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**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL
COMMITTEE AND THE COMMITTEE OF THE REGIONS**

**Making progress on the European Union Agenda on Procedural Safeguards for
Suspects or Accused Persons - Strengthening the Foundation of the European Area of
Criminal Justice**

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It is a well-known maxim that ‘justice must not only be done, but be seen to be done’. In the European area of justice, the corollary is that citizens must not only have the right to a fair trial anywhere in the European Union, but be confident of this when exercising their right to move freely in the European Union. The judicial authorities in the Member States also need to be able to trust each other’s justice systems to work fairly.

To develop this area of justice based on mutual recognition and mutual trust, the Commission was in the Stockholm Programme¹ asked to submit proposals to strengthen the procedural rights of suspects or accused persons.² This political mandate for a strong focus on strengthening citizens’ rights in criminal proceedings, to ensure the right to a fair trial across the European Union, resulted in the Commission’s Procedural Rights Agenda.

The present package is the continuation of a successful legislative program. Step by step, very good progress has been made and the European Union has adopted three Directives on procedural rights.

- A Directive on the right to **interpretation and translation** in criminal proceedings was adopted in 2010 and must be transposed by 27 October 2013.³ Defendants will be provided with interpretation free of charge not only during trial but also during police interrogation and important meetings with their lawyer, as well as with a written translation of documents essential to exercise their right of defence.
- A Directive on the right to **information** in criminal proceedings followed in 2012, and must be implemented by 2 June 2014.⁴ Suspects who are arrested should always be provided with a written Letter of Rights in simple everyday language, with information on their rights. It will be translated if needed.
- A Directive on the right of **access to a lawyer and the right to communicate upon deprivation of liberty** was adopted in October 2013.⁵ This measure is at the core of the Procedural Rights Agenda. Anyone who is a suspect will be guaranteed the right to see a lawyer from the earliest stages of proceedings until their conclusion. Moreover, anyone deprived of liberty has the opportunity to communicate with their family and, if arrested in another EU country, with the consulate.

These Directives are landmarks for strengthening the procedural rights of EU citizens. The novelties of the Lisbon Treaty in the area of criminal law, including qualified majority voting in Council and the European Parliament acting as a co-legislator, have led to these pioneering instruments, which were produced in a collaborative effort by the institutions.

¹ OJ C 115, 4.5.2010, p. 1.

² OJ C 291, 4.12.2009, p. 1.

³ Directive 2010/64/EU of 20 October 2010, OJ L 280 of 26.10.2010, p. 1–7.

⁴ Directive 2012/13/EU of 22 May 2012, OJ L 142 of 1.6.2012, p. 1–10.

⁵ Directive 2013/48/EU of 22 October 2013, OJ L 294 of 6.11.2013, p. 1–12.

In addition, a Green Paper on the application of EU criminal justice legislation on **detention** was published in June 2011, exploring the links between detention and mutual trust in the EU. Detention conditions can have a direct impact on the smooth functioning of mutual recognition of judicial decisions, as substandard detention conditions could lead a judge to refuse surrendering a requested person e.g. in European Arrest Warrant proceedings.⁶ The replies and an analysis of these replies have been published on the Commission's website. The conclusion is that while pre-trial detention and the promotion of alternatives to it are important issues, raised by Member States and civil society, proper and timely implementation of existing EU legislation is the priority.⁷

This Communication introduces **a package of five legal measures to make progress on the Procedural Rights Agenda and to further strengthen the foundation for the European area of criminal justice**. This package follows up on the successful recent adoption of the three procedural rights Directives.

It consists of **three proposals for Directives** on:

- (1) strengthening certain aspects of **the presumption of innocence** and of the right to be present at trial in criminal proceedings,
- (2) special safeguards for **children** suspected or accused in criminal proceedings, and
- (3) **provisional legal aid** for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings.

Since the measures taken must be proportionate to the aim of EU action, there are also two **Commission Recommendations**:

- (4) procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, and
- (5) the right to legal aid for suspects or accused persons in criminal proceedings.

