

ASSESSMENT OF THE FREE SECONDARY LEGAL AID SYSTEM IN UKRAINE IN THE LIGHT OF COUNCIL OF EUROPE STANDARDS AND BEST PRACTICES

MINISTRY OF FOREIGN
AFFAIRS OF DENMARK



COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

This report was prepared within the framework of the Council of Europe Project “Continued support to the criminal justice reform in Ukraine”, funded by the Danish Government.

The opinions expressed in this work are the responsibility of the authors and do not necessarily reflect the official policy of the Council of Europe.

**Continued support to
the criminal justice
reform in Ukraine**

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THE ASSESSMENT COVERS
THE FREE SECONDARY LEGAL AID IN
CRIMINAL CASES, IN CASES
OF ADMINISTRATIVE DETENTION
AND ARREST

February – June 2016

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LIST OF ABBREVIATIONS

CoM	Cabinet of Ministers of Ukraine
CPC	Criminal Procedure Code of Ukraine
CCLAP	Coordination Centre for Legal Aid Provision
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
FLA	Free legal aid
FSLA	Free secondary legal aid
FSLAC	Free secondary legal aid centre
LA Law	The Law of Ukraine On Free Legal Aid of 2 June 2011
Law on the Bar	The Law of Ukraine On Bar and Legal Practice of 5 July 2012
LAA	Legal aid authorities
MoJ	Ministry of Justice of Ukraine
NBA	Ukrainian National Bar Association
QM	Quality Managers
Quality Commissions	Commissions for Evaluation of Quality, Completeness and Timeliness of Free Secondary Legal Aid Provided by the Lawyers
QS or Quality Standards	Standards of Quality of the Provision of Free Secondary Legal Aid in Criminal Proceedings, approved by the Ukrainian National Bar Association in 2013 and the Ministry of Justice of Ukraine in 2014, entered into force on 1 July 2014
RFSLAC	Regional free secondary legal aid centre
<i>Salduz</i>	ECtHR, <i>Salduz v. Turkey</i> , Grand Chamber judgment, 27 November 2008

INTRODUCTION

The present report is concerned with the assessment of the free secondary legal aid system of Ukraine. The assessment has been undertaken by the Directorate of Human Rights, Directorate General Human Rights and Rule of Law of the Council of Europe in the framework of the Council of Europe Project “Continued Support to the Criminal Justice Reform in Ukraine”, funded by the Danish Government (hereinafter – the Project).

Improving quality of legal aid and supporting implementation of the Law of Ukraine on Free Legal Aid, as well as facilitating drafting and application of legislation leading to the execution of relevant judgments of the European Court of Human Rights are among the priorities underlined in the Council of Europe Action Plan for Ukraine 2015-2017¹.

In the light of these objectives, the Project is aimed at *inter alia* establishing mechanisms for strengthening the quality and accessibility of legal aid in Ukraine and facilitating enhanced access to justice as part of the right to a fair trial, enshrined in Article 6 of the European Convention of Human Rights.

The aim of the assessment is to analyse the compliance of the system with the Council of Europe standards and best practices, identify challenges and needs, provide recommendations as to the potential changes in the legal or policy framework or implementation practices, and define areas where further support is required. The scope of the assessment is limited to the criminal justice system, in particular the legal aid in criminal proceedings, as well as cases of administrative detention and arrest.

The assessment has been conducted by Mr Peter van den Biggelaar², Ms Nadejda Hriptievschi³, Professor Alan Paterson⁴, Mr Oleksandr Banchuk⁵ and Mr Gennadiy Tokarev⁶ (hereinafter – experts), who were engaged for this assignment as Council of Europe consultants.

¹ Action Plan for Ukraine 2015 – 2017, GR-DEM(2015)2, Section 2.2.

² Former Executive Director of the Dutch Legal Aid Board.

³ Director of Programs at the Legal Resources Centre from Moldova, member of the European Commission against Racism and Intolerance.

⁴ Chair of the International Legal Aid Group, Director of the Centre for Professional Legal Studies, Strathclyde University, Scotland.

⁵ Doctor at law, Expert of the Centre for Political and Legal Reforms, researcher at the State and Law Institute of the National Academy of Sciences of Ukraine.

⁶ Defence Lawyer, Head of the Strategic Litigation Centre, Kharkiv Human Rights Protection Group.

METHODOLOGY OF THE ASSESSMENT

The assessment has been based on desk review and field research. The desk review focused on the regulatory framework, including the Law of Ukraine On Free Legal Aid (LA Law), the Criminal Procedure Code of Ukraine (CPC), as well as other related legislation and sub-legislation, internal instructions, guidelines and forms related to the functioning of the Ukrainian free legal aid (FLA) system both at the central and regional levels. Various reports and information material related to the functioning of the FLA system were consulted⁷, including two reports prepared by the Ukrainian National Bar Association (NBA)⁸. In addition, the assessment has taken account of the statistics of the Coordination Centre for Legal Aid Provision (CCLAP), Supreme Court of Ukraine and the State Judicial Administration, the General Prosecutor's Office, etc.

There were two fact-finding missions undertaken by the experts in Ukraine in February and March 2016 with a view to obtaining various data required for the field research. In the course of the fact-finding missions, the experts met with the representatives of the CCLAP, regional and local Centres providing FLA, the NBA, the Ministry of Justice (MoJ), judges representing first instance, appellate and cassation courts, the Presidential Administration, the National Police, the Secretariat of the Ukrainian Parliamentary Commissioner for Human Rights, international and donor organisations, Ukrainian non-governmental organisations, including professional organisations of lawyers⁹. The meetings in the form of focus groups were conducted with participation of lawyers providing free secondary legal aid (FSLA) in criminal and administrative offences proceedings in Kyiv and regions, including Cherkasy, Chernigiv, Dnipro, Kharkiv, Lviv, Rivne, Zhytomyr. In addition, field visits were made by the local experts to several regional free secondary legal aid centres (RFSLACs), namely, Kyiv, Poltava, Sumy and Zhytomyr regions and meetings were held with the staff of the Centres, lawyers and members of the Bar self-governance bodies.

As a result of the analysis of the data collected during the fact-finding missions and desk review, draft findings and suggested options were put forward for discussion with all key stakeholders during a round table meeting held in Kyiv on 13 May 2016. The comments and feedback received were further taken into account while preparing the final version of the report and relevant recommendations.

⁷ In particular, the report draws upon the results of the Free Legal Aid System in Ukraine: The First Year of Operation Assessment which was conducted in July 2013 – February 2014 by Ukrainian Legal Aid Foundation, International Renaissance Foundation and Ukrainian Helsinki Human Rights Union, URL http://issuu.com/irf_ua/docs/hr-2014-4_fin_engl/1; Legal Aid System in Ukraine: an Overview prepared in the framework of the "Quality and Accessible Legal Aid in Ukraine" project (October 2014), URL http://legalaid.gov.ua/images/control/Legal%20Aid%20System%20in%20Ukraine%20an%20Overview_Eng.pdf

⁸ LEGAL AID SYSTEM IN UKRAINE: Current Issues and Recommendations for Reform, prepared by the Ukrainian National Bar Association, approved by decision of the Bar Council of Ukraine №125 as of November 13, 2015, URL <http://unba.org.ua/assets/uploads/news/advocatura/2015.11.30-unba-report-legal-aid-eng.pdf>; and LEGAL AID SYSTEM IN UKRAINE: Current Issues and Recommendations for Reform (an update to the report adopted by the Bar Council of Ukraine on 13 November 2015, URL: <http://en.unba.org.ua/assets/uploads/news/novosti/2016-05-23.legal.aid.report.pdf>

⁹ All-Ukrainian Public Organisation "Ukrainian Bar Association"; All-Ukrainian Public Organisation "Ukrainian Advocates' Association"; Civic Organisation "Bar Association of Legal Aid Providers".

EXECUTIVE SUMMARY

Accessibility of free secondary legal aid

The Ukrainian legal aid system envisages a wide range of beneficiaries of FSLA in criminal proceedings as well as administrative detention and arrest cases, thus ensuring large-scale access to justice and stronger protection of human rights. There is a great variety of legal aid services that can be used by the beneficiaries. The broadness of scope of the FSLA is a very positive element. The fact that primary legal aid (mainly, legal advice and drafting of non-procedural documents) is also available for criminal cases means that people can receive legal advice and information at all stages in the criminal justice process. The availability of legal aid after sentencing and during the punishment phase is equally important.

A person deprived of liberty (detained within criminal proceedings or proceedings on administrative offences or remanded in custody as a measure of restraint) has the right to receive FSLA from the moment of detention. The legislation does not expressly provide that “from the moment of detention” means prior to the first questioning by police, but this can be understood from the combined application of several legal provisions. Ensuring early access to a lawyer is also a priority for the legal aid system in Ukraine. However, it seems that instances when detaining authorities do not notify the free secondary legal aid centres (FSLACs) about detention continue and that various practices are still used to avoid the mandatory involvement of a lawyer (*see for details chapter 2*). There is a need for a concerted effort of all criminal justice actors to ensure effective early access to a lawyer for any suspect/defendant in Ukraine.

The determination of eligibility for criminal legal aid is simple as long as suspects are detained (remanded in custody etc.), but outside this situation it appears quite complex. Firstly, it is complex for people who are not detained and need legal aid, and, secondly, for people who are detained and then released, because it is not completely clear if legal aid will continue to be provided until the case is finished in court (*see for details chapter 2*).

People can appeal against various decisions regarding legal aid and against actions and failure by officials and employees that violate procedures and deadlines for reviewing the requests for legal aid. However, the LA Law lacks provisions on concrete time limits for, and procedures for appeals regarding decisions on legal aid provision.

The legal aid system has taken important steps to raise awareness of the right to legal aid. Information on legal aid is available on the CCLAP website and the websites of the FSLACs. However, this is not enough. A strategy for raising awareness amongst the public is needed. The cooperation of other stakeholders, especially police, prosecution authorities and courts will be particularly important.

Assignment and replacement of a lawyer to provide free secondary legal aid

One of the main innovations introduced by the LA Law concerns a new system of appointing lawyers to provide legal aid. RFSLACs appoint lawyers to provide legal aid from the Registry of Lawyers Providing Free Secondary Legal Aid, which includes licensed lawyers, members of the Bar, selected through a rigorous procedure. The selection procedure includes tests and interviews conducted by the selection commissions composed of representatives of the Bar, judiciary, civil society, FLA system and MoJ (*see for details chapter 4*). Prior to the LA Law, the police, other criminal investigation bodies and the courts appointed the lawyers. The overwhelming majority

of the criminal justice stakeholders consulted during the fact-finding missions confirmed the benefits of the new appointment system and praised it, primarily for breaking the dangerous links between police, criminal investigation bodies, courts, on the one hand, and lawyers, on the other hand. The new system seems to have significantly enhanced the independence of the lawyers providing FSLA. The appointment of lawyers by specialized legal aid authorities/ bodies is a common practice for many European countries.

The appointment of lawyers to defendants who are not detained and request FSLA does not seem to raise concerns, while the appointment of lawyers to defendants that are detained is not yet done in a timely and systematic manner. The main reasons for shortcomings are caused by the problematic or delayed contact from the police and other detention authorities, on the one hand, and the unavailability of lawyers 24/7 in all regions, on the other hand.

The system of allocation of cases to the lawyers varies from region to region and the rules on assignment of cases are not published for all RFSLACs. The NBA has criticized the legal aid system for a lack of transparency in the allocation of cases among different lawyers and varying caseloads between lawyers. This assessment report found that reasonable measures were taken both at the system and regional level, when problematic trends in the allocation of cases were detected in some regions. These measures include publication of the number of assignments issued and the amount of money paid to each lawyer on the CCLAP website, setting up the limit of 30 pending cases per lawyer, as well as establishing good practices in certain regions, such as the publication of duty schedules. However, further improvements are advisable. In order to ensure transparency of the system and create safeguards against potential abuses, the rules on assignment of cases to lawyers in each RFSLAC should be published. While the criteria mentioned in Article 21 part 2 of the LA Law are appropriate *per se*, their application in practice requires either a sophisticated mechanism of appointment or reliance to a great extent on the RFSLACs` Directors. A more straightforward system of assignment, based on an objective and easy to implement method, is recommended (*see for details chapter 3*).

The NBA has also raised the concern that the LA Law fails to enshrine the principle of free choice of a lawyer. The assessment report concluded, however, that the Ukrainian legislation and regulations are in line with European Convention on Human Rights (ECHR) standards on the choice of a lawyer. The practical application of the norms may vary, but no significant concerns were raised during the fact-finding missions regarding the appointment of lawyers contrary to the wishes of the suspects/defendants. The system of selection of lawyers to provide legal aid, the rules on appointment and the quality assurance mechanism are designed to ensure that the services of the appointed lawyers are of an appropriate quality. However, the assessment report has brought to light the fact that neither the RFSLACs nor the Commissions for Evaluation of Quality, Completeness and Timeliness of Free Secondary Legal Aid Provided by the Lawyers (Quality Commissions) of the Bar appear to have the power to replace a legal aid lawyer for non-performance of his/her obligations to the client, even if there has been a request from the suspect / defendant. Clear rules on the replacement of legal aid lawyers for non-performance are recommended (*see for details chapter 3*).

Continuity of defence is not expressly provided for in the LA Law or the Standards of Quality of the Provision of Free Secondary Legal Aid in Criminal Proceedings (Quality Standards, *see for details chapter 4*), although it seems to be implemented in practice and is provided in the CCLAP regulations (*see for details chapter 3*). It would be advisable to provide it expressly in the LA Law and/or the Quality Standards. The legal aid system seems to be taking sufficient measures to reduce the abusive appointment of lawyers to provide legal aid for a separate (single) procedural action, based on Article 53 of the CPC. However, the criminal investigation authorities and the courts should in the first place apply this provision only in exceptional cases,

within the spirit of the CPC. Periodic discussions on this issue among all criminal justice sector actors, both on national and local levels, are advisable.

At the normative level, the CPC and the Quality Standards provide sufficient guarantees, in line with the ECHR standards, on the waiver of the right to a lawyer. In practice, however, anecdotal evidence points to a discrepancy between the law and the practice. The Ukrainian criminal justice system does not produce publicly available unified statistics on the total number of detained individuals and the number of refusals from a lawyer at the time of detention, classified by reasons for refusal. Nor are there statistics on the number of defendants who are represented by a defence lawyer and a number of defendants who are not¹⁰. In such circumstances, it is hard to assess the extent to which criminal legal aid needs are met and if the institution of waiver of the right to a lawyer is misused to the detriment of the right to defence.

Quality Assurance

Since legal aid is paid for from public funds it is increasingly being recognised in Europe and further afield that it must be of an adequate quality. This has been reinforced in Ukraine by (1) the terms of the LA Law (especially articles 5, 26 and 28), (2) the emphasis put on quality assurance in the Memorandum of Cooperation between the NBA and the MoJ with respect to free legal aid and (3) Article 6 § 3 (c) of the ECHR which requires the state to ensure that legal aid lawyers provide an effective defence to the beneficiaries of legal aid.

Around 17% of private lawyers in Ukraine are registered to undertake criminal legal aid work under the FSLA scheme. This proportion is not particularly unusual in European terms, but it is unclear whether there are sufficient legal aid lawyers to meet Ukraine's needs, particularly in the rural areas. The MoJ and the CCLAP have tried to resolve this issue whilst ensuring that legal aid lawyers in Ukraine are of sufficient quality through three routes (1) requiring legal aid lawyers to pass special tests, (2) encouraging them to undertake relevant training and (3) introducing quality standards and monitoring the practitioners' adherence to these standards (*see for details para 4.2.2*).

The special selection procedures are designed to check the lawyers' knowledge of new areas of law, the quality standards of legal aid and the rules of legal ethics, as well as their commitment to legal aid clients. The CCLAP estimate that over the years the success rate for applicants in each competition has been around 80%. However, the available figures do not distinguish between failure rates of the different components of the competition, and there are variations in the success rate between different regions, suggesting that the system would benefit from regular audits. The NBA has criticised the transparency of the tests as well as their existence but there is no evidence that the contests are a serious barrier to becoming a legal aid lawyer nor of any bias in the results – not least because the contests are administered by regional selection panels on which representatives of the Bar, the judiciary and civil society serve. Nevertheless, there is a need for greater clarity over the aims of the selection system (*see for details para 4.2.3*).

Training for legal aid lawyers is encouraged by the CLAAP and the NBA although some issues remain as to who can provide the training for it to be accredited. Much of the funding for the training has come from donor organisations. Due to a shortage of funds to cover all legal aid lawyers directly by donor organizations, a program of Training of Trainers and cascade training has been used, to considerable effect.

¹⁰ At least such statistics are not available publicly.

Quality Standards and the appropriate mechanisms for monitoring them are the most important quality assurance measures for legal aid lawyers in Ukraine. The standards are mandated in the LA Law (Article 28) and resemble a checklist of actions which FSLA lawyers must take at every stage of criminal proceedings, ranging from conducting a confidential initial interview with the client to taking appropriate steps where the client shows signs of having been subjected to ill-treatment, and from objecting on the client's behalf to procedural rulings by the judge to gathering all the relevant information concerning the client which relates to the case. The Quality Standards have been criticised on various grounds and it has been suggested that they be revisited with some additional content and a wider range of stakeholders consulted. Measuring adherence to the Quality Standards has also proved problematic. Relying on client complaints has been ineffective, as has been the case in other jurisdictions, because it is a reactive rather than proactive form of quality assurance, because clients tend to under-complain, and clients can only assess certain aspects of quality. The use of observations in court and interviews with clients have a role to play but have been conducted insufficiently frequently in Ukraine to be truly effective. However, the principal omission relates to the lack of an independent peer review assessment of lawyers' files. A scrutiny of the experience of jurisdictions which use peer review to quality assure their legal aid programmes suggests that the obstacles to the introduction of peer review in Ukraine can be overcome (*see for further detail para. 4.4.4*).

Payment

The payment system is the most complex part of the FLA system and it contains also a time consuming scheme with a lot of risks for mistakes. The approach 'from general to specific' is not used in the Method of Payment as formulated in the Resolution of the Cabinet of Ministers of Ukraine no. 465 of 17 September 2014 that regulates the payment for legal aid. This makes it very difficult to understand the system of payment and makes it the subject of discussion and criticism. The formulas used for the calculation of fees make the determination of fees complex and difficult to check. A lot of information must be registered and checked by the FSLACs, which puts a significant administrative burden on the FSLACs and their budgets. The requirement of checking and double checking everything creates a further burden. In practice, it seems that the FSLACs require lawyers to submit additional information/papers for checking which was not foreseen in the original regulations.

The lawyers complained that the basic fee rate is set relatively low and reported disproportional fee rates for some kinds of FSLA work provided in criminal proceedings (*see for details chapter 5*). The payment system should be made clearer and more understandable for the lawyers so that they are more able to estimate the payment they will receive.

It is absolutely clear that this payment scheme needs to be changed (*see for details chapter 5*) to be more focused on costs saving with respect to the administrative procedures for checking the bills so that the budget can be more effectively directed to providing the legal services and to paying a reasonable fee.

Independence

Independence as a concept applied to legal aid authorities (LAA) covers a range of aspects: institutional, operational and financial independence. In many Western jurisdictions LAA have a legal structure that is outside Government with either an executive Board of directors or a stakeholder Board. This is not essential to ensure independence from the state but it is a clear way

of doing so. LA Law in Ukraine vests much of the responsibility for legal aid and its regulation in the CoM whilst in practice the CCLAP has considerable day to day independence from the MoJ and other ministries. The assessment report found that the CCLAP and its Director had an acceptable measure of independence with respect to, and accountability for, its resources and staffing to the Executive and the Parliament. The assessment report proposes that more of the day to day running of legal aid be formally transferred to the CCLAP and that it should have an advisory or supervisory board whose members are drawn from a range of stakeholders and that Director of the CCLAP should also receive greater formal autonomy from the state and the MoJ in particular.

In terms of operational autonomy the key area for LAA is independence from state interference when it comes to the grant or refusal of secondary legal aid. Despite suggestions from the NBA to the contrary, the assessment report finds no evidence in practice of state interference with grants or refusals of legal aid in Ukraine. Nevertheless, it is suggested that consideration be given to a formal prohibition on external forces from interfering with the assignment of legal aid lawyers to clients (in the LA Law or CCLAP regulations). The assessment report notes that there is a general trend internationally to locate policymaking more in the hands of LAA and that in practice, though not always formally, the CCLAP has a considerable involvement in legal aid policymaking (*see for detail chapter 6*).

Research and monitoring

A lot of information and data about the legal aid system is available. However, there is insufficient information on the criminal justice system in general. For example, there is no public information on the unified number of detained persons in criminal and administrative proceedings, the number of criminal suspects / defendants represented by lawyers and the ones not represented etc. This information on the functioning of the criminal justice system can serve as an important tool for the improvement of policy or practice. In addition, only by analysing the legal aid data in comparison with the general data on needs for legal aid, can the legal aid system assess the extent to which legal aid needs are met. Further steps to develop a methodology and indicators for data collection and analysis will produce more insights into the functioning of the legal aid system by revealing trends and patterns.

A number of stakeholders expressed on a wide variety of occasions the need for a central system of registration and electronic exchange of information. The data connection between the different stages in the chain (detention authorities, investigators/prosecutors, lawyers, courts, FSLA system) is poor and causes lots of problems, such as assignments provided too late, no proof or evidence that requests for legal aid are done in a proper way. The requests for assignments for legal aid are not handled in a uniform format. The chance that information gets lost in case of a request by telephone is quite high. Electronic data traffic between the relevant players needs to be further developed to strengthen these proceedings, to improve the speed of the proceedings and the quality of the processes.

OVERVIEW OF THE FREE SECONDARY LEGAL AID SYSTEM

The assessment report only covers legal aid provided in criminal proceedings as well as administrative detention and arrest cases.

This chapter describes the main aspects of the FSLA system in Ukraine: the beneficiaries of legal aid in criminal proceedings and administrative detention or arrest cases, the management structure, the legal aid providers and the funding for legal aid. The aim of the chapter is to provide a brief outline of the system to be easier to follow throughout the report the different terms used and institutions mentioned. Separate chapters follow with a detailed analysis and recommendation regarding eligibility, appointment of lawyers, quality assurance, payment and independence of the system.

1.1 The main beneficiaries of legal aid in criminal proceedings and cases of administrative detention or arrest

According to current legislation¹¹, the following groups of persons are eligible to receive FSLA:

- ▶ Any person subject to administrative detention or arrest¹².
- ▶ Any person detained in a criminal procedure.
- ▶ Any person remanded in custody as a preventive measure in a criminal procedure.
- ▶ Any person entitled to the legal aid according to the CPC:
 - cases of mandatory defence;
 - whereby appointment of a defence lawyer is made by authorities when defendant cannot engage a lawyer due to the lack of financial resources or other objective reasons;
 - legal aid lawyer is appointed bearing in mind particular circumstances of criminal proceedings (“interests of justice”);
 - engagement for “conducting a separate (single) procedural action”.
- ▶ Any person serving the sentence envisaging deprivation of liberty.
- ▶ Certain groups of vulnerable people.

¹¹ Article 14 of the LA Law and Articles 49, 52 and 53 of the CPC.

¹² Administrative arrest is a sanction imposed for certain offences in accordance with the Code of Administrative Offences of Ukraine.

1.2 Management of the system

The CoM is responsible for adopting the regulations and policies related to the operation of the FLA system, as well as ensuring interagency cooperation related to legal aid (for example, establishes the procedures for informing the FSLACs on any case of detention). The CoM approves the procedures for competitions, the requirements as well as the procedure and terms of contracting of lawyers engaged in the legal aid system, including lawyer's payment scheme (Article 27 of the LA Law).

The MoJ coordinates and oversees the implementation of the state policy in the area of FLA by central executive agencies. In particular, it is responsible for the general management, implementation and operation of the FSLA system; establishes the Centres for provision of free secondary legal aid; submits to the CoM draft laws and other regulations on provision of free legal aid; approves quality standards for provision of FLA and analyses the implementation of the LA Law (Article 28 of the LA Law).

The CCLAP is responsible for drafting the policies on legal aid, the day to day management of the legal aid system and coordination of the provision of legal aid in the regions by the FSLACs. The CCLAP was established by Resolution of the Cabinet of Ministers of Ukraine no. 504 of 6 June 2012 On Establishment of the Coordination Centre for Legal Aid Provision and Liquidation of the Centre for Legal Reform and Legislative Drafting under the Ministry of Justice, which includes the Statute of the CCLAP. The CCLAP is a governmental institution within the area of MoJ's governance. The CCLAP is a legal entity, has a seal with the National Emblem and its name, independent balance sheet, accounts within the Treasury (p. 5 of the Statute). The CCLAP sets out the qualification requirements for its staff, however the salaries are set by the Government¹³ and the number of positions are proposed by the CCLAP Director and approved by the MoJ jointly with Ministry of Finance.

The CCLAP is in charge of drafting policies related to legal aid and further submitting them to the MoJ for approval. The CCLAP also proposes to the MoJ the establishment of local and regional FSLACs as its territorial offices. Further, the CCLAP provides the FSLACs with methodological guidelines, expert advice and oversees their operation. Once the budget is approved, the CCLAP has autonomy in carrying out its competences within the approved budget (p. 14 (1) of the Statute). The CCLAP is led by a Director, appointed to and dismissed from his/her position by the Minister of Justice. The Director is personally responsible for the performance of the CCLAP. The CCLAP Director hires and dismisses the staff of the CCLAP and appoints the directors and deputy directors of its territorial offices.

The FSLACs are established by the MoJ on regional, (republican (in the Autonomous Republic of Crimea), oblast, municipal (in Kyiv and Sevastopol) and local (district, interdistrict, municipal, municipal district, interdistrict municipal and district municipal) levels, according to the needs of administrative territorial units and for guarantee of access of a person to free secondary legal aid. They are the territorial units of the CCLAP. According to the LA Law, the RFSLACs are established to provide the following types of secondary legal aid: (1) defence, (2) representation of the interests of persons that have a right to free secondary legal aid in the courts, other state agencies, local self-government authorities, and before other persons, and (3) drafting procedural documents (Article 13 part 2 and Article 16 part 4 of the LA Law). In addition to legal aid in criminal proceedings and cases of administrative detention or arrest, the RFSLACs are responsible for coordinating provision of primary legal aid and provision

¹³ The basis for the salaries and the scheme for different bonuses is contained in Cabinet of Ministers Resolution of 20 June 2012 No. 552 with further amendments. Within the budget and the limitations set by this Resolution, CCLAP Director and territorial Centres' directors have some flexibility.

of free secondary legal aid in civil and administrative proceedings (provided by the local FSLACs)¹⁴. As of June 2016, there are 24 RFSLACs and 97 local FSLACs¹⁵.

The RFSLACs manage contracts with lawyers engaged in the legal aid system, provide legal aid in criminal proceedings and in cases of administrative arrest and administrative detention, provide legal aid to persons deprived of their liberty following a conviction, are in charge of payments to the lawyers and quality management. The local FSLACs handle citizens' direct requests, check potential recipients' eligibility, ensure representation of the interests of persons in civil and administrative proceedings, and check the lawyers' reports before they are sent to the regional Centres. In addition, about 400 legal aid bureaus are planned to be set up as the units within local FSLACs structure throughout Ukraine, for legal empowerment of local communities, including provision of primary legal aid. Since the current assessment report is limited to free secondary legal aid in criminal proceedings and in cases of administrative detention or arrest, no analysis is done regarding the other types of legal aid.

The RFSLACs are funded from the state budget of Ukraine and other sources not prohibited by the law. The RFSLACs are responsible for the organisation of delivery of free secondary legal aid within the area of their jurisdiction. They contract the lawyers to provide free secondary legal aid, receive requests for appointing lawyers and appoint the lawyers, they pay the fees of lawyers engaged to provide free secondary legal aid and take decisions on replacement of the lawyer appointed to provide free secondary legal aid or termination of a contract. The RFSLACs also cooperate and ensure relevant sharing of information among the main justice stakeholders within their region of operation. They submit requests to the CCLAP for exclusion of lawyers from the Registry of Lawyers Providing Free Secondary Legal Aid and provide activity reports to the CCLAP.

An important function of the RFSLACs is quality assurance (*see chapter 4 for a detailed analysis on this issue*). In order to carry out this function, quality monitoring units within RFSLACs were established. Quality Manager (QM) positions were established to lead the work of these quality monitoring units. QMs have a dual accountability – both to their relevant RFSLAC's Director and to the CCLAP. QMs were selected from among the practising lawyers with at least 3 years of practice, hence they were all members of the National Bar. Many of them had provided legal aid services at some point in the past but in order to avoid a conflict of interest, it was decided that quality managers should not be permitted to provide free secondary legal aid services. However, QMs have the right to continue their private practice outside their working hours within the FSLACs.

As of February 2016, the total number of staff involved in the legal aid system in Ukraine, including the local Centres, is approximately 1,200.

All licensed lawyers in Ukraine, including those involved in providing FSLA, are bound by the Rules of the Bar Ethics, any standards of defence developed by the NBA and subject to verification by the Qualification and Disciplinary Commissions of the Bar. Hence, the Bar has a leading role in quality assurance of the legal services, including FLA services, having the authority to establish the system and the rules of lawyer's ethics and discipline. In addition, the Bar establishes the regional Quality Commissions.¹⁶ They are in charge of assessing the quality of legal aid provided in the respective region, upon request of the respective RFSLACs. Their activities are covered by the Regulation adopted on 17 December 2012 by the Bar Council of Ukraine. As reported by the NBA during the fact-finding mission, such commissions have been set up in all regions.

¹⁴ The provision regarding FSLA in civil and administrative proceedings entered into force on 1 July 2015 (para 6 of the LA Law's Transitional Chapter).

¹⁵ Order of the MoJ of 19 February 2016 no. 479/5 The Matters of Optimizing of Free Secondary Legal Aid System.

¹⁶ See Article 25 part 2 and Article 48 part 4 para 10 of the Law of Ukraine On the Bar and Legal Practice of 5 July 2012.

1.3 Legal aid providers

According to Article 45 of the CPC, only licenced lawyers (defence counsel) can carry out defence within criminal proceedings. Similarly, only licenced lawyers provide FSLA in the cases of administrative offences (see, for example, Articles 268 and 271 of the Code of Administrative Offences of Ukraine)¹⁷. Hence, it is a pre-condition for any lawyers who wish to provide secondary legal aid services that they must already have a licence according to the Law on the Bar and, consequently, respect all the legal and ethical obligations that follow from the Bar regulations of the profession.

