



Training of lawyers on various areas of EU Law (TRAVAR)

María Barbancho Saborit

**The right to access a lawyer in criminal and
European Arrest Warrant proceedings**

Madrid, 3-4 December 2024



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RIGHT OF ACCESS TO A LAWYER, TO CONTACT WITH THIRD PARTIES AND CONSULAR AUTHORITIES IN THE EVENT OF CUSTODY – *where do we come from?*

The Council (Justice and Home Affairs) adopted, in 2009, the **Roadmap for strengthening procedural rights** of suspected or accused persons in criminal proceedings. The Roadmap pursued the following aims:

- **Strengthen mutual trust** between the judicial authorities in the Member States of the European Union (EU), by setting **minimum rules/common standards on procedural rights across the EU**.

The Roadmap calls on the Commission to submit proposals for legislative measures on various procedural rights subsequent to its adoption. **By 25 October 2016, five measures had been adopted:**

- **Directive 2010/64/EU** on the right to interpretation and translation,
- **Directive 2012/13/EU** on the right to information,
- **Directive 2013/48/EU** on the right of access to a lawyer,
- **Directive (EU) 2016/343** on the presumption of innocence, and
- **Directive (EU) 2016/800** on procedural safeguards for suspected or accused children.

i. RIGHT TO ACCESS TO A LAWYER: CORNESTONE OF A FAIR TRIAL – ECTHR CASE LAW

In ECtHR's case law the right to counsel is an essential feature of a fair trial. **Article 6 (3) c of the ECHR states that everyone charged with a criminal offence has the right 'to defend himself in person or through legal assistance of his own choosing or**, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

Ground-breaking judgement: Salduz case (november 2008)

The Strasbourg Court ruled that *"in order for the right to a fair trial to remain sufficiently practical and effective, Art. 6(1) [of the European Convention on Human Rights (ECHR)] 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."* According to the ECtHR, *"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 Art. 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."*

ii. RIGHT TO ACCESS TO A LAWYER: CORNESTONE OF A FAIR TRIAL – ECTHR CASE LAW

Several Member States already started adapting their legislation before the entry into force of the Directive. The Directive takes into account this jurisprudence in a number of provisions

- ❖ Ibrahim and Others v. the United Kingdom [GC], 2016 - restriction on access to a lawyer in the context of fight against terrorism;
- ❖ Simeonovi v. Bulgaria [GC], 2017 - Ibrahim and Others principles in the context of an ordinary crime (armed robbery and murder);
- ❖ Beuze v. Belgium [GC], 2018 - general and mandatory (statutory) restriction on access to a lawyer during the first police interview and impossibility for the suspect to be assisted by a lawyer during the questioning in subsequent pre-trial proceedings;
- ❖ Artur Parkhomenko v. Ukraine, 2017, §§ 83-91 - detailed assessment of the overall fairness of the proceedings where no compelling reasons for the restriction existed;
- ❖ Dimitar Mitev v. Bulgaria, 2018 - restriction on access to a lawyer during police questioning;
- ❖ Dubois v. France, 2022 - restriction on access to a lawyer during the first questioning of a person not deprived of liberty.

Directive 2013/48/EU – right of access to a lawyer, to contact with third parties and consular authorities in the event of custody

It aims to ensure that suspects and accused persons in criminal proceedings and requested persons in European arrest warrant proceedings (hereafter 'citizens') have access to a lawyer and have the right to communicate while deprived of their liberty.

The Directive lays down the following rights:

1. The right of access to a lawyer (Articles 3, 4, 8, 9 and 10);
2. the right to have a third person informed of the deprivation of liberty (Articles 5, 8 and 10(3));
3. the right to communicate, while deprived of liberty, with third persons (Article 6 and 10(3));
4. the right to communicate with consular authorities (Article 7 and 10(3)).

KEY POINTS:

Citizens must have access to a lawyer without undue delay:

- before they are questioned by a law enforcement (e.g. the police) or judicial authority; during an investigative or other evidence-gathering act (e.g. confrontation);
- from the moment of deprivation of liberty;
- in due time before they appear before a criminal court.

More specifically, the law covers:

- the right to meet in private and to communicate with a lawyer;
- the right for the lawyer to participate effectively when the person is questioned, and to attend the investigative and evidence-gathering acts;
- the confidentiality of all forms of communication (meetings, correspondence, telephone conversations, etc.).

As regards persons subject to a European arrest warrant, **the directive lays down the right of access to a lawyer in the executing EU country and to appoint a lawyer in the issuing country.**

b.-) Rights in the event of deprivation of liberty

Citizens deprived of liberty have the right, without undue delay:

- to have at least 1 person of their choice informed of their deprivation of liberty. If the arrested person is a child, the holder of parental responsibility should be informed as soon as possible;
- to communicate with at least 1 person of their choice.

If they are deprived of liberty in an EU country other than their own, they have the right to inform their consular authorities, to be visited by them, to communicate with them and to have legal representation arranged for by them.

c.-) Exceptions

The directive allows for the possibility to derogate temporarily from certain rights in exceptional circumstances and under strictly defined conditions (for example, where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person).

d.-) Legal aid

Directive (EU) 2016/1919 sets out common minimum rules concerning the right to legal aid for suspects, accused persons and requested persons ensuring the effectiveness of Directive (EU) 2013/48. It requires EU countries to ensure that suspects and accused persons who lack sufficient resources to pay for the assistance of a lawyer have the right to legal aid when the interests of justice so require. EU countries may apply a means test (to assess if the person lacks sufficient resources to pay for legal assistance), a merits test (to assess whether providing legal aid would be in the interest of justice), or both to determine whether legal aid is to be granted.

Directive (EU) 2016/1919 is the last legal text planned as part the roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings adopted by the Council in November 2009.

This directive has to become law in the EU countries by 5 May 2019.

FROM WHEN DOES THE DIRECTIVE APPLY?

It has applied since 26 November 2013 and had to become law in the EU countries by 27 November 2016.

MAIN DOCUMENT

- Directive [2013/48/EU](#) of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ L 294, 6.11.2013, pp. 1-12)

RELATED DOCUMENTS

- Directive (EU) [2016/1919](#) of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (OJ L 297, 4.11.2016, pp. 1-8)
- Successive amendments to Directive (EU) 2016/1919 have been incorporated into the original document. This [consolidated version](#) is of documentary value only.
- [Commission Recommendation](#) of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings (OJ C 378, 24.12.2013, pp. 8-10)
- [Commission Recommendation](#) of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings (OJ C 378, 24.12.2013, pp. 11-14)
- Directive [2012/13/EU](#) of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ L 142, 1.6.2012, pp. 1-10)
- Directive [2010/64/EU](#) of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ L 280, 26.10.2010, pp. 1-7).
- [Resolution](#) of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (OJ C 295, 4.12.2009, pp. 1-3)

CASE(C-15/24 PPU, STACHEY)

On **14 May 2024**, the Court of Justice of the European Union (ECJ) issued a ruling clarifying the interpretation and application of Directive 2013/48/EU, which deals with the right of access to a lawyer in criminal proceedings.

The case (C-15/24 PPU, Stachev) concerned a Bulgarian national, CH, who had been arrested and accused of committing violent robberies. Upon his arrest, CH signed a statement waiving his right to a lawyer, despite being illiterate and not fully informed about the consequences of this waiver. During subsequent police interrogations and investigative actions, CH did not have legal representation, which raised concerns about the fairness of the proceedings.

The Sofia District Court posed several questions to the ECJ on the compatibility of the waiver of the right of access to a lawyer with the Directive and the consequences of the waiver. The ECJ addressed these issues as follows:

Non-transposition of directive provisions: The ECJ ruled that national authorities cannot rely on Art. 3(6)(b) of the Directive 2013/48/EU, which allows for temporary derogation from the right to a lawyer in exceptional circumstances, if that provision has not been properly transposed into national law. In this case, the Bulgarian authorities could not invoke this derogation because it was not part of Bulgarian law.