1. THE RATIONALE FOR ACTION AT EU LEVEL

- *The common basis: the EU Charter and the ECHR*

The EU has a strong tradition of developing and promoting fundamental rights. The Charter of Fundamental Rights of the European Union (EU Charter) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) form the basis for protecting the rights of suspects or accused persons in criminal justice systems in the European Union. The Treaty makes the EU Charter legally binding⁸ and provides that the European Union will accede to the ECHR.⁹ All Member States are signatories to the ECHR. The right to an effective remedy, to a fair trial, to be presumed innocent and a right of defence, provided for in Articles 47 and 48 of the EU Charter and in Article 6 of the ECHR, need to be upheld in the EU's area of justice. This means that there is a substantial legal framework recognised in the Member States for the rights covered in the package.

⁶ 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 of 18.7.2002, p. 1-18.

⁷ http://ec.europa.eu/justice/newsroom/criminal/opinion/110614_en.htm.

⁸ Article 6(1) TEU.

⁹ Article 6(3) TEU.

A shift of focus: complementing security with procedural rights and mutual trust as a condition for mutual recognition

In the decade before the entry into force of the Lisbon Treaty, EU legislation concentrated on making it easier to fight crime, resulting in an impressive number of instruments for judicial cooperation and mutual recognition aimed at prosecuting offenders. The best-known is the Framework Decision on the European arrest warrant, which allows requested persons to be transferred expeditiously between Member States. The aim is primarily to ensure that the free movement of citizens across EU borders does not hamper cross-border law enforcement.

These EU instruments allow national judicial authorities to mutually, easily and promptly recognise investigation measures and punitive decisions against defendants across the European Union. They assume that the request should be recognised and executed because each Member State has a system of justice which guarantees fair trial rights to a relatively similar degree.

The system of mutual recognition can only operate satisfactorily if Member States trust each other's criminal justice systems. However, the protection of the procedural rights of suspects and accused persons still varies significantly between the Member States. This situation gives rise to gaps to achieve the mutual trust needed between EU Member States. To fill those gaps the European Union must ensure that all Member States uphold a common minimum level of procedural rights, and that these rights can be enforced through EU law.

This is why the Lisbon Treaty allows action at EU level on the rights of individuals in criminal procedure in Article 82(2)(b) TFEU. It is also spelled out in the mandate that the European Council gave to the Commission for the period 2010-2014: *'...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.'*¹⁰

- *Citizens' trust in a level playing field in procedural rights*

The need to protect the fair trial rights of suspects or accused persons has a clear cross-border dimension. Around 14.1 million EU citizens reside permanently outside their home country,¹¹ 10% of EU citizens have lived and worked abroad at some time in their lives and 13% have gone abroad for education or training.¹² As people are constantly travelling and moving across borders in the European Union and risk being involved in criminal proceedings outside their own country, the European Union must ensure that there is a level playing field on procedural rights in criminal proceedings.

¹⁰ Recital 10, OJ C 291, 4.12.2009, p. 1.

¹¹ Eurostat, Migration and migrant population statistics (March 2013).

¹² Eurobarometer 337/2010.

2. TIME FOR WELL-CONSIDERED MEASURES TO MAKE PROGRESS ON THE EUROPEAN UNION'S AGENDA ON PROCEDURAL RIGHTS

- *Why go further at EU level?*

Once implemented by the Member States, the recently adopted Directives on procedural rights will ensure that suspects or accused persons benefit from a wide range of essential guarantees. But the Procedural Rights Agenda needs to be strengthened.