In addition, the legal aid system has a system of selection of lawyers that are willing to be eligible to provide free secondary legal aid services (*see details in chapter 4*).

According to the LA Law, there are two principal ways of providing free secondary legal aid by lawyers:

- ▶ Provision of free secondary legal aid on a permanent basis, based on a contract signed with the RFSLAC of the region where they operate, and
- ▶ Provision of free secondary legal aid on an *ad hoc* basis.

In order for a lawyer to provide legal aid, he/she has to be selected and included in the Registry of Lawyers Providing Free Secondary Legal Aid. Once the lawyer is included in the Registry, the respective RFSLAC further contracts with the lawyer and appoints him/her according to the established procedure. There is no difference in the status of the lawyer or the nature of services provided on permanent or on *ad hoc* basis, apart from the lawyers' contractual relationship with the RFSLACs. The RFSLACs first select for appointment a lawyer that provides free secondary legal aid on a permanent basis and only if such a lawyer is not available will they then appoint a lawyer that provides free secondary legal aid on *ad hoc* basis (Article 22 part 1 of the LA Law). In practice, the recourse to lawyers that provide free secondary legal aid on an *ad hoc* basis is very limited. As of 1 June 2016, 2,555 out of about 5,000 registered lawyers in the Registry of Lawyers Providing Free Secondary Legal Aid had permanent contracts with the Centres; there were only 16 *ad hoc* contracts.

1.4 Funding of the legal aid system

The FLA is funded from the state budget of Ukraine (Article 29 of the LA law). The table below provided by the CCLAP shows the total budget allocated for legal aid since 2012:

Year	2012		2013		2014		2015		2016 (planned)	
Annual budget /THND UAH/	9 884,4		39 841,5		79 114,3		242 368,8		287 209,0	
including:	THND UAH	%	THND UAH	%	THND UAH	%	THND UAH	%	THND UAH	%
capital costs	5 883,5	59,5	2 119,2	5,3	3 788,6	4,8	66 931,2	27,6	0,0	0,0
legal services	1 160,6	11,7	27 456,7	68,9	58 894,3	74,4	118 742,7	49,0	222 001,1	77,3
administrative costs	2 840,3	28,8	10 265,7	25,8	16 431,3	20,8	56 694,9	23,4	65 207,9	26,7

The level of funding of the free legal aid system is an important indicator of the state's commitment to provide legal aid services to the population. The funding for the FLA system in Ukraine has grown significantly since 2012, which can be interpreted as a steady commitment on behalf of the state to provide legal aid to those in need.

¹⁷ Amendments to the Constitution of Ukraine were adopted by the Parliament on 2 June 2016 and will come into effect on 30 September 2016. The said amendments, *inter alia*, limit the representation before courts to licenced lawyers save for several exceptions (Article 131-2.)

2

Chapter

ACCESSIBILITY OF THE FREE SECONDARY LEGAL AID

Legal aid is an integral part of any justice system with special international and national characteristics. The established basic framework of criminal legal aid in Ukraine is spread over several international treaties and conventions and Ukrainian legislation, which are summarized below.

This encompasses the Government's responsibility, financial guarantees, organisational structure, scope, implementation and legal responsibility of, and for, legal aid. It has to be in line with economic, legal and social development and has to safeguard continuously the rule of law. Regulations on legal aid do need to meet the practical demand of current reforms and developments.

The right to legal aid is not an absolute right. It may be limited in a way that is fair in relation to what citizens and the state can afford.

In all countries of the Council of Europe there is at least a way that citizens can get legal aid in criminal cases in order to have effective access to justice. The systems differ from one country to another and there is no unified model. Important elements for granting legal aid are a means and a merits test. Financial resources, the type of cases for which legal aid can be granted and the conditions relating to the substance of the dispute can be part of the tests.

There are fundamental differences in the philosophy, organisation and management of the legal aid systems in the Council of Europe Member States. As regards the philosophy of the systems, the broad objective in some states seems to be to make legal services and access to justice generally available, whereas in others, legal aid can be available only to the very poorest.

Most schemes are available for national citizens, citizens of the European Union and for a foreign national habitually lawfully or unlawfully residing in the jurisdiction.

In criminal cases, anyone with insufficient means to pay for legal assistance, must be given legal aid when the interests of justice so require. The assistance of a lawyer can provide pre-litigation advice and representation in court, if necessary, either free or for a modest fee.

A means test is mostly related to the receipt of income whatever the resource may be and assets. There is generally no means test in criminal cases if the suspect is detained.

2.1 Legal framework establishing the right to legal aid in Ukraine

European Convention on Human Rights

Article 6 § 3 (c)

« Everyone charged with a criminal offence has the following minimum rights: 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. »

International Covenant on Civil and Political Rights

Article 14, part 2, d

« 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(d) 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; »

Constitution of Ukraine

Article 59

« Everyone has the right for legal aid. In cases stipulated by the law legal aid should be provided free of charge. »

Law of Ukraine On Free Legal Aid

Article 1, part 1, paragraph 1

« Free legal aid: legal aid guaranteed by the state and funded in full or in part by the state budget of Ukraine, the local budgets or other sources. »

Criminal Procedure Code of Ukraine

Article 42, part 3, paragraph 3

« 3) [the suspect, accused shall be entitled to] have, on his first demand, a defence counsel and consultation with him prior to the first interrogation under conditions ensuring confidentiality of communication, and also upon the first interrogation to have such consultations with no limits as to their number or duration; the right to the presence of defence counsel during interrogations and other procedural actions, the right to refuse the services of the defence counsel at any time in the course of criminal proceedings; have services of a defence counsel provided at the cost of the state in the cases stipulated for in this Code and/or the law regulating provision of free legal aid, including when no resources are available to pay for such services. »

Council of Europe Parliamentary Assembly Resolution «Honouring of Obligations and Commitments by Ukraine, no. 1466 (2005), paragraph 13.13

« ...To improve the conditions of access to a court by establishing a system of free legal aid in line with Council of Europe standards and the case law of the European Court of Human Rights. »

2.2 ECtHR case law

According to Article 6 § 3 (c) of the ECHR cited above, a person has the right to free legal aid if two conditions are met: (1) if he/she does not have sufficient means to pay for legal assistance, the so-called “means test”, and (2) if the interests of justice so require, the so-called “merits test”. This means that legal aid is not a right guaranteed to everyone involved in a criminal procedure and the states are not obliged to provide legal aid to anyone, but to the persons that do not have the means to hire a lawyer and the interests of justice require that in the particular type of case or procedure, legal aid is provided. Both tests – means and merits – have to be met in order to benefit from legal aid, unless the national law lays down more generous standards.

It is for the states to set the rules regarding the means test, including the financial threshold and the methods of checking the person’s eligibility. However, the criteria and the method of selection of cases eligible for the legal aid should be clear and the system should offer substantial procedural guarantees against arbitrariness in the determination of financial eligibility for legal aid.¹⁸ Lack of financial means should not be interpreted “beyond all doubt”, a defendant being eligible for legal aid from the financial perspective if there are “some indications” regarding his/her lack of funds and there are no “clear indications to the contrary.”¹⁹ The Court found that the burden of proving a lack of sufficient means should be borne by the person who pleads it.²⁰

The “interests of justice” test requires consideration of the seriousness of the offence, the complexity of the case, and the ability of the defendant to provide his or her own representation.²¹ These three considerations do not need to be met in each case, one consideration being sufficient to establish the need for providing legal aid. Regarding the seriousness of the offence, the European Court of Human Rights (ECtHR) found that where deprivation of liberty is at stake, the interests of justice in principle call for legal representation.²² The seriousness of the offence includes consideration of the severity of the penalty the applicant can be subject to.²³ When considering the complexity of the case, legal or factual issues of the case are analysed. For example, in *Quaranta v. Switzerland*, the facts of the case did not raise any difficulties, but the outcome of the trial comprised both imposing a new sentence and the possibility of activating the previous suspended sentence. These circumstances were complicated in themselves as well as crucial for the applicant. In addition, the applicant’s position was even more complicated on account of his personal situation: a young adult of foreign origin from an underprivileged background, with no real occupational training, a long criminal record, a drug addiction and living with his family on social security benefit. The Court decided that in the circumstances of the case, his appearance in person before the investigating judge, and then before the Criminal Court, without the assistance of a lawyer, did not enable him to present his case in an adequate manner.²⁴ In *Barsom and Varli v. Sweden*, the ECtHR noted that both applicants had been living in Sweden for nearly thirty years, and were businessmen who owned and ran a restaurant. The Court found that it was highly unlikely that they would be incapable of presenting their case related to tax surcharges without legal assistance before the national court, especially taken into consideration the Swedish courts’ obligation to provide directions and support to the applicants to present their case adequately.²⁵

¹⁸ ECtHR, *Santambrogio v Italy*, 21 September 2004, para. 54-55.

¹⁹ ECtHR, *Pakelli v. Germany*, 25 April 1983; ECtHR, *Twalib v. Greece*, 9 June 1998; ECtHR, *Croissant v. Germany*, 25 September 1992; ECtHR, *R. D. v. Poland*, 18 December 2001.

²⁰ ECtHR, *Croissant v. Germany*, 25 September 1992, para. 37.

²¹ ECtHR, *Quaranta v. Switzerland*, 24 May 1991, para. 33-37.

²² ECtHR, *Benham v. United Kingdom*, Grand 10 June 1996, para. 59.

²³ ECtHR, *Padalov v. Bulgaria*, 10 August 2006, para. 43-44.

²⁴ ECtHR, *Quaranta v. Switzerland*, 24 May 1991, para. 34-36.

²⁵ ECtHR, *Barsom and Varli v. Sweden*, dec., 4 January 2008.

Stages of proceedings during which legal aid is eligible

Even if the primary purpose of Article 6, as far as criminal proceedings are concerned, is to ensure a fair trial by a “tribunal” competent to determine “any criminal charge”, it does not follow that the Article has no application to pre-trial proceedings. Thus, Article 6 - especially paragraph 3 – may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions.²⁶ The ECtHR found that in order for the right to a fair trial to remain sufficiently “practical and effective”, 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. 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.²⁷

The right to free legal assistance applies at all higher appellate or other stages depending on the special features of the domestic proceedings taken in their entirety and on the role of the appellate or cassation courts. Account must be taken of the entirety of the proceedings conducted in the domestic legal order and of the role of the appellate or cassation court therein.²⁸

Procedures related to granting legal aid

Article 6 of the ECHR may be violated if serious deficiencies in the proceedings relating to the application for legal aid lead to arbitrary denial of free legal assistance or access to court.²⁹ The national legal aid scheme should offer individuals substantial guarantees to protect them from arbitrariness. For example, in a case against France, the ECtHR found that the Legal Aid Office’s refusal to grant the applicant legal aid to appeal to the Court of Cassation did not infringe the very essence of her right of access to a court. In reaching this decision, the Court took into account several elements, such as the composition of the Legal Aid Office of the Court of Cassation³⁰, the possibility to appeal against the refusals of legal aid and the applicant’s possibility to put forward her case both at first instance and on appeal.³¹

The authorities granting legal aid should act diligently. For example, in *Tabor v. Poland*, the ECtHR found that the regional court’s rejecting of the applicant’s request for legal aid in making a cassation appeal was in violation of Article 6 § 1. The ECtHR found that the applicant’s request for legal aid was not handled with the requisite degree of diligence since the regional court did not provide reasons for the rejection and issued its decision one month after the deadline for lodging a cassation appeal.³²

²⁶ ECtHR, *Imbrioscia v. Switzerland*, 24 November 1993, para. 36.

²⁷ ECtHR, *Salduz v. Turkey*, 27 November 2008, para. 55.

²⁸ ECtHR, *Delcourt v. Belgium*, 17 January 1970, para. 26; *Monnell and Morris v. The United Kingdom*, 2 March 1987, para. 56.

²⁹ ECtHR, *Aerts v. Belgium*, 30 July 1998, para. 60; *Del Sol v. France*, 26 February 2002, para. 26-27; *Gutfreud v. France*, 12 June 2003, para. 44.

³⁰ It was presided over by a judge of that court and also included its senior registrar, two members chosen by the Court of Cassation, two civil servants, two members of the Conseil d’Etat and Court of Cassation Bar and a member appointed by the general public.

³¹ ECtHR, *Del Sol v. France*, 26 February 2002, para. 25-27.

³² ECtHR, *Tabor v. Poland*, 27 June 2006, para. 44-46.

2.3 Eligibility

The determination of eligibility for legal aid is regulated in the LA Law and the CPC.

LA Law, Article 3

1. *The right to free legal aid is guaranteed by the Constitution of Ukraine as the entitlement of a citizen of Ukraine, a foreigner, a stateless person, including refugees, or a person who needs complementary protection, to receive free primary legal aid in full scope, and also the right of certain categories of individuals to receive free secondary legal aid in cases set forth by this Law.*

Primary legal aid

LA Law Article 8, Persons that have the right to free primary legal aid

1. *In accordance with the Constitution of Ukraine and this Law, the right to free primary legal aid shall be granted to all persons under the jurisdiction of Ukraine.*

Secondary legal aid

LA Law Article 14, Persons that have the right to free secondary legal aid

1. *In accordance with this Law and other laws of Ukraine, the following categories of persons have the right to free secondary legal aid:*
 - 1) *persons under the jurisdiction of Ukraine, if the average monthly income of their families is lower than the minimum subsistence level calculated and approved in accordance with the Law of Ukraine On the Minimum Subsistence Level for the persons belonging in the principal social and demographic groups of population, and disabled persons who receive pension (or allowance) of less than two minimum subsistence levels for the disabled persons have the right to all types of legal services set forth by Article 13, part 2 of this Law;*
 - 2) *orphaned children, children deprived of parents' care, children in complicated life circumstances, children who suffered from military actions and hostilities have the right to all types of legal services set forth by Article 13, part 2 of this Law;*
 - 3) *persons to whom administrative detention has been applied have the right to legal services mentioned in Article 13, part 2, paragraphs 2³³ and 3³⁴ of this Law;*
 - 4) *persons to whom administrative arrest has been applied have the right to legal services mentioned in Article 13, part 2, paragraphs 2 and 3 of this Law;*
 - 5) *persons who are considered as detained, pursuant to the provisions of legislation on criminal procedure, have the right to legal services as set forth by Article 13, part 2, paragraphs 1³⁵ and 3 of this Law;*
 - 6) *persons, with regard to whom a preventive measure was chosen in the form of remand in custody, have the right to legal services as provided for by Article 13, part 2, paragraphs 1 and 3 of this Law.*
 - 7) *persons, in whose criminal proceedings a lawyer is committed, in accordance with the provisions of the Criminal Procedural Code of Ukraine, by an investigator, a prosecutor, an investigating judge or a court, in order to be appointed as a defence lawyer, or to conduct a single procedural action, as well as persons, sentenced to imprisonment, commitment to a military disciplinary unit, or restriction of liberty have the right to all types of legal services mentioned in Article 13, part 2 of this Law;*

³³ Representation

³⁴ Preparation of legal documents

³⁵ Defence.

- 8) *persons covered by the Law of Ukraine On Refugees and Persons in Need of Complementary or Temporary Protection, have the right to all types of legal services mentioned in Article 13, part 2 of this Law, until the decision is made on providing them refugee status or if the person appeals against the decision on providing refugee status;*
 - 9) *war veterans and persons covered by the Law of Ukraine On the Status of War Veterans and Guarantees of their Social Protection, persons with special merits, those who have rendered special labour services to the country, and victims of Nazi persecution have the right to legal services under paragraphs 1-3 of part 2 of Article 13 of this Law, with regard to their social protection;*
 - 10) *persons in relation to whom the court is considering restriction of one's civil capability, recognition of the individual as incapable, and recovery of the person's civil capability have the right to legal aid mentioned in Article 13, part 2, paragraphs 2 and 3 of this Law, in the course of the hearing;*
 - 11) *persons in relation to whom the court is considering rendering compulsory psychiatric care have the right to legal aid provided in Article 13, part 2, paragraphs 2 and 3 of this Law, in the course of the hearing;*
 - 12) *persons rehabilitated in accordance with the legislation of Ukraine have the right to legal aid mentioned in Article 13, part 2, paragraphs 2 and 3 of this Law, with regard to rehabilitation-related issues.*
2. *The right to free secondary legal aid shall be granted to citizens of the states with which Ukraine has signed the relevant international treaties on legal aid, ratified by the Verkhovna Rada of Ukraine, as well as foreigners and stateless persons in accordance with international treaties to which is Ukraine is a party, if such treaties prescribe free legal aid to be provided by the participating states to certain categories of persons.*

CPC

Article 49. Committing a defence counsel by investigator, public prosecutor, investigating judge or court for defence by appointment

1. *Investigator, public prosecutor, investigating judge or court shall be required to ensure participation of a defence counsel in criminal proceedings in the following cases:*
 - 1) *when under Article 52 of the present Code the participation of a defence counsel is mandatory, and the suspect, accused has not committed a defence counsel;*
 - 2) *when the suspect, accused filed a plea on committing a defence counsel but for reasons of lack of funds or for other objective reasons, is unable to commit one on his own;*
 - 3) *when investigator, public prosecutor, investigating judge or court decide that circumstances of the criminal proceedings concerned require the participation of a defence counsel, and the suspect, accused has not committed one.*

Defence counsel shall be engaged by investigator, prosecutor, investigating judge or court in other cases pursuant to the law regulating free legal aid.

2. *In cases specified in part 1 of this Article, investigator, public prosecutor issues a resolution, and the investigating judge and the court adopt a ruling, assigning an appropriate body (institution) authorized by the law to provide free legal aid to appoint a defence lawyer to act as defence counsel by appointment, and to ensure his appearance at a time and place stated in the resolution (ruling), for participation in criminal proceedings.*

3. *A resolution (ruling) on assignment to appoint a defence lawyer shall be immediately sent to an authority (institution) authorized by the law to provide free legal aid and shall be subject to immediate execution. Failure to comply, improper or delayed compliance with the resolution (ruling) instructing to appoint a defence counsel shall entail a legal liability as established by law.*

Article 52. Mandatory participation of a defence counsel

1. *Participation of a defence counsel shall be mandatory in criminal proceedings in respect of crimes of especially grave severity. In such cases, participation of a defence counsel is ensured from the time when a person achieves the status of a suspect.*
2. *In other cases, participation of a defence counsel is ensured:*
 - 1) *in respect of a person who has not attained 18 years and who is suspected or accused of the commission of a criminal offence – upon establishing that the person concerned is an underage or when in any doubt as to his majority;*
 - 2) *in respect of a person subject to compulsory educational measures - upon establishing that the person concerned is an underage or when in any doubt as to his majority;*
 - 3) *in respect of persons who as a result of having mental or physical disabilities (dumbness, deafness, blindness, etc.) are unable to fully enjoy their rights – upon establishing the presence of such disabilities;*
 - 4) *in respect of persons who have no knowledge of the language in which criminal proceedings are conducted – upon establishing this fact;*
 - 5) *in respect of a person subject to compulsory medical measures or where application of such was considered, – upon establishing that the person concerned has mental disorder or other information giving ground to doubts about the person's criminal capacity;*
 - 6) *in connection with the rehabilitation of a deceased person – when the right to the rehabilitation of the deceased person has arisen;*
 - 7) *in respect of persons who are under special pre-trial investigation or special judicial proceedings - from the moment of making the corresponding procedural decision.*
 - 8) *in case of an agreement concluded between the prosecutor and the suspect or the accused on the admission of guilt – upon initiation of the conclusion of such agreement.*

Therefore, the following groups of persons are eligible to receive free secondary legal aid:

- ▶ Any person subject to administrative detention or arrest;
- ▶ Any person detained within criminal proceedings;
- ▶ Any person remanded into custody as a preventive measure within criminal proceedings;
- ▶ Any person entitled to the legal aid according to the CPC:
 - cases of mandatory defence,
 - appointment of a defence lawyer is made by authorities when defendant cannot engage a lawyer due to the lack of financial resources or other objective reasons,
 - legal aid lawyer is appointed bearing in mind particular circumstances of criminal proceedings ("interests of justice"),
 - engagement for "conducting a single procedural action".
- ▶ Any prisoner serving the sentence entailing deprivation of freedom.
- ▶ Certain groups of vulnerable people.

The right to free secondary legal aid shall be granted to citizens of the states with which Ukraine has signed the relevant international treaties on legal aid, ratified by the Verkhovna Rada of Ukraine, as well as foreigners and stateless persons in accordance with international treaties to which is Ukraine is a party, if such treaties prescribe free legal aid to be provided by the participating states to certain categories of persons (Article 14 part 2 of the LA Law). This provision shall be read together with Article 26 part 1 of the Constitution of Ukraine and Article 3 part 1 of the Law of Ukraine On Legal Status of Foreign Citizens and Stateless Persons, of 22 September 2011. The latter states that “foreign citizens and stateless persons who are within the territory of Ukraine on lawful grounds, have all the rights, freedoms and responsibilities as the citizens of Ukraine with exceptions stipulated by the Constitution and international treaties ratified by Ukraine”. As confirmed by CCLAP, in practice all the foreign citizens and stateless persons are eligible for FSLA in cases required by CPC and Code of Administrative Offences. To ensure that the LA Law is not interpreted wrongly in practice by excluding non-nationals, Article 14 should be amended to provide that legal aid is provided irrespective of the beneficiary’s citizenship.

According to the LA Law, free secondary legal aid is provided free of charge, with no financial test being applied, to the following categories of beneficiaries: any person placed under administrative detention or under administrative arrest (Article 14 part 1 paras 3-4), any person detained within criminal proceedings or against whom remand in custody as a preventive measure has been applied (Article 14 part 1 paras 5-6), any person in whose criminal proceedings the appointment of a lawyer to provide legal aid is requested by an investigator, a prosecutor, an investigating judge or a court in cases of mandatory defence or for the interests of justice, or any person sentenced to imprisonment, commitment to a military disciplinary unit, or restriction of liberty (Article 14 part 1 para 7). This provision is understood as providing a lawyer when the interests of justice so require.

In other criminal cases and procedures that are not covered by the above situations, legal aid can be provided based on Article 14 part 1 para 1 of the LA Law, at the decision of the FSLACs, if the person does not have financial means to hire a lawyer. The financial test is met “if the average monthly income of their families is lower than the minimum subsistence level calculated and approved in accordance with the Law of Ukraine On the Minimum Subsistence Level for the persons belonging in the principal social and demographic groups of population, and disabled persons who receive pension (or allowance) of less than two minimum subsistence levels for the disabled persons” (Article 14 part 1 para 1 of the LA Law).

The determination of eligibility for criminal legal aid is simple as long as suspects are detained (deprived of liberty), but outside this situation it appears quite complex. Firstly, it is complex for people who are not detained and need legal aid for criminal proceedings, and, secondly, for people who are detained and later released because it is not completely sure if legal aid will be provided until the case is finished in court.

The legislation does not specify whether legal aid is provided throughout the case or not. The interpretation of several provisions suggests that legal aid is provided only as long as the person remains eligible. If the lawyer was provided following a request for a case that involves mandatory defence, it is clear that the lawyer is provided throughout the case. However, if the lawyer was provided to a person that is in remanded in custody and the person is released from custody, then once the custody ends, legal aid will only be continued if the person is eligible for legal aid.³⁶

Furthermore there is a chance that the authorities who have to deal with the assessments of applications will make mistakes and it will be difficult to raise awareness amongst the public about their eligibility. Probably these complex proceedings are caused by the lack of coherence between the LA law and CPC.

³⁶ See in this respect para 2 of the Procedure of Informing the Centres for Providing Free Secondary Legal Aid about the Cases of Detention, Administrative Arrest, or Measure of Restraint in the Form of Remand in Custody, approved by CoM’s Resolution no. 1363 of 28 December 28, 2011. According to Resolution of Cabinet of Ministers no. 465 on Remuneration of Lawyers Providing FSLA and Compensation of their Expenses, if the custody as a restrictive measure was cancelled, the lawyer continues to defend his/her client until the end of the current stage of criminal proceeding.

RECOMMENDATION 2.1

Administrative burdens when dealing with applications should be kept to a minimum. The regulatory framework could be improved so that it clearly defines individuals eligible for legal aid, is more simple and understandable for beneficiaries. This could be done through ensuring that the specialised law on legal aid is consolidated to encompass all the relevant aspects of legal aid and guarantees in a holistic and uniform manner, thus avoiding the creation of a patchwork of legislation.

RECOMMENDATION 2.2

The LA Law or relevant regulations should be amended to clarify whether legal aid is provided throughout the case or not and clear procedures need to be developed for provision of legal aid if this is not provided throughout the case.

2.4 Services

LA Law, Article 1 provides for a general definition:

4) legal services – providing legal information, consultations and explanations on legal issues; drafting applications, complaints, procedural and other legal documents; legal representation of individuals in courts and other state authorities, local self-government bodies, and before other persons; ensuring defence against charges; assisting individuals in gaining access to secondary legal aid and mediation.

LA Law, Article 7 refers to the primary FLA (also relevant for criminal cases):

2. Free primary legal aid includes the following types of legal services:
 - 1) provision of legal information;
 - 2) providing advice and explanation of legal issues;
 - 3) drafting applications, complaints and other legal documents (except for procedural documents);
 - 4) assisting individuals in gaining access to the secondary legal aid and mediation.

LA Law, Article 13 refers to the secondary FLA:

2. Free secondary legal aid includes the following types of legal services:
 - 1) defence;
 - 2) legal representation of individuals entitled to free secondary legal aid in courts and other state authorities, local self-government bodies, and before other persons;
 - 3) drafting procedural documents.

CPC, Article 47 Duties of the defence counsel

1. Defence counsel is obliged to use legal remedies determined in the present Code and other laws of Ukraine, in order to ensure that the rights, freedoms and legitimate interests of the suspect, accused are respected, and establish circumstances that dispel the suspicion or charges, mitigate or exclude criminal liability of the suspect, accused.

Consequently, there is a great variety of legal aid services in Ukraine that can be used by the clients. In fact there are very few, if any, exclusions. This is a very positive element. The fact that the primary legal aid is also available for criminal cases means that people can get advice and information at all stages. The availability of legal aid after sentencing and during the punishment phase is equally important.

2.5 Early access to a lawyer or *Salduz* dogma

Legal aid systems across Europe face challenges in providing timely and qualitative services from the moment of arrest / deprivation of liberty, before the first questioning by police. Following the ECtHR judgment in *Salduz v. Turkey*³⁷, all Council of Europe member states have to ensure that legal assistance is provided “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.” Thus, the *Salduz* jurisprudence has introduced as a requirement that the police cannot interview the client before the lawyer arrives.

In Ukraine a detained person has the right to receive free secondary legal aid from the moment of detention. The legislation does not expressly provide that “from the moment of detention” means prior to the first questioning by police, but this can be understood from the combined application of several legal provisions.³⁸

The efforts of the Ukrainian legal aid system to fully implement the current international legal framework on early access to a lawyer are commendable. However, it seems that instances when detaining authorities do not notify the RFSLACs about detention continue and that various practices are still used to avoid the mandatory involvement of a lawyer.³⁹ The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment also noted problems in this respect during its visit from 18 to 24 February 2014. It noted that In both Kyiv and Dnipropetrovsk, the practical operation of procedural safeguards against ill-treatment – in particular the proper recording of detentions, the right of notification of custody and the right of access to a lawyer, including FLA – were not fully implemented. The relevant provisions of the CPC had been routinely ignored by law enforcement officials with initial periods of actual deprivation of liberty of up to 12 hours, and in a few cases up to 24 hours, often unrecorded. A number of detained persons interviewed indicated that they had been first questioned by an investigator without the presence of a lawyer and before being put in a position to have a relative or another third party informed of their situation. In many other instances, ex officio lawyers arrived at the very end of the interview, only to sign the protocols of detention. Further, meetings with lawyers were often only possible in the presence of the investigator.⁴⁰

It also appears that a large number of detentions are conducted unlawfully, without a court ruling in those cases where a ruling is obligatory according to the legislation⁴¹. Such practices are not in line with the safeguards enshrined in Article 5 of the ECHR, the Constitution of Ukraine and the relevant provisions of the CPC and might lead to the violation of the right of early access to a lawyer.

During the fact-finding mission lawyers reported violations of the right of early access to a lawyer, not in a systemic way, but that it is frequently encountered. This is an important challenge and additional efforts are necessary for tackling it.

For a better insight in these shortcomings and to find ways to improve this situation a registration of all the detentions and presence of a lawyer is needed (*see paragraph 2.9 below*).

The National Police representatives stated that implementation of early access or *Salduz* obligation depends on all parties’ involvement and that an automatic system of registration of detention is required. The National Police also informed that they had not yet organised specific training on complying with the *Salduz* obligation. In part, this was because it was said that the Ukrainian legislation does not provide for the mandatory participation of a lawyer in all criminal cases. For

³⁷ ECtHR, *Salduz v. Turkey*, Grand Chamber judgment of 27 November 2008.

³⁸ Article 20 part 3, Article 42 part 3 para 3, Article 208 part 4, Article 213 part 4 of the CPC, Article 13 part 2 para 1, Article 14 part 1 para 5 of the LA Law.

³⁹ The study free legal aid system in Ukraine: the First Year of Operation Assessment, Ukrainian Legal Aid Foundation, International Renaissance Foundation and Ukrainian Helsinki Human Rights Union, pp. 36-37; Yuriy Belousov, Tetyana Sivak, Volodymyr Suschenko, Hennadiy Tokarev and Serhiy Shvets, study report Procedural Safeguards for Apprehended Persons, International Renaissance Foundation, Kyiv, 2015.

⁴⁰ CPT, CPT/Inf (2015) 3, Report to the Ukrainian Government on the visit to Ukraine carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 18 to 24 February 2014, para. 52.

⁴¹ Yuriy Belousov, Tetyana Sivak, Volodymyr Suschenko, Hennadiy Tokarev and Serhiy Shvets, study report Procedural Safeguards for Apprehended Persons, International Renaissance Foundation, Kyiv, 2015..

all detained people the Police have to call to the RFSLAC for the criminal defence lawyer. But the National Police representatives pointed out that the individual can waive his/her right to a lawyer, except in mandatory defence cases. Here the *Salduz* jurisprudence may be clearer than the Ukrainian law: the police can't start the questioning before the suspect has had the opportunity to talk to a lawyer, only a few, very special, exceptions exist. It is in the interest of the Police and Investigator as well to change their attitudes regarding *Salduz* obligation. Of course their main goal is to do their best to prove that the detained person is guilty, but evidence collected from the detained person before he/she could consult a lawyer will be excluded.

Thus, the investigator needs to be interested in having the lawyer at pre-trial investigation, so that subsequently the evidence cannot be challenged. Ideally, 100% of criminal defendants should benefit from legal aid just to avoid the possibility that evidence is collected in breach of the right to consultation before the hearings.

