



JUSTICIA
EUROPEAN RIGHTS NETWORK

COMPLIANCE OF LEGAL AID SYSTEMS WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN SEVEN EU JURISDICTIONS

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LIST OF ABBREVIATIONS

CCPCJ	Commission for Crime Prevention and Criminal Justice
CJEU	Court of Justice of the European Union
EC	European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
NGO	Non-Governmental Organisation
UDHR	Universal Declaration of Human Rights

CHAPTER I INTRODUCTION

1. INTRODUCTION

This is a report on the compliance of seven EU jurisdictions with criminal legal aid standards as provided for by the ECHR. The countries involved are Bulgaria, Czech Republic, England & Wales, Germany, Greece, Ireland and Lithuania.

This report and its recommendations are based on the answers provided to questionnaires from representatives of seven **JUSTICIA** European Rights Network Member organisations in the aforementioned countries.

Chapter II gives a summary of the right to criminal legal aid under international and EU law. It focuses particularly on the ECHR and the case law which has stemmed from the ECtHR.

Chapter III examines a number of benchmarks from the relevant jurisprudence of the ECtHR and from International and EU law.

Chapter IV provides conclusions and an analysis of Network Member jurisdictions' conformity with ECHR standards.

In light of the report's conclusions, Chapter V offers recommendations to protect the right to criminal legal aid. Chapter V also considers what action, if any, should be taken by the EU to regulate legal aid in Network Member jurisdictions.

1.1 QUESTION

Are Network Member jurisdictions complying with criminal legal aid standards as provided for by the European Convention of Human Rights and the jurisprudence of the European Court of Human Rights?

1.2 LEGAL BASIS & JUSTIFICATION

This report will focus on criminal legal aid, which forms part of the right of the accused person to legal assistance in criminal proceedings under the ECHR.

The Stockholm Programme is the European Union's plan in the areas of freedom, security and justice for the period, 2010 to 2014¹. The programme promotes fundamental rights as enshrined in the Charter of the Fundamental Rights of the European Union and the ECHR. The Stockholm Programme identified the protection of the rights of the accused persons in criminal proceedings, among others, as a fundamental right within the European Union².

The European Council adopted a *Resolution on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings* on 30 November 2009³. The Roadmap⁴ provides for six steps to strengthen the rights of the individual in criminal proceedings:-

Measure A: Translation and Interpretation

Measure B: Information on Rights and Information about the Charges

Measure C: Legal Aid & Legal Advice

Measure D: Communications with Relatives, Employers and Consular Authorities

Measure E: Special Safeguards for Vulnerable Persons

Measure F: A Green Paper on the Right to Review of the Grounds of Detention

¹ Council of the EU, *The Stockholm Programme – An open and secure justice serving and protecting the citizens* (Official Journal 2010/C 115/01) Available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:en:PDF>> [Last accessed 18th December 2012] [Hereafter *Stockholm Programme*]

² Ibid, *Stockholm Programme* at para 2.1

³ *Resolution on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings* OJ C 295, 4.12.2009, p. 1 Available at <[http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32009G1204\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32009G1204(01):EN:NOT)> [Last accessed 19th December 2012] [Hereafter the *Procedural Rights Roadmap*]

⁴ *Stockholm programme*, para 2.4, supra note 1

The Stockholm Programme invited the EU Commission to complete an Action Plan which would set out the ‘*aims and priorities*’ in order to turn the ‘*Stockholm programme into concrete actions with a clear timetable for adopting and implementation*’⁵. In April 2010, an *Action Plan Implementing the Stockholm Programme* was published⁶. The Annex to the *Action Plan* outlines a number of actions to protect fundamental rights, including an accused persons rights in criminal proceedings⁷. It provided for action on a *legislative proposal on Legal Advice and Legal Aid*, timetabled for 2011⁸.

The European Union decided to split Measure C into two, given the differences in Member States’ application of legal aid and the administrative difficulties which could arise with any change in the legal aid system⁹. As a result Measure C has been divided into two elements; Measure C1 on the Right of Access to a Lawyer (which is now also combined with Measure D, i.e. Communications with Relatives, Employers and Consular Authorities) and Measure C2 on legal aid. This report will focus on legal aid in criminal proceedings, i.e. Measure C2.

5 *Stockholm Programme* at para 1.2.10, supra note 1

6 *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Delivering an area of freedom, security and justice for Europe’s citizens - Action Plan Implementing the Stockholm Programme*, COM(2010) 171 final Available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0171:FIN:EN:PDF>> [Last accessed 19th December 2012] Hereafter - *Action Plan Implementing the Stockholm Programme*

7 *Ibid*, *Action Plan Implementing the Stockholm Programme, Annex* at pg. 10

8 *Action Plan Implementing the Stockholm Programme, Annex* at pg. 14, supra note 6

9 Viviane Reding, Vice-President of the European Commission responsible for Justice, Fundamental Rights and Citizenship ‘*Legal aid: a fundamental right for citizens to access justice*’ (Speech made at a joint CCBE-ERA conference on the occasion of the CCBE’s 50th anniversary, Brussels, 26 November 2010) Available at <http://www.ccbe.eu/fileadmin/user_upload/document/50th_anniversary/Speech_Reding_final.pdf> Last accessed 19th December 2012. See also *Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest - Note by Belgium / France / Ireland / the Netherlands / the United Kingdom* document No. 14495/11 ANNEX, DROIPE 99, COPE 232, CODEC 1492 at pg. 6 Available at <<http://register.consilium.europa.eu/pdf/en/11/st14/st14495.en11.pdf>> [Last accessed 18th December 2012] See also <<http://www.europapraw.org/ue/konferencja-pomoc-prawna-z-urzedu-w-postepowaniu-karnym-w-unii-europejskiej>> [Last accessed 18th December 2012]

Significant work has been completed in relation to Measure C1, the right of access to a lawyer, since the European Commission's original proposal in 2011¹⁰. The proposal for a Directive on Measure C1 is currently at the final stages of negotiations between the European Union institutions (Commission, Council and Parliament),¹¹ and has undergone considerable modifications since the initial proposal¹².

Work on Measure C2, legal aid, has been done to a lesser extent; however, the legal basis for this report can be found in the Commission's publication of a *Roadmap on the legislative proposal on legal aid in criminal proceedings*¹³. This proposal is based on the Procedural Rights Roadmap, mentioned above, as adopted by the EU Council on 30 November 2009. The EU Commission has indicated that the policy objectives of any legislative proposal on legal aid is the '*promotion of mutual trust between Member States' judicial authorities in order to enhance mutual recognition of judicial decisions throughout the EU by way of laying down minimum standards of access to legal advice free of charge, or at reduced cost, where necessary*'¹⁴.

The *Roadmap on the legislative proposal on legal aid in criminal proceedings* identifies four means by which the European Commission could consider adopting measures relating to legal aid in criminal proceedings. These are:-

- 1) retain the status quo,
- 2) non-legislative action,
- 3) legislative action, or
- 4) a mix of options¹⁵

10 European Commission Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest [COM(2011) 326/3] {SEC(2011) 686} {SEC(2011) 687}. Available at: <http://ec.europa.eu/justice/policies/criminal/procedural/docs/com_2011_326_en.pdf> [Last accessed 19th December 2012]

11 For further information on the proposal and its various drafts, please see www.eujusticia.net.

12 Council of the European Union Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest [First reading]-Progress Report, from the Presidency to the Council (Justice and Home Affairs). [Brussels, 3 December 2012] [16521/12]. Available at <www.eujusticia.net>.

13 *Commission Roadmap: Legislative proposal on legal aid in criminal proceedings*. Available at: <http://ec.europa.eu/governance/impact/planned_ia/docs/2013_just_014_legal_aid_in_criminal_proceedings_en.pdf> [Accessed 19th December 2012]

14 *Ibid*, *Commission Roadmap: Legislative proposal on legal aid in criminal proceedings, B. Objectives of the initiative* pg. 1-2

15 *Commission Roadmap: Legislative proposal on legal aid in criminal proceedings, C. Options* pg. 2

The EU Commission is currently completing a legal aid study, with the assistance of a questionnaire¹⁶. Any impact assessment completed by the Commission on legal aid is likely to include a cost/benefit analysis of the application of hard or soft law on this issue¹⁷.

This report is justified given current developments in the EU in this area. Furthermore, it will assist Network Member jurisdictions covered in this report to identify any issues relating to legal aid within their jurisdictions which need further measures in order to protect the rights of the individual in criminal proceedings.

1.3 RESEARCH METHODOLOGY

This report analyses whether seven Network Member jurisdictions are complying with criminal legal aid requirements as provided for by the ECHR. This report considers both primary and secondary sources of International and EU law. Particular focus is placed on the European Convention on Human Rights [ECHR] and the jurisprudence of the European Court of Human Rights [ECtHR]. The study completed in 2009, entitled *EU Procedural Rights in Criminal Proceedings*¹⁸, will form the basis of any impact assessment completed by the European Commission in relation to legal aid¹⁹. This report has paid particular attention to the findings of that publication and follow up publications.

Empirical research is essential in order to ascertain whether Network Member jurisdictions are in practice complying with the legal aid requirements provided for by the ECHR and the ECtHR. The research questionnaire was carefully drafted having regard to jurisprudence from the ECtHR and practical issues faced by States in relation to criminal legal aid.

16 See <<http://www.cses.co.uk/manage/legal-aid-study/>> [Last accessed 19th December 2012]

17 *European Commission Impact Assessment Planning of impact assessments – roadmaps*, Available at: <http://ec.europa.eu/governance/impact/planned_ia/roadmaps_2012_en.htm> [Last accessed 19th December 2012] See also *Commission Roadmap: Legislative proposal on legal aid in criminal proceedings*, B. Objectives of the initiative pg. 2

18 Spronken, Vermeulen, de Vocht, van Puyenbroeck 'EU Procedural Rights in Criminal Proceedings' *Universities of Maastricht and Ghent (2009)* Available at <<http://arno.unimaas.nl/show.cgi?fid=16315>> [Last accessed 19th December 2012]

19 *Commission Roadmap: Legislative proposal on legal aid in criminal proceedings E. Evidence base, planning of further work and consultation* pg. 3

In November 2012 this questionnaire was sent out to seven Network Member Organisations in seven jurisdictions. The answers received to the questionnaire are based on the practical experience and knowledge of the seven research participants, all of whom work in the criminal justice and human rights sector in their respective countries, in relation to the domestic law, professional rules, statistics and other relevant research information of their Network Member jurisdictions.

