, CY, DE, EL, HU, IE, LU, NL).

Moreover, in a majority of the Member States (18 MS) *the training requirements* to carry out defence services are minimal or non-existent.⁸¹

In relevant literature⁸² and in consultation with stakeholders⁸³ insufficient levels of remuneration are frequently asserted as a major reason for poor quality of legally aided services. CPT and SPT have noted that excessive workloads and low fees for services discouraging effect on legal aid lawyers.⁸⁴ Adequate remuneration, no matter the length or complexity of the case, is important for the obligation to provide an effective representation sufficient to secure the fair trial guarantees. The data on the total criminal legal aid expenditure and the vast difference between Member States (see **Annex VI**) is an indicator that in practice there are problems in compliance with the requirement of the ECHR to provide an effective and practical defence resulting from low levels of remuneration.⁸⁵ It can be identified that in a number of Member States the remuneration of a legal aid lawyer is much lower than that of a private practising lawyer (for example €5 in LT compared to €96, HU €10 per hour instead of €23, EE €32 instead of €150, IT remuneration is 25 % of the fees of a private practicing lawyer).⁸⁶

Deborah Dark (shortcomings of the quality of defence in EAW cases)

In 1989 Deborah Dark was arrested in France on suspicion of drug related offences and held in custody for eight and a half months. Her trial took place later in 1989 and the court acquitted her of all

⁷⁸ See conclusion of Justicia report, arguing that there appears to be little or no monitoring of the legal aid system in the 7 Network Members jurisdiction, cited supra at footnote 19.

⁸⁰ FTI Report "*The practical operation of legal aid in the EU*", Fair Trials International, July 2012. www.fairtrials.net/wp-content/uploads/2012/09/Legal_Aid_Report.pdf, p. 23. E. Cape, Z. Namoradze, *Effective Defence in Eastern Europe*, p. 452, and in relation to Bulgaria, pp. 455-456, and to Lithuania, p 460.

⁸¹ See CSES Study for the Impact Assessment, Section 2.7 and Section 3.2.5.

⁸² See e.g. E. Cape, Z. Namoradze, *Effective Defence in Eastern Europe*, p. 60, Justice Report on EAW system, p. 40.

⁸³ 87 % of respondents to the online survey conducted by the contractor found that it was not adequate. See also ECBA Cornerstones on Legal Aid.

⁸⁴ Report on the visit to Croatia carried out by the CPT from 4 to 14 May 2007, CPT/Inf (2008) 29, at para. 19; Report on the visit to Hungary carried out by the CPT from 30 March to 8 April 2005, CPT/Inf (2006) 20, at para. 23; Report on the visit to Poland carried out by the CPT from 8 to 19 May 2000, CPT/Inf (2002) 9, at para. 23.

⁸⁵ See E. Cape, Z. Namoradze, *Effective Defence in Eastern Europe*, p. 60.

⁸⁶ See CSES Study for the Impact Assessment Sections 2.5. and 3.2.3, and relevant country sheets.

charges. She was released from jail and returned to the UK. The prosecutor appealed against the decision without notifying Deborah or her French lawyer. The appeal was heard in 1990 with **no one there to present Deborah's defence**. The court found her guilty and sentenced Deborah to 6 years imprisonment. Again, she was not informed that an appeal had taken place, nor notified that her acquittal had been overturned. As far as she was concerned she had been found not guilty of all charges and was free to start rebuilding her life. In April 2005, fifteen years after the conviction on appeal, an **EAW** was issued by the French authorities for Deborah to be returned to France to serve her sentence.

In 2008 Deborah travelled to Spain to visit her father who had retired there. On trying to return to the UK, she was arrested and taken into custody in Spain, where she faced extradition to France. **A court appointed legal aid lawyer visited her and advised her that she had no option but to consent to extradition.** However, a doctor who visited Deborah shortly afterwards advised her to resist extradition. Deborah took this advice and at the extradition hearing the Spanish court refused to extradite Deborah on the grounds of unreasonable delay and the significant passage of time.

4.3. The scale of the problem

Member States currently do not collect data on the number of proceedings in which insufficient access to a lawyer due to denied legal aid is complained about or the amount of decisions denying legal aid that have been appealed and upheld, or reversed by a higher court. It is therefore not possible to estimate with any accuracy the number of cases where suspects have no access to legal aid or where the legally-aided service is of low quality so that it impacts on the fair trials rights.

What one can conclude on the basis of the comparative analysis of the number of EU citizens that benefit from legal aid in their criminal proceedings in the EU Member States, is that it appears that there is a wide range (between 0.1% and 73% of criminal proceedings benefit from legal aid), with an average of 27 %. 17 Member States lie below the EU average.

4.4. Baseline scenario: How would the problem evolve all things being equal?

Directive 2013/48EU on access to a lawyer will have to be implemented in the Member States by 2016. Without any flanking measure ensuring publicly funded legal representation, the rights provided under that Directive will be governed exclusively by Member States' domestic systems of legal aid, as well as the ECHR and the judicial oversight of the ECtHR. This means that the deficiencies in the legal aid system of several Member States are likely to continue hampering the right to a fair trial for suspects and accused persons, especially at the early stage of the proceedings (at the police station stage) and for legal advice in the issuing Member States of EAWs.

Considering the hands-off approach of the ECtHR with regard to most aspects of legal aid and the piecemeal development of case-law described in section 4.1.1, it is not likely that reliance on the ECHR will strengthen the protection of fundamental rights in order to ensure mutual trust on a sufficient level. The best that could be expected is that Member States would respond to particular developments in respect of the right to legal aid, but this would only be reactive, without any true supervisory powers by the Council of Europe or the EU and the reaction would be *ad hoc*. It is unlikely that such reforms would result in any common minimum standards or that all Member States would proceed at the same pace.

The expected further increase in the caseload of the ECtHR, as well as the fact that these cases only are the tip of an iceberg in an area where the very problem is the absence of a

lawyer and legal aid, will continue to limit the effectiveness of legal aid to suspects and accused persons.

Nevertheless, through the adoption and national transposition of the Directive on Access to a Lawyer, the issue of legal aid is likely to be brought within the scope of EU law (Article 51 of the Charter). This would mean that the Court of Justice could assess the adequacy of the Member States' criminal law legal aid regimes on the basis of Article 47(3) of the Charter. This access to future judicial review could lead to an improvement, but given the fact that the scope of Article 47(3) has only been tested to a limited extent in Court, any action will be reactive to individual cases being brought to the Court, and it is unlikely that this will result in a broad improvement in the short to medium term of the protection of fundamental rights and mutual trust.

From a wider EU perspective, the absence of common minimum standards on the right to legal aid will continue to cause concern to the judicial authorities in the state being asked to apply an instrument at the request of another Member State, where there are deficiencies in the legal aid system of this other Member State that undermine confidence in the effective respect of the rights to a fair trial. In the light of the current on-going reforms of criminal legal aid systems, in the future legal aid in the Member States could be reduced significantly. This could lead to a violation of fundamental rights of a sufficient level to be invoked to refuse judicial cooperation more systemically and impair mutual recognition as provided by Article 82 TFEU.

The need to improve mutual trust will become even more pressing with the implementation and application of the raft of EU judicial cooperation instruments besides the EAW, such as the three "detention" Framework Decisions, the Freezing and confiscation Framework Decisions, where the absence of legal aid in the underlying criminal proceedings in the executing State may raise doubts as to the respect of fair trials in that Member State. Indeed, mutual trust is needed to ensure a smoothly working mutual recognition system, where all the mutual recognition instruments will be correctly applied, especially instruments where access to a lawyer free of charge will be a fundamental part of the fair trial rights (such as in the European Investigation Order). Mutual trust would not be strengthened if no action on legal aid is taken.

Increased movement of citizens between Member States⁸⁷ will lead to a greater need for judicial cooperation in criminal matters between Member States in the future.

4.5. Does the EU have power to act?

4.5.1. The legal basis

The EU's legislative competence for laying down minimum rights in criminal procedure is set out in Art 82(2) (b) TFEU.⁸⁸ Pursuant to this provision, minimum rules concerning the rights of individuals in criminal procedure may be adopted by means of Directives, to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension. While Article 82 (2) (b) TFEU makes explicit reference to Directives, this legal basis would indeed also allow for adopting any less intrusive measure, as examined in the policy options, according to the principle the larger contains the lesser.

⁸⁷ In 2011, 13 million EU citizens lived in a Member State other than their own, an increase of 0,5 % with respect to 2010.

⁸⁸ Denmark, Ireland and the UK do not take part in the adoption of measures in the justice field (Protocols 21 and 22 to the TFEU). However, Ireland and the UK have the possibility to opt in.

Any EU instrument will apply to all criminal proceedings, including purely domestic ones, irrespective of whether they present a cross-border element. While Art 82(2)(b) TFEU refers to cross-border proceedings, it has in relation to the previous instruments in the Roadmap been concluded that a precise, ex ante categorisation of criminal proceedings as cross-border or domestic is impossible⁸⁹ in relation to a significant number of cases: for instance, a purely domestic procedure may take on a cross-border dimension at a later stage, when the suspect flees to another country or when there is a need to gather relevant evidence in another Member State.

Moreover, the objectives can only be met if minimum rules apply to all criminal procedures. In order to improve mutual trust and judicial cooperation, judicial authorities need to be aware that sufficiently high fair trial standards apply across the board in the jurisdictions of other Member States. If Member States were at liberty to apply lower standards to purely domestic procedures, the requisite mutual trust between judicial authorities could not be boosted. As concerns the need to safeguard the fundamental rights of citizens, the enactment of minimum rules for cross-border procedure only, far from addressing the problem, would create two different classes of defendants in criminal procedure, one with more rights than the other. Such a distinction made on the basis of the cross-border nature of the procedure, would lead to unreasonable differentiation and would eventually be detrimental to the protection of fundamental rights. In addition, the Charter guarantees rights to everyone suspected of a criminal offence, whether involved in cross-border or purely national proceedings.

4.5.2. *Subsidiarity: Why the EU is better placed to take action than the Member States*

It is considered that there is a need for EU action based on the following factors:

- (a) *Mutual trust as a condition for mutual recognition:* The EU is establishing its own, unique system of judicial cooperation based on the principle of mutual recognition throughout the EU. Such a novel system calls for a guarantee of minimum standards of fundamental procedural rights protection in the EU. The problem has a cross-border dimension because if certain Member States do not respect procedural rights, this creates problems for other Member States. For example, if a judicial authority is requested to execute a court ruling from another Member State where the standards in the proceedings have not been adequate, it may either refuse to do so, or may request additional information which would result in delayed execution and consequently delayed justice
- (b) *Free movement of persons:* Persons can be involved in criminal proceedings outside their own Member State and the needs of those suspected and accused persons need to be tackled at EU level. In the European Union people are constantly travelling and moving across borders. Around 13 million Europeans live outside their home country, 10% of Europeans have lived and worked abroad during a period of their lives and 13% have gone abroad for education or training.⁹⁰

These numbers show the importance of ensuring proper, effective action on the rights of those who get involved in criminal proceedings, in their own country or while

⁸⁹ See Impact Assessment on Access to a Lawyer, “Commission Staff Working paper, Impact Assessment accompanying the Proposal for a Directive of the European Parliament and of the Council on the Right of Access to a Lawyer and of Notification of Custody to a third person in Criminal Proceedings”, COM (2011) 326 Final.

⁹⁰ Eurostat, Statistics in Focus 94/2009, Eurobarometer 337/2010

travelling or living abroad. The EU must ensure that suspects and accused persons benefit from a common minimum level of protection and are confident that there is a right to an effective access to a lawyer and legal aid, should they be subject to criminal proceedings when abroad.

- (c) *Insufficient enforcement mechanisms under ECtHR:* The ECHR already sets European-wide fair trial standards, but with respect to legal aid its case-law has been very scarce. Moreover, the ECHR's enforcement mechanisms cannot guarantee a sufficient and consistent level of compliance by its signatory States, including EU Member States. Similarly repeated censure by the CPT (which in some Member States has been repeated over the course of a number of visits) has not proved adequate to change the practice of Member States.

Moreover, the system of protection granted by the ECtHR is *ex-post* only. Ensuring justice in individual cases *ex-post* serves a different purpose from laying down generally applicable rules *ex-ante* and can never be said to be equivalent. There is no enforcement mechanism comparable to the EU infringement proceedings, if it is found that a Member State is in breach of the Convention. Moreover, the enforcement system of the ECHR suffers from a huge backlog of cases awaiting disposal at the ECtHR⁹¹, so a remedy for the violation may come many years after. There are also practical difficulties in bringing a case, e.g. the requirement to pursue domestic appeals and the application to the ECtHR can be too expensive for some applicants in the absence of legal aid. As a consequence, many people whose rights have been violated never bring an action at the ECtHR.

5. OBJECTIVES

Objectives:	
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.
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 Directive 2013/48/EU 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 procedure before the formal decision on legal aid has been made, 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),

⁹¹ 139,650 cases pending as at December 2010.

	4) To ensure that Member States take measures to improve the quality of legally aided services.
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6. POLICY OPTIONS

The present initiative forms part of a package of measures for improving mutual trust. Only once all the measures envisaged in the Stockholm Programme are in place will it be possible to achieve the general objective.

In accordance with the Communication from the Commission on the Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union⁹², this Impact Assessment Report also examines the impact on the Fundamental Rights of the options proposed, in particular in the light of the 'fundamental rights check list' presented in the Communication.

All the policy options are intended to operate in the framework of the previous Stockholm programme and Roadmap Measures and have the same scope of application. In previous measures, *suspected or accused persons* has consistently been used as the category of persons falling within the personal scope of the action. This encompasses all persons who are involved in criminal procedure, against whom a suspicion that they have committed a criminal offence exists, irrespective of the terms used in domestic law. It encompasses also childrens and other vulnerable suspects. The personal scope also covers persons subject to EAW proceedings. The temporal scope for the other fair trial rights instruments is "*from the time a person is made aware that he is suspected or accused of having committed a criminal offence until the conclusion of the proceedings*". The latter term is understood to mean the final determination of the question whether they have committed the offence, including, where applicable, sentencing and the resolution of any appeal.

6.1. Discarded options

6.1.1. *To set out a common harmonised EU standard for eligibility testing for the EU (i.e. require a cumulative means and merits test)*

The option of introducing a common harmonised eligibility test, and require all Member States to introduce a cumulative merits test and means test has been discarded. This would restrict the protection of fundamental rights in a number of Member States as compared to the current situation. While the ECHR and the Charter contain a cumulative means and a merits test,⁹³ 16 Member States operate only one of the tests⁹⁴ and in those Member States, it is hence likely that access to legal aid is wider than what is required by the ECHR (provided that the test in question on the means or the merits is not too narrowly defined). Requiring these Member States to apply an additional criterion would restrict the circle of persons benefitting from legal aid compared with the situation today. The EU cannot do so in an instrument aiming at the protection of rights of suspected and accused persons; Member States must be able to maintain a higher level of protection.

⁹² http://ec.europa.eu/justice/news/intro/doc/com_2010_573_4_en.pdf

⁹³ 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 sanction which can be imposed is not serious.

⁹⁴ See Annexes VI-VII.

6.1.2. To set down harmonised levels for remuneration of legal aid practitioners

The option to introduce some harmonised quantitative EU level of remuneration for legal aid lawyers as proposed by stakeholders has been discarded as it is not possible to assess what level of remuneration would be adequate given the difference in standards of living, the readiness of lawyers to carry out defence work, the complexity and lack of comparability of legal aid remuneration regimes and fees charged by lawyers when acting privately.

6.2. Overview of policy options

We have considered 4 options: retention of *status quo* (option 1) and three other policy options. The retention of status quo would involve taking no further action on EU level, while the 3 other options will improve the fair trial rights by bettering the right to legal aid for suspected and accused persons in the EU. The three options range from low level of obligation – medium – high level of obligation.

Option 1 - Status quo	Retention of status quo. No action at EU level.
Option 2 – Low level of obligation	Least ambitious option through practical measures: Combination of actions on capacity building, making information more easily available and exchange best practices between the Member States in expert group on the topic, with the possibility to compile such best practices into practitioners' guidelines.
Option 3 – Medium level of obligation	Legal instrument – sub-option 3(a) through a recommendation or 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 the standard in some Member States. Goes beyond low intervention, without setting out detailed prescriptive action, by leaving discretion to the Member States in their implementation.
Option 4 – High level of obligation	The most ambitious and prescriptive option 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.

6.3. Detailed description of the options

Policy option 1: the *status quo*, has been presented in the baseline scenario (see Section 4.4).

Policy option 2: This option would consist of a number of non-statutory measures:

The action would aim at capacity building, e.g. by making funds, including EU funds under the Justice Programme 2014-2020, available for training of lawyers involved in providing emergency legal defence and ordinary legal aid services. Training would also involve staff from the competent authorities deciding on applications on legal aid (judicial authorities and legal aid bureaus). The delivery of training would remain the responsibility of Member States.

The action would also involve awareness raising. It would encourage the Member States to provide information to citizens confronted to justice systems and practitioners on the right to legal aid including in case of EAW proceedings, on websites (e.g. national ones and the EU e-justice portal) and leaflets (e.g. as concerns eligibility criteria, how and where to apply for legal aid, how to ask for review of the decision, possible responsibility of repayment).

It would also invite Member States to collect information on different aspects of legal aid (such as the means and the merits test, the rates of remuneration of legal aid lawyers, legal aid lawyers specialised in EAW proceedings) and to communicate the information to the Commission that will make such information available in a comparative format by a study (on a yearly basis).

The Commission would create an expert group on criminal legal aid at EU level, aiming at exchanging and establishing best practices on aspects of such as how to ensure a practicable emergency defence, an efficient administration of legal aid (e.g. independence of appointing authorities, time-limits, judicial review) and quality legal advice (qualification, training, possibilities for monitoring). On this basis, the expert group could instruct the production of best practice guidelines to be disseminated by the Commission.

Policy Option 3: goes further than option 2 in defining what the common minimum standards on legal aid at EU level and, to some extent, clarifying in a legal instrument the case law of the ECHR, for example by explicitly setting out the criteria to be used in the eligibility testing. The option also draws on existing standards such as the UN Recommendation, for instance as regards the eligibility criteria, emergency defence, and the quality of legal aid providers. This option has been split into two sub-options depending on the nature of the legal instrument through which it may be realised: **Option 3(a)** through a Recommendation; **Option 3(b)** through a Directive. These two sub-options may also be combined by providing for some elements in a binding legal instrument, while providing for the others in a non-binding instrument (see further Section 8).

Member States would need to provide legal aid in EAW proceedings, when they are the executing Member State or when they are the issuing Member State, subject to eligibility testing according to the law in the relevant Member State.

This Policy Option would require Member States to ensure that there is an emergency defence system⁹⁵ in place to ensure effective access to a lawyer and legal aid before the first questioning at police station for all persons deprived of liberty, including vulnerable suspects, until the formal decision on eligibility for legal aid is made.⁹⁶ It would, nevertheless, be possible for Member States to recover the sums spent on the emergency defence in case the formal eligibility assessment shows that the suspected or accused persons do not fulfil the criteria for legal aid. (i.e. the means and/or the merits test).

As regards the eligibility criteria for legal aid, this option would clarify that a case-by-case approach is needed in the assessment, and provide objective factors from the ECHR case-law and UN principles and guidelines (Guideline 1 para 40) that the competent authorities in the Member States should take into account when assessing the means (made on the basis of objective factors such as income, capital or family situation), and/or the merits test (seriousness of the offence and the severity of the potential sentence, the complexity of the case, and the personal situation of the defendant).⁹⁷ This Option would allow Member States to continue operating the model for eligibility testing that they have chosen (i.e. only a means test, only a merits test or a combined means and merits test), while still complying with common minimum criteria.

⁹⁵ Stakeholders in a number of focus groups were supportive of a legislative measure ensuring non-means tested legal aid at the pre-trial or police stage of the proceedings, See CSES section 4.2.3.

⁹⁶ See e.g. UN guidelines, para 40c.

⁹⁷ In the focus group meetings it appeared that there was a preference for such a qualitative approach compared to the quantitative approach under option 4 section 4.2.3.

As concerns the quality of legal aid services,⁹⁸ Option 3 would require Member States to introduce accreditation and monitoring schemes, and ensure professional training for legal aid practitioners.⁹⁹ It would also provide that remuneration for legal aid practitioners needs to be proportionate to the case at hand.

Policy Option 4: would be legally binding and more prescriptive than option 3(b). It will provide more detailed criteria on access to legal aid, to some extent going beyond ECHR standards as it will lay down e.g. a harmonised means test. The obligations with regard to emergency defence and making legal aid available in proceedings under mutual recognition instruments would be more onerous on the Member States.

In EAW proceedings, access to legal aid would not be subjected to the national eligibility criteria, but should always be granted as the person is deprived of liberty and the situation thus is comparable to that of emergency defence. Moreover, operating a means and a merits test in cross-border proceedings meet practical obstacles likely to substantially delay the legal assistance while the person is in custody and the time limits under the EAW are running.

With regard to emergency legal aid, Option 4 would make this available to everyone before their first police station interview if a formal decision on legal aid has not yet been made, i.e. also persons at large would be able to benefit from free legal advice at the first stages of their criminal proceedings, subject to the possibility for the State to recover the costs if the subsequent eligibility assessment shows that they are not eligible for legal aid.

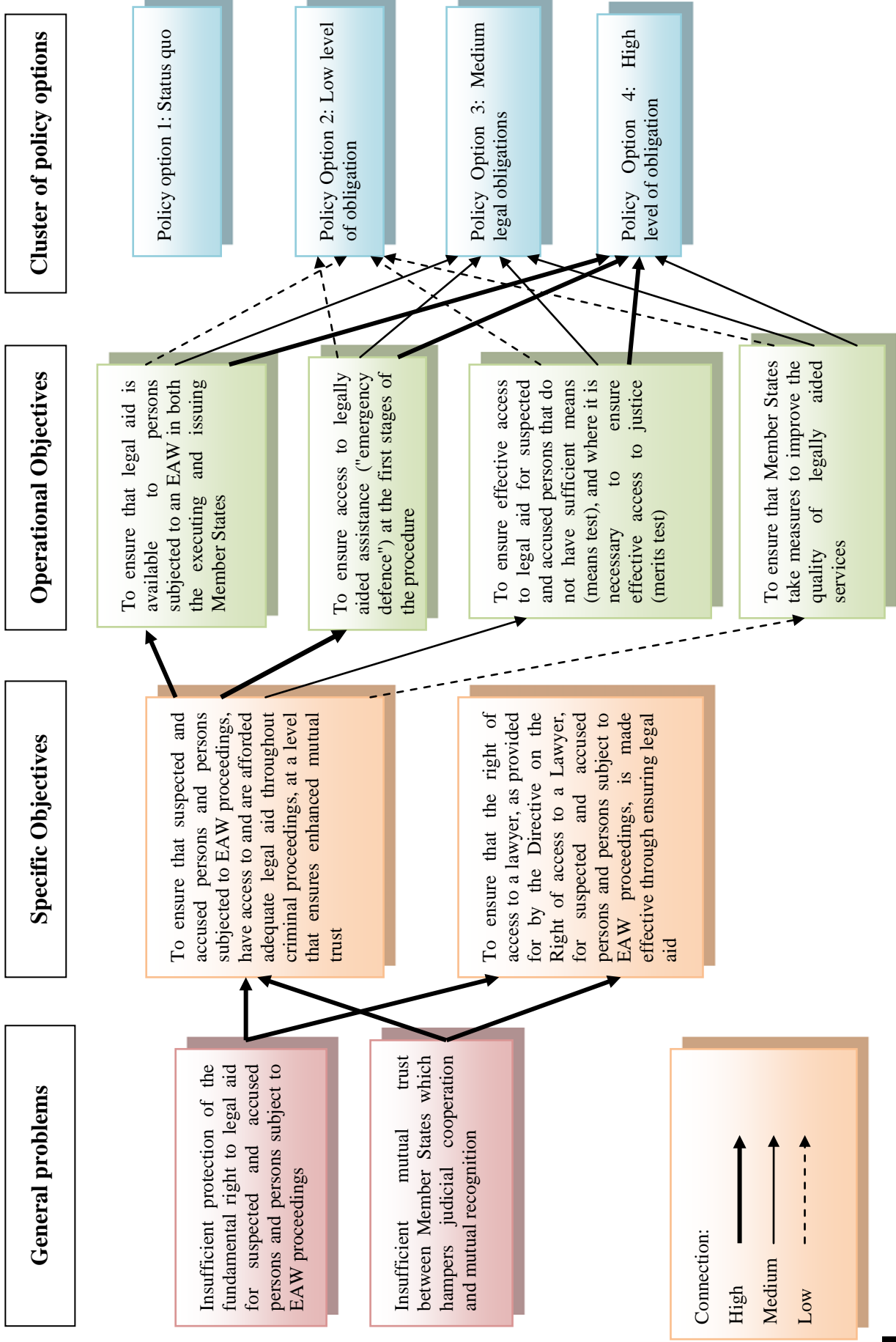
As regards the eligibility criteria, the Directive would provide a minimum income threshold (based on a % of the average income threshold in the relevant Member State) for each Member State.¹⁰⁰ Also the merits test would be more closely harmonised by setting out e.g. special categories of persons that always should be considered fulfilling the merits test (certain vulnerable suspects such as children) and it would also provide that the merits test would be fulfilled for all offences that carry a custodial sentence over a certain threshold under the applicable domestic law.

As regards the quality of legal advice under legal aid schemes, the option would be equal to Option 3b.)

⁹⁸ Stakeholders representing the legal profession showed limited enthusiasm for increased supervision, (CSES IA Study, section 3.2.5) while the Member States' in the expert meeting were positive with regard to non-legally binding action.

⁹⁹ See e.g. ECHR case law and UN standards and Guidelines, para 36-37.

¹⁰⁰ Stakeholders in a number of countries (e.g. BE, CY, CZ, EE, SE) from a range of backgrounds referred to difficulties in introducing a common quantitative threshold. See CSES Study for the IA, section 4.2.3.



Comparative table of Policy Options 3-4

	Policy Option 3	Policy Option 4
<p><u>Underlying cause 1: Insufficient possibility to access legal aid in extradition proceeding under the EAW in executing and issuing Member States</u></p> <p>Objective: To ensure that legal aid is available to persons subjected to EAW proceedings, both in the executing and issuing Member States</p>	<p>Require Member State to ensure that legal aid is available in the executing Member State and in the issuing Member State, subject to a means and/or merits test, as applicable in the relevant Member State.</p>	<p>Require Member States to ensure that legal aid is provided in both the executing and issuing Member States, without a means and/or merits test.</p>
<p><u>Legal Aid in EAW proceedings</u></p>	<p>Require Member State to ensure that legal aid is available in the executing Member State and in the issuing Member State, subject to a means and/or merits test, as applicable in the relevant Member State.</p>	<p>Require Member States to ensure that legal aid is provided in both the executing and issuing Member States, without a means and/or merits test.</p>
<p><u>Underlying cause 2: Timing – Legally aided assistance is not always available at the early stages of the proceedings</u></p> <p>Objective: To ensure access to legally aided assistance ("emergency defence") at the first stages of the procedure</p>	<p>Require Member States to ensure a system of access to emergency legal aid available free of charge for persons deprived of liberty, without first having recourse to a means or merits test, where a suspect has access to a lawyer in accordance with Article 3 of the Directive on Access to a Lawyer, until release from detention or the formal decision on legal aid is made.</p> <p>Provide possibility for Member States to retroactively see repayment of the legal aid granted at this stage, in case the eligibility criteria for legal aid are not met in the subsequent</p>	<p>Require Member State to ensure a system of emergency legal aid available free of charge for all <u>suspected and accused persons that are questioned by the police</u> and that have a right of access to a lawyer under Article 3 of the Directive on Access to a lawyer, without the need for a means or merits test, until the formal decision on legal aid is made.</p> <p>Provide possibility for Member States to retroactively see repayment of the legal aid granted at this stage, in case the eligibility criteria for legal aid are not met in the subsequent assessment.</p>
<p><u>Emergency defence</u></p>	<p>Require Member States to ensure a system of access to emergency legal aid available free of charge for persons deprived of liberty, without first having recourse to a means or merits test, where a suspect has access to a lawyer in accordance with Article 3 of the Directive on Access to a Lawyer, until release from detention or the formal decision on legal aid is made.</p> <p>Provide possibility for Member States to retroactively see repayment of the legal aid granted at this stage, in case the eligibility criteria for legal aid are not met in the subsequent</p>	<p>Require Member State to ensure a system of emergency legal aid available free of charge for all <u>suspected and accused persons that are questioned by the police</u> and that have a right of access to a lawyer under Article 3 of the Directive on Access to a lawyer, without the need for a means or merits test, until the formal decision on legal aid is made.</p> <p>Provide possibility for Member States to retroactively see repayment of the legal aid granted at this stage, in case the eligibility criteria for legal aid are not met in the subsequent assessment.</p>

	Policy Option 3	Policy Option 4
	assessment.	
<p><u>Underlying cause 3: Too restrictive eligibility criteria to qualify for legal aid</u></p> <p>Objective of EU action: 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)</p> <p>Eligibility criteria</p>	<p>Means test: Require that Member States ensure that the authorities making the decisions on legal aid take into account certain objective factors (family composition, income) when establishing whether the means test has been met.</p> <p>Merits test: Provide for minimum qualitative criteria to be respected when applying the merits test as per ECHR case-law and UN guidelines (seriousness of the offence, the personal situation of the defendant, severity of the potential sanction, the complexity of the case).</p> <p>Case-by case analysis: Ensure that rigidly set eligibility tests do not hamper fair trials rights, but that the Member States' systems ensure flexibility. Require a case-by-case approach. For the means test, it means that the actual possibility to pay in the case at hand is assessed (i.e. it might be more difficult to afford defence in a complex murder trial than in a shoplifting case). For the merits test, there must always be a possibility to have the whole situation assessed and it should not be decided only on the basis of the potential sanction.</p>	<p>Means test: MS that operate a means test must make legal aid available to everyone who meets the harmonised EU formula, based on a minimum income threshold, calculated per Member State.</p> <p>Merits test: Provide detailed harmonised minimum rules for when the merits test is met, including when deprivation of liberty above a certain minimum length is in the scale of crime, and for certain vulnerable categories of suspects.</p> <p>Case-by case analysis: As in option 3.</p>

	Policy Option 3	Policy Option 4
<p>Underlying cause 4: Shortcomings in quality and effectiveness of legal assistance provided through legal aid schemes</p> <p>Objective: To ensure that Member States take measures to improve the quality of legally aided services</p> <p>Accreditation, training, quality control, funding of the legal aid system</p>	<p>Require Member States to ensure that there are mechanisms in place for quality control, and requirements of accreditation and continuous professional training for lawyers participating in the legal aid schemes.</p> <p>Require Member States to ensure that remuneration of legal aid services is proportionate to the complexity and duration of the case at hand and ensures the provision of effective legal assistance.</p>	<p>As Option 3, and in addition:</p> <p>Set out prescriptive requirements on remuneration for legal aid providers (taking account of different income levels in MSs).</p> <p>Require MS to pay legal aid lawyers within a set number of weeks following the closure of the case.</p> <p style="text-align: center;">DISCARDED</p>

7. IMPACT ANALYSIS OF POLICY OPTIONS

The options have been assessed on the basis of the effectiveness in achieving the specific and operational objectives in largely qualitative terms.¹⁰¹ All policy objectives envisage equal treatment of EU and non-national EU nationals; third country nationals would receive the same protection as EU citizens in criminal proceedings throughout the EU.