- **Validity of the waiver:** The ECJ found that CH's waiver of his right to a lawyer was invalid. For a waiver to be valid under Art. 9(1) of Directive 2013/48, the suspect must be fully informed, in clear and understandable language, about the content of the legal right and the possible consequences of waiving it. Additionally, the waiver must be documented properly. In CH's case, these conditions had not been met, particularly because of his illiteracy and the lack of an adequate explanation of the consequences.
- **Requirement to re-inform:** The ECJ also held that if a vulnerable person, such as CH, waives their right to a lawyer, authorities must remind them of the possibility to revoke this waiver before each significant investigative act, particularly those that could have a substantial impact on the person's rights and interests.
- **Assessment of evidence:** The ECJ emphasised that national courts must have the ability to assess whether evidence obtained in violation of the right to a lawyer was used in the proceedings. Specifically, when a court is deciding on the appropriateness of a pre-trial detention measure, it must consider whether any evidence was obtained in breach of Directive 2013/48/EU. If such evidence was obtained, the court must ensure that the fairness of the proceedings is not compromised. The ECJ ruled that national case law preventing courts from excluding evidence obtained in violation of the Directive is incompatible with EU law.

In conclusion, the ECJ underscored the importance of ensuring that suspects' rights are fully protected, particularly in cases involving vulnerable individuals, and that any procedural breaches are appropriately addressed in order to maintain the fairness of criminal proceedings

ARE NATIONAL LEGISLATIONS COMPLAINT WITH THE DIRECTIVE?

**GAME
OVER**

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**PROVIDENCIA DEL MAGISTRADO-JUEZ
D. SANTIAGO J. PEDRAZ GÓMEZ**

En Madrid, a 27 de enero de 2023.

Dada cuenta de haberse recibido escrito de fecha 26.01.2023, N^o R^o 3574/2023 (acontecimiento número 62), presentado por la Letrada, D^a. María Barbancho Saborit, solicitando se la tenga por personada en defensa de [REDACTED] y se le de traslado del expediente judicial suspendiéndose cualquier plazo pendiente actualmente; únase a la Orden Europea de Investigación 2/2023 de su razón para su constancia, **no ha lugar a lo solicitado toda vez que no cabe personación en OEI al no estar previsto legalmente, sin perjuicio de que pueda personarse ante las Autoridades Requirientes Francesas (Parquet du Tribunal Judiciaire de París. Expediente n^o: [REDACTED] 3).**

COMMISSION IMPLEMENTATION REPORT ON ACCESS TO LAWYER DIRECTIVE

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0560>

Conclusions:

The extent of the Directive's impact on Member States varies according to the national criminal justice systems in place. This implementation report highlights that there are still difficulties regarding key provisions of the Directive in a number of Member States. This is particularly the case as regards:

1. the scope of the rights provided for by the Directive;
2. the extent of possible derogations, in particular from the right of access to a lawyer;
3. the waiver of the right of access to a lawyer; and
4. the right of access to a lawyer in the issuing Member State of a European arrest warrant.



Training of lawyers on various areas of EU Law (TRAVAR)

Salvador Guerrero Palomares

**Presumption of innocence and right to be present at
trial**

Madrid, 3-4 December 2024



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POI: LEGAL FRAMEWORK

Art. 6.2 ECHR.

Art. 14.2 ICCPR.

Art. 48 CFREU.

Directive 2016/343, 9th march.

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ORIGINS



Not initially in the route map covered by the Stockholm Programme.



Green book (2006) > despite its recognition there were many shortcomings > many judgments from ECtHR against ME.



2013 – first draft.



2016 – Directive (POI and RBPT).

GENERAL ISSUES

- Four (4) chapters – 16 articles – 51 recitals.
- Two rights: Presumption of Innocence and Right to Be Present at Trial.
- Key piece of legislation regarding POI.
 - First time that a piece of law set up elements or contents of the POI.
 - Codification of ECtHR case law.
 - Two dimensions:
 - Extra procedural.
 - Procedural.
- Clarification on the Right to Be Present at Trial (EAW issues)



SCOPE OF APPLICATION

Subjective: natural (no legal) persons (art. 2; recital 14).

Material: criminal (no administrative) proceedings (Engels criteria), at all stages (art. 2; recitals 11 to 15).

POI. CONCEPT (ART. 3)

- *Member States shall ensure that suspects and accused persons are presumed innocent until proved guilty according to law*

POI.
EXTRAPROCEDURAL
DIMENSION.
PUBLIC REFERENCE
TO GUILT (ART. 4.1
and 2).

- Statements of public authorities must not refer to the suspect or accused as guilty.
 - Not incompatible with the right of the society to be informed.
- Court decisions (other than those of guilt) must not refer the suspect or accused as guilty neither.
 - Not incompatible with acts of the prosecution or preliminary rulings.
- ME must establish measures in the event of non-compliance.

POI.
EXTRAPROCEDURAL
DIMENSION.
PRESENTATION OF
SUSPECTS AND
ACCUSED.
(ART. 5)

- The suspects and accused shouldn't be presented as being guilty, in court or in public, through the use of measure of physical restraint (cages, uniforms, handcuff).
 - Unless it is necessary.

PROCEDURAL DIMENSION

Burden of the proof on
the accusation.

- Presumptions of fact or law – not possible.

In dubio pro reo principle.

- Standard of proof – Beyond any reasonable doubt.

Right to remain silent and
not to incriminate oneself.

- Art. 7.5 – Murray doctrine
-

THE RIGHT TO BE PRESENT AT TRIAL (art. 8 AND 9)

Not absolute. Trials in absentia are possible.

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Conditions for trials in absentia (art. 8.3):

- The suspect or accused has been informed, in due time, of the trial and of the consequences of non appearance; OR,
- The suspect or accused, having informed of the trial, is represented by a mandated lawyer, appointed by him or by the State.

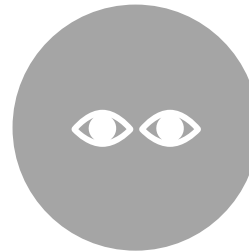
Even without these conditions is possible a trial in absentia if the suspect or accused cannot be located despite reasonable efforts (art. 8.4).

- In these cases, once apprehended, the convicted person must have right to a new trial or an effective remedy (**with fresh determination of the merits of the case**)

GENERAL AND FINAL PROVISIONS



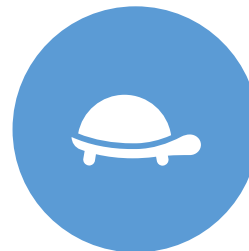
Effective remedy (art.
10.1).



Admissibility of evidence
(art. 10.2).



Non regression clause
(art. 13).



Deadline for
transposition (1th April
2018).



**THANK YOU FOR YOUR
ATTENTION**



Training of lawyers on various areas of EU Law (TRAVAR)

Carolina Macías Reyes

Legal aid and Directive (EU) 2016/1919

Madrid, 3-4 December 2024



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INTRODUCTION TO LEGAL AID AND DIRECTIVE (EU) 2016/1919

Definition

Legal aid ensures that individuals who cannot afford legal representation are provided with assistance to guarantee their right to a fair trial. This is fundamental in criminal justice systems to avoid inequalities.

Importance

Access to justice is a core principle of the EU's legal framework. Legal aid helps ensure that suspects and accused individuals, regardless of their financial situation, can mount an adequate defense.

INTRODUCTION TO LEGAL AID AND DIRECTIVE (EU) 2016/1919

Directive scope

- ➔ The Directive (EU) 2016/1919 aims to standardize access to legal aid across Member States, particularly for suspects and accused persons in criminal proceedings and for requested individuals in European Arrest Warrant (EAW) cases.
- ➔ It covers pre-trial stages, including police questioning, and sets the minimum procedural standards for legal aid.

KEY PROVISIONS OF THE DIRECTIVE

Eligibility criteria

• *Means Test:*

Member States may determine eligibility based on the applicant's financial situation (means test). If an individual lacks the financial means to afford a lawyer, they may qualify for aid.

• *Merits Test:*

Some Member States also apply a merits test, where they evaluate whether providing legal aid is necessary for the proper administration of justice.



Practical Example

KEY PROVISIONS OF THE DIRECTIVE

Timely access to Legal Aid

The Directive mandates that suspects must have access to legal aid promptly, especially before questioning or any procedural steps that may affect their rights.



Practical Example: A suspect is detained and interrogated within hours. Requirement for Member States to ensure a lawyer is present or available for consultation before the interrogation begins, with minimal delay.

:

KEY PROVISIONS OF THE DIRECTIVE

Minimum quality standards

Legal aid lawyers must provide competent and independent representation. This includes having adequate training and resources to ensure effective assistance.



Case study: Risks of inadequate representation (e.g., lack of preparedness or resources) and how the Directive addresses this by setting quality standards :

Lawyer's role beyond interrogation presence

A lawyer's role in supporting a suspect under Directive (EU) 2016/1919 extends far beyond simply being present at the interrogation. They provide essential legal guidance to ensure that the suspect's procedural rights are upheld at each stage, protecting the fairness and integrity of the criminal process.



