

FAIR TRIALS INTERNATIONAL



Report

The practical operation of legal aid in the EU

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About Fair Trials International

Fair Trials International (**FTI**) is a non-governmental organisation that works for fair trials according to international standards of justice and defends the rights of those facing charges in a country other than their own. Our vision is a world where every person's right to a fair trial is respected, whatever their nationality, wherever they are accused.

FTI pursues its mission by providing assistance to individuals arrested outside their own country through its expert casework practice. It also addresses root causes of injustice through broader research and campaigning and develops local legal capacity through targeted training, mentoring and networking activities.

More generally, FTI is active in the field of EU Criminal Justice policy. Through our expert casework practice, we are uniquely placed to provide evidence on how policy initiatives affect defendants throughout the EU.

FTI is currently involved in a European Commission funded joint project with Dutch NGO EuroMoS, 'Advancing Defence Rights'. This report sets out selected results from a survey of defence practitioners across the EU that has been conducted by EuroMoS as part of the project. FTI would like to thank EuroMoS for providing us with the data and comments from this survey for inclusion in this report.

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Introduction

1. European Member States today cooperate more than ever before in justice matters. This means they must be able to trust in the fairness of each other's justice systems. Equally, people facing charges in Europe must be confident they will be treated fairly, wherever they are charged. This is, unfortunately, a long way from reality. For trust to be established, basic defence rights must be guaranteed by the legal systems of every single Member State and be enforceable by nationals and non-nationals alike.
2. The ability to access legal advice and representation is a fundamental safeguard to ensure fairness in criminal proceedings. Legal aid is a crucial part of this right, as the majority of those arrested in the EU have insufficient means to pay for a lawyer. It is also guaranteed by the European Convention on Human Rights (ECHR), which binds all Member States. Article 6(3)(c) ECHR states that everyone charged with a criminal offence has the right "to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require".
3. We recognise that ensuring effective legal aid provision across the EU has cost implications, and that in a time of economic crisis, all expenditure must be fully justified. However, mutual recognition instruments such as the European Arrest Warrant (EAW) can only work effectively if Member States have trust and confidence in the fairness and efficiency of each others' justice systems. Despite recent progress under the Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings (the Roadmap), we are still a long way from an EU where every Member State offers sufficient fundamental rights protections for suspects and defendants. In many states, there is no adequate legal aid provision for accused persons unable to afford a lawyer. Without the right to free legal advice for those who cannot afford it, the basis for mutual trust is lacking.
4. Furthermore, justice systems that do not guarantee proper, timely access to legal advice and representation, funded where necessary by the state, frequently suffer unnecessary waste and expense because of appeals, quashed convictions and infringement litigation resulting from the inadequate safeguarding of defence rights during the investigation or trial.

'Advancing EU Defence Rights' Project

5. Defence lawyers have important, first-hand experience of how justice systems in the EU operate in practice. In November 2011, FTI launched a joint project with Dutch NGO EuroMoS: 'Advancing EU Defence Rights'. The project commenced with a survey of defence practitioners across the EU on the extent to which basic defence rights are being respected in practice within EU Member States. This will add an important new perspective to a subject which has previously been dominated by input from state actors, including justice ministry officials, prosecutors and judges. The project will culminate in a major report to be published in September 2012, and an interactive web-based map showing the state of defence rights protection across the EU. It is intended to help policy makers and legislators to find the best methods to improve fair trial standards in Europe.

6. The survey of lawyers was questionnaire based. In relation to legal aid, practitioners were asked: i) to what extent the competent authority helps the subject to apply for legal aid if they are unable to pay for a lawyer; and ii) whether an emergency lawyer or duty lawyer scheme exists in the jurisdiction to ensure that every subject in custody has access to legal advice, even when unable to afford it. Each question provided space for additional comments. Participants were also asked to comment on how the legal aid system is organised in their jurisdiction and whether they are satisfied with the way it works in practice. They were not asked to set out legal rules, but to concentrate on what happens in practice.