7.1. Policy option 1: Status quo

Description: No action is taken on EU level.

Expected Impact	
Effectiveness in meeting the policy objectives	<ul style="list-style-type: none"> • No incentive for any action to achieve common minimum standards for the right to legal aid or to improve mutual trust and the effective working of mutual recognition instruments. • Importantly, in many Member States, taking no decisive corrective measures would not meet the needs of those requiring publicly-funded legal assistance. The right of access to a lawyer guaranteed in the Directive on Access to a Lawyer would be likely to remain ineffective especially at the police station stage and for legal advice in the issuing Member States of EAWs. • The right to publicly funded legal representation will remain governed exclusively by the Member States' domestic system of legal aid, as well as the ECHR and the judicial oversight of the ECtHR. Thus, divergences between the legal aid systems of the Member States would be likely to grow.
Impact on fundamental rights	<ul style="list-style-type: none"> • None. Access to legal aid will continue to be protected at Member State level, through the ECHR, and the Charter and the current problems of limited protection would continue which could risk declining standards of justice and increased risks of miscarriages of justice. • This situation would not provide adequate protection of the right to legal aid for suspects or accused persons in the EU or the right of access to a lawyer according to the Directive on Access to a Lawyer. There is a risk of a declining perception of the EU as a model in upholding human rights, especially fair trials rights.
Political Feasibility	<ul style="list-style-type: none"> • N/A
Impact on the legal system of Member States	<ul style="list-style-type: none"> • None. Domestic justice systems may evolve towards more convergence in the light of ECtHR jurisprudence but it is not likely that this will happen in the short to medium term.
Costs	<ul style="list-style-type: none"> • None. There are no immediate new financial burdens associated with this option. This option is also unlikely to lead to the reduction of costs of ECtHR and domestic appeals, re-trials and aborted prosecutions due to breach of suspects' fair trial rights. On the contrary, given the increase in applications to the ECtHR, costs for Member States linked with damages awarded to individuals are likely to augment.

¹⁰¹ Due to very limited data available, many of the calculations are based on estimations and extrapolations. The costs are rather giving an indication of an assumed maximum cost. Annex IV shows the effect of the variations of the assumptions which can be made and includes different scenarios.

7.2. Policy Option 2: Low level of obligation

Expected Impacts							
Effectiveness in meeting the policy objectives	<ul style="list-style-type: none"> • Low. The actions under this Policy Option are of some practical benefit and can lead to better application of already existing domestic standards. It can bridge information gaps on legal aid in the domestic systems and in cross-border cases, as well as create some impetus for change by exchanges of best practices. • Even where action is taken, it will lead to few changes and improvements in the protection of the fundamental right to legal aid. However, it is unlikely that the action will lead to any commonly defined minimum standards. It is not likely to be sufficient to address deficiencies in the legal framework of the Member States, such as the lack of legal aid for EAW proceedings and emergency legal aid, or narrowly defined eligibility criteria. • There will be a very limited effect on the strengthening of mutual trust and the working of the mutual recognition system. Some extended benefits could be achieved through the establishment of guidelines by the expert group. 						
Impact on fundamental rights	<ul style="list-style-type: none"> • Low. The strengthening of the protection of fundamental right to legal aid will be left to the goodwill of national legislatures. The impact of this option and the enhancement of the right to a fair trial and the rights of defence will depend on how Member States will choose to comply with the best practice examples or guidelines, how the information on legal aid will be diffused and how the training is carried out. • In general, Option 2 is likely to ensure a higher positive impact on suspect's right to a fair trial and right to defence than Option 1. However, consisting mainly of soft-law measures and given the overall situation as regards the lack of possibilities to enforce those rights, the positive impact will remain limited. 						
Social Impacts	<ul style="list-style-type: none"> • Low. The social impact will be positive but limited. It would raise awareness of the right to legal aid for suspected and accused persons. Capacity building and training activities of professionals could improve access to legally-aided assistance for suspected and accused persons in the long-term . 						
Political Feasibility	<ul style="list-style-type: none"> • High. As Member States will make limited commitments, except certain reporting tasks, this option should not meet any significant objections. 						
Impact on the domestic justice systems	<ul style="list-style-type: none"> • Low. The overall impact on domestic justice systems will be very limited since the actions are non-binding and do not directly aim at achieving common minimum standards throughout the EU. It might lead to information being more easily available for suspected and accused persons and that lawyers and staff of the judicial systems have better knowledge on legal aid. Legislative reforms will not be imposed, but left to national legislators. Guidelines and recommendations may help the judiciary to interpret domestic provisions to provide a higher protection, but it is unlikely that the effect would be significant. 						
Costs	<ul style="list-style-type: none"> • Low. The costs for this option will be limited. They will be borne both by the Member States and by the EU. <table border="1" style="width: 100%; margin-top: 10px;"> <thead> <tr> <th style="width: 70%;"></th> <th style="text-align: right;">Total EU cost (Millions of Euros)</th> </tr> </thead> <tbody> <tr> <td>EU expert group on criminal legal aid</td> <td style="text-align: right;">€0.2 million</td> </tr> <tr> <td>Awareness raising and data collection</td> <td style="text-align: right;">€0.25 million</td> </tr> </tbody> </table>		Total EU cost (Millions of Euros)	EU expert group on criminal legal aid	€0.2 million	Awareness raising and data collection	€0.25 million
	Total EU cost (Millions of Euros)						
EU expert group on criminal legal aid	€0.2 million						
Awareness raising and data collection	€0.25 million						

	Training of defence lawyers and legal aid officials	€2.5 million
	Total	€3 million EU budget: €0.45 million/year Member States' budget: €2.5 million
Exchange of best practices - EU expert group on criminal legal aid The costs are estimated at €0.2 million/year for the EU budget		
<p>The costs are calculated on the basis of the EU organising 2-day-meetings a year, to exchange best practices and draw up guidelines. The average costs of organising one expert meeting (2 experts/Member State, travels, per diem) amounts to ca. €0.1 million.</p> <p>Translation costs of the guidelines would be marginal and borne by the Commission.</p>		
Awareness raising and data collection €0.25 million		
<p>The administrative burdens and costs for the Member States to collect legal aid data and share it with the Commission are marginal and have been calculated as 0. Also the costs and administrative burdens for the EU to make such data available on e.g. its e-justice website are marginal. To prepare a yearly comparative report with a contractor, the costs are estimated to be ca €250.000.</p> <p>Disseminating information on legal aid in criminal cases to suspected and accused persons by electronic means or by leaflets, would have some costs for the Member States, but they would be minor.</p>		
Training of defence lawyers and legal aid officials		
<p>The Member States would aim at organising workshops to spread the best practice guidelines with staff administering legal aid (judges, prosecutors, police officers, staff of legal aid authorities) and defence lawyers.</p> <p>A 2-day-training of 10 % of lawyers in the EU in groups of 10 would amount to €15 million/year for all EU Member States.¹⁰² This cost could be partly met by EU funds for training with action grants under the Justice Programme 2014-2020.</p> <p>Training for other officials involve persons from Ministries of Justices, judges, prosecutors, legal aid board staff and police officers and would amount to ca. half of the cost for training of defence lawyers, i.e. €7,5 million.</p>		

7.3. Policy Option 3: Medium legal obligations

This option has been split into two sub-options depending on the legal instrument through which it may be realised: **Option 3(a)** through a Recommendation; **Option 3(b)** through a Directive. These two sub-options may also be combined (see further under Section 8) and address some elements in a Directive and some in a Recommendation. Such a combination would ensure that legally binding action is taken with respect to the questions that are the most pressing to ensure strengthening of mutual trust (such as emergency legal aid for

¹⁰² For calculations see Annex IV.

suspects and legal aid in EAW proceedings), to allow for the smooth functioning of mutual recognition and to ensure that the right of access to a lawyer becomes effective.

7.3.1. Option 3(a) – Recommendation

Expected Impact	
Effectiveness in meeting the policy objectives	<ul style="list-style-type: none"> • Low-Medium. Compared to Option 2, this option sets out common minimum standards on the fundamental right to legal aid in a legal instrument. The existence of recommendations on minimum standards on legal aid will horizontally improve mutual trust and improve mutual recognition, provided that the standards are incorporated into national legislation and applied. • Assuming Member States implement the Recommendation, the option will have positive impacts with regard to the achievement of the policy objectives, as follows: <ul style="list-style-type: none"> ✓ Legal aid in EAW proceedings: The right to access to a lawyer in EAW proceedings as set out in Directive on Access to a Lawyer will be rendered effective as legal aid. Hereby, the right to a fair trial is safeguarded also in such proceedings and will ensure the smooth functioning of this judicial cooperation instrument and avoiding unnecessary delays. ✓ Emergency legal aid: By requiring the availability of a system of emergency legal aid for persons deprived of liberty at the most crucial point of the proceedings until the formal decision on legal aid is made, fair trial rights and Member States' trust in each other's systems will be significantly improved. ✓ Eligibility criteria: By providing common factors to take into account in the evaluation of the eligibility for legal aid, the framework of the assessment as developed in ECtHR case-law is made clearer and convergence is promoted, which will contribute to increased mutual trust in other Member State's justice systems. ✓ Quality of legally-aided services: There will be improvements as Member States should set up mechanisms to ensure the quality, including ensuring proportionate remuneration, systems of monitoring, accreditation and continuous professional training for legal aid professionals.
Impact on fundamental rights	<ul style="list-style-type: none"> • Low-Medium. The <i>right to liberty and security</i> (Article 6 Charter) and the right to fair trial (Article 47 Charter) as well as the right to be <i>presumed innocent</i> (Article 48 of the Charter) would be enhanced as access to legal aid will allow suspected and accused persons to benefit from the right of access to a lawyer and defend their rights more effectively at pre-trial stages and trial stages. By providing for emergency legal aid, the pre-trial detention rate is expected to fall. By setting a minimum qualitative criteria for the means test, it will further equality before the law (Article 20 of the Charter) of persons with insufficient means. • The impact of this Option, however, will depend on how Member States implement the Recommendation. Some improvement in the right to a fair trial and defences are likely to accrue, but the absence of any method of enforcement might result in only a variable improvement in the Member States. • This option would not address the problem of ensuring legal aid in cases of mandatory legal assistance for children, as provided under the proposal on vulnerable suspects.
Social impact	<ul style="list-style-type: none"> • Low-Medium. If properly implemented by Member States, this option will have positive social impacts e.g. ensuring equal access to justice by ensuring legally-

	<p>aided assistance for persons with insufficient means, if they are deprived of liberty, and in Member States that apply a means test. It will also reinforce the quality of legally-aided assistance that indigent persons benefit from and thus make the right to a good defence less dependent on financial resources of a person.</p>
Political Feasibility	<ul style="list-style-type: none"> • Medium. Given that this policy option seeks to establish minimum standards above the levels currently applicable in the Member States, it will involve corresponding costs for a number of them. Negotiation and implementation will entail discussions, in particular with those Member States which have the lowest standards in place.
Impact on the domestic justice systems	<ul style="list-style-type: none"> • Medium. If implemented, this Policy Option would require changes in a number of Member States that currently have a low standard regarding the right to legal aid for suspected or accused persons in criminal proceedings. It, however, leaves room for flexibility as it sets out generally worded obligations, and thus ensures respect for legal tradition and culture as provided for in 82 TFEU. Most Member States, albeit to a varying extent, will have to alter their regulations and practice to transpose the Directive provisions in some way, but for a small number of Member States, more considerable changes will be required. • Since the Recommendation is non-binding, it is difficult to foresee the impact of the instrument as the extent of the Member States' implementation of the standards depends on their willingness to comply. Yet, the existence of a Recommendation and the Commission's undertaking to review compliance after three years will exert political pressure to comply, and given the general provisions of the instrument, Member States would have a certain scope in how to comply.
Costs	<ul style="list-style-type: none"> • Medium-High. The financial or administrative burdens resulting from this option will depend on the level of Member States' implementation of all or some of the provisions in the recommendation. • In a best case scenario, should all Member States comply with the recommendation, the costs would be the same as under option 3(b) (see the calculations below). It is however not likely that all Member States will fully comply with the Recommendation, and the costs are therefore possibly considerably lower than the ones indicated in 3(b). • The option would also reduce current costs of ECHR and domestic appeals, re-trials, and aborted proceedings due to inadequate legal representations.

7.3.2. Option 3(b) – Directive

Expected Impact	
Effectiveness in meeting the policy objectives	<ul style="list-style-type: none"> • High: This option will lead to a significant improvement as suspected or accused persons will benefit from common minimum standards on legal aid which, in contrast to Option 3(a), are legally binding and enforceable before domestic and EU courts. This option will thus have a very positive impact with regard to the attainment of the objectives. • The option would significantly improve mutual trust and judicial cooperation; judicial authorities would have greater mutual trust owing to the existence of legally binding common minimum standards on the right to legal aid, and it is likely that there would be fewer refusals to cooperate with other Member States (with a corresponding fall in the costs of associated delays, aborted proceedings, re-trials and appeals.) • More specifically, certain areas where this policy option would have a significant impact on strengthening of the fundamental right to legal aid in Article 6 and

	Article 47 of the Charter, and make the right of access to a lawyer under the Directive practicable and effective, as set out in relation to option 3(a) above.												
Impact on fundamental rights	<ul style="list-style-type: none"> • High: This option would have the same positive impact on fundamental rights of suspected and accused persons, as in option 3(a), with the additional benefit of making those impacts certain as the measure would be legally binding. • 												
Social impacts	<ul style="list-style-type: none"> • High: This option has the same positive social impacts as Option 3(a), with the additional benefit of making those impacts certain as the measure would be legally binding. 												
Political Feasibility	<ul style="list-style-type: none"> • Medium-Low. Given that this policy option foresees obligations on Member States and will involve corresponding costs, negotiation and implementation will entail severe discussions, in particular with those Member States which currently have the lowest standards in place. Yet the general manner in which the obligations are set out make this a more feasible option than Option 4. 												
Impact on the domestic justice systems	<ul style="list-style-type: none"> • Medium-High: This option will require legislative reforms in a number of Member States. It, however, leaves room for flexibility as it sets out generally worded obligations, and thus ensures respect for legal tradition and culture as provided for in 82 TFEU. Most Member States, albeit to a varying extent, will have to alter their regulations and practice to transpose the Directive provisions in a limited way, but for a small number of Member States, more considerable changes will be required. 												
Costs	<ul style="list-style-type: none"> • High. Almost all costs will have to be borne by public administrations on both national and local level. • As the Directive partly aims at providing for compliance with ECHR case law, the costs partly relate to complying with ECHR, irrespective on any EU law legislation. • The option would also reduce current costs of ECHR and domestic appeals, re-trials, and aborted proceedings due to inadequate legal representations.¹⁰³ • For details, see Annex IV (or Annex V for break down per MS). <table border="1" data-bbox="450 1339 1404 1753"> <thead> <tr> <th></th> <th>Total EU cost (Millions of Euros)</th> </tr> </thead> <tbody> <tr> <td>Legal Aid in EAW Proceedings</td> <td>€0.13-0.24 million</td> </tr> <tr> <td>Emergency legal aid for persons deprived of liberty</td> <td>€52-81 millions</td> </tr> <tr> <td>Eligibility criteria</td> <td>€181-287 millions</td> </tr> <tr> <td>Quality control</td> <td>€13.4 million</td> </tr> <tr> <td>Total</td> <td>€247 million-382 million</td> </tr> </tbody> </table>		Total EU cost (Millions of Euros)	Legal Aid in EAW Proceedings	€0.13-0.24 million	Emergency legal aid for persons deprived of liberty	€52-81 millions	Eligibility criteria	€181-287 millions	Quality control	€13.4 million	Total	€247 million-382 million
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¹⁰³ Member States' potential savings owing to a reduction in a number of appeals, condemnations by the ECtHR, or delays in judicial cooperation proceedings cannot be estimated with any statistical precision due to lack of Member State data on costs per case. Only indicative qualitative expectations in non-numerical terms can therefore be provided based on stakeholders' judgments. However, as an example of the cost of a case being brought through the domestic and ultimately before the ECtHR, it is estimated that the *Cadder* case in Scotland on insufficient legal representation cost in excess of €175,000.

Legal Aid in EAW proceedings

The costs are estimated in the range between **€0.13 million and €0.24 million/year**

Providing legal aid in the executing Member States would cost between €0.03 million and €0.13 million. The limited costs are due to the low number of EAWs in the EU and the fact that this right is provided for in a number of Member States. It would have impacts on FI, LV, PL, PT, RO, ES and only marginal impacts on some other Member States.

Legal aid in the issuing Member States would cost between €0.1 million-0,12 million and it would affect all Member States, but in a limited manner. This is so as the work of the lawyer in the issuing Member State is limited and the number of EAWs is limited.

Emergency Legal Aid

The costs are estimated to range between **€2 million and 81 million (EU wide/year)**

The costs relate to providing emergency legal aid for suspected and accused persons deprived of liberty in countries where it does not exist and in a number of countries where there is evidence that it is not properly working or where the first interrogation can take place before there is access to legal aid. From this sum, we have deducted the cost savings because of an expected fall in pre-trial detention by 20 %, based on experience in Member States that have introduced emergency legal aid. Further deductions have been made, taking into account the sums which will be recovered from the suspected and accused persons who ultimately do not fulfil the eligibility test.

Member States affected: BG, CY, EE, EL, FI, IT, PL, PT, RO, SI, DE, HU. The main costs are however born by DE 50%, IT 20%, PL 12 %, HU 6 %, EL 5 %).

Moreover, the fact that one ensures legal aid to obtain legal advice from the early start of the proceedings can lead to cost saving as it avoids delays, challenges of evidence, appeals and retrials.

Means and Merits Test

The costs are estimated to range of between **€181 million and €287 million (EU wide/Year)**

Based on a scenario where the Member States will reach a situation of 20 % of criminal cases benefitting from legal aid (which is still below the EU average of 27 %, but which would yet bring the level of protection up in a number of Member States), **the costs of the measure with regard to who is entitled to legal aid is between €181 million and €287 million.**

Estimated cost for jurisdictions applying only a means test: **€11-22 million** (HR, LV, MT, PL, SK, SL). No estimated cost for jurisdictions applying only a merits test (DE, SE): Estimated cost for jurisdictions applying both a means and a merits test: **€64 million** (AU, CY, HU, IT, NL, RO).

The total impact reflects the costs that would be borne by mainly by a selected number of Member States with a particularly low % of legally aided cases (Italy €85 million, Hungary €50 million, followed by NL 25 million, PL 10 million, SI 10 million).

Quality improvement

The costs are estimated at maximum **€3.4 million (EU wide/year)**

The costs take into account costs of operating an accreditation scheme, providing mandatory training of defence lawyers (calculated on training of 10% of the lawyers) and ensuring that there is a monitoring mechanism for legally aided work in place:

	<p>Cost of training for defence lawyers: Maximum cost of €4.6 million/ a year over 5 years</p> <p>Continuous professional training: €7,5 million/year</p> <p>Accreditation and monitoring: €1.3 million EU wide/year</p> <p>The above scenario assumes that no training, monitoring or accreditation currently takes place. Although exact details of costs are not available, we know that it is 18 Member States do not have any particular training requirement to do criminal defence work. 8 Member States do not provide any monitoring (BG, CY, DE, EL, HU, IE, LU, NL). As the costs are calculated for all Member States, they are likely to be significantly reduced given that a number of Member States have some quality assurance in place.</p>
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7.4. Policy Option 4: High level of obligation

Expected Impact	
<p>Effectiveness in meeting the policy objectives</p>	<ul style="list-style-type: none"> • Very High. This option would have all the strength of the legislative instrument set out above under 3(b) (binding nature, high enforceability) and would have a significant positive impact on meeting the policy objectives, but it will put a high burden on Member States. The choice of a more prescriptive measure than under 3(b) would yield results in terms of increased trust among judicial authorities, and more clarity and higher standards of protection for individuals. • More in particular, the impact goes further than those of option 3(b) on the following points: <ul style="list-style-type: none"> ✓ Legal aid in EAW proceedings: Persons arrested for the purpose of extradition would be granted legally-aided assistance on the same conditions as in emergency legal aid situations, and without the delay which a means and/or merits test lead to in a cross-border situation. ✓ Emergency legal aid: The availability of emergency legal aid in e.g. the police station for everyone who is suspected and accused from before the first questioning until the formal decision on legal aid is made will greatly contribute to the protection of the right to a fair trial and ensure that the right of access to a lawyer is effective. By ensuring in practice an early access to a lawyer, the integrity of the criminal process will be enhanced and the mutual trust will be significantly enhanced. ✓ Eligibility criteria: The harmonised means test and the stricter conditions under the merits test will considerably enlarge the number of EU citizens that benefit from legal aid and their fair trial rights will be considerably strengthened.
<p>Impact on fundamental rights</p>	<ul style="list-style-type: none"> • High. This option would have a significant positive impact on the fundamental rights of suspects and accused persons according to the Charter, especially the right to liberty (article 6), the right to a fair trial (Article 47) and the presumption of innocence (Article 48). It sets out a high common standard and would lead to a significant improvement of a number of rights, as set out in option 3(b). The difference with the latter is that the impact is sometimes stronger and the fundamental rights of more individuals are enhanced due to the higher level of ambition. • Emergency legal aid for all persons, whether deprived of liberty or not, will have a significant impact on the rights of defence and the right to be presumed innocent, as well as avoidance of ill-treatment in detention. Early intervention with regard to persons that are at large can also avoid pre-trial detentions, thus furthering the right

	<p>of liberty in Article 6 of the Charter.</p> <ul style="list-style-type: none"> • This option would improve the rights of children, as children will automatically be considered to fulfil the merits test and thus benefit of legal aid in cases of mandatory legal assistance. • The right to legal aid in issuing and executing Member States in EAW proceedings irrespective of a means and/or merits test avoids the inequality and delays that can stem from applying a means test in cross-border situations. 								
Social Impacts	<ul style="list-style-type: none"> • High. This option will have high social impacts as it will widen access to legal aid and consequently the possibility of a fair trial for indigent suspected and accused persons. For example, by setting a quantitative means test at EU level for each Member State, more indigent persons will benefit from legal aid. By providing emergency legal aid to all suspects before they are questioned by the police, persons in particularly exposed situation will receive assistance in the interest of justice. 								
Political Feasibility	<ul style="list-style-type: none"> • Very Low. The option contains legally binding prescriptive obligations and it is likely to yield substantial costs for a majority of Member States. Against the background of the current austerity in the EU, negotiations and implementation will entail very difficult discussions. 								
Impact on the legal system of Member States	<ul style="list-style-type: none"> • Very High. This option would yield the most significant impacts on the domestic justice systems. The judiciary would have all the necessary tools to uphold the right to legal aid at a very high standard. Compared to option 3(b) it leaves less flexibility in implementation for Member States and would ensure that the domestic justice systems with regard to legal aid are brought in closer convergence, for example with regard to the eligibility criteria. • Significant legislative reforms would need to be carried out to all Member States' legal aid systems. Yet, some of the requirements posed by this option would be hard to accept for some Member States such as emergency defence for everyone (e.g. FR, BE), that "interest of justice" requires legal aid for crimes that carry a minimum prison sentence above 6 months (e.g. SE, DE, BU) and the need for accreditation for legal aid lawyers (most MS). 								
Costs	<ul style="list-style-type: none"> • Very high. The costs are the highest of all options. Almost all costs will fall on the public administration on local or national level. • The option would also reduce current costs of ECHR and domestic appeals, re-trials, and aborted proceedings due to inadequate legal representations.¹⁰⁴ • For details see Annex IV (or Annex V for break down per MS). <table border="1" data-bbox="411 1473 1394 1816"> <thead> <tr> <th></th> <th>Total EU cost (Millions of Euros)</th> </tr> </thead> <tbody> <tr> <td>Legal aid in EAW Proceedings</td> <td>€0.8-1.1 million</td> </tr> <tr> <td>Emergency Legal Aid</td> <td>€180-210 million</td> </tr> <tr> <td>Eligibility criteria for legal aid</td> <td>€1.4 billion and €2 million (mandatory</td> </tr> </tbody> </table>		Total EU cost (Millions of Euros)	Legal aid in EAW Proceedings	€0.8-1.1 million	Emergency Legal Aid	€180-210 million	Eligibility criteria for legal aid	€1.4 billion and €2 million (mandatory
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¹⁰⁴ Member States' potential savings owing to a reduction in a number of appeals, condemnations by the ECtHR, or delays in judicial cooperation proceedings cannot be estimated with any statistical precision due to lack of Member state data on costs per case. Only indicative qualitative expectations in non-numerical terms can therefore be provided based on stakeholders' judgments.

		legal aid for children)	
	Quality improvement	€13.4 million	
	Total	€1.594 million- 1.716 million	
<p>Legal Aid in EAW Proceedings</p> <p>The costs for introducing legal aid in EAW proceedings, both in executing and issuing Member State, without means or merits test are estimated in the range between €0.8-1.1 million</p> <p>The cost for introducing legal aid in executing Member States, not subject to means and/or merits test is estimated at between €0.4 million - €0.7 million. All Member States (except NL) are concerned, most to a limited extent, for the same reasons cited under Option 3(b).</p> <p>Costs for introducing legal aid in the issuing Member State would be €0.4 million. All Member States would be affected, but to a rather limited extent for the same reasons as cited under Option 3(b).</p> <p>Emergency Legal Aid</p> <p>The costs are estimated in the range of €180 million - €210 million across the EU Member States</p> <p>The cost is calculated for all persons being interviewed at the police station. The sums recovered from persons that will not ultimately fulfil the eligibility test have been subtracted as well as the savings from a fall in pre-trial detention.</p> <p>The policy option would affect all Member States except the UK.</p> <p>Eligibility criteria for legal aid</p> <p>The costs are estimated to amount to a maximum of €1.4 billion across EU Member States.</p> <p>The costs pertain to the extra costs resulting from widening the number of persons that benefit from legal aid compared to today. The calculation is made on the assumption that the <u>means test</u> would be fulfilled by suspects and accused persons earning under the minimum wage to be eligible for legal aid, or in those Member States where minimum wages do not exist, a share of 70 % of the average wage has been applied as a proxy.</p> <p>The option would cost €81 million for jurisdictions where only a means test is applied. BE, LV, MT, HR, PL, SI, SK, would be affected, but with major impacts in BE, PL, SI.</p> <p>Would the merits test require that legal aid is provided for crimes that carry a minimum prison sentence above 6 months would result in €169 million for jurisdictions where only a merits test is applied, a cost that exclusively relates to DE.</p> <p>In Member States applying both a means and a merits test, this option would cost €1.155 million and would affect all Member States except FI and IE. 58 % of the costs pertain to IT, 12 % to HU, 13% to NL).</p> <p>Providing a right to legal aid for children in cases of mandatory defence would amount to €3 million and would affect AT, CY, FI, FR, DE, IE, LU, NL, SE, SI, UK.¹⁰⁵</p> <p>Quality improvement</p> <p>The costs are estimated to be at a maximum of €13.4 Million/year</p>			

¹⁰⁵ For cost calculations, see IA on vulnerable suspects.

	See above Option 3.
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8. COMPARATIVE ASSESSMENT

Explain why no preferred option

Advice on how the measures could be combined (also something from 2?)

Objectives/ impacts	Policy option 1	Policy option 2	Policy option 3a	Policy option 3b	Policy option 4
Meeting the policy objectives	0	Low	Low to Medium	High	Very High
Impact on fundamental rights	0	Low	Low to medium	High	High
Social impacts	0	Low	Low to medium	High	High
Political Feasibility	N/A	High	Medium	Low- Medium	Very Low
Impact on legal systems of Member States	0	Low	Medium- High	Medium- High	Very High
Economical and financial impacts	0	€3 million	€27-382 million	€27-382 million	€1.594 million- €1.716 million

If **Policy Option 1** (*status quo*) is pursued the risk of suspected and accused persons not being granted legal aid and thus being denied access to legal advice would continue and possibly deteriorate. Although highly feasible, Policy option 1 (*status quo*) does not meet the identified objectives and is therefore not further considered. Furthermore, among stakeholders a large majority supports some EU action in the field and find *status quo* to be unsatisfactory.¹⁰⁶

¹⁰⁶ See CSES Report for the Impact Assessment, Section 4.2.1. See also Section 6.1.1 accounting for the limited support for *status quo* in the interviews and focus groups. Also in the expert meeting it emerged that even though

The measures envisaged within **Policy Option 2** are likely to contribute to the objectives of an EU intervention in the field, but only to a limited extent. They are likely to have an impact on raising the awareness of suspects and accused persons as concerns their right to legal aid, as well as to build capacity among legal aid lawyers and policy makers with regard to best practices on legal aid issues. However, Policy Option 2 will not on its own provide common minimum standards and it thus only has a limited potential to improve the protection of the fundamental right to legal aid and it will not enhance mutual trust to any considerable extent. Therefore Policy Option 2 does not sufficiently fulfil the objectives.

Policy Option 3 will contribute moderately to meeting the objective of strengthening mutual trust, though not to the same extent as Option 4 (see below). However, the higher flexibility left to the Member States makes this Option considerably more politically feasible to negotiate, shows more sensitivity to the proportionality of the action and results in substantially lower financial burdens than Option 4. By providing for action in a Recommendation, **Policy Option 3(a)** is more politically feasible than **Policy Option 3(b)**, and leaves larger room for Member States to implement the obligations under a longer time-span, allowing them to take into account budgetary restraints. On the other hand, by being legally binding, Policy Option 3(b) will be more effective in furthering the mutual trust between the EU Member States and thus is likely to be more effective in meeting the objectives than Option 3(a).