CHAPTER II

CRIMINAL LEGAL AID

1. INTERNATIONAL LAW

The right of an accused to a fair trial is included in the 1948 Universal Declaration of Human Rights (UDHR)²⁰. Article 10 of the UDHR provides that a person charged with a criminal offence is entitled to a “*fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations*”. Article 11 (1) goes on to say that “*everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence*”. However, no reference is made in the UDHR to the right of an accused person to free legal aid.

The International Covenant on Civil and Political Rights (ICCPR)²¹ also recognises the principle of the right to a fair trial but it goes further than the UDHR by including the right to free legal aid. Article 14 (3) (d) of the ICCPR states that a person charged with a criminal offence has the minimum right “*to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it*”.

In December 2012, the General Assembly adopted the *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*²². The *Principles and Guidelines* are derived from best practice and international standards in the provision of criminal legal aid²³. Legal aid, for the purpose of the *Principles and Guidelines*, include any ‘*legal advice, assistance and representation for persons detained, arrested or imprisoned²⁴, suspected or accused of, or charged with a criminal offence and for victims and witnesses in the criminal justice process that is provided at*

20 General Assembly resolution 217 A (III) *International Bill of Human Rights*, 10th December 1948 Available at <<http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/88/IMG/NR004388.pdf?OpenElement>> Last accessed 18th December 2012

21 *International Covenant on Civil and Political Rights*; Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976 Available at <<http://www2.ohchr.org/english/law/ccpr.htm>> Last accessed 18th December 2012. Hereafter ICCPR

22 A/RES/67/187 *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* Adopted by the General Assembly without a vote on the 20th December 2012 <<http://www.un.org/News/Press/docs/2012/ga11331.doc.htm>> The United Nations Commission on Crime Prevention and Criminal Justice first adopted it on the 27th April 2012. [Hereafter the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems]

23 Ibid, *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* at para 6

24 As defined by the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (General Assembly resolution 43/173, annex)

*no cost for those without sufficient means or when the interests of justice so require*²⁵.

The *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* state that a person should be entitled to legal aid where they are ‘arrested, detained, suspected of or charged with a criminal offence’ and where the punishment is a term of imprisonment or the death penalty. ‘Suspected’ person is defined as someone who becomes aware that they are under investigation and they are in a custodial setting. In these circumstances a person should be provided with legal aid prior to questioning²⁶.

Legal aid should be granted, notwithstanding a person’s means where it is in the interests of justice to do so i.e. where there is an ‘urgency’ or ‘complexity’ in the case or due to the potential severity of the penalty²⁷. In these circumstances it is recommended that an accused person be given preliminary legal aid until there has been a determination on the issue.²⁸

The *Principles and Guidelines* consider the means test for ascertaining whether legal aid should be applied. It provides that a person who is refused legal aid, due to the means test, should have the right to appeal. A person, on appeal, can then be granted legal aid, with or without a contribution by the accused person, if it is in the interests of justice to do. Also, only the income of the person applying for legal aid should be considered when applying a means test in a family household who are in conflict or where the family income is not equally accessible to all persons²⁹.

Guidelines are laid down relating to legal aid at the pre-trial stage³⁰, during court proceedings³¹ and at the post-trial stage³². The Guidelines provide that a person’s right to legal aid should not be restricted arbitrarily where the person has been arrested, detained, charged with or accused of a criminal offence. Access to legal aid

25 Ibid at para 8

26 *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, Principle 3, para 20 at footnote 10, Supra note 22

27 *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, Principle 3, para 23, Supra note 22

28 *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, Guideline 1, para 41 (c)

29 *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, Guideline 1, para 41 (d), (e), (f). Supra note 22

30 *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, Guideline 4, Supra note 22

31 *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, Guideline 5, Supra note 22

32 *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, Guideline 6, Supra note 22

providers should be facilitated at the pre-trial stage³³. Legal aid should be provided in all court proceedings, including an appeal and related proceedings, where there is a risk of a term of imprisonment or the death penalty³⁴. Persons who are serving a term of imprisonment should also be entitled to legal aid³⁵. Legal aid should be effective and prompt at all stages of the criminal process. This includes the ‘*unhindered access to legal aid providers for detained persons*’³⁶.

The *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* also deal with the accountability and competence of legal aid providers. It suggests that mechanisms should be established ‘*to ensure that all legal aid providers possess education, training, skills and experience that are commensurate with the nature of their work, including the gravity of the offences dealt with, and the rights and needs of women, children and groups with special needs*’³⁷. Also that complaints made against a legal aid provider should be dealt with promptly by an independent body and they should be subject to judicial review³⁸.

The *Principles and Guidelines* also provide for legal aid for victims³⁹ and witnesses⁴⁰. Victims and witnesses do not form part of the remit of this report and they are therefore not considered in any further detail.

The aforementioned *Principles of Guidelines* lend assistance where the ECHR or the ECtHR is silent on a particular issue.

2. EU LAW

Any action relating to criminal legal aid in the EU will build on the fundamental rights of an accused to a fair trial as encapsulated by the Charter of Fundamental Rights of the European Union (EU Charter) and the jurisprudence of the Court of Justice of the European Union (CJEU).

33 *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, Guideline 4, para 44 (a), (c), Supra note 22

34 *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, Guideline 5, para 45, Supra note 22

35 *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, Guideline 6, para 46, Supra note 22

36 *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, Principle 7, para 28-29, Supra note 22

37 *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, Principle 13, para 37, Supra note 22

38 *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, Principle 13, para 38, Supra note 22

39 *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, Principle 4 & Guideline 7, Supra note 22

40 *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, Principle 5 & Guideline 8, Supra note 22

Article 47 of the EU Charter provides for a right to an effective remedy and to a fair trial. It states that:

“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

Article 52 (3) of the EU Charter outlines the relationship between it and the European Convention on Human Rights (ECHR) such that the ‘*meaning and scope*’ of the EU Charter shall be the same as the ECHR:

“In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”

The case of *Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland (DEB)*⁴¹ is of paramount importance in understanding the relationship between Article 47 of the EU Charter and Article 6 of the European Convention on Human Rights⁴².

⁴¹ Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* [2010] ECR I-00000

⁴² See also Case C 402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6352 at para 335; Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305 at para 29; Case C29/69 *Stauder* [1969] ECR 419 at para 7; Case C-274/99 P *Connolly v Commission* [2001] ECR I-1611 at para 37; Case C-283/05 *ASML* [2005] ECR I-12041 at para 26

DEB considered whether legal aid should be made available to legal persons so that they could have effective access to justice. The court concluded that the issue before the court was ‘*the principle of effective judicial protection*⁴³’, which stems from Article 6 and Article 13 of the ECHR.

The Court of Justice of the European Union held that the rights as enshrined in both Article 47 of the EU Charter and Article 6 ECHR correspond to one another. Also, the ‘*meaning and scope*’ of the EU Charter is to be determined by both the ECHR and the jurisprudence of the ECtHR. The CJEU went on to say that there is nothing preventing EU law providing a ‘*wider protection*’:-

*“As regards the Charter, Article 52(3) thereof states that, in so far as the Charter contains rights which correspond to those guaranteed by the ECHR, their meaning and scope are to be the same as those laid down by the ECHR. According to the explanation of that provision, the meaning and the scope of the guaranteed rights are to be determined not only by reference to the text of the ECHR, but also, inter alia, by reference to the case-law of the European Court of Human Rights. The second sentence of Article 52(3) of the Charter provides that the first sentence of Article 52(3) is not to preclude the grant of wider protection by EU law (see, to that effect, Case C-400/10 PPU *McB* [2010] ECR I-0000, paragraph 53)”⁴⁴.*

DEB illustrates the importance of the ECHR and the jurisprudence of the ECtHR in interpreting EU law. The ECHR and the judgments of the ECtHR are essential in enabling us to ascertain whether Member States are complying with their legal obligations in relation to the provision of criminal legal aid.

Article 6 (2) of the Treaty of Lisbon, which entered into force in December 2009, required the EU to accede to the ECHR⁴⁵. Article 6 (3) of the Lisbon Treaty goes on

⁴³ *Case C-279/09 DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* [2010] ECR I-00000 at para 29

⁴⁴ Dillon-Malone, P; *EU Law and Human Rights: Implications for Legal Practice in Ireland*, Conference Paper on Promoting and Protecting Human Rights in Ireland: The Role of the Irish Constitution and European Law (Law Society of Ireland, 13th October 2012) at pg. 7 <http://www.ihr.ie/download/pdf/patrick_dillon_malone_bj_ihrc_law_society_10th_annual_human_rights_conference_13_october_2012.pdf> [Last accessed 17th December 2012]

⁴⁵ *2007/C.306/01 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, signed at Lisbon, 13 December 2007 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:FULL:EN:PDF>> Last accessed 19th January 2013 [Hereafter *The Lisbon Treaty*]

to provide that the *'(f)undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'*⁴⁶. Protocol No. 14 of the ECHR also provides for accession⁴⁷. As of December 2012, the EU has not acceded to the ECHR and therefore any laws of the European Union cannot yet be brought before the ECtHR⁴⁸. Discussions are on-going on the EU's accession to the ECHR.

In light of the foregoing any legislation implemented by the EU should be compatible with the ECHR and the case law of the ECtHR.

3. THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE CASE LAW OF THE ECtHR

Article 6 of the European Convention on Human Rights provides for the right to a fair trial.

Article 6 (1) states that: *"in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice"*⁴⁹.

⁴⁶ *The Lisbon Treaty*, Article 6 (3)

⁴⁷ *Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention*, Entry into force 1st June 2010. <<http://conventions.coe.int/Treaty/EN/Treaties/Html/194.htm>> Last accessed 19th January 2012

Article 17 provides for the amendment of the Convention to enable the EU to accede to the ECHR.

'Article 59 of the Convention shall be amended as follows:

1. A new paragraph 2 shall be inserted which shall read as follows: "2. The European Union may accede to this Convention."

⁴⁸ European Court of Human Rights Press Release *'Case-law concerning the European Union'* (December 2012) Factsheet – Case-law concerning the EU/Press Unit <http://www.echr.coe.int/NR/rdonlyres/EA6F3298-FE75-48E7-B8A7-F9C5FF5EB710/0/FICHES_Union_Europeenne_EN.pdf> Last accessed 31st December 2012

⁴⁹ *European Convention of Human Rights as amended by Protocols Nos. 11 and 14 and supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13*. Available at http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf [Last accessed 31st December 2012], Article 6 (1)

Article 6 (3) sets out a list of minimum rights or guarantees which must be provided to everyone who is charged with a criminal offence. Of particular relevance to this report is, Article 6 (3) (c) which states that a person who is charged with a criminal offence has a 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 require⁵⁰”*.