- *More than 100 defence practitioners from all 27 Member States took part in the project.*
- *They report that while forms of legal aid systems exist in every state, there are many problems with how these operate in practice.*
- *The pay provided under many systems is very low.*
- *Legal aid lawyers are often inexperienced or incompetent and do not spend sufficient time on a case.*
- *In many jurisdictions, legal aid is not granted until after the initial police custody and questioning. This means that defendants are denied access to a lawyer at this key stage in proceedings if they cannot afford to pay for one.*

7. This paper summarises the legal aid related responses to the survey, as provided by practitioners to EuroMoS. This is not a legal analysis of the theoretical rights available or a scientific study. Rather, it is designed to give an indication of the reality of the situation faced by suspects and defendants, as indicated by the day-to-day experiences of defence practitioners. This unique information is combined with the experiences of FTI's clients to indicate the importance of an effective Roadmap measure guaranteeing the right to legal aid. We hope that it will assist the Commission in preparing their proposal in this area.

Availability of legal aid in the EU – an overview

8. A vast majority of Member States have some form of emergency duty lawyer scheme to ensure that people in custody have access to legal advice even when they cannot afford it. However, defence practitioners report numerous problems with these schemes in practice.

9. Recurring problems include:

- duty lawyers are often poorly paid or have to wait a long time for payment to be processed. In some Member States legal aid lawyers are provided with a flat rate regardless of the amount of work done or the complexity of the case;
- the quality of duty lawyers in a majority of Member States is very low, meaning that the actual access to legal advice, in reality, is limited;
- in a number of Member States, legal aid cannot be granted until suspects are brought before a judge up to 48 hours after arrest, meaning that they may be without legal representation during the crucial time of initial police questioning;
- in some Member States, while legal aid is available during criminal proceedings, defendants are required to repay their legal costs if found guilty. FTI is concerned

that this could pressure suspects into waiving their right to a lawyer for fear of being unable to pay later;

- in a vast majority of Member States, suspects are not allowed to choose their legal aid lawyer and must accept whoever is appointed;
- in a few Member States, legal aid practitioners are appointed and funded by the police, leading to concerns that their advice may be prejudiced as they are unlikely to be instructed if they challenge the investigation;
- practitioners are concerned that in a number of Member States police will pressure suspects to waive their right to access a lawyer; and
- the extent to which the relevant competent authority helps suspects apply for legal aid if they are unable to pay for a lawyer varies considerably. In some Member States the application process is very bureaucratic, which is particularly problematic for non-nationals who may not understand the documentation required.

10. The responses to the survey also revealed some examples of best practice. Estonia has an internet based legal aid system which is available to all suspects. Practitioners tell us that it works well in practice, although defendants must repay costs if they are found guilty. In Luxembourg, suspects are able to appoint a lawyer of their choice and the services provided at the police station will always be reimbursed, even if legal aid for the rest of the proceedings is later denied.

Country specific analysis

11. **Austria:** There is an emergency lawyer scheme in operation in Austria and legal aid is available. In practice, however, police tell suspects that they must pay the lawyer and do not inform them about the availability of free advice if they cannot afford to do so. This means that the duty scheme is rarely used and that suspects often make statements before they have spoken to a lawyer. Suspects are not allowed to choose their lawyer and must accept whoever is appointed under the scheme. Practitioners are routinely informed that they are representing a suspect well after the initial arrest and in some cases only once the person has been remanded in pre-trial detention.
12. **Belgium:** Belgium has an emergency lawyer scheme and the police do in practice help suspects apply for legal aid. However, there have been problems with lawyer compensation under the scheme, which was introduced following the *Salduz* case. The poor remuneration has led to a number of lawyers refusing to participate in the legal aid system. Those who do take part are often junior and inexperienced.
13. **Bulgaria:** There is an emergency lawyer scheme in operation in Bulgaria and legal aid is available. However, suspects are not allowed to choose their lawyer and must accept whoever is appointed under the scheme. The scheme is linked to local bar associations and there are suggestions that in some parts of the country these are not well organised, meaning that the police can find it difficult to get a lawyer to attend the police station. Therefore, while there is a constitutional right to legal aid from the moment of arrest, in practice a lawyer is often not provided until much later. The quality of duty lawyers can be very low. This means that access to legal advice is limited in practice. If the defendant is found guilty then they must repay their legal costs.