The Member States have all together called for legislative action with regard to legal aid in the Declaration in Council of June 2012. Such action is also viewed as necessary by the European Parliament. Subsequently, some Member States have expressed some reluctance (e.g. CY, DE, NL, PT) mainly for subsidiarity and budgetary reasons, especially as concerns an all-encompassing binding instrument with regard to legal aid. Some Member States strongly support legislative action (SE, FR, BE) – at least with regard to certain issues.

To address the concern for proportionality, Policy Option 3 could be realised partly by a Recommendation and partly by a Directive, by combining Option 3(a) and Option 3(b). This would ensure that legally binding action is taken with respect to the questions that are the most pressing to ensure strengthening of mutual trust, to allow for smooth functioning of mutual recognition and to ensure that the right of access to a lawyer becomes effective (**the issues of legal aid in EAW proceedings and emergency legal aid**), while leaving more leeway to the Member States with respect to the eligibility criteria and the quality of legally-aided services by including them in a Recommendation, an approach that also find support in among stakeholders.

In the Expert meeting, the possibility to combine a legally binding instrument with a non-binding instrument was raised and supported by a number of Member States (e.g. SE, BE, FR).

The need for emergency defence services provided free of charge for persons deprived of liberty has also been one of the main problems needing to be addressed that was raised in the focus groups¹⁰⁷ and by civil society organisations, underlining that there needs to be legally binding action on that issue to make access to a lawyer for persons deprived truly effective when they are the most vulnerable.¹⁰⁸

some member States were not favourable to a fully-fledged European binding legislation on legal aid, some action was favoured.

¹⁰⁷ See CSES IA Study, section 4.2.3.

¹⁰⁸ See. e.g. "Compliance of Legal Aid systems with the European Convention on Human Rights in seven jurisdictions" covering Bulgaria, Czech Republic, England & Wales, Germany, Greece, Ireland and Lithuania,

To provide for such emergency defence service would have financial impacts on 12 Member States (BG, CY, EE, EL, FI, IT, PL, PT, RO, SI, DE, HU). Taking into account the fall in pre-trial detention and the possibility to recover sums, the maximum cost of the measure would be ca 80 million euros EU wide per year. The impact on the 5 Member States that are the most affected is as follows; DE: ca 50 Million, IT: ca 8 million, PL: ca 8 Million, HU: ca 4 million EL: ca 3 million.

With regard to legal aid in EAW proceedings, stakeholders underline that for dual defence to be effective, there needs to be legally binding action with regard to right of legal aid.¹⁰⁹ Moreover, seen that the EAW is at the heart of mutual recognition, and the ECHR does not cover EAW proceedings, there is a need for binding EU action with regard to legal aid in EAW proceedings.

The costs for providing access to legal aid in the executing and the issuing Member States are very limited, due to the low number of EAWs in the EU and the fact that this right is provided for in a number of Member States. The total cost EU wide per year would be between 0,13-0,24 million euros.

Action on training and monitoring was supported in all the focus groups and in the expert meeting for the Member States, but it was underlined that action should not be too prescriptive in this respect, but with a preference from non-binding action.¹¹⁰

Overall, **Policy Option 4** is likely to contribute most effectively to the objective of EU action; it will ensure a high minimum protection of fundamental rights and thus establish a strong basis for mutual trust between the EU Member States. It will provide legally enforceable standards. However, it is the most prescriptive Option and provides Member States with the least amount of flexibility in implementation. It also imposes more far-reaching obligations on the Member States and as a result, the costs for this Option are considerably higher than the other options. It is the least politically feasible option.

9. TRANSPOSITION, MONITORING AND EVALUATION

Should the measure be in the form of a Directive, the timeframe for transposition of the Directive by Member States will be two or three years from its entry into force. As the Directive would create only a comparatively limited number of obligations for Member States which, to some extent, mirror existing ECHR obligations or already exist in a number of Member States, it is expected that a two-year deadline would provide Member States with sufficient time to effect necessary changes to their respective national laws and practice. Potential risks to implementation in time would be identified in an Implementation Plan accompanying the proposal for the Directive setting out relevant measures by the Commission aimed at countering these risks.

As regards a possible Recommendation, the Commission would assess its implementation by 3 to 4 years from the adoption at the latest. In this context, the Commission should assess also whether further measures to strengthen the procedural safeguards foreseen in the Recommendation should be proposed. In order to allow for the correct implementation and best practice exchanges of the Recommendation, and the Directive, the Commission would

Report by Justicia Network, April 2013, Cornerstones on legal Aid, May 2013, ECBA. See also CSES IA Study Section 4.2.3, reporting that stakeholders in a number of focus groups were supportive of a legislative measure ensuring non-means tested legal aid at the pre-trial or police stage of the proceedings.

¹⁰⁹ See CSES IA Study, Section 4.4.5.

¹¹⁰ See CSES IA Study section 3.2.5.

establish an expert group on criminal legal aid at EU level. Within this group, reporting on the implementation of the Recommendation can be made, the expert group could also instruct the production of best practice guidelines to be disseminated by the Commission, and be instrumental in the collection of data from the Member States.

Providing for a robust monitoring and evaluation mechanism is crucial to ensure that the rights envisaged in the Directive are complied with in practice as well as in legislation. The Directive will stipulate that Member States should report on the effective implementation of legislative or non-legislative measures based on the nature of the proposed changes.

Data provided by Eurostat, Eurobarometer and the Council of Europe will enable the formation of a useful baseline for monitoring the situation. Besides quantitative data provided by Member States, other possible sources of qualitative information on legislative and practical compliance will be gathered.

Member States should be encouraged to collect relevant data to assist in this process as there is currently a lack of reliable empirical data. Such data should include: More the general cost of legal aid in criminal proceedings, concrete data especially on the costs of emergency defense, number of cases that benefit from legal aid (and emergency legal aid) and number of criminal cases (with breakdown where a suspect is deprived of liberty or not).

The indicators that would be relevant to monitor the attainment of the objectives are the following:

<i>Operational objective</i>	<i>Potential indicator</i>
To ensure that legal aid is available to persons subjected to an EAW in both the executing and issuing Member States	<ul style="list-style-type: none"> • Number of EAWs per MS (when issuing or executing), • number of cases where legal aid is awarded in EAW cases (in the issuing state and in the executing Member State, • Number of denied legal aid applications in EAW proceedings, • number of challenges of EAWs on the basis of deficient legal aid standards in the issuing Member State, • information on the costs per Member State for providing legal aid for EAW cases (both when executing and issuing)
To ensure access to legally-aided assistance ("emergency defence") at the first stages of the procedure,	<ul style="list-style-type: none"> • Percentage of suspected and accused persons deprived of liberty that benefit from emergency legal aid, • Number of cases where a discrepancy is reported between the point at which a suspected or accused person is questioned while having being granted the right of access to a lawyer and the point in time when he has access to state-funded legal assistance.

	<ul style="list-style-type: none"> • Number of cases where the right was waived • Average cost per case when providing emergency defence • Number of emergency aid cases where repayment is sought • Number of emergency aid cases where repayment is executed • Reduction of number of pre-trial detentions
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),	<ul style="list-style-type: none"> • Measure increase of persons that benefit from legal aid (with a target that increase should reach between 15-20% of cases benefitting from legal aid) • Share of population that is eligible for legal aid under current means test
To ensure that Member States take measures to improve the quality of legally aided services	<ul style="list-style-type: none"> • Information on general remuneration per legal aid case, number of lawyers doing legal aid defence work, • number of lawyers that are EAW specialists, number of lawyers/government officials trained • Number of complaints regarding insufficient representation, quality or delays in accessing legal aid services

The Commission envisages carrying out specific empirical studies with an emphasis on data collection 3-5 years into the implementation of each instrument of the Roadmap, to gain in-depth quantitative and qualitative insights into the effectiveness of the proposal. All the data collected would enable the Commission to evaluate the actual compliance in Member States more robustly than using the means hitherto available. With this current procedural rights package the Commission has now presented the main Roadmap Measures and it will be essential to evaluate the efficiency of the Roadmap as a whole.

ANNEX I
Procedural Rights Roadmap

Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings

Whereas:

(1) In the European Union, the Convention for the Protection of Human Rights and Fundamental Freedoms (the ‘Convention’) constitutes the common basis for the protection of the rights of suspected or accused persons in criminal proceedings, which for the purposes of this Resolution includes the pre-trial and trial stages.

(2) Furthermore, the Convention, as interpreted by the European Court of Human Rights, is an important foundation for Member States to have trust in each other’s criminal justice systems and to strengthen such trust. At the same time, there is room for further action on the part of the European Union to ensure full implementation and respect of Convention standards, and, where appropriate, to ensure consistent application of the applicable standards and to raise existing standards.

(3) The European Union has successfully established an area of freedom of movement and residence, which citizens benefit from by increasingly travelling, studying and working in countries other than that of their residence. However, the removal of internal borders and the increasing exercise of the rights to freedom of movement and residence have, as an inevitable consequence, led to an increase in the number of people becoming involved in criminal proceedings in a Member State other than that of their residence. In those situations, the procedural rights of suspected or accused persons are particularly important in order to safeguard the right to a fair trial.

(4) Indeed, whilst various measures have been taken at European Union level to guarantee a high level of safety for citizens, there is an equal need to address specific problems that can arise when a person is suspected or accused in criminal proceedings.

(5) This calls for specific action on procedural rights, in order to ensure the fairness of the criminal proceedings. Such action, which can comprise legislation as well as other measures, will enhance citizens’ confidence that the European Union and its Member States will protect and guarantee their rights.

(6) The 1999 Tampere European Council concluded that, in the context of implementing the principle of mutual recognition, work should also be launched on those aspects of procedural law on which common minimum standards are considered necessary in order to facilitate the application of the principle of mutual recognition, respecting the fundamental legal principles of Member States (Conclusion 37).

(7) Also, the 2004 Hague Programme states that further realisation of mutual recognition as the cornerstone of judicial cooperation implies the development of equivalent standards of procedural rights in criminal proceedings, based on studies of the existing level of safeguards in Member States and with due respect for their legal traditions (point III 3.3.1).

(8) Mutual recognition presupposes that the competent authorities of the Member States trust the criminal justice systems of the other Member States. For the purpose of enhancing mutual trust within the European Union, it is important that, complementary to the Convention, there

exist European Union standards for the protection of procedural rights which are properly implemented and applied in the Member States.

(9) Recent studies show that there is wide support among experts for European Union action on procedural rights, through legislation and other measures, and that there is a need for enhanced mutual trust between the judicial authorities in the Member States. These sentiments are echoed by the European Parliament. In its Communication for the Stockholm programme, the European Commission observes that strengthening the rights of defence is vital in order to maintain mutual trust between the Member States and public confidence in the European Union.

(10) Discussions on procedural rights within the context of the European Union over the last few years have not led to any concrete results. However, a lot of progress has been made in the area of judicial and police cooperation on measures that facilitate prosecution. It is now time to take action to improve the balance between these measures and the protection of procedural rights of the individual. Efforts should be deployed to strengthen procedural guarantees and the respect of the rule of law in criminal proceedings, no matter where citizens decide to travel, study, work or live in the European Union.

(11) Bearing in mind the importance and complexity of these issues, it seems appropriate to address them in a step-by-step approach, whilst ensuring overall consistency. By addressing future actions, one area at a time, focused attention can be paid to each individual measure, so as to enable problems to be identified and addressed in a way that will give added value to each measure.

(12) In view of the non-exhaustive nature of the catalogue of measures laid down in the Annex to this Resolution, the Council should also consider the possibility of addressing the question of protection of procedural rights other than those listed in that catalogue.

(13) Any new EU legislative acts in this field should be consistent with the minimum standards set out by the Convention, as interpreted by the European Court of Human Rights,

HEREBY ADOPTS THE FOLLOWING RESOLUTION:

1. Action should be taken at the level of the European Union in order to strengthen the rights of suspected or accused persons in criminal proceedings. Such action can comprise legislation as well as other measures.
2. The Council endorses the ‘Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings’ (hereinafter referred to as ‘the Roadmap’), set out in the Annex to this Resolution, as the basis for future action. The rights included in this Roadmap, which could be complemented by other rights, are considered to be fundamental procedural rights and action in respect of these rights should be given priority at this stage.
3. The Commission is invited to submit proposals regarding the measures set out in the Roadmap, and to consider presenting the Green Paper mentioned under point F.
4. The Council will examine all proposals presented in the context of the Roadmap and pledges to deal with them as matters of priority.
5. The Council will act in full cooperation with the European Parliament, in accordance with the applicable rules, and will duly collaborate with the Council of Europe.

ROADMAP FOR STRENGTHENING PROCEDURAL RIGHTS OF SUSPECTED OR ACCUSED PERSONS IN CRIMINAL PROCEEDINGS

The order of the rights indicated in this Roadmap is indicative. It is emphasised that the explanations provided below merely serve to give an indication of the proposed action, and do not aim to regulate the precise scope and content of the measures concerned in advance.

Measure A: Translation and Interpretation

Short explanation: The suspected or accused person must be able to understand what is happening and to make him/herself understood. A suspected or accused person who does not speak or understand the language that is used in the proceedings will need an interpreter and translation of essential procedural documents. Particular attention should also be paid to the needs of suspected or accused persons with hearing impediments.

Measure B: Information on Rights and Information about the Charges

Short explanation: A person that is suspected or accused of a crime should get information on his/her basic rights orally or, where appropriate, in writing, e.g. by way of a Letter of Rights. Furthermore, that person should also receive information promptly about the nature and cause of the accusation against him or her. A person who has been charged should be entitled, at the appropriate time, to the information necessary for the preparation of his or her defence, it being understood that this should not prejudice the due course of the criminal proceedings.

Measure C: Legal Advice and Legal Aid

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

Measure D: Communication with Relatives, Employers and Consular Authorities

Short explanation: A suspected or accused person who is deprived of his or her liberty shall be promptly informed of the right to have at least one person, such as a relative or employer, informed of the deprivation of liberty, it being understood that this should not prejudice the due course of the criminal proceedings. In addition, a suspected or accused person who is deprived of his or her liberty in a State other than his or her own shall be informed of the right to have the competent consular authorities informed of the deprivation of liberty.

Measure E: Special Safeguards for Suspected or Accused Persons who are Vulnerable

Short explanation: In order to safeguard the fairness of the proceedings, it is important that special attention is shown to suspected or accused persons who cannot understand or follow the content or the meaning of the proceedings, owing, for example, to their age, mental or physical condition.

Measure F: A Green Paper on Pre-Trial Detention

Short explanation: The time that a person can spend in detention before being tried in court and during the court proceedings varies considerably between the Member States. Excessively long periods of pre-trial detention are detrimental for the individual, can prejudice the judicial cooperation between the Member States and do not represent the values for which the European Union stands. Appropriate measures in this context should be examined in a Green Paper. EN 4.12.2009 Official Journal of the European Union C 295/3.

ANNEX II
Text of the Directive on Access to a Lawyer

(Text of compromise package reached by the negotiating parties on 28 May 2013)

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on the right of access to a lawyer in criminal proceedings and European arrest warrant proceedings, and on the rights to have a third party informed upon deprivation of liberty and to communicate, while deprived of liberty, with third persons and with consular authorities

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 82(2)(b) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee,

After consulting the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Article 47 of the Charter of Fundamental Rights of the European Union (hereinafter referred to as "the Charter"), Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the ECHR") and Article 14 of the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR") enshrine the right to a fair trial. Article 48 of the Charter guarantees respect for the rights of the defence.

- (2) The Union has set itself the objective of maintaining and developing an area of freedom, security and justice. According to the conclusions of the European Council in Tampere of 15 and 16 October 1999, and in particular point 33 thereof, the principle of mutual recognition of judgments and other decisions of judicial authorities should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union, because enhanced mutual recognition and the necessary approximation of legislation would facilitate cooperation between authorities and the judicial protection of individual rights.
- (3) According to Article 82 of the Treaty on the Functioning of the European Union ("TFEU"), judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions.
- (4) The implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States trust in each other's criminal justice systems. The extent of the mutual recognition is very much dependent on a number of parameters, which include mechanisms for safeguarding the rights of suspects or accused persons and common minimum standards necessary to facilitate the application of the principle of mutual recognition.
- (5) Mutual recognition can only operate effectively where there is mutual trust, which requires detailed rules on the protection of procedural rights and guarantees stemming from the Charter, the ECHR and the ICCPR. Common minimum rules should increase confidence in the criminal justice systems of all Member States, which in turn should lead to more efficient judicial cooperation in a climate of mutual trust and to the promotion of a fundamental rights culture in the Union. They should also remove obstacles to the free movement of citizens throughout the territory of the Member States. Such common minimum rules should apply to the right of access to a lawyer and the right to have a third party informed upon deprivation of liberty.
- (6) Although the Member States are parties to the ECHR and the ICCPR, 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.
- (7) Strengthening mutual trust requires detailed rules on the protection of the procedural rights and guarantees arising from the Charter and from the ECHR. It also requires, by means of this Directive and other measures, further development within the Union of the minimum standards set out in the ECHR and the Charter.
- (8) Article 82(2) TFEU provides for the establishment of minimum rules applicable in the Member States so as to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension. That Article refers in point (b) to "the rights of individuals in criminal procedure" as one of the areas in which minimum rules may be established.
- (9) Common minimum rules should lead to increased confidence in the criminal justice systems of all Member States, which in turn should lead to more efficient judicial cooperation in a climate of mutual trust. Such common minimum rules should be established in the field of access to a lawyer in criminal proceedings.
- (10) On 30 November 2009, the Council adopted the Roadmap for strengthening the procedural rights of suspected and accused persons in criminal proceedings ("the

Roadmap')¹¹¹. Taking a step-by-step approach, the Roadmap calls for the adoption of measures regarding the right to obtain translation and interpretation, the right to receive information on rights and information about the charges, the right to receive legal advice and legal aid, the right to communicate with relatives, employers and consular authorities, and establishing special safeguards for suspected or accused persons who are vulnerable. The Roadmap emphasises that the order of the rights is indicative, implying that it may be changed according to priorities. It is designed to operate as a whole; only when all its components are implemented will its benefits be felt in full.

- (11) On 10 December 2009, the European Council welcomed the Roadmap and made it part of the Stockholm programme - An open and secure Europe serving and protecting citizens (point 2.4). The European Council underlined the non-exhaustive character of the Roadmap, by inviting the Commission to examine further elements of minimum procedural rights for suspected and accused persons, and to assess whether other issues, for instance the presumption of innocence, need to be addressed, in order to promote better cooperation in that area.
- (12) Two measures included in the Roadmap have been adopted so far: Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and to translation in criminal proceedings¹¹² and Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings¹¹³.
- (13) This Directive sets out minimum rules on the right of access to a lawyer and on the right to have a third party informed upon deprivation of liberty in criminal proceedings and in proceedings for the execution of an European Arrest Warrant. In doing so, it promotes the application of the Charter, in particular Articles 4, 6, 7, 47 and 48, by building upon Articles 3, 5, 6 and 8 of the ECHR, as interpreted by the European Court of Human Rights, which in its case-law sets standards on an ongoing basis on the right of access to a lawyer. This case-law provides inter alia that the fairness of proceedings requires that a suspect or accused person be able to obtain the whole range of services specifically associated with legal assistance. In this regard, the lawyer should be able to secure without restriction the fundamental aspects of that person's defence.
- (14) Without prejudice to the obligations of Member States under the ECHR to ensure fair trial rights, proceedings in relation to minor offending which takes place within a prison and proceedings in relation to offences committed in a military context which are dealt with by a commanding officer should not be considered to be criminal proceedings for the purposes of this Directive.
- (15) This Directive should be implemented taking into account the provisions of the Directive 2012/13/EU on the right to information in criminal proceedings that provide that suspects or accused persons are provided promptly with information concerning the right of access to a lawyer, and that suspects or accused persons who are arrested or detained are provided promptly with a written Letter of Rights, which should contain information about the right of access to a lawyer.

¹¹¹ OJ C 295, 4.12.2009, p. 1.

¹¹² OJ L 280, 26.10.2010, p. 1.

¹¹³ OJ L 142, 1.6.2012, p.1.

- (16) The term lawyer in this Directive refers to any person who, in accordance with national law, is qualified and entitled, including by accreditation by an authorised body, to provide legal advice and assistance to suspects or accused persons.
- (17) In some Member States an authority other than a court having jurisdiction in criminal matters may be competent 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 disproportionate to require that the competent authority should ensure all the rights granted 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 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.
- (18) 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. It would be disproportionate to require that the competent authorities should ensure all the rights granted under this Directive in respect of such minor offences. 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.

- (19) The scope of application of this Directive in respect of certain minor offences should not affect the obligations of Member States under the ECHR to ensure fair trial rights, including obtaining legal assistance from a lawyer.
- (20) Member States should ensure that suspects or accused persons have the right of access to a lawyer without undue delay. In any event, suspects or accused persons should have access to a lawyer before the person concerned is questioned by the police or other law enforcement authorities and during any such questioning, upon the carrying out by investigative or other competent authorities of an investigative or other evidence-gathering act and without undue delay from the deprivation of liberty. In any case, suspects or accused persons should be granted access to a lawyer during criminal proceedings before a court, if they have not waived that right.
- (21) For the purposes of this Directive, questioning does not include preliminary questioning by the police or other law enforcement authorities whose purpose is any or all of the following: the identification of the person concerned; the verification of the possession of weapons or other similar safety issues; or the determination of whether an investigation should be started, for example in the course of a road-side check, or during regular random checks when a suspect or accused person has not yet been identified.
- (22) When a person other than a suspect or accused person, such as a witness, becomes a suspect or accused person, he should be protected against self incrimination and has the right to remain silent, as confirmed in the case law of the European Court of Human Rights. It is therefore appropriate to make express reference to the practical situation where a person, other than a suspect or accused person, during questioning by the police or by another law enforcement authority in the context of criminal proceedings becomes suspected or accused of having committed a criminal offence. When, in the course of such questioning, a person other than a suspect or accused person becomes a suspect or accused person, any questioning should be suspended immediately; however, questioning may be continued if the person has been made aware that he is a suspect or accused person and he is able to fully exercise the rights provided for under this Directive.
- (23) Suspects or accused persons should have the right to meet in private with the lawyer representing them, including prior to questioning by the police or other law enforcement or judicial authorities. Member States may make practical arrangements concerning the duration and frequency of meetings between a suspect or accused person and his lawyer, taking into account the circumstances of every proceeding, notably the complexity of the case and the procedural steps applicable. Member States may also make practical arrangements to ensure safety and security, in particular of the lawyer and of the suspect or accused person, in the place where the meeting between the lawyer and the suspect or accused person is conducted. All these arrangements should not prejudice the effective exercise and essence of the right of the suspect or accused person to meet with his lawyer.
- (24) Suspects or accused persons should have the right to communicate with the lawyer representing them. Such communication can take place at any stage, including before any exercise of the right to meet with the lawyer. Member States may make practical arrangements concerning the duration, frequency and means of communication between the suspect or accused person and his lawyer, including concerning the use of videoconferencing and other communication technology in order to allow such

communications to take place, provided such arrangements do not prejudice the effective exercise and essence of the right of the suspect or accused person to communicate with his lawyer.

- (25) In respect of certain minor offences, this Directive should not prevent Member States from organising the right of the suspect or accused person to legal assistance by telephone. However, limiting the right in this way should be restricted to cases where the person will not be questioned by the police or by other law enforcement authorities.
- (26) Member States should ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when they are questioned by the investigating authorities, as well as during court hearings. Such participation should be in accordance with procedures in national law, which may regulate the participation of a lawyer during questioning of the suspect or accused person by the investigating authorities, as well as during court hearings, provided these rules do not prejudice the effective exercise and essence of the right concerned. During questioning by the investigating authorities of the suspect or accused person or in a court hearing, the lawyer may *inter alia*, in accordance with such rules, ask questions, request clarification and make statements, which should be recorded in accordance with national law.
- (27) The suspect or accused person has the right for his lawyer to attend at least the following investigative or evidence-gathering acts, insofar as they are provided for in the national law concerned and insofar the suspect or accused person is required or permitted to attend: identity parades, at which the suspect or accused person figures among other persons in order to be identified by a victim or witness; confrontations, where a suspect or accused person is brought together with one or more witnesses or victims when there is disagreement between them on important facts or issues; experimental reconstructions of the scene of crime at which the suspect or accused person is present and where the circumstances of a crime are reconstructed, in order to better understand the manner and circumstances under which a crime was committed and to be able to ask specific questions to the suspect or accused person. Member States may make practical arrangements concerning the presence of a lawyer during investigative or evidence-gathering acts, provided such arrangements do not prejudice the effective exercise and essence of the rights concerned. Where the lawyer is present during an investigative or evidence-gathering act, this should be recorded in accordance with the recording procedure of the law of the Member State concerned.
- (28) Member States should be encouraged to make general information available, for instance on a website or by means of a leaflet that is available at police stations, to facilitate suspects or accused persons in obtaining a lawyer. However, Member States would not need to actively pursue that a suspect or accused person who is not deprived of his liberty will be assisted by a lawyer if the person concerned has not himself arranged to be assisted by a lawyer. Such suspect or accused person concerned should be able to freely contact, consult or be assisted by that lawyer.
- (29) In cases where a suspect or accused person is deprived of liberty, Member States should make the necessary arrangements to ensure that the person concerned is in a position to effectively exercise his right of access to lawyer, including by arranging for the assistance of a lawyer when the person concerned does not have one, unless he has waived this right. The arrangements could imply, *inter alia*, that the competent

authorities arrange for the assistance of a lawyer on the basis of a list of available lawyers from which the suspect or accused person could choose. The arrangements could include those on legal aid if applicable.

- (30) Pre-trial detention and detention conditions should fully respect the standards set out by the ECHR, by the Charter, and by the case law of the European Court of Human Rights and of the European Court of Justice. When providing assistance under this Directive to a suspect or accused person who is in detention, the lawyer concerned should be able to raise a question to the competent authorities regarding the conditions under which that person is detained.
- (31) In cases of geographical remoteness of the suspect or accused person, e.g. in overseas territories or where the Member State undertakes or participates in military operations outside that Member State, Member States are permitted to temporarily derogate from the right of the suspect or accused person to have access to a lawyer without undue delay after deprivation of liberty. During a temporary derogation on this ground, the competent authorities are not allowed to question the person concerned or to carry out any of the investigative or evidence-gathering acts foreseen in this Directive. Where immediate access to a lawyer is not possible because of the geographical remoteness of the suspect or accused person, Member States should arrange for communication via telephone or video conference unless this is strictly impossible.
- (32) Member States should be permitted to temporarily derogate from the right of access to a lawyer in the pre-trial phase when there is a need, in cases of urgency, to avert serious adverse consequences for the life, liberty or physical integrity of a person. During a temporary derogation on this ground, the competent authorities may question a suspect or accused person without the lawyer being present, it being understood that the suspect or accused person has been informed of his right to remain silent and can exercise that right, and that questioning does not prejudice the rights of the defence, including the privilege against self-incrimination. Questioning may be carried out for the sole purpose and to the extent necessary to obtain information that is essential to avert serious adverse consequences for the life, liberty or physical integrity of a person. Abuse of this derogation would in principle irretrievably prejudice the rights of the defence.

- (33) Member States should also be permitted to temporarily derogate from the right of access to a lawyer in the pre-trial phase where immediate action by the investigating authorities is imperative to prevent a substantial jeopardy to criminal proceedings, in particular to prevent destruction or alteration of essential evidence, or to prevent interference with witnesses. During a temporary derogation on this ground, the competent authorities may question a suspect or accused person without the lawyer being present, it being understood that the suspect or accused person has been informed of his right to remain silent and can exercise that right, and that questioning does not prejudice the rights of the defence, including the privilege against self-incrimination. Questioning may be carried out for the sole purpose and to the extent necessary to obtain information that is essential to prevent a substantial jeopardy to criminal proceedings. Abuse of this derogation would in principle irretrievably prejudice the rights of the defence.
- (34) Confidentiality of communication between a suspect or accused person and his lawyer is key to ensuring the effective exercise of the rights of the defence and is an essential part of the right to a fair trial. Member States should therefore respect the confidentiality of meetings and other forms of communication between the lawyer and the suspect or accused person in the exercise of the right of access to a lawyer provided for in this Directive, without derogation. This Directive is without prejudice to procedures that address the situation when there are objective and factual circumstances whereby the lawyer is suspected of being involved with the suspect or accused person in a criminal offence. Criminal activity of the lawyer should not be considered to be legitimate assistance to suspects or accused persons in the framework of this Directive. The obligation to respect confidentiality not only implies that Member States should refrain from interfering with or accessing such communication but also that, where the suspect or accused person is deprived of liberty or otherwise finds himself in a place under the control of the State, Member States should ensure that arrangements for communication uphold and protect confidentiality. This is without prejudice to mechanisms in place in detention facilities in order to avoid illicit enclosures being sent to detainees, such as screening correspondence, as long as such mechanisms do not allow the competent authorities to read the communication between the suspect or accused person and his lawyer. This Directive is also without prejudice to procedures in national law according to which forwarding correspondence may be rejected if the sender does not agree to the correspondence first being submitted to a competent court.
- (35) This Directive should be without prejudice to a breach of confidentiality which is incidental to a lawful surveillance operation by competent authorities. This Directive should also be without prejudice to the work carried out, for example by national intelligence services, to safeguard national security in accordance with Article 4(2) of the Treaty on European Union or that falls within the scope of Article 72 of the Treaty on the Functioning of the European Union, according to which Title V on an area of Freedom, Security and Justice shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.
- (36) Suspects or accused persons deprived of their liberty should have the right to have at least one person of their choice, such as a family member or employer, informed of the deprivation of liberty without undue delay, it being understood that this should not prejudice the due course of the criminal proceedings against the person concerned, nor

any other criminal proceedings. Member States may make practical arrangements in relation to the application of this right, provided such arrangements do not prejudice the effective exercise and essence of the right. In limited, exceptional circumstances, however, it should be possible to temporarily derogate from this right when this is justified, in the light of the particular circumstances of the case, by a compelling reason as specified in this Directive. When the competent authorities envisage making such a temporary derogation in respect of a specific third person, they should firstly consider whether another third person, nominated by the suspect or accused person, could be informed of his deprivation of liberty.

