



Training of Lawyers on EU Instruments on procedural rights in Criminal proceedings (CRIMILAW)

Directive (EU) 2016/1919 on legal aid

Demetris Lochias

Cypriot Lawyer



The project is co-financed with the support of the European Union's Justice programme

DIRECTIVE (EU)2016/1919

ON LEGAL AID FOR SUSPECTS & ACCUSED
PERSONS IN CRIMINAL PROCEEDINGS AND FOR
REQUESTED PERSONS IN EUROPEAN ARREST
WARRANT PROCEEDINGS

Dimitris Lochias – Criminal Lawyer, Cyprus Bar Association

The right to legal aid, goes hand in hand with the right of access to a lawyer.

See Article 1(2): This Directive complements Directives 2013/48/EU and (EU) 2016/800 (Directive on procedural safeguards for children who are suspects or accused).

Basic principles of fairness and equality. If one cannot afford legal representation in criminal proceedings, he must be aided, to that end, by the State.

The right to legal aid, as provided for in this Directive, is not a novel right!

- **Article 6(3) ECHR**: Everyone charged with a criminal offence has the following minimum rights: (c) 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;**
- **Article 47(3) CFR**: Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.
- **Article 14(3)(d) ICCPR**: [...] 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;

The general right to legal aid is also referenced in [Directive 2013/48/EC](#) on the right of access to a lawyer.

Recital (48): “Pending a legislative act of the Union on legal aid, Member States should apply their national law in relation to legal aid, which should be in line with the Charter, the ECHR and the case-law of the European Court of Human Rights.”

See also Article 11 of the same Directive.

Directive on Legal Aid:

- What is it?
- What does it purport to achieve?
- Why?

What is it?

As already mentioned, the right to legal aid pre-existed the Directive. This Directive, therefore, is one that **regulates** that pre-existing right to legal aid.

To achieve?

- The Directive purports to “*ensure the effectiveness of the right of access to a lawyer ... by making available the assistance of a lawyer funded by the Member States for suspects and accused persons in criminal proceedings and for persons who are the subject of EAW proceedings*” – Recital (1).
- To establish **common minimum rules** concerning the right to legal aid, which in turn aims to strengthen the **trust** of Member States in each other’s criminal justice systems and thus improve the notion of mutual recognition of decisions/judgements.
- Whilst the right, as already mentioned, pre-existed the Directive, nonetheless, experience has shown that the right itself does not always provide a sufficient degree of trust in the criminal justice systems of other Member States. In other words, we needed something more **specific** than a general right.

Why was it necessary?

- Part of the EU's [2009 Roadmap](#) on Strengthening Procedural Rights of Suspected and Accused Persons in Criminal Proceedings. This Directive falls under the step-by-step approach mentioned in the Roadmap and specifically [Measure C](#).
- [2009 Roadmap](#): *"Mutual recognition presupposes that the competent authorities of the Member States trust the criminal justice systems of the other Member States. For the purpose of enhancing mutual trust within the European Union, it is important that, complementary to the Convention, there exist European Union standards for the protection of procedural rights which are properly implemented and applied in the Member States."*
- Recital (31) of the Directive: The objective of this Directive cannot be sufficiently achieved by Member States but can, by reason of its scale and effects, be **better achieved at Union level**.
- EAW Proceedings notoriously short. They are based on the notion of trust between Member States and there is little scope for disputing whether a requested person will receive a fair trial in the issuing state. Therefore, Member States can be **sure**, with Directives such as these, that the fundamentals of a fair trial are **guaranteed** throughout the EU.

General Notes on the Directive

- Applies to criminal & EAW proceedings only. Three types of persons therefore: suspects, accused persons and requested persons in EAW proceedings.
- **Not absolute:** Does not apply where one has waived his right to legal representation or in some minor offences (more to follow on that).
- Legal aid can be determined by a means test, a merits test, or both.
- The Directive sets out **minimum rules**. Member States free to extend rights but may never allow such rights to fall **below** the standards set by this Directive, the Charter or the ECHR.
- Staff involved in decision-making whether to grant legal aid, must be adequately trained. That includes judges.
- The right applies to **all** persons, irrespective of their legal status, citizenship or nationality.