- Suspects or accused persons will promptly be given information on their right to remain silent, but what happens if they make use of this right? In some Member States, judicial authorities may consider this silence as corroborating any evidence against the person. Fair trial rights must be put on a solid basis and EU-wide protection of the **presumption of innocence** must be ensured.
- Those who cannot speak or understand the language of the criminal proceedings will be provided with interpretation and translation, but what about those who, for example, due to their young age or mental disability are unable to properly follow and participate in the criminal proceedings? The existing EU Directives on safeguards for suspects and accused persons apply also to children. However, because of their inherent vulnerability, it is widely recognised by stakeholders and Member States that children need specific enhanced protection; for example, mandatory assistance by a lawyer if they face the police or the criminal justice system.¹³ At present, the fair trial rights of children and other vulnerable persons are not sufficiently guaranteed in the EU - no overarching protections exists. The Stockholm Programme explicitly foresees that a specific measure should be adopted to provide common minimum rules for vulnerable persons. Such minimum rules will strengthen the trust of Member States in the criminal justice system of other Member States and will thus help improve the mutual recognition of decision in criminal matters. **Special safeguards** are needed to meet needs of children and vulnerable persons during the criminal proceedings.
- The Directive on the right of access to a lawyer gives any suspect or accused person the right to a lawyer from the earliest stages of proceedings, and e.g. when questioned by police. But what if they do not have the means to afford a lawyer? They will need **legal aid** to make sure that their right of access to a lawyer is effective.
- *Need for balanced action*

The Commission is presenting a balanced package of measures taking into account and respecting the differences between the legal traditions and systems of the Member States, as provided for in Article 82(2) TFEU, seeking to foster mutual trust while respecting the principle of proportionality (Article 5 TEU). Each element has been carefully assessed to decide if action should be taken at EU level, and if so, at what level and in what form, including the potential costs for the Member States. The need for caution is particularly obvious in times of fiscal consolidation, when cost implications need to be carefully assessed. This is why, for example, in the field of legal aid, the Commission does not in the package propose legally binding parameters for eligibility testing for legal aid in a Directive. The costs for the Member States to provide provisional legal aid and legal aid in European arrest warrant proceedings will be limited.

¹³ See e.g. Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice.

- *A wider perspective: procedural safeguards and the European Public Prosecutor's Office*

This package will also contribute to strengthening the legal safeguards for individuals in proceedings by the European Public Prosecutor's Office. The recently presented proposal for a Council Regulation¹⁴ clarifies that a suspect has all rights granted by EU legislation, the EU Charter and applicable national law, and it explicitly refers to the right to legal aid and the right to be presumed innocent. Introducing strengthened rights will reinforce the procedural safeguards applying to proceedings led by the European Public Prosecutor's Office and will foster public trust in the good functioning of this Office.

3. THE MAIN ELEMENTS OF THE PROPOSALS

3.1. A strong foundation for fair trial rights - the presumption of innocence

- *The presumption of innocence — a fundamental principle of justice*

That defendants are presumed innocent until proven guilty by a court in a final judgment and that it is the prosecution that must prove their guilt is one of the oldest and most important principles in criminal proceedings, enshrined in all major international and regional human rights instruments. Inspired by Article 6(2) of the ECHR, and Article 11(1) of the Universal Declaration of Human Rights, Article 48(1) of the EU Charter states that: *'Everyone who has been charged shall be presumed innocent until proved guilty according to law'*.

The European Court of Human Rights (ECtHR) has clarified the scope of the principle of the presumption of innocence over the years. Article 6(2) ECHR encompasses three key issues:¹⁵ the right not to be referred to as guilty by public authorities before the final judgment,¹⁶ that the burden of proof is on the prosecution and that any reasonable doubt about guilt should benefit the accused,¹⁷ and the right to be informed of the accusation.¹⁸ The presumption of innocence is an essential prerequisite for a fair trial and the ECtHR has stated that a breach of the presumption of innocence undermines the right to a fair trial.¹⁹ This particularly applies to the right not to incriminate oneself, the right not to cooperate and the right to silence.²⁰

The right to be presumed innocent encompasses different needs and degrees of protection regarding natural persons and legal persons, as recognised by the case law of the Court of Justice on the right not to incriminate oneself.²¹ The proposal for a Directive takes account of these differences and therefore only applies to natural persons.

- *The presumption of innocence as the foundation and cement of the rights laid down in the Directives on procedural rights*

The fair trial rights referred to in the existing EU instruments, including the right to be given information, the right to be able to understand and follow the proceedings and the right of

¹⁴ Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM(2013) 534 final; 17.7.2013.

¹⁵ *Barberà, Messegué and Jabardo v. Spain*, Applications No 10588/83, 10589/83 and 10590/83, judgment of 6 December 1988.