- (37) Suspects or accused persons, while deprived of liberty, should have the right to communicate without undue delay with at least one third person, such as a relative, nominated by them. Member States may limit or defer the exercise of this right in view of imperative requirements or proportionate operational requirements. These requirements can, for example, be a need to avert serious adverse consequences for the life, liberty or physical integrity of a person, a need to prevent prejudice to criminal proceedings, a need to prevent a criminal offence, a need to await a court hearing, and a need to protect victims of crime. When the competent authorities envisage limiting or deferring the exercise of the right to communicate in respect of a specific third person, they should firstly consider whether the suspect or accused person could communicate with another third person nominated by him. Member States may make practical arrangements concerning the timing, means, duration and frequency of communication with third persons, taking account of the need to maintain good order, safety and security in the place where the person is being deprived of liberty.
- (38) The rights of suspects and accused persons who are deprived of their liberty to consular assistance is enshrined in Article 36 of the 1963 Vienna Convention on Consular Relations where it is a right conferred on States to have access to their nationals. This Directive confers a corresponding right on suspects or accused persons who are deprived of their liberty, subject to their wishes. Consular protection may be exercised by diplomatic authorities when they act as consular authorities.
- (39) Member States should clearly set out in their national law the grounds and criteria for any temporary derogations from rights granted under this Directive, and they should make a restricted use of these derogations. Any temporary derogations allowed under this Directive should be proportional, strictly limited in time, not be based exclusively on the type or the seriousness of the alleged offence, and not prejudice the overall fairness of the proceedings. Member States should clearly set out in their national law the grounds and criteria for any temporary derogations from rights granted under this Directive, and they should make a restricted use of these derogations. Any temporary derogations allowed under this Directive should be proportional, strictly limited in time, not be based exclusively on the type or the seriousness of the alleged offence, and not prejudice the overall fairness of the proceedings. Member States should ensure that when a temporary derogation has been authorised under this Directive by a judicial authority which is not a judge or a court, the decision on authorising the temporary derogation can be assessed by a court, at least during the trial stage.
- (40) Without prejudice to national law requiring the mandatory presence or assistance of a lawyer, the suspect or accused person should be allowed to waive a right granted under this Directive, as long as he has been given, orally or in writing, clear and sufficient information in simple and understandable language about the content of the right concerned and the possible consequences of waiving it. When providing the

information, the specific conditions of the person concerned should be taken into account, including the age of the person, and his mental and physical condition.

- (41) A waiver and the circumstances in which it was given should be noted, using the recording procedure in accordance with the law of the Member State concerned. This should not lead to any additional obligation for Member States to introduce new mechanisms or to any additional administrative burden.
- (42) It should be possible for a suspect or accused person to revoke a waiver at any point during the criminal proceedings, and the person concerned should be informed about this possibility. A revocation of a waiver should come into effect from the point in time when the revocation was made. Hence, it should not be necessary to proceed again with questioning and any procedural acts that have been carried out during the period when the right concerned was waived.
- (43) The person subject to a European Arrest Warrant should have the right of access to a lawyer in the executing Member State in order to allow him to exercise his rights effectively under the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States.
114 When the lawyer participates in a hearing of the requested person by an executing judicial authority, he may *inter alia*, in accordance with procedures provided for under national law, ask questions, request clarification and make statements. The fact of participation should be recorded in accordance with national law.
- (44) Requested persons should have the right to meet in private with the lawyer representing them in the executing State. Member States may make practical arrangements concerning the duration and frequency of such meetings, taking into account the particular circumstances of the case. Member States may also make practical arrangements to ensure safety and security, in particular of the lawyer and of the requested person, in the place where the meeting between the lawyer and the requested person is conducted. All these arrangements should not prejudice the effective exercise and essence of the right of the requested person to meet with his lawyer.
- (45) Requested persons should have the right to communicate with the lawyer representing them in the executing Member State. Such communication can take place at any stage, including before any exercise of the right to meet with the lawyer. Member States may make practical arrangements concerning the duration, frequency and means of communication between the requested person and his lawyer, including concerning the use of videoconferencing and other communication technology in order to allow such communications to take place, provided such arrangements do not prejudice the effective exercise and essence of the right of the requested person to communicate with his lawyer.
- (46) Executing Member States should make the necessary arrangements to ensure that a requested person is in a position to effectively exercise his right of access to lawyer in the executing Member State, including by arranging for the assistance of a lawyer when the person concerned does not have one, unless he has waived this right. The arrangements, including those on legal aid if applicable, should be governed by national law. They could imply, *inter alia*, that the competent authorities arrange for

¹¹⁴ OJ L 190, 18.7.2002, p. 1.

the assistance of a lawyer on the basis of a list of available lawyers from which the requested person could choose.

- (47) Without undue delay after being informed that the requested person wishes to appoint a lawyer in the issuing Member State, the competent authority of that Member State shall provide information to the requested person to facilitate him in appointing a lawyer there. Such information could, for example, include a current list of lawyers, or the name of a lawyer on duty in the issuing State, that can provide information and advice in European Arrest Warrant cases. Member States could request that the appropriate bar association draw up such a list.
- (48) The surrender procedure is crucial for cooperation in criminal matters between the Member States. Observance of the time limits contained in Council Framework Decision 2002/584/JHA is essential for such cooperation. Therefore, while requested persons should be able to fully exercise their rights under this Directive in proceedings for the execution of a European Arrest Warrant, those time limits should be respected.
- (49) In the absence to-date of a legislative act of the Union on legal aid, Member States should apply their national law in relation to legal aid, which should be in line with the Charter, the ECHR and the case-law of the European Court of Human Rights.
- (50) In accordance with the principle of effectiveness of Union law, Member States should put in place adequate and effective remedies to protect the rights conferred upon individuals by this Directive.
- (51) Member States should ensure that in the assessment of statements made by a suspect or accused person or of evidence obtained in breach of his right to a lawyer or in cases where a derogation to this right was authorised in accordance with this Directive, the rights of the defence and the fairness of the proceedings should be respected; in this context, regard should be had at the case-law of the European Court of Human Rights, which has established that the rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction. This should be without prejudice to the use of statements for other purposes permitted under national law, such as the need to execute urgent investigative acts to avoid the perpetration of other offences or serious adverse consequences for any person or related to an urgent need to prevent a substantial jeopardy to criminal proceedings where access to a lawyer or delaying the investigation would irretrievably prejudice the on-going investigations regarding a serious crime. Further, this should be without prejudice to national rules or systems regarding admissibility of evidence, and should not prevent Member States from maintaining a system whereby all existing evidence can be adduced before a court or a judge, without there being any separate or prior assessment as to admissibility of such evidence.
- (52) The duty of care towards suspected or accused persons who are in a potentially weak position underpins a fair administration of justice. The prosecution, law enforcement and judicial authorities should therefore facilitate that such persons are able to exercise effectively the rights provided for in this Directive, for example by taking into account any potential vulnerability that affects their ability to exercise the right of access to a lawyer and to have a third party informed upon deprivation of liberty, and by taking appropriate steps to ensure those rights are guaranteed.

- (53) This Directive upholds the fundamental rights and principles recognised by the Charter, including the prohibition of torture and inhuman and degrading treatment, the right to liberty and security, respect for private and family life, the right to the integrity of the person, the rights of the child, integration of persons with disabilities, the right to an effective remedy and to a fair trial, the presumption of innocence and the right of defence. This Directive must be implemented according to these rights and principles.
- (54) Member States should ensure that the provisions of this Directive, where they correspond to rights guaranteed by the ECHR, are implemented consistently with those of the ECHR and as developed by case law of the European Court of Human Rights.
- (55) This Directive sets minimum rules. Member States may extend the rights set out in this Directive in order to afford a higher level of protection. Such higher level of protection may not constitute an obstacle to mutual recognition of judicial decisions that these minimum rules are designed to facilitate. The level of protection should never go below the standards provided by the Charter and by the ECHR, as interpreted in the case law of the European Court of Justice and the European Court of Human Rights.
- (56) This Directive promotes the rights of children and takes into account the Guidelines of the Council of Europe on child friendly justice, in particular its provisions on information and advice to be given to children. The Directive ensures that suspects and accused persons, including children, should be provided with adequate information to understand the consequences of waiving a right under this Directive and that the waiver should be given voluntarily and unequivocally. The holder of the parental responsibility of a suspect or accused child should be notified as soon as possible of his deprivation of liberty and the reasons pertaining thereto. If providing such information to the holder of the parental responsibility of the child is contrary to the best interests of the child, another suitable adult such as a relative should be informed instead. This should be without prejudice to provisions of national law which require that any specified authorities, institutions or individuals, in particular those which are responsible for the protection or welfare of children, should be informed of the deprivation of liberty of a child. Member States should refrain from limiting or deferring the exercise of the right to communicate with a third party in respect of suspected or accused children who are deprived of liberty, save in the most exceptional circumstances. Where a deferral is applied the child should nonetheless not be held incommunicado, but be permitted to communicate with, for example, an institution or individual responsible for the protection or welfare of children.
- (57) In accordance with the Joint Political Declaration of Member States and the Commission on explanatory documents of 28 September 2011, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.
- (58) Since the objectives of this Directive, namely setting common minimum rules for the right of access to a lawyer and the right to have a third person informed of the deprivation of liberty, cannot be sufficiently achieved by the Member States, and can, by reason of the scale of the measure, be better achieved at Union level, the Union

may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve these objectives.

- (59) Without prejudice to Article 4 of the Protocol on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, the United Kingdom and Ireland will not participate in the adoption of this Directive and will not be bound by or be subject to its application.
- (60) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark will not participate in the adoption of this Directive, and is therefore not bound by it or subject to its application,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER 1

Objective, Scope

Article 1

Objective

This Directive lays down minimum rules concerning the rights of suspects and accused persons in criminal proceedings and of persons subject to proceedings pursuant to Council Framework Decision 2002/584/JHA¹¹⁵ ("European arrest warrant proceedings") to have access to a lawyer and to have a third party informed of the deprivation of liberty.

Article 2

Scope

1. This Directive applies to suspects or accused persons in criminal proceedings from the time a person has been made aware by the competent authorities of a Member State, by official notification or otherwise, that he is suspected or accused of having committed a criminal offence, and irrespective of whether he is deprived of liberty or not. It applies until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspected or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal.
2. This Directive applies to persons subject to European arrest warrant proceedings from the time they are arrested in the executing Member State in accordance with Article 10.

¹¹⁵ OJ L 190, 18.7.2002, p. 1.

3. This Directive also applies, under the same conditions as provided for in paragraph 1, to persons other than suspects or accused persons who in the course of questioning by the police or by another law enforcement authority become suspects or accused persons.
4. 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 shall only apply to the proceedings before a court having jurisdiction in criminal matters.

However, the Directive shall in any case fully apply when the suspect or accused person is deprived of liberty, irrespective of the stage of the criminal proceedings.

CHAPTER 2

Right of access to a lawyer

Article 3

The right of access to a lawyer in criminal proceedings

1. Member States shall ensure that suspects and accused persons have the right of access to a lawyer in such a time and manner so as to allow the person concerned to exercise his rights of defence practically and effectively.
2. The suspect or accused person shall have access to a lawyer without undue delay. In any event, the suspect or accused person shall have access to a lawyer as from the following moments in time, whichever is the earliest:
 - (a) before he is questioned by the police or other law enforcement or judicial authorities;
 - (b) upon the carrying out by investigative or other competent authorities of an investigative or other evidence-gathering act in accordance with paragraph 3(c);

- (c) without undue delay from the deprivation of liberty;
 - (d) in due time before the suspect or accused person, who has been summoned to appear before a court having jurisdiction in criminal matters, appears before that court.
3. The right of access to a lawyer shall entail the following:
- (a) Member States shall ensure that a suspect or accused person has the right to meet in private and communicate with the lawyer representing him, including prior to questioning by the police or other law enforcement or judicial authorities;
 - (b) Member States shall ensure that the suspect or accused person has the right for his lawyer to be present and participate effectively when he is questioned. Such participation shall be in accordance with procedures in national law, provided these procedures do not prejudice the effective exercise and essence of the right concerned. When a lawyer participates during questioning this shall be recorded in accordance with national law;
 - (c) Member States shall ensure that the suspect or accused person shall as a minimum have the right for his lawyer to attend the following investigative or evidence-gathering acts, if these acts are provided for in the national law concerned and if the suspect or accused person is required or permitted to attend the act concerned:
 - i) identity parades;
 - ii) confrontations;
 - iii) experimental reconstructions of the scene of crime.
4. Member States shall endeavour to make general information available to facilitate suspects or accused persons in obtaining a lawyer.

Notwithstanding provisions of national law concerning the mandatory presence of a lawyer, Member States shall make the necessary arrangements to ensure that suspects or accused persons who are deprived of liberty shall be in a position to effectively exercise their right of access to a lawyer, unless they have waived this right in accordance with Article 9.

5. In exceptional circumstances and in the pre-trial stage only, Member States may temporarily derogate from the application of paragraph 2(c) when the geographical remoteness of a suspect or accused person makes it impossible to ensure the right of access to a lawyer without undue delay after deprivation of liberty.
6. In exceptional circumstances and in the pre-trial stage only, Member States may temporarily derogate from the application of the rights provided for in paragraph 3 when and to the extent this is justified, in the light of the particular circumstances of the case, by one or more of the following compelling reasons:
- (a) an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;

(b) immediate action by the investigating authorities is imperative to prevent a substantial jeopardy to criminal proceedings.

Article 4
Confidentiality

Member States shall respect the confidentiality of communication between a suspect or accused person and his lawyer in the exercise of the right of access to a lawyer provided for under this Directive. This shall include meetings, correspondence, telephone conversations and other forms of communication permitted under national law.

CHAPTER 3
**Informing a third person of deprivation of liberty and
communication with third persons and consular authorities**

Article 5

The right to have a third person informed of the deprivation of liberty

1. Member States shall ensure that suspects or accused persons who are deprived of their liberty have the right to have at least one person, such as a relative or employer, nominated by them, informed of the deprivation of liberty, without undue delay, if they so wish.

2. If the suspect or accused person is a child, Member States shall ensure that the holder of the parental responsibility of the child is informed as soon as possible of the deprivation of liberty and of the reasons pertaining thereto, unless it would be contrary to the best interests of the child, in which case another appropriate adult shall be informed. For the purposes of this paragraph, a person below the age of 18 years shall be considered to be a child.

3. Member States may temporarily derogate from the application of the rights set out in paragraphs 1 and 2 when this is justified, in the light of the particular circumstances of the case, by one of the following compelling reasons:
 - (a) an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person ;
 - (b) an urgent need to prevent a situation where there could be a substantial jeopardy to criminal proceedings.

4. When Member States temporarily derogate from the application of the right set out in paragraph 2, they shall ensure that an authority responsible for the protection or welfare of children is informed without undue delay of the deprivation of liberty of the child.

Article 6

The right to communicate, while deprived of liberty, with third persons

1. Member States shall ensure that suspects or accused persons who are deprived of liberty have the right to communicate without undue delay with at least one third person, such as a relative, nominated by them.

2. Member States may limit or defer the exercise of this right in view of imperative requirements or proportionate operational requirements.

Article 7

The right to communicate with consular authorities

1. Member States shall ensure that suspects or accused persons who are deprived of their liberty and who are non-nationals have the right to have consular authorities of their State of nationality informed of the deprivation of liberty without undue delay and to communicate with those authorities, if the suspects or accused persons so wish. However, when suspects or accused persons have two or more nationalities, they may choose which consular authorities, if any, are to be informed of the deprivation of liberty and with whom they wish to communicate.
2. Suspects or accused persons also have the right to be visited by their consular authorities, the right to converse and correspond with them and the right to have legal representation arranged for by their consular authorities, subject to the agreement of these authorities and the wishes of the suspects or accused persons concerned.
3. The exercise of the rights in this Article may be regulated in national law or procedures, provided such law and procedures shall enable full effect to be given to the purposes for which these rights are intended.

CHAPTER 4

Derogations and waiver

Article 8

General conditions for applying temporary derogations

1. Any temporary derogation under Articles 3(5), 3(6) and 5(3),
 - (a) shall be proportionate and not go beyond what is necessary;
 - (b) shall be strictly limited in time;
 - (c) shall not be based exclusively on the type or the seriousness of the alleged offence; and
 - (d) shall not prejudice the overall fairness of the proceedings.
2. Temporary derogations under Article 3(5) and 3(6) may only be authorised by a duly reasoned decision taken on a case-by-case basis, either by a judicial authority, or by another competent authority on condition that the decision can be submitted to judicial review. The duly reasoned decision shall be recorded in accordance with the law of the Member State concerned.

3. Temporary derogations under Article 5(3) may only be authorised on a case-by-case basis, either by a judicial authority, or by another competent authority on condition that the decision can be submitted to judicial review.

Article 9

Waiver

1. Without prejudice to national law requiring the mandatory presence or assistance of a lawyer, Member States shall ensure that, in relation to any waiver of a right referred to in Articles 3 and 10 of this Directive:
 - (a) the suspect or accused person has been provided, orally or in writing, with clear and sufficient information in simple and understandable language about the content of the right concerned and the possible consequences of waiving it; and
 - (b) the waiver is given voluntarily and unequivocally.
2. The waiver, which can be made in writing or orally, shall be noted, as well as the circumstances under which the waiver was given, using the recording procedure in accordance with the law of the Member State concerned.
3. Member States shall ensure that a waiver can be subsequently revoked at any point during the criminal proceedings and that the suspect or accused person is informed about this possibility. A revocation of a waiver shall come into effect from the point in time when the revocation was made.

CHAPTER 5

European Arrest Warrant proceedings

Article 10

The right of access to a lawyer in European Arrest Warrant proceedings

1. Member States shall ensure that a person requested for surrender in accordance with Council Framework Decision 2002/584/JHA has the right of access to a lawyer in the executing Member State upon arrest pursuant to the European Arrest Warrant.
2. With regard to the content of the right of access to a lawyer in the executing Member State, the requested person shall have the following rights in that Member State:
 - (a) the right of access to a lawyer in such a time and manner so as to allow him to exercise his rights effectively and in any event without undue delay from deprivation of liberty;
 - (b) the right to meet and communicate with the lawyer representing him;
 - (c) the right for his lawyer to be present and, in accordance with procedures in national law, participate during a hearing of the requested

person by the executing judicial authority. When the lawyer participates during the hearing this shall be recorded in accordance with national law.

3. The rights provided for in this Directive under Articles 4, 5, 6, 7, 9 and - when a temporary derogation under Article 5(3) is applied - Article 8 shall apply, *mutatis mutandis*, to European arrest warrant proceedings in the executing Member State.
4. The competent authority in the executing Member State shall, without undue delay after deprivation of liberty, inform the requested person that he has the right to appoint a lawyer in the issuing Member State. The role of that lawyer in the issuing Member State is to assist the lawyer in the executing Member State by providing him with information and advice with a view to the effective exercise of the rights of the requested person under Council Framework Decision 2002/584/JHA.
5. Where the requested person wishes to exercise this right and does not already have a lawyer in the issuing Member State, the competent authority in the executing Member State shall promptly inform the competent authority in the issuing Member State. The competent authority of that Member State shall, without undue delay, provide information to the requested person to facilitate him in appointing a lawyer there.
6. The right of a requested person to appoint a lawyer in the issuing Member State to assist his lawyer in the executing Member State is without prejudice to the time limits set out in Council Framework Decision 2002/584/JHA or the obligation on the executing judicial authority to decide, within those time limits and the conditions defined under that Framework Decision, whether the person is to be surrendered.

CHAPTER 6

General and final provisions

Article 11

Legal aid

This Directive is without prejudice to national law in relation to legal aid, which shall apply in accordance with the Charter and the ECHR.

Article 12

Remedies

1. Member States shall ensure that suspects or accused persons in criminal proceedings as well as requested persons in European Arrest Warrant proceedings have an effective remedy under national law in instances where their rights under this Directive have been breached.
2. Without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in criminal proceedings, in the assessment of statements made by a suspect or accused person or of evidence obtained in breach of his

right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 3(6), the rights of the defence and the fairness of the proceedings are respected.

Article 13

Vulnerable persons

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

Article 14

Non-regression clause

Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the Charter, the ECHR, and other relevant provisions of international law or the law of any Member States which provide a higher level of protection.

Article 15

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [36 months after publication of this Directive in the Official Journal]. They shall immediately inform the Commission thereof.
2. When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.
3. Member States shall communicate to the Commission the text of the measures of national law which they adopt in the field covered by this Directive.

Article 16

Report

The Commission shall by [36 months after the deadline for implementation of the Directive mentioned in Article 15(1)] submit a report to the European Parliament and to the Council, assessing the extent to which the Member States have taken the necessary measures in order to comply with this Directive, including an evaluation of the application of Article 3(6) in conjunction with Article 8(1) and (2), accompanied, if necessary, by legislative proposals.

Article 17

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 18
Addressees

This Directive is addressed to the Member States in accordance with the Treaties

Done at Brussels,

For the European Parliament
The President

For the Council
The President

ANNEX III
ECtHR digest case-law on legal aid in criminal proceedings

The right to legal aid at pre-trial stages

Berlinski v Poland¹¹⁶

The Court held that the right to legal aid advice (as opposed to any type of legal assistance, as in *Salduz, Mader et al*) **arises during pre-trial procedural acts, including police questioning**: “*The Court observes that it is undisputed that the applicants lacked means to employ a private representative in the context of criminal proceedings against them. It is also uncontested that the applicants' request for an official lawyer to be appointed was ignored by the authorities, with the result that they had no defence counsel for more than a year. Given that a number of procedural acts, including questioning of the applicants and their medical examinations, were carried out during that period (see §§ 40-45 above), the Court finds no justification for this restriction which deprived the applicants of the right to adequately defend themselves during the investigation and trial. Accordingly, there has been a breach of Article 6 §§ 1 and 3 (c) of the Convention.*”

Means test

Pakelli v Germany

The Court held that the first part of Art 6.3(c) was satisfied as it appeared that Mr Pakelli did not have sufficient means to pay a lawyer at the time of the appeal in Germany. The ECtHR relied on “some indications” that the applicant had been unable to pay for his lawyer, including tax-related statements, and the fact that the applicant had spent the previous two years in custody while his appeal on points of law were pending. In the absence of indications to the contrary, the ECtHR was satisfied that the applicant was engaged in business on a small scale and that his financial situation was modest, in finding that he lacked the means to pay for a lawyer.¹¹⁷ In addition, the relevant authority must **seriously consider the relevant circumstances of the particular case**.¹¹⁸ Therefore, the contracting states’ means tests – whatever they comprise – should not be so inflexible as to obstruct the practical and effective exercise of the Article 6(3)(c) right to legal aid.

The test of "interest of justice" (merits test)

Quaranta v Switzerland¹¹⁹

The court held that **three factors** determine when “*the interests of justice*” in Article 6(3)(c) require the right to free legal advice. These factors are broad, and comprise the: a) Seriousness of the offence and the severity of the potential sentence; b) Complexity of the case; and c) personal situation of the defendant.

The Court examined the various criteria. It examined the seriousness of the offence of which the applicant was accused and the severity of the sentence which he risked: he had been

¹¹⁶ *Berlinski v Poland*, Application no.s 27715/95 and 30209/96), judgment of 20 June 2002, paragraphs 77 and 78.

¹¹⁷ *Pakelli v Germany*, ECtHR, Judgment of 25 April 1983, at para. 34. See also: *Twalib v Greece*, ECtHR, Judgment of 9 June 1998, at para. 51.

¹¹⁸ *Kreuz v Poland*, Application no. 28249/95, judgment of 19 June 2001.

¹¹⁹ *Quaranta v. Switzerland* (application no. 12744/87), judgment of 24 May 1991.

charged with use of and traffic in narcotics and was liable to a sentence up to 3 years' imprisonment. This warranted free legal assistance by reason of the mere fact that so much was at stake. It also took into account the personal situation of the defendant: “*a young adult of foreign origin from an underprivileged background, he had no real occupational training and 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*”.¹²⁰

Benham v United Kingdom¹²¹

The applicant, Stephen Benham, became liable to pay a community charge known as the ‘poll tax’. The applicant did not pay the amount owed, and bailiffs visited his parents' house (where he was living), but were told that he had no goods of any value there or elsewhere which could be seized by them and sold in order to pay the debt. Under the relevant regulations, the authorities were empowered to apply to a magistrates' court for an order committing to prison a person who was found to have insufficient goods on which to levy outstanding community charge. The charging authority applied for such an order, and on 25 March 1991 Mr Benham appeared at the Poole Magistrates' Court for the inquiry required by the regulations. He was not assisted or represented by a lawyer, although he was eligible for legal advice and assistance before the hearing. The applicant was convicted by the magistrates. He faced a possible maximum penalty of three months' imprisonment, and was ordered to be detained for thirty days (the case was however overturned on appeal). The applicant submitted that the interests of justice required that he ought to have been represented by a legal aid lawyer when he appeared before the magistrates.

It was not disputed that Mr Benham lacked sufficient means to pay for legal assistance himself. The only issue before the Court was whether the interests of justice required that Mr Benham be provided with free legal representation at the hearing before the magistrates. In answering this question, regard had to be had to the severity of the penalty at stake and the complexity of the case. The ECtHR held that “*where the deprivation of liberty is at stake, in principle the interests of justice call for legal representation*” and added that in the case, the defendant ought to have benefited from free legal representation. In this case, Mr Benham faced a maximum term of three months' imprisonment. The Court also added that the law which the magistrates had to apply was not straightforward.

Effectiveness of legal aid system

Wersel v Poland¹²²

In *Wersel v Poland*, the ECtHR's ruled that judicial authorities' decisions regarding the availability of legal aid should be made in sufficient time to enable the accused to present their case in a concrete and effective way. In the case at hand, the shortness of the time left to the applicant for appointing a lawyer of his choice and for preparing the intended cassation appeal did not give him a realistic opportunity of having his case brought to and defended in the cassation court in a “concrete and effective way” as the legal aid board communicated

¹²⁰ *Quaranta v Switzerland*, ECtHR, Judgment of 24 May 1991, at para. 35.

¹²¹ *Benham v. United Kingdom* (application no. 19380/92), judgment of 10 June 1996, paragraphs 61 and 64.

¹²² *Wersel v Poland*, Application no. 30358/04, judgment of 13 September 2011.

their refusal two days before the expiry of the time-limit for the submission of the applicant's appeal.¹²³

Right to choose counsel

Croissant v Germany¹²⁴

On the point of **the suspect's right to choose a lawyer**, the court held the suspect's or accused's Article 6(3)(c) right to be defended by counsel of his own choosing, notwithstanding the importance of a relationship of confidence between lawyer and client, cannot be considered to be absolute – it may be constrained where there are **relevant and sufficient grounds** for holding that this is in the interests of justice. However, the reference to “*relevant and sufficient grounds*” implies that in the ordinary course of events (i.e. unless exceptional circumstances apply), the suspect should indeed have a role in choosing the state funded defence lawyer. This is especially the case since the Strasbourg court found in *Croissant* that national courts must **have regard to the defendant's wishes when appointing defence counsel**, albeit they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice.¹²⁵ “*notwithstanding the importance of a relationship of confidence between lawyer and client, this right cannot be considered to be absolute. It is necessarily subject to certain limitations where free legal aid is concerned and also where, as in the present case, it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them. When appointing defence counsel the national courts must certainly have regard to the defendant's wishes ... However, they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice*”.¹²⁶

Ramon Franquesa Freixas v Spain¹²⁷

The applicant complained that his Article 6(3)(c) rights were violated because he had been assigned a lawyer specializing in labour law to defend him in a criminal case. The ECtHR held that his complaint was manifestly ill founded, because Article 6(3)(c) did not guarantee a defendant the right to choose which lawyer the court should assign him and because the applicant had failed to present any plausible evidence to support his assertion that the lawyer was incompetent.

Possibility for the State to require repayment of costs for legal aid

Croissant v Germany¹²⁸

The ECtHR noted that under German law the requirement for a convicted individual to pay the fees and disbursements of his court-appointed counsel was a normal consequence of the

¹²³ *Wersel v Poland*, ECtHR, Judgment of 13 September 2011, at para. 52. See also: *R.D. v Poland*, ECtHR, Judgment of 18 December 2001, at paras. 50-52.

¹²⁴ *Croissant v Germany*, Application no. 58295/00, judgment of 27 November 2007, para 36.

¹²⁵ See *Croissant*, paragraph 29.

¹²⁶ *Croissant v Germany*, ECtHR, Judgment of 25 September 1992, at para. 29. See also: *Lagerblom v Sweden*, ECtHR, Judgment of 14 January 2003, at para. 55, holding that Article 6(3)(c) cannot be interpreted as securing a right to have public defence counsel replaced.

¹²⁷ *Ramon Franquesa Freixas v Spain*, ECtHR (dec.), Decision of 21 November 2000.

¹²⁸ *Croissant v Germany*, Application no. 58295/00, judgment of 27 November 2007, para 36.

conviction, and that it was only in the ensuing enforcement proceedings that his or her financial situation played a role. In the Court's view, such a system would not be compatible with Article 6 if it adversely affected the fairness of the proceedings. There was, however, no indication that it generally produced such a result or had done so in Mr Croissant's case. The appointment of his defence counsel had been compatible with the requirements of Article 6 and it was therefore not incompatible with that provision that he was liable to pay their fees, which were not excessive.

*Ognyan Asenov v Bulgaria*¹²⁹

The applicant complained that following his conviction he was ordered to reimburse the fees of his court-appointed counsel. The ECtHR examined whether the possibility of being ordered to bear the costs of his defence in the event of a conviction had inhibited the applicant from asking the trial court to appoint a lawyer for him. The ECtHR found that the applicant had not felt inhibited and that it did not undermine his procedural rights.¹³⁰

Quality control

*Artico v. Italy*¹³¹

The Court recalled that the ECHR is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective; this is particularly so if the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive. Article 6.3(c) speaks of "assistance" and not of "nomination". Mere nomination does not ensure effective assistance since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations. Adoption of the Government's restrictive interpretation would lead to results that are unreasonable and incompatible with both the wording of 6.3(c) and the structure of Article 6 taken as a whole; in many instances free legal assistance might prove to be worthless. Admittedly, a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes but, in the particular circumstances, it was for the competent Italian authorities to take steps to ensure that the applicant enjoyed effectively the right to which they had recognised he was entitled.

*Imbrioscia v. Switzerland*¹³²

The ECtHR remarked that the applicant's lawyers did not complain of not being invited to attend the interviews and that the second lawyer did have the occasion to attend the last interview after requesting to do so. It held that the applicant did not at the outset have the necessary legal support, but "a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes" see the *Kamasinski v. Austria* judgment of 19 December 1989, Series A no. 168, p. 33, para. 65) or chosen by the accused. Owing to the legal profession's independence, the conduct of the defence is essentially a matter between the defendant and his representative; under Article 6.3(c) the Contracting States are required

¹²⁹ *Ognyan Asenov v Bulgaria*, ECtHR, Judgment of 17 February 2011.

