

Legal Aid in criminal proceedings in the EU

Caroline Morgan

April 2012

This is a summary of the data collected to date on behalf of the European Commission in preparation of an Impact Assessment to accompany the Roadmap measure planned for June 2013 on legal aid ("Measure C2").

In order to assess the provision of legal aid in each Member State against the fair trial rights criteria in the ECHR and the ECtHR case-law, there are a number of key questions.

- Is there an 'interests of justice'/merits test?
- Is there a means test?
- Does legal aid cover all stages of the criminal proceedings, from initial detention to trial and any appeal stages?
- Is there a right of appeal where the suspect or accused person is denied legal aid?
- Is the efficiency and competence of legal aid lawyers monitored by the State/Bar Association?
- Are persons subject to a European Arrest Warrant entitled to legal aid? Is this the case both when the Member State is the executing State and when it is the issuing State?

The following table sets out the information gathered from the 2009 Spronken and Vermeulen study, *EU Procedural Rights in Criminal Proceedings*¹ together with amendments and comments from the (i) Ministries of Justice and (ii) Bar Associations or other expert practitioners/academics.

¹ T. Spronken, G. Vermeulen, D. de Vocht en L. van Puyenbroeck, *EU Procedural Rights in Criminal Proceedings*, Antwerp-Apeldoorn-Portland, Maklu, 2009

Summary of right to legal aid in EU Member States

Country	Means test?	Merits test?	Legal aid available from initial detention?	Efficiency / competence of lawyers monitored?	Right of appeal where legal aid denied?	Cap on expenditure in individual cases?	Individuals subject to EAW right to legal aid whether MS is state of issuance or execution?
Austria	<u>√</u>	<u>X</u>	<u>√</u>	<u>X</u>	<u>√</u>	<u>X</u>	<u>√²</u>
Belgium	<u>√</u>	<u>√</u>	<u>√</u>	<u>X</u>	<u>√</u>	<u>?</u>	<u>√</u>
Bulgaria	<u>√</u>	<u>√</u>	<u>√</u>	<u>X</u>	<u>√</u>	<u>X</u>	<u>√</u>
Cyprus	<u>√</u>	<u>√</u>	<u>X</u>	<u>X</u>	<u>√</u>	<u>?</u>	<u>E</u>
Czech Republic	<u>√</u>	<u>X</u>	<u>X</u>	<u>√</u>	<u>√</u>	<u>X</u>	<u>√</u>
Denmark	<u>X</u>	<u>X</u>	<u>√</u>	<u>√</u>	<u>√</u>	<u>X</u>	<u>√</u>
England & Wales	<u>√³</u>	<u>√</u>	<u>√</u>	<u>√</u>	<u>√</u>	<u>X</u>	<u>E</u>
Estonia	<u>X</u>	<u>X</u>	<u>√</u>	<u>X</u>	<u>N/A⁴</u>	<u>√</u>	<u>E</u>
Finland	<u>√</u>	<u>√</u>	<u>X⁵</u>	<u>√</u>	<u>√</u>	<u>√</u>	<u>√</u>
France	<u>√</u>	<u>√</u>	<u>√</u>	<u>√</u>	<u>√</u>	<u>?</u>	<u>E</u>
Germany	<u>√</u>	<u>X</u>	<u>√</u>	<u>X</u>	<u>√</u>	<u>X</u>	<u>E</u>
Greece	<u>√</u>	<u>√</u>	<u>√</u>	<u>X</u>	<u>√</u>	<u>√</u>	<u>E</u>

² Ministry of Justice states that legal aid is available for individuals subject to an EAW where Austria is either executing or issuing state; practitioners said that legal aid was only available where Austria is executing state.

³ This does not currently include legal advice provided at the police station.

⁴ There is no review procedure because the authorities cannot refuse to grant legal aid in criminal proceedings.

⁵ Legal aid is available to the suspect at all stages of the criminal proceedings. However how soon after the suspect's detention legally aided assistance is usually provided varies and there are no statistics.