Article 6 (3) (c) has three elements, the first is the right of a person to defend him or herself if he/she so wishes. Secondly a person charged with a criminal offence can choose the person from whom they want to obtain legal assistance. Thirdly and finally, if a person does not have sufficient means to pay for legal advice then it should be provided free of charge, once it is in the interests of justice to do so. These elements form part of the general principles of a fair trial as encapsulated in Article 6 (1), quoted above. Article 6 (3) (c) should not be considered in isolation and regard should be had to the proceedings as a whole, in ascertaining whether there has been a breach of the right to a fair trial⁵¹.

Article 6 (3) (c) illustrates a number of elements which must be satisfied before free legal aid should be granted by a court;

- I. The person must be charged with a criminal offence;
- II. The person must not have sufficient means to pay for legal assistance;
- III. It must be in the interests of justice to provide free legal aid.

⁵⁰ Ibid at Article 6 (3) (c)

⁵¹ *Can v Austria*, (Application no. 9300/81) Judgment 30 September 1985 at para 48 *“The Commission recalls its constant case law according to which the compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident (cf the Report in the Nielsen case, YB 4, at p. .548), although it cannot be excluded that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings (cf. applications N° 8603, 8722, 8723 and 8729/79, Crociani and others v Italy, DR 22, 147 at .p.216, and application N° 7945/77 v. Norway, DR 14, 228). This principle holds true not only for the application of the concept of fair trial as such, as laid down in Art 6 (1), but also for the application of the specific guarantees laid down in Art 6 (3). They exemplify the notion of fair trial in respect of typical procedural situations which arise in criminal cases, but their intrinsic aim is always to ensure, or contribute to ensuring, the fairness of the criminal proceedings as a whole. The guarantees enshrined in Art 6 (3) are therefore not an aim in themselves, and they must accordingly be interpreted in the light of the function which they have in the overall context of the proceedings.”*. See also Reid, Karen, *A Practitioner’s Guide to the European Convention on Human Rights*, (4edn, Sweet and Maxwell 2012) at 187

It is therefore necessary to consider the jurisprudence of the ECtHR in order to ascertain the requirements on Member States in the provision of free criminal legal assistance.

3.1 WHAT IS A CRIMINAL OFFENCE FOR THE PURPOSES OF ARTICLE 6 OF THE ECHR?

Generally speaking the European Court of Human Rights will look to domestic law in order to ascertain whether an act or offence is criminal in nature under Article 6 of the ECHR. However, ECtHR jurisprudence has found acts or offences to be criminal notwithstanding that they are not defined as such by Member States. Three criteria were developed in *Engel and Others v The Netherlands*⁵² in order to ascertain whether an offence is criminal for the purposes of Article 6 of the ECHR. These are:-

1. The domestic classification of the offence
2. The nature of the charge
3. The nature and severity of the penalty

These criteria were first applied to cases of military discipline⁵³ and were later extended to both disciplinary proceedings in a custodial setting⁵⁴ and to certain cases involving tax surcharges⁵⁵. Also it does not matter that an offence is minor in nature and the penalty is a fine “*as there is nothing in the Convention to suggest that the criminal nature of an offence, within the meaning of the Engel criteria, necessarily requires a certain degree of seriousness*”⁵⁶.

⁵² *Engel and Others v The Netherlands* (Application Nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, Judgment of 8 June 1976 & Simor, J, Emmerson, B; ‘*Human Rights Practise*’ (Thomson Reuters (Professional) UK Limited, 2012); Emmerson, Ashworth, Macdonald ‘*Human Rights and Criminal Justice*’ (3rd edn, Sweet & Maxwell, 2012)

⁵³ *Engel and Others v The Netherlands* (Application Nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72), Judgment of 8 June 1976

⁵⁴ *Campbell and Fell v the United Kingdom* (Application no. 7819/77; 7878/77) Judgment 28 June 1984

⁵⁵ *Janosevic v Sweden* (Application no. 34619/97) Judgment 23 July 2002

⁵⁶ *Tomasovic v Croatia* (Application no. 53785/09) Judgment 18 October 2011 at para 22

The Engel criterion has been endorsed by domestic jurisprudence⁵⁷. It is important for Member States to be able to ascertain whether an offence is criminal in nature under the Engel criteria as it enables them to ensure that domestic procedures adhere to Article 6 ECHR. However, recent case law has started to distinguish between hard and soft criminal offences. The guarantees of Article 6 will not necessarily apply to its fullest extent in a case involving soft criminal offences such as tax surcharges i.e. they may not be entitled to free legal aid due to the soft nature of the criminal offence. For example a tax surcharge may be deemed by the court to amount to a criminal offence but it may not meet the ‘*interests of justice test*’, which must be satisfied if an accused person is to obtain criminal legal aid under Article 6 (3) (c)⁵⁸.

3.2 THE CRITERIA FOR OBTAINING FREE LEGAL ASSISTANCE IN CRIMINAL CASES UNDER THE ECHR

As discussed above, Article 6 (3) (c) will only apply when a person has been charged with a criminal offence. Furthermore, in order for a person to then obtain legal assistance he/she must have insufficient means and it must be in the interests of justice to provide it. Any refusal of legal aid must be reviewable⁵⁹. If a person is provided free legal aid, they may have to pay partial or full reimbursement of the fees at a later date, if their circumstances change and they have sufficient means to pay.⁶⁰

⁵⁷ *Gale v Serious Organised Crime Agency* [2011] UKSC 49 In *Walsh v United Kingdom* (Application No 43384/05) Judgment 21st November, 2006 an action for the proceeds of crime was deemed to be civil in nature and not criminal and therefore did not fall under the ambit of Article 6 (2) or 6 (3) of the ECHR. This was also held to be the case in Ireland. See *D. P. P. -v- Gilligan* [2010] IEHC 345

⁵⁸ *Barsom and Varli v Sweden* (Application no. 40766/06 and 40831/06) Judgment 4 December 2007

⁵⁹ *Granger v The United Kingdom* (Application no. 11932/86) Judgment 28 March 1990 at para 47; *Artico v Italy* (Application no. 6694/74) Judgment 13 May 1980;

⁶⁰ *Croissant v Germany* (Application no. 13611/88) Judgment 25 September 1992

3.2.1 'INSUFFICIENT MEANS' TEST

The applicant bears the responsibility of proving that they have insufficient means to pay for legal assistance⁶¹. However, they do not have to '*prove beyond all doubt*' that they have insufficient means. Also an absence of '*indicators*' to the contrary should be sufficient for an accused person to satisfy the test⁶².

In *Pakelli v. Germany*⁶³ the applicant complained that there was a breach of Article 6 (3) (c) on the basis that he was denied free legal aid in a criminal appeal on a point of law. The court noted that there were '*indications*', that he did not have the means to pay for a lawyer. First, he had offered a certificate of indigence (affidavit of means) to the German Federal Court but they refused the offer. The court noted that there is nothing to suggest that this would not have been provided. He was granted legal aid in the ECtHR on the basis of documentation and tax returns, which showed he had a modest income. Also, he had spent two years in prison a number of years previously. The court found the applicant did not have to '*prove beyond all doubt*' that he had insufficient means to pay and rather the '*absence of clear indications to the contrary*'⁶⁴ indicated that there had been a breach of Article 6 (3) (c) in failing to provide free legal assistance in the circumstances.

In *R.D. v. Poland*, the applicant had been granted legal aid at first instance but was refused legal aid on appeal, notwithstanding that his financial circumstances had not changed. The court held that in those circumstances there was '*reasonable grounds to consider that the applicant's financial means were limited. Hence, there were strong indications that he did not have "sufficient means to pay for legal assistance" within the meaning of Article 6 § 3 (c)*'⁶⁵.

61 *Croissant v Germany* (Application no. 13611/88) Judgment 25 September 1992

62 *Pakelli v Germany* (Application no. 8398/78) Judgment 25 April 1983 at para 34

63 *Pakelli v Germany* (Application no. 8398/78) Judgment 25 April 1983

64 *Pakelli v Germany* (Application no. 8398/78) Judgment 25 April 1983 at para 34.

65 *R.D. v Poland* (Applications nos. 29692/96 and 34612/97) Judgment 18 December 2001 at para 45

3.2.2 'INTERESTS OF JUSTICE' TEST

The ECtHR will consider certain criteria in order to ascertain whether it is in the interests of justice to grant free legal assistance. First the court will consider the seriousness of the offence before the court and the severity of the maximum sentence which could be imposed. Secondly, it should consider the complexity of the case⁶⁶. Finally it will look at the personal circumstances of the accused person. The possibility of activating a suspended sentence can be deemed to satisfy this test along with the wide measures which the court had at their disposition.

In *Granger v The United Kingdom*⁶⁷, the applicant had been convicted for perjury and sentenced to five years in prison. He had legal aid at trial but he was refused legal aid on appeal. It was accepted that he had insufficient means to pay for legal assistance and so the issue before the court was whether it was in the interest of justice to provide it. The domestic court held that four of his arguments on appeal were “*wholly without substance*”, however, one ground was considered valid. Notwithstanding this, legal aid was refused⁶⁸. The ECtHR held that it would not consider the substance of the appeal and the domestic courts view on that rather, “*the question whether the interests of justice required a grant of legal aid must be determined in the light of the case as a whole*”⁶⁹.

The court concluded that legal aid should have been granted in the interests of justice so that the applicant was in a position to contribute effectively to the proceedings. Also, the case warranted legal advice as there were complex legal issues before the court on both sides.

⁶⁶ *Quaranta v Switzerland* (Application no. 12744/87) Judgment 24 May 1991 at para 33-34

⁶⁷ *Granger v The United Kingdom* (Application no. 11932/86) Judgment 28 March 1990

⁶⁸ *Granger v The United Kingdom* (Application no. 11932/86) Judgment 28 March 1990 at para 46

⁶⁹ *Ibid*

In *Quaranta v. Switzerland* the court put forward certain criteria which should be considered prior to ascertaining whether it is in the interests of justice to grant free legal assistance to an accused person. First, the court provided that regard should be had to the ‘seriousness of the offence’ and the ‘severity of the sentence’, which an accused person is at risk of. Secondly, the court should look at the ‘complexity of the case’. Thirdly, the court should consider the personal circumstances of the accused person⁷⁰.

