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COMMISSION RECOMMENDATION

of 27.11.2013

on the right to legal aid for suspects or accused persons in criminal proceedings

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 292 thereof,

Whereas:

- (1) The aim of this Recommendation is to reinforce the right to legal aid for suspects or accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings pursuant to Council Framework Decision 2002/584/JHA¹ in order to complement and render effective the right of access to a lawyer as set out in Directive 2013/48/EU of the European Parliament and the Council².
- (2) The right to legal aid in criminal proceedings is enshrined in Article 47(3) of the Charter of Fundamental Rights of the European Union ("the Charter") and in Article 6(3)(c) of the European Convention on Human Rights ("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.
- (3) The scope and content of the right of access to a lawyer are set out in Directive 2013/48/EU and nothing in this Recommendation should be construed as limiting the rights as provided for in that Directive.
- (4) A suspect or accused person in criminal proceedings has a right of access to a lawyer from the time 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. It applies until the conclusion of the proceedings, which is understood to mean the final determination of the question of whether the suspect or accused person has committed the offense, including where applicable, sentencing and the resolution of any appeal. The same temporal scope should apply to the right to legal aid.
- (5) The term "lawyer" in this Recommendation refers to 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.
- (6) "Legal aid" means funding and assistance from the Member State ensuring the effective use of the right of access to a lawyer. The funding should cover the costs of

¹ 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).

² Directive 2013/48/EU of the European Parliament and the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and 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 (OJ L 294, 6.11.2013, p.1).

the defence and the proceedings for suspects or accused persons in criminal proceedings and requested persons in European arrest warrant proceedings.

- (7) Suspects or accused persons and requested persons who lack sufficient financial resources to meet some or all of the costs of the defence and the proceedings should have access to legal aid, insofar as such aid is required in the interests of justice.
- (8) A suspect or accused person should not have to prove beyond reasonable doubt that they have insufficient financial means, as has been set out in the case law of the European Court of Human Rights. In order to determine whether the 'interests of justice' require free legal assistance to be provided, the European Court of Human Rights has held that the non-cumulative criteria of the seriousness of the offence, the severity of the sentence at stake, the complexity of the case or the personal situation of the suspect or accused persons should be taken into account.
- (9) Moreover, the European Court of Human Rights has held that, when deprivation of liberty is at stake, the interests of justice test should, in principle, be considered to be fulfilled.
- (10) The decision as to whether or not legal aid is granted in criminal proceedings should be made in sufficient time to enable the suspect or accused person to present their case in a concrete and effective way.
- (11) Given the legal profession's independence, the conduct of the defence is essentially a matter between the suspect or accused or requested person, and their representative. In order to ensure a high professional standard of legal assistance that ensures a fair trial, Member States should establish effective systems for general quality assurance of legal aid lawyers. To this end, Member States should put in place accreditation schemes for legal aid lawyers. In any event, Member States should ensure that action is taken if a failure in the legal assistance is manifest or is sufficiently brought to the Member States' attention.
- (12) Defense lawyers, as well as staff involved in decision-making on the right to legal aid, such as prosecutors, judges and staff on legal aid boards, should receive appropriate training to further the right to effective access to legal aid.
- (13) Given the importance of confidence between lawyer and client, the relevant competent authorities should, as far as possible, have regard to the preference and wishes of the suspect or accused person in the choice of the legal aid lawyer. However, as has been recognised in the case-law of the European Court of Human Rights, they may override those wishes where there are relevant and sufficient grounds for holding that this is necessary in the interests of justice.
- (14) This Recommendation upholds fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms. In particular, this Recommendation seeks to promote the right to liberty, the right to a fair trial and the rights of defense. It should be interpreted and given effect accordingly.
- (15) Insofar as the Charter of Fundamental Rights of the European Union contains rights, which correspond to rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights should be the same as those laid down by that Convention. The corresponding provisions of this Recommendation should thus be interpreted and given effect in a

manner which is consistent with those rights, as interpreted in the case-law of the European Court of Human Rights.

- (16) Member States should inform the Commission on the action taken to follow up on this Recommendation.
- (17) Within 48 months after notification of this Recommendation, the Commission should assess if any further action, including legislative measures, is needed in order to ensure that the objectives of this Recommendation are fully met.

HEREBY RECOMMENDS:

SECTION 1

SUBJECT-MATTER AND SCOPE

1. This Recommendation concerns the right to legal aid for suspects or accused persons in criminal proceedings and for requested persons subject to European arrest warrant proceedings in order to ensure effective access to a lawyer according to the Directive 2013/48/EU.
2. Suspects and accused persons in criminal proceedings should have a right to legal aid from the time they are suspected of having committed a criminal offence. This right should apply until the conclusion of the proceedings.