RECOMMENDATION 2.3

The criminal justice actors, in particular the police, prosecution, courts and the legal aid system - should make concerted efforts to ensure that legal aid is provided to any suspect/defendant from the moment of detention, prior to the first questioning by police, as prescribed by Ukrainian legislation and ECtHR case law. These efforts may include, *inter alia*, developing (and where relevant updating) the regulations on ensuring early access to a lawyer for each relevant actor, adequate automatic registration of all detained suspects / defendants and prompt notification of the RFSLACs on the need to appoint a lawyer. Moreover, it is in the interest of the society, police and lawyers to bring to justice only those that are guilty and to avoid the exclusion of evidence because a lawyer has not been provided from the moment of detention, prior to the first police interview (the *Salduz* rule). So training should be provided to all the relevant stakeholders on this rule and the consequences of breaking it.

2.6 Review and appeal

In order to ensure that the legal aid regulations are properly complied with it is important that people can ask for reviews of or appeal⁴² against decisions that can limit or affect their rights to legal aid (see, for example, *Del Sol v. France*, cited above, para 27-28).

Review can be asked of decisions in respect with primary legal aid which is also available for criminal cases (see Article 10 of the LA Law). People can request review or appeal against actions and failure by officials and employees, which violate procedures and deadlines for reviewing request for legal aid (see Article 31). It is also possible to challenge before administrative courts the refusal to provide FSLA (see Article 30). Review and appeal are also available for objections concerning quality of services as well, so this is well foreseen in the law (see Article 31).

However, there are no time limits given for decision making in respect with reviews or appeals, except for the general rules set forth by the Administrative Procedure Code. There is no information on the CCLAP web page on appeals for refusal to provide FLA.

RECOMMENDATION 2.4

The LA Law should set out the time limits within which the decisions on granting legal aid can be challenged and the procedure to be followed. The various provisions on legal aid applications which are currently dispersed in different Articles of the LA Law, should be brought together into a consolidated set of provisions, including review and appeal.

⁴² Review is an internal proceeding and appeal is a process before the court.

2.7 Awareness of the right to legal aid

No matter how comprehensive one's legal aid system is, if the citizen is unaware of its existence or its content then there is a threat to the rule of law and a need for public legal education. So making the people familiar with the legal aid system is crucial for the state and the proper functioning of the rule of law.

No clear strategy seems to exist for raising awareness amongst the public. Of course there is a lot of publicity, booklets, information sheets etc., but awareness must be present at the moment it is needed by the public ("just in time" knowledge). All the necessary information on LA is available on the official site of CCLAP⁴³ and the websites of the regional Centres, but this is not easy for a detained person to access.⁴⁴ It is not also clearly defined whether primary legal aid is part of the criminal legal aid scheme. Primary legal aid can however play an important role in creating more awareness of the availability of secondary legal aid, the *Salduz* requirements and the quality of the rule of law.

When one looks at the figures (*paragraph 2.9*) it seems likely that there is a lack of awareness with respect to getting legal aid in time. There are a relatively low number of applications for legal aid. Also researches show low levels of awareness in the public.⁴⁵

RECOMMENDATION 2.5

There is a need for an improvement in providing information (oral and written) at the moment of detention combined with recording of the interviews so that the public and lawyers are sure that people are well informed about their rights. The more this can be done the more people will be aware of their rights to information and an effective defence. The availability of primary criminal legal aid can be also used for this purpose.

2.8 Data related to (needs for) free secondary legal aid

It proves to be extremely difficult to find available and accurate statistical data on various elements of the functioning of the criminal justice system of Ukraine. Some of the information obtained while preparing the assessment report and relevant conclusions drawn are presented below.

Court proceedings

According to the information provided in the reports published on the official web-site of the Supreme Court of Ukraine, in 2015, 154,509 criminal cases were pending in the first instance courts and 22,198 in courts of appeal. 127,047 cases were received by first instance courts and 19,661 cases were received by courts of appeal in 2015.⁴⁶

Pre-trial proceedings

The General Prosecutor's Office maintains statistics on criminal investigations throughout the country, which includes, for example such figures as number of registered crimes and number of persons officially informed on suspicion of committing a crime in 2015: 565,182 and 188,099 respectively.⁴⁷

Deprivation of liberty

It is to be noted that there is no information publicly available on the total number of detentions in the criminal proceedings. Each agency keeps its own statistics on detention. While some of

⁴³ See for details: <http://legalaid.gov.ua/ua/operatyvna-info/pytannia-ta-vidpovidi>.

⁴⁴ In the past the CCLAP had some difficulties in co-operation with Ministry of Interior with regard to public awareness raising. Recently the situation has changed. On February 12, 2016 the Memorandum of Co-Operation in the Area of Legal Aid between MoJ and National Police was signed. It prescribes the number of activities in the area of awareness of detainees. According to the CCLAP, the information campaign would start soon. All police offices, rooms for detainees, rooms for confidential meetings with lawyer, cars for transportation of detainees etc. will contain all the necessary information materials to ensure the awareness on the right to FSLA.

⁴⁵ Free Legal Aid System in Ukraine, the first year of operation assessment; Free Legal Aid System in Ukraine: an Overview, October 2014, URL http://legalaid.gov.ua/images/control/Legal%20Aid%20System%20in%20Ukraine%20an%20Overview_Eng.pdf

⁴⁶ [http://www.scourt.gov.ua/clients/vsu/vsu.nsf/\(documents\)/D17027FCA3B933F6C2257F930027876A](http://www.scourt.gov.ua/clients/vsu/vsu.nsf/(documents)/D17027FCA3B933F6C2257F930027876A)

⁴⁷ http://www.gp.gov.ua/ua/stst2011.html?dir_id=112173&libid=100820

them ensure accessibility of this information (e. g. Prosecutor's Office⁴⁸, State Fiscal Service⁴⁹), the others (e.g. the Police) do not provide up-to-date information on their web-sites. It is noticeable that the law enforcement agencies use the 'joint' indicator of the number of persons apprehended under Articles 207 and 208 of the CPC, while Article 207 sets forth the provisions for civil arrest, at the same time Article 208 governs the detention by the authorised official without a court order.

The State Judicial Administration keeps the statistics on court orders on apprehension of a suspect with a view to compelled appearance (Article 188 of the CPC). For 2015 it is as follows: motions received 18,833; motions satisfied 16,975.⁵⁰

According to the statistics of the Supreme Court, in 2015 investigating judges received 34,083 motions on applying remand in custody as a preventive measure, 31,700 motions were considered, and 18,643 out of them were satisfied.

As to the administrative proceedings, administrative arrest as a punishment was applied 22,625 times in 2015.⁵¹ There is, however, no publicly available information concerning administrative detention.

Legal aid

The CCLAP web page displays a table with statistical information of activity of RFLACs, which includes statistical data on the notifications/requests concerning FSLA and appointments. Thus it is possible to compare the number of notifications/requests for FSLA and the number of cases when FSLA was actually provided in 2015)⁵²:

Nº	Kind of proceedings or legal aid to be provided	Number of notifications/requests	Number of lawyer's appointments
1	Administrative detention	10 071	6902
2	Administrative arrest	10 722	4575
3	Detention in the course of criminal proceedings (both with and without court's order)	18 922	17 309
4	FSLA on a separate stage of criminal proceedings (criminal defence by appointment)	38 523	38 685*
5	Participation in a single procedural action	3177	3113
6	Proceedings on application of compulsory measures of medical nature	3751	3743
7	Extradition proceedings	103	101
8	Court proceedings related to enforcement of convictions	598	604*
9	Legal aid requested by convicts serving a punishment	1379	1185
	TOTAL:	87 246	76 217

In addition to this table there is also statistics available on the number of refusals of clients from FLA lawyer: 5,290 in 2015.⁵³

⁴⁸ http://www.gp.gov.ua/ua/stst2011.html?_m=fslib&_t=fsfile&_c=download&file_id=194815

⁴⁹ <http://sfs.gov.ua/data/material/000/105/156743/2015.pdf>

⁵⁰ http://court.gov.ua/sudova_statystyka/Sud_statustuka_Zvit_2015/

⁵¹ http://court.gov.ua/userfiles/ogliad_2015.pdf

⁵² https://docs.google.com/spreadsheets/d/1ahqET83Sg_cBIOHp_9Ealp-OZFShKJWHE6UU-cicBPw/edit#gid=1036692300

⁵³ https://docs.google.com/spreadsheets/d/1ahqET83Sg_cBIOHp_9Ealp-OZFShKJWHE6UU-cicBPw/edit#gid=1036692300

Some remarks with respect to these figures:

1. There is no central database available with figures of what happens in the criminal judicial chain, nor are the figures available from different sources combined.
2. In two cases (marked with * in the table above) the number of appointments of lawyers is higher than the number of requests for FLA; the following explanation was received from CCLAP:
 - a) Sometimes the resolution/ruling of a prosecutor or a court concerns several persons in need of a defence lawyer. A defence lawyer for each individual will be appointed by a separate instrument.
 - b) The number of the appointments may be higher because of the replacement of a lawyer (the new lawyer will be appointed by a separate instrument).
 - c) A new appointment is made in the case of a suspect/accused/convicted/acquitted who had previously waived his/her right to a lawyer.
3. There is a significant gap between the number of notifications and the number of appointments in cases of administrative offences, when a person is detained or under administrative arrest (numbers 1 and 2 in the table). The following explanation was received from CCLAP: In case of administrative detention there is a big number of cases when the person was detained and in a very short period of time (less than 1 hour) released. But in any case there is an obligation to inform RFSLACs about all the facts of such detentions except for the cases when individuals defend themselves on their own or have already engaged a private lawyer.⁵⁴ Thus, even if the detainee is released in a short period of time, the detaining authorities inform the RFSLACs, who register the relevant information. In case of such short-term detentions, the RFSLACs may receive notifications after the person has already been released. The question remains, whether this modus operandi is compliant with the *Salduz* rule.

As to administrative arrests, it was applied 22,625 times in 2015. The RFSLACs received notifications in 10,722 cases, out of which 4,575 appointments were issued. The latter was explained by the CCLAP as follows: the relevant authorities should notify the FLA system on all arrests irrespective of the fact whether the person wishes or not to engage a FLA lawyer. If the person prefers not to engage one, the notification is registered in the FLA system, however, no lawyer is appointed. As to the difference between the number of arrests and the number of notifications, this could be stemming from the recurrent failure of the relevant authorities to inform the FLA system of administrative arrests.

4. For detention of persons in the course of criminal proceedings (number 3 in the table) the number of the cases where legal aid was actually provided is much higher – more than 90%. Although it does not exclude the detaining authorities' practice on delayed informing of the RFSLACs about the facts of the detention, it is very regrettable that the data on the total number of detentions is not available, at least from public sources. In such circumstances, it is hard to fully assess the extent to which legal aid needs are being met.
5. The number of appointments for criminal defence (38,685 for both pre-trial and trial stage) is relatively low in comparison with the number of criminal cases received even only by the first instance courts (127,047⁵⁵) as well as the number of notifications of suspicions (188,099). It is possible that the suspects/defendants arranged their own private lawyer. However, due to the absence of detailed statistics and relevant breakdowns per indicators, it is not possible to conduct proper analysis and rule out the violation of the right to legal aid.
6. The number of refusals by clients from legal aid lawyers is 6.9% from the total number of cases where legal aid is granted (76,217). The reasons for the refusal are not recorded (*see chapter 3*).

⁵⁴ Code of Administrative Offences, Article 261 was supplemented with this provision in May 2016; previously a similar exception was set forth in the Law On Police

⁵⁵ [http://www.scourt.gov.ua/clients/vsu/vsu.nsf/7864c99c46598282c2257b4c0037c014/2a874f25beac68d2c2257f8d003f8080/\\$FILE/100.pdf](http://www.scourt.gov.ua/clients/vsu/vsu.nsf/7864c99c46598282c2257b4c0037c014/2a874f25beac68d2c2257f8d003f8080/$FILE/100.pdf).

Thus appropriate statistics should be kept by all relevant criminal justice institutions to identify the percentage of suspects/defendants eligible for legal aid and the real beneficiaries thereof.

It would also be necessary to have a separate breakdown of the number of FLA cases in the course of pre-trial investigation, including a number of legal aid awards for detained persons (so called 'early access to detained'), procedures on selection of a measure of restraint or prolonging terms of measures of restraint, and the number of FLA cases in courts, separating trial, appellate and cassation ones. The reasons for the refusals by clients to use services of legal aid lawyers should be recorded as well.

RECOMMENDATION 2.6

It would be useful if the statistics collected and processed by different criminal justice institutions could be compiled on the basis of similar indicators, so that it is possible to compare the legal aid data with the statistics of law enforcement and courts, and therefore to know the percentage of criminal cases (proceedings) where legal aid should be provided and the percentage of the actual beneficiaries receiving legal aid, as well as the reasons for any possible discrepancies.

ASSIGNMENT AND REPLACEMENT OF A LAWYER TO PROVIDE FREE SECONDARY LEGAL AID

3

Chapter

This chapter analyses the rules and practice on appointing lawyers to provide legal aid, continuity of defence, choice of a lawyer and replacement of a lawyer. States have the discretion to choose the systems of appointing legal aid lawyers depending on the adopted scheme of administration of the legal aid system. There is no legal standard on appointment of lawyers. States must be driven by considerations of quality, efficiency and promptness in appointing lawyers. More and more countries choose to set up specialised bodies to administer the legal aid system, including the appointment of legal aid lawyers (*see more details in chapter 6*). Irrespective of the chosen model, the appointment rules must be clear and ensure a prompt appearance of the lawyer.

3.1 The system of assignment of lawyers to provide free secondary legal aid

3.1.1 Procedures for appointment of a lawyer

The RFSLACs appoint lawyers to provide secondary legal aid in criminal cases and in cases of administrative detention or arrest. The RFSLAC, depending on the urgency of the requested service, appoints a lawyer in the following two types of situations:

1. When the defendant or his/her relatives filed a request for receiving free secondary legal aid, in which case the RFSLAC issues the decision to provide secondary legal aid within 10 days from the day when the request was received. The decision to provide free legal aid is notified in writing to the person that requested it (Article 19 part 1 of the LA Law).

According to CCLAP, in practice the procedure is the following. If the person is eligible, the RFSLAC issues an order of appointment. The order does not include the name of the lawyer, only the decision to provide legal aid. Further, the RFSLAC contacts the lawyer from the Registry of Lawyers Providing Free Secondary Legal Aid and once the lawyer that is available confirms, the RFSLAC issues the assignment (power of attorney) to the respective lawyer. The RFSLAC informs the applicants about both the decision and the assignment, providing all necessary data. If the person is not eligible, the RFSLAC issues an order of refusal, which is sent to the applicant. Depending on the applicant, RFSLACs inform them via e-mail or post and, in addition, via phone.

2. When the request for free secondary legal aid is made by the detained person⁵⁶ or members of his/her family or his/her relatives, the RFSLAC has to provide legal aid from the moment of detention (Article 19 part 5 of the LA Law).⁵⁷ Similarly, when the RFSLAC receives a decision of an investigator, a public prosecutor, a ruling of an investigating judge, a court for commitment

of a lawyer in order to be appointed as a defence lawyer, or to conduct a single procedural action,⁵⁸ the RFSLAC shall appoint the lawyer *immediately*.

The LA Law and the CPC provide for the right to a lawyer from the moment of detention and the representative of the law enforcement body has the obligation to inform the detained person that he/she is entitled to invite a lawyer of his/her choice and if he/she does not have one, a lawyer is provided through the free secondary legal aid system.⁵⁹ Article 213 part 4 of the CPC contains an explicit obligation of the official who had carried out the detention to inform the FLA agencies. The detailed procedure of informing the RFSLAC about detention and requesting the appointment of a lawyer is provided in the CoM Resolution no. 1363 of 28 December 2011 On Approval of the Procedure of Informing the Centres for Providing Free Secondary Legal Aid about the Cases of Detention, Administrative Arrest, or Measure of Restraint in the Form of Remand in Custody, (the Procedure). The Procedure obliges the RFSLACs to appoint the lawyer to the detainee within one hour. The RFSLAC issues a decision on the appointment of a lawyer to the person, which is sent via fax, email or through the internal system to the requesting officer. (If the request for appointment of a lawyer is made by the detained person, the RFSLAC officer shall inform him/her by phone about the appointment of a lawyer). The lawyer should also arrive within one hour, from the moment the notification was received from the RFSLAC, to the place where the person is detained (in exceptional cases it can be within 6 hours, however, the Procedure does not specify what the exceptional cases are). Hence, according to the procedures, a detainee should in principle be able to see a lawyer within two hours from detention.

During the fact-finding missions, no concerns were highlighted regarding the appointment of lawyers to provide legal aid to defendants that request free secondary legal aid during the 10 days procedure. Concerns have been raised regarding the appointment of lawyers to provide free secondary legal aid to defendants that are detained. The main concerns refer to the unavailability of lawyers 24/7 in all regions, on the one hand, and the problematic or delayed contact from the police and other detention authorities, on the other hand.

Availability of lawyers 24/7

An important concern was raised during the mission and field visits regarding the availability of lawyers to promptly take on appointments at night or during weekends/holidays. Hence, even if the RFSLACs' directors draw up monthly duty schedules, lawyers do not always answer the phones or accept appointments during "out of office" hours. When the pool of lawyers is insufficient, their reluctance to accept appointments around the clock is even more problematic. In September 2015, a new CoM Resolution On Remuneration of Lawyers Providing Free Secondary Legal Aid and Compensation of Their Expenses was adopted.⁶⁰ It allows for the first time compensation of expenses for fuel and lubricants if the lawyer uses his/her own car at night or in rural areas to get to the client. This new provision is believed to be helping to overcome geographical imbalances in the number of lawyers in cities and rural areas.

⁵⁶ The detained persons covered by Article 19 part 5 of the LA Law are the persons referred to in Article 14, part 1, paragraphs 3-6 of the LA Law, which includes: "3) persons to whom administrative detention has been applied.; 4) persons to whom administrative arrest has been applied; 5) persons who are considered as detained, pursuant to the provisions of legislation on criminal procedure.; 6) persons, with regard to whom a preventive measure was chosen in the form of remand in custody".

⁵⁷ This amendment was introduced by Law No 1697-VII of 14 October 2014 as an attempt to increase the instances of requests and provision of legal aid to detained persons, meant to counteract the shortcomings on behalf of law enforcement bodies informing the RFSLACs of detention.

⁵⁸ According to Article 53 of the CPC, an investigator, public prosecutor, investigating judge or court can engage a defence counsel in a single procedural action exceptionally in urgent cases, where the procedural action is required immediately, and the defence counsel who was informed in advance cannot appear to participate in such procedural action or send a replacement, or where the suspect or accused person is willing to have a defence counsel engaged, but either there was not enough time to engage defence counsel or the appearance of the counsel chosen is not possible.

⁵⁹ The following provisions are relevant: Article 20, Article 42 part 3 paras 2-3, Article 208 part 4 and Article 212 part 3 para 2 of the CPC.

⁶⁰ Replacing the CoM Resolution No 305 of 18 April 2012.

Early access to a lawyer *(see more details in chapter 2)*

Ensuring early access to a lawyer is also a priority for the legal aid system in Ukraine.⁶¹ However, several studies⁶² and interviews during the fact-finding mission confirm that early access to a lawyer is still not implemented systematically. The main impediments in ensuring early access to a lawyer are the delays or failures on behalf of the law enforcement authorities to contact the RFSLACs, the use of various practices to avoid the mandatory involvement of a lawyer and continuous differences between the de-facto deprivation of liberty and registered detention, causing delayed provision of legal assistance to detained persons. Several cases brought before the ECtHR against Ukraine regarding the violation of the right to a lawyer during the police questioning confirm that this is an important problem in Ukraine.⁶³ In some instances, the legal aid system fails to secure the timely participation of a lawyer, especially in regions where there are not sufficient lawyers.

Although providing early access to a lawyer is a priority for the legal aid system, the system alone cannot tackle this problem. The CCLAP has taken several measures to improve the situation. For example, the CCLAP promoted the amendment of the LA Law to allow the detainee or his/her family members or relatives to request directly the appointment of a lawyer.⁶⁴ A Memorandum of Cooperation between the National Police of Ukraine and the Ministry of Justice of Ukraine in the Area of Free Legal Aid Provision, signed on 12 February 2016, is a new instrument that is designed to improve cooperation between police and the legal aid system. The Quality Standards emphasize the role of a lawyer at the first interview with the police.

In conclusion, while appointment of a lawyer to defendants that request free secondary legal aid during the 10 days procedure does not seem to raise concerns, appointment of lawyers to defendants that are detained is not yet done in a timely and systematic manner. The main reasons for shortcomings in appointing lawyers in a timely and systematic manner to any detained person are the problematic or delayed contact from the police and other detention authorities, on the one hand, and unavailability of lawyers 24/7 in all regions, on the other hand.

3.1.2 Rules for assignment of a certain lawyer

Requests for appointment of a lawyer can be sent by telephone or fax to a single telephone for contacting the FLA system or the requests can be sent by email, telephone or a comprehensive information analysis system on providing legal aid to any of the regional FSLACs (para 2 of the Procedure). The authorized officers within the RFSLACs operate around the clock for handling the appointments in a timely manner (para 5 of the Procedure). The current sub-section is focused on the rules that are guiding the RFSLACs in assigning one or another lawyer from the Registry of Lawyers Providing Free Secondary Legal Aid.

According to the LA Law, after deciding on provision of free secondary legal aid, the RFSLAC appoints a lawyer that provides free secondary legal aid on a regular basis in accordance with the contract (Article 21 part 1). If it is impossible to appoint a lawyer that provides free secondary legal aid on a regular basis, the RFSLAC shall contract with an “*ad hoc*” lawyer that is included in the Registry of Lawyers Providing Free Secondary Legal Aid (Article 22 part 1). The RFSLAC confirms via a power of attorney an appointed lawyer to act as lawyer in criminal proceedings or

⁶¹ As confirmed during the interviews with the Director of the CCLAP and other representatives of the legal aid system. In addition, the first quality standard refers to early access to a lawyer (Standards of Quality of the Provision of Free Secondary Legal Aid in Criminal Proceedings, approved by Order no. 386/5 of the Ministry of Justice of Ukraine dated 25 February, 2014, no. 337/25114).

⁶² Yuriy Belousov, Tetyana Sivak, Volodymyr Suschenko, Hennadiy Tokarev and Serhiy Shvets, Human Rights Behind Closed Doors “Procedural Safeguards for Apprehended Persons” study report, International renaissance Foundation, Kyiv, 2015, pp. 63-64; The Study Free legal aid system in Ukraine: the first year of operation assessment, pp. 36-37; Council of Europe, Report on an evaluation of the implementation of the Criminal Procedure Code of Ukraine, Support to Criminal Justice Reform in Ukraine, April 2015, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168044f56a>.

⁶³ For example, ECtHR, Nechiporuk and Yonkalo v. Ukraine, 21 April 2011; ECtHR, Dushka v. Ukraine, 3 February 2011.

⁶⁴ Initially, the FSLACs depended entirely on how quickly the relevant authorities were contacting the legal aid system and were limited in possibilities to tackle the lack of lawyers at the initial stages or detention. As a result, the LA Law was amended on 14 October 2014 to allow the detained persons and members of their families/relatives to contact directly the FSLAC to request the appointment of a lawyer. This positive amendment should increase the number of appointments of lawyers as soon as the person is detained.

administrative offence proceedings (Article 21 part 3 and Article 22 part 3). According to Article 21 part 2 of the LA Law, the RFSLAC considers the following criteria when assigning a lawyer to provide free secondary legal aid:

- a) His/her expertise,
- b) Experience,
- c) Workload,
- d) Complexity of cases in which the lawyer participates.

The system of appointment of legal aid lawyers is affected by certain features of the Ukrainian legal aid system:

- 1) Voluntary participation of lawyers in the legal aid system. This means that the lawyers can choose how many legal aid cases they can accept, moreover they can refuse any request for FLA during their duty time, hence the caseload of lawyers providing free secondary legal aid will never be equal if lawyers choose varying degrees of involvement in the legal aid system;
- 2) Territorial distribution of lawyers is uneven, with very few lawyers in rural areas. Inevitably, in districts where few lawyers to provide free secondary legal aid are available, they will always have a higher caseload than lawyers in districts with higher number of lawyers.

Each RFSLAC is responsible for case assignments in their region based on the general criteria provided in Article 21 part 2 of the LA Law. The RFSLACs appoint lawyers practising in their region from the Registry of Lawyers Providing Free Secondary Legal Aid. In addition, each RFSLAC draws a monthly duty schedule that indicates the days when the lawyers of the respective region are on duty for urgent assignment, e.g. cases of detention. When a request for legal aid is received by the RFSLAC, the RFSLAC's duty officer, following the general criteria, decides which lawyer should be assigned to the respective client. However, there are no central/ uniform detailed rules on case assignment to lawyers that provide free secondary legal aid. As a result the procedure varies between RFSLACs. Hence, the implementation of the general criteria for assignment of a specific lawyer in a consistent fashion depends to a great extent on the abilities of the RFSLAC staff to ensure that the Centre / duty officers follow a certain predictable system.

The NBA has criticized the legal aid system for a lack of transparency in the allocation of cases among different lawyers and varying caseload among lawyers.⁶⁵ Indeed, as acknowledged by the CCLAP, in some regions the system developed problematic appointment trends. The CCLAP has reported that it has taken a range of measures, both regarding individual Centres and on systemic level, to overcome the identified problems.

On the individual Centres level, for example, in 2014 the CCLAP conducted an internal audit in the Poltava RFSLAC, where it found several violations, including deficiencies in the system of appointing lawyers, one lawyer having received 451 assignments. As a result, the Centre's director was dismissed and new rules of appointing lawyers were adopted (the Procedure of Case Allocation between Lawyers Providing FSLA in Criminal Proceedings in Poltava Oblast of 03 February 2016). In Odesa region in 2013-2014 there was only one lawyer that received all assignments in the Izmail district due to lack of other lawyers in the system. This situation has changed since 2015, when two more lawyers joined the system. Kyiv RFSLAC posts the monthly duty schedule on their website, which is an important tool for ensuring transparency of appointments.

On systemic level, the following measures have been taken:

- ▶ Since 1 September 2014, the number of assignments issued to each lawyer and the amount of money paid to each lawyer is published on the website of the CCLAP. This is a quite an unprecedented practice in the region and should ensure transparency in the system of

⁶⁵ NBA press conference of 14 September 2015 and the report "Legal Aid System in Ukraine: Current Issues and Recommendations for Reform" of 13 November 2015.

appointment of lawyers. The experts consider that CCLAP should be encouraged to continue with this practice.

- ▶ In September 2015, a new CoM Resolution On Remuneration of Lawyers Providing FSLA and Compensation of Their Expenses was adopted (referred to above). It allows for the first time compensation of expenses for fuel and lubricants if the lawyer uses his/her own car at night or in rural areas to get to the client. This new provision helps to address more effectively the problem of geographical misbalances in the number of lawyers in cities and rural areas. It is believed that this will reduce or eliminate the instances when one lawyer will receive too many assignments due to lack of other lawyers in the respective locality.
- ▶ In March 2015, the CoM Resolution No. 8 of 11 February 2012 On Approval of the Procedure and Conditions of Contract with Lawyers Providing FSLA on a Regular Basis and Lawyers Providing FSLA on an *ad hoc* Basis was amended by the Resolution of the CoM of Ukraine of 11 March 2015 no. 110 On Amending of Some Resolutions of CoM of Ukraine Regarding Human Rights Protection by Means of Simplifying of Access to FSLA and Improving its Quality. A provision on the maximum of 30 pending cases to be allocated simultaneously to a lawyer was introduced. This limit was included in the contracts with the lawyers contracted by the legal aid system. This measure was designed primarily to prevent potential abuses of the system by allocating too many cases to a lawyer and to set some pre-requisites for quality of service, ensuring that a lawyer does not receive more cases that can reasonably be handled well.

Within the fact-finding missions, the Council of Europe local experts visited four RFLACs (Kyiv, Poltava, Sumy and Zhytomyr Regions' Centres). Out of the four RFLACs visited, only Poltava Centre has a written procedure for allocation of cases (mentioned above). The Poltava Procedure was developed after the management of the Centre was changed, partly because of problematic practices in the allocation of cases.

The Poltava Procedure for case assignment includes the following important provisions:

- ▶ It sets the types of powers of attorney to be issued by the RFLACs, depending on the type of request.
- ▶ It sets a maximum number of pending cases allocated to one lawyer simultaneously, which is limited to 30, as required by CoM Resolution no. 2 of 11 January 2012. The caseload of lawyers is calculated on a monthly basis and it does not include appointments made in administrative districts where there are no lawyers present to provide FSLA and outside of the respective lawyer's basic employment and residence district.
- ▶ It sets the rules for contacting lawyers included in the duty schedule:
 - the lawyers' duty schedule is drawn on a monthly basis and is approved by the RFLAC's Director;
 - if a lawyer refused to receive the power of attorney assigned or if he/she cannot be reached on the telephone or does not answer the telephone on the day being on duty, an authorised RFLAC's official (on duty official) shall record a refusal in the Journal and call a lawyer next in duty schedule. (If a lawyer's telephone does not answer or he/she cannot be reached on telephone, an authorised Centre's official (official on duty) has to call no less than 3 times at 5 minute intervals);
 - lawyers who refused to receive the power of attorney for 3 or more times within a month shall not be included to the duty schedule for the next month.
- ▶ It sets a continuous monitoring system for assignment of cases to lawyers (control over the accuracy of powers of attorney assignment shall be performed on daily basis after turnaround of duties and executed by the Head of structural department where an authorised Centre's official is employed and by the Deputy Head of the Centre according to division of duties. After that, the rating of lawyers' caseload shall be updated).

The Poltava system of allocation of assigned cases is based on a so-called lawyers' caseload rating, estimated in accordance with the number of assigned cases taken by each lawyer since the beginning of the year. It is also based on the appointment of the next available person and takes into account the lawyers' caseload. Thus the lawyer with the minimum rating gets the next case, notwithstanding whether they are on duty or not. If the request for FSLA comes in an assigned case with a client where any FSLA lawyer has already participated in the proceedings on previous stages, the case is allocated to this lawyer. The Procedure sets clear rules of appointment, including important guarantees against potential abuse: (1) a maximum number of pending assigned cases, (2) rating of FSLA lawyers in accordance with their caseload in assigned cases (for every locality) along with the principle of assigning of cases to the lawyer with the lowest number of assigned cases and (3) clear rules on how to decide that a lawyer does not answer the phone or cannot be reached. The procedure does not include references to the lawyer's experience and expertise (the other criteria included in Article 21 part 2 of the LA Law and mentioned by representatives of the CCLAP). Excluding these criteria from the appointment rules makes the system more objective and easier to manage.