In *Hooper v. the United Kingdom* the ECtHR held that ‘where deprivation of liberty is at stake, the interests of justice in principle call for legal representation’⁷¹.

In *Barsom and Varli v Sweden*⁷², tax surcharges were imposed on the applicants. They applied for legal aid on the basis that they were in a poor financial situation and they did not have a full knowledge of the Swedish legal system or language, notwithstanding that they had lived in Sweden for 30 years. They claimed that there had been a breach of Article 6 (3) on the basis that they were refused legal aid. The ECtHR held that there was no risk of a deprivation of the applicant’s liberty and the tax surcharge was straightforward. It was held that there was no breach of Article 6 (3) on the basis that the applicants could adequately deal with the issue before the court⁷³.

3.3 AT WHAT STAGE OF CRIMINAL PROCEEDINGS IS A PERSON ENTITLED TO FREE LEGAL AID UNDER THE ECHR?

An accused person is entitled to free legal aid, in certain circumstances, at all stages of criminal proceedings from the preliminary stages to the appeal hearing.

⁷⁰ *Quaranta v Switzerland* (Application no. 12744/87) Judgment 24 May 1991 at para 32, 34, 35

⁷¹ *Hooper v the United Kingdom* (Application no. 42317/98) Judgment 16 November 2004 at para 20

⁷² *Barsom and Varli v Sweden* (Application no. 40766/06 and 40831/06) Judgment 4 December 2007

⁷³ European Court of Human Rights, *Information Note on the Court’s case-law* (No. 104, January 2008), at pg. 17 <<http://www.echr.coe.int/NR/rdonlyres/797BA549-C2A0-4F29-85E6-E8585AE48A0E/0/Example104.pdf>> Last accessed 31st December 2012

3.3.1 THE RIGHT OF AN ACCUSED PERSON TO LEGAL ASSISTANCE AT THE PRELIMINARY STAGES OF PROCEEDINGS

A person is entitled to legal assistance at all stages of the legal proceedings, save in exceptional circumstances. This includes a right to legal assistance at the pre-trial stage i.e. prior to the questioning of the accused⁷⁴ to the final determination of the hearing⁷⁵. In allowing pre-trial legal assistance the court aims to protect the right to silence and the right of an accused person not to incriminate themselves⁷⁶.

Even if there are exceptional circumstances for prohibiting access to legal assistance, failure to provide a lawyer at the pre-trial stage may still be in breach of the ECHR where it would irretrievably prejudice the rights of the accused⁷⁷. Minors should be afforded legal assistance at the pre-trial stage⁷⁸. Also, the vulnerability of an accused person is another factor which should be considered by the court in ascertaining whether there is a breach of Article 6⁷⁹.

Legal assistance, free of charge, should be made available as soon as an accused person is taken into custody or detained prior to being questioned by the police⁸⁰. In some instances, a right to legal assistance may be necessitated notwithstanding that a person has not been detained, for example where a person is '*significantly affected as soon as the suspicion against him was seriously investigated and the prosecution case compiled*'⁸¹. One such example could be where a person is giving a statement as a witness and then, during the course of questioning, he is interrogated as a suspect by the police.

74 *Imbrioscia v Switzerland* (Application no. 13972/88) Judgment 24 November 1993

75 Open Society Justice Initiative and the Public Interest Law Institute; *Paper on the European Court of Human Rights Jurisprudence on the Right to Legal Aid* (December 2006)

76 *Ibid* at pg. 38

77 *Salduz v Turkey* (Application no. 36391/02) Judgment 27 November 2008 at para 53

78 *Salduz v Turkey* (Application no. 36391/02) Judgment 27 November 2008 at para 60

79 *Adamkiewicz v Poland* (Application no 54729/00) 2nd March 2010 [Available only in French], *Panovits v Cyprus* (Application no. 4268/04) Judgment 11 December 2008

80 *Dayanan v Turkey*, (Application no. 7377/03) Judgment of 13 October 2009, at para 31 & 32. See also Isobel, M; '*Early Access to Legal Assistance - Template Brief Issue #1*'; *New Journal of European Criminal Law*, Vol. 3, Issue 2, 2012 at pg. 185, 189

81 *Shabelnik v Ukraine* (Application no. 16404/03) Judgment 19 February 2009 at para 57

In *Imbrioscia v. Switzerland*, the applicant, despite his request, did not have the assistance of a lawyer during questioning by the police. The applicant claimed that the failure to have legal assistance at the preliminary hearings was in breach of Article 6 (1) and (3). The respondent argued that Article 6 (1) and (3) did not apply to preliminary hearings.

The court held that in considering whether Article 6 applied regard should be had to any ‘special features of the proceedings involved and on the circumstances of the case’⁸². In that instance the applicant had employed a lawyer when he was first arrested but the lawyer later came off record having never seen or spoken to him. When this lawyer came off record, the government immediately assigned the applicant another one. The ECtHR held that “a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes” (see the *Kamasinski v. Austria* judgment of 19 December 1989, Series A no. 168, p. 33, para. 65)⁸³. In this instance the court held that there had been no breach of the ECHR given the short period of questioning and the failure of the applicant to complain about the lawyer with whom he had instructed.

Imbrioscia v. Switzerland was later approved by the Grand Chamber in *Murray v. The United Kingdom*⁸⁴. Murray notes that a person should benefit from the rights as provided for by Article 6 (1) and (3) in the preliminary stages of proceedings. However, these rights can be restricted for ‘good cause’. The question before the court ‘is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing’⁸⁵. In this instance the applicant was refused legal assistance for 48 hours on the basis that the police were afraid that access to a lawyer would prevent the gathering of information on terrorist acts. The court reiterated that Article 6 requires that an accused person should have the benefit of legal assistance at the early stages of a police interrogation. It was not necessary to consider the fact that an accused may not have acted any differently with the assistance of a lawyer. Furthermore, in this instance, the denial of a lawyer for 48

82 *Imbrioscia v Switzerland* (Application no. 13972/88) 24 November 1993 at para 38

83 *Imbrioscia v Switzerland* (Application no. 13972/88) Judgment 24 November 1993 at para 41 This was taken from (*Kamasinski v Austria* (Application no. 9783/82) Judgment of 19 December 1989, para. 65

84 *John Murray v The United Kingdom* (Application no. 18731/91) Judgment 8 February 1996

85 *John Murray v The United Kingdom* (Application no. 18731/91) Judgment 8 February 1996 at para 63

hours could ‘irretrievably prejudice’, the accused and it was therefore in breach of the ECHR⁸⁶. This was particularly the case in this instance as under UK legislation inferences could be drawn from an accused’s silence during questioning.

*Salduz v Turkey*⁸⁷ reiterated the principles as laid down in *Imbrioscia* and *Murray*⁸⁸. However, it went even further and held that an accused person should be provided with legal assistance on first being questioned by the police, save in exceptional circumstances. Furthermore, even if there are exceptional circumstances for preventing legal assistance at the pre-trial stage, there may still be a breach of Article 6 (1) and Article 6 (3) if it would unduly prejudice the accused’s rights to a fair trial. The relevant passage is as follows:

“the Court finds that in order for the right to a fair trial to remain sufficiently “practical and effective” (see paragraph 51 above) Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction - whatever its justification - must not unduly prejudice the rights of the accused under Article 6 (see, mutatis mutandis, Magee, cited above, § 44). The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.”⁸⁹

In *Salduz*, the applicant, a minor, was refused legal assistance at the pre-trial stage based on domestic legislation. He made statements during the course of his interrogation, upon which all of the prosecution’s case was based. The only justification for the refusal of legal assistance was based upon the relevant domestic legislation and there was an absolute ban on legal assistance at the pre-trial stage under the legislation. The Grand Chamber held that the blanket refusal of legal

⁸⁶ *John Murray v The United Kingdom* (Application no. 18731/91) Judgment 8 February 1996 at para 66

⁸⁷ *Salduz v Turkey* (Application no. 36391/02) Judgment 27 November 2008

⁸⁸ *Salduz v Turkey* (Application no. 36391/02) Judgment 27 November 2008 at para 52

⁸⁹ *Salduz v Turkey* (Application no. 36391/02) Judgment 27 November 2008 at para 55

assistance, regardless of the accused age or other factors, was in breach of the ECHR as provided for in *Imbrioscia* and *Murray*. The prosecution had used the applicant's statements as the basis for conviction, notwithstanding that the applicant disputed their accuracy. The Grand Chamber held that '*neither the assistance provided subsequently by a lawyer nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred during police custody. However, it is not for the Court to speculate on the impact which the applicant's access to a lawyer during police custody would have had on the ensuing proceedings*'⁹⁰. The court went on to say that there is nothing preventing an accused person from waiving his right to legal assistance; however, this must be done in an '*unequivocal manner*'. The Grand Chamber noted that the applicant was a minor and it stressed the '*fundamental importance of providing access to a lawyer where the person in custody is a minor*'⁹¹.

The principles as encapsulated by *Salduz* have been applied by the ECtHR in different contexts under the ECHR⁹².

3.3.2 THE RIGHT OF AN ACCUSED PERSON TO LEGAL ASSISTANCE ON APPEAL

The right to free legal assistance on appeal will depend on domestic law and the role which the appellant court will play in the hearing⁹³. The court will look at the type of proceedings and the complexity of the case in deciding whether legal aid should be made available on appeal. Legal aid will not be granted on appeal, where there are no grounds for appeal and the prosecution, along with the accused, are not present at the hearing for leave to appeal⁹⁴.

90 *Salduz v Turkey* (Application no. 36391/02) Judgment 27 November 2008 at para 58

91 *Salduz v Turkey* (Application no. 36391/02) Judgment 27 November 2008 at para 59-60

92 *Pishchalnikov v Russia* (Application no. 7025/04) Judgment 24 September 2009 at para 71 & 73; *Brusco v France*, (Application no. 1466/07), Judgment of 14 October 2010 [Text only available in French. It is not final]. For a summary of the case in English see European Court of Human Rights Press Release '*Police custody – right to remain silent and to be assisted by a Lawyer*' (14th October 2010) Press release no. 752/ issued by the Registrar of the Court <http://eujjustice.iccl.ie/sites/default/files/caselaw/Chamber_judgment_Brusco_v_France_14_10_2010%20%281%29.pdf> Last accessed 20th January 2013 ; See also *Lang and Hastie v United Kingdom* (Application No. 19/11 and 36395/11) Judgment 22 May 2012; *Othman v United Kingdom* (Application No.8139/09) Judgment 17 January 2012; *Al-Khawaja v United Kingdom* (Application No. 26766/05 and 22228/06) Judgment 15 December 2011; Isobel, M; 'Early Access to Legal Assistance - Template Brief Issue #1'; New Journal of European Criminal Law, Vol. 3, Issue 2, 2012 at pg. 185

93 *Monnell and Morris v The United Kingdom* (Application no. 9562/81; 9818/82) Judgment 2 March 1987 at para 56

94 *Monnell and Morris v The United Kingdom* (Application no. 9562/81; 9818/82) Judgment 2 March 1987

Delcourt v. Belgium held that an appeal will fall under the remit of Article 6 ECHR as ‘a criminal charge is not really “determined” as long as the verdict of acquittal or conviction has not become final. Criminal proceedings form an entity and must, in the ordinary way terminate in an enforceable decision. Proceedings in cassation are one special stage of the criminal proceedings and their consequences may prove decisive for the accused. It would therefore be hard to imagine that proceedings in cassation fall outside the scope of Article 6 para. 1 (art. 6-1)’⁹⁵.