14. **Cyprus:** There is no emergency lawyer scheme in operation in Cyprus and police do not in practice assist suspects in applying for legal aid. Legal aid must be applied for in court and this is usually only possible after the investigative stage. This means that suspects may not have access to a lawyer before or during the initial questioning or during the evidence gathering stage, if they cannot afford to pay for one.
15. **Czech Republic:** There is an emergency lawyer scheme in operation in the Czech Republic, but it is only used in “mandatory defence” situations, i.e. where legal representation is required by law and cannot be waived (which is the case, for example, with certain serious offences). In other cases, it is at the discretion of the police whether to allow the suspect access to the contact details of lawyers. In legal aid cases, the suspects cannot choose their lawyer and must accept the person appointed. If defendants are found guilty then they must repay their legal costs.
16. **Denmark:** There is an emergency lawyer scheme in operation in Denmark and the police do in practice help suspects apply for legal aid. If defendants are found guilty then they must repay costs as determined by the trial judge.
17. **Estonia:** Estonia has an emergency lawyer scheme and the police do in practice help suspects apply for legal aid. The legal aid system is internet based and police send a request for a lawyer via an online system which is then accepted by someone who is part of the scheme and is available in the area. Defence practitioners tell us that the system generally works well in practice and that legal aid is provided without merit or means testing. However, if defendants are found guilty then they must repay the costs of the lawyer.
18. **Finland:** Legal aid is available in Finland, but there is no emergency lawyer scheme, although the public prosecutor is in the process of initiating one. Police do usually have contact details for lawyers, but in practice may advise suspects to waive their right to a lawyer so that proceedings can conclude more quickly. Legal aid can only be granted with court approval. Applications for legal aid can be very complicated and must sometimes be initiated by a lawyer, which the suspect may not be able to afford. Lawyers are reluctant to make legal aid applications without payment because if legal aid is denied then their costs will not be covered by the state.
19. **France:** France has an emergency lawyer scheme and the police do in practice help suspects apply for legal aid if they cannot afford a lawyer. Practitioners tell us that the pay for lawyers who participate in the scheme is very low.
20. **Germany:** Legal aid is available in Germany, but it is not granted until the suspect appears before a judge. At this point payment will be available for legal services provided during initial police questioning, but the lawyer must take the risk of non-payment if legal aid is refused, something that many practitioners are reluctant to do. There is an emergency lawyer scheme in Germany, but there are problems with lawyer availability outside of cities.
21. **Greece:** Lawyers tell us that the legal aid system in Greece does not function well. There is no emergency lawyer scheme and police do not generally assist suspects in applying

for legal aid. There are some organisations that maintain registers of people who will provide free legal advice, but these are not provided by or funded by the state and are not widely used by the police. In practice, suspects will only have access to a lawyer if they ask the police to contact a specific person and are able to pay. In the rare cases where legal aid is granted, it is usually only when suspects are brought before a judge 48 hours after arrest, meaning that they are without legal representation during police questioning. Legal aid lawyers are given very little time to prepare cases and often have little or no experience of criminal practice.