¹⁶ *Minelli v. Switzerland*, Application No 8660/79, judgment of 25 March 1983.

¹⁷ See footnote 14.

¹⁸ This is addressed in Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings.

¹⁹ *John Murray v UK*, Application 18731/91, judgment of 26 January 1996.

²⁰ *Murray v. UK*, see supra, *Funke v. France*, Application No 10828/84, judgment of 25 February 1993, *Saunders v. UK*, Application No 19187/91, judgment of 17 December 1996.

²¹ See *inter alia* Case C-301/04 P *Commission v SGL Carbon* [2006] ECR I-5915 and Case T-112/98 *Mannesmannröhren-Werke v Commission* [2001] ECR II-732.

access to a lawyer, are thus complementary to and inseparable from the presumption of innocence in securing a fair trial and mutual trust.

The Stockholm Programme called on the Commission to examine further elements of minimum procedural rights for suspects or accused persons, and mentioned, in particular, the presumption of innocence. The Commission proposes in a Directive to strengthen certain aspects of the presumption of innocence in criminal proceedings, aspects that are closely linked and indispensable to make both the procedural rights and the mutual recognition instruments work in a climate of mutual trust. It will further foster a culture amongst professionals limiting recourse to measures such as pre-trial detention.

- *Strengthening certain aspects of the right to be presumed innocent at EU level*

The proposed Directive focuses on certain aspects of the presumption of innocence flowing from ECtHR case-law and where there is a need to set common minimum standards to ensure mutual trust. It gives a solid basis to other procedural rights instruments which have already been adopted or are proposed together with this Directive.

Moreover, given that the right of the accused person to be present at trial is an essential right of defence and part of the right to a fair trial, as interpreted by the ECtHR,²² strengthening this right will contribute to reinforcing the right to a fair trial and is also addressed in the proposal.

The level of safeguards in Member States' legislation is, in a general way, acceptable and there does not seem to be any systemic problem in this area. However, there still exist points on which legal safeguards should be strengthened. Moreover, breaches of the presumption of innocence do still occur too often across the European Union.

(a) *No public reference to guilt before conviction*

A public statement made by police or judicial authorities, suggesting that someone who has not been finally convicted is guilty damages that person's reputation and can influence the jury or the court that decides the case.

Along the lines of ECtHR case-law,²³ the Directive makes it a firm principle that, before final conviction, official decisions and statements by, for example, police and judicial authorities must not present the suspect or accused person as guilty. It hereby protects the reputation and privacy of those facing criminal proceedings.

(b) *The burden of proof - any doubt about guilt should benefit the suspect or accused person*

In criminal proceedings, the burden of proof should be on the prosecution and any doubt should benefit the suspect or accused person, without prejudice to the independence of the judiciary when assessing the suspect or accused's guilt. A judgment must be based on the evidence put before it and not on allegations or assumptions. However, the ECtHR has accepted that in specific and limited cases the burden of proof may be shifted to the defence, and the Directive will reflect this standard, striking a balance between the public interest in effective prosecution and the rights of the defence.²⁴

(c) *The right to remain silent - no coercion to incriminate oneself or to cooperate*

²² *Colozza v. Italy*, Application No 9024/80, judgment of 12 February 1985.

²³ *Minelli v Switzerland*, Application 8660/79, judgment of 25 March 1983; *Alenet de Ribemont v. France*, Application no. 15175/89, judgment of 10 February 1995; *Pandy v. Belgium*, Application 13583/02, judgment of 21 September 2006; *Garlicki v. Poland*, Application 36921/07, judgment of 14 June 2011.

²⁴ *Salabiaku v. France*, Application 10519/83, judgment of 7 October 1988; *Barberà, Messegué and Jabardo v. Spain*, Application 10590/83, judgment of 6 December 1988.

The right to remain silent, the right to not incriminate oneself and the right not to cooperate are ‘generally recognised international standards which lie at the heart of the notion of a fair procedure.’²⁵ They ensure that a suspect or accused person cannot be improperly forced to produce evidence, which would breach the principle that the burden of proof is on the prosecution.