Country	Means test?	Merits test?	Legal aid available from initial detention?	Efficiency / competence of lawyers monitored?	Right of appeal where legal aid denied?	Cap on expenditure in individual cases?	Individuals subject to EAW right to legal aid whether MS is state of issuance or execution?
Hungary	√	√	√ ⁶	<u>X</u>	√	√	√ ⁷
Ireland	√	√	√	<u>X</u>	<u>X</u>	<u>X</u>	<u>E</u>
Italy	√	<u>X</u>	√	√	√	√	√
Latvia	√	√	<u>X</u>	<u>X</u>	√	<u>X</u>	√
Lithuania	√	√	√	√	√	√	<u>E</u>
Luxembourg	√	<u>X</u> ⁸	√	<u>X</u>	√	√	√
Malta	√	<u>X</u>	√	√	√	√	√
Netherlands	√	√	√	√	√	√	<u>E</u>
Poland	√	√	√	√	<u>X</u>	<u>X</u>	√
Portugal	√	√	√	√	√	<u>X</u>	√
Romania	√	√	?	√	√	?	√
Scotland	√	√	√	√	√	<u>X</u>	√
Slovakia	√	√	√	√	<u>X</u>	<u>X</u>	√
Slovenia	√	√	<u>X</u>	<u>X</u>	√	√	√
Spain	√	<u>X</u>	<u>X</u>	√	√	<u>X</u>	√
Sweden	√	<u>X</u>	√	√	√	√	<u>E</u>

Key:

√ = Right exists; X = No right; ? = Unknown; E = Right to legal aid exists **only** where the MS is the state of execution of the EAW; N/A = Not applicable

Means and merits tests

⁶ There are some doubts as to whether this right exists in practice.

⁷ There are some doubts as to whether this right exists in practice.

⁸ No merits test with the exception of a legal provision for free legal aid for minors.

Not all Member States use means and/or merits criteria to determine right to legal aid. Where they do, the nature of these tests may differ from one jurisdiction to another.

Legal aid available from initial detention?

In a significant minority of Member States, the right to legal aid does not arise from the moment of initial detention. By analogy with the right to legal assistance under Article 6(3)(c) and *Salduz* case law, the failure to provide state-funded legal assistance before the suspect or accused person is questioned by police or judicial authorities may be an infringement of the ECHR on the ground that the rights are insufficiently practical and effective⁹. The *Salduz* judgment has widened the scope of the right to legal aid in some Member States. For example, **Belgium** has recently introduced a ‘*loi Salduz*’ granting detained persons the right to (state-funded, where applicable) legal assistance before police interrogation.¹⁰

Efficiency/competence of lawyers monitored?

There is much variation in quality control. In many Member States (e.g. **Austria, Denmark and Romania**), the only formal requirement of legal aid lawyers is that they are qualified to practise law, with usually the Bar Association (or the court¹¹ or most rarely the State¹²) having a supervisory role. Whether the supervision is practical and effective, or only nominal, needs to be explored. In **Germany, Greece and Ireland**, there is no formal system of quality assurance for legal aid lawyers. **Belgium and Portugal** permit trainees to act as legal aid defence counsel.¹³ In **England and Wales**,¹⁴ **the Netherlands**¹⁵ and **Spain**, training and monitoring schemes are in place.

⁹ The *Salduz* judgment does not refer to the suspect or accused’s detention *per se*. The emphasis is on his right to legal assistance as from the first police interrogation. However, given the ECtHR’s aim to render Article 6(3) rights ‘practical and effective’, it is arguable that in many cases this will involve making legal assistance available from the initial detention.

¹⁰ *Loi du 13 août 2011 modifiant le Code d’instruction criminelle et la loi du 20 juillet 1990 relative à la détention préventive afin de conférer des droits, dont celui de consulter un avocat et d’être assistée par lui, à toute personne auditionnée et à toute personne privée de liberté, M.B., 5 septembre 2011 (Loi Salduz)* (entered into force 1 January 2012).

¹¹ E.g. **Czech Republic and Poland**.

¹² E.g. **Lithuania**, where some supervision is exercised by the State-guaranteed Legal Aid Services, as well as the Bar Association.

¹³ In **Portugal**, trainee lawyers provide legal assistance under the supervision of the qualified lawyer responsible for their training.

¹⁴ In addition to supervision by the Solicitors Regulations Authority (for solicitors) and the Bar Standards Board (for barristers), in **England & Wales** the Legal Services Commission the LSC sets a number of requirements for solicitors’ firms wishing to undertake criminal legal aid work under contract to the LSC. Duty Solicitors wishing to undertake duty solicitor work at the police station and magistrates’ court must hold a Duty Solicitor Qualification awarded by the SRA.

