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COM(2013) 824

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**

{SWD(2013) 476}

{SWD(2013) 477}

## EXPLANATORY MEMORANDUM

### **1. CONTEXT OF THE PROPOSAL**

1. This proposal for a Directive of the European Parliament and the Council aims to set common minimum standards on the right to provisional legal aid for suspects or accused persons in criminal proceedings when they are deprived of liberty and for provisional legal aid and legal aid for persons subject to proceedings pursuant to Framework Decision 2002/584/JHA on the European arrest warrant ("requested persons").
2. The Stockholm Programme<sup>1</sup> 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 proposals 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 measures deal with distinct procedural rights for suspects or accused persons which have been identified by Member States and stakeholders alike as needing to be strengthened by action at EU level, and thus have to be considered as a building-block for a whole edifice.
3. Three measures have already been adopted: a Directive 2010/64/EU of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings<sup>2</sup> in October 2010 and Directive 2012/13/EU of the European Parliament and of the Council on the right to information in criminal proceedings in May 2012<sup>3</sup>, 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 consular authorities while deprived of liberty in October 2013.<sup>4</sup> Measures on the protection of vulnerable persons suspected or accused in criminal proceedings are presented as a package with the present initiative, together with a Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, which form part of the underlying principles of the right of fair trial.
4. Similarly to the previous measures, this proposal seeks to improve the rights of suspects or accused persons in criminal proceedings. Having common minimum standards governing these rights should boost mutual trust between judicial authorities and thus facilitate the application of the principle of mutual recognition. A certain degree of compatibility between the legislation of Member States is pivotal to improve judicial cooperation in the EU.
5. The proposal is based on Article 82(2) of the Treaty on the Functioning of the European Union (TFEU). That Article provides that, '[t]o the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and

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<sup>1</sup> OJ C 115, 4.5.2010, p. 1.

<sup>2</sup> Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings (OJ L 280, 26.10.2010, p. 1).

<sup>3</sup> Directive 2012/13/EU on the right to information in criminal proceedings (OJ L 142, 1.6.2012, p. 1).

<sup>4</sup> Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ L 294, 6.11.2013, p. 1).

judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.

*They shall concern:*

*(a) mutual admissibility of evidence between Member States;*

*(b) the rights of individuals in criminal procedure;*

*(c) the rights of victims of crime;*

*(d)(...)'.*

6. The current proposal is closely linked to Directive 2013/48/EU on the right of access to a lawyer and it aims to contributing to rendering effective the right on access to a lawyer provided for in that Directive at the early stages of the proceedings for suspects or accused persons deprived of liberty and to ensure that requested persons in European arrest warrant proceedings have access to legal aid to ensure the right of access to a lawyer in both the executing and issuing Member State ("right of dual defence").
7. The Commission is presenting a balanced package of measures, respecting the differences between the legal traditions and systems of the Member States, as provided for in Article 82 (2) TFEU and taking the action needed to foster mutual trust while respecting the principle of proportionality (Article 5 TEU). It has been carefully assessed if action should be taken at EU level, and if so, at what level and in what form. The need for caution is particularly obvious in times of fiscal consolidation, when cost implications need to be carefully weighed.
8. The aspects on legal aid in criminal proceedings dealt with in this Directive have been identified as of particular importance to complement and ensure the effectiveness of the rights in the Directive on access to a lawyer and to improve mutual trust between criminal justice systems.
9. The right to legal aid in criminal proceedings is enshrined in Article 47(3) of the Charter and in Article 6(3)(c) ECHR. It is also recognised in Article 14, paragraph 3 (d) of the ICCPR. The fundamental principles on which a legal aid system should be based are outlined in the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems adopted on 20 December 2012 by the General Assembly.
10. It is in the early phase of the proceedings, especially if deprived of liberty, that suspects or accused persons will be the most vulnerable and most in need of legal aid to be assisted by a lawyer. Therefore, the Directive makes provisions for so-called "provisional legal aid" which brings significant added value and improved mutual trust between criminal justice systems.<sup>5</sup>
11. Moreover, while all Member States provide access to legal aid for suspects and accused persons in criminal proceedings, it appears that requested persons in European Arrest Warrant proceedings do not always have access to legal aid in the Member States. This hampers the exercise of the right provided for in the Directive

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<sup>5</sup> Early intervention may also help to reduce pre-trial detention (in France and Belgium the pre-trial detention rates fell by respectively 30% and 20% after introducing similar schemes).

on access to a lawyer, i.e. access to a lawyer in both the executing and issuing Member State. Moreover, the rights in Article 6 ECHR, including the right to legal aid, do not extend to extradition proceedings. Therefore, in order to improve mutual trust and make the right to dual defence in European arrest warrant proceedings effective, the Directive also requires Member States to give access to legal aid, beyond provisional legal aid as the requested persons are not always deprived of liberty.