SECTION 2

ACCESS TO LEGAL AID

Right to legal aid

3. Member States should take appropriate measures to ensure that suspects or accused persons and requested persons are entitled to receive effective legal aid to ensure the right to a fair trial in accordance with this Recommendation.
4. Suspects or accused persons and requested persons should, as a minimum, be granted legal aid if they lack sufficient financial resources to meet some or all of the costs of the defence and the proceedings as a result of their economic situation ('means test'), and/or when such aid is required in the interests of justice ('merits test').
5. All necessary measures should be taken to make all relevant information on legal aid in criminal proceedings easily accessible and understandable for suspects or accused persons and requested persons, including information on how and where to apply for such aid, transparent criteria on when a person is eligible for legal aid, as well as information on the possibilities to complain in circumstances where access to legal aid is denied or a legal aid lawyer provides insufficient legal assistance.

Means test

6. When a requirement of lack of sufficient financial resources is applied when assessing the right to legal aid (means test), the assessment of the applicant's economic situation should be made on the basis of objective factors such as income, capital, family situation, standard of living and the cost of a defence lawyer. When

the legal aid is for a child, the child's own assets should be taken into account and not those of their parents or holder of parental responsibility.

7. Where the household income of families is taken into account in the means test, but individual family members are in conflict with each other or do not have equal access to the family income, only the income of the person applying for legal aid should be used.
8. In determining the question of whether suspects or accused or requested persons lack sufficient financial resources, all relevant circumstances should be considered.
9. If a Member State defines a threshold above which a person is presumed partly or totally able to bear the cost of the defence and the proceedings, they should take into account the factors in point 6 when setting that threshold. Moreover, the existence of such a threshold should not prevent persons who are above the threshold from obtaining legal aid in respect of all or some of the costs, if they lack sufficient financial resources in the particular case at hand.
10. Suspects or accused persons and requested persons should not need to prove beyond all doubt that they lack of sufficient financial resources to cover the costs of the defence and the proceedings.

Merits test

11. When a requirement of whether the interests of justice require legal aid is applied (merits test), this should encompass an assessment of the complexity of the case, the social and personal situation of the suspect or accused person or requested person, the seriousness of the offence and the severity of the potential penalty that can be incurred. All relevant circumstances should be considered.
12. In situations where a person is suspected or accused of an offence that carries a custodial sentence as a possible penalty, and in situations where legal assistance is mandatory, the granting of legal aid should be considered to be in the interests of justice.
13. Where legal aid is granted to suspects or accused persons or requested persons on the basis of a merits test, the costs of legal aid can be recovered in the event of a final conviction, provided that the person has sufficient resources at the time of recovery, as determined in accordance with points 6 to 10.

Decisions on legal aid applications

14. Decisions on whether or not to grant legal aid should be made promptly by an independent competent authority, within a time frame that allows suspects or accused persons and requested persons to effectively and concretely prepare their defence.
15. Suspects or accused persons and requested persons should have a right to review decisions rejecting their application for legal aid in full or in part.
16. Where applications are rejected in full or in part, the reasons for rejection should be given in writing.

SECTION 3

EFFECTIVENESS AND QUALITY OF LEGAL AID

Quality of legal assistance provided under legal aid schemes

17. Legal assistance provided under legal aid schemes should be of high quality in order to ensure the fairness of proceedings. To this end, systems to ensure the quality of legal aid lawyers should be in place in all Member States.
18. Mechanisms should be in place that allow the competent authorities to replace legal aid lawyers or require them to fulfil their obligations, if those lawyers fail to provide adequate legal assistance.

Accreditation

19. A system of accreditation for legal aid lawyers should be put in place and maintained in each Member State.
20. Member States are invited to establish criteria for the accreditation of legal aid lawyers, taking into account best practices.

Training

21. Staff involved in the decision-making on legal aid in criminal proceedings should receive appropriate training.
22. In order to ensure high quality legal advice and assistance, training and the development of training programmes for lawyers that provide legal aid services should be encouraged.
23. The accreditation of legal aid lawyers should as far as possible be linked with an obligation to undergo continuous professional training.

Appointment of legal aid lawyers

24. The preference and wishes of the suspects or accused persons and requested persons should as far as possible be taken into account by the national legal aid systems in the choice of the legal aid lawyer.
25. The legal aid system should endeavour to ensure continuity in legal representation by the same lawyer, if the suspect or accused or requested person so wishes.
26. Transparent and accountable mechanisms should be put in place to ensure that suspects or accused persons and requested persons can make an informed choice on legal assistance under the legal aid scheme, free from undue influence.

SECTION 4

DATA COLLECTION AND MONITORING

Data collection

27. Member States should collect data on relevant matters for the follow up on this Recommendation.

Monitoring

28. Member States should inform the Commission on the measures taken to give effect to this Recommendation, by [36 months after notification].

SECTION 5

FINAL PROVISIONS

29. This Recommendation is addressed to the Member States.

Done at Brussels, 27.11.2013

For the Commission
Viviane REDING
Vice-President