Delcourt also provided that that the ECHR does not require Member States to set up an appeals court or a Court of Cassation but if a State has a means of appeal then it must comply with Article 6 ECHR⁹⁶. The court also noted the importance of equality of arms under Article 6, in other words there must be balance between both parties to the proceedings, the prosecution and the defence.

In *Monnell and Morris v UK* the court considered when Article 6 (1) and Article 6 (3) (c) will apply to appellant courts⁹⁷. In deciding whether there has been a breach of Article 6 regard should be had to the proceedings as a whole in the domestic court and the role which the appeal court plays in it. In order to ascertain whether Article 6 has been satisfied, the court considered the procedure for leave to appeal and its role in the context of criminal proceedings, the court of appeal’s powers and the way in which the ‘applicants’ interests were actually presented and protected before the Court of Appeal⁹⁸.

In *Monnell and Morris*, both applicants obtained legal advice to the effect that they did not have any grounds for appeal. Notwithstanding this they proceeded to seek leave to appeal. They were not present for the application before the judge for leave to appeal, nor were they legally represented. The prosecution also did not appear, in accordance with the principle of equality of arms. In considering whether leave to appeal should be granted, the court noted that regard should be had to whether there were arguable grounds for appeal⁹⁹. In this case there were none and the court provided that there was no breach of Article 6 (3) (c).

⁹⁵ *Delcourt v Belgium* (Application no. 2689/65) Judgment 17 January 1970 at para 25

⁹⁶ *Delcourt v Belgium* (Application no. 2689/65) Judgment 17 January 1970 at para 21

⁹⁷ *Monnell and Morris v The United Kingdom* (Application no. 9562/81; 9818/82) Judgment 2 March 1987 at para 56

⁹⁸ *Ibid*

⁹⁹ *Monnell and Morris v The United Kingdom* (Application no. 9562/81; 9818/82) Judgment 2 March 1987 at 57

In considering whether legal aid should be granted on an appeal, the court held, that in the instant case:-

“Under paragraph 3 (c) of Article 6 (art. 6-3-c), they were guaranteed the right to be given legal assistance free only so far as the interests of justice so required. The interests of justice cannot, however, be taken to require an automatic grant of legal aid whenever a convicted person, with no objective likelihood of success, wishes to appeal after having received a fair trial at first instance in accordance with Article 6 (art. 6). Each applicant, it is to be noted, benefited from free legal assistance both at his trial and in being advised as to whether he had any arguable grounds of appeal.”¹⁰⁰

The court noted that the interests of justice would be met in this case if the applicants were able to make written legal submissions to the court.

It is important to note that the granting of legal aid on appeal will be subjected to the same test as at first instance as provided for Article 6 (3) (c), namely, that the accused person has insufficient means and that it is in the interests of justice to provide it. The case of *Granger v. The United Kingdom* related to free legal aid which was sought on appeal, but had been refused (This case is discussed in further detail in section 3.2.2). In that instance the interests of justice test was satisfied by the fact that the accused had received legal aid at the trial of the matter and that on appeal there were complex legal issues on both sides which needed expert legal advice.

100 *Monnell and Morris v The United Kingdom* (Application no. 9562/81; 9818/82) Judgment 2 March 1987 at para 67

3.4 THE EFFECTIVENESS OF FREE LEGAL AID UNDER THE ECHR¹⁰¹

Under Article 6 (3) (c) an accused person is entitled to ‘effective’ legal representation. The reason for this is based on the fact that *‘the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective; this is particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive.’*¹⁰²

In *Artico v Italy* the lawyer appointed to deal with the applicant’s case indicated at the outset that he was not in a position to deal with it. However, no replacement was allocated:

*‘mere nomination does not ensure effective assistance since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations. Adoption of the Government’s restrictive interpretation would lead to results that are unreasonable and incompatible with both the wording of sub-paragraph (c) (art. 6-3-c) and the structure of Article 6 (art. 6) taken as a whole; in many instances free legal assistance might prove to be worthless.’*¹⁰³

In *Kamasinski v Austria*¹⁰⁴ the ECtHR provided that the relationship between a lawyer and client is independent and a State should not be held responsible for any issues arising. However, a State would have to intervene if a lawyer has failed to effectively represent his client and this fact is ‘sufficiently’ or manifestly brought to the attention of the State.

‘Nevertheless, “a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes” (ibid., p. 18, § 36). It follows from the independence of the legal profession from the State that

101 Spronken, T; Vermeulen, G; ‘Study on Procedural Rights in Criminal Proceedings: Existing Level of Safeguards in the European Union’ – 2008 Update; Maastricht Faculty of Law Working Paper 2009-11

102 *Artico v Italy* (Application no. 6694/74) Judgment 13 May 1980 at para 33

103 *Ibid*

104 *Kamasinski v Austria* (Application no. 9783/82) Judgment of 19 December 1989

the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately financed. The Court agrees with the Commission that the competent national authorities are required under Article 6 § 3 (c) (art. 6-3-c) to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way.’¹⁰⁵

3.5 RIGHT TO INFORMATION ON FREE LEGAL AID UNDER THE ECHR, INTERNATIONAL LAW AND EU LAW

Article 5(2) of the ECHR provides that certain information should be provided to accused persons. It states that:-

“Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.”

Similarly Article 6 (3) (a) provides that everyone charged with a criminal offence has the right:

‘to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him’

The ECHR requires that information should be given quickly after a person has been arrested or charged. No mention is made of how it should be made i.e. orally or in writing, nor is there any reference to what information should be provided and when this should be done. Certainly, there is no requirement, based on a literal reading of Article 5 (2) and Article 6 (3) (a) to provide information to accused persons on their right to legal aid.

In 2003 the EU Commission published a Green Paper on *Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union*¹⁰⁶.

¹⁰⁵ *Kamasinski v Austria* (Application no. 9783/82) Judgment of 19 December 1989 at para 65

¹⁰⁶ Green Paper from the Commission — Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union COM/2003/0075 final <http://eur-lex.europa.eu/LexUriServ/site/en/com/2003/com2003_0075en01.pdf> Last accessed 31st December 2012 [Hereafter Green Paper from the Commission(2003)]

The Green Paper provided that a letter of rights should be provided to accused persons as soon as their rights under Article 5 and Article 6 ECHR came into effect¹⁰⁷.

Reports funded by the EU Commission have considered the provision of information on free legal assistance to accused persons via a letter of rights¹⁰⁸. The report on an *EU-Wide Letter of Rights in Criminal Proceedings: Towards Best Practice* considers the issue of the letter of rights and its contents in more detail. It considered the provision of information to suspects on their right to legal assistance free of charge in certain instances. Concerns were raised in relation to the fact that some Member States did not provide the information at all, while in other Member States the information was provided by different means and at different times¹⁰⁹. A follow up report called *EU-Wide Letter of Rights in Criminal Proceedings: Towards Best Practice Final* report looked in more detail at the provision of information to accused persons.

The Directive on the *Right to Information in Criminal Proceedings* was published on 1 June 2012¹¹⁰ in the Official Journal of the European Union. It must be transposed by Member States by 2 June 2014. Annex 1 of the Directive provides for an '*Indicative Model Letter of Rights*', which was developed in order to assist Member States in preparing a letter for accused persons on their arrest or detention. It is a letter which '*must be given*' on an accused persons arrest or detention and it sets out their rights¹¹¹. It goes onto say that '*(t)his however does not prevent Member States from providing suspects or accused persons with written information in other situations during criminal proceedings*'. Part A of the draft letter states that a person is entitled to the '*assistance of a lawyer/entitlement to legal aid*' as well as '*the right to speak confidentially to a lawyer*'. Part A continues to state that '*a lawyer is independent from the police lawyer is independent from the police. Ask the police if you need help to get in contact with a lawyer, the police shall help you. In certain cases the assistance may be*

107 *Ibid* Green Paper from the Commission(2003) at 8.2 pg. 38

108 Spronken, Vermeulen, de Vocht, van Puyenbroeck '*EU Procedural Rights in Criminal Proceedings*' Universities of Maastricht and Ghent (2009) <<http://arno.unimaas.nl/show.cgi?fid=16315>> [Last accessed 19th December 2012] *Supra* note 18

Spronken, T; *EU-Wide Letter of Rights in Criminal Proceedings: Towards Best Practice Final* report (Maastricht University July 2010) <<http://arno.unimaas.nl/show.cgi?fid=20056>> [Last accessed 31st December 2012]

109 *Ibid* at pg. 11

110 *Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:142:0001:0010:EN:PDF> Last accessed 31st December 2012 [Hereafter *Directive on the Right to Information in Criminal Proceedings*]

111 *Directive on the Right to Information in Criminal Proceedings*, Article 11 (1)

free of charge. Ask the police for more information.'

Principle 8 of the UN Principles and Guidelines on Access to Legal Aid is called the '*Right to be informed*'. It recommends that information on legal aid should be '*freely available*' and '*accessible to the public*'¹¹². Guidelines are outlined for the provision of information on legal aid:

- a. Information on legal aid services and how to access them should be made available to the public via local government, religious and educational institutions, via the media and through the internet¹¹³.
- b. Isolated or marginalised persons should be informed of their right to legal aid via radio, television, newspapers and the internet, particularly if there has been a change in the law¹¹⁴.
- c. Unrepresented persons should be informed of their right to legal aid by the police, prosecutors and the judiciary¹¹⁵.
- d. Information on the availability of legal aid, for example, via a letter of rights or any other document which would meet the needs of minorities, children, persons with disabilities and illiterate persons. It should be in a language which the person understands. Also, any information which is given to children should be age appropriate.
- e. Remedies which are effective should be made available to persons who were not informed adequately of their right to legal aid. The remedies suggested included judicial review, exclusion of evidence and release of the accused person from detention.
- f. There should be some form of verification that a person has received information on legal aid.