The lawyer's role is important not only at the interrogation stage but throughout the entire criminal procedure. Directive (EU) 2016/1919 supports this by ensuring suspects are not only represented but are actively guided and protected, thus reinforcing procedural fairness and access to justice.

LAWYER'S ROLE BEYOND INTERROGATION PRESENCE

Legal guidance and advising the suspect

Educating the suspects on their rights:

Lawyers play a critical role in explaining the suspect's rights, such as the right to remain silent and the protection against self-incrimination. This initial consultation is vital, especially for individuals unfamiliar with legal proceedings or in high-stress situations, as it clarifies their options and the implications of any statements they make.

Evaluating the evidence and defense strategy:

Before or during the interrogation, a lawyer helps the suspect understand the strength of the evidence presented and advises on an initial defense strategy. They ensure that the suspect does not unintentionally admit guilt or provide statements that could be used against them without proper consideration.

LAWYER'S ROLE BEYOND INTERROGATION PRESENCE

Protecting against coercive interrogation tactics

➔ Ensuring a fair interrogation environment:

The lawyer monitors the police's conduct during interrogation to prevent any tactics that might pressure or mislead the suspect. This includes checking for prolonged questioning periods, inappropriate language, or suggestive questioning that could compromise the suspect's responses.

➔ Interrupting if rights are violated:

If procedural violations occur—such as aggressive questioning or failure to properly caution the suspect—the lawyer can intervene to ensure compliance with legal standards and halt the interrogation if necessary. This oversight function helps maintain procedural fairness.

LAWYER'S ROLE BEYOND INTERROGATION PRESENCE

Ensuring procedural rights beyond the interrogation room

Advocating for access to evidence and fair treatment:

Beyond the immediate interrogation, the lawyer ensures that the suspect has full access to evidence and any information necessary to prepare their defense. This includes requesting access to case files, forensic reports, and witness statements to construct a fair and informed defense.

Protecting against prolonged detention without charge:

The lawyer's role includes monitoring the suspect's detention conditions and duration, advocating for timely court appearances, or requesting bail where appropriate. This prevents excessive or arbitrary pre-trial detention and ensures that the suspect's rights are respected until trial.

LAWYER'S ROLE BEYOND INTERROGATION PRESENCE

Preparing the suspect for future court proceedings

Guidance on court procedures and testimonies:

Lawyers prepare the suspect for potential courtroom appearances, explaining the process, helping them understand the nature of charges, and coaching them on how to present themselves and respond to questioning.

Developing a comprehensive defense strategy:

The lawyer collaborates with the suspect to develop a defense plan, potentially including witness lists, evidence collection, and expert consultations. This preparation can significantly impact the trial's outcome, ensuring the suspect's rights to a fair and effective defense.

Practical Scenario 1 - Arrest and Interrogation

Situation: Suspect arrested and questioned by police.

Directive Requirement: Immediate access to legal aid.

Lawyer's Role: Advising the suspect, safeguarding rights.



Practical Scenario 2 - Legal Aid in EAW cases

Situation: Suspect detained under an EAW in another EU country.

Directive Requirement: Legal aid in both issuing and executing states.

Challenges: Language barriers, cross-border coordination.

Case outline:

Situation: *Marta*, a Spanish citizen, is arrested in Germany under a European Arrest Warrant (EAW) issued by Spain for alleged fraud charges.

As she is detained in a foreign Member State, *Marta* faces not only legal proceedings related to her potential surrender to Spanish authorities but also unfamiliarity with the language, legal processes, and her rights regarding legal aid.



LEGAL AID IN EUROPEAN ARREST WARRANT (EAW) CASES Directive (EU) 2016/1919 Obligations for Legal Aid in EAW Cases

Legal Aid obligation in the executing state (Germany)

➔ Immediate access to Legal Aid:

Germany, as the *executing state*, is obligated under the Directive to promptly inform Marta of her right to legal aid, especially as she does not have immediate access to resources or a lawyer in Germany. The German authorities must provide legal assistance to support Marta in navigating the extradition process and understanding her rights in the German legal system.

➔ Access to EAW-Related Defense:

The executing state must ensure Marta receives legal aid to specifically address the EAW procedures, including her right to challenge the warrant or request additional information on the charges she faces in Spain.

LEGAL AID IN EUROPEAN ARREST WARRANT (EAW) CASES

Directive (EU) 2016/1919 Obligations for Legal Aid in EAW Cases

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Access to a lawyer in Spain:

Spain, as the *issuing state*, is also required to provide legal representation to assist Marta with her defense in the home jurisdiction. This lawyer in Spain helps her understand the charges she faces and collaborates with the German legal aid lawyer to coordinate her defense and legal aid options across jurisdictions.



Information exchange:

The lawyer in Spain is responsible for informing Marta's defense team in Germany about any relevant information on the case or procedural aspects that could impact her surrender, her ability to challenge the warrant, or other options like voluntary return.

LEGAL AID IN EUROPEAN ARREST WARRANT (EAW) CASES

Directive (EU) 2016/1919 Obligations for Legal Aid in EAW Cases

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COORDINATION BETWEEN THE EXECUTING AND ISSUING STATES
Coordination and timely provision of legal aid

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Ensuring timely communication:

Both states must establish a clear communication channel to coordinate Marta's defense. German and Spanish authorities should promptly exchange documents, evidence, and procedural information to ensure her defense team in both states has comprehensive and current information.

Reducing delays:

The Directive emphasizes minimal delays in providing legal aid, meaning the legal aid lawyer in Germany must be assigned immediately, and coordination with Spanish counsel should occur as soon as Marta's arrest takes place. Prompt cross-border coordination prevents prolonged detention and supports Marta's right to a fair and efficient legal process.

LEGAL AID IN EUROPEAN ARREST WARRANT (EAW) CASES Directive (EU) 2016/1919 Obligations for Legal Aid in EAW Cases

COORDINATION BETWEEN THE EXECUTING AND ISSUING STATES Addressing Practical Challenges

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➔ Language barriers:

Language differences are a common challenge in EAW cases. To address this, both the executing and issuing states are obligated to provide Marta with legal documents and access to legal counsel in a language she understands. If Marta's German lawyer does not speak Spanish, translation services or legal interpreters must be made available to ensure clear communication between Marta and her legal representatives in both countries.

➔ Resource constraints:

Cross-border legal aid can strain resources, especially in cases involving complex charges or numerous procedural requirements. To mitigate this, Member States are encouraged to invest in dedicated cross-border legal aid programs or specialized EAW legal aid teams, providing these services in a way that aligns with the Directive's quality standards.

➔ Differences in Legal Aid standards:

EAW cases often reveal disparities between Member States' legal aid frameworks, such as varying eligibility criteria or quality standards. The Directive seeks to harmonize these disparities by establishing minimum standards for access and quality, ensuring that Marta's right to legal aid is respected regardless of local variations.

LEGAL AID IN EUROPEAN ARREST WARRANT (EAW) CASES Directive (EU) 2016/1919 Obligations for Legal Aid in EAW Cases

Outcome and impact of the Directive in EAW scenarios

Fair access to justice in cross-border cases:

The Directive's provisions help ensure that suspects like Marta have fair access to legal aid in both the executing and issuing states, supporting her defense and helping her understand her legal options.

Strengthened legal protection and rights awareness:

By requiring both states to provide legal aid, the Directive ensures that Marta is better informed about her rights under the EAW, from challenging her extradition to preparing a defense in Spain.

Enhanced cooperation across member states:

This scenario underscores the Directive's role in fostering better cooperation between Member States, with clear standards for legal aid that respect the rights of suspects and create more cohesive EAW proceedings across borders.

Legal Aid application process across Member States

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Procedural variations

While the Directive sets minimum standards, each Member State has its own specific processes for determining eligibility and granting legal aid.

These variations highlight the flexibility allowed under the Directive, which lets Member States tailor their legal aid frameworks to national needs while upholding minimum standards for accessibility and effectiveness.

CHALLENGES AND LIMITATIONS

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Common obstacles:

Challenges in providing effective legal aid include *funding limitations*, *access barriers in rural areas*, and *varying levels of legal aid lawyer training* across the EU.

CHALLENGES AND LIMITATIONS

1. Timeliness of legal aid provision

Weekend and after-hours challenges:

Legal aid systems frequently struggle to provide timely assistance outside of regular business hours, such as during weekends, holidays, or at night. This can delay a suspect's access to counsel, impacting their immediate understanding of their rights, options for self-protection, and response to interrogation.