As for the duty schedule, the Procedure provides that it is drafted on a monthly basis by the RFLAC director. However, the procedure does not spell out the principles on which the duty schedule itself is drafted, which need to be clarified both for the lawyers and the public.

According to the RFLACs' directors and lawyers that the experts met during the fact-finding missions, in their practices of allocation of cases, they are guided by considerations related to ensuring uniform case distribution among the lawyers, availability of lawyers, their experience and expertise in certain areas. However, a study in 2014 found that the criteria mentioned in Article 21 part 2 of the LA Law were not always taken into account in practice.⁶⁶

In conclusion, the system of assignment of lawyers seems to vary in different regions. There were reasonable measures taken when problematic trends on assignment of lawyers were detected, e.g. Poltava and Odesa regions, mentioned above. Similarly, there were reasonable measures taken on the system's level, e.g. publication of the duty schedules, setting up the limit of 30 pending cases. However, in order to ensure transparency of the system and create safeguards against potential abuses of the system, the rules on assignment of lawyers in each RFLAC should be drafted and published. While the criteria mentioned in Article 21 part 2 of the LA Law are appropriate *per se*, their application in practice requires either a sophisticated mechanism of appointment or reliance to a great extent on the RFLAC's staff. Therefore, a more straightforward system of assignment, based on objective and easy to implement method, is recommended.

RECOMMENDATION 3.1

Rules on appointment of lawyers to provide free secondary legal aid should be drafted and published in each RFLAC. The Poltava regulation seems a good one that could be used as an example. These rules should include the way duty schedules are drafted and the method of how the lawyers on duty are assigned. The rules should be straightforward and based on easily applied objective criteria. However, in complex or serious cases the experience or specialisation of the lawyer should be taken into consideration perhaps by establishing specialised lists of lawyers for specific categories of cases.⁶⁷

RECOMMENDATION 3.2

Ensuring an equal distribution of cases should not be a goal in itself, as the legal aid system should primarily be guided by the best interests of the legal aid beneficiaries, rather than by ensuring an equal workload of lawyers. Hence, the RFLACs should not strive to ensure equal distribution of cases among lawyers, but should monitor and intervene when evident disproportionalities among lawyers occur.

⁶⁶ Free legal aid system in Ukraine: the first year of operation assessment, p. 60.

⁶⁷ The experts consider that there is merit in the RFLAC taking account of experience when the RFLAC is allocating complex or serious cases to avoid a situation where an inexperienced lawyer is assigned, for instance, to a murder case. Alternatively, to complex or serious cases two lawyers can be appointed.

3.1.3 The positive impact of the new system of appointment of lawyers to provide legal aid

The change of the appointment system of lawyers to provide free secondary legal aid seems to be one of the most important changes introduced by the LA Law. The RFSLACs appoint the lawyers to provide legal aid, from a roster of lawyers selected through a rigorous procedure (*see details in chapter 4*). This system of appointment is particularly important for criminal and administrative detention cases. Prior to the LA Law, the police, the criminal investigation bodies and the courts were directly appointing the lawyers. That system, common for other East European countries, led to a dependency of the legal aid lawyers on these bodies. In addition to being appointed, in some countries, including Ukraine, the legal aid lawyers had to obtain the confirmation of attendance of the procedural actions or cases from these authorities in order to get paid. As a result, many legal aid lawyers tended to become too friendly with police, criminal investigation bodies and courts, appearing when needed for such authorities and often not acting in the best interests of the clients (for example signing the police interview protocols even if they were not present or not raising the violations of their clients' rights). These lawyers were referred to as "pocket lawyers" in the region.⁶⁸ Changes in the way lawyers are appointed and paid are very important to ensure that lawyers are more independent and able to act in the best interest of the client, without fearing to get less appointments or not getting paid for their work.

Participants at almost all meetings during the fact-finding mission undertaken by the Council of Europe experts in Ukraine confirmed the benefits of the new appointment system, primarily for breaking the dangerous links between police, criminal investigation bodies, courts, on the one hand, and lawyers, on the other hand. The new system seems to have significantly enhanced the independence of the lawyers providing free secondary legal aid. Several lawyers during the meetings confirmed that the appointment by the RFSCLA is an important guarantee for their independence and allows them to better carry out their duties as lawyers. Previous assessments of the legal aid system contain similar findings. For example, according to a survey of lawyers and RFSLACs staff, "the independence of lawyers is first and foremost ensured by the new mechanism of assignment of defenders by new independent institutions (RFSLACs) and the detaining authorities now have no chance to call their so-called "pocket lawyers"".⁶⁹

In addition to lawyers, according to a recent study, the police, criminal investigation bodies and courts appreciate the new system of appointment as an effective one. They stated that they do not have to search for lawyers to provide legal aid anymore, but only notify the RFSLAC and the lawyers are provided in a timely fashion by the latter.⁷⁰ However, the misuse of Article 53 of the CPC and the gap between the number of criminal cases and the number of appointments (*see chapter 2*) suggest that improvements are still necessary.

The appointment of lawyers by specialized legal aid authorities/ bodies is a common practice for many European countries. The case of Ukraine is similar in many respects. There is overwhelming evidence regarding the positive impact of such a system for Ukraine, in particular for ensuring the independence of the lawyers providing free secondary legal aid.

3.2 Choice of defence lawyer

The right to choose a lawyer is paramount for an effective defence. However, this right is not an absolute one and in the legal aid system limitations may be applied. Article 6 § 3 (c) of the ECHR provides 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". It is clear from the text that

⁶⁸ On this issue and other barriers to effective criminal defence in Eastern Europe, see Ed Cape, Zaza Namoradze, *Effective Criminal Defence in Eastern Europe: Bulgaria, Georgia, Lithuania, Moldova, Ukraine*, Legal Aid Reformers' Network, Soros Foundation-Moldova, 2012, available online at <http://www.legalaidreform.org/criminal-legal-aid-resources/item/399-effective-criminal-defence-in-eastern-europe>.

⁶⁹ See, for example, *Free legal aid system in Ukraine: the first year of operation assessment*, pp. 70-71.

⁷⁰ See, for example, *Ibid.* pp. 20-21.

the defendant has the right to choose his/her lawyer when paying for lawyer's services. However, the ECtHR has held that, "notwithstanding the importance of a relationship of confidence between lawyer and client, this right cannot be considered to be absolute". In particular, this right is subject to certain limitations when legal aid is provided for free and when it is for the national authorities to decide whether the interests of justice require that they appoint a defence counsel for the defendant. While when appointing a defence counsel the authorities "must certainly have regard to the defendant's wishes, ... they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice".⁷¹

In *Croissant v. Germany*, the ECtHR held that the appointment of more than one defence counsel is not of itself inconsistent with the Convention and may indeed be called for in specific cases in the interests of justice. However, before nominating more than one counsel, a court/ the legal aid appointing authority should consider the accused's views as to the number needed, especially where he will have to bear the consequent costs if he is convicted. An appointment that runs counter to those wishes will be incompatible with the notion of fair trial under Article 6 § 1 if, even taking into account a proper margin of appreciation, it lacks relevant and sufficient justification. The Court further noted that avoiding interruptions or adjournments corresponds to an interest of justice which is relevant in the present context and may well justify an appointment against the accused's wishes.⁷² Practically, the right to choice is embedded in systems that have quality assurance mechanisms for legal aid services, including selection of lawyers to provide legal aid and mechanisms for replacement for poor performance.

The NBA has raised the concern that the LA Law fails to enshrine the principle of free choice of a lawyer. In their view, according to Article 19 of the LA Law, the RFSLAC decides and appoints a defence lawyer to a person. Accordingly, a person against whom criminal charges were brought and to whom legal aid is being granted is effectively denied the right to free choice of a defender.⁷³ This assessment report did not support this argument as the ECHR does not grant a right to free choice of a legal aid lawyer. The right to choose a lawyer is not an absolute right. When the defendant contracts with the lawyer, he/she has the right to engage any lawyer qualified according to the national requirements if he/she can pay for them. When it comes to an appointed lawyer, the jurisprudence of the ECtHR does not require the state to assign a lawyer of defendant's choice, but only to ensure that a qualified lawyer is appointed from the roster of legal aid lawyers, in a timely manner.

The CPC of Ukraine provides that any suspect or accused, as well as other persons upon request or consent of the suspect, can engage a defence lawyer of their choice, prohibiting the law enforcement bodies and the courts to recommend a specific lawyer (Article 48 of the CPC). The law enforcement body/court requests the legal aid body to appoint a lawyer from free secondary legal aid if the suspect/accused has not engaged a defence lawyer in one of the following situations: when the participation of a defence lawyer is mandatory according to the law, the suspect/accused does not have funds or for other objective reasons cannot engage a lawyer of his/her choice, or the law enforcement body/court decide that participation of a lawyer is necessary in the circumstances of the given case (Article 49 of the CPC). According to the LA Law and internal regulations, the RFSLACs appoint a lawyer from the Registry of Lawyers Providing Free Secondary Legal Aid (the procedure is indicated above).

This system indeed does not provide for the right of the defendant to choose the lawyer when the latter is provided free by the legal aid system. However, the system has important guarantees to allow the lawyer that provides free secondary legal aid to build a relationship of trust with the client and ensure a defence of reasonable quality. For example, the Quality Standards require the lawyers that provide FSLA to always conduct a confidential meeting with the client after appointment.

⁷¹ ECtHR, *Croissant v. Germany*, 25 September 1992, para. 29; *Lagerblom v. Sweden*, 14 January 2003, para. 54.

⁷² ECtHR, *Croissant v. Germany*, 25 September 1992, para. 27-28.

⁷³ Ukrainian National Bar Association, *Legal aid system in Ukraine: current issues and recommendations for reform*, 2016, p. 6.

Provision of services of an adequate quality is part of the appointed lawyer's obligation (Article 26 part 1 of the LA Law). In case of improper execution of contractual obligations by the lawyer, the latter can be replaced (Article 24 of the LA Law, see for details the section below on replacement of a lawyer that provides free secondary legal aid).

In conclusion, the Ukrainian legislation and sub-legislation are in line with ECHR standards on the choice of a lawyer. The practical application of the norms may vary, but no significant concerns were raised during the meetings regarding the appointment of lawyers contrary to the wishes of the suspects/defendants. When the suspect/defendant does not retain a lawyer of his/her own choice, the LAA appoint the lawyer. The system of selection of lawyers to provide legal aid, the rules on appointment and the quality assurance mechanism are designed to ensure that the services of the appointed lawyers are of an appropriate quality. In case of improper execution of contractual obligations by the lawyer, the latter can be replaced, including upon the request of the suspect/defendant, although the procedures are still not very clear.

3.3 Continuity of defence

The Ukrainian legal aid system seems to promote the continuity of defence, but this principle is not stated expressly in the LA Law or the Quality Standards. However, continuity of defence can be derived from an interpretation of CCLAP Order no. 33 of 25 December 2014 On Issuing Powers of Attorney by the Centres for Provision of Free Secondary Legal Aid, which provides that the assignment is valid until "the closure of the criminal proceedings; the end of the last court proceedings on revision of court's decisions; all national legal remedies are used." Implicitly, the continuity of defence is also secured by legislative limitation of grounds for refusal from the defence on the lawyer's part:

- ▶ conflict of interests,
- ▶ disagreement with the defendant on the measure of defence selected by him/her,
- ▶ wilful non-obedience by the defendant to the terms of the contract, e.g., systematic non-compliance with the lawyer's lawful requests, violation of the CPC provisions etc.,
- ▶ lack of the lawyer's expertise in specific proceedings, which are particularly complex.⁷⁴

Article 53 of the CPC allows the investigator, public prosecutor, investigating judge or court, as well as the defendant, to engage a defence lawyer for a single procedural action, rather than for the full case. The CPC clearly provides that such instances are allowed only as exceptions, "in urgent cases, where the procedural action is required immediately and the defence lawyer who was informed in advance cannot appear to participate in such procedural action or send a replacement, or where the suspect or accused person is willing to have a defence lawyer engaged, but either there was not enough time to engage defence lawyer or the appearance of the lawyer chosen is not possible". Many stakeholders during the fact-finding mission raised the concern that law enforcement bodies and courts often abuse their powers and request the appointment of a lawyer to provide free secondary legal aid, even if the procedure is not urgent. Moreover, it is often used when the 'contracted' lawyer acts actively against the prosecution. This is a violation of the right to legal assistance, since the 'new' lawyer is not aware of the agreed defence strategy and may provide inappropriate advice. The problematic application of Article 53 was also noted in the Council of Europe assessment of implementation of the CPC.⁷⁵

According to data provided by the legal aid system, in 2015, the number of issued powers of attorney based on Article 53 of the CPC amounted to 4% of the overall number of powers of attorney issued by the RFLACs (a total of 3,113 powers of attorney). Even if the percentage is

⁷⁴ Article 47 part 4 of the CPC.

⁷⁵ The assessment is available here: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168044f56a>

relatively small, the representatives of the legal aid system acknowledged that there is misuse of Article 53 by police, criminal investigators and courts and took several measures to stop that abuse. To ensure appropriate safeguards, the Quality Standard 4.1. provides the following: “If the defence lawyer is appointed for a single procedural action, the defence lawyer shall be convinced of whether any other defence lawyer was timely and duly notified of such a procedural action before, and whether such a procedural action is really urgent. In the event of detection of non-compliance with these requirements, the defence lawyer shall file a request with the investigator, prosecutor, investigating judge or the court for the postponement of such a procedural action due to the absence of such circumstances”. The language of the Standard 4.1. is clear and gives an appropriate guideline to lawyers involved in the FLA system to refrain from any involvement if the situation does not so require.

During the fact-finding missions several RFSLACs’ directors reported that RFSLACs often receive requests to appoint a lawyer on the basis of Article 53 of the CPC when there are no indications that such procedural action is urgent (for example, familiarization with files of criminal proceedings, necessity to hand in a written notification on suspicion or to examine a motion on pre-trial detention of the defendant or prolonging terms of pre-trial detention, when the time limit is expiring). When it comes to decisions of investigators or prosecutors, the management of the RFSLACs often refuses to uphold such requests, after it is found that such engagement is not necessary. It is usually done by means of submitting a reasoned refusal to the investigator in issue or his/her superiors. For example, the number of refusals to fulfil the requests issued by investigators of Zhytomyr Centre is about 50%. As far as it pertains to rulings of investigating judges or the court, the capabilities of the RFSLACs are limited and they have to issue powers of attorney in response to all such requests of the judicial authorities, otherwise they risk prosecution for not executing judicial decisions.

In conclusion, although continuity of defence is not expressly provided in the LA Law or the Quality Standards, this principle is being implemented in practice, and is reflected in the CCLAP bylaws. However, it would be advisable to provide it expressly in the LA Law and/or the Quality Standards. The legal aid system seems to be taking sufficient measures to reduce the abusive appointment of lawyers to provide legal aid for a single procedural action, based on Article 53 of the CPC. However, the criminal investigation authorities and the courts should in the first place apply this provision only in exceptional cases, within the spirit of the CPC. Regular discussions on this issue among all criminal justice sector actors, both on national and local levels, are advisable.

RECOMMENDATION 3.3

It would be advisable to provide the principle of continuity of defence expressly in the LA Law and/or the Quality Standards.

RECOMMENDATION 3.4

The legal aid system should continue assessing each request for appointing a lawyer for a single procedural action based on Article 53 of the CPC before appointing a lawyer and, where the law gives such a possibility, refuse the appointment if the request is not justified or abusive. It would seem sensible for the legal aid system to initiate regular discussions on the use of Article 53 of the CPC with criminal justice sector actors, both on national and local levels, aiming at eliminating any abusive practices.

3.4 Waiver and replacement of a lawyer that provides free secondary legal aid

3.4.1 Waiver of the right to a lawyer

The right to a lawyer can be violated by lack of clear legislation or abusive practices regarding the waiver of the right to a lawyer. In *Pishchalnikov v. Russia*, the ECtHR held that the waiver “must be voluntary, but also constitute a knowing and intelligent relinquishment of a right. Before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be”.⁷⁶ In *Yaremenko v. Ukraine*, the ECtHR found a violation of Article 6 § 3 (c) of the ECHR because the applicant was coerced into waiving his right to counsel and incriminating himself. The ECtHR was struck by the procedure adopted by the authorities, which allowed them to bypass the mandatory representation of the defendant. The authorities initiated criminal proceedings for infliction of grievous bodily harm causing death rather than for murder. The former was a less serious crime and therefore did not require the obligatory legal representation of a suspect. Immediately after the confession was obtained, the crime was reclassified as, and the applicant was charged with, murder.⁷⁷

The CPC of Ukraine provides similar rules for the waiver of the right to a lawyer, irrespective of whether the lawyer is privately retained or appointed through the legal aid system. Article 54 of the CPC provides that the suspect / accused has the right to waive or replace the defence lawyer, which should take place “only in the presence of a defence lawyers after an opportunity for a confidential communication has been given”. Waiver of defence lawyer is not accepted when participation of the defence lawyer is mandatory. If the suspect / accused refuses to be represented by a specific defence lawyer and does not employ any other lawyer, a defence lawyer shall be appointed from the legal aid system.

The Quality Standards include the following standard:

“If the person under detention refuses services of the defence lawyer appointed by the Centre for the provision of free secondary legal aid, the latter shall independently find out whether such a refusal is voluntary and whether it is a result of pressure on the part of officers of the pre-trial investigation agencies, prosecutor, and the court. The statement of waiver shall be filed by the client after a confidential interview, during which the defence lawyer shall explain to the client his/her rights set out in the Convention and the CPC, as well as possible consequences of waving, and the defence lawyer shall make sure that the client understands the rights and consequences of such a refusal to use services of the defence lawyer”.

Lawyers mention that the police often put pressure on the detainees ranging from deceit to threatening and even abuse of force exercised before a lawyer’s arrival (one reason for delayed informing the RFSLACs about the detention) and force them to waive the right to legal aid by refusing to be represented by the appointed lawyer. Later, during the confidential meeting with the legal aid lawyer, the detainee, still under the influence of the police “coercion”, informs the lawyer about his/her desire to retain a lawyer of his/her own. However, in many cases the lawyer will not be engaged, at least at this stage. The Ukrainian criminal justice system lacks relevant and complete statistics to allow an evaluation of the level at which criminal legal aid needs are met. For example, in 2015 the legal aid system issued 17,309 decisions to appoint lawyers to provide legal aid to the persons detained (remanded in custody) in criminal proceedings. However, there is no data on the number of detentions which could be compared with the number of decisions issued by the legal aid system. In addition, the Ukrainian criminal justice system does not record

⁷⁶ ECtHR, *Pishchalnikov v. Russia*, 24 September 2009, para. 76.

⁷⁷ ECtHR, *Yaremenko v. Ukraine*, 12 June 2008, para 87-91.

and report on the number of refusals from a lawyer at the time of police detention, classified by reasons for refusal. Nor are there statistics on the number of defendants being represented by a defence lawyer and a number of those who are not. The only information available is the number of refusals by clients from legal aid lawyers, which amounts to 6.9% from the total number of cases where legal aid is granted (76,217). However, the reasons of refusal are not recorded.

In conclusion, at the normative level, the CPC and the Quality Standards provide sufficient guarantees, in line with the ECHR standards, on the waiver of the right to a lawyer. In practice, however, anecdotal evidence points to a discrepancy between the law and the practice. The Ukrainian criminal justice system does not produce statistics (at least that are publicly available) on the total number of detained individuals and does not provide data on the number of refusals from a lawyer at the time of detention, classified by reasons for refusal. Nor are there statistics on the number of defendants being represented by a defence lawyer and the number of those who are not. In such circumstances, it is hard for the legal aid system to assess the extent to which criminal legal aid needs are met and if the institution of waiver of the right to a lawyer is misused to the detriment of the right to defence.

RECOMMENDATION 3.5

It is strongly recommended that statistics are collected and published by the criminal justice system on the number of suspects/defendants that are represented by a lawyer and the number of those that waive their right to a lawyer classified by reasons and stages of proceedings. These statistics will allow, amongst other things, the legal aid system to assess the extent to which legal aid needs are met.

3.4.2 Replacement of a lawyer that provides free secondary legal aid

Replacement of a lawyer is another important component of the right to a lawyer. A formal appointment of a legal aid lawyer would not be sufficient for satisfying the requirement of Article 6 § 3 (c) of the ECHR, since the ECHR was intended to guarantee not rights that are theoretical and illusory, but rights that are practical and effective; this is particularly true 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. Although a state cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes, in certain circumstances, the competent authorities should take steps to ensure that the right to a lawyer is effectively enjoyed, including through replacement of the appointed lawyer.⁷⁸ For the state to intervene, the failure of the defence counsel to provide effective representation shall be “manifest or sufficiently brought to their attention”.⁷⁹

The CPC of Ukraine provides similar rules for the replacement of a lawyer, irrespective of whether the lawyer is privately retained or appointed through the legal aid system. Article 24 of the LA Law further states that a lawyer that provides free secondary legal aid can be replaced in the following cases:

- 1) lawyer’s illness;
- 2) improper execution of contractual obligations by the lawyer;
- 3) lawyer’s failure to comply with the procedures for provision of free secondary legal aid;
- 4) expulsion of the lawyer from the Registry of Lawyers Providing Free Secondary Legal Aid.

⁷⁸ ECtHR, *Artico v. Italy*, 13 May 1980, para 33 - 37.

⁷⁹ ECtHR, *Imbrosio v. Switzerland*, 24 November 1993, para 41. For example, in *Daud v. Portugal*, 21 April 1998, para. 39, the ECtHR noted that “the first officially assigned lawyer, before reporting sick, had not taken any steps as counsel for Mr Daud, who tried unsuccessfully to conduct his own defence. As to the second lawyer, whose appointment the applicant learned of only three days before the beginning of the trial at the Criminal Court, the Court considers that she did not have the time she needed to study the file, visit her client in prison if necessary and prepare his defence. The time between notification of the replacement of the lawyer (23 January 1993 – see paragraph 19 above) and the hearing (26 January 1993 – see paragraph 20 above) was too short for a serious, complex case in which there had been no judicial investigation and which led to a heavy sentence. The Supreme Court did not remedy the situation, since in its judgment of 30 June 1993 it declared the appeal inadmissible on account of an inadequate presentation of the grounds”.

The representatives of the legal aid system consider that the reasons provided in Article 24 are not sufficient, since they do not cover some technical circumstances, like the merger of two or more cases or transfer of proceedings to another region.

The ground “improper execution of contractual obligations by the lawyer” includes failures of the lawyer to provide legal assistance of an adequate quality, since provision of such services is part of the appointed lawyer’s obligation (Article 26 part 1 of the LA Law). A lawyer appointed to provide free secondary legal aid can be replaced for poor performance in one of the following situations:

- a) following a complaint based on Article 31 of the LA Law,
- b) a result of quality monitoring activities by QMs of the RFLACs
(see details about the quality monitoring system in chapter 4).

In these cases, the RFLAC Director shall send the case/complaint to the regional Bar Quality Commissions in accordance with the relevant procedure.⁸⁰

Article 31 of the LA Law provides that “poor quality legal aid, can be challenged judicially through procedures set forth by the law, or through administrative procedure”. No further procedures or rules have been developed for the complaints regarding the quality of legal aid.

CCLAP provided the following data regarding the replacement of lawyers providing legal aid in 2015:

Region / type of appointment	For the individuals subject to administrative detention /arrest	For the individuals deemed to be detained and /or where remand in custody was chosen as a measure of restraint	In criminal proceedings	For the individuals sentenced to imprisonment	Total
Cherkasy region	0	0	42	0	42
Chernigiv region	0	0	7	0	7
Chernivtsi region	0	0	15	0	15
Dnipropetrovsk region	0	0	13	0	13
Donetsk region	0	0	4	0	4
Ivano-Frankivsk region	0	0	27	0	27
Kharkiv region	0	0	31	0	31
Kherson region	0	2	15	2	19
Khmelnyskyi region	0	3	16	1	20
Kirovohrad region	0	4	75	0	79
Kyiv city	0	17	75	1	93
Kyiv region	0	4	12	1	17
Lviv region	0	0	11	0	11
Luhansk region	0	0	13	8	21
Mykolaiv region	0	1	71	1	73
Odesa region	0	0	55	2	57
Poltava region	0	0	66	4	70

⁸⁰ Procedure for Applying by the Centres on Provision of Free Secondary Legal Aid to the Commissions for Evaluating Quality, Completeness and Timeliness of Provision of Free Legal Aid by Lawyers, approved by the CCLAP Order no. 135 of 6 April 2015.

Region / type of appointment	For the individuals subject to administrative detention /arrest	For the individuals deemed to be detained and /or where remand in custody was chosen as a measure of restraint	In criminal proceedings	For the individuals sentenced to imprisonment	Total
Rivne region	0	3	12	0	15
Sumy region	0	0	33	3	36
Ternopil region	0	0	18	0	18
Vinnitsia region	0	1	25	2	28
Volyn region	0	1	12	0	13
Zakarpattia region	0	1	24	0	25
Zaporizhzhia region	0	0	1	2	3
Zhytomyr region	0	4	42	0	46
Total	0	41	715	27	783

However, these statistics are not broken down by reasons of replacement, because the legal aid system does not collect data on the reasons of replacement. These statistics are, therefore, not useful in assessing whether replacement of a lawyer in practice is done appropriately.

There are several problems regarding the current legal framework and practice on replacement of a legal aid lawyer for poor performance.

In terms of the CCLAP's Order no. 135 of 6 April 2015 setting forth the Procedure for Applying by the Centres on Provision of Free Secondary Legal Aid to the Commissions for Evaluating Quality, Completeness and Timeliness of Provision of Free Legal Aid by Lawyers, a RFSLAC should send a case/complaint to the Bar Quality Commission if:

- there is a complaint concerning a lawyer's actions where an individual claims that there has been a deficient, incomplete or untimely defence and the complaint is not within the competence of the RFSLAC (according to the CCLAP, the RFSLAC cannot consider the complaint if it is required to assess the position of a lawyer in a particular case, compliance with rules of lawyers' ethics, etc.)
- there is a reasonable suspicion that there has been, or may be, a deficient, incomplete or untimely delivery of legal aid by the lawyer;
- there is a request of the CCLAP to do so.

Thus, it appears⁸¹ that the Order no. 135 is interpreted in a way that the RFSLAC cannot decide on the lawyer's poor performance on its own and replace a lawyer in the course of a particular case, even if there is a complaint from the beneficiary of legal aid. However, RFSLACs have another tool in ensuring quality, although it is applied not for the specific case, but for the future. Namely, if a lawyer does not perform his/her duty, the RFSLAC can discontinue (not prolong) the contract with him/her.

As regards the Quality Commissions, there is no clear reference in the regulatory framework to their explicit power to propose to the RFSLAC that a lawyer be replaced. According to the Regulation

⁸¹ Information derived from the CCLAP.

on Commission on Evaluating Quality, Completeness and Timeliness of Provision of Free Legal Aid by Lawyers, adopted by the NBA's by Decision of 17 December 2012 no. 35, the Commission is entitled to:

- give recommendations to the lawyer, whose professional activities are being assessed by the Commission, regarding improvement of FLA;
- submit to the RFSLAC proposals with regard to signing (refusal to sign) a certificate of services rendered by the lawyer under a contract (*ad hoc* agreement), terminating a contract (*ad hoc* agreement) with a lawyer and/or excluding him/her from the Registry of Lawyers Providing Free Secondary Legal Aid;
- lodge an application to the Bar Qualifications and Disciplinary Commission regarding the conduct of a lawyer.

At the same time, the CCLAP's Order no. 135 indicates that it is possible to appeal to the Quality Commissions only in cases where the lawyer has already completed the services according to a specific power of attorney issued to him/her by a RFSLAC and has submitted the relevant report. This means that the issue on poor performance can be considered by the competent authorities only after the lawyer has accomplished provision of the legal services – which is too late to replace the lawyer for poor quality, whilst the case is ongoing.

Thus, it appears that the interpretation of the current regulatory framework and the subsequent practice is as follows: the RFSLACs do not make a decision on their own with regard to replacement of a lawyer on the grounds of poor performance because of the terms of CCLAP Order no. 135. At the same time, the Bar Quality Commissions do not have a clear mandate to recommend such replacement even if they receive complaints from the RFSLACs. Moreover, such complaints can be forwarded to the Quality Commissions only once the report on the execution of the power of attorney has been filed with the RFSLAC by the lawyer. Thus, it seems that the only real possibility for replacement of a lawyer due to poor performance during a particular case is the court's ruling. However this is not explicitly regulated in the legislation either, although it happens in practice.

In this context, it would be logical if the Quality Commissions were enabled to recommend that the RFSALCs replace a legal aid lawyer due to his/her performance. In this way, the decision on replacement of a lawyer would be split between the Bar Quality Commission and the RFSLAC, providing additional guarantees both to the lawyer and the client against potential abuse. However, for this mechanism to work, the Quality Commissions should be functional and able to convene in at a short notice to examine speedily the complaint. As shown in chapter 4, the Bar Quality Commissions do not appear to be functioning very efficiently as yet.

In addition to the FLA system and the Bar, the competent state authorities, namely criminal investigation bodies and the courts, have the duty to ensure that defendants receive an effective criminal defence. This duty should imply also notifying the authorities if the lawyer appointed to provide legal aid manifestly fails to provide an effective defence. However, there is no express provision to this effect in the legislation. According to information received from different sources, in practice judges use the general provision of Article 54 of the CPC setting forth the suspect/accused person's right to replace the lawyer, and issue rulings obliging the RFSLAC to replace the FLA lawyer, with or without reasoning as to the quality of FLA being provided. The RFSLACs, as a rule, comply with such rulings, as it is obligatory to follow judicial decisions. However, judges should provide reasoning for their ruling / order and the RFSLAC should be able to take a final decision, otherwise such competencies could be misused by the courts seeking to replace lawyers that are too active or are disliked by the respective judge/ judges.

In conclusion, a lawyer providing legal aid can be replaced if he/she is not able to further represent the client due to illness or exclusion from the Registry of Lawyers Providing Free Secondary Legal Aid. The lawyer can also be replaced by the LAA for improper execution of contractual obligations, including poor performance, or for lawyer's failure to comply with the procedures for provision of free secondary legal aid. However, the competences of the FSLACs and Bar Quality Commissions regarding the replacement of a legal aid lawyer are not clearly defined in the legislation and this is inhibiting action being taken when legal aid lawyers fail

to deliver an adequate service to their client. Furthermore, the legislation does not allow LAA to replace a lawyer for technical reasons, such as merger of cases or transfer to other regions. Investigation bodies and courts do not have an express legal obligation to notify the LAA when lawyers providing legal aid fail to provide an effective criminal defence.