Right of appeal where legal aid denied?

In **Ireland, Poland and Slovakia**, there is no right of appeal where the request for legal aid has been denied. There is no explicit right of appeal under the ECHR. However, the absence of such a right is detrimental to practical and effective access to legally aided assistance for the purposes of Article 6(3)(c).

Cap on expenditure in individual cases?

There are varying restrictions on the legal aid budget for individual cases in a significant minority of Member States. In **Italy**, the court ('judicial authority') determines the legal aid fee in each case, and it is not expected to exceed the average amount of the applicable fee scale.¹⁶ In the **Netherlands**, payment is on the basis of a points system, where each type of case is assigned a number of points (based on an average number of hours that the lawyer should spend working on the case), and these are multiplied by a standard hourly fee. In **Lithuania**, the payment limit differs between the two types of legal aid lawyers providing state-guaranteed legal aid. Lawyers who are exclusive, full-time legal aid practitioners receive a fixed salary regardless of the amount of assistance given in an individual case; lawyers who provide legal aid only occasionally are paid according to a limit set by the State Guaranteed Legal Aid Service (though this can be increased in exceptional circumstances).

The spending figures for legal aid in criminal proceedings are set out in the table. They show a significant difference in expenditure. In **England & Wales** and **Italy**, countries with similar populations,¹⁷ the total criminal legal aid budget is €1,343 million and €87 million respectively. The legal aid systems of **Belgium** and **Bulgaria** are superficially similar regarding the rights they afford to suspects or accused persons. However, given the dramatic variation in expenditure, in both absolute terms as well as spending per inhabitant,¹⁸ it is doubtful whether the right to legal aid is as similar *in practice* as it is in law.

¹⁵ Legal aid lawyers in the **Netherlands** must be legally qualified and have practical experience in dealing with criminal cases. They must participate in additional training every two years and meet certain requirements with regard to the running of their office.

¹⁶ In **Italy**, lawyers' fees are determined by a decree from the Ministry of Justice which provides for a minimum and maximum fee for every professional act a counsel may perform. The fee requested must not be clearly disproportionate to the work accomplished. See Cape et al, *Effective Criminal Defence in Europe*, Intersentia, 2010, p.388, footnote 43.

¹⁷ The population of **England and Wales** is approximately 55 million inhabitants, and **Italy** approximately 60 million. (See UK Office for National Statistics <http://www.ons.gov.uk/ons/rel/pop-estimate/population-estimates-for-uk--england-and-wales--scotland-and-northern-ireland/mid-2010-population-estimates/index.html> and Europa website, http://europa.eu/about-eu/countries/member-countries/italy/index_en.htm).

¹⁸ **Belgium** spends €54 million on criminal legal aid, representing €5 per inhabitant; the equivalent figures for **Bulgaria** are €3 million and €0.39 per inhabitant.

Summary of legal aid expenditure in Member States

EU jurisdiction	Legal expenditure for criminal proceedings (€ millions)	aid for proceedings (€ per inhabitant) ¹⁹
Austria	18	2.17
Belgium	54	5.05
Bulgaria	3	0.39
Cyprus	0.2	0.25
Czech Republic	21	2
Denmark	-	-
England & Wales	1343	24.42
Estonia	-	-
Finland	47	8.87
France	103	1.60
Germany	N/A ²⁰	N/A
Greece	-	-
Hungary	-	-
Ireland	48	10.67
Italy	87	1.45
Latvia	0.6	0.26
Lithuania	2	0.61
Luxembourg	-	-
Malta	-	-
Netherlands	188	11.46
Poland	21	0.55
Portugal	-	-
Romania	3	0.14
Scotland	168	32.17
Slovakia	-	-
Slovenia	-	-
Spain	108	2.36
Sweden	120	13.04

¹⁹ This is calculated by dividing the total expenditure stated in the previous column by the approximate country population of each Member State as stated on the Europa website (or, in the case of the UK jurisdictions, the Office for National Statistics).

²⁰ Mandatory defence counsel is appointed in all cases in which it is deemed necessary. Remuneration is provided according to a codified fee scheme. Neither is dependent upon budget decisions.