Impact on quality of representation:

Without prompt access to a lawyer, suspects may face questioning without adequate guidance, potentially leading to self-incrimination or missed opportunities to challenge procedural errors. Delayed legal aid services often compromise the suspect's initial defense and weaken their case.

CHALLENGES AND LIMITATIONS

2. Remote and rural areas

Limited availability of lawyers:

In remote areas, there may be few lawyers available, especially those who specialize in criminal defense. Even when lawyers are available, they may need to travel long distances, delaying their arrival and legal assistance.

Resource constraints:

Rural legal aid offices often operate with limited resources, including fewer staff, limited training opportunities, and reliance on general practitioners rather than specialists in criminal law. These limitations can reduce the quality and consistency of representation provided to suspects in these areas.

CHALLENGES AND LIMITATIONS

3. Practical effects on representation quality

Reduced preparedness:

A lawyer arriving late or with limited resources may have insufficient time to review case details, resulting in less effective initial defense strategies and inadequate advice to the suspect.

Increased risk of rights violations:

Delayed representation increases the risk that suspects' procedural rights, like the right to remain silent or to avoid self-incrimination, are not fully explained or protected, leading to compromised legal outcomes.

CHALLENGES AND LIMITATIONS

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Key takeaway

The Directive underscores the importance of timely legal aid, but practical challenges like after-hours availability and rural resource shortages continue to affect the quality of representation.

Addressing these issues is essential to ensure fair and effective defense, emphasizing that equal access to legal aid requires both policy and practical solutions.



CHALLENGES AND LIMITATIONS

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Judicial cooperation issues:

In EAW cases, language barriers, differences in legal systems, and procedural hurdles can complicate cooperation between Member States.

CHALLENGES AND LIMITATIONS

1. Challenges in cross-border legal aid cases

Language barriers:

In cross-border cases, suspects may not speak the language of the Member State where they are detained or prosecuted. This can lead to significant misunderstandings of legal rights, processes, and the implications of any statements made during interrogations.

Complex legal terminology:

Legal jargon can complicate matters further, as the nuances of legal terms may not have direct translations, leading to misinterpretations that can severely affect the outcome of the case.

CHALLENGES AND LIMITATIONS

2. Role of language interpretation services

Access to legal representation:

To ensure effective legal representation, it is crucial to provide professional interpretation services at all stages of the legal process, from initial police questioning through court proceedings. This allows suspects to communicate effectively with their lawyers and understand the legal proceedings against them.

Quality of communication:

Quality interpretation services can bridge the gap between lawyers and clients, ensuring that clients fully grasp their legal options and the consequences of their decisions. Effective communication fosters a more trusting lawyer-client relationship, which is essential for building a strong defense.

CHALLENGES AND LIMITATIONS

3. Coordinated communication between Member States

Ensuring timely information exchange:

In cross-border cases, it is vital for issuing and executing states to communicate efficiently regarding the suspect's rights, legal representation, and interpretation needs. Poor coordination can result in delays, which may infringe on the suspect's rights and affect their defense.

Unified standards:

The Directive encourages Member States to establish unified standards for the provision of language interpretation services. This includes ensuring that qualified interpreters are available who understand both the legal terminology and cultural context necessary for accurate communication.

CHALLENGES AND LIMITATIONS

4. Practical solutions and implementation

Cross-Border Legal Networks:

Establishing networks of legal professionals across Member States can facilitate quicker access to language interpretation services, allowing for seamless communication and representation.

Use of technology:

Utilizing technology, such as video conferencing and remote interpretation services, can help bridge geographical divides, making it easier to provide necessary legal support without unnecessary delays.

CHALLENGES AND LIMITATIONS

Training of Lawyers on
various areas of European
Union Law

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Key takeaway

Language interpretation services and coordinated communication are essential components of effective legal aid in cross-border cases. By ensuring that suspects understand their rights and the legal processes they face, these services uphold the principles of fairness and justice, as mandated by Directive (EU) 2016/1919. Addressing language barriers is crucial for maintaining the integrity of the legal aid system and protecting the rights of individuals in an increasingly interconnected legal landscape.



Role of lawyers in ensuring compliance with the Directive

Training of Lawyers on
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Lawyers' responsibilities:

Lawyers must ensure suspects are aware of their rights and assist them in understanding and asserting these rights throughout the process.

Role of lawyers in ensuring compliance with the Directive

1. Context of Police interrogation

High-pressure situations:

During police interrogations, suspects often find themselves in high-pressure situations where they may feel compelled to respond to aggressive questioning or manipulation. This environment can lead to violations of their rights, including the right to remain silent or to not self-incriminate.

Potential for coercion:

Without legal representation, suspects may be more vulnerable to coercion or intimidation by law enforcement, which can result in false confessions or unreliable testimony.

Role of lawyers in ensuring compliance with the Directive

2. Role of the lawyer during interrogations

Immediate legal advice:

The presence of a lawyer ensures that suspects receive immediate legal advice on how to respond to questioning. This guidance helps them understand their rights, including the right to remain silent and the implications of their statements.

Monitoring compliance with rights:

A lawyer acts as a watchdog during the interrogation process, ensuring that police conduct complies with legal standards and that the suspect's rights are respected. They can intervene if they observe any form of pressure or coercion being applied by law enforcement officials.

Role of lawyers in ensuring compliance with the Directive

3. Interventions in cases of rights violations

Stopping improper tactics:

If a lawyer witnesses any improper tactics or violations of rights, such as threats or aggressive questioning techniques, they can intervene immediately to halt the interrogation. This intervention is crucial in protecting the suspect's legal rights and ensuring that any statements made during the interrogation are not obtained through coercion.

Documenting violations:

Lawyers can document any instances of rights violations, which can later serve as critical evidence in court. This documentation can help establish a defense against potentially coercively obtained confessions or statements.

Role of lawyers in ensuring compliance with the Directive

4. Legal framework and Directive compliance

Directive requirements:

Directive (EU) 2016/1919 mandates the right to legal assistance for suspects at all stages of the criminal process, including during police interrogations. The lawyer's presence not only aligns with this directive but reinforces the overarching principles of fair trial rights and due process.

Promoting fairness in legal proceedings:

By ensuring that suspects have access to legal representation during police questioning, the legal system upholds fairness and integrity, thereby contributing to the overall credibility of criminal proceedings.

Role of lawyers in ensuring compliance with the Directive

Key takeaway

The presence of a lawyer during police interrogations serves as a critical safeguard against police pressure, providing vital legal advice and intervening when rights are at risk of violation.

This protective role not only helps to uphold the suspect's legal rights but also ensures the integrity of the legal process, as established by Directive (EU) 2016/1919. By reinforcing the principles of justice and due process, lawyers play an indispensable role in the protection of individuals facing criminal charges.



Role of lawyers in ensuring compliance with the Directive

Training of Lawyers on
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Quality assurance:

Lawyers can advocate for resources, training, and protocols to guarantee the quality of legal aid services, ensuring they align with the Directive's standards.

Role of lawyers in ensuring compliance with the Directive

1. Importance of specialized training

Understanding EU standards:

Given the complexities of the legal framework established by Directive (EU) 2016/1919, it is essential for legal aid providers to receive specialized training to fully comprehend and implement the standards for legal aid across Member States.

Navigating cross-border cases:

Legal aid providers must be equipped to handle the unique challenges posed by cross-border legal issues, such as language barriers, jurisdictional differences, and the interplay between different national legal systems.

Role of lawyers in ensuring compliance with the Directive

2. Recommended training components

EU legal framework overview:

Training should begin with a comprehensive overview of the EU legal framework regarding legal aid, focusing on the principles outlined in Directive (EU) 2016/1919. This will help legal aid providers understand their obligations and the rights of suspects in various Member States.

Cross-border legal aid procedures:

Legal aid providers should be trained in the specific procedures for granting legal aid in cross-border cases, including the necessary steps for coordination between issuing and executing states.

Cultural competence and language skills:

Incorporating elements of cultural competence and basic language training can enhance legal aid providers' ability to communicate effectively with clients from diverse backgrounds and facilitate smoother interactions in cross-border cases.

Role of lawyers in ensuring compliance with the Directive

3. Enhancing collaboration and coordination

Networking and partnerships:

Training should emphasize the importance of establishing networks and partnerships with legal professionals across Member States. This can foster collaboration and resource sharing, which is essential in handling complex cases that span multiple jurisdictions.