The proposed Directive does not only uphold these principles with respect to natural persons, but provides for a specific remedy. Any use of evidence obtained in breach of these rights is excluded save in exceptional cases where the use of such evidence will not prejudice the overall fairness of the proceedings.

(d) *The right to be present at trial - a common minimum standard and a remedy*

If a suspect or accused person is tried ‘in absentia’, i.e. is not present at the trial, the right of defence is jeopardised: defendants are denied the opportunity to give their version of the facts to the court, and to rebut evidence.

Framework Decision 2009/299/JHA²⁶ improved the protection of such defendants in various other EU instruments on the mutual recognition of judicial decisions in line with ECtHR standards,²⁷ by establishing a possible ground for refusal in cases of judicial cooperation if certain common minimum standards have not been met.

The proposed Directive consequently takes the fundamental right of the accused to be present at the trial, established by the ECtHR, and makes it a minimum EU standard applicable also to domestic criminal proceedings. It is subject to very limited exceptions to ensure that justice is not unduly delayed by defendants acting in bad faith. A concrete remedy in the form of a re-trial is provided, as established by the ECtHR²⁸ in cases where the right to be present at trial has been breached.

3.2. Protection for those who need it most - special safeguards for vulnerable persons

- *Who needs special protection, and why?*

The Stockholm Programme emphasises the need to strengthen the rights of individuals who are vulnerable in criminal proceedings: ‘it is important that special attention is shown to suspected and 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.’²⁹

International standards and ECtHR case-law recognise their specific needs. Someone may be vulnerable because he or she cannot effectively participate in criminal proceedings: “‘effective participation’ in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed.”³⁰

Children are considered vulnerable by definition, due to young age, unfinished physical and psychological development and emotional immaturity.³¹ Children are also at greater risk of

²⁵ *Heaney and McGuinness v. Ireland*, Application 34720/97, judgment of 21 December 2000.

²⁶ 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 2008/947/JHA, OJ L 81, 27.3.2009, p. 24-36.

²⁷ *Colozza v. Italy*, Application 9024/80, judgment of 12 February 1985.

²⁸ See footnote 25.

²⁹ OJ C291, 4.12.2009, p.1

³⁰ *S.C. v. UK*, Application No 60958/00, judgment of 10 November 2004.

³¹ Under Article 1 of the UN Convention on the Rights of the Child, which has been ratified by all EU Member States and the EU, anyone below the age of 18 should be considered a child.

ill-treatment and health problems than other suspects or accused persons; they may not be able to properly express their difficulties or health problems. All Member States therefore regard children as requiring special safeguards and protection in criminal proceedings.

The situation is different for adults. The reasons why an adult may not be able to participate effectively in the proceedings can be manifold, for example mental illness or a physical or learning disability. There is no standard definition of who is a vulnerable adult in criminal proceedings in the EU Member States.

- *A Directive focusing on crucial safeguards for children*

The three Procedural Rights Directives already adopted apply to all suspects or accused persons, including children. However, even though they provide for certain safeguards specifically for children, they do not take sufficient account of the specific needs they may have e.g. finding it hard or impossible to understand and follow the proceedings, increased risk of ill-treatment because of their vulnerability.

The proposed Directive will ensure:

- that the procedural safeguards apply to children from the time they are suspected or accused of having committed an offence (scope);
- that children are assisted by their parents or other appropriate persons when arrested, and that both children and their parents are informed of their rights;
- that children cannot waive the right to be assisted by a lawyer, as there is a high risk that they would not understand the consequence of their actions; mandatory access to a lawyer is the core measure of the proposed Directive;
- that their personal and family situation and needs are properly assessed before judgment and that children receive a medical examination if deprived of liberty; that throughout the proceedings, questioning is carried out in circumstances that take into account the child's age and level of maturity and questioning by police is audio-visually recorded unless it would not be proportionate;
- that children cannot be tried in their absence; to ensure that children cannot be found guilty without having had the opportunity to rebut the grounds for such a conviction, and understand the grounds of a possible conviction to prevent re-offending by children and to foster social integration.
- that judicial authorities dealing with children receive specialised training; that the child's privacy is protected to facilitate reintegration into society, e.g. by ensuring that the proceedings are in principle not open to the public;
- that children are only deprived of liberty only as a last resort, and that children are detained separately from adults.