12. This measure is presented together with an accompanying Commission Recommendation on the right to legal aid for suspects or accused persons in criminal proceedings. The Recommendation seeks to foster certain convergence as regards the assessment of eligibility of legal aid in the Member States, as well as encouraging the Member States to take action to improve the quality and effectiveness of legal aid services and administration.
13. The current proposal will also contribute to strengthening the legal safeguards that protect individuals involved in proceedings conducted by the European Public Prosecutor's Office. The recently presented Proposal for a Council Regulation<sup>6</sup> clarifies that the suspected person has all rights granted by EU legislation as well as other rights which derive directly from the Charter of the Fundamental Rights of the European Union, to be applied in accordance with applicable national law. It explicitly refers to the right to legal aid and by introducing strengthened standards on legal aid, the current proposal also reinforces the procedural safeguards applying in proceedings conducted by the European Public Prosecutor's Office.
14. 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. benefitting 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 defence 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.

## **2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS**

15. In March 2009, a 2-days-expert meeting on procedural rights, including the right to legal aid was organised. In a meeting on 3 June 2013, all concerned 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.<sup>7</sup> The European Parliament, in its orientation vote on the Directive

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<sup>6</sup> Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM (2013) 534 final; 17.7.2013.

<sup>7</sup> 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*

on Access to a Lawyer of 12 July 2012, called on the Commission to come up with a proposal on legal aid.

16. 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.
17. Stakeholders were consulted on several occasions. The Commission has had regular and bilateral contacts with a number of NGOs and other stakeholders and several of the NGO's shared contributions with the Commission in view of the forthcoming measures.<sup>8</sup>
18. In the context of the study for the Impact Assessment, wide outreach with Member States' Ministries of Justice, interest organisations in the Member States, Bar Associations and legal aid boards was made. In-depth interviews were carried out with lawyers in the bar associations, representatives from stakeholder organisations and Ministries of Justices in all Member States. 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. In addition, an on-line consultation for legal aid providers in the Member States was carried out.
19. The Commission carried out an impact assessment to underpin its proposal. The report on the impact assessment is available at <http://ec.europa.eu/governance>.

### **3. LEGAL ELEMENTS OF THE PROPOSAL**

#### **Article 1 – Subject-matter**

20. The objective of the Directive is to ensure that suspects or accused persons in criminal proceedings who are deprived of liberty and persons subject to European arrest warrant proceedings have access to legal aid to render effective their right of access to a lawyer as provided for in the Directive on the right of access to a lawyer.

#### **Article 2 – Scope**

21. The Directive applies to suspects or accused persons who are deprived of liberty. It applies from the deprivation of liberty, i.e. as from the moment one is taken into police custody or similar custody, which also covers periods before formal charge and arrest has taken place. This reflects ECtHR jurisprudence under Article 5(1) ECHR.
22. The Directive also applies to requested persons in European arrest warrant proceedings. In such situations, the Directive applies from the time of arrest in the executing Member State until the surrender, or, in cases of non-surrender, until the decision on surrender has become final.

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*route visant à renforcer les droits procéduraux des suspects et des personnes poursuivies dans le cadre des procédures pénales."*

<sup>8</sup> See e.g. "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, ECBA Cornerstones on Legal Aid, May 2013, CCBE Recommendations on Legal Aid.

### Article 3 Definitions

23. Legal aid means funding and assistance from the Member State ensuring the effective use of the right of access to a lawyer. It should cover the costs of the defence, such as the cost of the lawyer, and other costs of the proceedings, such as court fees.
24. Provisional legal aid means legal aid to a person deprived of liberty until the decision on legal aid has been taken.