Practical simulations and workshops:

Engaging legal aid providers in practical simulations and workshops that mimic real-life cross-border scenarios can enhance their problem-solving skills and prepare them for the challenges they may face in practice.

Role of lawyers in ensuring compliance with the Directive

4. Continuous professional development

Ongoing training opportunities:

Legal aid providers should be encouraged to participate in ongoing professional development opportunities to stay updated on changes in EU law and best practices in providing legal aid. This could include webinars, conferences, and workshops focused on recent developments in cross-border legal aid.

Feedback mechanisms:

Establishing feedback mechanisms that allow legal aid providers to share their experiences and challenges in applying the Directive can help refine training programs and address emerging needs in the field.

Role of lawyers in ensuring compliance with the Directive

Key takeaway



Specialized training for legal aid providers on EU standards and cross-border legal aid is essential for effectively meeting the requirements of Directive (EU) 2016/1919.

By equipping legal aid providers with the knowledge and skills necessary to navigate the complexities of cross-border cases, we can ensure that suspects receive the quality legal representation and support they deserve, thereby upholding the principles of justice and fairness across Member States.

IMPLEMENTATION OF THE LEGAL AID DIRECTIVE: THE SPANISH CASE

Directive 2016/1919 was to be transposed into national law by 5 May 2019. Spain did so by means of **Law 3/2018 of 11 June 2018**, which implemented Directive 2014/41/EU regarding the European Investigation Order in criminal matters (EIO).

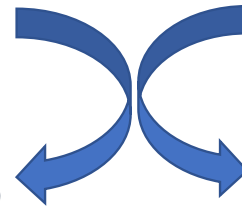
The subject matter of free legal aid is so closely linked to the right of access to a lawyer that the scope of Directive 2016/1919 cannot be separated from the scope of Directive 2013/48.

(Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty).

IMPLEMENTATION OF THE LEGAL AID DIRECTIVE: THE SPANISH CASE

The Spanish legislator implemented the Directive within the framework of two premises:

The right to free legal aid is closely linked to the fundamental right to defence through its relation to the right of access to a lawyer.



The State is committed to assuming the costs and to establishing a payment system.

IMPLEMENTATION OF THE LEGAL AID DIRECTIVE: THE SPANISH CASE

The Spanish Law of Free Legal Aid (hereinafter LAJG) met almost all the requirements of the Union legislation and only needed to be amended in three respects:

1. To include special consideration of the specific needs of persons in vulnerable situations.
2. To extend the right to legal aid and representation to defendants accused of minor offences in criminal proceedings (where legal assistance is not mandatory), if the defendant requests for legal assistance or if the court requires legal assistance in order to guarantee equality in the proceedings.
3. To recognize the right of the applicant of legal aid to request the replacement of the designated lawyer.

IMPLEMENTATION OF THE LEGAL AID DIRECTIVE: THE SPANISH CASE

Right to free legal defence and representation in criminal proceedings for minor offences

In this situation, Spanish Provincial Courts had considered that, if an entitled person exercises the right to legal assistance requesting a counsel, then the right to legal assistance deploys all its effects even in cases where domestic legislation provides that assistance of a lawyer is not mandatory.

The amended law establishes that the right to legal aid includes free defense and representation by a lawyer and a procedural representative in judicial proceedings, when the intervention of these professionals is legally required or when their intervention is expressly required by the court or tribunal by means of a reasoned order to guarantee the equality of the parties in the proceedings

IMPLEMENTATION OF THE LEGAL AID DIRECTIVE: THE SPANISH CASE

Right of the person receiving free legal aid to request the replacement of a designated counsel

The LAJG incorporates the right to request the replacement of a designated counsel into the new Art. 21 *bis*, as a measure linked to the quality of the assistance provided.

This amendment raises the level of protection, since this right had not previously been contemplated. Spanish law also enables to request substitution by another *ex officio* lawyer or to appoint a lawyer of the defendant's own choice, although this one is not an unlimited right.

The right of defence entitles the defendant to change his/her lawyer if he/she has lost confidence in the person originally appointed (or wishes to appoint a lawyer of his/her own choice).

IMPLEMENTATION OF THE LEGAL AID DIRECTIVE: THE SPANISH CASE

Legal persons' right to legal aid in the Spanish criminal justice system

Criminal liability of legal persons is known in Spain since 2010.

Spanish legislation only provides for legal aid to legal persons in so far as they pursue purposes of social or public interest and who lack sufficient resources for litigation.

Furthermore, Associations aiming at the promotion and defence of the rights of victims of terrorism and associations aiming at the promotion and defence of the rights of persons with disabilities are also entitled to free legal aid, regardless of the resources for litigation.

By means of Organic Law 5/2010, the Spanish Criminal Code was modified to include a new Art. 31**bis** establishing criminal liability of legal persons for offences committed by its legal representatives on behalf of and for the benefit of the legal person, and for offences facilitated by the legal person through failure to exercise due control over its employees.

According to Art. 3.5 LAJG, the phrase “*insufficient resources for litigation*” refers to a legal person with no sufficient assets and an annual income less than three times the “*public revenue index*” (Indicador Público de Renta a Efectos Múltiples – IPREM).

IMPLEMENTATION OF THE LEGAL AID DIRECTIVE: THE SPANISH CASE

Training of Lawyers on
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Financing legal aid the Spanish legislator has chosen to regulate the financial support as a subsidy from the budgets of the Autonomous Communities (abbreviated in Spanish as CC.AA.), whose public administrations are responsible for the implementation, care, and operation of the free legal aid services provided by the Bars and Lawyers' Associations.

The decentralization may lead to significant differences in the amounts of the fees, depending on the Autonomous Community.



Such a scheme risks breaks with essential principles, such as equality before the law, the right to judicial protection, and the right to defence.



In order to mitigate friction, a proposal was introduced to amend the Free Legal Aid Regulation (RAJG) implementing the Legal Aid Act, in order to establish a State Advisory Council in which all public administrations and bodies involved are represented. This proposal is still debated.

Directive (EU) 2016/1919 represents a significant step forward in the harmonization of legal standards in the EU Member States, ensuring greater protection of fundamental rights and creating a more coherent legal framework.

By setting clear guidelines and promoting consistency, it not only improves legal certainty, but also strengthens the rights and protections available to people across the European Union.





Training of lawyers on various areas of EU Law (TRAVAR)

Gerasimos Alexandros Mazarakis

**Presentations on the influence of the 3 EU Directives
on procedural rights in Greek Law**

Madrid, 3-4 December 2024



Co-funded the European Union

The right of access to a lawyer

Directive 2013/48/EU the right of access to a lawyer (Greek law 4478/2017)

(art. 3 par. 1) Member States shall ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively.

(art. 10 par. 1) Member States shall ensure that a requested person has the right of access to a lawyer in the executing Member State upon arrest pursuant to the European arrest warrant

The presumption of innocence

Directive (EU) 2016/343 presumption of innocence (Greek law 4596/2019)

(art.3) Member States shall ensure that suspects and accused persons are presumed innocent until proved guilty according to law.

Legal Aid

Directive (EU) 2016/1919 legal aid for suspects & accused (Greek law 4689/2020)

(art.4 par.1) Member States shall ensure that suspects and accused persons who lack sufficient resources to pay for the assistance of a lawyer have the right to legal aid when the interests of justice so require.