112 *The United National Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Supra note 22*

113 *The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems at para 42 (a). Supra note 22.*

114 *The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems at para 42 (b). Supra note 22.*

115 *The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems at para 42 (c). Supra note 22.*

CHAPTER III

NETWORK MEMBER JURISDICTIONS' APPLICATION OF CRIMINAL LEGAL AID PRINCIPLES

Completed questionnaires have been received from representatives of Network Member Organisations in the following seven jurisdictions: Bulgaria, Czech Republic, England & Wales, Germany, Greece, Ireland and Lithuania. Network Member States have been assessed via benchmarks identified based on the ECHR and its jurisprudence.

The results are presented in the following tables, which record the state of compliance with the standards of the European Convention on Human Rights in the seven jurisdictions concerned.

I. THE SCOPE OF THE LEGAL AID IN CRIMINAL CASES & ELIGIBILITY FOR LEGAL AID

Table I.1 – The Right to Legal Aid

Network Member Jurisdiction	Does your jurisdiction provide legal aid at the pre-trial stage?	Does your jurisdiction provide legal aid in cases relating to criminal justice issues at the trial stage?
Greece	Yes, legal aid is made available as soon as someone is arrested or when an accused person is summoned.	<p>Yes, the provision of legal aid at the trial stage varies depending on the crime involved. In the case of a misdemeanour the presiding Judge should receive a written request for legal aid at least five days prior to the trial. For a felony a request can also be made at the trial of the action.</p> <p>In Greece all suspects and accused persons are eligible to legal aid. In cases involving misdemeanours only accused persons with a low income are eligible for legal aid.</p>
Lithuania	Yes, legal aid is available at the pre-trial stage but only after a person is deemed eligible.	<p>Yes, in the majority of cases the legal aid agency is contacted by the investigating officer or the prosecutor.¹¹⁶ The courts would rarely contact the legal aid agency. This agency must provide a lawyer without undue delay. In practice there appears to be a significant delay between the granting of legal aid and a lawyer providing legal assistance to an accused person. Legal aid is awarded by the court, the officer carrying out the pre-trial investigation, the prosecutor and the SGLA¹¹⁷ agency, which can consider any application from the accused.</p>

¹¹⁶ Code of Criminal Procedure [Baudžiamojo proceso kodeksas], No. IX-785, Article 50

¹¹⁷ State Guaranteed Legal Aid

Network Member Jurisdiction	Does your jurisdiction provide legal aid at the pre-trial stage?	Does your jurisdiction provide legal aid in cases relating to criminal justice issues at the trial stage?
Bulgaria	<p>Yes, prior to the 1st of January 2012, an accused person in Bulgaria was only provided with legal aid after he/she was charged with a criminal offence. Since 2012 the Bulgarian Legal Aid Act has provided that an accused person can access criminal legal aid when they are arrested. Legal aid will then be provided by a 'duty solicitor'. These solicitors are on a register of the National Bureau of Legal Aid.</p>	<p>Yes, legal aid is also available at trial in accordance with the Criminal Procedure Code. Lawyers dealing with an accused at the pre-trial stage will normally also deal with him/her at the trial. Legal aid is awarded based on selected eligibility by the National Legal Aid Bureau in Bulgaria.</p>
Czech Republic	<p>Yes, Article 37 (2) of the Bill of Fundamental Rights and Freedoms 1993 provides that <i>'everyone has the right for a legal aid in proceedings before courts.'</i> The Czech Constitutional Court has interpreted Article 37 (2) to provide for legal aid at every stage of legal proceedings. Legal aid is available based on selected eligibility by the court or the bar association. Under Article 33 (2) Criminal Procedure Act 1961 an accused person has the right to free legal aid at the pre-trial stage if he/she does not have the financial means to pay for it. Furthermore, Article 36 of the Criminal Procedure Act 1961 provides for the provision of mandatory legal aid where <i>'the accused is held in pre-trial detention; serving a prison sentence; is under guardianship; placed in a health care centre for observation in order to assess his or her mental state; is on a run; or the prosecutor has so decided due to his or her disability'</i>.</p>	<p>Yes</p>

Network Member Jurisdiction	Does your jurisdiction provide legal aid at the pre-trial stage?	Does your jurisdiction provide legal aid in cases relating to criminal justice issues at the trial stage?
Germany	Yes ¹¹⁸ , a prosecutor will appoint counsel on request at the pre-trial stage under §141 (3) of the German Code of Criminal Procedure.	When legal aid is granted the court will appoint a defence counsel. If the accused has chosen a defence lawyer, under § 142 German Code of Criminal Procedure, the court will usually appoint this person as the accused's defence counsel. If a defendant is convicted and he was granted legal aid then he will have to pay the legal fees notwithstanding his financial position or whether he has requested a lawyer ¹¹⁹ .
Ireland	Yes, an accused person is entitled to access to a solicitor at the pre-trial stage.	An application for legal aid must be made by the defence solicitor before a Judge. This is usually done when an accused person is first brought before the court. Legal aid is based on selected eligibility by a court. A Judge is obliged to consider granting legal aid under Section 2 of the Criminal Justice (Legal Aid) Act 1962 as substituted by s5(6) of the Criminal Justice (Miscellaneous Provisions) Act 1997.
England & Wales	Yes, on arrest a suspect is asked by the custody officer at the police station whether they want to contact a solicitor. A lawyer will then be made available free of charge notwithstanding the income of the accused.	Yes, an application for legal aid at trial is made by way of application to the court. This application is made when the accused first appears in court. England & Wales provide legal aid on a selected basis by the court.

¹¹⁸ In Germany, sixteen federal states are responsible for the administration of legal aid. There is no centralised legal aid system on federal level. In the sixteen federal states, the administration of legal aid is entrusted to the state court systems and not to a state legal aid board or foundation.

¹¹⁹ The German legal aid system is a pure judicare model that lacks any centralised structure that oversees its operation. In Germany four times more money is spent on non-criminal legal aid than on criminal legal aid.

Table I.II – Eligibility Criteria for awarding Criminal Legal Aid

Network Member Jurisdiction	What criteria does your jurisdiction apply in order to award free legal aid?
Greece	In Greece all suspects and accused persons are eligible for legal aid. The provision of legal aid at the trial stage varies depending on the crime involved. In cases involving misdemeanours only accused persons with a low income are eligible for legal aid.
Lithuania	In Lithuania legal aid is awarded on selected eligibility, in most cases, due to lack of financial means. Legal aid will be provided in Lithuania in a number of situations regardless of a person's financial situation. ¹²⁰ Also the investigating officer, prosecutor or the court may identify that an accused person needs legal aid in circumstances where an accused persons rights would not be adequately protected without the legal aid. ¹²¹
Bulgaria	No information provided.
Czech Republic	Under Article 33 (2) Criminal Procedure Act 1961 an accused person has the right to free legal aid at the pre-trial stage if he/she does not have the financial means to pay for it. In the Czech Republic legal aid is awarded based on selected eligibility, namely lack of financial means. However, legal aid will be provided notwithstanding the financial means of a person in certain instances.

120 The suspect or accused is a juvenile; the suspect or defendant has a physical or intellectual disability, which hinders his or her defence; the suspect or defendant does not understand the language of the proceedings (Lithuanian); there is a possible conflict of interests between several suspects or defendants and at least one of them has a legal representative; the case involves a crime for which the suspect or defendant can be sentenced to life imprisonment; proceedings are conducted in absentia; the suspect or accused is placed in pre-trial detention; person's extradition is decided upon; the case is heard in the court under expeditious proceedings.

121 Code of Criminal Procedure [Baudžiamojo proceso kodeksas], No. IX-785, Article 51

Network Member Jurisdiction	What criteria does your jurisdiction apply in order to award free legal aid?
Germany	Legal aid is based on selected eligibility. In Germany, when granting legal aid, the financial means of the person will be taken into account as will the gravity of the offence. However, the granting of legal aid is not dependent on the financial circumstances of the accused when providing legal aid in cases relating to criminal justice. Legal aid will only be granted at trial if there is a certain gravity as provided by § 140 of the German Code of Criminal Procedure. A Judge will consider whether there is a need for 'necessary representation' in a case, as provided for § 140 of the German Code of Criminal Procedure. If representation is necessary then a lawyer will be appointed to the accused, notwithstanding his/her means or whether the accused wants legal representation.
Ireland	A Judge is obliged to consider granting legal aid under Section 2 of the Criminal Justice (Legal Aid) Act 1962 as substituted by s5(6) of the Criminal Justice (Miscellaneous Provisions) Act 1997. ¹²² A statement of means of the accused person must be before the court in order for the Judge to assess whether he/she has insufficient means to pay for legal assistance. Often a Garda (police officer) is shown the statement of means and he/she may make enquires to verify it. ¹²³ Then the court must consider the gravity of offence or whether there are any exceptional circumstances before the court which would warrant legal aid being granted. The accused must be 'at risk' of a prison sentence in order for legal aid to be granted. ¹²⁴ The Irish Supreme Court recently considered this issue in <i>Joyce v DJ Brady & Anor</i> [2011] IESC 36. ¹²⁵
England & Wales	The UK also provides for a means and merits/interests of justice test in allocating free legal aid in criminal cases.

122 "If it appears to the District Court before which a person is charged with an offence or an alternative court within the meaning of section 5 of the Criminal Justice (Miscellaneous Provisions) Act, 1997, before which a person is appearing –

(a) that the means of the person before it are insufficient to enable him to obtain legal aid, and

(b) that by reason of the gravity of the offence with which he is charged or of exceptional circumstances it is essential in the interests of justice that he should have legal aid in the preparation and conduct of his defence before it."

123 This was recently discussed in *Joyce v DJ Brady & Anor* [2011] IESC 36.

124 Very often a Garda will be asked by the court whether an accused person is 'at risk', and if the Garda answers in the negative then legal aid may not be granted. This is the case notwithstanding that an accused person may be subject to a potential prison sentence.