### Article 4 – Access to provisional legal aid

25. At the early stages of the proceedings, suspects or accused persons are particularly vulnerable and access to a lawyer is of paramount importance to protect the fair trial rights, *inter alia* the right to not incriminate oneself.<sup>9</sup> Article 6 of the ECHR requires that, as a rule, a suspect should be granted access to legal assistance from the moment he is taken into police custody or pre-trial detention, and that such assistance should be assigned officially if need be.<sup>10</sup>
26. Under the Directive on access to a lawyer, suspects or accused persons have a right to access to a lawyer *inter alia* without delay after deprivation of liberty and before any questioning. In order for suspects or accused persons who are deprived of liberty to be in a position to effectively exercise the right of access to a lawyer at the early stages of the proceedings, they should not have to wait for access to a lawyer pending the processing of the application for legal aid and the assessment of the eligibility criteria for legal aid, which could be lengthy. Member States should, therefore, ensure that access to provisional legal aid is available without delay after deprivation of liberty and before any questioning takes place.
27. To this effect, Member States should set in place procedures or mechanisms, for example duty lawyer schemes or emergency defence services, allowing intervention with short notice at police stations or detention centres, so that the right to provisional legal aid and access to a lawyer without undue delay after deprivation of liberty and before any questioning becomes practicable and effective.
28. The right of access to a lawyer entails a number of rights for suspects or accused persons, as provided for in Article 3(3) of Directive 2013/48/EU on the right of access to a lawyer, such as the right to meet in private and communicate with the lawyer, the right to have the lawyer present and participate effectively when the suspect or accused person is questioned, and the right for the lawyer to assist to certain evidence-gathering acts. Member States may make practical arrangements regarding the exercise of the right of access to a lawyer e.g. as regards the duration and frequency of communication with the lawyer and there can thus be certain limits to the exercise of that right, provided they do not prejudice the essence of the right. The right to provisional legal aid must be provided to the extent necessary to allow for the effective exercise of the right of access to a lawyer and any limitation must ensure that suspects or accused persons are not prevented from exercising effectively their rights.
29. The right to provisional legal aid should last at least until the competent authority has made the final decision on whether the suspect or accused person is eligible and benefits from legal aid. In case the application for legal aid is fully or partially

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<sup>9</sup> *Salduz v. Turkey*, ECtHR, Grand Chamber, Judgment of 27 November 2008.

<sup>10</sup> *Dayanan v. Turkey* Application No. 7377/03, judgment of 13 October 2009, paras 30-32.

rejected, the right to provisional legal aid ceases when this decision has become final and the rights to appeal or review have been exhausted. If the application for legal aid is granted, the right to provisional legal aid ceases when the legal aid has taken effect and, if applicable, the appointment of the legal aid lawyer has taken effect. In such cases, Member States shall ensure that there is no gap where the suspect or accused person is unrepresented.

30. The right to provisional legal aid also applies to requested persons in European arrest warrant proceedings who are deprived of liberty. Such persons should have the right to effective provisional legal aid from the time of deprivation of liberty in the executing Member State, and at least until the competent authority has treated the application for legal aid and determined the eligibility and, if applicable, the appointment of the legal aid lawyer has taken effect.
31. The Member States may provide in their national law that the costs relating to provisional legal aid can subsequently be recovered from suspects or accused persons, or requested persons, if following the final decision on the application for legal aid, the person is not, or is only partially, eligible for legal aid under the Member State's legal aid regime.

#### **Article 5 – Legal aid for requested persons**

32. Member States shall ensure that requested persons in European arrest warrant proceedings have a right to access legal aid in the executing Member State upon arrest pursuant to the European arrest warrant until the surrender, or, in cases of non-surrender, until the decision on surrender has become final.
33. In order to ensure the effectiveness of the right to appoint a lawyer in the issuing Member State to assist the lawyer in the executing Member State, according to Article 10 of Directive 2013/48/EU on the right of access to a lawyer, Member States shall ensure that there is a right to access legal aid in the issuing Member State for requested persons that exercise this right of access to a lawyer, for the purpose of the European arrest warrant proceedings in the executing Member State.
34. The right to legal aid in the executing and issuing Member State may be subject to an assessment of the means of the requested person and/or whether it is in the interests of justice to provide legal aid, according to the applicable eligibility criteria in the executing or issuing Member State in question.
35. However, in the period leading up to the final decision on whether the requested person benefits from legal aid in the executing Member State, requested persons that are deprived of liberty are entitled to provisional legal aid in the executing Member State in accordance with Article 3 of this Directive.

#### **Article 6 – Provision of data**

36. In order to monitor and evaluate the effectiveness and efficiency of this Directive, there is a need for collection of reliable data by the Member States with regard to the exercise of the right to provisional legal aid in Article 3, and with regard to the exercise of the right to legal aid for requested persons in Article 4.