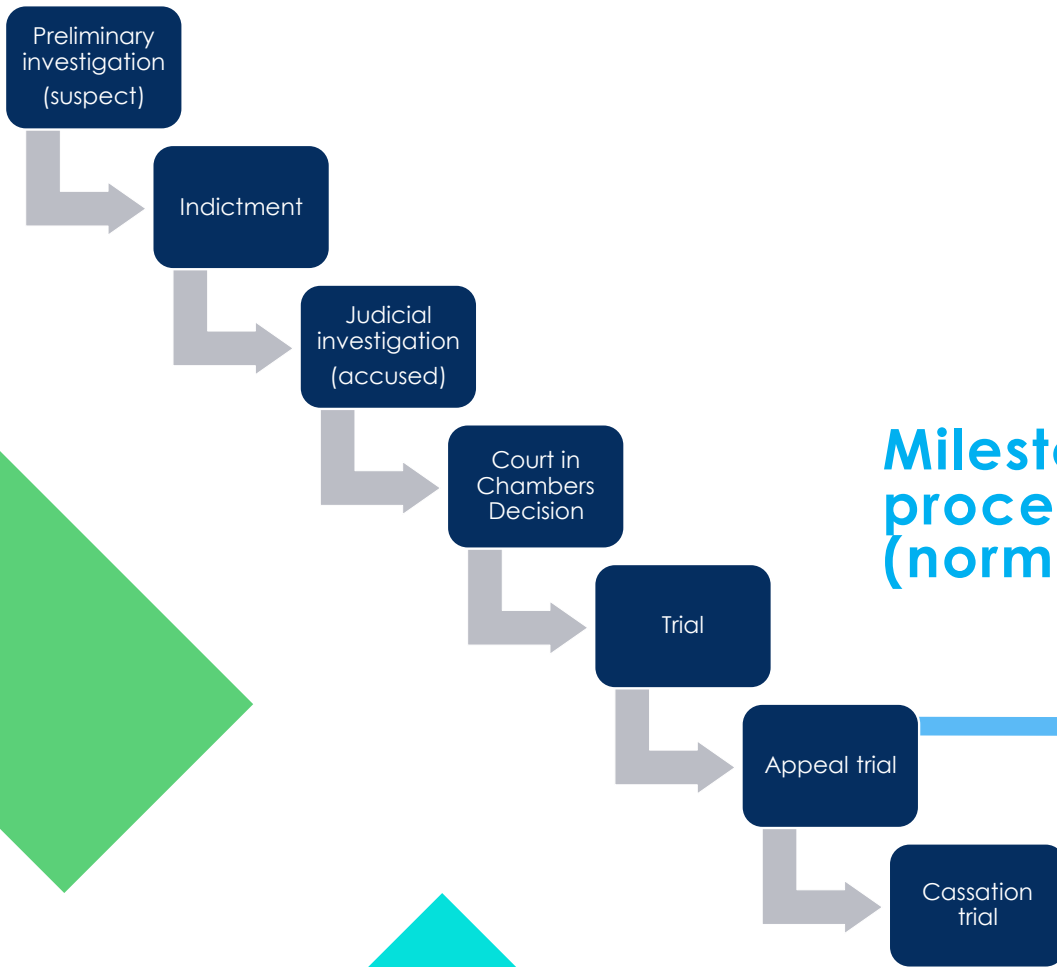
(art.5 par.1) The executing Member State shall ensure that requested persons have a right to legal aid upon arrest pursuant to a European arrest warrant until they are surrendered, or until the decision not to surrender them becomes final.

INTRODUCTION

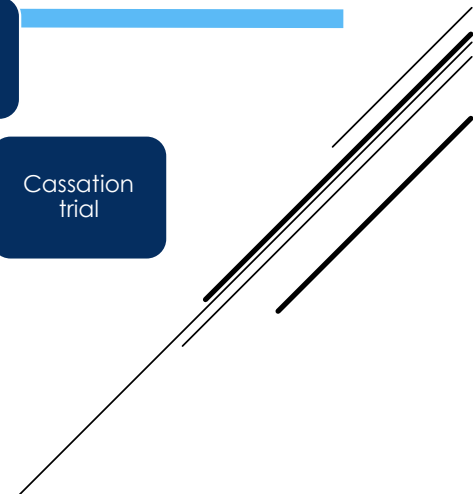
Procedural Directives are considered as approximation instruments that visualize the common ground in the national criminal procedures. To this effect member states must reach the minimum standards set forward by these Directives and interpreted in concreto by the Court of Justice & the European Court of Human Rights. Member states may extend the rights set out thus providing an even higher level of protection to the rights of access to a lawyer, the presumption of innocence & the effective legal aid. Attention must be brought to the actual transposition of the Directives in member state's law, so as not to invalidate national provisions that already stand above European minimum requirements in criminal procedure.



The milestones of criminal procedure In Greece



Milestones of the Greek criminal procedure in felonies (normal procedure)



Milestones of the Greek criminal procedure in misdemeanors (normal procedure)






The Greek legal system is an inquisitorial legal system.

Thus:

The judicial authorities are heavily involved in investigating the facts of the case.

The Public Prosecutor is an impartial judicial authority and not a party (as in the Adversarial legal system).

Inquisitorial legal system aims for a “just trial”, compared to the “fair trial” of the adversarial legal system, the main structural difference lying in the role of the Public Prosecutor as an authority in the one & a party in the other.



**application in
Greece of
Directive
2013/48/EU**

1) Greek legislature had a long tradition and a high standard concerning the right of access to a lawyer. In theory it was taken for granted. Questions were & are raised as to the effectiveness in the actual exercise of this particular right.

- Transposition of Directive 2013/48/EU took place in the old criminal procedure code of 1950 by Law 4478/2017
- These provisions were then integrated in the new criminal procedure code of 2019
- Overall, only minor interventions were needed, in the preliminary investigation and the confidentiality of the communication with the appointed lawyer.
- In general Greek law – and in particular Greek CPC – does not make any distinction between a suspect & an accused person, as far as his/her right of access to a lawyer (as well as his/her other rights), obliging police authorities to inform the suspect/accused immediately.

2) On the other hand, Greek law did not provide for the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

- Thus, the relevant provisions of Directive 2013/48/EU were directly integrated in the Greek criminal procedure code.

1.1) The right to access to a lawyer in the relevant provisions of Greek CPC.

- **Article 89** -The suspect or accused person has the right to appoint up to 2 lawyers in pretrial proceedings and up to 3 lawyers in trial proceedings (**Article 340**); the duly appointed lawyer represents his client in all aspects.
- **Article 92** - The suspect or accused person has the right to be present with his lawyer upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act except for witness or other suspect or accused persons statements; detained persons must be transferred to the location, where such an investigative or other evidence-gathering act takes place and only if the transfer is difficult, they can be represented by the appointed lawyer.
- **Article 95** – Right to information. 1. The suspect or accused person shall be informed immediately of at least the following rights: a) **the right to be represented by a lawyer...** 2. The information in accordance with par. 1 is provided in plain and intelligible language, orally or in writing, taking into account the specific needs of vulnerable suspects or accused persons. The object of the information must also be to indicate the consequences of waiving the exercise of rights. A report is drawn up for the information of the suspect or accused person and signed.
- **Article 96** – Letter of rights. 1. A suspect or accused person who is arrested or detained shall be provided immediately with a document listing their rights, which they are allowed to keep in their possession throughout the period of deprivation of liberty. This document contains information on the following rights: a) **the right to be present with a counsel...** 2. Where this is not available in the appropriate language, the suspect or accused person is informed of their rights orally in a language they understand. That document must then be issued, without undue delay, in a language that the suspect or accused person understands.

1.1) The right to access to a lawyer in the relevant provisions of Greek CPC (suite)

- **Article 99. – Right of attendance of the accused person with a lawyer.** 1. When the accused person is called to account, even in cross-examination with witnesses or other accused persons, they have the right to attend with a lawyer. For this purpose, they are called twenty-four hours before each investigative action.
- 2. This period may be shortened if the postponement creates a risk, the existence of which is specifically certified by a report of the investigator or the investigating officer.
- 3. The investigator has the obligation to ex officio appoint a lawyer for the accused person, unless the latter expressly and irrevocably declares that they waive this right. The investigator has the same obligation in misdemeanors, if the accused person expressly requests it.
- 4. Under no circumstances may the communication of the accused person with their lawyer be forbidden. **This communication is completely confidential.** (Note that Greek authorities had always ensured the **confidentiality** between the accused and the lawyer.)
- The above provisions were, in general, always present in Greek CPC (bearing in mind the relevant provision of European Convention on Human Rights).
- *But*, before the implementation of art. 96 and the introduction of the SPECIFIC document an “unintentional” waiver was not uncommon (in cases of arrest).

2.1) The right to have a third party informed while deprived of liberty, communicate with them & consular authorities.

- **Article 97. – Right to have a person informed in the event of deprivation of liberty.** 1. The accused person shall have the right to request that at least one person of their choice be informed, without undue delay, of the deprivation of liberty of the accused. If the accused person is a minor, the holder of parental responsibility is informed, unless this is contrary to the interests of the minor, in which case another appropriate adult or the authority responsible for the protection of minors is informed. 2. In exceptional cases and in order to prevent imminent danger either to the life, liberty or physical integrity of a person or to the investigation of the crime, the competent authorities may temporarily refrain from informing a third person of the deprivation of liberty of the accused person. In this case, it is examined whether another third person, designated by the accused, can be informed accordingly. If the accused person is a minor, the authority responsible for the protection of minors is informed in this case. 3. An accused person who is a foreign national and deprived of liberty shall have the right to request that the consular authorities of the State of which he/she is a national be informed without undue delay.
- **Article 98. – Right to communicate with third parties during the deprivation of liberty.** An accused person who is a foreign national and deprived of liberty shall have the right to communicate, without undue delay, with the consular authorities of the State of which he/she is a national. He/she also has the right to receive visits by their consular authorities, the right to talk and correspond with them, and the right to have legal representation arranged by the consular authorities, provided that those authorities have no objection.