It results from international standards that children confronted with the criminal justice system should benefit from alternative measures to imprisonment and education and should be deprived of liberty only in exceptional circumstances. Children are in a particularly vulnerable position when deprived of liberty given the inherent risks for their physical, mental and social development. In order to prevent ill-treatment and abuse in case of deprivation of liberty, certain protection measures should be foreseen. Given those specific needs of children, the Directive contains special rules on the specific treatment of children in case of deprivation of liberty.

The Directive will thus promote the rights of the child, bearing in mind international guidelines and recommendations on child-friendly justice and it forms part of the EU Agenda for the Rights of the Child.³² The Directive will not affect national rules determining criminal responsibility³³.

- *A Commission Recommendation ensuring that vulnerable persons are recognised and their needs taken into account*

Defining why people may be vulnerable in criminal proceedings - for reasons other than young age - is not possible at this stage; any definition may even be criticised as stigmatising them. This results from several consultations and meetings with stakeholders and Member States.

However, at the same time it is generally recognised by stakeholders that some people need special safeguards in criminal proceedings to ensure that they understand and exercise their rights. If people do not understand the proceedings or the consequences of actions such as confessing, either because their vulnerability is not identified or because special safeguards are not in place, this leads to 'inequality of arms', which reduces their chances of receiving a fair trial and threatens the integrity of the judicial process. If action is not taken at EU level an uneven level of protection would persist throughout the EU. Therefore, the only balanced approach that would reconcile proportionality and subsidiarity considerations and the need to enhance the level of protection of vulnerable persons is a Commission Recommendation fostering the core rights of vulnerable persons in criminal proceedings.

- Setting up assessment mechanisms to ensure that vulnerable persons are detected and recognised, and that their special needs are met in criminal proceedings, is the core of the Recommendation. It is recommended that an assessment is made by an independent expert, ensuring that the degree of vulnerability is properly ascertained and the person's specific needs are acknowledged.
- Establishing appropriate safeguards for vulnerable persons: the Recommendation calls on the Member States to put in place concrete safeguards depending on the assessment, such as mandatory access to a lawyer, assistance by an appropriate third person, audio-visual recording of police questioning and medical assistance.

While giving Member States more flexibility than a Directive, the Recommendation will nevertheless contribute to raising standards on the procedural rights of vulnerable adults and to enhancing mutual trust. The Commission will assess the extent to which Member States have taken measures to give effect to the Recommendation four years after its publication and, if necessary, propose legislative measures to enhance the procedural rights of vulnerable persons.

3.3. An effective right to access to a lawyer - the right to legal aid

Drawing on Article 6(3)(c) ECHR, Article 47(3) of the EU Charter states 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.*'

The right to legal aid is intrinsically linked to the right of access to a lawyer. For persons who lack resources access to a lawyer cannot be effective unless the State provides legal aid to ensure legal assistance. Thus, for the right of access to a lawyer to be effective, and to further

³² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 15.2.2011, COM(2011) 60 final

³³ This is the age when children become criminally responsible for their actions.

strengthen mutual trust in the European Union, legal aid needs to be available to those who need it.

A Directive focussing on certain aspects of the right to legal aid

- *Guaranteeing legal aid for access to a lawyer when it is most needed - ‘provisional legal aid’*

At the early stages of proceedings, the suspect or accused person is particularly vulnerable, especially if deprived of liberty. Access to a lawyer at those stages is of paramount importance to protect fair trial rights, including the right to not incriminate oneself, as stated in ECHR case law. Article 6 ECHR requires that, as a rule, suspects or accused persons are granted access to legal assistance from the moment they are taken into police custody or pre-trial detention, and that such assistance is assigned officially if need be. They should not have to wait for access to a lawyer until their application for legal aid has been processed and their eligibility assessed.