22. **Hungary:** There is an emergency lawyer scheme in operation in Hungary, but this is only used in “mandatory defence” situations, i.e. where legal representation is required by law and cannot be waived (which is the case, for example, with certain serious offences). There are problems with the way that the scheme works in practice. Some practitioners suggest that police often wait until the middle of the night to call lawyers, when they are less likely to be available, or give them very little notice of an interrogation. Legal aid practitioners are appointed and funded by the police and there are concerns that this can prejudice the advice that they give, as the police will in practice call lawyers who are less likely to cause problems with the investigation. Suspects are not allowed to choose their legal aid lawyer and must accept whoever is appointed.
23. **Ireland:** There is no state-run emergency lawyer scheme in Ireland, although individual firms of lawyers do provide the police with emergency contact details of practitioners. Legal aid is available on a means-tested basis and practitioners report that the system for those eligible works reasonably well. However, those who do not satisfy the financial test for legal aid (currently set at maximum earnings of €20,500 per annum) will not have access to a lawyer unless they can agree fees, which can be difficult depending on the complexity of the case and the possible charges.
24. **Italy:** There is an emergency lawyer scheme in operation in Italy and legal aid is available. However, the application process is very bureaucratic and because suspects must provide documentary evidence of their inability to pay, it is very rarely completed during the police custody stage. Therefore, the duty lawyer may have to take the risk of non-payment if legal aid is later refused. Practitioners in Italy report that the low compensation provided and the fact that payments can take up to four years to process mean that experienced lawyers do not generally work in the legal aid system.
25. **Latvia:** Latvia has an emergency lawyer scheme, however there are reports that police are unwilling to use this and will try and pressure suspects not to exercise their right to legal advice. Legal aid is available, however there are problems with how the scheme works in practice as the low pay provided to duty lawyers means that the quality of lawyers is low and the amount of work provided limited. The small pool of lawyers available also means that the same person will often work with the same police representatives, leading to suggestions that the interests of the police investigation may sometimes come before those of the client.
26. **Lithuania:** There is an emergency lawyer scheme in operation in Lithuania. In practice suspects will usually be provided with a lawyer free of charge if they cannot afford one,

but there are concerns that legal aid lawyers do not provide good levels of service and are overworked. Lawyers are appointed by the Legal Aid Board and suspects are not allowed to choose their own representation.

27. **Luxembourg:** There is no legally established emergency lawyer scheme in Luxembourg, but in practice there is a system in place between the police and the bar association. Suspects are allowed to appoint their own lawyer and if they do not have a preferred person they will be given a list to choose from. Police do not assist suspects in applying for legal aid, as this is usually done by the appointed lawyer. Even if legal aid is not granted, the services provided by the lawyer at the police station will be reimbursed by the state.
28. **Malta:** Malta has an emergency lawyer scheme and the police do in practice help suspects apply for legal aid. However, there are concerns about the availability of legal aid, as it is often denied in practice. Practitioners generally take on legal aid work on top of their full time private practice and so are not usually able to spend much time with their non-fee paying clients.
29. **Netherlands:** There is an emergency lawyer scheme in operation in the Netherlands and legal aid is available. Indications are that the system works well in practice, with the police contacting duty lawyers two hours before any interrogation. Difficulties arise when the same lawyer has to get to several clients in different locations, as the two hour time limit can be too short. Suspects are allowed to choose their own lawyer under the legal aid system, but in practice there are reports that police incorrectly inform them that doing so will make them ineligible for free advice.
30. **Portugal:** Portugal has an emergency lawyer scheme and the police do in practice help suspects apply for legal aid if they cannot afford a lawyer. However, suspects are not allowed to choose their lawyer and must accept whoever is appointed under the scheme. There are some problems with how the scheme works in practice as the lawyers provided are usually very junior with little criminal experience.
31. **Poland:** There is an emergency lawyer scheme in operation in Poland, but this is only used in certain situations. Legal aid applications have to be made to the court. This means that, while in theory access to a legal aid lawyer should be granted on arrest, in practice this will not usually happen until the person appears before a court up to 48 hours later. Therefore if suspects cannot find and pay for a lawyer themselves then they may not have representation for the initial police questioning. Legal aid lawyers are provided with a flat rate regardless of the amount of work done or the complexity of the case, meaning that the work is usually done by trainees with little or no criminal experience.
32. **Romania:** There is an emergency lawyer scheme in operation in Romania and legal aid is available. There are, however, problems with how the system operates in practice. Lawyers are given very little time to study the case file, the police and prosecution do not cooperate with appointed lawyers and the payments are very low. This can result in legal assistance being formally provided which is of little practical use.