Important note:

- The above provisions are a *mot à mot* implementation of ar. 5, 6, 7, 8 of Directive 2013/48/EU
- Still, though, it is not uncommon for (non Greek) citizens detained to “disappear” & not be given the right to communicate with their consular authorities.

The waiver of the right to appoint a lawyer (article 90 Greek CPC following the provision of art.9 of the Directive)

- *Article 90. – Waiver of the right to appoint a lawyer.: Without prejudice to the provisions requiring the mandatory appearance of counsel, the suspect or accused person shall have the right to refrain from the appointment of a lawyer, after having received orally or in writing clear and sufficient information in plain and intelligible language about the content of the right in question and the possible consequences of waiving it. The waiver shall be made in the manner set out in the provisions of the previous article and shall be the product of the person's free will and shall not contain any terms or conditions. The suspect or accused person may revoke the waiver at a later date, at any stage of the criminal proceedings.*

Important note:

- *Exception to the “waiver” applies to proceedings where the representation by a lawyer is mandatory, as is the case of filing a cassation and appearing in a cassation trial before Greek Supreme Court (Areios Pagos) mainly because the appeal and thus the trial before the Supreme Court bears only on legal issues of the case, that require professional legal background & experience.*

Other relevant remarks regarding Greek CPC.

- There is no limitation as to the time when a person suspect (**art.70** criminal lawsuit) or accused (**art.72** formal indictment or any other investigative act against the person during a judicial investigation), has the right to appoint a lawyer & communicate freely and confidentially with him/her.
- The right of access to a lawyer without undue delay, applies also during every pretrial proceeding, namely the preliminary stage (**art. 244**-criminal lawsuit filed against the person or any other investigative act against the person during a preliminary investigation by the police without a request from the PP) and in cases of arrest (**art.105**), before the detained person is required to give a statement to the police authorities (art. 4 of the Directive).
- There are no derogations from the application of the right of access to a lawyer in criminal proceedings like the ones allowed for in Art. 3 par. 5 or par. 6 of the Directive for “exceptional circumstances” e.g. where the geographical remoteness of a suspect or accused person makes it impossible to ensure the right of access to a lawyer without undue delay after deprivation of liberty, where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person, or where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings.
- Any evidence produced by surveillance or generally by control of the communication between the lawyer and the accused person **cannot be lawfully used in court.**
- The problem of “prosagogi”, meaning the police malpractice of “*bringing people in*” without officially accusing or putting them under investigation (a grey zone between *witness* and *accused*), is considered a major deficiency in the Greek criminal procedure.

Major infringement of the Directive in Greek police practice”prosagogi (art. 74 par.15 Presidential Decree 141/1991)


The major issue of non respect of the Directive is called “prosagogi”, meaning the police malpractice of “bringing people in” without officially accusing or officially opening an investigation against them (a grey zone between witness and accused), thus prohibiting the person “brought in” to contact a lawyer. This unofficial interrogation is conducted with no lawyer present on behalf of the person “brought in” under the false pretense, that he/she is not yet arrested & it is not decided yet if he/she is a suspect, an accused or neither. Nonetheless “prosagogi” implicates detention in police stations, thus the right of the detained person to immediately contact & freely communicate with its lawyer, must be exercised accordingly.

This “prosagogi” practice has led the European Council to send letter of formal notice to Greece under Article 258 TFEU in the context of infringement proceedings, as it considered that the country had not correctly transposed into its national law the rules contained in Directive (EU)2013/48, concerning the right of access to a lawyer and communication at arrest.

An eventual internal remedy to this infringement could be based on art.1 par.2 of the Greek Lawyer’s Code of Ethics & Conduct, according to which “The content of the function is the representation and defense of his/her client in any court, authority or service or extrajudicial institution, the provision of legal advice and opinions, as well as his/her participation in institutionalized Greek or international bodies” as well as in article 36 par. 1 which stipulates that “The exclusive task of the lawyer is to represent and defend his/her client in any court or authority of the Hellenic Republic or any other country, in the courts, services and bodies of the European Union, in international courts, in disciplinary and service councils...” Police authorities are of course no exception to the above provisions.

The impact in the relevant provisions of transposition law 3251/2004 (EAW), access to a lawyer during proceedings.

- **Article 15 par. 1** *Where the requested person is arrested on the basis of the European arrest warrant, they shall be immediately provided with a document containing information on their rights and shall be taken without delay to the public prosecutor at the Court of Appeal. The public prosecutor of the Court of Appeal shall, after having established their identity, inform them of the existence and content of the warrant, of their right to have recourse to the services of a legal counsel and interpreter in the executing Member State and in the issuing Member State, **of the right to inform a third person and to communicate with third persons and with the consular authorities of the State of which they are a national**, and the opportunity to consent to their transfer to the issuing State. For the above information and the relevant statements of the requested person, **a report shall be drawn up** in accordance with the terms of Articles 148 to 153 of the CPC.*
- **Article 15 par. 2** (as amended by L. 4478/2017): *The arrested person or his appointed lawyer has full access to the file at his/her own expenses*
- **Article 15 par. 5** (as amended by L. 4478/2017): *The rights of the accused person in domestic proceedings (art.97 & 98 CPC) shall apply mutatis mutandis in the case of a requested person arrested on the basis of a European arrest warrant, when Greece is the executing member state.*



**application in
Greece of
Directive
2016/343/EU**

Greek legislature always had relevant provisions especially regarding the presumption of innocence (the relevant provision of art. 6 of the European Convention on Human Rights that supersedes all national law according to art.28 par.1 of the Greek Constitution).

- The principle of just (fair) trial & the respect of the rights of the accused, as set in art. 6 of the ECHR – and applied by all judicial instances national and international – has served as basis to a long confirmed doctrine safeguarding the presumption of innocence, that horizontally crosses all the phases from the preliminary procedure to the final conviction, in which case only the final revocation of the presumption of innocence arises.
- Moreover it's violation is “sanctioned” in the highest level, since any breach of art. 6 ECHR generates absolute invalidity of the procedure & constitutes a motive for a cassation appeal before the Greek Supreme Court, according to art. 171 par.1 d' & art. 510 par.1 of the Greek CPC.
- Several national provisions override the minimum standards laid down by the Directive, for ex. In national law there were never restrictions to the full access to the file of the suspect or the accused.
- On the other hand various articles of the Greek CPC regulating the right to remain silent, are deemed not to fully meet the demands of the Directive, namely art. 223 par.4 (self incrimination of a witness) , art. 273 par.2 (plea of the accused during the interrogation), art.357 par.4 (questioning of witnesses/accused) and art. 365 par.3 (plea of the accused in court) CPC.
- This being said we could acknowledge that the Directive has contributed in optimising articulation, interpretation and protection of rights that were already in place.
- As stated in the explanatory memorandum of the Greek Law 4596/2019 that incorporated the Directive, “in reality the Directive aims at the codified incorporation of the case law of the European Court of Human Rights into the Law of the European Union and the Member States”.

Provisions of Greek CPC & minimum standards laid by the Directive : the actual impact.

- **Article 71.** – *suspects and accused persons are presumed innocent until proved guilty according to law.* (mot à mot integration of ar. 3 of the Directive). Declaration of the self-evident established long time ago as the principal of “in dubio pro reo”.
- **Article 178** (art.6 of the Directive), is labeled *Means of evidence. Burden of proof* This is a typical example of bad legislation or “legal public relations”, since, as everybody acknowledges, there is no such thing as *Burden of Proof* in the inquisitorial criminal procedure (and nothing relevant is actually mentioned in the article). Nonetheless some adjustments were made in order to combat judicial practices that burdened the accused/defendant with proving his innocence; Namely par.2 that states the obligation of all judicial authorities – including the PP – to find and assess all evidence, both in favor and against the defendant impartially and even so for any evidence invoked by the defendant on his favor. Furthermore, a par. 3 was added to art. 178 stating (mot à mot integration of ar. 6 par.2 of the Directive) that *any doubt as to the question of guilt is to benefit the suspect or accused person.* Of course, this *in dubio pro reo* principle was always respected.
- **Article 104.** (mot à mot integration of ar. 7 of the Directive) “1. *Suspects and accused persons have the right to remain silent and not to incriminate themselves.* 2. *The exercise of the right not to incriminate oneself shall not prevent from gathering evidence which may be lawfully obtained and which exist independently of the will of the persons suspects and accused.* 3. *The exercise of the right to remain silent or of the right not to incriminate oneself shall not be used against the suspects and accused persons.*” This article was introduced (some considered it as unnecessary), although the right to remain silent & not incriminate oneself regardless of the status of the person as a witness, a suspect or an accused, was declared in various articles of the Greek CPC (art. 223 par.3, 273 par.2, 357 par.4, art. 366 par.3, art. 365 par.3)


Though the above were never put in doubt in Greece (and still remain in the relevant art. 273 CPC!), there is reason not to be satisfied with the malpractice of considering the person’s silence as “evidence” of guilt“ and the procedural breach referred to as “witnessing the accused”.