RECOMMENDATION 3.6

The secondary legislation on legal aid should be amended to include a clear procedure for replacement of legal aid lawyers, including for poor performance. The Bar Quality Commissions should have the competence to recommend the replacement of a legal aid lawyer following a referral on competence grounds from the RFSLAC or following a client complaint referred by the RFSLAC and providing a reasoning for their recommendation. However, it is recommended that the RFSLACs have the ultimate decision on whether to replace a legal aid lawyer. It is also recommended that the decision on replacement of a legal aid lawyer be subject to appeal (e.g. to the CCLAP). The courts should also be able to make recommendations to the RFSLACs on the need to replace a legal aid lawyer, by issuing a reasoned court order.

RECOMMENDATION 3.7

The legislation should be amended to provide the LAA with the possibility to replace a lawyer for technical reasons, such as merger of cases or transfer to other regions. Investigation bodies and courts should be able to notify the LAA when lawyers providing legal aid manifestly fail to provide effective criminal defence.

RECOMMENDATION 3.8

The legal aid system should collect and maintain statistics not only on the overall number of replacements of lawyers, but also disaggregated by reasons of replacement. This will allow the system to be able to analyse and draw appropriate conclusions.

QUALITY ASSURANCE / MANAGEMENT FOR LEGAL AID SERVICES

4 Chapter

This chapter of the assessment report focuses on issues to do with Quality Assurance: (a) the selection of appropriate legal aid lawyers (b) the training of these lawyers and (c) quality standards and the monitoring mechanisms.

The Memorandum of Cooperation between the Ukrainian National Bar Association and the Ministry of Justice of Ukraine with Regard to Free Legal Aid, which was signed in 2013, committed the state (represented by the MoJ) and the NBA to support the continued development of the FLA system as an integral institution ensuring fair justice administration in a state governed by law. Sub-paragraph 2.1 of paragraph 2 of the Memorandum outlines the principal areas for cooperation between the Parties:

- information liaison;
- compliance with Bar guarantees and protection of professional rights of lawyers;
- development, approval and implementation of quality standards applicable to FLA;
- monitoring and quality assessment of FLA provision by lawyers;
- advanced training for lawyers.

The emphasis on quality assurance measures in the Memorandum was significant, not least because it is a requirement in terms of Article 6 of the ECHR, and Article 6 § 3 (c) of the ECHR in particular, that a state has to design a legal aid scheme that has sufficient safeguards to ensure that appointment of lawyers to provide legal aid is not a simple formality, but the lawyers provide an effective defence to the beneficiaries of legal aid.⁸² In this regard, effective quality assurance mechanisms are particularly important, as explained in chapter 3 above.

4.1 Selection of legal aid providers

The number of practising lawyers in Ukraine is unclear, as is the number of those who regularly undertake criminal defence work, although there are over 30,000 registered lawyers in Ukraine. Around 5,000 of them are registered to undertake legal aid work under the FSLA. Overwhelmingly these are *judicare* lawyers working in private practice. It is not unusual in Europe for only a minority of a country's private practitioners to provide legal aid services – that is the position in Scotland, England and Wales as well as the Netherlands - although there are variations between European countries as to whether any practising lawyer is entitled to undertake legal aid work.⁸³ Nonetheless the fact that not every lawyer can offer legal aid services in Ukraine raises a range of questions. First, are there enough legal aid lawyers? This is a question of judgment. The independent report

Free Legal Aid System in Ukraine: The First Year of Operation Assessment concluded that in some regions the number of lawyers was not enough to meet the real FSLA needs.⁸⁴ This is also the view of CCLAP who informed the experts that there are now probably sufficient legal aid lawyers to do the work available in the big cities like Kyiv but that in a range of rural areas they do not think that there are enough. In these areas CCLAP considers that it has been a choice between providing legal aid of a poor quality or not providing legal aid at all, although they are hopeful that a more generous travel payment scheme will help to address the problem. As the said *Free Legal Aid System in Ukraine: The First Year of Operation Assessment* observed,⁸⁵ in regions where there are insufficient FSLA lawyers the RFSLACs are unable to take account of considerations of specialisation, experience, workload and complexity of case when they are making assignments of lawyers. The MoJ and CCLAP operate on the basis that not every practising Bar lawyer should be allowed to do legal aid cases. This seems to be influenced by a belief that simply having passed the Bar exam and having done the required period of practical training does not qualify a practitioner to do legal aid work of an adequate quality. Here the MoJ and CCLAP are raising an issue which is likely to grow in significance in the future in European legal aid programmes. Although the majority of private lawyers in Scotland, England, Germany and the Netherlands consider themselves to be specialists in a particular field of law, nonetheless neither the Bar Associations nor the Government in these jurisdictions require lawyers to acquire any specialist qualifications before being permitted to take on specialist work. This is in marked contrast with doctors who have to have a specialist qualification before practising in that specialist field. The MoJ and CCLAP, however, took and take the view that lawyers undertaking legal aid work in Ukraine must have additional qualifications⁸⁶ akin to being a specialist. Their reasoning seems to be that (a) legal aid is a new system of funding legal help to the public of some complexity, (b) that it was accompanied by the introduction of new CPC and (c) the enhanced need for the application of the ECHR and neither the Bar examinations nor the practical training of earlier lawyers would have covered (a), (b) or (c). CCLAP further took the view that some practitioners who qualified before legal aid was introduced in 2012 had become too close to the police, or prosecutors or even the judiciary and were therefore likely to be hampered in providing the independent representation to accused persons which acting in their best interests requires. Accordingly CCLAP, in conjunction with the MoJ, has required that any lawyer in Ukraine who wished to undertake FSLA work should be able to demonstrate their knowledge of the new areas of law, the quality standards of legal aid and the rules of legal ethics, as well as their commitment to legal aid clients. The terms and conditions of competitive selection of lawyers to be involved in provision of FSLA were approved by the Resolution of the CoM of Ukraine no. 1362 of 28 December 2011 (with further amendments).

4.1.1 The selection contests

Every selection competition (to date there have been eight competitions)⁸⁷ is conducted in 3 stages: (1) verification by the commission of the documents submitted by applicants, (2) an anonymous written exam with multiple questions on legal aid, ethics, the new procedural rules and the ECHR and (3) a panel interview. In assessing the application form consideration is given

⁸² See generally, ECtHR, *Artico v. Italy*, 13 May 1980, para. 33, 36; ECtHR, *Kamasinski v. Austria*, 19 December 1989, para. 65-66; ECtHR, *Czekalla v. Portugal*, 10 October 2002, para. 60-66; ECtHR, *Sannino v. Italy*, 27 April 2006, para. 49-52.

⁸³ In Bulgaria and Germany any practising attorney can provide legal aid in court. Indeed all German attorneys are required to take legal aid cases if so required by the Court. There are ways out of this obligation and in practice, as in other European countries, some attorneys specialise in criminal defence work and therefore do far more defence cases than others. In Georgia only GBA attorneys who have taken general or specific Bar exams in criminal law will obtain the licence from the Bar Association to participate in criminal court proceedings (E. Cape and Z. Namoradze, *Effective Criminal Defence in Eastern Europe*, Soros Foundation, 2012 at p.185). In Scotland any practising lawyer can undertake legal aid work but to be registered to undertake civil legal aid solicitors have to show that they have recent experience in the courts of the areas of law in which they plan to take legal aid cases. Where they lack recent awareness of legal aid, they are required to attend training courses run by the Scottish Legal Aid Board. Where there are questions as to the expertise and experience of the lawyer seeking to be registered it is not unusual for the solicitor to be interviewed by a panel from the Law Society, the Scottish Legal Aid Board and a lay representative with an interest in quality assurance. In England only solicitors who are part of an entity or firm that has a contract to provide legal aid, with the legal aid authority, may provide legal aid. In the Netherlands to be recognized as a legal aid lawyer for civil cases and for criminal cases as well, private lawyers or law firms must be registered with the Dutch Bar Association, as well as the LAB, and comply with the quality standards set by the Bar and additionally by the LAB. Open Society Justice Initiative, "Legal aid in the Netherlands", Available from <https://www.opensocietyfoundations.org/sites/default/files/eu-legal-aid-netherlands-20150427.pdf>. In Lithuania lawyers seeking to do regular legal aid cases must pass an exam as in Ukraine.

⁸⁴ *Free Legal Aid System in Ukraine: The First Year of Operation Assessment*, p.10.

⁸⁵ *Ibid* p.10.

⁸⁶ Lithuanian attorneys who wish to do permanent legal aid work must also pass an additional exam.

⁸⁷ The decision to hold a contest is initiated by the CCLAP but the actual decision is made by the MoJ.

to the candidate's advocacy experience (counts for 25% of the overall marks), the specialty of the lawyer and any disciplinary measures taken against the lawyer. The first list of test questions was approved by the Order of the MoJ no. 1582/5 dated 30 October 2012. The questions in each written exam are set by a working group of lawyers set up by the CCLAP and change with each contest since CCLAP publishes the full written test after each competition. In the interview the level of applicant's motivation to do legal aid work, communication skills, emotional balance and the ability to present examples of him/her providing legal assistance is assessed. Interestingly, commitment to doing legal aid work only counts for 15% of the overall marks.⁸⁸

Each regional panel in charge of the contest includes members of the Bar from the relevant regions/ representatives of regional Bar councils,⁸⁹ MoJ (central and regional level), CCLAP and the relevant regional FSLAC, judges, and representatives of non-governmental organisations of the relevant region.⁹⁰ The total number of members of the interview panel is not less than 7 persons (paragraph 6 of the Procedure and Conditions for Holding a Competitive Selection of Lawyers to be Involved in Provision of Free Secondary Legal Aid). Members are approved by the head of a respective regional department of justice. All contests take place simultaneously in the different regions and CCLAP sends monitors to different regions to ensure consistency in operation.

As noted above, in 2013 the MoJ and NBA signed a Memorandum of Cooperation aimed at combining the efforts of the state and Bar self-governance bodies in their common urge to support the continued development of the FLA system as an integral institution ensuring fair justice administration in a state governed by law. In implementation of this Memorandum the MoJ was committed to taking efficient measures to create incentives for Bar lawyers to get involved in contests for selection of lawyers to provide free secondary legal aid. This included the MoJ organizing contests for the selection of lawyers to provide free secondary legal aid twice a year. As part of this the MoJ is expected to run a comprehensive awareness-raising campaign targeted at explaining the contest's purpose, terms and conditions to lawyers. As of September 22, 2015 over 240 meetings with approximately 1,200 lawyers had been held by regional and local FSLACs across the regions.

4.1.2 The outcome of the selection contests

The CCLAP informed that in the early years of selection there was very little real competition but in recent years the interest of lawyers in becoming legal aid lawyers had increased. The CCLAP estimated that at the beginning the success rate for applicants in each competition was 80% and that the success rate had not greatly changed even though the CCLAP considered that in recent years the pass standard had been raised. In fact, according to MoJ figures 308 out of 353 applicants in the 5th competition were successful in spring 2014 (87%), 323 of 463 applicants in the 6th contest in the autumn of 2014 were successful (70%) and 372 of 522 applicants in the 7th contest in spring 2015 were successful (71%). In the latest contest (the 8th) in October 2015 493 out of 668 applicants were successful (74%). Further research has elicited that there is a considerable regional variation in the success rate, both between different regions and between the same regions over time. Thus in Kyiv region – none of 10 candidates who applied in 2014 were successful although in 2015, 10 candidates out of 19 gained entry to the Registry. Again in Zhytomyr – none of 6 candidates made it to the Registry in 2013, but 14 out of 18 applicants were successful in 2015. The variations in regional success rate can be seen from the detailed results for the 8th contest which was held in October 2015.

⁸⁸ Addendum 9 to the Order of the Ministry of Justice of Ukraine dated October 15, 2012. no. 1520/5 (as amended by the order of the MoJ dated September 17, 2015, no. 1783/5).

⁸⁹ It is to be noted that for example in Zhytomyr a good understating and cooperation has been developed between the Centre and the local Bar Council.

⁹⁰ CoM Resolution of 28th December 2011 no.1362 On Approval of the Procedure and Conditions for Holding a Competitive Selection of Lawyers to be Involved in Provision of Free Secondary Legal Aid.

Applications and regional success rates for Legal Aid Registration

Region	Submitted applications	Participated in testing	Participated in interview	Selected	Success rate
Cherkasy region	12	12	11	10	83%
Chernigiv region	14	11	11	7	50%
Chernivtsi region	19	19	19	10	53%
Dnipropetrovsk region	44	42	42	42	95%
Donetsk region	44	33	33	33	75%
Ivano-Frankivsk region	14	12	12	10	71%
Kharkiv region	40	39	38	21	53%
Kherson region	21	20	20	14	67%
Khmelnyskyi region	12	10	10	10	83%
Kirovohrad region	18	17	17	17	94%
Kyiv city	70	59	59	33	47%
Kyiv region	19	15	15	10	53%
Luhansk region	6	6	5	5	83%
Lviv region	52	52	50	50	96%
Mykolaiv region	16	15	15	12	75%
Odesa region	44	38	38	38	86%
Poltava region	52	49	48	31	60%
Rivne region	22	18	18	17	77%
Sumy region	15	14	14	14	93%
Ternopil region	13	11	11	9	69%
Vinnitsia region	15	15	15	15	100%
Volyn region	17	17	17	17	100%
Zakarpattia region	21	18	18	11	52%
Zaporizhzhia region	50	47	47	43	86%
Zhytomyr region	18	17	16	14	78%
Total	668	606	599	493	74%

The detailed figures reveal that since 2013 the interest amongst lawyers to get on the Registry of Lawyers Providing Free Secondary Legal Aid has risen with each contest, suggesting that the efforts by the CCLAP and the FSLACs to raise awareness and interest in the contests is bearing fruit. They also suggest that weeding out at the application stage (even before the written exam) can be quite significant in certain regions e.g. Donetsk, Kyiv and Odesa. It is not clear why this should be so. The available figures do not distinguish between failure rates in the written exam and the interview and whether the demographics of successful candidates is different from those who do not succeed. Anecdotally such variations do exist. Nor is it clear why the fail rates in some regions are so much higher than in others.⁹¹

⁹¹ It is understood that about 10% of lawyers who apply decide not to attend testing for some reason or their applications are considered by the commission as not in line with requirements Lawyers to be Involved in Provision of Free Secondary Legal Aid.

RECOMMENDATION 4.1

Each stage in the contest receives a separate score although the assessment form indicates that an overall score for the whole contest is given. It is considered that after every contest there should be an audit of the returns to ascertain the score at each stage and the demographics of the candidates at each stage. This would aid transparency. An audit of success rates over time within and between regions should also be undertaken with the regional selection panels or relevant FSLA Centres being asked to comment on their figures over time.

4.1.3 Observations on the selection contests and proposals for reform

The NBA considers that the selection contests insufficiently reward experienced lawyers and are biased in favour of younger candidates who, they claim, are better at exams. The CCLAP accepts that the younger lawyers have been predominantly successful in the contests but takes the view that this is because they are better motivated, have shown greater interest in gaining a reputation for performing effectively for their clients in criminal cases, and greater commitment to legal aid work, including being willing to travel and to work unsocial hours. The attitude from lawyers towards this issue varies from one region to another, while in some regions the lawyers interviewed considered the selection system to be transparent, clear and objective⁹², in others they believed that the testing for knowledge of law was not relevant, as all the lawyers had already passed the Bar exam. Some lawyers who were interviewed considered the selection procedure to be too theoretical and biased in favour of younger lawyers who had a better memory when it came to knowledge based examinations, when more experienced colleagues who perform better in terms of practical skills do not do well enough in the written test to pass irrespective of the interview results.

The NBA similarly object to the selection contests referring to them as “*additional, non-transparent testing and selection*” of lawyers.⁹³ It is not clear in what way the contests can be said to lack transparency, not least since representatives of the Bar in regions have an automatic place on the regional selection panels, but the primary objections of the NBA is that the additional tests add nothing to the Bar exam (no matter how long ago it was taken), are an erosion of self-regulation and amount to a form of state regulation.⁹⁴ The counter argument to this – which seems to be influencing the CCLAP and MoJ – is that many lawyers will have taken their Bar exam well before the recent revisions to the Criminal Code, and the CPC and even before the ECHR was ratified by Ukraine and became part of the Ukrainian legislation.

A few lawyers expressed the view during the fact-finding missions that the competitive selection should be reduced to an interview with candidates. Instead of questions related to the knowledge of the law, the focus should be on willingness to perform contract liabilities and understanding the system of FSLA. Some lawyers highlighted that during the interview specialization of lawyers should be taken into account (overlooking the fact that it is considered at the earlier stage), however others stated the opposite, i.e. that the lawyer shall be “multiskilled”.

As no competitive selection of lawyers is scheduled for the spring of 2016, and there are no FSLA lawyers in some districts of several regions (as well as any available lawyers at all), and the number of FSLA lawyers in other places is too low, it was suggested amending the Procedure and Conditions for Holding a Competitive Selection of Lawyers to allow some regions to have a contest without holding a contest in all regions at the same time.

⁹² For instance Kyiv and Zhytomyr regions.

⁹³ Report of the NBA approved by the Bar Council of Ukraine on 13 November 2015, p.10.

⁹⁴ The report does not mention that in Western Europe it is becoming the norm for co-regulation to replace self-regulation because of the failings of the latter form of regulation to adequately safeguard the interests of the public.

Alternatively, some of the lawyers thought that it was weakness in the legislation that applicants have to set out their work experience as a defence lawyer (but not that in other legal professions, e.g. legal adviser, investigator, judge) as one of the decisive criteria in the selection procedure. Lawyers suggested that experience of other legal work should count with certain ratios to experience as defence lawyer (for example, 2 or 3 years of other legal work to be equalled to 1 year of experience as defence lawyer, etc.). Finally, according to the CCLAP they are considering development of a draft of a new Procedure for Holding a Competitive Selection. One of the ideas – is to go from the current test and interview to proposing that lawyers who wish to join the system should pass some distance learning courses and after those courses to pass a test. Basically the CCLAP is considering changing the model from the checking of lawyers' knowledge and skills to a model whereby the lawyers are required to upgrade their qualifications. The last would be in keeping with developments in the UK whereby doctors, criminal advocates in England and legal aid solicitors in England, Wales and Scotland are required to demonstrate continuing competence at five yearly intervals – not simply at the outset of their professional careers.

RECOMMENDATION 4.2

There should be greater clarity over the aims of the selection system. The CCLAP has the data from the forms to identify which kinds of lawyers are (a) applying (b) failing at each stage and should publish the results of an audit after each contest.

RECOMMENDATION 4.3

The responsibility for the timing and content of the selection contests should be transferred to the CCLAP from the MoJ (*See recommendations 6.3.1 and 6.3.2 below*).

4.2 Training of lawyers that provide legal aid

The second leg of the three pronged approach to quality assurance is training of the providers. Having selected those that they considered most qualified to provide legal aid the CCLAP then turned to the business of providing them with as much continuing and advanced training as possible. They discussed the matter with the NBA and the Memorandum of Cooperation between the NBA and the MOJ signed in 2013 committed the state and the NBA to mutual cooperation with respect to advanced training for lawyers.⁹⁵ This included (1) affording the CCLAP selected lawyers and staff preferential right of access to organization and/or conduct of advanced trainings for lawyers, for the purposes of improvement of qualifications; (2) the recognition that attendance at training events run by the CCLAP would count as a form of qualification upgrade of lawyers; and (3) jointly organising learning and sharing experience events.

4.2.1 Free legal aid and training

Further, the establishment of a mechanism of continuous training and, specifically, of professional development and improvement of the lawyers and staff of FSLACs constituted one of the objectives of the State Targeted Program for Establishment of the FLA System for 2013 – 2017, approved by the Regulation of the Cabinet of Ministers of Ukraine of February 13, 2013 (no. 394). The programme included:

⁹⁵ Sub-paragraph 2.1 of paragraph 2 of the Memorandum of Cooperation 2013. The section that follows is in part a synopsis of the report Free Legal Aid System in Ukraine: The First Year of Operation Assessment pp.62-66

1. MoJ input to “Law” and “Law enforcement” training for legal professionals at educational institutions, in relation to the curricula and the quality of training in particular;
2. Getting the study of FLA into university courses;
3. Enhancing quality of training.

Since no relevant funding for the training and professional development of the FSLA lawyers was contained in the state budget much of the training has had to be funded by donor organisations. In the early days training events were held on an *ad hoc* basis but in 2013 a decision was made to try to reach all FSLA lawyers. A network of FSLA lawyer trainers was established (around 60 in all) at a 58 hour ToT programme in Kyiv who later attended further “cascade trainings” throughout Ukraine.⁹⁶ It is estimated that 85% of the FSLA lawyers in Ukraine were reached in such events. The feedback from the events showed that most of the lawyers were satisfied with the level of the trainings, quality of training materials and highly evaluated the performance of lawyers-trainers and would appreciate such trainings on a more frequent basis. At the regional level RFSLACs (often their QMs) also organize local training events, ongoing dialogue and the sharing of experience among lawyers although there are considerable local variations with respect to training. Feedback from FSLA lawyers suggests that they have gained from the training and opportunities for joint discussion of issues and the exchange of opinions. This may in part be attributable to the fact that many FSLA lawyers are young and keen to improve their qualifications.

4.2.2 The two tier training system

With respect to para 2.6.2 of the Memorandum of Cooperation the CCLAP indicates that the system of advanced training for lawyers providing free secondary legal aid is two-tier and envisages regular training courses for lawyers-trainers who, at the same time, conduct cascade training courses for lawyers providing free secondary legal aid in all regions of Ukraine. It is understood that every training course for lawyers-trainers takes 5 days and is conducted by experts who have relevant practical experience, includes specific areas and methodology and involves examination of teaching practice by every lawyer-trainer. Equally, all cascade training courses take 1 or 2 days, are conducted in small groups up to 30 persons, and include theory lessons with mandatory use of presentations and collective work on practical. Between July 2013 and October 2015 6 courses in lawyering as defence counsel for attorney trainers were conducted in Ukraine. In September–November 2013 73 cascade trainings here held with 1,160 lawyers participating. In 2014 lawyers-trainers conducted three rounds of cascade training courses for lawyers in regions making a total of 126 training courses reaching 1,722 FSLA lawyers. In June 2015 51 cascade training courses were conducted with 1,575 lawyers trained overall, including 41 lawyers not providing free secondary legal aid. In November – December 2015 54 cascade trainings were conducted with 1,980 lawyers trained. The Council of Europe provides extensive support to the capacity-building of the FSLA lawyers. In particular, within the framework of the Project “Support to the Criminal Justice Reform in Ukraine” (funded by the Danish Government, implemented in 2013 – 2015) several ToTs were conducted for FSLA lawyers from different regions. A number of FLSLA lawyers have been enabled to learn from visits to legal aid organisations in other jurisdictions. A distance training course for lawyers was launched at the end of 2015.

4.2.3 Relations with the Ukrainian National Bar Association

In the Public Report on Implementation by the Ministry of Justice of the Memorandum of Cooperation between the NBA and the MoJ with Regard to Free Legal Aid, dated 24 September 2015⁹⁷ it is stated with respect to para 2.6.1 that in 2013 43 lawyers providing free secondary legal

⁹⁶ Details of cascade training is available on the CCLAP website.

⁹⁷ http://legalaid.gov.ua/images/news/Zvit_Memorandum.pdf.

aid were certified by the NBA as experts for conducting the continuous training events for lawyers (decision of the NBA Expert Council for Accreditation and Certification no. 5 of September 9, 2013). The said report also states that the NBA is involving the trainers trained by the CCLAP in its own advanced training courses for lawyers on a regular basis. Further, in accordance with p. 2.6.2 of the Memorandum, the training events organised by the CCLAP or the territorial Centres were automatically recognised as continuous training for the purposes of the NBA's requirements with respect to mandatory continuing professional development. The relevant changes were introduced in the Continuous Training Procedure adopted by the Bar Council of Ukraine. However, on 26 February 2016 the Bar Council of Ukraine amended this Procedure again, removing the CCLAP trainers from the list of continuous training providers and indicating that FSLA training courses would not be certified by the NBA as counting as credits for obligatory continuous trainings for Bar members (as it used to be). Thus, the FSLA lawyers have to attend also the trainings organised by local Bar Councils, which, according to the lawyers, are not always of the quality of the FSLA workshops.

4.2.4 Conclusion

The feedback the experts received concerning the training is that the ToT and cascade training has been a considerable success but that the FSLA lawyers consider that there is still not enough and more funding for training should be provided as a priority.⁹⁸ That said the *Overview Report on the Legal Aid System in Ukraine*⁹⁹ states that because of resource constraints post-training feedback questionnaires are no longer distributed to training participants and that therefore now “the measurement and evaluation of training effectiveness is virtually non-existent”.

RECOMMENDATION 4.4

To continue with cascade training, to seek additional funding for training, and to promote meetings with judges, prosecutors and the police for discussion of issues concerning the performance of the defence function.

RECOMMENDATION 4.5

To resume post training effectiveness assessment through feedback questionnaires.

RECOMMENDATION 4.6

To encourage the NBA to work with the CCLAP to implement the Memorandum of Cooperation and in particular to allow the FSLA courses to receive the Bar accreditation as in 2013.

RECOMMENDATION 4.7

To establish that the MoJ should not be involved with the training of FSLA staff, although earmarked funding for training from the MoJ and the Ministry of Finance would be acceptable.

⁹⁸ The lawyers refer very positively to the training system of the CCLAP / FLA system in general, with regard to the topics, trainers, and organisation. Many of them also mentioned the Council of Europe capacity-building assistance provided in the framework of the Project “Support to the Criminal Justice Reform in Ukraine”, which helped to develop the pool of lawyers-trainers within the FLA system.

⁹⁹ See p. 34.

4.3 Quality standards and monitoring mechanisms

Increasingly in the 21st century taxpayers in Western countries who fund the cost of public services expect the state to provide some kind of evidence that the public is receiving (1) services of an adequate minimum standard and (2) value for money for these funds. This is true not just for schools, universities and hospitals but now also in relation to legal aid lawyers funded from the public purse. Quality evaluation work in the medical and legal worlds of professional practice has tended to focus on four main measures or proxies for quality: *Inputs, Structures, Process and Outcomes*.¹⁰⁰

4.3.1 Quality measures

Input measures refers to those things that the professional brings to practice before the work begins. They include educational attainment, professional qualifications, skills training undertaken, membership of accredited specialist panels, continuing professional development seminars attended, work experience, legal knowledge, contacts in the legal community, office accommodation, library facilities and IT. These measures have the attraction of being relatively easy to collect, but because they are indirect measures of quality at best, they generally have the least to offer.

Structure refers to the management of inputs in order to create an appropriate operating system and environment for the lawyers and other workers which leads to a good and effective work product for clients. The management systems range from resourcing levels to record-keeping procedures, from training to supervision and from staff development policies to complaints procedures. However, structural measures, while assisting efficient practice management, only facilitate quality of performance in other aspects of professional practice – they do not ensure it.

Process measures focus on the manner in which the actual work is done by the service providers from the first point of entry into the system of the office through the handling of the case and onwards to maintenance of files and documents thereafter. As such they encompass the appropriateness of the legal work done, its effectiveness, its closeness to the stated wishes of the client (so far as these may be respected in all the circumstances) and therefore the lawyer's competence. It is probably essential to have good inputs and a good structure in order to produce a good process. But the inputs and structure by themselves may not assure the quality of the process of the work carried out.

Process measures will usually include the quality of advice and information given to the client both in person and in following correspondence, the quality of letters and other documents to the opposing party, to the court and to others (such as expert witnesses) involved in the process, the quality of decisions taken and the advocacy, written and oral, carried out on behalf of clients. Such process measures can, for example, look at elements expected in given transactions, information essential to make proper, appropriate decisions, sufficient information and advice imparted to the client fully and in an appropriate manner in order to make the necessary decisions. So, process measures would take into account the whole range of lawyering, from fact gathering and legal analysis to client handling, advice and assistance and practice management. Inevitably such matters are more difficult to measure and to measure consistently than input and structure measures, because they operate in the territory of professional judgement and are open to subjective reasoning and differing opinions among professionals and others. It is also the most characteristically "professional" element of all the measures, based on all learning and experience about law and its practice and therefore an essential, if contested element in all quality

¹⁰⁰ See Sherr et al. In the same work the authors argue that the principal methods of assessing quality are self-assessment; external assessment; standardized clients and peer review.

assessment. Sometimes process measures will be evaluated through compliance with check-lists or with standards of performance, frequently they are assessed through peer review applying agreed performance criteria.¹⁰¹

Outcome measures, like process measures, have had a wider provenance in educational and medical spheres than in the legal world. Thus, avoidable deaths, morbidity rates, re-infection and re-admission rates, and survival-recurrence rates are everyday measures for today's hospital administrators. Legal equivalents have been slow to arrive and those that have emerged continue to provoke debate in the profession.¹⁰² Part of the problem is that the qualitative examination of outcomes in a few individual cases is a quite different exercise from collecting statistically valid evidence of the quality of the outcomes achieved by a group of law firms. The first, in the shape of peer review, is understood by lawyers, but has until recently been thought of as too expensive to justify implementation on a wide scale.¹⁰³ The second requires a statistical approach which considers general patterns in aggregate case results. While the latter are cheaper to collect than using peer review, the aggregate approach assumes that the factors that influence the outcome of an individual case are too complex to be captured by a handful of performance indicators. To this extent, the approach accepts the lawyers' argument that each case is unique. The statistical approach also assumes that if a large enough sample is taken that allows the other key factors to be controlled for, systematic variations in outcomes from a normal distribution of results will be due to differences in the quality of the lawyering. Unfortunately, the number of cases required to effectively control for other factors is so great that it means that only a handful of firms even in a country as large as the United Kingdom have big enough caseloads to permit the statistical approach to quality assurance to be operationalised.¹⁰⁴

The most commonly discussed outcome measures in the legal realm include: case cost, time taken, success rates and client satisfaction.¹⁰⁵ *Average case cost* appears straightforward, but contains complexities. *Time taken* at first sight also appears to be a useful performance measure. The measure is predicated on the assumption that, if other factors can be held constant, firms or providers of services which consistently take longer than others to handle similar case-loads at otherwise similar standards of quality are providing a poorer service. This should hold as true for the time taken to reach a trial or settlement date as for hospital waiting lists. Yet, some clients favor delay, and delays in hearings are likely to vary between court districts due to the operation of 'local legal cultures'.¹⁰⁶ It is therefore necessary to distinguish between the time actually spent by lawyers in relation to a case and the elapsed time from the date when the process began.