125 The Supreme Court concluded that: "If the trial of a person in the District Court on a given charge, without legal aid, would be unfair, then the charge is of sufficient gravity or the circumstances are sufficiently exceptional so as to require legal aid. There is no doubt that the real risk of imprisonment is one compelling indicator that a trial without legal aid would be unfair, but the perceived absence of such a risk is not the sole or decisive test justifying a refusal of legal aid. Furthermore, the refusal of legal aid following an inquiry by one District Justice of one member of the Gardaí as to whether that member perceived the accused to be "at risk" (particularly when the trial may proceed before another District Judge and be prosecuted by another Garda) falls in my view short of what the Constitution requires." – at para 22

II. INFORMATION ON THE RIGHT TO FREE LEGAL AID

Table II

Network Member Jurisdiction	Are suspects/accused persons automatically informed of his or her right to legal aid?	When is a suspect/accused person informed of this right	Who will usually inform a suspect of their entitlement in the first instance?
Greece	Yes. However, <i>the United Nations Working Group on Arbitrary Detention</i> conducted a country mission to Greece and found that information on legal aid was not being provided in practice. Also, information leaflets were 'very vague' and they did not refer to the right to legal assistance ¹²⁶ .	An accused person is informed orally of this right immediately following arrest by the arresting police officer.	Police officer

126 El Hadji Malick Sow, Working Group on Arbitrary Detention statement upon the conclusion of its mission to Greece (Office of the High Commissioner for Human Rights, 31st January 2013) <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12962&LangID=E> Last accessed 19th February 2013 From the 21st to the 31st of January 2013, the United Nations Working Group on Arbitrary Detention conducted a country mission to Greece. The following comments from the report are relevant for the purpose of this report:

'National law provides for proper safeguards for persons charged with criminal offences at the pre-trial stage. However, the Working Group found serious discrepancies between the legal requirements and the actual application of some of these safeguards. For instance, according to Greek national law, everyone, charged with a felony, has the right to have legal assistance assigned to him without payment if he does not have sufficient means to pay for it. Nonetheless, the Working Group found that in numerous instances the accused did not enjoy this right in practice. Most detainees indicated that they did not have a lawyer because they could not afford it. Very few were aware of the right to free legal assistance. Moreover, a number of detainees who had chosen to engage a lawyer at their own expense complained that the lawyers simply took their money and did not follow up on their cases. Information leaflets on the rights of detainees found in detention facilities are very vague and refer only to the right of any detainee to contact a lawyer. They do not refer to the right to free legal assistance.'

Network Member Jurisdiction	Are suspects/accused persons automatically informed of his or her right to legal aid?	When is a suspect/ accused person informed of this right	Who will usually inform a suspect of their entitlement in the first instance?
Lithuania	Yes	In Lithuania a person is informed orally of their right to legal aid. This is usually done before or during the questioning of the accused by the police officer. The Lithuanian Code of Criminal Procedure does not state when an accused person should be first informed of his/ her right to legal aid. However, it must be done no later than when an accused person is first questioned.	Police officer
Bulgaria	Yes	Accused persons are informed of their right to legal aid in writing in Bulgaria. This is done before or during questioning by the arresting police officer.	Police officer
Czech Republic	Yes	In the Czech Republic an accused person is entitled to be informed of their right to legal aid orally and in writing before or during questioning by a police officer.	Police officer

Network Member Jurisdiction	Are suspects/accused persons automatically informed of his or her right to legal aid?	When is a suspect/accused person informed of this right	Who will usually inform a suspect of their entitlement in the first instance?
Germany	Yes	On arrest an accused person is informed orally of their right to choose a lawyer.	Police Officer. Moreover, during the course of investigations the police or the prosecution can request the appointment of a defence council if they deem it necessary. If a person is charged at the end of pre-trial investigations and the confirmation of charges, the presiding judge of the competent chamber appoints a defence counsel ex officio. The court must appoint a defence counsel to an accused person where the prosecutor requests it.
Ireland	Yes	In Ireland an accused person is informed of their right to legal assistance as soon as they are brought into the Garda (police) station. They are informed of this right orally and in writing. A Judge will also inform a person of their right to legal aid.	Police Officer/Judge/Solicitor ¹²⁷ .
England & Wales	Yes	An accused person in England & Wales is told of his/her right to legal aid on arriving at the police station.	The custody officer will inform him/her orally of their right of access to a solicitor of their choosing.

127 Information on legal aid is also available in Ireland via the citizen's information board, in their offices and on their website See <http://www.citizensinformation.ie/en/justice/legal_aid_and_advice/criminal_legal_aid.html>

III. THE RIGHT TO APPEAL A REFUSAL OF LEGAL AID

Table III

Network Member Jurisdiction	Can a negative decision regarding the access to legal aid be judicially appealed?
Greece	Yes
Lithuania	Yes, however there is no particular procedure to appeal a refusal to grant legal aid by the investigating officer or prosecution but a refusal can be appealed generally to a higher prosecutor or to the court. A refusal by the court can be appealed to a higher court.
Bulgaria	Yes, Article 25(2) of the Legal Aid Act in Bulgaria provides for an appeal of a refusal of legal aid for the preparation of documents and for a consultation.
Czech Republic	Yes, under Article 33 (3) Criminal Procedure Act 1961, a refusal of legal aid can be appealed within three days of the decision of a Regional Court.
Germany	Yes, under § 305 of the German Code of Criminal Procedure a complaint can be made for a refusal of legal aid.
Ireland	Yes, section 2(2) of Legal Aid Act 1962 states that a decision of the District Court in relation to an application under s2 (1) of the Act of 1962 for legal aid is final and cannot be appealed. However, an accused person can judicially review a refusal of legal aid, as was the case in <i>Joyce v DJ Brady & anor.</i> ¹²⁸
England & Wales	Yes

¹²⁸ *Joyce v DJ Brady & anor* [2011] IESC 36

IV. THE EFFECTIVENESS & TRANSPARENCY OF LEGAL AID

Table IV

Network Member Jurisdiction	Can lawyers appointed under the legal aid system meet with their clients in private prior to the first interview with the competent authorities / police? ¹²⁹	Can lawyers appointed under the legal aid system accompany clients during interrogation?	How would you describe the time allotted to lawyers appointed under the legal aid system to prepare cases?
Greece	Yes, always	Yes, always	Sufficient
Lithuania	Yes, always ¹³⁰	Yes, always	Insufficient – Persons working only on SGLA have a high workload. Lawyers working on a part-time basis have low interest as they get a much lower rate of pay than they would get in other matters.
Bulgaria	Yes, always	Yes, always	Sufficient
Czech Republic	Yes, always	Yes, always	Sufficient
Germany	Yes, always	Yes, always	Insufficient
Ireland	Yes, always	No	Sufficient – usually the defence will be given sufficient time to prepare their case.
England & Wales	Yes, always	Yes, always	Insufficient – Legal aid fees are a fixed sum and preparation time forms part of these fees. A legal aid lawyer is paid £75 for a half day trial and £125 for a full day trial in the magistrates court.

¹²⁹ This refers to the first official questioning by a police officer.

¹³⁰ Code of Criminal Procedure [Baudžiamojo proceso kodeksas], No. IX-785, Articles 10, 50

V. THE MONITORING OF FREE LEGAL AID

Table V

Network Member Jurisdiction	Are there quality mechanisms in place in relation to the appointment of lawyers under the legal aid system?
Greece	No
Lithuania	No
Bulgaria	The only mechanism available is the quality assurance certificate issued by the Bar Council.
Czech Republic	No
Germany	Yes
Ireland	Complaints can be made against solicitors and barristers in Ireland via the Law Society and the Bar Council respectively. Breaches of a solicitor's or barrister's code of conduct could result in them being struck off.
England & Wales	Only those organisations which have a quality standard recognised by the Legal Services Commission can work in criminal legal aid.

CHAPTER IV

CONCLUSIONS & ANALYSIS OF NETWORK MEMBER STATES' CONFORMITY WITH ECHR STANDARDS

I. THE STAGE AT WHICH LEGAL AID IS PROVIDED

All of the Network Member jurisdictions provide for legal aid at trial and pre-trial stage. A major concern identified in Lithuania is the significant delay between the granting of legal aid to an accused person and the subsequent provision of a lawyer. This could result in a person being questioned without the benefit of legal assistance and it may result in a breach of Article 6 (1) and (3) (c) of the ECHR.

Network Member jurisdictions provide for legal assistance and legal aid when a person is arrested. However, the provision of legal aid on arrest does not necessarily comply with the ECHR. For example an accused person may voluntarily attend at a police station to give a statement. A witness may voluntarily attend a police station in order to make a statement, during the course of which the police may conclude that the witness is in fact a suspect. It was not possible to deduce from the information provided whether legal aid would be available to the accused person in these circumstances.

The *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* provides that a person should have access to free legal aid where they are 'arrested, detained, suspected of or charged with a criminal offence' and where the punishment is a term of imprisonment or the death penalty¹³¹. A suspected person is someone who only becomes aware that they are under investigation when they are in a custodial setting, such as the police station¹³².

It is unclear whether suspects or accused persons, who are not arrested or detained, are afforded criminal legal aid by Network Member jurisdictions.

131 *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, Principle 3, para 20, Supra note 22

132 *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, Principle 3, para 20, Supra note 22

II. ELIGIBILITY FOR FREE LEGAL AID

Six of the seven Network Member jurisdictions provide for legal aid on a selected basis¹³³. In Greece eligibility is based on the crime involved but in cases relating to a misdemeanour an accused person is eligible for legal aid if they have a low income. In the Czech Republic, legal aid is awarded based on selected eligibility, namely lack of financial means. However, legal aid will be provided notwithstanding the financial means of a person in certain instances. In Lithuania legal aid is usually awarded based on the financial means of a person however, Lithuania provides for legal aid in other circumstances where it is in the interests of justice to do so.

In Germany, when granting legal aid, the financial means of the person will be taken into account as will the gravity of the offence except where an offender loses his case. In that instance the convicted person will have to re-pay the cost of his/her lawyers notwithstanding that the lawyer was appointed against the wishes. In Ireland in deciding whether legal aid is granted both the financial circumstances of the accused, the gravity of the offence and other exceptional circumstances are taken into account. England & Wales also provides for a means and merits/interests of justice test in allocating free legal aid in criminal cases¹³⁴.

The ECHR and the jurisprudence of the ECtHR is very clear in relation to the test which should be applied by Member States in awarding free legal aid in criminal cases. This places a large weight in favour of maintaining the status quo. However, the *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* state that preliminary legal aid should be granted, notwithstanding a person's means where it is in the interests to do so for example in a case of 'urgency' or 'complexity' or having regard to the penalty involved¹³⁵. Legal aid could later be withdrawn after a means assessment¹³⁶.