¹³⁰ *Ognyan Asenov v Bulgaria*, ECtHR, Judgment of 17 February 2011, at para 44.

¹³¹ *Artico v Italy*, Series A no. 37, judgement of 12 May 1980

¹³² *Imbriosca v Switzerland*, Application no. 13972/88, judgement of 24 November 1993

to intervene only if a failure by counsel to provide effective representation is manifest or sufficiently brought to their attention.

*Daud v Portugal*¹³³

In *Daud v Portugal*, the legal aid lawyer was only appointed three days prior to the trial for a serious, complex case. The ECtHR held that it was manifestly evident to the State authorities that the legal aid lawyer did not have time to prepare for the trial, and that they should have intervened to ensure the quality of the defence.¹³⁴

*Falcao dos Santos v Portugal*¹³⁵

The lawyer attended court but remained silent; he did not cross-examine witnesses or otherwise intervene on the applicant's behalf.¹³⁶ The applicant repeatedly complained about his poor legal representation to the authorities. The ECtHR found that the authorities failed to guarantee real assistance, as opposed to mere "appointment" of the lawyer, and that they had a duty to intervene.¹³⁷

¹³³ *Daud v Portugal*, ECtHR, Judgment of 21 April 1984.

¹³⁴ *Daud v Portugal*, ECtHR, Judgment of 21 April 1984, at para. 42.

¹³⁵ *Falcao dos Santos v Portugal*, ECtHR, Judgment of 3 July 2012.

¹³⁶ *Falcao dos Santos v Portugal*, ECtHR, Judgment of 3 July 2012, at paras. 12-18.

¹³⁷ *Ibid.*, at para. 45.

ANNEX IV
Detailed calculations on policy options 3 and 4

Introduction

Assessing the likely financial and economic impacts of the policy options with a degree of quantitative precision has proved to be difficult. This is largely due to the lack of detailed data relating to, *inter alia*, the:

- Cost (including training, infrastructure, and legal aid) to Member States of **providing access to state-funded legal assistance**, in particular at the pre-trial stage – both in absolute terms and as a proportion of their overall expenditure on legal aid.
- Cost (including training, infrastructure, and legal aid) of **bringing non-compliant Member States into line with ECHR jurisprudence**.
- It is also due to an impossibility to estimate with sufficient degree of accuracy, the quantitative increment of additional hours of legal advice that the implementation of the different options would lead to as this depends on case-by-case factors which cannot be realistically assessed in advance.

Thus, model calculations for the costs of the policy options provided below are based on such limited data as we obtained, working with external experts and other researchers and practitioners in this field. In addition, available reports and publications on the number of criminal cases and the costs of proceedings have been used. The EU-wide extrapolations set out are at best indicative and at times, due to significant divergence between Member States in terms of these numbers obtained, expressed as a wide range of estimated predicted costs for individual Member States.

Furthermore, the bulk of the financial impacts are a result of bringing all Member States in line with ECHR standards. Furthermore, some option are not expected to bear any further costs as they will entail a change in procedures rather than extra work from the stakeholders. The costs would vary between Member States and it likely that the financial impact on some jurisdictions would be minimal. The wide range of expected impacts reflects the multiple variables discussed above, such as the administrative systems and legal rights already in place in the Member State and the hidden savings.

Member States' potential savings owing to a reduction in a number of appeals, condemnations by the ECtHR, or delays in judicial cooperation proceedings cannot be estimated with any statistical precision due to lack of Member state data on costs per case. Only indicative qualitative expectations in non-numerical terms can therefore be provided based on stakeholders' judgments, including officials from Ministries of Justice NGOs and practitioners as they have expressed in focus groups and interviews for the Study.

Costs of emergency legal aid

Policy option 3

In order to assess the costs of emergency legal aid, we have first of all identified the countries where such a system is available at the early stages of the proceedings. Figures exist for four jurisdictions that have brought about a system similar to that of emergency legal aid, namely France, Belgium, the Netherlands and England & Wales. While each system functions differently, these examples provide interesting data that can be used to assess the average cost of an emergency legal aid intervention for each Member State.

In **France**, the annual budget of the legal aid during the garde à vues proceedings stands at € 48 million. The remuneration is as follows:

- €61 when a lawyer is present for a meeting with the suspect at the start of the GAV.
- €300 when a lawyer is present for a meeting with the suspect at the start of the GAV as well as during the questioning
- €250 when a lawyer is present for a meeting with the suspect at the start of the GAV as well as during the questioning for each extension of the GAV for 14 h

Furthermore, regardless of the number of interventions, a lawyer cannot be remunerated more than €1,200 per 24 hours.

Lawyers are present during the garde à vue only in an estimated 30%-40% of GAV cases¹³⁸, i.e. 243,810 cases (**35% of cases**). Overall, the average cost of emergency legal aid per intervention is therefore estimated at (€48 million / 243,810 cases) **€197 per intervention**.

It should be noted that in France, the number of garde à vues fell by 22.6% in the year since the reform was passed, which means that there were an estimated 696,600 gardes à vues in the 12 month leading to June 2012. (see further below)

In the **Netherlands**, following the “Salduz” reform of September 2009, an estimated 50% of the 310-360,000 arrest per annum were expected to take on the right to benefit from state-funded legal assistance. However in practice, only 21,000 (6.2%) consultations took place in 2010 and an estimated 38,000 (**11.3% of cases**) in 2011 for a total cost of 5.5 million, averaging at (€5.5 million / 38,000) **€145 per intervention**.¹³⁹

In **Belgium**, the number of auditions Cat IV (first audition of a suspect deprived of liberty) amounted to 45,756¹⁴⁰. According to the French and German speaking bar association, **80% of suspects** (36,606) asked for the presence of a lawyer at this stage. The 2012 budget for the introduction of the loi Salduz (i.e. the presence of a lawyer at the first point of police interrogation with deprivation of liberty) is €3.5 million. The average remuneration is thus estimated at (€3.5 million / 36,606) **€96 per intervention**.

¹³⁸ Discussions with criminal defence lawyers in the country

¹³⁹ Nederlandse Orde van Advocaten, Position Paper - Netherlands Bar Association – Directive concerning the right to access to an advocate in criminal proceedings and the right to communication on arrest

¹⁴⁰ ÉVALUATION DE LA LOI SALDUZ, Troisième rapport intermédiaire.

In **England and Wales**, the provision of legal aid at the police stage amounted to £176 million (€17 million) in 2011. Over the same period, there were 642,631 cases where the police interviewed a suspect under the conditions for which they are entitled to legal aid. Legal aid was provided to **98% of suspects**. The average remuneration was thus (€17 million / (98% of 642,631 = 629,778) **€345 per intervention**.

In order to weight the relative cost of justice in the different Member States, we have used figures from the *Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union*¹⁴¹ to assess the relative cost of justice in all Member States. While these figures relate to civil justice data, they provide an adequate idea of the relative cost of justice in the different member States. For instance the cost of a criminal justice lawyer is roughly the same in France and Germany, and around 4 times the cost of a lawyer in Poland. The data used¹⁴² (Column B) date from 2007 and have been inflated annually since 2007. **It is important to note that the figures provided refer to the daily fees of lawyers in civil proceedings, while the daily fee of criminal lawyers might be different.** However, discussions with criminal defence lawyers have confirmed that the figures provided are comparable with existing rates for criminal lawyers.

We have then calculated the cost of emergency legal aid intervention as a share of the hourly lawyer fee. In the case of Belgium for instance, the average cost of emergency legal aid (€96) is 43% of the hourly fee (€223). We have averaged this figure for the four jurisdictions where the information is available to reach the figure of 48% (Column C). In other words, the average cost of an emergency legal aid intervention is 48% of the hourly rate of a lawyer. We then estimate the average cost of an emergency legal aid intervention in each Member States but multiplying the cost per hour of a lawyer by 48%. (Column B) These calculations provide us with the average cost of an emergency legal aid intervention were the system to be put in place (Column D). This allows for a weighted average fee for emergency legal aid per intervention. One shortfall of this calculation is that it does not take into account the amount of time spend by a lawyer at the police station. However, in the absence of figures for this the calculations need to settle for an overall cost per intervention.

¹⁴¹ https://e-justice.europa.eu/content_costs_of_proceedings-37-en.do

¹⁴² Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union, previous footnote.

Table 1: Cost of emergency legal aid intervention – per case

EU jurisdiction (A)	Hourly lawyer fee (2007 with inflation) (B) ¹⁴³	Average cost of Emergency Legal aid in percentage of the hourly cost of lawyer (C) ¹⁴⁴	Average cost of emergency legal aid case (D) ¹⁴⁵
Austria	383		184
Belgium	223	43%	96*
Bulgaria	51		25
Croatia	137		66
Cyprus	128		61
Czech Republic	96		46
England & Wales	574	60%	345*
Estonia	223		107
Finland	383		184
France	383	51%	197*
Germany	383		184
Greece	223		107
Hungary	223		107
Ireland	574		276
Italy ¹⁴⁶	223		107
Latvia	383		184
Lithuania	96		46
Luxembourg	223		107
Malta	128		61

¹⁴³ Hourly lawyer fee taken from the appendices with country information from the Study on the Transparency of Costs of Civil Judicial Proceedings in the European Union, inflated since 2007 (the year the report was published), based on the yearly inflation rates from Eurostat.

¹⁴⁴ **Average cost of Emergency Legal aid / hourly cost of lawyer.** This is calculated only for the four Member States for which figures are available. It provides the share of the cost of an emergency legal aid intervention compared to the hourly lawyer fee (Column B). In the case of Belgium for instance, the hourly fee of a lawyer (€ 223) divided by the cost of an emergency legal aid intervention (€96). $\text{€}223/\text{€}96 = 0.43$ (43%). The non-weighted average for BE, E&W, FR and NL is 48%.

¹⁴⁵ **Average cost of emergency legal aid per intervention.** For BE, E&W, FR and NL, the explanations are provided above. For all other Member States, this is calculated by multiplying the hourly lawyer fee (Column B) by the average of Column C (48%). This provides an estimated figure for all Member States where no data is available.

¹⁴⁶ In the case of Italy, we had to revert to lower figures as the calculations would have led to a situation where the total amount of legal aid at the police station was higher than the amount spent on legal aid. We have thus aligned Italy with the group of member States including Greece, Hungary, Portugal and Slovenia based on discussion with Italian criminal lawyers.

Netherlands	383	38%	145*
Poland	96		46
Portugal	223		107
Romania	96		46
Scotland	574		276
Slovakia	96		46
Slovenia	223		107
Spain	38		18
Sweden	383		138 ¹⁴⁷
Total		48%	

*- Figures explained above

Now that we have figures on the cost on an emergency legal aid intervention, it is possible to estimate the cost of introducing a system of emergency legal aid for each Member State

For the same Member States as above (E&W, BE, FR, NL), data are available on the number of criminal cases where the suspect accused is effectively deprived of liberty (the equivalent of the Garde à vue in France). It is thus possible in those Member States to calculate the percentage of criminal cases for which there has been an effective deprivation of liberty.

Table 2: Calculations of the share of emergency criminal cases receiving legal aid

	Total number of criminal cases (B)¹⁴⁸	Number of cases of deprivation of liberty (C)¹⁴⁹	Percentage of cases of deprivation of liberty out of total criminal cases (D)¹⁵⁰	Share of cases of deprivation of liberty receiving legal aid (E)¹⁵¹
Belgium	189,716*	45,756	24%	80%
England and Wales	994,142*	642,631	68%	98%

¹⁴⁷ Number obtained from the Swedish national Court Administration.

¹⁴⁸ **Column B** – number of criminal cases – Figures from CEPEJ statistics, Ministries of Justice or extrapolations (based on existing figures). In order to extrapolate the figures, we have calculated the number of criminal cases per 1,000 inhabitants for Member States where the data is available and extrapolated those figures based on the population of the Member States for which data was needed. In order to reflect differences between legal aid systems, we have grouped Member States as follows (EU 15, EU10+ Croatia, and BG+ RO)

¹⁴⁹ **Column C** - Number of police station interrogation / deprivation of liberty – The number of criminal cases where the suspect accused is effectively deprived of liberty.

¹⁵⁰ **Column D** – Share of criminal cases where there has been an effective deprivation of liberty out of the total number of criminal cases. Column C divided by column B.

¹⁵¹ **Column E** – Share of cases of effective deprivation of liberty that receive legal aid .The data is provided by Ministries of Justice and bar associations.

France	1,061,097	696,600	66%	35%
The Netherlands	441,911	335,000	76%	11%
Average			58%	56%

*- Extrapolated figures. In order to extrapolate the figures, we have calculated the number of criminal cases per 1,000 inhabitants for Member States where the data is available and extrapolated those figures based on the population of the Member States for which data was needed. In order to reflect differences between legal aid systems, we have grouped Member States as follows (EU 15, EU10+ Croatia, and BG+ RO)

Below, we show the costs are incurred for Member States where legal aid is not available at the stage where the suspect is first interrogated and not free to leave, (namely BG, CY, EE, EL, PL, PT, SI).

Costs are also incurred for a number of Member States where the situation in practice is that legal aid is not always available at the first stage of deprivation of liberty (FI, DE, HU, IT, RO) according to the following criteria:

FI - The suspect usually has the right to consult his or her lawyer before police questioning (Section 10(3), Criminal Investigations Act) and to have the lawyer with him or her when questioned by the police (Section 31, Criminal Investigations Act). It varies how soon after the suspect's detention legally aided assistance is usually provided and there are no statistics about this. We have thus assumed that the extra cost of the measure would be 50% of what "legal aid at the police station" should cost $\text{€}3,593,816 / 2 = \text{€}1,796,908$

DE - Questioning of indigent suspects/accused can in practice take place without access to a lawyer, is in part remedied by the existence of emergency legal service groups all over Germany through which volunteer lawyers provide police station advice on a pro bono basis. For practical purposes, a measure on emergency legal aid would assume that the lawyers are remunerated and the full costs must thus be applied.

HU – In Hungary, despite the law setting out that a lawyer must be present at the time of first police interrogation, the shortcoming expressed during our workshop have lead us to include figures for the Member State. We therefore base the calculation on the assumption that only 10% of cases of legal aid at the police station is paid, thus the extra cost of the measure is $\text{€}4,473,020 \times 90\% = \text{€}4,025,718$

IT - The suspect has the right to have access to a lawyer directly after being arrested. This right to legal assistance immediately after arrest includes, in practice, the provision of state-funded (i.e. legally aided) assistance. Conversations with criminal defence lawyers highlight that in practice, this only happens at the point of formal arrest (decision by a judge) rather than questioning by the police. Consequently, we have assumed that the extra cost of the measure would be 50% of what "legal aid at the police station" should cost $= \text{€}6,352,513 / 2 = \text{€}3,176,256$

RO – The situation in practice is unclear. Based on conversations with criminal defence lawyers, we have thus assumed that the extra cost of the measure would be 50% of what "legal aid at the police station" should cost $\text{€}2,581,420 / 2 = \text{€}1,290,710$

To summarise, column H below includes the costs incurred to bring about emergency defence in the countries where it does not exist BG, CY, EE, DE, EL, PL, PT. It also includes the costs of ensuring an increased emergency defence in the Member States where it is not fully implemented, as mentioned above with the following percentages; 90% of HU, 50% of IT, 50% of FI, 50% of RO and SI.

Table 3: Cost of Emergency legal Aid

EU jurisdiction (A)	Legal aid expenditure for criminal proceedings – CEPEJ except where noted (€) (B) ¹⁵²	Number of criminal cases (CEPEJ Statistics except where noted) (C) ¹⁵³	Number of cases of deprivation of liberty – Column C x 58% (D) ¹⁵⁴	Number of cases of deprivation of liberty receiving legal aid – Column D x 56% (E) ¹⁵⁵	Cost of emergency legal aid per case (F) ¹⁵⁶	Legal aid at the early stages in gross/year (G) ¹⁵⁷	Extra cost of the measure (H)
Austria	8,920,405*	60,726	35,470	19,894	184	3,656,620	0
Belgium	36,518,391*	189,716*	45,756(a)	36,605(a)	96	3,500,000	0
Bulgaria	3,094,184	118,262	69,077	38,742	25	949,487	949,487(b)
Croatia	191,793*	110,524	64,557	36,207	66	2,384,784	0
Cyprus	194,090*	117,495	68,629	38,491	61	2,358,323	2,358,323
Czech Republic	21,474,461	97,675	57,052	31,998	46	1,470,377	0
England & Wales	1,344,000,000	944,142*	642,631(a)	629,778(a)	345	217,000,000	0
Estonia	2,491,687*	48,359(e)	28,246	15,842	107	1,698,632	1,698,632

¹⁵² Column B: Data on *Legal aid expenditure for criminal proceedings* is taken either from the CEPEJ report or provided directly by Ministries of Justice. For Member States where no data was available for the amount spent on legal aid in criminal procedures, we have multiplied the total legal aid by the share of legal aid devoted to criminal procedure for the member States where it is available. In order to reflect differences between legal aid systems, we have grouped Member States as follows (EU 15, EU10+ Croatia, and BG+ RO)

¹⁵³ Column C: *Number of criminal cases* is based on figures from Eurocrime statistics, Ministries of Justice or extrapolations (based on existing figures)

¹⁵⁴ Column D: *Number of cases of deprivation of liberty: Arrived at by taking the number of criminal cases in Column C multiplied by 58% (i.e. the share of criminal cases where there has been an effective deprivation of liberty out of the total number of criminal cases for Member States where data are available).*

¹⁵⁵ Column E: *Number of cases of deprivation of liberty receiving legal aid. Calculated by taking the number of cases of deprivation of liberty (Column D) and multiplying it by 56% (i.e. the share of cases of effective deprivation of liberty receiving legal aid as per Table 2)*

¹⁵⁶ As calculated in Table 1.

¹⁵⁷ The total cost of emergency legal aid in Member States, including in Member States where it already exists.

Finland	28,167,147*	59,683 ^(a)	34,861	19,552	184	3,593,816	1,796,908 ^(b)
France	119,010,621	1,061,097	696,600 ^(a)	243,810 ^(a)	197	48,000,000	0
Germany	85,822,785	1,181,995	690,401	387,217	184	71,173,911	71,173,911 ^(b)
Greece	1,212,012*	195,929*	114,442	64,186	107	6,882,097	6,882,097
Hungary	254,684*	269,691	157,526	88,350	107	9,473,020	8,525,718 ^(b)
Ireland	54,967,000	77,625*	45,341	25,430	276	7,011,295	0
Italy	87,080,432	1,607,646	939,023	526,659	107	56,352,513	28,176,256 ^(b)
Latvia	770,366	9,959	5,817	3,263	184	599,682	0
Lithuania	3,263,613*	81,277 ^(a)	47,474	26,626	46	1,223,529	0
Luxembourg	1,454,414*	14,579	8,516	4,776	107	512,094	0
Malta	71,019*	19,613	11,456	6,425	61	393,666	0
Netherlands	102,000,000	441,911	335,000 ^(a)	38,000 ^(a)	145	5,500,000	0
Poland	19,420,734*	1,111,772	649,384	364,212	46	16,736,357	16,736,357
Portugal	25,035,920*	115,466	67,444	37,826	107	4,055,796	4,055,796
Romania	7,485,586	171,480	100,161	56,176	46	2,581,420	1,290,710 ^(b)
Scotland	72,720,690*	152,522	89,088	49,966	276	13,776,184	0
Slovakia	1,134,444*	41,189	24,058	13,493	46	620,050	0
Slovenia	4,874,683*	90,205	52,689	29,551	107	3,168,492	3,168,492
Spain	115,334,141*	1,336,505	780,650	437,834	184	80,477,741	0
Sweden	130,470,000 ^(a)	91,000 ^(a)	53,153	29,811	138	5,479,571	0
Total	2,323,711,614					659,483,717	139,930,590

*-Extrapolations (see explanations above): In order to extrapolate the figures, we have calculated the number of criminal cases per 1,000 inhabitants for Member States where the data is available and extrapolated those figures based on the population of the Member States for which data was needed. In order to reflect differences between legal aid systems, we have grouped Member States as follows (EU 15, EU10+Croatia, and BG+RO)

^(a) Figures provided by the Ministry of Justice ^(b) Member States where some cases are covered by emergency legal aid but not all of them

Total cost of policy option 3 on emergency defence (before deduction of savings): 140 million
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Cost savings and recovery

A. Recovery of legal aid from suspects where it is found that they do not qualify for legal aid in the subsequent eligibility testing

The cost of emergency legal aid is off-set by the recovery of the costs from suspected and accused persons that do not fulfilling the eligibility criteria. If it is found, in the subsequent means and or merits test is found not eligible for legal aid, the Member State will have a right to recover the costs of emergency legal aid from the individual. The methods for recovery, and thus how effectively this is done, will be up to the Member States domestic legislation.

In this table, the recovery of emergency legal aid cost is calculated (i) based on the current situation of legal aid in the Member State, as well as according to three scenarii of the share of cases receiving legal aid (current situation, 15% and 20%)¹⁵⁸. In the cases that do not qualify for legal aid, we however assume that the Member State will ultimately not be able to recover all the costs in practice. Therefore, there are three scenarii, based on the rate of successful recover for the Member States.

Assuming that only 25% of emergency legal aid cases that do not qualify for legal aid will ultimately be recovered, on the basis of 15% or 20 % of cases receiving legal aid, the overall total amount of emergency legal aid that would be recovered once the means and/or merits test are applied throughout the EU would be an estimated €28-29 million. By deducting this figure from the total amount spent on emergency legal aid throughout the EU under this measure, the total spent on this measure would therefore be **(€140 million - €29.2 million) = €110.8 million.**

¹⁵⁸ Explanations of these percentages can be found in the section on means and merits tests below.

Table 4: Recovery of emergency legal aid

EU jurisdiction (A)	Share of cases receiving legal aid (B)	Legal aid at police station (C)	Costs recovered if 75% of non-eligible suspects ultimately repay emergency legal aid			Costs recovered if 50% of non-eligible suspects ultimately repay emergency legal aid			Costs recovered if 25% of non-eligible suspects ultimately repay emergency legal aid		
			Current share of suspects / accused granted legal aid	15% of suspects / accused are granted legal aid	20% of suspects / accused are granted legal aid	Current share of suspects / accused granted legal aid	15% of suspects / accused are granted legal aid	20% of suspects / accused are granted legal aid	Current share of suspects / accused granted legal aid	15% of suspects / accused are granted legal aid	20% of suspects / accused are granted legal aid
Austria	16% ^(a)	3,656,620*	2,316,775	2,316,775	2,193,972	1,544,517	1,544,517	1,462,648	772,258	772,258	731,324
Belgium	20%*	3,500,000	2,089,324	2,089,324	2,089,324	1,392,882	1,392,882	1,392,882	696,441	696,441	696,441
Bulgaria	28% ^(b)	949,487*	514,610	514,610	514,610	343,073	343,073	343,073	171,537	171,537	171,537
Croatia	13% ^(c)	2,384,784*	1,555,760	1,520,300	1,430,871	1,037,173	1,013,533	953,914	518,587	518,587	476,957
Cyprus	4% ^(c)	2,358,323*	1,703,303	1,503,431	1,414,994	1,135,535	1,002,287	943,329	567,768	567,768	471,665
Czech Republic	13% ^(c)	1,470,377*	959,229	937,365	882,226	639,486	624,910	588,151	319,743	319,743	294,075
England & Wales	59% ^(d)	217,000,000	66,045,490	66,045,490	66,045,490	44,030,327	44,030,327	44,030,327	22,015,163	22,015,163	22,015,163
Estonia	67% ^(e)	1,698,632*	423,033	423,033	423,033	282,022	282,022	282,022	141,011	141,011	141,011
Finland	56% ^(e)	3,593,816*	1,193,658	1,193,658	1,193,658	795,772	795,772	795,772	397,886	397,886	397,886
France	37% ^(b)	48,000,000	22,628,631	22,628,631	22,628,631	15,085,754	15,085,754	15,085,754	7,542,877	7,542,877	7,542,877
Germany	22% ^(c)	71,173,911*	42,767,091	42,767,091	42,704,347	28,511,394	28,511,394	28,469,564	14,255,697	14,255,697	14,234,782
Greece	20%*	6,882,097*	4,108,265	4,108,265	4,108,265	2,738,843	2,738,843	2,738,843	1,369,422	1,369,422	1,369,422
Hungary	0% ^(b)	9,473,020*	7,097,494	6,039,050	5,683,812	4,731,663	4,026,033	3,789,208	2,365,831	2,365,831	1,894,604
Ireland	71% ^(d)	7,011,295*	1,504,754	1,504,754	1,504,754	1,003,170	1,003,170	1,003,170	501,585	501,585	501,585
Italy	6% ^(b)	56,380,994	39,574,575	35,942,884	33,828,596	26,383,050	23,961,922	22,552,398	13,191,525	13,191,525	11,276,199
Latvia	13% ^(c)	599,682*	391,214	382,297	359,809	260,809	254,865	239,873	130,405	130,405	119,936

Lithuania	42%^(f)	1,223,529*	530,366	530,366	530,366	353,577	353,577	176,789	176,789	176,789
Luxembourg	20%^(c)	512,094*	305,694	305,694	305,694	203,796	203,796	101,898	101,898	101,898
Malta	13%^(c)	393,666*	250,962	250,962	236,200	171,210	167,308	85,605	83,654	78,733
Netherlands	13%^(c)	5,500,000	3,506,250	3,506,250	3,300,000	2,392,021	2,337,500	1,196,010	1,168,750	1,100,000
Poland	13%^(c)	16,736,357*	10,918,286	10,669,428	10,041,814	7,278,857	7,112,952	3,639,429	3,556,476	3,347,271
Portugal	73%^(c)	4,055,796*	784,909	784,909	784,909	523,273	523,273	261,636	261,636	261,636
Romania	15%^(c)	2,581,420*	1,630,420	1,630,420	1,548,852	1,086,947	1,086,947	543,473	543,473	516,284
Scotland	13%^(c)	13,776,184*	8,987,160	8,782,317	8,265,711	5,991,440	5,854,878	2,995,720	2,927,439	2,755,237
Slovakia	13%^(c)	620,050*	404,501	395,282	372,030	269,668	263,521	134,834	131,761	124,010
Slovenia	2%^(b)	3,168,492*	2,339,593	2,019,914	1,901,095	1,559,728	1,346,609	779,864	673,305	633,698
Spain	23%^(b)	80,477,741*	43,061,527	43,061,527	43,061,527	28,707,685	28,707,685	14,353,842	14,353,842	14,353,842
Sweden	59%^(e)	4,122,899*	1,267,791	1,267,791	1,267,791	845,194	845,194	422,597	422,597	422,597
<i>Total All EU</i>		<i>569,301,267</i>	<i>268,948,300</i>	<i>263,121,819</i>	<i>258,622,381</i>	<i>179,298,867</i>	<i>175,414,546</i>	<i>89,649,433</i>	<i>87,707,273</i>	<i>86,207,460</i>
Total relevant cost saving[†]			91,146,161	87,609,307	85,294,051	60,764,107	58,406,204	30,382,054	29,203,102	28,431,350

† Calculations based on recovery of the costs for emergency defence in BG, CY, EE, DE, EL, PL, PT and with 50% of FI, 90% of HU, 50% of IT, 50% of RO and SI as explained above.

B. Savings due to a fall in pre-trial detention

Furthermore, a system of emergency legal aid would also arguably reduce the number of pre-trial detentions. No figures exist for the length of pre-trial detentions so the calculations below are based on the cases of Pre-trial detention. In Belgium, following the *Salduz* law, the number of pre-trial detention cases fell by 30%. In France the number of Garde à vue went down by 22.6 %, although all Garde à vue do not end up in cases of Pre-trial detention.

A recent FTI report estimates the cost of a month of pre-trial detention to cost €3,000. The table below presents data from the International Centre for Prison Studies World Prison Report 2011.

The calculation of the saving is made on the assumption that the pre-trial detention would have lasted 1 month (i.e. number of pre-trial detainees X 3000 X percentage of the fall in pre-trial detention). This assumption gives us a minimum saving, as often pre-trial detentions last longer than 1 month. Would it instead have lasted 2 months, it suffices to multiply the saving by 2.

Table 5: Savings linked to a fall in Pre-trial detention

	Prison population ^(a)	Share of the prison population in pre-trial detention ^(a)	Number of pre-trial detainees	Scenarii – fall in pre-trail detentions			
				10%	20%	30%	40%
Austria	8,694	21.2%	1,843	N/A	N/A	N/A	N/A
Belgium	10,974	34.0%	3,731	N/A	N/A	N/A	N/A
Bulgaria	10,961	22.0%	2,411	723,426	1,446,852	2,170,278	2,893,704
Croatia	5,064	17.3%	876	N/A	N/A	N/A	N/A
Cyprus	900	44.6%	401	120,420	240,840	361,260	481,680
Czech Republic	23,015	10.0%	2,302	N/A	N/A	N/A	N/A
England & Wales	86,047	13.6%	11,702	N/A	N/A	N/A	N/A
Estonia	3,306	23.2%	767	230,098	460,195	690,293	920,390
Finland	3,214	18.1%	582	87,260	174,520	261,780	349,040
France	67,373	25.4%	17,113	N/A	N/A	N/A	N/A
Germany	67,671	16.5%	11,166	3,349,715	6,699,429	10,049,144	13,398,858
Greece	12,586	31.2%	3,927	1,178,050	2,356,099	3,534,149	4,712,198
Hungary	17,210	28.3%	4,870	1,315,016	2,630,032	3,945,048	5,260,064
Ireland	4,401	14.2%	625	N/A	N/A	N/A	N/A
Italy	66,685	40.2%	26,807	4,021,106	8,042,211	12,063,317	16,084,422
Latvia	6,561	31.0%	2,034	N/A	N/A	N/A	N/A
Lithuania	9,920	13.6%	1,349	N/A	N/A	N/A	N/A
Luxembourg	660	39.2%	259	N/A	N/A	N/A	N/A

Malta	580	64.0%	371	N/A	N/A	N/A	N/A
Netherlands	14,488	40.6%	5,882	N/A	N/A	N/A	N/A
Poland	84,730	8.7%	7,372	2,211,453	4,422,906	6,634,359	8,845,812
Portugal	13,630	20.0%	2,726	817,800	1,635,600	2,453,400	3,271,200
Romania	31,934	10.8%	3,449	517,331	1,034,662	1,551,992	2,069,323
Scotland	1,191	16.5%	197	N/A	N/A	N/A	N/A
Slovakia	11,092	12.3%	1,364	N/A	N/A	N/A	N/A
Slovenia	1,412	18.8%	265	79,637	159,274	238,910	318,547
Spain	69,437	15.7%	10,902	N/A	N/A	N/A	N/A
Sweden	6,669	22.8%	1,521	N/A	N/A	N/A	N/A
Total relevant costs saving^{†□}				14,651,310	29,302,620	43,953,930	58,605,240

^(a) ICPS World Prison Brief, [□] As per the explanations provided above

[†] Calculations based on the fall in BG, CY, EE, DE, EL, PL, PT and with 50% of FI, 90% of HU, 50% of IT, 50% of RO and SI as explained above.