#### **Article 7 – Non-regression clause**

37. The purpose of this Article is to ensure that setting common minimum standards in accordance with this Directive does not have the effect of lowering existing higher standards in certain Member States and the standards in the Charter and the ECHR.

Since the Directive provides for minimum rules, Member States remain free to set standards higher than those agreed in this Directive.

#### **Article 8 – Transposition**

38. This Article requires that Member States must implement the Directive [18 months after its publication] and, by the same date, transmit the text of the provisions transposing it into national law to the Commission.

#### **Article 9 – Entry into force**

39. This Article provides that the Directive will enter into force on the twentieth day following its publication in the Official Journal of the European Union.

### **5. SUBSIDIARITY PRINCIPLE**

40. The objective of this proposal cannot be sufficiently achieved by Member States alone, since there is significant variation in the right to provisional legal aid for suspects or accused persons deprived of liberty, and for requested persons. As the aim of the proposal is to promote mutual trust, only action taken by the European Union will establish consistent common minimum standards that apply throughout the European Union. The proposal will approximate Member States' legislation with respect to provisional legal aid in criminal proceedings and legal aid in European arrest warrant proceedings. The proposal therefore complies with the subsidiarity principle.

### **6. PROPORTIONALITY PRINCIPLE**

41. In accordance with the principle of proportionality, this Directive does not go beyond what is necessary in order to achieve the relevant objectives. It has been carefully assessed if action should be taken at EU level, and if so, at what level and in what form. The Directive only addresses aspects on legal aid in criminal proceedings that have been identified as indispensable to complement and ensure the effectiveness of the rights in the Directive on access to a lawyer and to improve mutual trust between criminal justice systems. The Commission does not propose legally binding parameters on eligibility testing or on quality in the Directive. These elements are dealt with in a Commission Recommendation which complements this proposal.

### **7. BUDGETARY IMPLICATIONS**

This proposal does not have any impact on the EU budget.



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**

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 point (b) of Article 82 (2),

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,

Having regard to the opinion of the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) The purpose of this Directive is to ensure the effectiveness of the right of access to a lawyer by providing assistance by the Member States for persons deprived of liberty at an early stage in the criminal proceedings and for requested persons in surrender procedures pursuant to Council Framework Decision 2002/584/JHA<sup>11</sup> (European arrest warrant proceedings).
- (2) By establishing minimum rules on the protection of procedural rights of suspects or accused persons, this Directive should strengthen the trust of Member State in criminal justice systems of other Member States and can thus help improve mutual recognition of decisions in criminal matters.
- (3) The Stockholm Programme<sup>12</sup> 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 proposals, setting out a step by step approach<sup>13</sup> to strengthening the rights of suspects or accused persons.
- (4) Three measures on procedural rights in criminal proceedings have been adopted to date, namely Directive 2010/64/EU of the European Parliament and of the Council<sup>14</sup>, Directive 2012/13/EU of the European Parliament and of the Council<sup>15</sup> and Directive 2013/48/EU of the European Parliament and the Council.<sup>16</sup>

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<sup>11</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.7.2002, p. 1).

<sup>12</sup> OJ C 115, 4.5.2010, p. 1

<sup>13</sup> OJ C 291, 4.12.2009, p. 1

<sup>14</sup> Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ L 280, 26.10.2010, p. 1).

<sup>15</sup> Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ L 142, 1.6.2012, p. 1.)