Results or success rates are commonplace performance indicators in the medical world, for example, mortality rates, re-admission rates, long-term survival or recurrence rates. Even here the indicators will frequently require interpretation. For the legal realm the problems of defining 'success'¹⁰⁷ are considerably greater. Excluding medical negligence cases, the overwhelming majority of personal injury cases in the common law world result in a settlement. It would be unwise, however, to equate the mere fact of settlement with a quality service.¹⁰⁸ Again, in a criminal case it is not intuitively obvious that a lawyer whose efforts entail his/her client receiving an order to perform work in the community has done a better job than one whose client receives a modest fine.¹⁰⁹

¹⁰¹ See Richard Moorhead, Avrom Sherr, Lisa Webley, Sarah Rogers, Lorraine Sherr, Alan Paterson and Simon Domberger, *Quality and Cost*, (2001).

¹⁰² See e.g. Report on the Outcomes, Performance Measures and Quality Assessment Summit held at Harvard Law School on June 21st 2003 and published by the LSC.

¹⁰³ See Avrom Sherr et al., *Lawyers, The Quality Agenda* supra note 10.

¹⁰⁴ See Richard Moorhead, Avrom Sherr and Alan Paterson *Judging on Results 1 International Journal of the Legal Profession* 191,200 (1994) and Tamara Goriely, *Contracting in Legal Aid: How much justice can we afford?*, Proceedings of the ILAG conference, Edinburgh, 1997.

¹⁰⁵ See the discussion in Richard Moorhead et al. *Judging on results?* (1994) supra note 10.

¹⁰⁶ Thomas Church, *Justice Delayed* (1978).

¹⁰⁷ For a discussion of research in the USA and the United Kingdom which uses outcome data in assessing the quality of poverty legal services, see Alan Paterson, *Professional Competence in Legal Services* (1990).

¹⁰⁸ On the complexities of assessing outcomes in personal injury cases, see Richard Moorhead, Avrom Sherr and Alan Paterson *Judging on Results 1* (1994) *International Journal of the Legal Profession* 191, 200.

¹⁰⁹ For a study focusing on the assessment of outcomes in criminal cases in Canada and Scotland see Tamara Goriely et al., *The Public Defence Solicitors' Office in Edinburgh: an Independent Evaluation* (2001).

4.3.2 Methods of measuring quality

Assessing Input or Structural measures is normally relatively straightforward although issues of judgement can present themselves e.g. how to measure “experience” or what constitutes “adequate supervision”. Process measures are less easy. In some studies non-lawyers¹¹⁰ have used detailed checklists to confirm whether all the steps that would normally be taken in particular kind of case, have been taken, or whether all the matters which one would expect to see on a client’s file were indeed present. Such an approach can perform a useful audit function, however, its major weakness lies in the fact that the assessor is not qualified to conclude whether the advice given to the client or the tactical and strategic decisions taken in the case fall within the range which a fellow professional would consider to be acceptable. In other cases e.g. in China and Chile the lawyers being assessed have been asked to complete a *self-assessment* of their own performance. This has not proved to be a particularly helpful weapon in the quality assurance armoury. Either the lawyers claim to be uniformly excellent, or the more modest or honest lawyers find themselves penalized by their candour.

If self-assessment is suspect, there seems no reason why external assessors and observers might not be used. Thus in England and Wales there are plans at an advanced stage for judges to play the role of assessor for criminal advocates in a scheme entitled the Quality Assurance Scheme for Advocates (QASA). In the early days of the FLA in Ukraine the *Free Legal Aid System in Ukraine: The First Year of Operation Assessment*¹¹¹ contained evidence from interviews with judges as to the quality of legal aid lawyers’ performance¹¹² which was augmented by interviews with members of the police and prosecution services. Such polls have their limitations even if they contain representative samples. The interviewees were necessarily subjective in their approach and were likely to be operating with different concepts of quality. The respondents had not been trained in assessment criteria nor monitored for consistency in their assessments. Moreover, they had not had access to the client’s file and therefore were not aware of the client’s instructions to the attorney.

One relatively common third party measure of process and outcome variables is the use of client satisfaction questionnaires or surveys.¹¹³ These rely on clients’ perceptions of the quality of service that they have received. However, the necessary gulf in expertise between the lawyer and the client (particularly the first time client) creates a power imbalance or information asymmetry between them. Lay clients can tell if their lawyers have been attentive, sympathetic, empathetic and contactable - all important matters to the client – but they often cannot judge how good the outcome the lawyer achieved for them was, or whether it took too long to achieve it or cost too much. This is because legal services are generally non-transparent, that is, difficult for a non-expert / specialist to evaluate. With one clear exception (criminal accused who are repeat players) legal aid clients will rarely know the relevant law or its application in the real world or have any familiarity with state organized dispute resolution mechanisms such as courts or tribunals.

It follows that in the service quality field what the client perceives may differ from the conclusion which an objective specialist in the field would draw. Some key factors such as the proper price for the job, the length of time it should take, and what should constitute an acceptable outcome, are matters on which clients – especially first time or ‘one-shot’ clients¹¹⁴

¹¹⁰ E. g. Franchising in England and Wales or quality assessment of Public Defenders in Chile. Although they were not practising lawyers, in some studies the assessors did have law degrees.

¹¹¹ See pp. 46-47.

¹¹² The experts in this assessment report equally had the opportunity to discuss the quality of legal aid lawyers with a small group of judges. In their view legal aid had brought about an improvement in the preparation and the quality of the work done by defence lawyers.

¹¹³ A discussion of international studies using client satisfaction surveys as part of the assessment of the quality of poverty legal services can be found in Alan Paterson, *Professional Competence in Legal Services* (1990). See also Richard Moorhead, Avrom Sherr and Alan Paterson *What clients know: client perspectives and legal competence* 10 *International Journal of the Legal Profession* 5-35 (2003). The *Free Legal Aid System in Ukraine: The First Year of Operation Assessment* report also drew on client assessments at p. 47.

¹¹⁴ Mark Galanter, *Why the Haves Come out Ahead*, 9 *Law and Society Review* 95 (1974).

– are peculiarly dependent on the advice of professionals. Clients therefore can safely be relied on to assess aspects of the client care which they have received, however, when it comes to assessing the quality of the results achieved in their case, the ability of professionals to influence client perceptions through ‘image management’ renders them less useful as an objective measure of quality.¹¹⁵ In any event, such surveys tend to lead to relatively little variation in client responses – satisfaction rates tend to be uniformly high.¹¹⁶

Closely linked to the use of client satisfaction surveys to assess quality is to rely on reported *complaints*. Indeed, in a recent global study of the legal aid¹¹⁷ a range of countries claimed to operate a quality assurance scheme of their providers. Further scrutiny revealed that the majority of these respondents were using levels of complaint against legal aid providers as their proxy for quality. Yet where the complaint is made by a client it suffers from the same deficiency as client satisfaction surveys – the problem of information asymmetry. Where the complaints are made by knowledgeable third parties e.g. judges or other lawyers these can have some traction as a way of assessing aspects of a lawyer’s quality. However, experience has shown that for a variety of reasons neither judges nor other lawyers¹¹⁸ are generally interested in making formal complaints against lawyers. This is the second problem with relying on numbers of complaints as a proxy for quality. It turns out that levels of complaints are not a good indicator of satisfaction with the service provided. A recent study of consumers in the UK conducted by the Office of Fair Trading into complaints about lawyers in the UK found that 15% of those who use legal services were dissatisfied. However, only a small minority (13%) of those who were dissatisfied went on to make a formal complaint.¹¹⁹ This is a considerably lower proportion than in relation to wider consumer problems – previous Office of Fair Trading research found that, of those who had experienced a problem and felt they had genuine cause for complaint, almost two-thirds complained or did something about the problem.¹²⁰ Finally, complaints suffer from a third weakness as proxy measures for quality. They are always re-active and isolated. Unlike other forms of quality monitoring they cannot be pro-active or focus on a range of the lawyer’s work to see if any problems are systemic.

It seems then that experience has shown that to conduct such assessments fairly and effectively entails the development of a set of agreed criteria (agreed both by the reviewers and the relevant stakeholders in the legal field in question) and a marking scheme, and rigorous training to enhance marker consistency.¹²¹

The complexities and the challenges in measuring the quality of legal services set out above have led scholars to the conclusion that to assess effectively the quality of the service provided by a lawyer requires a professional peer who is not a competitor of the lawyer being assessed (*peer review*). *Peer review* has been defined in the literature¹²² as “the evaluation of the legal service provided against *specified criteria and levels of performance* by an independent lawyer with significant current *practical* experience in the areas being reviewed”. However, although it is the most effective way of measuring *process* and *outcome* variables it has sometimes been asserted that a well-rounded quality evaluation is one that draws on a range of measures and procedures.¹²³ The peer review studies conducted by Professors Sherr and Paterson and

¹¹⁵ Research has shown that some lawyers use “image management” to impress their clients thus skewing their perception of the quality of work being done by their own and other lawyers. See for example, Abraham Blumberg, *The Practice of Law as a Confidence Game* 1 *Law and Society Review* 15, 24-31 (1967), Carl Hosticka, *Lawyer-Client Negotiations of Reality* 26 *Social Problems* 559 (1979), Douglas Rosenthal, *Lawyer and Client: Who’s in Charge?* (1974) 109-112, Stewart Macaulay, *Lawyers and Legal Consciousness* 14 *Law and Society Review* 115, 120-28 (1979).

¹¹⁶ Tamara Goriely, *Quality of Legal Services: The Need For Consumer Research* 1993 *Consumer Policy Review* 112.

¹¹⁷ UNODC Global legal aid survey (unpublished, 2016).

¹¹⁸ Unless there is a dispute over access to clients.

¹¹⁹ Office of Fair Trading (2013) *Economic Research into Regulatory Restrictions in the Legal Profession*, London: Office of Fair Trading: http://www.offt.gov.uk/shared_offt/reports/professional_bodies/OFT1460.pdf.

¹²⁰ Office of Fair Trading (2008) *Consumer Detriment: Assessing the frequency and impact of consumer problems with goods and services*, London: Office of Fair Trading: http://www.offt.gov.uk/shared_offt/reports/consumer_protection/OFT992.pdf.

¹²¹ A. Sherr and A. Paterson, “Professional Competence Peer Review and Quality Assurance in England and Wales and in Scotland”, 45 *Alberta Law Review* 151

¹²² *Ibid.*

¹²³ *Ibid.*

their team took this approach with peer review containing the basic assessment of *process* and *outcome* measures reinforced with *model clients* (actors who attended legal aid offices presenting an identical case in each office) and *client satisfaction* surveys. However, their results showed that neither *model clients* (which required peer review in any event) nor *client satisfaction* surveys added greatly to the wealth of information provided by *peer review*. Accordingly, when *peer review* was implemented in England and Wales and in Scotland over ten years ago, it was implemented as the principal quality assurance vehicle (although compliance audits are also conducted by non-lawyers of law firms' structural measures and file keeping and there are also occasional general surveys of public satisfaction). In South Africa however, *peer review* of files is augmented by telephone *client satisfaction* surveys. In Chile *peer review* (which is confined to public defenders) is supplemented by external audits conducted by non-lawyers, using a detailed checklist to assess what was and was not done on the file as compared with the detailed case information held on the Public Defender Organisation's computers. The public defenders also complete a self-assessment which is inspected by the peer reviewer along with any complaints against the public defender. This approach therefore relies on a basket of quality assurance measures to produce a report on the public defender.

4.3.3 Quality standards and monitoring mechanisms in Ukraine

The LA Law stipulates that quality assurance is one of the principles of the state policy in the sphere of FLA (Article 5), establishes the FSLA lawyer's duty to "provide high quality legal aid to the extent as necessary" (Article 26) and obliges the MoJ to adopt legal aid quality standards (Article 28). As will be clear from the discussion of *Quality Measures* earlier in this section, the CCLAP's initial steps in relation to quality assurance – Selection and Training¹²⁴ – involved the use of *Input* and *Structural* measures respectively, as proxies for quality. Whilst both are likely to enhance the quality of legal aid services delivered by the FSLA lawyers involved, neither is a guarantee of this. Perhaps for this reason the CCLAP turned to the development of Quality Standards in the year after the launch of the FLA scheme in Ukraine. A working group was established chaired by Oleksandra Yanovska, a professor at Kyiv National University and a practising lawyer, with representatives of various lawyer organizations, academics and FSLA lawyers in 2013. Because the Memorandum of Cooperation between the MoJ and the NBA¹²⁵ committed the state and the NBA to the development, approval and implementation of quality standards applicable to FLA and the monitoring and quality assessment of FLA provided by lawyers, the Standards of Quality of the Provision of Free Secondary Legal Aid in Criminal Proceedings drawn up by the working group, were approved by the NBA in 2013 and the MoJ in 2014, coming into force on 1st July 2014. The Quality Standards are based on the principle of rule of law, legitimacy, independence of advocacy activities, confidentiality, avoidance of conflicts of interest, dominance of client's interests, corruption prevention, competence, and integrity in the performance of the defence lawyer's duties. Indeed the QS resemble a checklist of mandatory (model) actions which FSLA lawyers must take at every stage of a criminal proceeding should certain issues arise.¹²⁶ This ranges from conducting a confidential initial interview with the client to taking appropriate steps where the client shows signs of having been subjected to ill-treatment, and from objecting on the client's behalf to procedural rulings by the judge to gathering all the relevant information concerning the client which relates to the case. The QS include references to the sources of some of the duties such as judgments of ECtHR,¹²⁷ in the Annex to the QS is a list of verification documents

¹²⁴ See Sections 4.2 and 4.3 above.

¹²⁵ Paras 2.4 and 2.5 of the Memorandum.

¹²⁶ In this respect they resemble similar lists which exist in other jurisdictions e.g. USA – ABA Standards for the performance of the Defence Function.

¹²⁷ Including decisions in *Oferta Plus S.R.L. v. Moldova* dated 19 December 2006, *Rybacki v. Poland* dated 13 January 2009, application no.52479/99, *Levinta v. Moldova*, dated 16 December 2008, application no. 17332/03, which are not translated into Ukrainian or Russian and that makes it more complicated for lawyers who do not know English and/or French to use them in their practical activities.

or monitoring forms which FSLA lawyers were initially required to submit to FSLACs such as sample minutes of the initial meeting with the client and sample minutes to register client's complaints of ill-treatment.¹²⁸ CCLAP reinforced the FSLA lawyers' familiarity with the QS with wide scale training sessions including cascade workshops, cluster workshops and workshops for lawyers- trainers. The report *Legal Aid System in Ukraine: an Overview* indicates that 77 QS workshops reached 1,200 lawyers in 2014.¹²⁹ Files for arranging cascade workshops can be found on the web site of the Coordinating Centre.

However, the QS can be criticised. It could be said that the QS have rather an organizational nature and do not contain provision on substantial aspects of a lawyer's work, e.g. on questioning of a client, gathering evidence for the defence, carrying out a lawyer's investigation or preparation to questioning of witnesses. Some lawyers have expressed concerns that, in certain situations, compliance with the QS will put their clients at a disadvantage because investigators, public prosecutors and judges do not appreciate a very pro-active attitude on the part of defence lawyers.¹³⁰ Sometimes, when a lawyer will not disclose certain information, will not emphasize certain procedural violations and so on, it can result in a court judgment with the minimum sentence which is very satisfactory for the accused. But a pro-active attitude of a lawyer can, on the contrary, worsen the situation. This is a matter which might benefit from discussion with the judiciary and ultimately training with FSLA lawyers.

RECOMMENDATION 4.8

That the QS be revised to include additional content e.g. on evidence gathering and preparation for questioning witnesses and that the range of stakeholders consulted in connection with the revision should include the Judiciary.

Even more problematic is that the question of how adherence to the QS is to be measured. Unless there is a way in which the lawyers' files can be examined by independent lawyers, even a self-report account by lawyers as to how often they have complied with checklist tasks will tell auditors or quality managers nothing about how often such tasks should have arisen and how many opportunities the lawyers have missed to comply with the QS.

The Memorandum of Cooperation between the MoJ and the NBA accepts that quality evaluation of the QS for FSLA will be done by commissions established by regional Bar councils (regional Quality Commissions) on request and in preparation for this, by departments for monitoring of CCLAP and RFLACs.¹³¹ The Memorandum further provides¹³² that the monitoring of adherence to the QS will be done by QMs employed in the departments who will be lawyers who have practised for at least three years and who have signed a written undertaking to protect attorney-client privilege for any material seen by them in the monitoring of adherence to the QS. The key tasks of the QMs and quality assurance units are:

- to monitor if lawyers comply with free legal aid QS.
- to assure arrangement of continuous training for lawyers providing free secondary legal aid;
- to summarise, analyse and spread the best practices of legal profession;
- to analyse the level of satisfaction of those entitled to free secondary legal aid with the quality of such aid provision.

¹²⁸ CCLAP decided in 2014 that compliance with these monitoring documents was unnecessarily burdensome and accordingly the MoJ has revoked the requirement to send in these documents to the FSLACs apart from the Minutes of the first meeting with the client [Public Report on the Fulfilment by the MoJ of the Memorandum of Cooperation with the NBA with Regards to the Free Legal Aid].

¹²⁹ The lawyers refer very positively to the training system of the CCLAP / FLA system in general, with regard to the topics, trainers, and organisation. Many of them also praised the Council of Europe capacity-building assistance provided in the framework of the Project "Support to the Criminal Justice Reform in Ukraine", which helped to develop the pool of lawyers-trainers within the FLA system.

¹³⁰ It is accepted, however that this is a problem of the justice system in general, not an indication of a weakness in the Quality Standards.

¹³¹ Para. 2.5. See also CLAAP order no. 136 of 6 April 2015 On Organisation of Monitoring of Compliance by Lawyer with Quality Standards Applicable to Free Secondary Legal Aid in Criminal Proceedings that introduced the current monitoring process starting from July 1, 2015.

¹³² Para. 2.5.2

QMs¹³³ are expected to:

- observe the work of lawyers at the court;
- summarise information pertaining to stories of successful legal defence of free secondary legal aid beneficiaries, examples of the best practices of lawyers' activities;
- render advisory and methodological assistance to lawyers providing free secondary legal aid with regard to compliance with the QS;
- in the light of their monitoring activities, to submit to the Directors of the RFLACs proposals regarding continuous training for lawyers of the FLA system;
- organise and conduct, including through local FSLACs, seminars and workshops of continuous training for lawyers of the FLA system;
- ensure interaction between the RFLACs and lawyers-trainers;
- submit to the CCLAP proposals regarding candidates and the required number of lawyers-trainers;
- ensure consideration by the RFLACs of complaints about the quality of FSLA provided by lawyers;
- prepare draft responses to complaints, draft applications from the RFLACs to the Quality Commissions¹³⁴;
- ensure interaction between the RFLACs and Bar bodies of the region, in particular, regarding issues of quality, lawyers' ethics and disciplinary liability of lawyers;
- in the light of their monitoring activities, submit proposals with regard to entering into or terminating contracts (ad hoc agreements) with lawyers providing FSLA or excluding lawyers from the Registry of Lawyers Providing FSLA;
- summarise proposals for development and improvement of quality standards and submits them to the CCLAP and the Directors of RFLACs.

The CCLAP annual plans require that QMs carry out the following key activities:

- questioning of lawyers;
- questioning (interviews with) clients (including at pre-trial detention facilities and places of deprivation of freedom);
- monitoring judicial proceedings;
- checking the report documents of lawyers;
- putting forward the proposals to renew / terminate contracts with lawyers.

As far as monitoring of lawyer performance in judicial proceedings is concerned the QM has a standardised assessment form issued by CCLAP. The QM is required to observe the work of defence lawyers in court on at least 18 occasions quarterly and to interview at least three clients (by agreement) quarterly. The clients interviewed will usually be cases in which the QM is also observing the work of the defence lawyer in court. The cases observed by the QMs will usually be cases where the accused is considered to be particularly vulnerable since QMs are required to monitor cases where the clients are juveniles, have physical (e.g. are deaf, dumb or blind) and mental disabilities, or do not know the language of criminal judicial proceedings. The QM is also expected to monitor clients who are provided with free secondary legal aid repeatedly by the same lawyer in the same district (city) during the same budget period to check for abuse of the system. The interviews evidenced that where QMs appear in court to observe lawyers, it has an impact on the behaviour of others in the courtroom including the judges. However, the QMs also report that there were one-off occurrences when judges did not allow a QM to make observations

¹³³ For example, the QMs of Poltava, Sumy RFLACs also hold the position of the Deputy Director of the Centre due to which they are vested with additional administrative authorities. The QM should be a practising defence lawyer, but he/she is not entitled to handle cases within the free legal aid system. In order to give the QM a possibility to practice as a private defence lawyer, they have a flexible work schedule.

¹³⁴ It is understood that this happens rarely.

as a monitor, so he/she was present at the courtroom as a regular visitor. Some lawyers even ask a QM to be present during the hearing to make observations of a complicated case so that to give “psychological support” to the lawyers. The results from the monitoring are recorded on the approved forms / checklists of the CCLAP and information from the monitoring activities is quarterly sent by the RFSLACs to the CCLAP. Summarised information based on the results of monitoring activities is submitted to the CCLAP annually. Also, pursuant to the above-mentioned order issued by the CCLAP, the QM summarises examples of the best practices of legal profession and successful legal defence, and the relevant information is submitted by the RFSLACs to the CCLAP on a monthly basis.¹³⁵

The Public Report on Fulfilment by the MoJ of the Memorandum with the NBA¹³⁶ records that from August to September 2014 the QMs from all FSLACs attended 252 court hearings and observed the work of 255 attorneys working on assignment of defence Centres. In total, QMs conducted 276 observations in court, including 177 observations in courts of first instance and 99 observations in appellate courts. In 8 cases QMs were unable to conduct observation in connection with adjournment of the court hearing. Observations covered courts in 112 cities. In this period QMs noted that in most cases lawyers provided a high-quality defence to the accused. There were only two cases when a lawyer failed to meet all applicable QS in the proceedings being observed (specifically, inadequate preparation to court hearing).¹³⁷ These findings square with other positive feedback from the judges with whom the experts spoke, with the rarity with which contracts with FLA lawyers are not renewed and the scarcity of complaints to the regional Quality Commissions in Ukraine (see below).

As can be seen the quality monitoring provisions for FSLA in Ukraine look impressive on paper, however, in practice there are a number of weaknesses. The selection and training of the FSLA lawyers are subject to *input* and *structural* measures but these are indirect proxies for quality. Whilst QMs may speak with clients the statistics suggest that they can only do so in a small percentage of cases – moreover as we saw earlier clients have severe limitations as assessors of quality of performance by their lawyers. Court observations seem to offer greater potential for the assessment of lawyers’ performances in court but again these only occur in a relatively small number of cases (although they may include some of the ones in which the clients are most vulnerable) and the QMs will not have access to the lawyer’s file in the case which will hamper the effectiveness of the observation as a measure of quality of performance.¹³⁸ The QMs response to such observations is that they start from the position that they believe that the lawyers are well intentioned and doing a good job. However, it might be said that on that argument there would be no reason to carry out any quality assurance. Even if the QMs were to confine their quality monitoring to cases in which the client is deemed to be at risk or particularly vulnerable this would require them to conduct more observations and many more client interviews than they currently do, and probably some file review.

RECOMMENDATION 4.9

That the funding be found to permit QMs to conduct more observations of lawyer performances in court and more interviews with clients.

There are two further ways in which QMs might assess the quality of the FSLA work provided by the FSLA lawyers. The first involves the use of *complaints* to assess quality of performance. As we saw above in term of the Memorandum of Cooperation between the MoJ and the NBA it is provided that complaints concerning the quality of performance by a FSLA lawyer should be

¹³⁵ The information is published in a digest of the legal aid system (monthly or once in 2 months), it is also published on the CCLAP web-site.

¹³⁶ http://legalaid.gov.ua/images/news/Zvit_Memorandum.pdf.

¹³⁷ The monitoring process excludes any potential intervention into the strategy of the assigned lawyer and is only attended for verification of compliance with the QS by the lawyer.

¹³⁸ In Chile and South Africa the quality assessors have access to the files, to the clients and also to audiotapes of the lawyer’s work in court.

referred to the regional Quality Commissions. As set out above, these Quality Commissions are established by the regional Bar Councils, and are staffed by local members of the Bar. However, the Quality Commissions have very little work since complaints about the quality of legal aid are not being referred to them in significant numbers by the FSLACs. According to the CCLAP¹³⁹ in 2015 the number of complaints sent by RFLACs to the regional Bar Quality Commissions regarding alleged breaches of the QS was 42 in all. Of these 10 applications are now under consideration by Quality Commissions, 2 applications were returned without consideration and in 3 cases the commission upheld the breach of the QS. In 26 cases the Quality Commissions rejected the alleged breach of the QS.

No special procedure was developed within the RFLACs for consideration of complaints about low quality of FLA provided by lawyers, and there is no procedure for appealing against responses of the regional Centre to complaints, therefore, complaints are considered according to the general procedure pursuant to the Law of Ukraine On Citizen's Applications.

The established rules indicate that it is possible to appeal to the Quality Commissions only with regard to cases under the power of attorney, with regard to which a lawyer has already submitted a report on its execution. So this makes it impossible to initiate consideration of a complaint by the Quality Commission with regard to a power of attorney where no report has been submitted. According to the Regulations on the Quality Commissions, they are entitled to do the following, based on the assessment results:

- to give recommendations to the lawyer, whose professional activities are being assessed by the Quality Commission, regarding improvement of FLA;
- to submit to the relevant RFLAC proposals with regard to signing (refusal to sign) a certification of services rendered by the lawyer under a contract (*ad hoc* agreement), terminating a contract (*ad hoc* agreement) with a lawyer and/or excluding him/her from the Registry of Lawyers Providing Free Secondary Legal Aid;
- to lodge an application to the Bar Qualifications and Disciplinary Commission regarding conduct of a lawyer.

As we saw above in other jurisdictions complaints are not seen as effective proxies for quality. First, because clients can only assess some aspects of quality. Second, because complaints are usually only the tip of the iceberg in terms of cases where the performance is perceived to have been defective, either by the client or by a more objective third party. Thirdly, because complaints are always re-active and isolated. Unlike other forms of quality monitoring they cannot be pro-active or focus on a range of the lawyer's work to see if any problems are systemic.

The final method of assessing the *process* and *outcome* aspects of legal aid cases is by the examination of the lawyers' files. Given the commitment to quality assurance built into the FLA from its inception, it is not surprising to find in the Memorandum of Cooperation¹⁴⁰ a recognition of "the necessity of an external independent monitoring of free legal aid system's functioning and development in order to achieve transparency, prevent corruption; stressing at the same time the necessity to respect the principle of independence of legal practice and to preserve lawyer-client privilege". The question left unanswered is how such external monitoring was to be done. Lawyer QMs were the obvious candidates – it was after all in their job descriptions – and the Memorandum expressly gives them the responsibility of monitoring adherence to the QS.¹⁴¹ However, there has been and remains resistance to this from some FLA lawyers and from the NBA. Some of the lawyers interviewed by experts were opposed to external file review since they saw it as an interference with their professional independence, their right to choose the strategy for the case and a violation of

¹³⁹ Information provided by the CCLAP in March 2016.

¹⁴⁰ In para 2.5.4 of the Memorandum.

¹⁴¹ In para 2.5.2 of the Memorandum.

lawyer-client privilege.¹⁴² A pilot peer review of FLA files conducted for the report *Free Legal Aid System in Ukraine: The First Year of Operation Assessment* encountered similar problems (as well as problems over objective criteria)¹⁴³, although the project concluded that there were no systemic problems with using peer review as an independent quality assurance mechanism.¹⁴⁴ According to the said report “The peer review confirmed the impossibility of evaluating the quality of legal aid in criminal matters without a thorough study of lawyers’ files”.¹⁴⁵ The argument from lawyer-client privilege is one that surfaces from time in different parts of Europe. In some civilian European countries the view is taken that the duty to protect the privilege and confidentiality is owed to society and therefore even if the client expressly waives it, the lawyer has also to waive it, before it can be disclosed to a third party. In the 21st century with its emphasis on consumer rights, it must be questioned whether this approach can be justified. It is not clear how such a doctrine can serve the best interests of the client, although it can certainly work to the benefit of the lawyer – particularly the negligent or indolent ones – who are thereby protected from scrutiny, even when paid from the public purse. In common law countries lawyer/client privilege and client confidentiality is seen as the property of the client and not to the lawyer, which seems more in accord with consumer rights. Moreover, lawyers and their staff and associates throughout the world are expected to adhere to client confidentiality and lawyer/client privilege in order to protect their clients. However, in Ukraine as in other jurisdictions the client is deemed to have waived the confidence and the privilege, if the client complains against the lawyer or sues the lawyer in court, to the extent necessary to permit the lawyer to defend him or herself.¹⁴⁶ Given that clients can be deemed to waive the confidence and the privilege in these circumstances it is not surprising to discover that in all jurisdictions, including Ukraine, the client can expressly waive the confidence and the privilege by permitting the lawyer to reveal the client’s secrets to the extent contained in the client’s written waiver.¹⁴⁷ In contrast, in the relevant law in Ukraine, as elsewhere, there is no reference to the lawyer being able to waive the confidentiality or the privilege either explicitly or implicitly, without the consent of the client. Increasingly it is being accepted across the world that the privilege and confidentiality are not an impediment to independent third party lawyers inspecting lawyer / client files (provided these lawyers respect the confidentiality of the client) and this is true of civilian countries such as Chile and China, mixed civilian and common law countries such as South Africa and Scotland, as well as common law countries.

Given the extent of the hostility from the NBA and some of the FSLA lawyers to client files being examined by QMs the latter have been very wary of looking inside even closed lawyers’ files. Examination of such files is not in their annual performance plan. Even where a client complains about a FLA lawyer’s performance the QMs who have to process these complaints before forwarding them to the Regional Quality Commissions have felt largely unable to look inside the files (because of the lawyers’ objections) – despite the law providing expressly that a complaint constitutes a partial waiver of the lawyer-client privilege. QMs will, however, review certifications of rendered services which lawyers submit to obtain the payment, together with the addenda thereto, among which there are the judgments/decisions in cases, based upon which the QMs can have an idea of the quality of work performed by the lawyer.