33. **Slovakia:** There is an emergency lawyer scheme in operation in Slovakia and legal aid is available. The police often help suspects apply for legal aid if they cannot afford a lawyer, but not always. Practitioners are satisfied that the system generally works well in practice and suspects are able to choose the lawyer they would like to represent them.
34. **Slovenia:** There is an emergency lawyer scheme in operation in Slovenia. However, this is organised and administered by the courts. This means that it is not usually possible to apply for legal aid during the first 48 hours of police custody when questioning is likely to take place.
35. **Spain:** Spain has an emergency lawyer scheme and the police do in practice help suspects apply for legal aid if they cannot afford a lawyer. Once contacted, the lawyer has 8 hours to get to the police station. Practitioners surveyed were satisfied that the system generally works well in practice.
36. **Sweden:** There is an emergency lawyer scheme in operation in Sweden and legal aid is provided to all suspects. However, following guilty convictions defendants must pay the legal costs associated with the case if they have the means to do so.
37. **United Kingdom:** The United Kingdom has an emergency lawyer scheme and the police do in practice help suspects apply for legal aid. The duty lawyers are not always of a high quality and there are some concerns that suspects are not told that they can appoint a different lawyer if they are not satisfied with the standard of legal advice provided.

Fair Trials International case study

Our cases regularly demonstrate how detrimental the lack of access to adequate legal aid at the earliest stages of the proceedings can be. One example is the case of British grandmother, Deborah Dark.

Deborah Dark

38. In 1989, Deborah Dark was arrested in France on suspicion of drug related offences and held in custody for eight and a half months. Her trial took place later in 1989 and the court acquitted her of all charges. She was released from jail and returned to the UK. The prosecutor appealed against the decision without notifying Deborah or her French lawyer. The appeal was heard in 1990 with no one there to present Deborah's defence. The court found her guilty and sentenced Deborah to 6 years' imprisonment. Again, she was not informed that an appeal had taken place, nor notified that her acquittal had been overturned. As far as she was concerned she had been found not guilty of all charges and was free to start rebuilding her life. In April 2005, fifteen years after the conviction on appeal, a European Arrest Warrant (**EAW**) was issued by the French authorities for Deborah to be returned to France to serve her sentence.
39. In 2008 Deborah travelled to Spain to visit her father who had retired there. On trying to return to the UK, she was arrested and taken into custody in Spain, where she faced extradition to France. A court appointed legal aid lawyer visited her and advised her that she had no option but to consent to extradition. As a legally aided client, Deborah was

only entitled to receive €250 worth of legal advice, however complex the case. The lawyer's advice was therefore not particularly surprising. Thankfully, however, a doctor who visited Deborah shortly afterwards advised her to resist extradition. Deborah took this advice and at the extradition hearing the Spanish court refused to extradite Deborah on the grounds of unreasonable delay and the significant passage of time. Deborah was released from prison and took a flight back to the UK. However, her ordeal was not over.

40. On arrival in the UK, Deborah was arrested again – this time by the British police at Gatwick airport. Once again, she refused to consent to the extradition and was released on bail pending another extradition hearing. The City of Westminster Magistrates' Court refused the extradition in April 2009. As there is no provision for the withdrawal of the EAW, Deborah felt unable to leave the UK due to the risk of being re-arrested on the same EAW. In May 2010, France finally agreed to remove the warrant, but only after Deborah had spent years as an effective prisoner in the UK.

Conclusion

41. The results of the EU-wide survey of practitioners reveal that the availability and standard of legal aid varies across Europe. Where it is offered, defence practitioners indicate that limited funding for legal aid means that the advice provided is often of insufficient quality to protect the best interests of the suspect. Legal aid is also often not provided until well after the point of arrest and initial questioning, meaning that suspects are unrepresented during one of the most crucial stages of the process.
42. Despite the fact that the right to free legal advice for those who cannot afford it is enshrined in the ECHR, this is not respected in all EU countries. We understand that resources are tight due to the current economic crisis. However, proper safeguards for basic fair trial rights are not an optional extra in a modern and fair justice system. On the contrary, defence rights must be better protected throughout the EU, if we are to build the mutual trust between Member States that is necessary for countries to cooperate effectively to tackle serious crime without compromising basic rights in the process
43. Access to adequate legal aid at the earliest stages of criminal proceedings is essential to ensure that suspects both know about, and are fully able to exercise, their legal rights. If people are denied access to high quality legal advice due to their financial circumstances, then this can lead to a serious inequality of arms, undermining fair trial rights and the rule of law. The information set out in this paper suggests there are real problems with the legal aid systems in many EU countries and Fair Trials International looks forward to working with the Commission to produce a strong proposal for this vitally important Roadmap measure.