Therefore, the proposed Directive on the right to legal aid provides for suspects or accused persons who are deprived of liberty to have access to provisional legal aid at these early stages of the proceedings and until the competent authority has made a final decision on the application for legal aid.

- *Special focus on those who are subject to European arrest warrant proceedings*

The Directive on access to a lawyer provides for a right to dual legal representation in European arrest warrant proceedings, i.e. in both the executing and issuing Member States, in order to boost mutual trust across the European Union. However, to make this effective, there needs to be a guarantee of access to legal aid in European arrest warrant proceedings.

Persons sought under a European arrest warrant also need to be given the right to provisional legal aid when deprived of liberty in the executing Member State, without having to wait for legal advice until the application for legal aid has been dealt with.

A Recommendation on some further issues on legal aid in criminal proceedings

- *Towards greater convergence in the criteria for deciding on the right to legal aid*

It follows from Article 47(3) of the EU Charter and Article 6(3)(c) ECHR that Member States may determine whether a person has a right to legal aid if that person has insufficient means (the ‘means test’), and/or the interests of justice require legal aid to be granted, for example in a complex case or because of the personal situation of the suspect, the gravity of the offence or the severity of the potential sanction (the ‘merits test’).

The way these eligibility criteria are combined and assessed varies greatly between the Member States. Some Member States apply only a means test, others apply a merits test, while some combine the two. There are also considerable differences in the way the means test and the merits test are interpreted and understood.

Because of the great variety of legal aid systems and the need to keep any measures proportional, especially in times of economic and financial challenges, this issue is addressed in a Recommendation. It provides common objective criteria to be taken into account when assessing the eligibility for legal aid. It clarifies the framework for the assessment as developed in ECtHR case-law and promotes convergence between the different legal systems, with a view to strengthening mutual trust.

- *Ensuring the quality and effectiveness of legal aid services*

The ECtHR has held that the State's obligation to provide free legal assistance is not met merely by appointing a publicly funded lawyer.³⁴ It must ensure that the assistance provided by legal aid lawyers is practical and effective. To this end, the Recommendation, asks Member States to set up mechanisms to ensure high-quality legal aid services, to promote systems for accrediting lawyers and continuous professional training for legal aid professionals and lawyers. The implementation of this Recommendation will improve the quality of and effectiveness of legal aid services and increase mutual trust in other Member States' justice systems.

To further the effect and application of the Recommendation, the Commission will have recourse to the existing expert group on judicial cooperation in criminal matters. The group may assist the Commission in drawing up guidelines for its application and facilitate exchange of best practices between the Member States. The Commission will assess the extent to which Member States have taken measures to give effect to the Recommendation four years after its publication and, if necessary, propose legislative measures to enhance the right to legal aid in criminal proceedings.

4. CONCLUSION

This package reflects common minimum standards for the right to a fair trial in the European Union, making progress in the Commission's Procedural Rights Agenda. Combined with the full range of instruments in place to make cross-border judicial cooperation a reality in a climate of mutual trust, through common minimum standards, it fosters the development of the European area of freedom, security and justice.

The new regime introduced by the Lisbon Treaty will become fully effective soon. The Treaty's transitional regime for justice and home affairs - covered by the former so-called 'third pillar' - expires on 30 November 2014. From that date, the Commission will have enforcement powers over the whole justice and home affairs *acquis* and the European Court of Justice will have full jurisdiction for pre-Lisbon mutual recognition instruments. This, together with the establishment of an EU-wide prosecution system to tackle fraud against the EU's financial interests, will change the landscape of the European area of criminal justice.

Given the internationalisation of crime, it should result in an increase in requests for investigations and enforcement of decisions in criminal matters across the EU resulting from the implementation of the many mutual recognition measures. This is all the more reason to make progress on the European Agenda on Procedural Rights by rapidly adopting this new package.

In the longer term, this framework of procedural rights at EU level will be transposed into national law. Its impact on upholding the right to a fair trial in practice will have to be carefully assessed and any gaps identified, possibly with a view to drafting a consolidated proposal on fair trial rights.

³⁴ ECtHR case *Pavlenko v. Russia*, Application No 42371/02, judgment of 4 October 2010, para. 99.