¹⁴² Law of Ukraine on the Bar and Legal Practice, 5 July 2012, no. 5076-VI Article 21 states that it shall be forbidden for an advocate to disclose, without the client’s consent, information constituting advocate’s secrecy or use such information in his or her own interests or in the interests of any third parties.

¹⁴³ The pilot project was conducted before the QS had been developed.

¹⁴⁴ *Free Legal Aid System in Ukraine: The First Year of Operation Assessment*, pp.49-51. Despite these limitations the pilot peer review found that the performance of the vast majority of FLA lawyers were assessed as “satisfactory” or “good”. The lawyers who were examined had positive feelings on peer review, unlike the NBA which criticized the lawyers who took part in the peer review pilot.

¹⁴⁵ *Ibid*, p.50.

¹⁴⁶ Law on the Bar, Article 22 part.4.

¹⁴⁷ Law on the Bar, Article 22 part. 2.

RECOMMENDATION 4.10

Effective monitoring of the quality of work done by FSLA lawyers and of their adherence to the QS requires peer review of client's files in addition to the existing quality measures such as court observation and client interviews by QMs. This is even more the case if Ukraine moves to a fixed fee system of payment (see chapter 5 below). The experts are not aware of anything in Ukrainian law and professional ethics that forbids independent lawyers from looking at files, particularly closed files, if the client has given their written consent to their inspection, under the protection of confidentiality, for quality assurance purposes. There is no reason why such independent lawyers could not include QMs who are experienced criminal defence lawyers. Indeed, we would expect that the bulk of QMs with the relevant experience would be likely to become peer reviewers. It follows that the CCLAP should consider inserting a clause on every legal aid application form (as is the case in Scotland) which the applicant is asked to sign to allow their file to be quality assured by independent lawyers against the QS. If this is to occur the independent lawyers should receive training in the interpretation of the QS and an agreed marking scheme to reduce marker variation between reviewers. One of the major strengths of this form of peer review is the feedback that the reviewers would be able to give to the lawyers, thus enhancing the quality of the FLA service over time.

PAYMENT AND ACCOUNTABILITY OF LEGAL AID PROVIDERS

5.1 Payment rules

There is no international standard on how the payment system should be designed, this being left to individual states. However, the states do not have an unlimited margin of appreciation in establishing the payment system. It is important that the fees and/or reimbursement of costs related to provision of legal aid be reasonable to motivate and allow the lawyers to provide adequate defence to legal aid clients, including collection of evidence.¹⁴⁸

The payment system for legal aid is and will always be the subject of discussion. The resources of a Government are limited and lawyers and NGOs mostly ask for better remuneration. It is not easy to create a system that keeps the balance of power between all the stakeholders and that also guarantees that the number of legal aid providers is sufficient for the need of legal aid clients, that the fees are reasonable and that the costs are affordable for the Government and taxpayers.

In the recent years a growing number of jurisdictions have moved to a scheme of fixed fees. The fixed fee scheme is mostly developed on the basis of a high number of closed cases with an outcome that ensures that payment will be done on an average number of hours spent for a classified case (e.g. duty lawyer scheme, cases at first instance, appeal, divorce etc.). The goal of this kind of scheme is that a provider in a legal aid scheme will get a reasonable payment when he/she participates in the scheme with a reasonable number of cases. It stimulates providers to invest in legal aid work, it can reduce administrative burdens such as the number of checks required, and it can also stimulate specialisation. It needs, of course, a system of checks and balances, including a system of quality assurance.

RECOMMENDATION 5.1

The payment system should motivate lawyers to provide adequate defence services to any detained client, even if it implies traveling at night or during holidays. Incentives should be provided for lawyers to represent clients in remote areas. Inadequately low fees for legal aid will not enable the lawyer to adequately prepare and provide effective defence services to the legal aid client, which may lead to a violation of the right to defence.

5.1.1 Ukrainian payment system

The payment system in criminal legal aid cases attracted more complaints from lawyers whom the experts met than any other aspect of the legal aid system. The methodology of calculation of the fee for legal aid in criminal cases is very complex and incomprehensible without detailed

¹⁴⁸ See, for example, the in Guideline 12 para. 62 of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice System, 3, October 2012, UN Doc. A/C.3/67/L.6, which suggest that "Adequate special funding should be dedicated to defence expenses such as expenses for copying relevant files and documents and collection of evidence, expenses related to expert witnesses, forensic experts and social workers, and travel expenses. Payments should be timely."

explanations such as those received by the experts during the fact-finding missions. The payment scheme was also actively discussed during the round table discussion on May 13th, 2016.

The experts have spoken with the author of the first methodology of calculation of the fee for FSLA in criminal cases, cases of criminal or administrative detention, which was adopted by the Resolution of the CoM of Ukraine no. 305 of 18 April 2012, before the current legal aid system was established in Ukraine.

At the beginning of the development of the payment system for legal aid for criminal cases, there were a lot of disputes on the principles of the system. The fixed fee scheme based on a fixed sum per case as has been used in a number of countries was rejected due to the difficulties in setting the fixed size of a fee for cases of differing types, complexity and size. Besides that it was difficult to get the right picture of the actual time spent by lawyers in legal aid cases.

The decision was taken to introduce the payment system by using an estimation of the time required to be worked by lawyers in a case. The size of this estimated time is a basic value for calculating the lawyer's fee that is computed by multiplying the estimated time by the hourly fee rate.

Inevitably, this methodology did not produce the exact equivalence of the fees in any given case, but it was estimated that it would produce an average fee with an equivalence to the fee for a number of cases.

The starting point was that the calculation of the lawyer's fee for criminal cases was based on an hourly fee rate for a lawyer's work, an estimated (calculated) time for providing legal aid in a one criminal case taking into account the stages of criminal proceedings which a lawyer participated in, completeness of the lawyer's participation in the procedural actions and the **complexity of a case**.

A set of different coefficients were introduced for calculation of estimated time for the specific circumstances of the case (criminal proceedings). The fee was calculated in accordance with a mathematical formula.

The approach taken in the fee calculation method focused on criminal defence work in general, without distinguishing specific kinds of activity in criminal cases such as advising in course of criminal proceedings in a police station, providing legal aid for the persons remanded in custody or on the time of the "bail-or-jail" hearing. Later this kind of differentiation was introduced as an independent kind of legal aid in criminal proceedings, with a correspondingly separate fee calculation method. A differentiation was also set forth for the cases of administrative arrest.

When pursuant to the LA Law the LA system was extended to legal aid for other types, e.g. in civil cases, the CoM of Ukraine introduced the Resolution no. 465 of 17 September 2014, with the fee calculation method for legal aid in civil and administrative cases, as well for preparing (drafting) procedural documents.

With regard to payment in course of criminal proceedings, an important amendment was introduced in that the Resolution has also contained a **set of encouraging coefficients** which gave the possibility to get significantly more fees in the case of e.g. acquittal, dismissal a case on the rehabilitative grounds or refusal by a court of prosecution's motion of pre-trial detention etc.

All participants the experts met during the fact-finding missions confirmed the complexity of the system and the overwhelming majority criticised it severely during the fact-finding missions and the round table. Concerns were expressed with regard to the coefficients, problems arising when a hearing is postponed, problems with travel and waiting time reimbursement, etc. During the round table discussion a clear need for a more user friendly model was reiterated. The CCLAP also confirmed this need and said that the payment system is too complex.

5.1.2 Description of the current procedure of the fee calculation

Nowadays the matters of lawyers' fee for FSLA and reimbursement for their expenses are contained in the above-mentioned Resolution of the CoM of Ukraine no. 465 of 17 September 2014, as amended by the Resolution of the CoM no. 110 dated 11.03.2015. This resolution approved two documents:

1. 'The Procedure on Service Payment and Reimbursement for Expenses to Free Secondary Legal Aid Lawyers' (hereinafter – **the Procedure**).
2. 'Method of Calculation of the Remuneration to Free Secondary Legal Aid Lawyers' (hereinafter – **the Method**).

These two documents contain the ingredients for calculating the legal aid lawyer's fee for delivering legal aid with regard to the different parts of a criminal defence (initial meetings with the client, traveling to the client, advising the client as well as appearing in court). Para 3 of the Procedure sets out a payment method for criminal defence according to Article 13 part 2 para 1 of the LA Law and for legal aid for persons who are under administrative detention (according to paras 3 and 4 of part 1 of Article 14 of the LA Law). The fees are counted according to the Method, which is the key element of the payment system. **The hourly rate of fee for an estimated time is 2.5% of the monthly minimal wage as of the moment of issuing the power of attorney (this rate equalled to approximately 1.15 € as of June 2016).**

The only common factor used for calculation of the fee for legal aid of any kind is applying the **time reporting factor Кзвіт (Kzvit)** that means a lawyer's quickness of reporting for fulfilment of the assignment for providing legal aid. If a lawyer did not report during 45 days, he/she would be paid less or even not paid at all according to the application of the factor (coefficient) **Kzvit** (see Table 6.1 in para 14-1 of the Method).

Table 6-1

On-time reporting factor (Кзвіт (Kzvit))

Term of submitting the certification of services with the appropriate annexes	Coefficient value
up to 45 days	1
46 to 60 days	0,75
61 to 90 days	0,5
91 to 120 days	0,25
over 120 days	0

These amendments were enacted on 11 March 2015 for purpose of **accountability** of lawyers for delaying with reporting for fulfilment of appointments.

In the current edition there are no general provisions describing the aetiology of the Method. The only conceptual aspect is contained in para 1 of the Method, namely that the mechanism for establishing the fee for a criminal defence work is calculated for every completed stage of criminal proceedings. Thus, the payment for a **criminal defence work is carried out separately for every stage of criminal proceedings**, so a unit for payment for this work is a stage of the proceedings, not a case at whole.

The Method contains the formulas for calculating the legal aid fee for criminal defence work during the many different stages of a criminal case. Thus the formula for calculating the fee for the legal aid is contained in para 15 of the Method.

A further important component for calculating the fee for criminal defence work in each and every completed stage of criminal proceedings is the '**Criminal proceeding complexity factor**' **Кскл (Kskl)** which is set out in para 21 of the Method.

The approach 'from general to specific' is not used in the 'Method of payment' and this makes it very difficult to understand and makes it the subject of discussion and criticism as confirmed during this assessment.

5.1.3 Kinds of legal aid

There are four types of the fee calculation methods; one for each of the following four kinds of legal aid which are envisaged by the Method:

1. for the persons being in administrative detention or/and under administrative arrest (para 3 of the Method),
2. for the persons being detained in course of criminal proceedings or for those for which a preventive measure in the form of remand in custody is applied (para 4 of the Method),
3. in the case of participation of a lawyer in a single (separate) procedural action (para 5 of the Method),
4. in a separate stage of criminal proceedings (paras 15 - 20 of the Method).

One further element contained in the Method is the formulas for calculation of the fee for each of these four kinds of legal aid. For the first three, this is the constant '2' – an **estimated summary time** (in hours) necessary for providing legal aid including the time of travelling to and back from the place where legal aid is provided. In calculation of the fee for legal aid provided in a separate stage of criminal proceedings, another constant '20' is used. It suggests '**a minimum estimated time (in hours) spent by a lawyer for providing legal aid during one stage of one criminal proceeding**'. In other words, the base unit for subsequent calculations is the nominal value in terms of time for a lawyer's work at each stage in a criminal case of a **minimum complexity** (with a minimum severity of a crime, one defendant, one episode of criminal activity etc.)

The final fee is arrived at by applying and multiplying the coefficients associated with the different legal aid types to the basic (minimal) estimated time and to the minimal hourly fee rate by using an appropriate formula.

5.1.4 Factors (coefficients) used in calculation of the fee

A lot of different coefficients are used in the Method for calculation of a lawyer's fees of these four kinds, some of them are the same for all four, while others are specific for a particular type of legal aid provided in course of criminal defence. **All these coefficients are empirical** and theoretically designed to ensure that a nominal (calculated) complexity of a case (and therefore, an amount of fee) matches to the actual complexity of a case (in a sense of the time spent). The principal factors are set out below.

The 'severity of an offence' factor Ктяж (Ktyazh) is the most influential coefficient in which values are set out in Table 1 (para 6) of the Method according to legally defined severity of an offence (Article 12 of the Criminal Code of Ukraine): of minor (1), medium gravity (1,5), grave (2), especially grave crime (3). Murder is considered as a special sort of crimes with the highest coefficient of severity (5).

The ‘number of criminal activity events (episodes) committed by the defendant’ factor Кеп (Кеп) (Table 2, para 7 of the Method). It can be noted that the value of the coefficient does not fully correspond to changes in workload in the case (in a sense of the time spent), since for one episode it is 1.0 and only 1.48 - for 10 episodes.

The ‘number of partners in crime’ factor Ксп. ОПД (Ксп. ОПД) (Table 3 in para 8 of the Method). The values of the coefficient do not match real changes in workload in a case either, as it is 1.0 for zero co-defendants and 1.48 – for nine co-defendants.

The ‘special category of persons (defendants)’ factor Кос. кат (Кос. кат) (para 9 of the Method) reflects the increased complexity of a case, when a defendant belongs to one of the so-called ‘vulnerable groups’ (minors, with physical or mental defects etc.) or does not speak the language.

The ‘number of lawyer’s activities’ factor Кдій (Кдii) (Table 4, para 10 of the Method) covers all lawyer’s activities: a meeting with a client, participation in procedural actions, drafting documents etc. Increasing the value of the coefficient with the number of a lawyer’s activities produces significantly more than for coefficients Ксп. ОПД (Ксп. ОПД) and Кос. кат (Кос. кат). Therefore, it can be more profitable for lawyers to get an assignment to provide legal aid e.g., in course of a single procedural action (if there are several lawyer’s activities: meeting with a client, participation in interrogation, confrontation, identification, investigatory experiment, drafting several motions etc., that gives this coefficient value 3.0 or more) than an assignment to provide legal aid during the trial stage.

The ‘applying the measure of restraint’ factor Кззз (Кzzz) (Table 5, para 11 of the Method) is, in essence, an incentive to the lawyers. It is applied to the value of the coefficient with respect to the result of the last procedural action in the defence of the person for whom legal aid is provided. The coefficient motivates legal aid lawyers to be pro-active to get the release of a detained person and to prevent a court (investigating judge) from applying a measure of restraint in form of pre-trial detention. The value of the coefficient is up to 5.0, and this fivefold increase of the fee may induce the lawyers to be more pro-active with their defence.

The ‘special time’ factor Кос. час (Кос. chas) takes into consideration the specific sorts of time when legal aid is provided: night time, weekends, holidays and days off, that makes additional disturbances to legal aid lawyers (Table 6, para 12 of the Method). If a lawyer started to fulfil an assignment e.g., one hour before the end of a working day (6 p.m.), and then participated in interrogation of a client etc. during e.g. two hours, the portion of the lawyer’s activity in a night time was $2:3 = 66.7\%$, so the factor should be 1.5.

The ‘refusal of the person from a lawyer’ factor Квідм (Кvidm) (para 13 of the Method) and **the ‘termination of the lawyer’s participation’ factor Кприп (Кprip)** (para 14 of the Method) are used for taking into consideration the cases when providing legal aid has been discontinued upon the initiative of a client (**Квідм (Кvidm)**) or of a lawyer (**Кприп (Кprip)**) before the end of the planned period providing legal aid according to the power of attorney.

Квідм should be used **only in case if a client refuses the legal aid during the first meeting with lawyer**. According to the Method in such a case **Квідм** is accepted with value “0.5”, and all other coefficients are used with their values. So, a lawyer receives remuneration for the time he spent for journey to the client and back (2 hours), and 1 hour for the meeting with client.

In any other case of legal aid termination **Кприп** should be used with value “0.5”. In this case all other coefficients are used with their values. So, a lawyer receives remuneration for all the time he spent for journeys to the client and back, and 50% of remuneration for legal aid services in comparison with all the services would have been done completely.

These two coefficients could not be used simultaneously.

All in all, the analysed payment scheme seems very complex and time consuming with a lot of potential for mistakes. Besides that it takes a great deal of effort to check all the activities.

5.1.5 Formulas for calculation of the fee

1. The fee for providing legal aid to the person under administrative detention and/or administrative arrest (para 3 of the Method) is calculated with the following formula:

$$\text{Radm} = (2 \times \text{Kvyizdiv} + 2 \times \text{Kos. kat} \times \text{Kdii} \times \text{Kvidm} \times \text{Kprip} \times \text{Ogod} \times \text{Kos. chas} \times \text{Kzvit})$$

where the factors (besides those already described) are:

Kvyizdiv – *the number of visits of a lawyer to a place of clients detention or/and of conducting of procedural actions. It seems that the factor partly takes into consideration the same factors as the coefficient 'number of lawyer activities' Kdii.*

Ogod – *hourly fee rate.*

2. The fee for providing legal aid to the person being detained in course of criminal proceedings or for those for whom a preventive measure in the form of remand in custody is applied (para 4 of the Method) is calculated with the following formula:

$$\text{Rkrym. zatr} = (2 \times \text{Kvyizdiv} + 2 \times \text{Kos. kat} \times \text{Kdii} \times \text{Kzzz} \times \text{Kvidm} \times \text{Kprip} \times \text{Ogod} \times \text{Kos. chas} \times \text{Kzvit})$$

All factors in the formula are already described above.

3. The fee for providing legal aid in the case of participation of a lawyer in single procedural action (p.5 of the Method) is calculated with the following formula:

$$\text{Rokr. diia} = (2 \times \text{Kvyizdiv} + 2 \times \text{Ktiash} \times \text{Kep} \times \text{Kdii} \times \text{Ksp. OPD} \times \text{Kos. kat} \times \text{Kvidm}) \times \text{Ogod} \times \text{Kos. chas} \times \text{Kzvit}$$

All factors in the formula are already described above.

4. The fee for providing legal aid in a separate stage of proceedings (para 15 of the Method):

$$\text{Rk} = 20 \times \text{Ogod} \times \text{Ksp} \times \text{Kskl} \times \text{Kos} \times \text{Krez} \times \text{Kzvit}$$

Where factors (besides those already described) are:

20 – *minimum estimated time, as described above;*

Kcp (Ksp) – *criminal proceeding stage factor;*

Kskl (Kskl) – *criminal proceeding complexity factor;*

Kos (Kos) – *special complexity factor of criminal proceeding;*

Krez (Krez) – *total encouraging factor.*

Criminal proceeding stage factor Kcp (Ksp) - takes into consideration, whether the lawyer previously participated in a criminal defence of the client in the same set of criminal proceedings. If he/she did, the coefficient is lower, if not, the coefficient is higher (which can be explained by previous knowledge of the lawyer of this case) (Table 8, para 20 of the Method).

Criminal proceeding complexity factor Kskl (Kskl) is used in the formula for calculation of the fee for providing legal aid in a separate stage of proceedings (para 15 of the Method) and takes into consideration a number of factors that set a degree of the complexity of the criminal proceedings (case).

Special complexity factor Kos (Kos) is applied in cases where a lawyer initiated additional criminal proceedings challenging unlawful decisions, actions or omission of the investigating or prosecuting authorities and/or prepared and lodged criminal complaints on behalf of the client, and is calculated as 1+ 0.1 multiplied to the number of such separate proceedings (complaints).

It is argued that increasing the fee by 10% is inadequate for the lawyer's work in additional proceedings, typically as the defendant's (the client's) representative in criminal proceedings where the defendant is recognized as a victim of a crime committed by the police in course of criminal persecution of the defendant.

Para 27 of the Method provides for a **number of incentivising factors Крез (Krez)** that can be summed up in an aggregate factor. These factors are defined as a result of a stage of criminal proceedings.

Para 28 of the Method is devoted to the fee calculation method for providing legal aid in criminal proceedings on the continuation, modification or termination of use of compulsory measures of a medical nature (for persons with mental disorders, who committed illegal acts). The increasing factor Кмед (Kmed) is foreseen which applies when the lawyer achieves decrease of the compulsory measure of its termination

Calculation of the lawyer's fee in extradition proceedings is set out in para 29 of the Method.

The formulas make the determination of fees complex, difficult to check in a time consuming process. A lot of information must be collected, a lot of calculations done, and this can/will put a burden on the participants. The Centres require lawyers to submit additional information/papers for checking which is not foreseen by the regulation.

5.2 Financial accountability mechanisms

The obligation of lawyers providing FSLA to report about completed assignments (powers of attorney) of RFSLACs during 45 days is set out in and approved by the Resolution of the CoM of Ukraine no. 8 of 11 January 2012. The Method of the payment foresees the time reporting factor Кзвіт (Kzvit) that will decrease the fee in case a lawyer reports after this time limit (see Table 6-1 in para 14-1 of the Method).

If a lawyer submits a report later than 120 days after having completed the work, the lawyer will not be paid for this work at all. There is no uniform procedure laid down by the CCLAP on acceptance and checking lawyer certifications that they have provided FSLA, but the CCLAP drafted the recommendations on the basis of which such procedures were adopted on a regional level. For example, Poltava Regional Centre on 4 January 2016 set out new Organisation Procedure on the Matter of Acceptance and Checking Certifications of the Provision of Free Secondary Legal Aid. All the other Regional Centres have done the same. It is very important that this procedure becomes uniform in order to boost transparency between the Centres.

According to the Poltava Procedure, lawyers upon completing a stage of proceedings must submit the following package of documents: two samples of the certification, calculation of the fee, a copy of the power of attorney for providing FSLA, originals or properly authorized copies of procedural documents, properly formalized documents on the lawyer's expenses etc. The package is submitted along with a list of the activities submitted at the same time.

A lawyer must prove the correctness of calculation of the fee, so he/she needs to substantiate the values of every coefficient used in calculation of the fee on the certification. According to the information provided by lawyers, in doing so, they submit official certificates confirming the number of hearing days in court (signed by a judge), of meetings with a client in a place of detention (authorized by a chief of the jail), the time spent in a police station (signed by an investigator), copies of the lawyer's motions with a stamp of acceptance etc. According to the CCLAP, however, there are no legal requirements for lawyers to present the afore-mentioned certificates. Therefore the CCLAP is trying to eliminate this practice occurring in some regions, in that way the proceedings will be better compliant with the legislation and less bureaucratic.

The certifications are submitted to local FSLACs, registered in a special registry book and then checked by the Centre within 15 days. If the local Centre finds a shortage in the package of documents or mistakes in the calculation of the fee, it will return the certification (package) to the lawyer.

If the package of documents is correct it is passed from a local Centre to a regional Centre and the RFSLAC must check the documents within certain time limits. There is a document containing time limits for checking operations of the lawyer's acts, Guidelines on Reception and Check of Certifications of the Provision of FSLA prepared by the CCLAP on 2 October 2015 and recommended to the FSLACs for adoption.¹⁴⁹ If there are mistakes in the documents (certifications) they are returned to the local Centre, which has to correct the mistakes. Transferring the acts from a local Centre to a regional Centre is meant to take place at least once a week. All operations in receiving, transferring, checking, returning the acts are filed in the registry book. Thus, in fact, there are two examinations of the acts with accompanying documents by the accounting staff of, firstly the local Centre and, secondly a regional Centre and finally the papers are reviewed by a Director of a RFSLAC, and each of them is signed and sealed, while the number during a month can reach 2000 and more.

A lot of information must be registered and checked by the Centres and this can put a burden on the Centres and take a significant part of the budget. There is also a considerable administrative burden in the system of checking and double checking.

Lawyers also criticised what they saw as disproportional fee rates for some kinds of services for criminal proceedings. Universally, however, they considered the basic fee rate to be too low. In their discussions with the experts various lawyers suggested a wide range of minor alterations to the payments system, however, the experts have come to the conclusion that such changes would only serve to further complicate an already over-complex system. Instead the experts are of the view that the existing system could better be replaced with a fixed fee system.

RECOMMENDATION 5.2

It is recommended to simplify the current very detailed payment system which takes a lot of time and puts substantial burdens on lawyers and Centres as well. The payment system should be clearer and more understandable for the lawyers who should be able to estimate the payment they will receive. One way to simplify the payment system would be to change the current system into a fixed fee system. In a number of European countries we can see the development of a fixed fee system which pays on average a reasonable fee with sometimes less payment and sometimes more, but on average a reasonable fee. It is much better to introduce a new – less complex – system instead of making (small) modifications in the current system. There are also cost savings and a reduction in the time consuming checks of the bills freeing up time which could better be spent on providing services itself. An effective, file based, quality assurance programme (*see chapter 4*) is an important prerequisite for introducing a fixed fee system.

¹⁴⁹ Examples:

Par. 2: The certifications are registered in in the registry book of a local Centre immediately if a lawyer submitted the report in person or during one working day if the report is sent by mail.

Par. 6: An employee of the local Centre having completed the check of the reporting documents (if everything is correct) during one working day must pass the documents to a director of the local Centre for approval.

Par. 7: If the documents are not correct they are sent back to the lawyer during one working day.

Par. 8: Summary checking period of the reporting documents may not be more than ten days from the date of submitting the documents (the certifications), if they are not sent back to the lawyer.

Par. 9: After approval of the certification by the director of the local Centre the documents are directed to the corresponding regional Centre during two working days.

Par. 10: The accounting department of the regional Centre during two working days checks the documents, signs them and during one day passes the documents for a chief accountant. The chief accountant during one working day passes the certification to a director of the regional Centre for approval.

Par. 11: If the documents are incorrect they are returned to the local Centre during one working day.

RECOMMENDATION 5.3

It is recommended that consideration should be given to the regulation of payment for certain additional actions required for a lawyer to actively fulfil her/his role within the adversarial proceedings: carrying out forensic expertise, lawyer's business trips to other regions of the country for collecting evidence etc.

RECOMMENDATION 5.4

Consideration should be given to exempting payments for legal aid services to lawyers from tax as a way to enhance the payment for legal aid as public services.

INDEPENDENCE OF THE FREE SECONDARY LEGAL AID SYSTEM

6.1 Independence of the Coordination Centre for Legal Aid Provision and its territorial branches

6.1.1 Introduction: Independence of legal aid authorities and legal aid providers

Independence as a concept applied to LAA covers a range of aspects: institutional, operational and financial independence.¹⁵⁰

Institutional autonomy

The experience of Western jurisdictions is that most, but not all, LAA have a legal structure that is outside Government with either an executive Board of directors or a stakeholder Board. The use of a public appointments process (with a reasonable security of tenure) in the recruitment of the Board and Chair provides the greatest autonomy from Government although stakeholder nomination against a skills and competencies framework is also considered to bring a reasonable measure of autonomy. Similarly, CEOs who are appointed by Boards using a form of public appointments procedure, with robust security of tenure (perhaps with a separate financial responsibility as Accountable Officer to Parliament) are seen as having the greatest degree of institutional independence. If the preference is to locate the LAA within Government then the more autonomous option is the “non-Ministerial department” along the lines proposed by a recent review¹⁵¹ in Northern Ireland with a small executive board of senior managers together with an Advisory Council selected by a public appointments procedure. The role of the Advisory Council might cover ensuring the independence of decision-making by the LAA in relation to grants, refusals and withdrawals of legal aid, acting as an appeals panel for complex and difficult cases and as a source of independent advice for the Government on Access to Justice matters. The lay chair might also serve as non-executive director on the management board.

Accountability

Whilst there will always be a tension between accountability and independence, provided suitable structures and processes are in place (preferably enshrined in legislation) to preserve the autonomy of the LAA and its senior staff (which will support a good working relationship between the LAA and the Government) accountability mechanisms – including independent monitoring need not inhibit the proper functioning of the LAA.

Staffing

The evidence from Western countries suggests that in small jurisdictions there can be difficulties in recruitment at senior levels or in acquiring the flexible skills set needed for today’s complex

¹⁵⁰ The introductory section of this chapter is based on A. Paterson, *Establishing an independent legal aid authority in Hong Kong : lessons from overseas jurisdictions* (2013).

¹⁵¹ Access to Justice Review, Northern Ireland. August 2011 par 7.22. https://www.courtsni.gov.uk/en-GB/Publications/Public_Consultation/Documents/Access%20to%20Justice%20Review%20Northern%20Ireland%20-%20The%20Report/Access%20to%20Justice%20Review%20FINAL%20REPORT.pdf

legal aid programmes (as there have been in Northern Ireland and New Zealand), if the staff is not composed of civil servants – irrespective of whether the LAA is external to Government. However, non-Governmental LAAs are considered to be more autonomous where the Government does not seek to control the number, grade, salary and pension entitlement of LAA staff.

Grant giving independence

The key protections of independence here are legislative and cultural, but in the view of most common law and European jurisdictions, (though not in Finland) the threat of Governmental interference with individual legal aid grants or withdrawals is seen as higher where the LAA is within Government than where it is outside Government. That said – wherever the LAA is situated – there are a range of measures that are considered to enhance autonomy (especially if they are contained in legislation):

- a) a legal prohibition on the Government interfering with the grant, refusal or withdrawal of legal aid in individual cases;
- b) clear limits on any power of the Government to give guidance to the LAA as to its functions in relation to grant giving and payments;
- c) clarification that any references to “the public interest” in the merits test for legal aid cannot be read to mean interest of the state or state security, or the interests of the economy;
- d) a strengthening and clarification of the confidentiality obligation with clear limits as to what may be passed to the Government by the LAA as advanced warning of legal aid cases in the pipeline;
- e) a robust internal review system for refusals and withdrawals of legal aid, coupled with an appeal committee that is independent of Government and the LAA together with provision for a review mechanism by a judge or the courts, where legal aid is being sought where the LAA or the Government is being legally challenged.

Policymaking

The general trend is to locate policymaking more in the hands of the LAA rather than the Government, except where the LAA is located inside the Government. This is thought to encourage autonomy and self-confidence without posing a threat to the Government who still control financial independence. The general view was that LAAs which are outside Government are in a stronger position to engage with the media, form alliances with other stakeholders, respond critically to consultation papers or to appear before parliamentary committees in situations where the Government is planning to introduce major changes to legal aid, than if their LAA was in the Government.¹⁵²

Budgeting and Financial independence

Finally, although no jurisdiction affords its LAA complete budgetary autonomy, some LAAs are afforded considerably more independence than others. Whilst most now operate in an environment of budget caps and rationing, it is still possible to be an open-ended uncapped demand led jurisdiction provided the LAA retains the confidence and trust of its Government.

6.1.2 Independence of the CCLAP and the FSLACs in Ukraine

The CCLAP and the FSLACs are established by statute under the LA Law. The CCLAP was established as a separate public law entity within the system of the MoJ¹⁵³ (Decree of the President of Ukraine no. 374/2012 of 1 June 2012 and CoM Resolution no. 504 of 6 June 2012) to implement the duties

¹⁵² One NDPB CEO observed that he could organise to meet with his Minister quite easily, but that if he were a departmental head within the Ministry he would find the senior civil servant in the Ministry and the Minister's staff blocking his path to similar access to the Minister. The counter argument that if you are the Ministry you will hear of the Minister's proposals first did not convince many external CEOs.