Article 1: Subject Matter

This Directive lays down common minimum rules concerning the right to legal aid for:

- (a) Suspects and accused persons in criminal proceedings; and
- (b) Persons who are the subject of EAW proceedings.

Criminal Proceedings (under ECHR case-law):

See *Engel a.o. v. The Netherlands, paras 82-83* for the concept of “criminal charge”. Defined as having an autonomous meaning, independent of the classifications of the national systems. The criteria outlined in the *Engel* case:

- *The classification under National law;*
- *Nature of the offence;*
- *Severity of the penalty the person risks incurring.*

See also *Beuze v. Belgium [GC] para 113* for the moment protection under Art. 6 of the ECHR is “activated” – once a person is made aware, by a competent authority, that he is suspected or accused of having committed a criminal offence, or from the point at which his situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him.

Article 2: Scope

Article 2 sets the scope of the Directive regarding suspects and accused persons in criminal proceedings. It states that it applies to those aforementioned persons (and of course requested persons in EAW proceedings) who have the right of access to a lawyer, pursuant to Directive 2013/48/EU and who are:

- Deprived of liberty;
- Required to be assisted by a lawyer in accordance with Union or national law; or
- Required or permitted to attend an investigative or evidence-gathering act, such as identity parades, confrontations and reconstructions.

Note: The Directive also applies, under the above conditions, to persons who were not initially suspects or accused persons but **become suspects** or accused persons *in the course of questioning*.

- Recital (10): *"Where, in the course of such questioning, a person other than a suspect or an accused person becomes a suspect or an accused person, questioning should be suspended immediately. However, it should be possible to continue questioning where ... That person is able to fully exercise the rights provided for in this Directive"*.

Article 2: Scope (continued)

The right is not an absolute one

Article 2(4) states that in respect of minor offences and without prejudice to the right to a fair trial:

- (a) Where the law of a Member State provides for the imposition of a sanction by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed or referred to such a court; or
- (b) Where deprivation of liberty cannot be imposed as a sanction;

This Directive applies only to proceedings before a court having jurisdiction in criminal matters.

In any event, the Directive applies when a decision on detention is taken, and during detention, at any stage of the proceedings until the conclusion of the proceedings.

Directive's explanation for this:

Recital (11) – (14):

It would be unreasonable to require the competent authorities to ensure all rights under this Directive, where for example, minor traffic offences are dealt with out of court. Therefore, where the law of a MS provides for the imposition of a sanction by a competent authority and there is a possibility for the case to be referred to a court having jurisdiction in criminal matters, this Directive will only apply to those proceedings before the court.

In some MS, traffic offences, municipal regulations and minor public order offences are considered criminal offences. It would be unreasonable therefore to expect competent authorities to apply this Directive to such cases.

This, however, does not affect the obligations of MS under the ECHR to ensure the right to a fair trial, including obtaining the assistance of a lawyer.

Article 3: Definition

"For the purposes of this Directive, 'legal aid' means funding by a Member State of the assistance of a lawyer, enabling the exercise of the right of access to a lawyer"

See also, Recital (8): *"Legal aid should cover the costs of the defence of suspects, accused persons and requested persons. When granting legal aid, the competent authorities of the Member States should be able to require that suspects, accused persons or requested persons bear part of those costs themselves, depending on their financial resources"*.

Consider what the "costs of the defence" means. Expert witness costs & costs of any forensic examinations, for example?

Article 4: Legal aid in criminal proceedings

Member States must ensure that those who lack sufficient resources, have the right to legal aid when the interests of justice so require.

Member States may apply a **means test**, a **merits test** or **both** to determine whether legal aid should be granted.

Means test – Art. 4(3): taking into account all relevant and objective factors such as the income, capital and family situation of the person concerned, as well as the costs of the assistance of a lawyer and the standard of living in that MS, in order to determine whether the person concerned lacks sufficient resources to pay for the assistance of a lawyer.

Merits test – Art. 4(4): taking into account the seriousness of the criminal offence, the complexity of the case and the severity of the sanction at stake, in order to determine whether the interests of justice require legal aid to be granted. In any event, the merits test shall be deemed to have been met in the following situations:

- (a) Where a suspect or an accused person is brought before a competent court or judge in order to decide on detention at any stage within the scope of this Directive; and
- (b) During detention.