Based on a scenario where the number of pre-trial detentions would fall by 20 %, in those jurisdictions introducing emergency legal aid, one could expect costs savings of **€9 million** (if the pre-trial detention falls on average by one month) or **59 million** (if pre-trial detention on average falls by two months).

Conclusion costs policy option 3:

The total cost of this option would therefore amount to:

Cost of introducing emergency legal aid: €140 million

Amount of emergency legal aid recovered: - €9.2 million

Amount saved by fall in Pre-trial detention: - €9.3 million – 58.6 million

Total cost of the option: range of 52.2 million - €81.5 million

Costs of emergency legal aid under Option 4

In this case, it is assumed that legal aid would be given to everyone that is interviewed in the police station.

The calculations are based on the assumption that in a number of the total of criminal proceedings mentioned in C below, no questioning will take place as there might be summary proceedings or cases of strict liability. In Column D, the number of criminal cases where questioning in the police station will take place figures and it has on the basis of contacts with stakeholders been calculated by assuming that in 70 % of the cases where a person is not detained (i.e. in 42 % of the total number of criminal cases), there will be questioning. This figure is possibly high, but ensures that the costs calculated are maximum costs.

In Column E: Column D multiplied with 0.56 as it is assumed (as above) that 56 % of the suspected or accused persons will avail themselves of that right see reasoning under option 3).

Table 6: Cost of emergency defence for all persons interviewed at police station

EU jurisdiction (A)	Legal aid expenditure for criminal proceedings – CEPEJ except where noted (€) (B)	Number of criminal cases CEPEJ except where noted (C)	Number of criminal cases where questioning in the police station with legal aid would take place (Cx0,42X0,7) (D)	Number of cases where emergency legal aid will be used D x 56% (E)	Legal aid at police station for persons at large (per case) (F)	Total cost of the measure (G)
Austria	8,920,405 *	60,726	17,853	9,998	184	1,839,619
Belgium	14,711,665*	189,716*	55,777	31,235	96	2,998,552
Bulgaria	3,094,184	118,262	34,769	19,471	25	486,766
Croatia	191,793*	116,214	34,167	19,133	66	1,262,806
Cyprus	194,090*	117,495	34,544	19,344	61	1,180,007
Czech Republic	21,474,461	97,675	28,716	16,081	46	739,736
England & Wales	1,344,000,000	944,142*	277,578	155,443	345	
Estonia	2,491,687*	48,359 ^(a)	14,218	7,962	107	851,915
Finland	28,167,147*	59,683 ^(a)	17,547	9,826	184	1,808,022
France	119,010,621	1,061,097	311,963	174,699	197	34,415,705
Germany	85,822,785	1,181,995	347,507	194,604	184	35,807,073
Greece	1,212,012*	195,929*	57,603	32,258	107	3,451,580
Hungary	254,684*	269,691	79,289	44,402	107	4,751,006
Ireland	54,967,000	77,625*	22,822	12,780	276	3,527,331
Italy	87,080,432	1,607,646	472,648	264,683	107	28,321,064
Latvia	770,366	9,959	2,928	1,640	184	301,696
Lithuania	3,263,613*	81,277 ^(a)	23,895	13,381	46	615,546
Luxembourg	1,454,414*	14,579	4,286	2,400	107	256,831
Malta	71,019*	19,613	5,766	3,229	61	196,974

Netherlands	102,000,000	441,911	129,922	72,756	145	10,549,653
Poland	19,420,734*	1,111,772	326,861	183,042	46	8,419,939
Portugal	25,035,920*	115,466	33,947	19,010	107	2,034,104
Romania	7,485,586	171,480	50,415	28,232	46	1,298,693
Scotland	72,720,690*	152,522	44,841	25,111	276	6,930,697
Slovakia	1,134,444*	41,189	12,110	6,781	46	311,942
Slovenia	2,828,514*	90,205	26,520	14,851	107	1,589,095
Spain	107,750,629*	1,336,505	392,932	220,042	18	3,960,759
Sweden	130,470,000 ^(a)	91,000 ^(a)	26,754	14,982	138	2,067,549
Total	2,245,998,895	-	-			159,974,662

Extra cost of policy option 4: 160 million

The cost of option 4 is off-set by the recovery of the costs from suspected and accused persons that do not fulfilling the eligibility criteria. If it is found, in the subsequent means and or merits test is found not eligible for legal aid, the Member State will have a right to recover the costs of emergency legal aid from the individual. The methods for recovery, and thus how effectively this is done, will be up to the Member States domestic legislation. The following calculations are in line with those set out in Option 3.

Thus, the recovery of emergency legal aid cost is calculated (i) based on the cost of emergency defence for all persons interviewed at police station (Column G of Table 6), as well as according to three scenarii of the share of cases receiving legal aid (current situation, 15% and 20%)¹⁵⁹. In the cases that do not qualify for legal aid, we however assume that the Member State will ultimately not be able to recover all the costs in practice. Therefore, there are three scenarii, based on the rate of successful recover for the Member States.

Assuming that 25% of emergency legal aid cases will be recovered, on the basis of 15% of cases receiving legal aid under Option 4, the overall total amount of emergency legal aid that would be recovered once the means and/or merits test are applied throughout the EU would be an estimated €12.4 million. By deducting this figure from the total amount spent on legal aid throughout the EU under Option 4, the total spent on this measure would therefore be **between (€92 million - €12 million) = €80 million and (€222 million - €12 million) = €210 million.**

There is however no fall in pre-trial detention as the persons are at large.

¹⁵⁹ Explanations of these percentages can be found in the section on means and merits tests below.

Table 7 Recovery of emergency legal aid under Option 4

EU jurisdiction (A)	Share of cases receiving legal aid (B)	Cost of emergency defence for all persons interviewed at police station (C)	Costs recovered if 75% of non-eligible suspects ultimately repay the emergency legal aid under Option 4			Costs recovered if 50% of non-eligible suspects ultimately repay the emergency legal aid under Option 4			Costs recovered if 25% of non-eligible suspects ultimately repay the emergency legal aid under Option 4		
			Current share of suspects / accused granted legal aid	15% of suspects / accused are granted legal aid	20% of suspects / accused are granted legal aid	Current share of suspects / accused granted legal aid	15% of suspects / accused are granted legal aid	20% of suspects / accused are granted legal aid	Current share of suspects / accused granted legal aid	15% of suspects / accused are granted legal aid	20% of suspects / accused are granted legal aid
Austria	16% ^(a)	1,839,619	1,165,552	-	932,442	777,035	-	621,628	388,517	-	310,814
Belgium	20% [*]	2,998,552	1,789,984	-	-	1,193,323	-	-	596,661	-	-
Bulgaria	28% ^(b)	486,766	263,821	-	-	175,881	-	-	87,940	-	-
Croatia	13% ^(c)	1,262,806	823,816	700,244	659,053	549,211	466,829	439,368	274,605	233,415	219,684
Cyprus	4% ^(c)	1,180,007	852,262	724,423	681,810	568,175	482,949	454,540	284,087	241,474	227,270
Czech Republic	13% ^(c)	739,736	441,585	-	-	294,390	-	-	147,195	-	-
England & Wales	59% ^(d)	-	-	-	-	-	-	-	-	-	-
Estonia	67% ^(e)	851,915	212,164	-	-	141,443	-	-	70,721	-	-
Finland	56% ^(e)	1,808,022	600,521	-	-	400,347	-	-	200,174	-	-
France	37% ^(b)	34,415,705	16,224,589	-	-	10,816,393	-	-	5,408,196	-	-
Germany	22% ^(c)	35,807,073	21,515,810	-	17,212,648	14,343,873	-	11,475,099	7,171,937	-	5,737,549
Greece	20% [*]	3,451,580	2,060,419	-	-	1,373,613	-	-	686,806	-	-
Hungary	0% ^(b)	4,751,006	3,559,608	3,025,667	2,847,686	2,373,072	2,017,111	1,898,458	1,186,536	1,008,556	949,229
Ireland	71% ^(d)	3,527,331	757,031	-	-	504,687	-	-	252,344	-	-
Italy	6% ^(b)	28,321,064	19,878,934	16,897,094	15,903,147	13,252,622	11,264,729	10,602,098	6,626,311	5,632,365	5,301,049

Latvia	13% ^(c)	301,696	196,817	167,294	157,454	131,211	111,530	104,969	65,606	55,765	52,485
Lithuania	42% ^(f)	615,546	266,822	-	-	177,881	-	-	88,941	-	-
Luxembourg	20% ^(c)	256,831	153,315	-	-	102,210	-	-	51,105	-	-
Malta	13% ^(c)	196,974	128,500	109,225	102,800	85,667	72,817	68,533	42,833	36,408	34,267
Netherlands	13% ^(c)	10,549,653	6,882,269	5,849,928	5,505,815	4,588,179	3,899,952	3,670,543	2,294,090	1,949,976	1,835,272
Poland	13% ^(c)	8,419,939	5,492,909	4,668,972	4,394,327	3,661,939	3,112,648	2,929,551	1,830,970	1,556,324	1,464,776
Portugal	73% ^(c)	2,034,104	393,656	-	-	262,437	-	-	131,219	-	-
Romania	15% ^(c)	1,298,693	820,253	-	656,202	546,835	-	437,468	273,418	-	218,734
Scotland	13% ^(c)	6,930,697	4,521,374	3,843,167	3,617,099	3,014,249	2,562,112	2,411,399	1,507,125	1,281,056	1,205,700
Slovakia	13% ^(c)	311,942	203,502	172,976	162,801	135,668	115,318	108,534	67,834	57,659	54,267
Slovenia	2% ^(b)	1,589,095	1,173,376	997,370	938,701	782,251	664,913	625,801	391,125	332,457	312,900
Spain	23% ^(b)	3,960,759	2,119,298	-	-	1,412,866	-	-	706,433	-	-
Sweden	59% ^(g)	2,067,549	635,771	-	-	423,848	-	-	211,924	-	-
<i>Total cost savings except E&W</i>		159,974,662	93,133,957	37,156,361	53,771,984	62,089,304	24,770,907	35,847,989	31,044,652	12,385,454	17,923,995

Conclusion policy option 4:

The total cost of this option would therefore amount to:

Cost of introducing emergency legal under Option 3:	€2 – €2 million
<u>Cost of additional cases receiving legal aid</u>	<u>€60 million</u>
<u>MINUS Amount of emergency legal aid recovered under Option 4</u>	<u>- €12 million</u>
Total cost of the option:	€80 – 210 million

Eligibility criteria for legal aid

Option 3:

The main issue when assessing the financial impact of the different policy options on means and merits tests is that in the absence of a quantitative threshold of income or wealth, it is not possible to exactly define the extra costs incurred following the introduction of the policy option, which is qualitative. For each of the three type of jurisdictions (those with a means test, with a merits test and with both a means and merits test), the following sub-sections explain the reasoning behind the selection of the hypotheses used to calculate the financial impacts of the options.

The figures and data available do not make it possible to develop a detailed understanding of the exact impact of any measure on who is entitled to receive legal aid. For jurisdictions with a merits test, there are no detailed figures on the number of criminal cases detailed by the sanction that can be imposed. To take the case of Germany, while we know that currently, with suspects under suspicion of having committed a crime punishable by one year imprisonment receiving legal aid, 20% of criminal cases receive legal aid. There is no way of understanding how this share would change if the threshold was changed, for instance lowered to 6 month. In order to be able to calculate such impacts, detailed data on the number of criminal cases by potential custodial sentence would be necessary. These data do not exist.

In order to provide an indication of the financial impacts of the policy option, we have therefore calculated the share of criminal cases receiving legal aid and identified Member States whose systems are closest to the policy option.

The extent of differences in the provision of legal aid in the Member States is reflected in the financial impacts that any measure would have. There is no detailed data on the difference between the legal aid threshold and the circumstances of those suspect and accused persons who fail to qualify at present. It is therefore not possible to provide precise statistics on the costs of increasing the threshold.

In order to provide some data, we have calculated the share of criminal cases where the suspected or accused person has benefited from legal aid (these vary between 0.1% and 73%) either based on means or merits tests, based on data from the CEPEJ report 2012, figures from

the Ministries of Justice and the number of crimes from the Euro Crime Statistics¹⁶⁰. We have then developed scenarios illustrating a situation (where 15%, 20% and 37% of accused/suspect persons were to be covered by legal aid) as shown in the tables below. At the bottom of the spectrum, a 15% “target” would assume an effort from the Member States where legal aid is most problematic. On the other hand, 37% of criminal cases in France receive legal aid. France was seen to have a more adequate system and includes some of the aspects of quality control, and gradual legal aid which were identified as good practices. The middle figure (20%) provides an indication of a system similar to that in place in Belgium where 20% of criminal cases receive legal aid. The system of legal aid in Belgium is seen as adequate, with a number of stakeholders emphasising the low level of remuneration and the fact that because of the remuneration system, there is a de facto cap on legal aid cases. 20% is also similar to the situation in Germany, the Czech Republic and Luxembourg.

Column I - Number of criminal cases - based on figures from the Ministries of Justice, the *European Sourcebook of Crime and Criminal Justice Statistics – 2010*. Where no data was available, we have extrapolated the data based on the population of the Member States.¹⁶¹

Column II - Number of criminal legal aid cases (per annum) based on figures from the MOJs, the CEPEJ report or an extrapolation of the data based on the share of criminal legal aid cases in all legal aid cases for other member States where the data is available.

Column III - Total amount spent on Legal Aid for criminal proceedings – From the CEPEJ report, Ministries of justice or extrapolations based on the average share of the amount spent on criminal legal aid out of the total amount spent on legal aid for the Member States where those figures are available.¹⁶²

Column IV - Average spent per case on criminal legal aid cases – calculated by dividing the total amount spent on criminal legal aid (Column III) by the number of criminal legal aid cases (Column II)

Column V – Share of criminal cases receiving legal aid - Share of criminal cases where the suspected or accused person has benefited from legal aid (these vary between 0.1% and 67%) calculated by dividing the number of criminal legal aid cases (Column II) by the number of criminal cases (Column I)

¹⁶⁰ *European Sourcebook of Crime and Criminal Justice Statistics – 2010*

¹⁶¹ *European Sourcebook of Crime and Criminal Justice Statistics – 2010*

¹⁶² In order to reflect differences between legal aid systems, we have grouped Member States as follows (EU 15 – 48%, EU10 + Croatia (84%), and BG+ RO – 87%)

Calculation for countries with means tests only (BE, HR, CZ, FR, LT, LV, LU, MT, PL, PT, SK, SI, ES)

Table 8: Cost impacts of widening the number of suspect/accused persons entitled to legal aid in jurisdictions where only means tests are applied

Means	Number of criminal cases (I)	Number of criminal legal aid cases (II)	Total amount spent on Legal Aid for criminal proceedings (III)	Average spent per case on criminal LA (IV) (III/II)	Share of criminal cases receiving legal aid (V = II/I)	15% scenario			20% scenario			37% scenario		
						Total number of cases covered by Legal Aid	New cases covered	Extra cost	Total number of cases covered by LA	New cases covered	Extra cost	Total number of cases covered by LA	New cases covered	Extra cost
Belgium	189,716 *	38,715*	14,711,665 *	380 *	20%	28,457	-	-	37,943	-	-	70,195	31,480	11,962,466
Croatia	116,214*	15,128*	191,793*	13*	13%	17,432	2,304	29,210	23,243	8,115	102,878	42,999	27,871	353,348
Czech Republic	97,675 ^(d)	12,715*	21,474,461	810 ^(e)	20%	14,651	-	-	19,535	-	-	36,140	16,207	13,126,587
France	1,061,097 ^(d)	394,120 ^(d)	119,010,621	302 ^(b)	37%	159,165	-	-	212,219	-	-	392,606	-	-
Latvia	9,959 ^(d)	1,296 *	770,366	594 ^(e)	13%	1,494	197	117,327	1,992	695	413,225	3,685	2,388	1,419,277
Lithuania	81,277 ^(e)	34,302 ^(d)	3,263,613*	95 ^(c)	42%	12,192	-	-	16,255	-	-	30,072	-	-
Luxembourg	14,579 ^(d)	2,975*	1,454,414*	489*	20%	2,187	-	-	2,916	-	-	5,394	2,419	1,182,624
Malta	19,613 ^(d)	2,553*	71,019*	28 *	13%	2,942	389	10,816	3,923	1,369	38,095	7,257	4,704	130,841
Poland	1,111,772 ^(d)	144,724*	19,420,734*	134*	13%	166,766	22,042	2,957,786	222,354	77,630	10,417,292	411,356	266,631	35,779,615
Portugal	115,466 ^(d)	85,672*	25,035,920*	292*	74%	17,320	-	-	23,093	-	-	42,722	-	-
Slovakia	41,189 ^(d)	5,362*	1,134,444*	212*	13%	6,178	817	172,776	8,238	2,876	608,516	15,240	9,878	2,090,032
Slovenia	90,205 ^(d)	1,396 ^(d)	2,828,514*	607 ^(e)	2%	13,531	12,135	7,361,014	18,041	16,645	10,096,959	33,376	31,980	19,399,174
Spain	1,336,505 ^(d)	383,000 ^(d)	107,750,629*	281 ^(d)	29%	-	-	-	267,301	-	-	494,507	111,507	31,370,583

Means	Number of criminal cases (I)	Number of criminal legal aid cases (II)	Total amount spent on Legal Aid for criminal proceedings (III)	Average spent per case on criminal LA (IV) (III/II)	Share of criminal cases receiving legal aid (V = II/I)	15% scenario			20% scenario			37% scenario		
						Total number of cases covered by Legal Aid	New cases covered	Extra cost	Total number of cases covered by LA	New cases covered	Extra cost	Total number of cases covered by LA	New cases covered	Extra cost
	4,285,267	1,121,958	317,118,193			642,790	37,883	10,648,929	857,053	107,331	21,676,965	1,585,549	505,066	116,814,547
						200,476								

*- extrapolation (see explanations in previous tables) ^(a)- Legal aid expenditure on criminal proceedings (CEPEJ), number of criminal legal aid cases (extrapolation); ^(b) Legal aid expenditure on criminal proceedings (CEPEJ), number of criminal legal aid cases (CEPEJ); ^(c) Legal aid expenditure on criminal proceedings (extrapolation), number of criminal legal aid cases (CEPEJ); ^(d) CEPEJ / Eurocrime Statistics; ^(e) figures provided by the MoJ ^(f)- Legal aid expenditure on criminal proceedings (MoJ), number of criminal legal aid cases (MoJ); ^(g) In the case of Slovenia and the Czech Republic, method (c) provided an unlikely high amount per case, which could have been due to a specifically expensive case; consequently, we have calculated a cost per case by using the total amount spent on legal aid and the total number of legal aid cases.

In the case of Croatia, the number of criminal cases has been calculated using a weighted average number of criminal cases per 1,000 inhabitants (where available). While data on the number of criminal cases was available for Croatia, the extremely high number of cases of misdemeanours and /or minor offences seemed to indicate a difference with other reporting countries in the definition of those cases.

Merits tests only (DE, SE)

In the case of jurisdictions where a merits test only is in place, one could assume that the system would be roughly similar to what is in place in Germany. We have also provided figures for the 15% and 20% case scenarios to provide a means of comparison with jurisdictions with other types of legal aid systems. Due to the qualitative nature of the policy option, this estimation of the financial impacts only provides a ball-park figure.

Table 9 - Costs for Member States with a merits test only

Means	Number of criminal cases (I)	Number of criminal legal aid cases (II)	Total amount spent on Legal Aid for criminal proceedings (III)	Average spent per case on criminal LA (IV)	Share of criminal cases receiving legal aid (V = II/I)	15% scenario			20% scenario		
						Total number of cases covered by LA	New cases covered	Extra cost	Total number of cases covered by LA	New cases covered	Extra cost
Germany	1,181,995 ^(d)	235,010 *	85,822,785	365 *	20%	177,299	-	-	235,010	-	-
Sweden	91,000 ^(e)	53,690 ^(e)	130,470,000	2,430 ^(e)	59%	13,650	-	-	18,200	-	-
Total						216,409	-	-	254,599	-	-

^(a)- Legal aid expenditure on criminal proceedings (CEPEJ), number of criminal legal aid cases (extrapolation); ^(b) Legal aid expenditure on criminal proceedings (CEPEJ), number of criminal legal aid cases (CEPEJ); ^(c) Legal aid expenditure on criminal proceedings (extrapolation), number of criminal legal aid cases (CEPEJ);

^(d) CEaPEJ / Eurocrime Statistics; ^(e) figures provided by the Ministries of Justice; *- extrapolation

Means and merits tests (AT, BG, CY, E&W, FL, EL, HU, IE, IT, NL, RO, SC)

In the case of jurisdictions where a merits test only is in place, one could assume that the option could seek to establish systems of legal aid where between 15% and 20% of criminal cases would be granted legal aid. In this model, we have also added a 37% option reflecting the situation in France. Due to the qualitative nature of the policy option, this estimation of the financial impacts only provides a ball-park figure.

Table 10 – Costs for Member States applying a means and a merits test

	Number of criminal cases (I)	Number of criminal legal aid cases (II)	Total amount spent on Legal Aid for criminal proceedings (III)	Average spent per case on criminal LA (IV)	Share of criminal cases receiving legal aid (V = II/I)	15% scenario			20% scenario			37% scenario		
						Total number of cases covered by LA	New cases covered	Extra cost	Total number of cases covered by LA	New cases covered	Extra cost	Total number of cases covered by LA	New cases covered	Extra cost
Austria	60,726 ^(e)	9,426 ^(e)	8,920,405 *	946 ^(e)	16%	9,109	-	-	12,145	2,719	2,573,347	22,469	13,043	12,343,035
Bulgaria	118,262 ^(d)	32,800 ^(d)	3,094,184 ^(d)	94 ^(b)	28%	17,739	-	-	23,652	-	-	43,757	10,957	1,029,952
Cyprus	117,495 ^(d)	4,347 *	194,090 *	47 ^(e)	4%	17,624	13,277	592,814	23,499	19,152	905,913	43,473	39,126	1,746,940
Greece	195,929	39,983	1,212,012	32	20%	29,389	-	-	39,186	-	-	72,494	32,511	985,520
Finland	59,683 ^(e)	33,252 ^(e)	28,167,147 *	847 ^(d)	56%	8,952	-	-	11,937	-	-	22,083	-	-
Hungary	269,691 ^(d)	276 ^(d)	254,684 *	923 ^(e)	0.1%	40,454	40,178	37,074,727	53,938	53,662	49,517,864	99,786	99,510	91,824,530
Ireland	77,625 *	55,412 ^(d)	54,967,000 ^(d)	992 ^(a)	71%	11,644	-	-	15,525	-	-	28,721	-	-
Italy	1,607,646 ^(e)	103,075 ^(d)	87,080,432 ^(d)	845 ^(b)	6%	241,147	138,072	116,670,756	321,529	218,454	184,593,799	594,829	491,754	415,532,147
Netherlands	441,911 ^(d)	57,525 *	102,000,000 ^(d)	791 ^(b)	13%	66,287	8,761	6,930,074	88,382	30,857	24,407,654	163,507	105,982	83,831,427

Romania	171,480 ^(a)	27,071 *	7,485,586 ^(d)	282 ^(b)	15%	25,722	-	-	34,296	7,225	1,997,704	63,448	36,376	10,058,500
UK	1,096,664	580,854	1,416,720,690	3,070	53%	164,500	-	-	219,333	-	-	405,766	-	-
Total	4,021,183	904,039	1,708,884,219			632,567	200,288	161,268,371	804,237	332,069	263,945,483	1,487,838	796,747	616,366,532

^(a)- Legal aid expenditure on criminal proceedings (CEPEJ), number of criminal legal aid cases (extrapolation); ^(b) Legal aid expenditure on criminal proceedings (CEPEJ), number of criminal legal aid cases (CEPEJ); ^(c) Legal aid expenditure on criminal proceedings (extrapolation), number of criminal legal aid cases (CEPEJ); ^(d) CEPEJ; ^(e) figures provided by the Ministries of Justice; ^(f) Legal aid expenditure on criminal proceedings (extrapolation), number of criminal legal aid cases (Ministries of Justice)

*- extrapolation; # UK figures are divided between England & Wales and Scotland, with figures from E&W provided by CEPEJ and Euro Crime Statistics and Scotland, the result of extrapolations.

As shown in the tables above, any legislative intervention would have varying impacts on the different Member States, with an expected larger burden on those jurisdictions where the provision of legal aid was seen by stakeholders to be less adequate (mainly Italy and Hungary)

Overall, due to the flexibility Member States will have to transpose a Directive or implementing a recommendation it is impossible to provide a detailed breakdown of the financial impacts of the measure on who is entitled to legal aid. It is expected however that the costs will be significant, especially in those Member States where the provision of legal aid is not adequate.

Based on a scenario where between 15%-20% of criminal cases are to be granted legal aid seen the raised standard under policy option 3, no matter what eligibility system they apply, the financial impacts would be broken down as follows:

Estimated cost for jurisdictions with only a means test: between **€1 million- €2 million**

Estimated cost for jurisdictions applying only a merits test: No costs

Estimated cost for jurisdictions applying both a means and a merits test: **€161 million - €264 million.**

The figures above are in line with the cost of bringing national legislation into line with the financial projections had been made in three Member States in connection with the cost of bringing national legislation into line with *Salduz*. These were as follows: France: **80 million euros**; Netherlands: **52 million euros**. **However, those costs also include training, infrastructure etc. which are not covered by this option.**

Based on the scenarios explained above, we estimate **the costs of the measure with regard to who is entitled to legal aid and to reach a situation where between 15%-20% of criminal cases are granted legal aid to be in a range between €172 million and €286 million.**

However, the costs expected to be incurred as a result of the increased share of suspect/accused persons entitled to legal aid should be seen as the cost of compliance to ECHR standards rather than extra costs brought about by the preferred option and might be considerably smaller.

Furthermore, the total impact reflects the costs that would be borne by a selected number of Member States (**Italy €17 - €85 million, and Hungary €37 million - €50 million**).

**Total cost for policy option 3 on means and merits test on the basis of reaching a situation where between 15%-20% of criminal cases are granted legal aid:
in a range between €172 million and €286 million**

Option 4:

This option would involve setting quantitative means test and a prescriptive merits test

Means tests only (BE, HR, CZ, FR, LT, LV, LU, MT, PL, PT, SK, SI, ES)

In order to calculate the costs of Option 4 for those member States with means tests only, we have assumed that the decision would be for suspects / accused earning under the minimum wage to be eligible for legal aid. In those Member States where minimum wages do not exist, we have taken an average of the minimum wage as a share of the average wage for all Member States where it is available (70%) and applied this share to the average wage.

Table 11 - Minimum and average wage in the EU (euros)

	Minimum wage (monthly) ^(a)	Minimum wage annually ^(a)	average wage annually ^(a)	Minimum wage as % of average wage	Calculated threshold
Austria			25,349.63	n/a	17158.2
Belgium	1443.54	17322.48	26,540.91	65%	17,322.48
Bulgaria	138.05	1656.6	2,275.63	73%	1,656.60
Croatia			8717.16	n/a	5900.314
Cyprus			21216	n/a	14360.3
Czech Republic	310.23	3722.76	7,914.69	47%	3,722.76
Denmark			25,692.58	n/a	17390.33
England and Wales	1201.96	14423.52	21,354.13	68%	14,423.52
Estonia	290	3480	6,663.55	52%	3,480.00
Finland			25,385.06	n/a	17182.18
France	1398.37	16780.44	21,926.16	77%	16,780.44
Germany			26,252.91	n/a	17769.6
Greece	683.76	8205.12	10,110.60	81%	8,205.12
Hungary	295.63	3547.56	6,034.92	59%	3,547.56
Ireland*			17,816.51		12059.32
Italy			19,171.74	n/a	12976.62
Latvia	285.92	3431.04	5,095.70	67%	3,431.04
Lithuania	231.7	2780.4	4,439.13	63%	2,780.40
Luxembourg	1801.49	21617.88	28,016.00	77%	21,617.88
Malta	679.87	8158.44	9,651.90	85%	8,158.44
Netherlands	1446.6	17359.2	24,969.61	70%	17,359.20
Poland	336.47	4037.64	5,370.04	75%	4,037.64
Portugal	565.83	6789.96	10,882.88	62%	6,789.96
Romania	161.91	1942.92	3,567.16	54%	1,942.92
Scotland	1201.96	14423.52	21,354.13	68%	14,423.52
Slovenia	763.06	9156.72	9,908.23	92%	9,156.72
Slovakia	327	3924	6,094.20	64%	3,924.00

Spain	748.3	8979.6	16,382.09	55%	8,979.60
Sweden			27,319.80	n/a	18491.73
Average				68%	

(a) Eurostat

Source: Eurostat

*In the case of Ireland we have used an extrapolation as the data provided by Eurostat places the minimum wage at 98% of the average wage.

Data are available dividing the population of each Member State by ten equal brackets of income (deciles). This allows the estimation of the share of the population that would be eligible for legal aid in the different countries. Table 12 provides the distribution of income in the Member States by deciles. Each column represents a tenth of the population. As an example, the 10% of the population in Austria with the lowest income receive earn less than € 11,503.