¹⁵³ The CCLAP is located in a MoJ building.

of the MoJ in the field of FLA. In July 2012 the 27 regional FSLACs were created by MoJ Order (no. 968/5 of 2 July 2012). Currently the CCLAP has neither an executive nor an advisory board. However, there is an informal Advisory Board in the shape of the Civic Platform for Legal Aid which assisted the CCLAP in selecting the directors for 100 local Centres.

As mentioned above, Article 28 of the LA Law stipulates that the MoJ shall:

- 1) ensure coordination of the central executive agencies with regard to realization of the state policy in the area of free legal aid;
- 2) be responsible for the general management of free primary legal aid and free secondary legal aid;
- 3) be responsible for implementation and operation of the free secondary legal aid system;
- 4) establish the Centres for provision of free secondary legal aid.

This might suggest that the CCLAP has relatively little independence from the MoJ. However, according to the MoJ¹⁵⁴, their main role with respect to FLA is (1) to lobby / promote relevant legislation for the legal aid system (2) to protect the interests of the system by promoting sufficient funding needed for the system to function properly and (3) relations / negotiations with the other institutions to promote human rights. Nevertheless their responsibility for the “operation of the free secondary legal aid system” means that they also have the role to approve or reject proposals from the CCLAP to hold a competition to select more FSLA lawyers, to approve the procedures and conditions of any such competition and the level of expertise required for any FSLA lawyer, establish the procedure and terms of contracts with FSLA lawyers and to decide on the amount and procedure of payment for FSLA lawyers.¹⁵⁵ These powers seem related to the expenditure of money rather than a particular threat to the independent operation of FLA. The final power of the MoJ is to decide who will be the Director of the CCLAP¹⁵⁶ (without any form of public appointments procedure). However, the current Director of CLAAP has been retained in position by 3 separate Justice Ministers which evidences the MoJ’s commitment to the independent operation of FSLA in Ukraine. According to the Minister, the Director could only lose his/her job by resignation or for a clear violation of the legislation governing the operation of FLA in Ukraine.¹⁵⁷

RECOMMENDATION 6.1

It is considered that there is a need for the legal relationship between the CCLAP and the CoM and MoJ to be further clarified through (a) underlining the day to day independence of the CCLAP and its Director from the CoM and the MoJ whilst retaining their accountability to the CoM and the Parliament (b) appointing a Supervisory or Advisory Board whose members are selected by a free, open, transparent and fair public appointments procedure and then approved by the MoJ. It is considered that the Board members should be drawn from a range of stakeholder groups and that no group should supply more than a quarter of the Board. The model of a Board with a majority of lawyers was not supported by the experts since it is very difficult to square with state accountability for public funds and because of the inherent conflict of interest between a Board controlled by lawyers being responsible for paying lawyers significant amounts of public funds.

¹⁵⁴ In a meeting with the experts held in the framework of the fact-finding mission.

¹⁵⁵ Technically, these are the functions of the CoM of Ukraine, the Government. The MoJ can only develop in more detail the provisions of the Resolutions of the Cabinet. However, the case for independence from the CoM is as strong as the case for independence from the MoJ.

¹⁵⁶ Regulations on CCLAP (Statute) (Cabinet of Ministers’ Resolution no. 504).

¹⁵⁷ However, normal labour law provisions also apply to the Director.

RECOMMENDATION 6.2

Measures should be taken to strengthen the independence of the position of the Director of the CCLAP e.g. the Director of the CCLAP should be appointed on merit by an independent public appointments procedure, with final approval by the CoM and the tenure of the Director of the CCLAP should be enshrined in the LA Law. The latter should also provide the grounds and procedure for removal from office of the CCLAP Director.

RECOMMENDATION 6.3

The role of the MoJ in the day to day management and operation of the FSLA scheme, should be reduced e. g:

- 6.3.1 Withdrawing the MoJ from the responsibility to determine when selection contests for the recruitment of FSLA lawyers should take place,
- 6.3.2 Withdrawing the MoJ from the responsibility to determine the content and the components of these contests.

Accountability

The Director of the CCLAP informed the experts that not only was the operation of FSLA in Ukraine independent from the MoJ but that independence had to be accompanied by accountability. The primary accountability was to the MoJ through audit and through transparency of published information e.g. relating to case assignments and moneys paid to legal aid lawyers. The national audit system verifies how the budget is spent, as with other public institutions. In the last two years the administration budget has been inflated by the cost of establishing a further 100 local legal aid Centres but the CCLAP's estimate for 2016 indicates that the split between legal services payments and administrative expenses is likely to be in the order of 75:25. Thereafter MoJ policy is to double the level of funds spent on lawyers whilst holding administrative costs level.

The Minister informed the experts that he did not have any influence over how the legal aid budget was spent. The annual budget is approved as part of the State Budget and once the Government and Parliament have made that decision the Minister cannot change that, nor can he give any instructions as to how it is to be spent. In practice the CCLAP prepares a draft budget which it then shares with the MoJ. As a rule the MoJ doesn't suggest changes in the figures they ask for. The CCLAP then goes to the Ministry of Finance for approval of the budget. So in practice the role of the Minister is to seek to convince the Government / Parliament to give funds to the legal aid system (and indeed lobby in support of the budget requests from the CCLAP), but once the budget is approved, he cannot interfere with that. Partly this is because the funds for legal aid do not come from the MoJ but from the Ministry of Finance. It follows that the MoJ may seek to influence the budget negotiations by indicating e.g. what should be spent on administration as opposed to legal services but that the MoJ cannot seek to influence how the administrative budget is actually spent. That is a decision for the CCLAP. That said, it seems that the MoJ jointly with Ministry of Finance has to approve the number of positions in the CCLAP and the FSLACs (see below) which is likely to make up much of the administrative expenditure.

Staffing

Our researches suggested that the 50 or so employees within the CCLAP and the 450 or so staff employed within the regional FSLACs are not counted as civil servants within the MoJ but as independent staff. On the surface it would appear that the CCLAP has control of staff appointments to itself and the Centres¹⁵⁸ through its own HR function¹⁵⁹ and of the training of its staff and the staff in the FSLACs. However, control of the number, grade, salary and pension of the staff is a shared responsibility between the CCLAP, the CoM and the MoJ¹⁶⁰. The CCLAP sets out the qualification

requirements for its staff, however the salaries are set by the Government and¹⁶¹ the number of positions are proposed by the Director and approved by the MoJ jointly with Ministry of Finance. There is no special provision made for staff pensions which are governed by the ordinary law. The report *Free Legal Aid System in Ukraine: The First Year of Operation Assessment* indicates that “the issue of staffing of FSLACs is vital although hardly ever discussed publicly”. The report indicates that in 2014, at least, the resources did not permit sufficient staff to be appointed in the FSLACs. However, the evidence from the Minister would suggest that he leaves decisions as to how many staff there should be in the CCLAP and the FSLACs as decisions for the Director of the CCLAP with advice from the Chief Accountant of the CCLAP.

Grant giving independence

It is not clear whether there is a legislative provision which expressly prevents the Government or the MoJ from interfering with the grant or refusal of secondary legal aid or the decision to allocate a lawyer to a legal aid client or to withdraw that allocation. However, there are practical hurdles which stand in the way of such interference, including the fact that the grants and the allocation of lawyers to clients is done by the FSLACs not by the CCLAP.¹⁶² (In Finland, although legal aid is run from within the MoJ, the independence of legal aid grants is ensured by the fact that these are all handled by regional Centres). Indeed, the *Free Legal Aid System in Ukraine: The First Year of Operation Assessment* report asserts very strongly that “police, courts, politicians or public authorities are unable to intervene in the decision-making process of a FSLAC whether to grant or refuse secondary legal aid, or interfere with the process of appointment of the lawyer and his/her assignment to act as defender”.¹⁶³

The NBA consider that the MoJ’s involvement in the selection contests is a threat to the independence of the FSLA because the MoJ has to agree when a contest should be held, and must approve the criteria used in those contests. The NBA take the view that any additional criteria in addition to being a licenced member of the NBA constitute a state interference with the independence of the legal profession, and that the introduction of exams favoured younger lawyers over more experienced lawyers. As stated in chapter 4, there are a range of factors which strengthen the independence of the selection process in practice (see below) and the additional knowledge exam can be justified on the grounds of enhancing continuing competence, especially amongst lawyer who passed their Bar exams long before the recent reforms to the criminal law and procedure, as well as prior to the enhancement of use of the ECHR and ECtHR case law in Ukrainian courts. This argument equally provides the answer to the criticism that exams favour younger lawyers. While the NBA might object to the way the contests are run, they provided no evidence to the experts to show that the regional selection panels that run the contests (which involve members of the Bar from the relevant regions) had been influenced by the MoJ. Again the NBA considers that there is a lack of transparency over the allocation of cases to FSLA lawyers. Although the CCLAP’s own website provides the evidence as to the imbalance in caseload between FSLAC lawyers (an issue which the NBA considers as evidence of a threat to the legal profession’s independence)¹⁶⁴ again there are explanations for this (including willingness of providers to travel or to work at night, or the availability of other lawyers in the region) which do not constitute a threat to professional independence. The experts asked the NBA for evidence of actual instances where it is alleged that

¹⁵⁸ Resolution. no. 504 (CCLAP Statute).

¹⁵⁹ One of the Deputy Directors of the CCLAP is in charge of the FLA System’s HR development.

¹⁶⁰ According to Resolution no. 504 (CCLAP Statute), the organisational chart of the CCLAP is approved by the Minister upon the suggestion of the CCLAP Director. The charts of the territorial Centres are adopted by the CCLAP Director. He hires and dismisses the staff of the CCLAP, directors and deputy directors of the territorial Centres.

¹⁶¹ The basis for the salaries and the scheme for different bonuses is contained in Cabinet of Ministers Resolution of 20 June 2012 no. 552 with further amendments. Within the budget and the limitations set by this Resolution, the CCLAP Director and territorial Centres’ directors have some flexibility.

¹⁶² The experts asked whether a Minister could interfere with the way individual FSLACs spent their money and the clients to whom they allocated a lawyer – the CCLAP were adamant that this could not happen.

¹⁶³ *Free Legal Aid System in Ukraine: The First Year of Operation Assessment*, p.78.

¹⁶⁴ See NBA Report on the Legal Aid System in Ukraine.

the MoJ had interfered, or sought to interfere, with the way that a FSLA lawyer had run a client's defence, but none was made available to the experts.

RECOMMENDATION 6.4

It is particularly important that external forces (whether from the Government, the MoJ, the police, the prosecution, or the NBA) cannot interfere with the assignment by the LAA of an individual legal aid lawyer to a client. Consideration should be given to amending the regulations on lawyer assignment (*discussed in chapter 3 above*) to expressly prohibit the interference by external forces in the assignment of a lawyer.

Policymaking

As indicated above there is a general trend to locate policymaking more in the hands of the LAA rather than the Government, except where the LAA is located inside the Government. This is thought to encourage autonomy and self-confidence without posing a threat to the Government who still control financial independence. In Ukraine it would appear that the CCLAP are strongly involved in policymaking even although it is located within the system of the MoJ. It is not clear however, how easy it would be for the CCLAP to take a public stance on an issue of legal aid policy which was opposed to the position of the MoJ.

Budgeting and financial independence

Although no jurisdiction affords its LAA complete budgetary autonomy, some LAAs are afforded considerably more independence than others. Whilst most now operate in an environment of budget caps and rationing, it is still possible to be an open-ended uncapped demand led jurisdiction provided the LAA retains the confidence and trust of its Government. The available evidence suggests that CCLAP despite being located within the system of the MoJ has considerable budgetary independence as we saw in the section on Accountability above. The constant increase of the legal aid budget since 2012 until 2015 is an important indicator regarding the overall Government's commitment to provide legal aid.

6.2 Independence of legal aid lawyers

The report covers the issue of the independence of legal aid lawyers from interference by the MoJ in the earlier part of this chapter. However, the issue of independence reaches further than that. The professional obligation to provide independent advice and representation to an accused client includes independence from any external influence which might affect the representation by the lawyer. This might include the family and friends of the lawyer or the client, the media, professional associations, NGOs, and other stakeholders in the justice system such as the police, prosecutors or judges.

Interviews conducted during the fact-finding missions elicited little evidence of significant threats to the independence of FSLA lawyers in carrying out their defence duties. There seemed to be absolute independence from the CCLAP although greater transparency concerning the assignment of clients by FSLACs would help to demonstrate that lawyers are totally independent from the FSLACs. The representatives of the lawyer associations interviewed during the fact-finding missions were adamant that the FLA system had, if anything, enhanced their independence as lawyers. However, the interviewees, including some judges, indicated that the phenomenon of "pocket lawyers" who were too close to either the police or the prosecution (or a combination of the two) did still exist in Ukraine amongst both private lawyers and FSLA lawyers although it was considered that their FSLAC allocation system was reducing the prevalence of the "pocket lawyer" phenomenon.¹⁶⁵

¹⁶⁵ The Free Legal Aid System in Ukraine: The First Year of Operation Assessment report referred to the continuing existence of "pocket lawyers" who were too close to investigators and therefore worked more in the investigators' interests than the clients (pp. 53, 56 and 78).

RESEARCH AND MONITORING OF THE FREE SECONDARY LEGAL AID

7 Chapter

A system of legal aid is designed to serve people who need legal services and cannot afford it. These people should be full members of society with all their rights and obligations. To be able to enforce these rights it is important that they have access to a solution to their juridical problem, that is, access to Justice.

The Government of Ukraine has sought to secure access to Justice for the Ukrainian people amongst others by bringing into force the CPC and FLA.

A number of jurisdictions have developed a monitoring system with the purpose of looking at how policy objectives are realised and how and where problems arise or new developments or innovations take place or arise. Indeed, monitoring data collection and research are both very important, since they are connected items. For example, how does the Government know that the rights are properly secured in the way that it is intended?

7.1 Data collection

Data collection is useful in determining the best way to proceed, because empirical data do not tell lies. Collecting data is useful for the Government, the CCLAP, the NBA, consumer organisations, NGO's and others to figure out exactly how the system of FLA operates, how it performs and if and whether or not the goals are achieved.

The need to collect, coordinate and analyse data and information in order to better identify the legal needs of citizens is of great importance. This is the essential first step in order to investigate if the system responds in the best possible way to the needs of the citizens.

Through continuously analysing the data that is available within the system of legal aid, the CCLAP has the possibility to follow the supply and demand for legal aid and to register over time the need to adapt the system in the face of changing conditions, so that the extent to which the objectives of the law are met, is effectively monitored. For policy makers, politicians and other stakeholders in the justice system data collection and research can be a useful source of information. Facts and figures can inform the debate (as it does in many jurisdictions) on legal aid budgets and on the measures taken to reduce costs while maintaining the level of quality of the current system.

The continuous monitoring of the status quo of the system is important for the assessment of the question whether the CCLAP adequately succeeds in achieving the objective of the FLA to provide to the client with sufficient access to find a solution for his/her legal problem and to ensure that services provided within the system are of good quality. Also tracking the development of the supply of service providers is one of the objectives of the FLA, which is certainly not insignificant with respect to the income of the legal profession.

The key questions are how to ensure efficient access to justice for every citizen and to acquire knowledge about who has access to legal services and what should be the best way to effectively manage these services in the best interest of citizens.

A lot of data is already available within the information system of the FLA system itself and it is already used for several goals amongst others by the National Bar, researchers and the CCLAP itself. Data from the CCLAP is certainly very significant. It provides facts, information and knowledge about the use of the legal aid, but it could be better used for policy making and checking and is not available in a coherent way. For example, attention needs to be paid to aggregating the regional statistics.

The data connection between several stages in the chain (police, investigators, prosecutors, lawyers, courts, CCLAP) is poor. There are different overviews of appointments, no real (reliable) data from police about arrested and detained people, from investigators about the cases they bring to court etc. It can cause lots of problems, such as assignments being too late or even having to be cancelled, and there is no proof or evidence that requests for legal aid are done in proper way. The requests for assignments for legal aid are not handled with a specified format. The chance that information gets lost in the case of a request by telephone is quite high.

RECOMMENDATION 7.1

Electronic data traffic between the relevant criminal justice actors/institutions needs to be further developed to strengthen these proceedings, to improve the speed of the proceedings and the quality of the processes. This information must be stored in a proper way so that it can be used in a coherent fashion.

RECOMMENDATION 7.2

Taking into consideration the overwhelming amount of paperwork, complexity of processes, time and resources consuming administrative procedures etc., introduction of a comprehensive internal electronic management information system as soon as possible is a key element of overall administrative effectiveness of the FLA system and essential for proper allocation of cases, lawyers' reporting process and producing statistics of the system.

7.2 Research

Regular and efficient collection and analysis of already available data of legal aid services and data from police and other detaining authorities, investigating bodies, public prosecution and courts make it possible to monitor and evaluate the performance and impact of the legal aid delivered. This provides the basis for identifying best practice and for the development of improvements and new approaches.

It is advisable to develop a monitoring system that is sustainable for the long term and covers the whole (criminal) judicial information chain concerning all stages and all organisations involved such as detaining authorities, investigation, court and legal aid.

A monitoring system will annually deliver insight into key developments. In this way it creates a tool for evidence based policy and a basis for further improvements. By annually repeating the data analysis in the same way certain trends and pattern can be revealed.

So there is a need for a more comprehensive approach towards the collection and analysis of data within the criminal justice system, unfortunately this is missing in almost all criminal justice institutions. Moreover coordination between them is weak.

RECOMMENDATION 7.3

It is recommended that the FLA system develops a methodology and indicators for data collection and analysis. This should include relevant data from the criminal justice system in order to allow the legal aid system to determine the level at which the needs for legal aid are met. This would generate important information on the functioning of the criminal justice system and serve as a source for authorities for the improvement of policy or practice. By annually repeating the data analysis in the same way certain trends and pattern can be revealed.

RECOMMENDATION 7.4

A permanent team for monitoring is the best guarantee for the continuity of the activities. An advisory committee with participation of all the stakeholders should be established. All criminal justice actors / institutions must be committed to develop a proper and useful monitoring system.

MAIN RECOMMENDATIONS

Chapter 2: Accessibility of the free secondary legal aid

- 2.1. Administrative burdens when dealing with applications should be kept to a minimum. The regulatory framework could be improved so that it clearly defines individuals eligible for legal aid, is more simple and understandable for beneficiaries. This could be done through ensuring that the specialised law on legal aid is consolidated to encompass all the relevant aspects of legal aid and guarantees in a holistic and uniform manner, thus avoiding the creation of a patchwork of legislation.
- 2.2. The LA Law or relevant regulations should be amended to clarify whether legal aid is provided throughout the case or not and clear procedures need to be developed for provision of legal aid if this is not provided throughout the case.
- 2.3. The criminal justice actors, in particular the police, prosecution, courts and the legal aid system - should take concerted efforts to ensure that legal aid is provided to any suspect/defendant from the moment of detention, prior to the first questioning by police, as prescribed by Ukrainian legislation and ECtHR case law. These efforts may include, *inter alia*, developing (and where relevant updating) the regulations on ensuring early access to a lawyer for each relevant actor, adequate automatic registration of all detained suspects / defendants and prompt notification of the RFSLACs on the need to appoint a lawyer. Moreover, it is in the interest of the society, police and lawyers to bring to justice only those that are guilty and to avoid the exclusion of evidence because a lawyer has not been provided from the moment of detention, prior to the first police interview (the *Salduz* rule). So training should be provided to all the relevant stakeholders on this rule and consequences of breaking it.
- 2.4. The LA Law should set out the time limits within which the decisions on granting legal aid can be challenged and the procedure to be followed. The various provisions on legal aid applications which are currently dispersed in different Articles of the LA Law, should be brought together into a consolidated set of provisions, including review and appeal.
- 2.5. There is a need for an improvement in providing information (oral and written) at the moment of detention combined with recording of the interviews so that the public and lawyers are sure that people are well informed about their rights. The more this can be done the more people will be aware of their rights to information and an effective defence. The availability of primary criminal legal aid can be also used for this purpose.
- 2.6. It would be useful that the statistics collected and processed by different criminal justice institutions could be compiled on the basis of similar indicators, so that it is possible to compare the legal aid data with the statistics of law enforcement and courts, and therefore to know the percentage of criminal cases (proceedings) where legal aid should be provided and the percentage of the actual beneficiaries receiving legal aid, as well as the reasons for any possible discrepancies.

Chapter 3: Assignment and replacement of a lawyer to provide free secondary legal aid

- 3.1. Rules on appointment of lawyers to provide free secondary legal aid should be drafted and published in each RFSLAC. The Poltava regulation seems a good one that could be used as an example. These rules should include the way duty schedules are drafted and the method of how the lawyers on duty are assigned. The rules should be straightforward and based on easily applied objective criteria. However, in complex or serious cases the experience or specialisation of the lawyer should be taken into consideration perhaps by establishing specialised lists of lawyers for specific categories of cases.
- 3.2. Ensuring an equal distribution of cases should not be a goal in itself, as the legal aid system should primarily be guided by the best interests of the legal aid beneficiaries, rather than by ensuring an equal workload of lawyers. Hence, the RFSLACs should not strive to ensure equal distribution of cases among lawyers, but should monitor and intervene when evident disproportionalities among lawyers occur.
- 3.3. It would be advisable to provide the principle of continuity of defence expressly in the LA Law and/or the Quality Standards.
- 3.4. The legal aid system should continue assessing each request for appointing a lawyer for a single procedural action based on Article 53 of the CPC before appointing a lawyer and, where the law gives such a possibility, refuse the appointment if the request is not justified or abusive. It would seem sensible for the legal aid system to initiate regular discussions on the use of Article 53 of the CPC with criminal justice sector actors, both on national and local levels, aiming at eliminating any abusive practices.
- 3.5. It is strongly recommended that statistics are collected and published by the criminal justice system on the number of suspects/defendants that are represented by a lawyer and the number of those that waive their right to a lawyer classified by reasons and stages of proceedings. These statistics will allow, amongst other things, the legal aid system to assess the extent to which legal aid needs are met.
- 3.6. The secondary legislation on legal aid should be amended to include a clear procedure for replacement of legal aid lawyers, including for poor performance. The Bar Quality Commissions should have the competence to recommend the replacement of a legal aid lawyer following a referral on competence grounds from the RFSLAC or following a client complaint referred by the RFSLAC and providing a reasoning for their recommendation. However, it is recommended that the RFSLACs have the ultimate decision on whether to replace a legal aid lawyer. It is also recommended that the decision on replacement of a legal aid lawyer be subject to appeal (e.g. to the CCLAP). The courts should also be able to make recommendations to the RFSLACs on the need to replace a legal aid lawyer, by issuing a reasoned court order.
- 3.7. The legislation should be amended to provide the LAA with the possibility to replace a lawyer for technical reasons, such as merger of cases or transfer to other regions. Investigation bodies and courts should be able to notify the LAA when lawyers providing legal aid manifestly fail to provide effective criminal defence.
- 3.8. The legal aid system should collect and maintain statistics not only on the overall number of replacements of lawyers, but also disaggregated by reasons of replacement. This will allow the system to be able to analyse and draw appropriate conclusions.

Chapter 4: Quality assurance/ management for legal aid services

- 4.1. Each stage in the contest receives a separate score although the assessment form indicates that an overall score for the whole contest is given. It is considered that after every contest there should be an audit of the returns to ascertain the score at each stage and the demographics of the candidates at each stage. This would aid transparency. An audit of success rates over time within and between regions should also be undertaken with the regional selection panels or relevant FSLA Centres being asked to comment on their figures over time.
- 4.2. There should be greater clarity over the aims of the selection system. The CCLAP has the data from the forms to identify which kinds of lawyers are (a) applying (b) failing at each stage and should publish the results of an audit after each contest.
- 4.3. The responsibility for the timing and content of the selection contests should be transferred to the CCLAP from the MoJ.
- 4.4. To continue with cascade training, to seek additional funding for training, and to promote meetings with judges, prosecutors and the police for discussion of issues concerning the performance of the defence function.
- 4.5. To resume post training effectiveness assessment through feedback questionnaires.
- 4.6. To encourage the NBA to work with the CCLAP to implement the Memorandum of Cooperation and in particular to allow the FSLA courses to receive the Bar accreditation as in 2013.
- 4.7. To establish that the MoJ should not be involved with the training of FSLA staff, although earmarked funding for training from the MoJ and the Ministry of Finance would be acceptable.
- 4.8. That the QS be revised to include additional content e.g. on evidence gathering and preparation for questioning witnesses and that the range of stakeholders consulted in connection with the revision should include the Judiciary.
- 4.9. That the funding be found to permit QMs to conduct more observations of lawyer performances in court and more interviews with clients.
- 4.10. Effective monitoring of the quality of work done by FSLA lawyers and of their adherence to the QS requires peer review of client's files in addition to the existing quality measures such as court observation and client interviews by QMs. This is even more the case if Ukraine moves to a fixed fee system of payment. The experts are not aware of anything in Ukrainian law and professional ethics that forbids independent lawyers from looking at files, particularly closed files, if the client has given their written consent to their inspection, under the protection of confidentiality, for quality assurance purposes. There is no reason why such independent lawyers could not include QMs who are experienced criminal defence lawyers. Indeed, we would expect that the bulk of QMs with the relevant experience would be likely to become peer reviewers. It follows that the CCLAP should consider inserting a clause on every legal aid application form (as is the case in Scotland) which the applicant is asked to sign to allow their file to be quality assured by independent lawyers against the QS. If this is to occur the independent lawyers should receive training in the interpretation of the QS and an agreed marking scheme to reduce marker variation between reviewers. One of the major strengths of this form of peer review is the feedback that the reviewers would be able to give to the lawyers, thus enhancing the quality of the FLA service over time.

Chapter 5: Payment and accountability of legal aid providers

- 5.1. The payment system should motivate lawyers to provide adequate defence services to any detained client, even if it implies traveling at night or during holidays. Incentives should be provided for lawyers to represent clients in remote areas. Inadequately low fees for legal aid will not enable the lawyer to adequately prepare and provide effective defence services to the legal aid client, which may lead to a violation of the right to defence.
- 5.2. It is recommended to simplify the current very detailed payment system which takes a lot of time and puts substantial burdens on lawyers and Centres as well. The payment system should be clearer and more understandable for the lawyers that should be able to estimate the payment they will receive. One way to simplify the payment system is to change the current system into the fixed fee system. In a number of European countries we can see the development of a fixed fee system which pays on average a reasonable fee with sometimes less payment and sometimes more, but on average a reasonable fee. It is much better to introduce a new – less complex – system instead of making (small) modifications in the current system. There are also costs savings and a reduction in the time consuming checks of the bills freeing up time which could better be spent on providing services itself. An effective, file based, quality assurance programme is a favourable prerequisite for introducing a fixed fee system.
- 5.3. It is recommended that consideration should be given to the regulation of payment for certain additional actions required for a lawyer to actively fulfil her/his role within the adversarial proceedings: carrying out forensic expertise, lawyer's business trips to other regions of the country for collecting evidence etc.
- 5.4. Consideration should be given to exempting payments for legal aid services to lawyers from tax as a way to enhance the payment for legal aid as public services.

Chapter 6: Independence of the free secondary legal aid system

- 6.1. It is considered that there is a need for the legal relationship between the CCLAP and the CoM and MoJ to be further clarified through (a) underlining the day to day independence of the CCLAP and its Director from the CoM and the MoJ whilst retaining their accountability to the CoM and the Parliament (b) appointing a Supervisory or Advisory Board whose members are selected by a free, open, transparent and fair public appointments procedure and then approved by the MoJ. It is considered that the Board members should be drawn from a range of stakeholder groups and that no group should supply more than a quarter of the Board. The model of a Board with a majority of lawyers was not supported by the experts since it is very difficult to square with state accountability for public funds and because of the inherent conflict of interest between a Board controlled by lawyers being responsible for paying lawyers significant amounts of public funds.
- 6.2. Measures should be taken to strengthen the independence of the position of the Director of the CCLAP e.g. the Director of the CCLAP should be appointed on merit by an independent public appointments procedure, with final approval by the CoM and the tenure of the Director of the CCLAP should be enshrined in the LA Law. The latter should also provide the grounds and procedure for removal from office of the CCLAP Director.

- 6.3. The role of the MoJ in the day to day management and operation of the FSLA scheme, should be reduced e. g:
 - 6.3.1. Withdrawing the MoJ from the responsibility to determine when selection contests for the recruitment of FSLA lawyers should take place;
 - 6.3.2. Withdrawing the MoJ from the responsibility to determine the content and the components of these contests.
- 6.4. It is particularly important that external forces (whether from the Government, the MoJ, the police, the prosecution, or the NBA) cannot interfere with the assignment by the LAA of an individual legal aid lawyer to a client. Consideration should be given to amending the regulations on lawyer assignment to expressly prohibit the interference by external forces in the assignment of a lawyer.

Chapter 7: Research and monitoring of the free secondary legal aid

- 7.1. Electronic data traffic between the relevant criminal justice actors/institutions needs to be further developed to strengthen these proceedings, to improve the speed of the proceedings and the quality of the processes. This information can be stored in a proper way so that it can be used in a coherent fashion.
- 7.2. Taking into consideration the overwhelming amount of paperwork, complexity of processes, time and resources consuming administrative procedures etc., introduction of a comprehensive internal electronic management information system as soon as possible is a key element of overall administrative effectiveness of the FLA system and essential for proper allocation of cases, lawyers' reporting process and producing statistics of the system.
- 7.3. It is recommended that the FLA system develops a methodology and indicators for data collection and analysis. This should include relevant data from the criminal justice system in order to allow the legal aid system to determine the level at which the needs for legal aid are met. This would generate important information on the functioning of the criminal justice system and serve as a source for authorities for the improvement of policy or practice. By annually repeating the data analysis in the same way certain trends and pattern can be revealed.
- 7.4. A permanent team for monitoring is the best guarantee for the continuity of the activities. An advisory committee with participation of all the stakeholders should be established. All criminal justice actors / institutions must be committed to develop a proper and useful monitoring system.

Continued support to the criminal justice reform in Ukraine

The Project is implemented by the Council of Europe and funded by the Danish Government

Council of Europe Office in Ukraine
8, Illinska Street, entrance 7, floor 5, Kyiv, 04070, Ukraine
Tel: +38 044 425 60 01 ext. 108, 117, 121
Fax: +38 044 425 60 01 ext. 111
www.coe.int/web/kyiv
www.coe.int/en/web/criminal-justice-reform

ENG

www.coe.int

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