Article 4(5) requires MS to ensure that legal aid is granted without undue delay, and at the least **before questioning** or **before** the evidence-gathering acts previously referred to in Article 2(1).

Croissant v. Germany

Facts: The applicant had been represented by three court-appointed lawyers during the whole trial and had been convicted and sentenced to 2 ½ years' imprisonment. He was also ordered to pay costs and expenses, including the fees of the three lawyers. The applicant complained that the order to pay the costs of the three court-appointed lawyers was incompatible to Art. 6(3)(c) ECHR, arguing that once free legal assistance had been granted, no payment could subsequently be demanded.

Findings:

The ECtHR found no violation of Art. 6(3)(c). The lawyers had been appointed in the interests of justice (merits test) and not as a result of an assessment of the financial situation of the accused (means test), in which case the requirement to pay the costs would have been incompatible with Article 6. In addition, the costs of their legal representation was not excessive and German law provided for the possibility to cover said costs, partially or in greater part, **if the applicant demonstrated a lack of sufficient means to cover them.**

Other ECHR judgements of note:

- **Pakelli v. Germany:** Proof of lack of resources on the applicant's part does not have to be "beyond all doubt". It is sufficient that there are some indications, or, a "*lack of clear indications to the contrary*" – para. 34
- **Quaranta v. Switzerland:** A further criterion of the merits test, is the complexity of the case and the personal circumstances of the accused. In this case, the ECtHR held that the applicant's personal situation, foreign origin, underprivileged background and long criminal record meant that the fact that the case was not a complexed one, **was not decisive**.
- **Meftah v. France:** The Court rejected the argument that the guarantees of Art. 6(3)(c) ECHR ceased to apply after the first instance proceedings or the stage at which, in domestic terms, the applicant is regarded as "convicted". Appeal, leave to appeal and continental cassation proceedings on conviction and/or sentence concern the determination of a criminal charge and the guarantees of Art.6 continue to apply.
- **Pham Hoang v. France:** Applicant was fined several million francs. He was refused legal aid counsel for cassation appeal. The Court held that the interests of justice (merits test) required legal representation having regard to the serious consequences at stake, the complexity of issues and his inability to present and develop the appropriate arguments.

Article 5: Legal aid in EAW proceedings

Article 5(1) requires that MS shall ensure that requested persons have a right to legal aid upon arrest, pursuant to a EAW until they are surrendered or until the decision not to surrender them becomes final.

Article 5(2) requires that the issuing MS shall ensure that requested persons who are the subject of EAW proceedings have a right to legal aid in the issuing MS for the purpose of such proceedings in the executing MS, so long as:

- The EAW is for the purpose of conducting a criminal prosecution;
- The requested person exercises his right to appoint a lawyer in the issuing MS to assist the lawyer in the executing MS;
- Legal aid is necessary to ensure effective access to justice.

Article 5(3) states that the abovementioned rights may be subject to a means test.

Article 6: Decisions regarding the granting of legal aid

1. Decisions on whether or not to grant legal aid and on the assignment of lawyers shall be made, **without undue delay**, by a competent authority. Member States shall take appropriate measures to ensure that the competent authority takes its decisions diligently, **respecting the rights of the defence**.
2. Member States shall take necessary measures to ensure that suspects, accused persons and requested persons are informed in writing if their request for legal aid is refused in full or in part.

Without undue delay and respecting the rights of the defence. Consider, for example, an accused person who is brought before a Court and who applies for legal aid. The judge informs him that a report will have to be compiled by the Social Welfare Authorities into his financial background and that will take around a month. Upon that, he asks the defendant to enter a plea immediately and before he has had his application determined.

Recital (19): *"The competent authorities should grant legal aid without undue delay and at the latest before questioning of the person concerned by the police, by another law-enforcement authority or by a judicial authority ... If the competent authorities are not able to do so, they should at least grant emergency or provisional legal aid before such questioning or before such investigative or evidence-gathering acts are carried out."*

Article 7: Quality of legal aid services and training

This is perhaps, the most important article in the Directive. It obliges MS to take necessary measures, including with regard to funding, to ensure that:

- (a) There is an effective legal aid system that is of an adequate quality; and
- (b) Legal aid services are of a quality adequate to safeguard the fairness of proceedings with due respect for the independence of the legal profession.