<sup>16</sup> Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right

- (5) Legal aid should cover the costs of the defence and the proceedings for suspects or accused persons in criminal proceedings and requested persons in European arrest warrant proceedings.
- (6) The scope and content of the right to access to a lawyer are set out in Directive 2013/48/EU. A suspect or accused person in criminal proceedings should have the right of access to a lawyer from the time when they are made aware, by official notification or otherwise, by the competent authorities, that they are suspected or accused of having committed a criminal offence, and irrespective of whether they are deprived of liberty. That right applies until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect or accused person has committed the offense, including where applicable, sentencing and the resolution of any appeal.
- (7) One of the fundamental features of a fair trial, as stated by the European Court of Human Rights ("ECtHR") is that everyone charged with a criminal offence is effectively defended by a lawyer, assigned officially if need be. The fairness of criminal proceedings requires that a suspect should be granted access to legal assistance from the moment of deprivation of liberty.
- (8) Directive 2013/48/EU provides that in cases where suspects or accused persons are deprived of liberty, Member States should make the necessary arrangements to ensure that they are in a position to exercise effectively their right of access to lawyer, unless they have waived this right.
- (9) In order for suspects or accused persons who are deprived of liberty to be in a position to exercise effectively the right of access to a lawyer at the early stages of the proceedings, they should not have to wait for access to a lawyer pending the processing of the application for legal aid and the assessment of the eligibility criteria for legal aid. Member States should therefore ensure that effective provisional legal aid is available without undue delay after the deprivation of liberty and before any questioning, and it should be available at least until the competent authority has taken the decision on legal aid and, in cases of full or partial rejection, this decision has become final, or, where the application for legal aid is granted, the appointment of the lawyer by the competent authority has taken effect.
- (10) The Member States should ensure that provisional legal aid is provided to the extent necessary and is not limited in a way that prevents the suspects or accused persons from exercising effectively the right of access to a lawyer as provided for in particular in Article 3(3) of Directive 2013/48/EU.
- (11) Requested persons in European arrest warrant proceedings who are deprived of liberty should have the right to provisional legal aid upon deprivation of liberty in the executing Member State, at least until the competent authority has taken the decision on legal aid and, in cases of full or partial rejection, that decision has become final, or, where the application for legal aid is granted, the appointment of the lawyer by the competent authority has taken effect.
- (12) Member States should be able to provide that the costs relating to provisional legal aid for suspects or accused persons deprived of liberty and costs relating to provisional legal aid for requested persons can be recovered from those persons if, in the

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to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ L 294, 6.11.2013, p. 1).

subsequent assessment of whether they have a right to legal aid, they are found to not meet the criteria to benefit from legal aid under national law.

- (13) To ensure the effective access to a lawyer in the executing Member State for requested persons, Member States should ensure that such persons have access to legal aid until the surrender, or, in cases of non-surrender, until the decision on surrender has become final. The right to legal aid may be subject to an assessment of the means of the requested person and/or whether it is in the interests of justice to provide legal aid, according to the applicable eligibility criteria in the executing Member State in question.
- (14) To ensure that requested persons can effectively exercise their right to appoint a lawyer in the issuing Member State to assist the lawyer in the executing Member State, in accordance with Directive 2013/48/EU, the issuing Member State should ensure that requested persons have access to legal aid for the purpose of the European arrest warrant proceedings in the executing Member State. This right may be subject to an assessment of the means of the requested person and/or whether it is in the interests of justice to provide legal aid, according to the applicable eligibility criteria in the issuing Member State in question.
- (15) This Directive provides for the right to provisional legal aid for children deprived of liberty and to legal aid for children that are requested in European arrest warrant proceedings.
- (16) When implementing this Directive, Member States should ensure the respect of the fundamental right of legal aid as provided for in Articles 47(3) of the Charter and Article 6(3)(c) ECHR and ensure that legal aid is available to those who do not have sufficient resources to pay for legal assistance when the interest of justice so requires.
- (17) The Member States should collect data showing how the right to legal aid for suspects or accused persons and requested persons have been accessed. Member States should also collect data on the number of cases where provisional legal aid was provided for suspects or accused persons deprived of liberty, as well as for requested persons, and the number of cases where this right was not exercised. Such data should include the number of requests for legal aid in European arrest warrant proceedings when the Member State acts as issuing and executing State, as well as the number of cases where these requests were granted. Data on the costs for providing provisional legal aid for persons deprived of liberty and for requested persons should also be collected.
- (18) This Directive should apply to suspects or accused persons regardless of their legal status, citizenship or nationality. This Directive upholds the fundamental rights and principles recognised by the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights, 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 the right to a fair trial, the presumption of innocence and the rights of the defence. This Directive should be implemented in accordance with those rights and principles.
- (19) This Directive sets minimum rules. Member States may extend the rights set out in this Directive in order to provide a higher level of protection. Such higher level of protection should not constitute an obstacle to the mutual recognition of judicial decisions that those minimum rules are designed to facilitate. The level of protection

should never fall below the standards provided by the Charter or the ECHR, as interpreted in the case-law of the Court of Justice and of the ECtHR.