Table 12– Member States distribution of income by deciles – 2010 (EUR)

	First decile	Second decile	Third decile	Fourth decile	Fifth decile	Sixth decile	Seventh decile	Eighth decile	Ninth decile	Tenth decile
<i>Austria</i>	11,503	14,388	16,655	18,498	20,618	22,874	25,654	29,388	36,737	N/A
<i>Belgium</i>	10,446	12,809	15,191	17,223	19,464	21,815	24,479	27,878	33,340	N/A
<i>Bulgaria</i>	1,254	1,765	2,195	2,607	3,016	3,458	4,009	4,740	5,997	N/A
<i>Croatia</i>	2,448	3,385	4,210	5,029	5,722	6,540	7,507	8,889	11,675	N/A
<i>Cyprus</i>	8,813	11,140	13,262	15,103	16,981	19,162	21,768	25,417	31,862	N/A
<i>Czech Republic</i>	4,359	5,292	5,894	6,455	7,058	7,755	8,710	9,943	12,171	N/A
<i>Denmark</i>	13,967	17,619	20,287	22,991	25,668	28,313	31,255	34,962	41,077	N/A
<i>UK (E&W)</i>	8,572	10,784	12,780	14,925	17,106	19,715	23,060	27,265	34,707	N/A
<i>Estonia</i>	2,924	3,709	4,347	4,973	5,727	6,650	7,802	9,365	11,924	N/A
<i>Finland</i>	12,000	14,598	17,066	19,149	21,349	23,636	26,423	29,755	35,668	N/A
<i>France</i>	10,942	13,704	15,809	17,907	20,058	22,427	25,427	29,721	38,045	N/A
<i>Germany</i>	9,657	12,444	14,635	16,745	18,797	21,141	24,051	28,030	34,756	N/A
<i>Greece</i>	5,500	7,148	8,853	10,333	11,963	13,908	15,822	18,602	23,333	N/A
<i>Hungary</i>	2,392	2,981	3,425	3,852	4,241	4,698	5,204	5,977	7,073	N/A
<i>Ireland</i>	10,472	12,844	14,897	16,987	19,882	22,799	26,658	32,223	41,174	N/A
<i>Italy</i>	7,534	9,937	11,933	13,851	15,937	18,251	20,902	24,243	30,680	N/A
<i>Latvia</i>	1,882	2,655	3,224	3,857	4,537	5,337	6,314	7,706	10,171	N/A
<i>Lithuania</i>	1,637	2,408	2,973	3,514	4,059	4,660	5,589	6,954	9,401	N/A
<i>Luxembourg</i>	17,277	21,108	24,716	28,193	32,333	36,427	41,463	48,239	58,339	N/A
<i>Malta</i>	5,599	6,809	8,082	9,189	10,458	11,909	13,456	15,722	19,402	N/A
<i>Netherlands</i>	12,077	14,505	16,497	18,364	20,292	22,568	25,313	28,893	35,494	N/A

<i>Poland</i>	2,159	2,773	3,326	3,842	4,405	5,008	5,764	6,844	8,579	N/A
<i>Portugal</i>	4,181	5,475	6,436	7,500	8,678	10,043	11,624	13,875	18,975	N/A
<i>Romania</i>	831	1,184	1,492	1,739	2,037	2,372	2,802	3,321	4,177	N/A
<i>UK (Scotland)</i>	8,572	10,784	12,780	14,925	17,106	19,715	23,060	27,265	34,707	N/A
<i>Slovakia</i>	3,433	4,370	4,960	5,532	6,117	6,820	7,683	8,789	10,717	N/A
<i>Slovenia</i>	6,543	8,263	9,489	10,555	11,736	12,959	14,412	16,297	19,451	N/A
<i>Spain</i>	5,288	7,658	9,459	11,200	13,030	14,900	17,540	20,696	26,474	N/A
<i>Sweden</i>	10,930	13,474	15,833	17,785	19,709	21,596	23,834	27,067	31,584	N/A

Source: Eurostat

Consequently, for those Member States with only a means test, it is possible to provide an estimate of the share of the population that would be entitled to legal aid if the threshold was set at the national minimum wage or 68% of the average wage in those Member States where there is no minimum wage¹⁶³ in all Member States. This is shown in the table below where the current share of cases receiving legal aid is shown in the blue boxes and the situation under Option 4, in the grey ones

Table 13: Share of the population currently entitled to legal aid (X %) and under the means test proposed under Option 4 (4)

	Less than 10%	10%-20%	20%-30%	30%-40%	40%-50%	50%-60%	60%-70%	70%-80%	80%-90%	Over 90%
<i>Slovenia</i>	2%		4							
<i>Poland*</i>		13%			4					
<i>Latvia*</i>		13%		4						
<i>Czech Republic*</i>	4	13%								
<i>Malta</i>		13%		4						
<i>Slovakia</i>		13%								
<i>Croatia</i>		13%				4				
<i>Belgium</i>			20%		4					
<i>Luxembourg</i>			20%							
<i>Spain</i>			23%							
<i>France</i>				37%						
<i>Lithuania</i>			4		42%					
<i>Portugal</i>				4				73%		

Source: CSES research *No set threshold

Assuming that the share of the population entitled to legal aid is roughly similar to the share of criminal cases receiving legal aid, the costs of this option are presented below. In cases

¹⁶³ On average, the minimum wage is equivalent to 68% of the average wage.

where the current share of the population entitled to legal aid is higher than that under Option 4 (CZ, FR, LT, PT, SK, ES), no cost will be incurred (and no savings either as we assume there will be a non-regression clause). We have not calculated the costs for those Member States where a higher share of the population is currently entitled to legal aid than it would be under this option.

Table 14: Cost impacts of widening the number of suspect/accused persons entitled to legal aid in jurisdictions where only means are applied under option 4

EU jurisdiction	average spent per case on criminal LA	Current share of cases receiving legal aid	Share of cases receiving legal aid under Option 4	Total number of criminal cases	number of criminal legal aid cases	Option 4		
						Total number of cases covered by LA	new cases covered	extra cost
Belgium	380	20%	45%	189,716	38,715	85,372	46,657	17,729,845
Croatia	13	13%	55%	110,524	15,128	60,788	48,789	618,551
Czech Republic	810	13%	5%	97,675	19,932	4,884	-	-
France	302	37%	35%	1,061,097	394,120	371,384	-	-
Latvia	594	13%	35%	9,959	1,296	3,486	2,189	1,300,918
Lithuania	95	42%	25%	81,277	34,302	20,319	-	-
Luxembourg	489	20%	25%	14,579	2,975	3,645	670	327,369
Malta	28	13%	35%	19,613	2,553	6,865	4,311	119,930
Poland	134	13%	45%	1,111,772	144,724	500,297	355,573	47,714,826
Portugal	292	73%	35%	115,466	85,672	40,413	-	-
Slovakia	212	13%	5%	41,189	5,362	2,059	-	-
Slovenia*	607	2%	25%	90,205	1,396	22,551	21,155	12,832,905
Spain	281	23%	25%	1,336,505	383,000	334,126	-	-
Total					1,129,175			80,644,343

*In the case of Slovenia, while the law states that anyone receiving less than twice the minimum wage is entitled to legal aid, the practice is very different, with an estimated 2% of the population receiving it. This table shows the cost of practical implementation compared to the practical situation.

Merits tests only (DE, SE)

Assuming the threshold for legal aid under option 4 is six month imprisonment, changes would only occur in Germany, this translates into a cost of €169 million.

Table 15 - Potential custodial sentences and the merits test

Member State	Merits test in relation to the suspected crime – where it is punishable by -
<i>Germany</i>	1 year imprisonment
<i>Sweden</i>	6 month imprisonment

Means and merits tests (AT, BG, CY, FI, EL, HU, IE, IT, NL, RO, UK)

Assuming that the share of the population entitled to legal aid is roughly similar to the share of criminal cases receiving legal aid, the costs of this option are presented below. In cases where the current share of the population entitled to legal aid is higher than that under Option

4 (FI IE), no cost will be incurred (and no savings either as we assume there will be a non-regression clause). Furthermore, regardless of the theoretical share of the population entitled to legal aid based on the means test, we assume that there is a minimum of 56% of cases covered under this option equivalent to the situation in Finland. The system in Finland is one where there is both a means and merits test. The means test is seen as adequate by stakeholders and the merits test is as follows: four month imprisonment, and people detained because of an offence. Legal aid is not available for “simple” criminal offences (such as drink driving).

One can thus assume that if a workable system comparable to what the situation in Finland is put in place, 56% of cases would be entitled to legal aid.

Table 16 - Cost impacts of widening the number of suspect/accused persons entitled to legal aid in jurisdictions where means and merits tests are applied under option 4

EU jurisdiction	average spent per case on criminal LA	Share of criminal cases receiving legal aid	Share of cases receiving legal aid under Option 3	Total number of criminal cases	number of criminal legal aid cases	Option 4		
						Total number of cases covered by LA	new cases covered	extra cost
Austria	946	16%	56%	60,726	9,426	34,007	24,581	23,262,099
Bulgaria	94	28%	56%	118,262	32,800	66,227	33,427	3,142,112
Cyprus	45	4%	56%	117,495	4,347	65,797	61,450	2,743,686
Finland	847	56%	56%	59,683	33,252	33,252		
Greece	30	20%	56%	195,929	39,983	109,720	69,738	2,113,983
Hungary	923	0.1%	56%	269,691	276	151,027	150,751	139,108,452
Ireland	992	71%	71%	77,625	55,412	11,644	-	-
Italy	845	6%	56%	1,607,646	103,075	900,282	797,207	673,639,712
Netherlands	791	13%	56%	441,911	57,525	247,470	189,945	150,246,231
Romania	277	16%	56%	171,480	27,071	96,029	68,957	19,067,625
UK	3,070	53%	56%	1,096,664	580,854	614,132	33,277	102,160,863
Total							1,429,332	1,115,484,762

Finally, no changes are expected in Estonia, where neither a means nor a merits test exists, but where 67% of criminal cases receive legal aid.

Overall, the total cost of Option 4, is therefore estimated to be €81 million for jurisdictions where only a means test is applied plus €169 million for jurisdictions where only a merits test is applied, plus €1.155 billion for those Member States where both a means and merits test is in place, bringing the **total cost of this option at €1.4 billion.**

Total cost for policy option 4 on a prescriptive means and merits test, reaching a situation where, under the means test, everyone earning under the minimum wage to be eligible for legal aid (alternatively, where minimum wages do not exist, we have taken an average of the minimum wage as a share of the average wage for all Member States where it

is available (70%)). **Under the merits test, everyone charged of a crime with a minimum sentence over (6 month), and that are effectively deprived of liberty are granted legal aid.**

Will cost a maximum of €1.4 billion

Legal Aid in EAW proceedings

Policy Option 3

Option: Legal aid in EAW proceedings in executing and issuing Member State, subject to means and or merits test as it is applied in the relevant Member State

3a) Costs for Executing Member States

The table below provides data on the number of EAWs per executing state. On the basis that EAW cases would be available under the existing thresholds for eligibility in the Member State, and that the costs per case would be equivalent to that of legal aid provided in the executing states, we have calculated the costs of legal aid in EAW cases.

In the table below, we have used a cost per case equivalent to that of emergency legal aid. This has been done because although the nature of legal aid for EAW is possibly higher than that of emergency legal aid, for the one case (France) for which we are aware of the remuneration of EAW cases, this was significantly lower than that of emergency legal aid (€16 against €97). Assuming that EAW proceedings would be more costly, one can calculate that EAW proceedings costs twice the emergency legal aid cost and hereby get an upper range of the cost.

Example: In the case of Bulgaria, for instance, 120 EAWs were executed in 2010, on the basis that the cost of providing legal aid is €24.5, the cost of introducing compulsory legal aid in executing states would be $(120 \times €24.5 =) €2,941$. If one instead assumes that legal aid in an EAW costs the double of the fee of emergency legal $€24.5 \times 2 \times 120 = 5,880$.

Table 17: Cost of legal aid in executing Member States, subject to current means and merits test

	Average cost of emergency legal aid case	EAW received – executed (2010)	Share of cases receiving legal aid	Current situation				15%				20%				
				Share of cases receiving LA	Number of EAWs receiving legal aid	Cost of legal aid in executing states (EAW x cost of emergency legal aid case)	Extra cost of introducing legal aid in executing states (EAW x cost of case)	Share of cases receiving LA	Number of EAWs receiving legal aid	Cost of legal aid in executing	Extra cost compared to current situation	Share of cases receiving LA	Number of EAWs receiving legal aid	Cost of legal aid in executing	Extra cost compared to current situation	
Austria	184	37	16%	6	1,056	No costs	No costs	16%	6	1,056	No costs	No costs	20%	7	1,362	306
Belgium	96	57	20%	11	1,068	No costs	No costs	20%	6	1,056	No costs	No costs	20%	6	1,056	No costs
Bulgaria	25	120	28%	33	816	816	816	28%	11	1,068			28%	11	1,068	
Croatia	66	n/a	13%	n/a	n/a	n/a	n/a	15%		-			20%			
Cyprus	61	4	4%	0	9	No costs	No costs	15%	1	37	28	28	20%	1	49	40
Czech Rep	46	94	13%	12	550	550	550	15%	14	649	99	99	20%	19	865	315
Estonia	107	29	67%	19	2,077	No costs	No costs	67%	19	2,077	No costs	No costs	67%	19	2,077	No costs
Finland	184	49	56%	27	5,018	5,018	5,018	56%	27	5,018			56%	27	5,018	
France	116*	424	37%	157	18,253	No costs	No costs	37%	157	18,253	No costs	No costs	37%	157	18,253	No costs
Germany	184	835	20%	166	30,516	No costs	No costs	20%	166	30,516	No costs	No costs	20%	166	30,516	No costs
Greece	107	33	20%	6	694	No costs	No costs	20%	6	694	No costs	No costs	20%	6	694	No costs
Hungary	107	231	0%	0	25	25	25	15%	35	3,708	3,682	3,682	20%	46	4,943	4,918

Ireland	276	16	71%	71%	11	3,149	No costs	71%	11	3,149	No costs	
Italy	276	57	6%	6%	4	391	391	15%	9	2,360	1,969	
Latvia	184	48	13%	13%	6	1,123	1,123	15%	7	1,325	201	
Lithuania	46	79	42%	42%	33	1,532	No costs	42%	33	1,532	No costs	
Luxembourg	107	14	20%	20%	3	294	294	20%	3	294	294	
Malta	61	1	13%	13%	0	8	8	15%	0	9	1	
Netherlands	145	-	13%	13%	0	-	-	15%	-	-	-	
Poland	46	929	13%	13%	118	5,435	5,435	15%	139	6,410	975	
Portugal	107	63	73%	73%	46	4,910	4,910	73%	46	4,910	4,910	
Romania	46	855	15%	15%	132	6,076	6,076	15%	132	6,076	171	
Slovakia	46	164	13%	13%	21	960	960	15%	25	1,132	172	
Slovenia	107	4	2%	2%	0	7	7	15%	1	64	58	
Spain	184	97	23%	23%	22	4,119	4,119	23%	22	4,119	4,119	
Sweden	138	65	59%	59%	38	5,304	No costs	59%	38	5,304	No costs	
UK	345	116	53%	53%	61	21,184	No costs	53%	61	21,184	No costs	
Total cost for jurisdictions where legal aid is not available												
							29,706 (if value is calculated as EAW costing the double emergency defence 59,412)				An extra 7,185 compared to the current situation (14,370 if doubled)	An extra 14,510 compared to the current situation (29,020 if doubled)

* In France the remuneration for EAW's is calculated to be 5 unités de valeurs (€28.18 × 5 = €115.9)

**Cost for legal aid in executing Member States subject to means and merits test:
in the range of €29,706-€59,412 if the current applicable means and merits test apply.
If EU action to ensure 20 % of suspects and accused persons are eligible, the cost would instead be in the range of 44,216-132,648.
Total range is between 0.03 million-0.13 million**

3b) Cost for issuing Member States

The table below provides data on the number of EAWs per issuing state that are de facto executed. Given the limited role of the lawyer in the issuing Member State, the costs per case would be equivalent to that of emergency legal aid provided in issuing state. On the basis that only EAWs meeting the eligibility threshold in the Member State at hand will receive legal aid, we have calculated the costs of legal aid in EAW cases in the issuing member States. As no Member State currently provides such aid, it implies extra costs for all Member States (column E).

Table 18: Cost of legal Aid for Issuing Member States (subject to a means and a merits test)

	Average cost of emergency legal aid case (A)	Executed EAWs where the Member State was the issuing jurisdiction (2010) ¹⁶⁴ (B)	Current situation			15%			20%			
			Share of cases receiving legal aid (C)	Number of cases receiving legal aid (D) (BxC)	Cost of legal aid if the existing means / merits test apply (E) (AxD)	Number of cases receiving legal aid	Cost of legal aid	Extra costs under 15% scenario	Number of cases receiving legal aid	Cost of legal aid	Extra costs under 20% scenario	
Austria	184	88	16%	14	2,513		18	3,238		725		
Belgium	96	166	20%	33	3,124					No change		
Bulgaria	25	84	28%	23	582					No change		
Croatia	66	n/a	13%	n/a	n/a							
Cyprus	61	9	4%	0	19		1	82	63	2	109.80	90.80
Czech Rep	46	166	13%	21	972		25	1,145	173	33	1,527.20	555.20
Estonia	107	22	67%	15	1,572							No change
Finland	184	35	56%	20	3,588							No change

¹⁶⁴ In order to calculate this figure, we have multiplied the share of EAWs per issuing state by the actual number of EAWs executed. For instance, Austria was responsible for 1.96% of all EAWs issued in 2010, year in which 4,466 EAWs were executed. $4,466 \times 1.96\% = 88$.

France	116*	339	37%	126	14,606	No change	No change	No change		
Germany	184	630	20%	125	23,048	No change	No change	No change		
Greece	107	40	20%	8	839	No change	No change	No change		
Hungary	107	305	0%	0	33	46	4,895	61	6,527	6,494
Ireland	276	10	71%	7	1,970	No change	No change	No change	No change	
Italy	276	36	6%	2	637	5	1,490	7	1,987.20	1,350.20
Latvia	184	48	13%	6	1,125	7	1,325	10	1,766.40	641.40
Lithuania	46	121	42%	51	2,349	No change	No change	No change	No change	
Luxembourg	107	10	20%	2	210	No change	No change	No change	No change	
Malta	61	5	13%	1	39	1	46	1	61.00	22.00
Netherlands	145	159	13%	20	2,935	24	3,458	32	4,611.00	1,676.00
Poland	46	1,127	13%	143	6,601	169	7,776	225	10,368.40	3,767.40
Portugal	107	25	73%	18	1,944	No change	No change	No change	No change	
Romania	46	601	15%	93	4,275	No change	No change	120	5,529.20	1,254.20
Slovakia	46	108	13%	14	633	16	22	360.60	994	361
Slovenia	107	9	2%	0	15	1	2	177.60	193	178
Spain	184	170	23%	39	7,226	No change	No change	No change	No change	
Sweden	184	51	59%	30	5,537	No change	No change	No change	No change	
UK	345	77	53%	41	14,079	No change	No change	No change	No change	
Total					100,472		7,968			17,115

* In France the remuneration for EAW's is calculated to be 5 unités de valeurs (€28.18 x 5 = €115.9)

** Figures for England & Wales and Scotland are bundled

Source: Ministries of Justice, FTI and Council of the European Union, "Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant" (Years 2006 – 2009)

Cost for legal aid in issuing Member States: €100,472 provided that the current means and merits test in the member States apply.

Would EU action to raise the eligibility standard to 20 % be taken the cost for issuing member States would instead be €117,587.

Total cost policy option 3:

Legal aid in EAW (subject to eligibility criteria in issuing Member States and executing Member States)

Executing Member States: €0.03 million-0.13 million

Issuing Member States: €0.1-0.12 million

Total range of €0.13 million-0.24 million

Policy Option 4

Legal aid in Executing Member States – not subject to means and merits test

The table below provides data with regard to EAWs in the executing Member State when it is not subject to a means and merits test, and thus is granted in all EAW cases executed. As all Member States (except NL) at present apply a means or a merits, test, it implies costs in all Member States.

The calculations are made on the same method as described in policy option 3.

Table 19: Cost of providing legal aid without eligibility testing in executing Member States in EAW proceedings

	Average cost of emergency legal aid case	EAW received – executed (2010)	Cost of legal aid if all EAWs cases receive legal aid	Current situation		
				Cases receiving legal aid	Cost of existing legal aid in executing states	Extra cost of introducing legal aid in executing states (EAW x cost of case)
Austria	184	37	6,801	6	1,056	5,745
Belgium	96	57	5,450	11	1,068	4,382
Bulgaria	25	120	2,941	33		2,941
Croatia	66	n/a	n/a	n/a		n/a
Cyprus	61	4	245	0	9	236
Czech Rep	46	94	4,320	12		4,320
Estonia	107	29	3,109	19	2,077	1,033
Finland	184	49	9,007	27		9,007
France	116*	424	49,142	157	18,253	30,889
Germany	184	835	153,480	166	30,516	122,965
Greece	107	33	3,538	6	694	2,845
Hungary	107	231	24,768	0		24,768
Ireland	276	16	4,411	11	3,149	1,262
Italy	276	57	6,102	4		6,102

Latvia	184	48	8,823	6	8,823	
Lithuania	46	79	3,630	33	1,532	2,098
Luxembourg	107	14	1,501	3		1,501
Malta	61	1	61	0		61
Netherlands	145	-	0	0		0
Poland	46	929	42,690	118		42,690
Portugal	107	63	6,755	46		6,755
Romania	46	855	39,289	132		39,289
Slovakia	46	164	7,536	21		7,536
Slovenia	107	4	429	0		429
Spain	184	97	17,829	22		17,829
Sweden	184	65	8,990	38	5,304	3,686
UK	345	116	39,970	61	21,184	18,786
						365,977 (if value is calculated as EAW costing the double emergency defence 731,954)

* In France the remuneration for EAWs is calculated to be 5 unités de valeurs (€28.18 x 5 = €115.9)

Costs in executing Member States: Range between €365,977-€731,954

Legal Aid in issuing Member State – not subject to means and a merits test

The table below provides data on the number of EAWs per issuing state. On the basis that all EAW cases would require legal aid (in practice, it will be far less), and that the costs per case would be equivalent to that of emergency legal aid provided in issuing states, we have calculated the costs of legal aid in EAW cases.

In the case of issuing states, our research found that virtually not Member State provides legal aid before the point of extradition. In those countries who claimed to provide legal aid when they were issuing states a discussion with the ministries of justice has shown that this was the case after the extradition rather than a system of liaison before. As such we have assumed that no Member State provides legal aid when they are the EAW issuing state.

Table 20 – Cost of providing automatic legal aid without eligibility testing in Issuing Member States in EAW proceedings

	Average cost of emergency legal aid case (A)	Executed EAWs which the Member State is the issuing jurisdiction (2010) ¹⁶⁵ (B)	Cost of introducing legal aid in issuing states (AxB)
Austria	184	88	16,175
Belgium	96	166	15,872
Bulgaria	25	84	2,059
Croatia	66	n/a	n/a
Cyprus	61	9	551
Czech Rep	46	166	7,628
Estonia	107	22	2,359
Finland	184	35	6,433
France	116*	339	39,290
Germany	184	630	115,799
Greece	107	40	4,289
Hungary	107	305	32,703
Ireland	276	10	2,757
Italy	276	36	3,854
Latvia	184	48	8,823
Lithuania	46	121	5,560
Luxembourg	107	10	1,072
Malta	61	5	306
Netherlands	145	159	23,013

¹⁶⁵ In order to calculate this figure, we have multiplied the share of EAWs per issuing state by the actual number of EAWs executed. For instance, Austria was responsible for 1.96% of all EAWs issued in 2010, year in which 4,466 EAWs were executed. $4,466 \times 1.96\% = 88$.

Poland	46	1,127	51,788
Portugal	107	25	2,681
Romania	46	601	27,617
Slovakia	46	108	4,963
Slovenia	107	9	965
Spain	184	170	31,247
Sweden	184	51	7,053
UK	345	77	26,532
		<i>Total</i>	409,343

* In France the remuneration for EAWs is calculated to be 5 unités de valeurs ($€28.18 \times 5 = €115.9$)

** Figures for England & Wales and Scotland are bundled

Source: Ministries of Justice, FTI and Council of the European Union, "Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant" (Years 2006 – 2009)

Costs for issuing Member States: €409,343

Total cost policy option 4:

Legal aid in EAW proceedings in issuing and executing member States (automatic and not subject to eligibility criteria)

In the range of €775,320-€1,141,297

Minimum_ €365,977 (executing)+€409,343(issuing)= €775,320

Maximum €731,954 (executing)+€409,343(issuing)= €1,141,297

Quality control

Option 3

Accreditation and training:

This option prescribes that certain standards should be achieved including that legal aid practitioners are competent in providing criminal defence work – this implies that they will receive training and that accreditation will be carried out. The standards should be set a Member State level. Member States can require that legal aid practitioners have followed a specific training, to be accredited and should provide such training (to be developed by the Member States), or that they have certain experience in criminal law practice (certain member States). The practical implementation and how to make the accredited lawyers available (i.e. a register or a list, managed by the bar association, or the legal aid board as is currently the case in some Member States).

The costs consist on the one hand of offering State-funded training for defence lawyers and administrative costs of managing the accreditation system.

Training of defence lawyers

There are numbers relating to how many lawyers there are in the Member State (Column A), but there is no existing data on how many lawyers that practice criminal defence work – even less on how many of those who practice criminal legal aid cases. Many lawyers do multi-practice. In most Member States, it is sufficient to be a qualified lawyer to do legal aid work and no specialisation is required. In order to have an estimation of how many % of the lawyers that practice criminal defence law we have used the example of Germany, where there are numbers on criminal defence practitioners – amounting to 3.300¹⁶⁶ lawyers out of ca 155,700 lawyers. That means that ca. 2 % of all lawyers do criminal defence work, and less than this does legal aid work. Assuming that the training also should reach out to a number of other lawyers that would want to practice criminal defence, we have based our calculations on an assumption that training should be made available to 10% of the practicing lawyers, which will give a maximum cost of the training per Member States.

The costs of the training should be borne by the public administration. The cost of the training is calculated on the basis of a 3-day-training to receive the certificate. As the training is offered regionally, no travel or hotel costs would be incurred. The cost will be incurred under a number of years.

The cost for trainers is the standards cost of €100 / h. Assuming that the training last 24 h, and takes place in small groups of 10 persons, the cost of training per defence lawyer is €240 (24X100/10).

We have not calculated any loss of income as the training is a part of a lawyer's tasks.

Table 21 – Cost of training of legal aid providers

EU jurisdiction	Total number of lawyers in the country (A)	Number of lawyers to train based on 10 % of all lawyers being trained (B)	Cost of training Bx€240
Austria	7,510	751	180,240
Belgium	16,517	1,652	396,480
Bulgaria	11,825	1,183	283,920
Croatia	4,133	413	99,120
Cyprus	2,855	286	68,640
Czech Republic	10,158	1,026	246,240
Estonia	788	79	18,960
Finland	1,893	189	45,360
France	51,758	5179	1,242,960
Germany	155,679	15,568	3,736,320
Greece	41,794	4,179	1,002,960
Hungary	12,099	1201	288,240

¹⁶⁶ This is the number of lawyer that are members of the Deutsch Anwaltsverein's Criminal Lawyer section. The number of Fachanwälte is slightly lower.

Ireland	8,625	863	207,120
Italy	211,962	21,196	5,087,040
Latvia	1,360	136	184,960
Lithuania	1,660	166	39,840
Luxembourg	1,903	190	45,600
Malta	1,600	160	38,400
Netherlands	16,728	1673	401,520
Poland	29,469	2947	707,280
Portugal	27,591	2759	662,160
Romania	20,620	2062	494,800
Slovakia	4,546	455	109,200
Slovenia	1,294	129	30,960
Spain	125,208	12,521	3,005,040
Sweden	5,000	500	120,000
UK	175,860	17,586	4,220,640
Total			22,964,000

The initial cost of setting up such a system would therefore stand at a maximum of €23 million, but that is provided that the MS currently do not provide for such training, which is the case in a number of MS (e.g. UK, NL, FR) but we have no exact figures on this.

This cost would be distributed over a number of years, and in the case the initial training action runs for 5 years, the EU wide cost would be maximum €4,6 million a year for 5 years.

6 Member States already have training schemes in place (ES, UK, IT, NL, PL, SE) but as it is difficult to assess to what extent those schemes address the need to prepare lawyers for accreditation, costs have still been calculated for these member States, but it is possibly that they will be considerable lower than stated.

The continuous professional training for defence lawyers will only arise after the training and would amount to 1 day to update the knowledge and share good practices. This would amount to ca 8 million/year in the whole EU if 10 % of the lawyers are trained.

Accreditation and monitoring

Accreditation schemes can vary depending on how the member States chose to implement the option. Here costing are based on the basis that a single organisation carries out accreditation, for example the legal aid board or the bar association. It will be left to the Member State to decide how to manage and maintain system of qualification and accreditation.

The monitoring of the legal

The accreditation scheme and a monitoring scheme, leaving the choice to the Member State how it should in practice look like would in addition to the costs detailed above, involve an estimated two full time employees (FTE), either from the Ministry of Justice, or if the Member State so prefers from the legal aid board or the bar association.

Based on the cost of the wage of an employee in the “business service” sector, the table below provides the costs of 2 FTE in each of the MS.

Table 22 - Cost of ensuring accreditation and monitoring

	Cost of FTE	Cost of 2 FTE
Belgium	43,423	86,846
Bulgaria	4,058	8,116
Czech Republic	19,080	38,160
Germany	28,858	57,716
Estonia	9,712	19,424
Ireland	30,766	61,532
Greece	18,841	37,682
Spain	24,403	48,806
France	34,132	68,264
Italy	23,850	47,700
Cyprus	25,251	50,502
Latvia	8,213	16,426
Lithuania	15,741	31,482
Luxembourg	49,316	98,632
Hungary	15,741	31,482
Malta	20,272	40,544
Netherlands	44,810	89,620
Austria	41,123	82,246
Poland	15,264	30,528
Portugal	18,364	36,728
Romania	5,420	10,840
Slovenia	20,034	40,068
Slovakia	10,691	21,382
Finland	27,189	54,378
Sweden	39,205	78,410
United Kingdom	38,925	77,850
Croatia	14,548	29,096
		1,294,460

Source: Eurostat

However, it should be noted that a number of Member States have training schemes in place so the costs would be lower than those provided.

Conclusion

Training of defence lawyers: Maximum cost of €4,6 million a year for 5 years.

Continuous professional training: 7,5 million euros

Accreditation and monitoring: €1,294,460 EU wide/year

Total cost policy option 3/year:

€4.6 million (training) + €1,3 million (accreditation and monitoring)+7,5 million (professional training)=**13.4 million**

Option 4

Same as option 3.