133 More information is required regarding the system in Bulgaria.

134 'Criminal Legal Aid Manual Applying for legal aid in criminal cases in the magistrates' and Crown Court' (February 2012) <<http://www.justice.gov.uk/downloads/legal-aid/eligibility/criminal-legal-aid-manual-feb-2012.pdf>> Last accessed 24th January 2013

135 United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Principle 3, para 23, Supra note 22

136 United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Guideline 1, para 41 (c), Supra note 22

Regulation might be warranted in providing for the limited provision of free legal aid pending the determination of the legal aid assessment. Legislative action, in the form of an EU Directive, would be best placed to apply such a principle across all Member States.

III. INFORMATION ON THE RIGHT TO FREE LEGAL AID

All Network Member jurisdictions provide information on criminal legal aid. All save Bulgaria provide this information orally. Bulgaria provides this information in writing, while the Czech Republic provides it both in writing and orally. Ireland provides information in relation to the right of an accused person to a lawyer rather than information on legal aid. However, this information is available orally and in writing.

Network Member jurisdictions vary on when the information is to be provided. Bulgaria gives information on legal aid immediately following arrest. Greece provides information following arrest but the Working Group on Arbitrary Detention statement upon the conclusion of its mission to Greece found that this was not done in practice. Also information leaflets were vague and they made no reference to the right to free legal assistance¹³⁷. Germany and England & Wales provide information on an accused person's right to a lawyer immediately following arrest. In England & Wales it is done on arriving at the police station. In Ireland an accused person is informed of his right to legal assistance when arrested and at the police station. In the Czech Republic and Lithuania information on legal aid must be done prior to or before questioning.

137 El Hadji Malick Sow, Working Group on Arbitrary Detention statement upon the conclusion of its mission to Greece (Office of the High Commissioner for Human Rights, 31st January 2013) <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12962&LangID=E> [Last accessed 31st January 2013]

Annex 1 of the *Directive on the Right to Information in Criminal Proceedings* provides for an ‘*Indicative Model Letter of Rights*’¹³⁸. The Annex has an example letter which ‘*must be given*’ on an accused persons arrest or detention¹³⁹. However, it goes onto say that: ‘*this however does not prevent Member States from providing suspects or accused persons with written information in other situations during criminal proceedings.*’ Part A of the draft letter states that an accused person is entitled to the ‘*assistance of a lawyer/entitlement to legal aid*’ and it instructs an accused person to ‘*(a)sk the police if you need help to get in contact with a lawyer, the police shall help you. In certain cases the assistance may be free of charge. Ask the police for more information.*’

IV. THE RIGHT TO APPEAL A REFUSAL OF LEGAL AID

Based on the information provided in the questionnaire, a right to appeal a refusal of legal aid exists in all Network Member jurisdictions examined.

V. THE EFFECTIVENESS & TRANSPARENCY OF LEGAL AID

There are a number of issues of concern in relation to the effectiveness and transparency of legal aid in Network Member jurisdictions.

There are concerns relating to the time allotted to cases. The Czech Republic, Lithuania, England & Wales indicated that the time to prepare a case was insufficient. The questionnaire from England & Wales also highlighted the relatively low monetary compensation given to lawyers.

¹³⁸ *Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:142:0001:0010:EN:PDF> [Last accessed: 31st December 2012] [Hereafter *Directive on the Right to Information in Criminal Proceedings*]

¹³⁹ *Directive on the Right to Information in Criminal Proceedings*, Article 11 (1)

The ECtHR has considered cases involving the effectiveness of criminal legal aid, however, this jurisprudence, though of assistance, is not sufficient to place a positive obligation on States to identify any ineffectiveness in a legal aid system and whether there are transparency issues. An EU Directive on legal aid would help to resolve issues of effectiveness and transparency in Member States' legal aid systems.

VI. THE MONITORING OF CRIMINAL LEGAL AID

Based on the information provided, there appears to be little or no monitoring of the criminal legal aid system in Network Member jurisdictions.

VII. CONCLUSION

A number of issues have been identified in Network Member jurisdictions legal aid systems. The provision of criminal legal aid to a person suspected or accused of an offence outside of their country of origin or residence is country dependant.

A Directive on Legal Aid is arguably the only effective means of ensuring that an arrested, detained, accused or suspected persons would have the same legal right to criminal legal aid throughout the EU. Further, a Directive on Legal Aid could offer an opportunity to provide '*a more extensive protection*' of the rights of an accused person in criminal proceedings than those encapsulated by the ECHR and the ECtHR¹⁴⁰.

140 Article 52 (3) of the EU Charter

CHAPTER V

RECOMMENDATIONS

RECOMMENDATION I

An EU Directive should be issued in order to provide for criminal legal aid in a manner that complies with the European Convention on Human Rights and other applicable international standards.

RECOMMENDATION II

The ECHR and the jurisprudence of the ECtHR have set out the rules which apply under Article 6 (3) (c) in determining whether a person should be entitled to criminal legal aid. The status quo, if respected in practice, would continue to protect an accused person's right to criminal legal aid, with the ECtHR acting as guardian of these rights.

The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems outlines best international practise relating to criminal legal aid. It provides for the provision of legal aid in certain circumstances notwithstanding the means of an accused person. Currently the ECtHR does not cover the provision of legal aid in the case of 'urgency' or 'complexity' notwithstanding the means of the accused person. The EU can provide 'a more extensive protection' than the ECHR. Therefore, legislative action, in the form of an EU Directive, would ensure the extension of criminal legal aid in exceptional circumstances.

RECOMMENDATION III

The *Directive on the Right to Information in Criminal Proceedings* requires that persons who are arrested or detained must be informed of their right to legal aid via a letter of rights or similar document. Annex 1 provides that Member States are not prevented from providing 'suspects or accused persons with written information in other situations during criminal proceedings'. The effectiveness of the Directive in ensuring that suspects and accused persons are informed of their right to legal aid can only be ascertained with time.

RECOMMENDATION IV

Article 8 of the *Directive on the Right to Information in Criminal Proceedings* provides that Member States must keep a record of when they provide information to suspected or accused persons. Best practice would be to ensure that any letter of rights or other information on legal aid should be verified by the receiver. The Directive leaves it open to Member States as to how they wish to record the provision of information. Time is needed in order to ascertain how effective the Directive will be in ensuring that a record is taken when an accused person or suspect is informed of his/her right to legal aid.

RECOMMENDATION V

Member States should ensure that all accused persons and their lawyers are given an adequate and reasonable time to prepare for court. Member States should complete an assessment as to whether the time period allotted for the preparation of a case is sufficient. An assessment of the work load and costs awarded should also be completed.

RECOMMENDATION VI

Further research needs to be conducted on the knock on effect that the *Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest* will have on legal aid in Member States.

RECOMMENDATION VII

An EU Directive should include provision for Member States to implement monitoring mechanisms on the criminal legal aid system. Member States should be required to report to the EU Commission on what action, if any, they propose to take to ensure the monitoring of the legal aid system.

ANNEX 1: CASE LAW

EUROPEAN COURT OF HUMAN RIGHTS

Adamkiewicz v Poland (Application no 54729/00) Judgment 2nd March 2010

Al-Khawaja v United Kingdom (Application No. 26766/05 and 22228/06) Judgment 15 December 2011

Artico v Italy (Application no. 6694/74) Judgment 13 May 1980

Barsom and Varli v Sweden (Application no. 40766/06 and 40831/06) Judgment 4 December 2007

Brusco v France (Application no. 1466/07) Judgment of 14 October 2010

Campbell and Fell v the United Kingdom (Application no. 7819/77; 7878/77) Judgment 28 June 1984

Can v Austria (Application no. 9300/81) Judgment 30 September 1985

Croissant v Germany (Application no. 13611/88) Judgment 25 September 1992

Dayanan v Turkey (Application no. 7377/03) Judgment of 13 October 2009

Delcourt v Belgium (Application no. 2689/65) Judgment 17 January 1970

Engel and Others v The Netherlands (Application Nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72) Judgment of 8 June 1976

Ezeh and Connors v United Kingdom (Applications nos. 39665/98 and 40086/98) Judgment 9 October 2003

Granger v The United Kingdom (Application no. 11932/86) Judgment 28 March 1990

Hooper v the United Kingdom (Application no. 42317/98) Judgment 16 November 2004

Imbrioscia v Switzerland (Application no. 13972/88) Judgment 24 November 1993

Janosevic v Sweden (Application no. 34619/97) Judgment 23 July 2002

Jussila v Finland (Application no. 73053/01) Judgment 23 November 2006

Kamasinski v Austria (Application no. 9783/82) Judgment of 19 December 1989

Lang and Hastie v United Kingdom (Application No. 19/11 and 36395/11) Judgment
22 May 2012

Monnell and Morris v The United Kingdom (Application no. 9562/81; 9818/82)
Judgment 2 March 1987

Murray v The United Kingdom (Application no. 18731/91) Judgment 8 February
1996

Othman v United Kingdom (Application No.8139/09) Judgment 17 January 2012

Pakelli v Germany (Application no. 8398/78) Judgment 25 April 1983

Panovits v Cyprus (Application no. 4268/04) Judgment 11 December 2008

Paykar Yev Haghtanak Ltd v Armenia (Application No 21638/03) Judgment 20
December 2007

Pishchalnikov v Russia (Application no. 7025/04) Judgment 24 September 2009

R.D. v Poland (Applications nos. 29692/96 and 34612/97) Judgment 18 December
2001

Salduz v Turkey (Application no. 36391/02) Judgment 27 November 2008

Shabelnik v Ukraine (Application no. 16404/03) Judgment 19 February 2009

Steininger v Austria (Application no. 21539/07) Judgment 17 April 2012

Tomasovic v Croatia (Application no. 53785/09) Judgment 18 October 2011

Walsh v United Kingdom (Application No 43384/05) Judgment 21 November 2006

EU LAW

Case C-283/05 ASML [2005] ECR I-12041

Case C-274/99 P Connolly v Commission [2001] ECR I-1611

Case C-279/09 DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland [2010] ECR I-00000

Case C 402/05 P and C-415/05 P Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities [2008] ECR I-6352

Case C-305/05; Ordre des barreaux francophones et germanophone and Others [2007] ECR I-5305

Case C29/69 Stauder [1969] ECR 419

ENGLISH LAW

Gale v Serious Organised Crime Agency [2011] UKSC 49

IRISH LAW

D.P.P. -v- Gilligan [2010] IEHC 345

Joyce v DJ Brady & anor [2011] IESC 36

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