It also obliges MS to ensure that adequate training is provided to staff involved in the decision making on legal aid. That includes any Social Welfare staff, who usually compile reports on the financial resources of an applicant. Furthermore, Article 7(3) requires that legal aid lawyers are themselves adequately trained, to ensure the fairness of proceedings.

Article 7(4) requires that MS take all necessary measures to ensure that suspects, accused persons and requested persons have the right to have their legal aid lawyer replaced, where the specific circumstances so require.

Quality of legal aid services

- This is ensured in the Directive, both as an obligation on Member States to ensure the quality of legal aid services by way of Article 7(1) and also by way of ensuring that lawyers who provide legal aid services are continuously trained.
- Could it also be ensured by setting minimum pay thresholds? A universal problem with legal aid services, is the low income it provides to lawyers. There are cases where a complexed fraud case, requiring many hours of studying, could bring in a fee of around 100 euros for a lawyer. Therefore, there are likely to be scenarios where a suspect or accused person has not been able to appoint the lawyer of his choosing (a right protected under Article 6(3) ECHR), due to the above considerations.
- Perhaps, the above, could be the basis of an argument before the CJEU or the ECtHR.

ECHR Judgements on the Quality of Legal Aid Services

- **Daud v. Portugal:** The appointment of a legal aid lawyer does not exhaust the obligations of the State. Legal assistance provided must be practical and effective and if the authorities are put on notice that a legal aid lawyer is unable to fulfill his duties, they are under an obligation to replace him (See also case of Artico v. Italy). Once they are, or should be, aware of a problem, the domestic courts cannot remain passive.
- **Bogumil v. Portugal:** Failure of a legal aid lawyer appointed shortly before the trial to request an adjournment to prepare does not relieve the court of its responsibility to ensure an adequate defence. It follows that it ought to adjourn of its own accord.
- **Czekalla v. Portugal:** The failure of a legal aid lawyer to complete the grounds of appeal with the necessary formal conclusions, which led to the rejection of the appeal, was found to deprive the applicant, who was a foreigner an ignorant of the language, of a practical and effective defence.
- **Lagerblom v. Sweden:** No right to choose who is appointed as legal aid counsel. Whilst domestic courts must have regard to the applicant's wishes, these can be overridden where there are relevant and sufficient grounds for holding this necessary in the interests of justice.

Articles 8 & 9

Article 8

Member States shall ensure that suspects, accused persons and requested persons have an effective remedy under national law in the event of a breach of their rights under this Directive.

Article 9

Member States shall ensure that the particular needs of vulnerable suspects, accused persons and requested persons are taken into account in the implementation of this Directive.

See also: Recital (18) – Member States should lay down practical arrangements regarding the provision of legal aid. Such arrangements could determine that legal aid is granted following a request by a suspect, an accused person or a requested person. Given in particular the needs of vulnerable persons, **such a request should not, however, be a substantive condition for granting legal aid.**

Article 11 – Non-regression

Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the Charter, the ECHR, or other relevant provisions of international law or the law of any Member State which provides a higher level of protection.

Directly Effective

Given that, by way of Article 12, Member States had until the 25th of May 2019 to implement this Directive into national law, the Directive now has **direct effect** (vertically) in Member States.

- See well-known case of [Van Duyn v. Home Office](#).

Closing Remarks

- Directive aims at regulating a right which has always existed, namely, by establishing minimum common rules throughout the EU.
- The right to legal aid is a huge part of the procedural fairness notions dealt with by all 2009 Roadmap Directives. The right to legal representation in criminal proceedings cannot hinge on the financial resources of each suspect or accused person. Therefore legal aid is a crucial part of ensuring equality between all those brought before the law.
- It can improve! Practically, there are still huge difficulties with legal aid services. Unfortunately, there is a general theory/mindset that legal aid services are of a lesser quality to the legal services offered by other legal practitioners. This is, of course, partly true. Hence why the Directive itself seeks to ensure that lawyers who provide legal aid services receive constant training.
- Remedies to this problem?

Thank you for your attention!

Questions, discussion & debate welcome in the message
board!