ANNEX V

Comparative table on costs per Member State: Options 3 and 4

EU jurisdiction	Cost of emergency defence for all persons		Eligibility criteria for legal aid		Legal Aid in EAW proceedings		Quality control (training, accreditation, and monitoring)		Total cost per year	
	Option 3 ¹⁶⁷	Option 4 ¹⁶⁸	Option 3	Option 4	Option 3	Option 4	Option 3	Option 4	Option 3	Option 4
Austria	-	1,839,619-1,528,805	0 - 2,573,347	23,262,099	2,513 - 3,544	21,920	118,294	118,294	120,807-2,695,185	25,241,932-24,931,118
Belgium	-	2,998,552	-	17,729,845	3,124-3,124	20,254	166,142	166,142	169,266	20,914,793
Bulgaria	-	486,766	-	3,142,112	1,398 ¹⁶⁹	5000	64,900	64,900	66,298	3,698,778
Croatia	-	1,029,391-1,043,122	29,210 - 102,878	618,551	-	-	48,920	48,920	78,130-151,798	1,696,862-1,710,593
Cyprus	1,616,339-1,645,818	2,554,872-2,598,555	592,814 - 905,913	2,743,686	110 - 149	787	64,230	64,230	2,273,493-2,616,111	5,363,575-5,407,258
Czech Republic	-	739,736	-	-	1,794-2,392	11,948	87,408	87,408	89,202-89,800	839,092

¹⁶⁷ Cost of emergency legal aid for persons deprived of liberty, taking into account the recovery of emergency legal aid and the savings linked to the fall in pre-trial detentions under 15% and 20% scenario when 25% of the cost is recovered.

¹⁶⁸ Cost of emergency defence for everyone interviewed at police station, minus the recovery of legal aid from suspects where it is found that they do not qualify for legal aid in the subsequent eligibility testing. The recovery of emergency legal aid cost is calculated assuming that only 25% of emergency legal aid cases that do not qualify for legal aid will ultimately be recovered, on the basis of 15% or 20% of cases receiving legal aid.

EU jurisdiction	Cost of emergency defence for all persons		Eligibility criteria for legal aid		Legal Aid in EAW proceedings		Quality control (training, accreditation, and monitoring)		Total cost per year	
	Option 3	Option 4	Option 3	Option 4	Option 3	Option 4	Option 3	Option 4	Option 3	Option 4
Estonia	1,097,426-1,097,426	1,949,341			1,572-1,572	3,392	23,216	23,216	1,122,214	1,975,949
Finland	1,423,445-1,423,445	3,231,467	-	-	8,606	15,440	63,450	63,450	1,495,501	3,310,357
France	-	34,415,705	-	-	14,606	70,179	316,856	316,856	331,462	34,802,740
Germany	50,218,785-50,239,700	86,025,858-80,309,224	-	169,000,000	23,048	238,764	804,980	804,980	51,046,813-51,067,728	256,069,602-250,352,968
Greece	3,156,576-3,156,576	6,608,156	-	2,113,983	839	7,134	238,274	238,274	3,395,689	8,967,547
Hungary	4,083,971-4,190,542	7,826,421-7,992,319	37,074,727-49,517,864	139,108,452	8,602 - 11,470	57,471	89,130	89,130	41,256,430-53,809,006	147,081,474-147,247,372
Ireland	-	3,527,331	-	-	1,970	4,019	102,956	102,956	104,926	3,634,306
Italy	8,000,000	36,832,263-37,515,960	116,670,756-184,593,799	673,639,712	3,850 - 5133	9,956	1,065,108	1,065,108	125,883,278-194,159,985	711,547,039-712,230,736
Latvia	-	245,931-249,211	117,327 - 413,225	1,300,918	2,649 - 3,532	17,646	53,418	53,418	173,394-470,175	1,617,913-1,621,193

EU jurisdiction	Cost of emergency defence for all persons		Eligibility criteria for legal aid		Legal Aid in EAW proceedings		Quality control (training, accreditation, and monitoring)		Total cost per year	
	Option 3	Option 4	Option 3	Option 4	Option 3	Option 4	Option 3	Option 4	Option 3	Option 4
Lithuania	-	615,546	-	-	2,349	7,658	39,450	39,450	41,799	662,654
Luxembourg	-	256,831	-	327,369	504	2,573	107,752	107,752	108,256	694,525
Malta	-	160,566-162,707	10,816-38,095	119,930	55-73	367	48,224	48,224	59,095-86,392	329,087-331,228
Netherlands	-	8,599,677-8,714,381	6,930,074-24,407,654	150,246,231	3,458-4,61	23,013	169,924	169,924	7,103,456-24,582,189	159,038,845-159,153,549
Poland	8,756,975-8,966,180	15,620,590-15,921,343	2,957,786-10,417,292	47,714,826	14,186-18,914	94,478	171,984	171,984	11,900,931-19,574,370	63,601,878-63,902,631
Portugal	2,158,560-2,158,560	4,192,664	-	-	6,854	9,436	169,160	169,160	2,334,574	4,371,260
Romania	-	1,298,693-1,079,959	0-1,997,704	19,067,625	10,351-13,395.20	66,906	109,800	109,800	120,151-2,120,899.2	20,543,024-20,324,290
Slovakia	-	254,283-257,675	172,776-608,516	-	2,758.60-2,503	12,499	43,222	43,222	218,756.6-654,241	310,004-313,396

EU jurisdiction	Cost of emergency defence for all persons		Eligibility criteria for legal aid		Legal Aid in EAW proceedings		Quality control (training, accreditation, and monitoring)		Total cost per year	
	Option 3	Option 4	Option 3	Option 4	Option 3	Option 4	Option 3	Option 4	Option 3	Option 4
Slovenia	2,335,913- 2,375,520	3,592,551- 3,651,715	7,361,014 -	12,832,905	272.60 - 279	1,394	46,260	46,260	9,743,459.6- 12,519,018	16,473,110- 16,532,274
Spain	-	3,960,759	-	-	11,345	49,076	649,814	649,814	661,159	4,659,649
Sweden	-	2,067,549	-	-	5,537-5,537	10,739	102,410	102,410	107,947	2,180,698
UK	-	59,277,476 - 59,352,832	-	102,160,863	14,079- 14,079	45,318	921,978	921,978	936,057	162,405,635- 162,480,991
Total Costs per Action	82,991,554 83,749,712	290,208,594 -	171,917,300 -	1,365,129,107	146,430.20 161,828.20	807,367	5,887,260	5,887,260 0	266,942,544 381,472,046	1,662,032,328 -1,657,251,945

ANNEX VI

Legal Aid Spending in the Member States and % of suspected/accused persons entitled to legal aid

Member States	Number of criminal cases (I)	Number of criminal legal aid cases (II)	Total amount spent on Legal Aid for criminal proceedings (III)	Average spent per case on criminal LA (IV)	Share of criminal cases receiving legal aid (IV = II/I)	Merits test, Means test or Means and Merits test
Austria	60,726 ^(d)	9,426 ^(c)	8,920,405 *	946 ^(c)	16%	Means and Merits test
Belgium	189,716 *	38,715*	14,711,665 *	380 *	20%	Means test
Bulgaria	118,262 ^(d)	32,800 ^(d)	3,094,184 ^(d)	94 ^(b)	28%	Means and Merits test
Croatia	116,214 ^(d)	15,128*	191,793*	13*	13%	Means test
Cyprus	117,495 ^(d)	4.347 *	194,090 *	45 ^(c)	4%	Means and Merits test
Czech Republic	97,675 ^(d)	19,932*	21,474,461	810 ^(a)	20%	Means test
Estonia	48,359 ^(a)	n/a	2,491,687*	n/a	67%	Neither a Means test, nor a Merits test
Finland	59,683 ^(c)	33,252 ^(c)	28,167,147 *	847 ^(f)	56%	Means and Merits test
France	1,061,097 ^(d)	394,120 ^(d)	119,010,621	302 ^(b)	37%	Means test
Germany	1,181,995 ^(d)	235,010 *	85,822,785	365 *	20%	Merits test
Greece	195,929*	39,983	1,212,012*	30	20%	Means and Merits test
Hungary	269,691 ^(d)	276 ^(d)	254,684 *	923 ^(c)	0.1%	Means and Merits test

Ireland	77,625 *	55,412 ^(d)	54,967,000 ^(d)	992 ^(a)	71%	Means and Merits test
Italy	1,607,646 ^(e)	103,075 ^(d)	87,080,432 ^(d)	845 ^(b)	6%	Means and Merits test
Latvia	9,959 ^(d)	1,296 *	770,366	594 ^(a)	13%	Means test
Lithuania	81,277 ^(e)	34,302 ^(d)	3,263,613 *	95 ^(c)	42%	Means test
Luxembourg	14,579 ^(d)	2,975 *	1,454,414 *	489 *	20%	Means test
Malta	19,613 ^(d)	2,553 *	71,019 *	28 *	13%	Means test
Netherlands	441,911 ^(e)	57,525 *	102,000,000 ^(d)	791 ^(b)	13%	Means and Merits test
Poland	1,111,772 ^(e)	144,724 *	19,420,734 *	134 *	13%	Means test
Portugal	115,466 ^(e)	85,672 *	25,035,920 *	292 *	74%	Means test
Romania	171,480 ^(e)	27,071 *	7,485,586 ^(d)	277 ^(b)	15%	Means and Merits test
Slovakia	41,189 ^(d)	5,362 *	1,134,444 *	212 *	13%	Means test
Slovenia	90,205 ^(d)	1,396 ^(d)	2,828,514, *	607 ^(c)	2%	Means test
Spain	1,336,505 ^(d)	383,000 ^(d)	107,750,629 *	281 ^(a)	29%	Means test
Sweden	91,000 ^(e)	53,690 ^(e)	130,470,000	2,430 ^(c)	59%	Merits test
UK †	1,096,664	580,854	1,416,720,690	3,070	53%	Means and Merits test
Denmark¹⁷⁰						
Total	9,823,733	2,357,553	2,245,998,895			

¹⁷⁰ Denmark benefits from special arrangements, which include all the measures adopted under the framework of the area of freedom, security and justice. This country has decided not to participate in the legislative procedures in this field. The impacts on DK have consequently not been measured.

- (a) Legal aid expenditure on criminal proceedings (CEPEJ), number of criminal legal aid cases (extrapolation);
- (b) Legal aid expenditure on criminal proceedings (CEPEJ), number of criminal legal aid cases (CEPEJ);
- (c) Legal aid expenditure on criminal proceedings (extrapolation), number of criminal legal aid cases (CEPEJ);
- (d) CEPEJ / Eurocrime Statistics;
- (e) figures provided by the MoJ
- (f) Legal aid expenditure on criminal proceedings (extrapolation), number of criminal legal aid cases (MoJ)

*- extrapolation; † UK figures are divided between England & Wales and Scotland, with figures from E&W provided by CEPEJ and Euro Crime Statistics and Scotland, the result of extrapolations.

ANNEX VII
Current standards on eligibility testing in the Member States

The vast majority of jurisdictions have a **means test**. From the information presented in the country fiches, it appears that:

In **12 Member States (BE, CZ, ES, FR, LT, LU, LV, MT, PL, PT, SI, SK) and Croatia**, the right to legal aid is **solely determined by a means test**. However, in some of the countries there is no means test at the initial stages of a criminal procedure (mainly those at the police station) for example in E&W as well as the NL and FR.

In eleven Member States (**AT, BG, CY, EL, FI, HU, IE, IT, NL, RO, UK**), the right to legal aid is determined by **both a means and a merits test** at some, but not necessarily all, procedural stages. A further variation is that in some Member States, for example, in the Netherlands, there is no requirement to satisfy a means test for certain categories of crimes.

In **three jurisdictions (DE, DK, SE)**, there is **only a merits and no means test**.

Finally, in **Estonia**, there is **neither a means nor a merits test**. However, here legal aid is not available during the pre-trial investigation stage except for certain categories of suspects. As well as vulnerable suspects these include those suspected of crimes punishable by life imprisonment, those who have been in pre-trial detention for at least 6 months, and those involved in expedited procedure¹⁷¹. To this extent, therefore, an 'interests of justice' test of sorts is used. Although no merits or means test is needed to qualify for legal aid at trial in the form of mandatory defence counsel if the accused is found guilty, he or she is liable to repay the cost of his or her legal defence.

Means testing

Of the countries which have a means test the number of population that theoretically fulfil the means test is the following :

Share on the population entitled to legal aid under means test
• Less than 10% of the population satisfies the means test for legal aid in Belgium and Luxembourg ;
• Between 10% and 20% of the population satisfies the means test for legal aid in Greece* and Lithuania ;
• Between 10% and 40% of the population satisfies the means test for legal aid in France ;
• Between 20% and 30% of the population satisfies the means test for legal aid in Italy and Finland* ;
• Between 30% and 40% of the population satisfies the means test for legal aid in Croatia, Malta, Scotland and Slovakia ;
• Between 40% and 50% of the population satisfies the means test for legal aid in England and Wales* ;
• Between 50% and 60% of the population satisfies the means test for legal aid in Ireland , the

¹⁷¹ However, the Estonian Bar Association informed us that in practice legal aid is granted immediately before a detained suspect is questioned for the first time by the police.

Netherlands* and **Portugal**;

- Between 60% and 70% of the population satisfies the means test for legal aid in **Cyprus*** and **Hungary***;
- Between 70% and 80% of the population satisfies the means test for legal aid in **Spain**; and
- Over 90% of the population satisfies the means test for legal aid in **Slovenia**.

Average wages and legal aid threshold in the Member States (Euros)

Member state	Average (net) wage - annual (€)	Income threshold to receive Legal Aid (€)	Legal aid threshold as a share of the average wage
Austria	25,349.63	N/A	N/A
Belgium	26,540.91	10,320	39%
Bulgaria	2,275.63	N/A	N/A
Croatia	8,717	4,294	49%
Cyprus	15,439.00	20,000	130%
Czech Republic	7,914.69	N/A	N/A
Denmark	17,845	N/A	N/A
England & Wales	21,354.13	15,813	74%
Estonia	6,663.55	N/A	N/A
Finland	25,385.06	15,600	61%
France	21,926.16	11,160	51%
Germany	26,252.91	N/A	N/A
Greece	10,110.60	5,920	59%
Hungary	6,034.92	4,752	79%
Ireland	17,816.51	20,316	114%
Italy	19,171.74	10,628	55%
Latvia	5,095.70	N/A	N/A
Lithuania	4,439.13	1,854	42%
Luxembourg	28,016.00	15,396	55%
Malta	9,651.90	8,160	85%
Netherlands	24,969.61	20,661	83%
Poland	5,370.04	N/A	N/A
Portugal	10,882.88	9,336	86%
Romania	3,567.16	N/A	N/A
Scotland	21,354.13	14,501	68%
Slovakia	6,094.20	5,494	90%
Slovenia	9,908.23	18,313	185%

Spain	16,382.09	17,952	110%
Sweden	27,319.80	N/A	N/A

Source: CSES research, Eurostat

Share of the population satisfying the means test for legal aid currently¹⁷²

	Less than 10%	10%-20%	20%-30%	30%-40%	40%-50%	50%-60%	60%-70%	70%-80%	80%-90%	Over 90%
<i>Belgium</i>	x									
<i>Luxembourg</i>	x									
<i>France*</i>		x	x	x						
<i>Greece</i>		x								
<i>Lithuania</i>		x								
<i>Finland</i>		x	X							
<i>Italy</i>			X							
<i>Croatia</i>				X						
<i>Malta</i>				X						
<i>Scotland</i>				X						
<i>Slovakia</i>				X						
<i>E & W</i>					X					
<i>Ireland</i>						X				
<i>Netherlands</i>						X				
<i>Portugal</i>						X				
<i>Cyprus</i>							x			
<i>Hungary</i>							x			
<i>Spain</i>								x		
<i>Slovenia</i>										x
<i>Austria</i>	<i>No information</i>									
<i>Bulgaria</i>	No set threshold (case by case decision)									
<i>Czech Republic</i>	No set threshold									
<i>Latvia</i>	No set threshold									
<i>Romania</i>	No set threshold									
<i>Denmark</i>	NO MEANS TESTS									
<i>Estonia</i>	NO MEANS TESTS									
<i>Germany</i>	NO MEANS TESTS									
<i>Sweden</i>	NO MEANS TESTS									

Merits testing

Potential custodial sentences¹⁷³ and the merits test

Member State	Merits test in relation to the suspected crime – where it is punishable by -
<i>Denmark</i>	Imprisonment
<i>England & Wales</i>	Imprisonment
<i>Ireland</i>	Imprisonment

¹⁷² This table above provides an indication of the share on the population entitled to legal aid. It should be noted that this is based on the information collected during the field research phase of the CSES study; in some cases estimations were used and in the case of countries with partial legal aid, the lowest threshold has been used.

¹⁷³ Where the length of potential sentence is specified this figure shown is generally the minimum sentence.

<i>Netherlands</i>	Imprisonment
<i>Finland</i>	4 month imprisonment
<i>Scotland</i>	6 month imprisonment
<i>Sweden</i>	6 month imprisonment
<i>Cyprus</i>	1 year imprisonment
<i>Germany</i>	1 year imprisonment
<i>Austria</i>	3 years imprisonment
<i>Greece</i>	5 years imprisonment
<i>Hungary</i>	5 years imprisonment
<i>Romania</i>	5 years imprisonment
<i>Bulgaria</i>	10 years imprisonment
<i>Italy</i>	“certain crimes”

Source CSES research

ANNEX VIII
Moment at which the Right to Legal Aid arises

Time at which the right to legal aid first arises

- In **two** national jurisdictions (**E&W and SCOT**), the right to legal aid arises as early as when he is questioned by a police officer, not necessarily whilst at a police station (in the street, at home; hospital etc.) and without being detained.
- In a group of **seven** countries (**BE, CZ, HU, LT, LU, MT, SE**) this right arises prior to the suspect being first “asked questions”, generally at a police station (in some of these states this can be before any formal arrest or charge, for example when a person is giving the police information and answering questions voluntarily).
- In **four** countries, (**AT, BG, IE, SK, FR**), this right arises when the suspect is arrested or detained at a police station.
- In **two** countries, (**DK, LV**), this right arises following the first identification as a suspect or after a formal charge or accusation is made.
- For 10 Member States this right arises at the point of formal arrest or charge (e.g. before a court). This can be after deprivation of liberty and questioning has taken place. The Member States are: **CY, DE, EE, EL, ES, FI, IT, PL, PT, RO**.
- In Slovenia, this right arises at the pre-trial questioning before the court.

CPT Reports –examples of practical deficiencies with providing legal aid at early stages of proceedings

- **Austria:**

Under the current criminal legislation, an ex officio lawyer could only be appointed following a court decision, but that, in principle, it was possible for the State to cover, on a subsidiary basis, the costs of the services of a lawyer in the context of police custody if the person concerned was not in the position to pay for them (Ausfallshaftung). However, not one single police officer, let alone any of the detained persons met by the delegation, had been aware of such a possibility.”¹⁷⁴

“A new system of legal telephone counselling free of charge was introduced in mid-2008 (in co-operation with the Austrian Bar Association) through the hotline of the “RechtsanwaltschaftlicheJournaldienst”. However, it is regrettable that many police officers outside Vienna appeared to have received no information and guidance on how to make use of the above-mentioned telephone counselling service. Not surprisingly, in several police establishments visited, not one single detained person had ever availed him/herself of this possibility. According to the Austrian Bar Association, on average, a mere two such calls had been registered per day in the entire country since the introduction of the hotline.

Further, the specific information sheet on the legal counselling by the Bar Association, which has been elaborated by the Federal Ministry of Justice, explicitly states that only

¹⁷⁴ CPT, 2010. Report to the Austrian Government on the Visit of Austria carried out by the CPT, p. 16-17. Available from: <http://www.cpt.coe.int/documents/aut/2010-05-inf-eng.pdf> [Accessed 30 May 2012]

initial counselling via the telephone is free of charge. Many of those detained persons who had been informed of the existence of the above-mentioned hotline declined to call a lawyer, since they did not have the means to pay for the lawyer to be present during police questioning.

- **Denmark:** “Some detained persons were dissuaded by police officers from exercising their right to a lawyer as a result of the high legal costs associated with it.”¹⁷⁵
- **Greece:** “The CPT recommended in its 2009 report that the Greek authorities engage with the Greek Bar Association, in order to extend access to legal aid scheme to the stage of police investigation, which is apparently at present not covered.”¹⁷⁶
- **Latvia:** “Despite the recent introduction of a scheme to ensure that persons who cannot afford legal representation are offered free legal aid, ‘a number of allegations were received that ex officio lawyers [appointed by this scheme] had had no contact with the detained persons until the first court hearing’.”¹⁷⁷
- **Poland:** “Persons in police custody who were not in a position to pay for legal services were effectively deprived of the right of access to a lawyer.”¹⁷⁸
- **Slovak Republic:** “In case of lack of financial means, a lawyer is appointed ex officio. However, the majority of persons interviewed by the CPT’s delegation claimed to have been informed of their right to a lawyer only at the time of the first court hearing, when an ex officio counsel was appointed. In very few cases did detained persons have an opportunity to consult a lawyer from the outset of their police detention, let alone request that the lawyer be present during the interrogation or initial questioning.”¹⁷⁹
- **Slovenia:** “According to Section 4 (4) of the CCP, when a suspect is not able to pay for a lawyer, the police should ensure, if the person so requests, that an ex officio lawyer is appointed if this is in the interests of justice. It appeared in the course of the 2006 visit that indigent persons in police custody generally did not benefit from access to a lawyer before being brought to a judge. The CPT would like to stress that, for as long as there is not an effective system of free legal aid for indigent persons at the stage of police custody, any right of access to a lawyer will remain, in most cases, purely theoretical.”¹⁸⁰

¹⁷⁵CPT, 2008. Report to the Danish Government on the Visit to Denmark carried out by the CPT, p. 15. Available from: <http://www.cpt.coe.int/documents/dnk/2008-26-inf-eng.pdf> [Accessed 30 May 2012]

¹⁷⁶CPT, 2012. Report to the Greek Government on the Visit to Greece carried out by the CPT, p. 42. Available from: <http://www.cpt.coe.int/documents/grc/2012-01-inf-eng.pdf> [Accessed 30 May 2012]

¹⁷⁷CPT, 2009. Report to the Latvian Government on the Visit to Latvia carried out by the CPT, p. 16. Available from: <http://www.cpt.coe.int/documents/lva/2009-35-inf-eng.pdf> [Accessed 31 May 2012]

¹⁷⁸CPT, 2011. Report to the Polish Government on the Visit to Poland carried out by the CPT, p. 17. Available from: <http://www.cpt.coe.int/documents/pol/2011-20-inf-eng.pdf> [Accessed 31 May 2012]

¹⁷⁹CPT, 2010. Report to the Government of the Slovak Republic on the Visit to the Slovak Republic carried out by the CPT, p. 18. Available from: <http://www.cpt.coe.int/documents/pol/2011-20-inf-eng.pdf> [Accessed 31 May 2012]

¹⁸⁰CPT, 2008. Report to the Slovenian Government on the Visit to Slovenia carried out by the CPT, p. 15. Available from: <http://www.cpt.coe.int/documents/pol/2011-20-inf-eng.pdf> [Accessed 31 May 2012]

ANNEX IX

Examples of when lack of mutual trust can hinder judicial cooperation

- The subject matter of a number of the recent **preliminary references from national courts to the European Court Justice (ECJ) on the Framework Decision on the European arrest warrant**¹⁸¹ (FD-EAW) are illustrative of the continuing gaps in mutual trust between Member States that can be closed by EU common minimum standards of procedural rights as follows:
- In the recent *Radu* case¹⁸² (judgment on the 29 January 2013) the Romanian court of appeal demonstrated by the nature and breadth of its questions to the ECJ that they did not have the required levels of trust in the EAW system. The wide-ranging questions were about the compatibility of the arrest of a person and the execution of an EAW with fair trial rights and rights to liberty in the EU Charter of Fundamental Rights (the Charter) and in the European Convention on Human Rights (the ECHR) and about the adequacy and compatibility of transposition of the FD-EAW in both issuing and executing Member States. The Court ultimately interpreted the questions in a narrow manner and ruled that judicial authorities cannot refuse to execute an EAW on the ground that the requested person was not heard in the issuing Member State before that arrest warrant was issued. However the case illustrates that in very recent times judicial authorities are questioning the levels of procedural rights for suspects and accused persons in other Member States with the potential to lead to considerable delay in the ultimate decision on judicial cooperation.
- The questions raised by the Spanish constitutional court in the *Melloni* case¹⁸³ (judgment 26th February 2013) on the obligations of an executing judicial authority where there are different standards of protection in respect of In Absentia trials (despite this issue having been harmonised in respect of EAW cases in the Framework Decision on In Absentia judgments¹⁸⁴) shows a lack of trust in the standards of protection of the presumption of innocence that has the potential to delay judicial cooperation and did in this case. The ECJ concluded that the difference in the standard of protection between the issuing and the executing Member State was not a reason to refuse the surrender as long as certain minimum standards were respected. As a consequence, the person was surrendered, but only after a serious delay following several court proceedings.
- The issue of the application of the rule of speciality (which prohibits prosecution for prior offences other than those in the warrant) has been the subject of a very recent ECJ case *Jeremy F*¹⁸⁵ (judgment on 4 April 2013) and was also the subject of the case of *Leymann and Pustovarov*¹⁸⁶ (judgment on 1 December 2008). In the recent case of *Melvin West*¹⁸⁷ (judgment 28 June 2012) the issue raised was about consent to onward surrender to another Member State. In the case of **Advocaten voor de**

¹⁸¹ Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States OJ L190/1 18.07.2002

¹⁸² ECJ Case C-396/11

¹⁸³ Court of Justice of the European Union, (Grand Chamber), 26 February 2013, case C-399/11.

¹⁸⁴ Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/909/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial OJ L81/54 27.3.2009

¹⁸⁵ ECJ Case C-168/13

¹⁸⁶ ECJ Case C-388/08

¹⁸⁷ ECJ Case C-192/12

Wereld¹⁸⁸ (judgment of 3 May 2007) the ECJ was asked to consider the compatibility of the non-verification of dual criminality for listed offences with the principle of equality and non-discrimination. The fact that all of these issues continue to be raised at ECJ level indicates the distance we still have to travel in terms of achieving mutual trust. This is because the FD-EAW gave Member States a number of options, which were largely not availed of, to have a very high level of judicial cooperation. These included the possibility to dispense with the requirement of dual criminality altogether (Article 2.4) the possibility to waive the rule of speciality entirely in dealings with other Member State (Article 27.1) and the possibility not to require consent for onward surrender to another Member State (Article 28.1). Ensuring minimum standards of procedural rights will help to create the conditions for Member States to be happy to enhance cooperation by availing of these possibilities. The ECJ would no longer be required to deal with issues such as dual criminality, speciality and onward surrender as they would not arise where mutual trust is optimum.

- It is clear from the experience with the EAW that lack of mutual trust can result in complex and long-drawn out investigations into the systems of other MS because of procedural rights issues raised at first instance and on appeal. This creates delays that can ultimately prejudice the resolution of cases for all parties involved, despite the fact that in the vast majority of EAW cases the ultimate decision (unless an agreed refusal ground applies) is to surrender the person. A high-profile recent illustration of this scenario is the Swedish-UK case of **Mr. Julian Assange**¹⁸⁹ whose surrender was ultimately confirmed by the UK Supreme Court in June 2012, a year and a half after his initial arrest in December 2010 in the UK pursuant to the EAW issued by Sweden. Mr. Assange raised wide-ranging issues including the legitimacy of the authority that issued the EAW, dual criminality, whether a decision to prosecute had been taken by the Swedish authorities and the proportionality of the request. The lack of common minimum standards of procedural rights can be exploited to lead to challenges that have the potential to considerably delay judicial co-operation.
- It is the case that in their implementation of the EAW FD, a number of Member States have chosen to go beyond the EAW-FD in providing for more stringent rules for surrender of their own citizens, indicating a level of mistrust that the procedural rights measures will help to address. One example is the case of **Klaas Karel Faber**, a former Member of the Waffen SS in the Netherlands, who was sought by the Netherlands from Germany pursuant to an EAW following his convicted to life imprisonment for murders. In 2011, a German court refused to surrender Faber to serve his sentence in the Netherlands on the grounds that his consent to surrender was required, thus adding an element that is not in the FD-EAW.
- The case of **Gary Mann**¹⁹⁰ shows the effect that a lack of EU minimum procedural safeguards can have on intra-EU judicial cooperation. The case relates to the execution of a Portuguese European arrest warrant by UK courts, for the surrender of Gary Mann, a British citizen, which took more than 14 months (the Framework Decision on

¹⁸⁸ ECJ Case C-303/05

¹⁸⁹ *Assange (Appellant) v The Swedish Prosecution Authority (Respondent)* [2011] UKSC 22 On appeal from [2012] EWHC Admin 2849, 30 May 2012, Supreme Court of the United Kingdom

¹⁹⁰ *R (Gary Mann) v City of Westminster Magistrates' Court & Anor* [2010] EWHC 48 (Admin), Garry Norman MANN against Portugal and the United Kingdom 1 February 2011, Application no. 360/10, European Court of Human Rights (Fourth Section).

the EAW provides for a sixty-day deadline) and involved five decisions by UK courts. The main issue raised was inadequate legal advice, since Mann and eleven other defendants were represented by only one lawyer. In addition, Mann was unable properly to instruct his lawyer due to the lack of time before the hearing. Following his arrest, trial and conviction that took place in less than 48 hours, he was finally sentenced to two years' imprisonment for his role in a riot at the Euro 2004 tournament. The case clearly shows that the execution of the EAW will happen much more swiftly if the executing judicial authority can be confident that there are minimum standards of procedural safeguards that are enforceable across the EU.

- The case of *Deborah Dark* shows that insufficient trust in the standards of protection of fair trial rights (lack of notification of the appeal, no legal representation during the appeal hearing and lack of information of the conviction, delay) may hinder effective judicial co-operation. In 1989 Deborah Dark was arrested in France on suspicion of drug related offenses but the court acquitted her of all charges. In 1990, she was convicted and sentenced to prison on appeal without herself or her French lawyer being notified. In 2005, an EAW was issued by the French authorities. In 2008 and 2009, Ms. Dark was arrested successively in Spain and in UK, and at the extradition hearing both of the national courts refused to extradite Ms. Dark to France. In May 2010, France finally agreed to remove the warrant. This case shows that there work remains to be done on minimum procedural rights to ensure the effective right of a suspect to fair trial and the essential confidence of judicial authorities in the systems of other Member States.
- The impact of concerns including those relating to the presumption of innocence in undermining mutual trust are illustrated by a recent English Appeal court case of *Sofia City Court v Diminrinka Atanasova-Kalaidzheiva of 2011*¹⁹¹. The UK courts refused to execute an EAW at first instance and on appeal on the basis that they had doubts that a fair trial was possible in this particular case and were not satisfied about the independence of the investigation and prosecution process in Bulgaria. Judicial authorities must be confident that the key right to be presumed innocent that underpins a fair trial is guaranteed.

¹⁹¹ *Sofia City Court v Diminrinka Atanasova-Kalaidzheiva*, 9 September 2011, EWHC 2335 -