- (20) Since the objectives of this Directive, namely setting common minimum rules for the right to legal aid for suspects or accused persons in criminal proceedings, 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 of the 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 those objectives.
- (21) [In accordance with Articles 3 of Protocol No 21 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, those Member States have notified their wish to participate in the adoption and application of this Directive] OR [In accordance with Articles 1 and 2 of Protocol 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the Treaty on the European Union and to the Treaty on the Functioning of the European Union, and without prejudice to Article 4 of that Protocol, those Member States are not taking part in the adoption of this Directive and are not bound by it or subject to its application]<sup>17</sup>.
- (22) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the Treaty on the European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Directive, and is not bound by it or subject to its application,

HAVE ADOPTED THIS DIRECTIVE:

#### *Article 1*

##### **Subject-matter**

1. This Directive lays down minimum rules concerning:
  - (a) the right to provisional legal aid for suspects or accused persons in criminal proceedings who are deprived of liberty, and
  - (b) the right to provisional legal aid and to legal aid for requested persons who are subject to European arrest warrant proceedings.
2. This Directive complements Directive 2013/48/EU. Nothing in this Directive shall be interpreted as limiting the rights provided for in that Directive.

#### *Article 2*

##### **Scope**

This Directive shall apply to:

- a) suspects or accused persons in criminal proceedings, who are deprived of liberty and who have a right of access to a lawyer pursuant to Directive 2013/48/EU;
- b) requested persons.

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<sup>17</sup> The final wording of this recital in the Directive will depend on the position of the United Kingdom and Ireland taken in accordance with the provisions of protocol No 21.

### *Article 3*

#### **Definitions**

For the purposes of this Directive, the following definitions shall apply:

- a) legal aid means funding and assistance from the Member State ensuring the exercise of the right of access to a lawyer,
- b) provisional legal aid means legal aid to a person deprived of liberty until the decision on legal aid has been taken,
- c) "requested person" means a person subject to a European arrest warrant,
- d) "lawyer" means any person, who, in accordance with national law, is qualified and entitled, including by means of accreditation by an authorised body, to provide legal advice and assistance to suspects or accused persons.

### *Article 4*

#### **Access to provisional legal aid**

1. Member States shall ensure that the following persons, if they so wish, have the right to provisional legal aid:
  - (a) suspects or accused persons in criminal proceedings, who are deprived of liberty;
  - (b) requested persons deprived of liberty in the executing Member State.
2. Provisional legal aid shall be granted without undue delay after deprivation of liberty and in any event before questioning.
3. Provisional legal aid shall be ensured until the final decision on legal aid has been taken and comes into effect, or, where the suspects or accused persons are granted legal aid, the appointment of the lawyer has taken effect.
4. Member States shall ensure that provisional legal aid is provided to the extent necessary to effectively exercise the right of access to a lawyer in Directive 2013/48/EU on the right of access to a lawyer, in particular having regard to Article 3 (3).
5. Member States shall be able to provide that the costs relating to provisional legal aid can be recovered from suspects or accused persons and requested persons who do not meet the eligibility criteria for legal aid as applicable under national law.

### *Article 5*

#### **Legal aid for requested persons**

1. The executing Member State shall ensure that requested persons have the right to legal aid upon arrest pursuant to a European arrest warrant until they are surrendered, or, in cases of non-surrender, until the decision on surrender has become final.
2. The issuing Member State shall ensure that requested persons, that exercise their right to appoint a lawyer in the issuing Member State to assist the lawyer in the executing Member State, according to Article 10 of Directive 2013/48/EU, have the right to legal aid in that Member State for the purpose of the European arrest warrant proceedings in the executing Member State.

3. The right to legal aid referred to in paragraphs 1 and 2 may be subject to an assessment of the means of the requested person and/or whether it is in the interests of justice to provide legal aid, according to the applicable eligibility criteria in the Member State in question.

#### *Article 6*

##### **Provision of data**

1. Member States shall collect data with regard to how the rights in Article 4 and Article 5 have been implemented.
2. Member States shall by [*36 months after publication of this Directive*] and every two years thereafter, send the Commission such data.

#### *Article 7*

##### **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 of Fundamental Rights of the European Union, the European Convention for the Protection of Human Rights and Fundamental Freedoms, or other relevant provisions of international law or the law of any Member State which provides a higher level of protection.

#### *Article 8*

##### **Transposition**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [*18 months after publication of this Directive*]. They shall immediately inform the Commission thereof.
2. When Member States adopt those 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 9*

##### **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 10*

##### **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*