The impact of the Directive in the relevant provisions of Greek CPC.

- **Article 7 law 4596/2019, (public references to guilt).** *The suspect or accused person has the right to bring an action for damages before the competent – administrative - Court, in accordance with the provisions of Articles 105 and 106 of the Introductory Law of the Civil Code, in order to remedy the damage they suffered as a result of the infringement of their presumption of innocence by statements of public authorities which occurred at any stage of the procedure before the adoption of judgment at first or second instance, which refer directly to the pending criminal proceedings and either encourage the public to believe in their guilt or make an assessment of the facts by which they prejudge the judicial judgment of the case.*
- The above provision integrates the provisions of **art. 4, 10 par. 1 of the Directive.**
- It is widely considered that the above (sole) provision *does not meet* the minimum standards of the Directive. A claim against the state for a pecuniary compensation cannot be considered an effective remedy in the meaning of Art. 10 par. 1 of the Directive.
- Thus, even today, the malpractice continues (as in the recent “Tempi” case). Politicians – namely members of government or MP’s of the majority or other parties - are often tempted to talk in public about open criminal cases, influencing public opinion mostly against the accused person(s), but sometimes even in their favor, affecting thus both the judgment on their guilt, as well as the sentencing.

The impact of the Directive in the relevant provisions of Greek CPC.

- Article 8 (par.4) of the Directive, (right to be present at ones trial) provides for the possibility of holding trials in the absence of suspects or accused persons, but it is not possible to comply with the conditions laid down in paragraph 2 of this article because a suspect or accused person cannot be located **despite reasonable efforts** having been made.
- The relevant art. 155, art.157 par. 1 & art. 340 par.4 Greek CPC states, among other, that *the actual search for the address of the accused, if none was declared, is done with appropriate means, at least according to the address declared in the last tax declaration and the relevant data of the Ministry of the Economy.*
- In general, the Greek state cannot boast about the standards required by Courts for a lawful summoning of the accused. They were out of date & unilaterally – in favor of the carrying on of the proceedings – applied. Though, after *POPOVITSI vs. GREECE* and other similar cases, a plenary decision (2/2014) was issued by the supreme court that set some criteria (standards) for a proper search (art. 155 CPC as above integrated the case-law criteria as the *appropriate means*). The criteria were further elaborated in Art. 157 par. 1 CPC 2019 (search in phone books, databases of judicial and tax authorities, through family and professional affiliations).
- Finally, one can argue about the exception of the Greek CPC regarding the authorities obligation *to search* only if the accused has not declared (in a previous stage) an address..



**application in
Greece of
Directive
2016/1919/EU**

Greek legislature always had relevant provisions.

- Before 2015 there was always an obligation of the presiding judge to appoint a lawyer in trials for felonies, but the appointed lawyer had insufficient time for preparation and the list prepared by the competent Bar Association was ignored in favor of certain colleagues, who passed their time in court rooms waiting to get appointed in order to collect the relevant – though minimum - fee from the state. Therefore strict application – and not free choice - by the presiding judge of the aforementioned alphabetical list on weekly basis, is crucial, in order to avoid the abuse in favor of certain lawyers.
- The actual importance of the Directive can be found on a new provision, namely **Article 91** of the CPC which provides that the suspect or accused person is entitled to free legal aid, which includes the provision of legal advice and legal assistance and their representation before the Court. This provision makes it **mandatory** to provide legal aid – advice for the suspect or accused person – **at any stage** of the criminal proceedings and for any crime.
- Right to legal aid established in the new CPC in Art. 91 CPC 2019: The suspect or accused person has a right to legal aid “according to the relevant provisions”:
- Two kinds of relevant provisions: of the CPC and of the special legal aid legislature
- The above mentioned obligatory legal aid provisions in the CPC establish the right of the accused person to legal aid without any restriction or derogation, arising f. ex. from his financial status (even rich people are entitled to free of charge legal aid from an appointed lawyer in felonies proceedings)
- The rest “relevant provisions” for criminal proceedings can be found in Art. 6 and 7 of Law 3226/2004, as amended by Art. 45 of Law 4689/2020, which transposed the Directive.

The obligatory legal aid of the Greek CPC

- **Art. 99 par. 3 CPC** (judicial investigation): Before providing any statement a) the judge of investigations is **obliged** to appoint a lawyer for the accused person when the offence is a **felony**, b) the judge of investigations is **obliged** to appoint a lawyer for the accused person when the offence is a **misdemeanor** when specifically asked, c) the judge of investigations is **obliged** to appoint a lawyer for the accused person when the latter is a minor and the accused cannot waive his right.
- **Art. 200 par. 1 CPC (pretrial legal aid)**: Before pretrial detention for psychological evaluation is ordered, the judge of investigations is obliged to appoint a lawyer.
- **Art. 340 par.1 & 2, 376 par. 3 CPC (trial legal aid)** : In a felony trial the presiding judge is obliged to appoint a lawyer for the accused person (2 or maximum 3 lawyers are appointed if the trial is expected to last). The same applies for some misdemeanors (punishable with a minimum sentence of 3 years of imprisonment & recently (L.5090/2024) to all misdemeanors tried by the 3 member 1st instance Court). The appointment is made from the list drawn by the competent Bar Association and a recess of up to 30 days is obligatory in order to give the appointed lawyer sufficient time to prepare the defence.
- **Art. 423 CPC** (fast track procedure trial for flagrant misdemeanors): the court is obliged to appoint a lawyer, if the accused person asks for one & allow him/her the time to prepare the defense.

The non-obligatory legal aid of the Greek CPC

- Apart from the above-mentioned occasions regulated in CPC, a right to legal aid has according to Art. 6 L. 3226/2004 every suspect or accused person if he meets the following conditions:
- Income of the last 3 years not over 6.000 €, if the person is single (increased by 1000 € for every supported child up to 4 children), or 8.000 €, if the person is married or living in a partnership (increased by 1000 € for every supported child up to 4 children)
- Object of the preliminary or judicial investigation is an offence with maximum sentence of up to 2 years (f. ex. there is no right to legal aid for an insult offence [Art. 361 CC])
- Object of the trial is an offence with maximum sentence of more than 2 years
- Object of the appeal trial is an offence with maximum sentence of more than 2 years,
- or the accused was convicted in the first instance to a prison sentence of at least 6 months.
- Then an application must be filed – accompanied by the documents that prove the above requirements – 1) within 48 hours after been notified of the right to a legal aid in preliminary/judicial investigations, 2) one month before the trial date, 3) on time to file an appeal. This application is then reviewed by a specially appointed judge, who has no time limitation as to render his/her decision.
- The same conditions apply in cases of EAW proceedings, from the arrest until the final surrender decision.

Legal aid for victims

- Beneficiaries of legal aid regarding any criminal claims also include the victims of the criminal acts such as terrorism offences, human trafficking, child abduction, sexual acts with minors, child abuse, facilitation of child abuse, child pornography, sexual act with a minor with payment, immigration offences, rape of minors, child sexual abuse, sexual acts between relatives, child solicitation for sexual reasons, pimping.

The problem of art. 7 of the Directive

- Art. 7 of the Directive (**Quality of legal aid services and training**) states
- *1. Member States shall 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 the proceedings, with due respect for the independence of the legal profession.*
- *2. Member States shall ensure that adequate training is provided to staff involved in the decision-making on legal aid in criminal proceedings and in European arrest warrant proceedings.*
- *3. With due respect for the independence of the legal profession and for the role of those responsible for the training of lawyers, Member States shall take appropriate measures to promote the provision of adequate training to lawyers providing legal aid services.*
- *4. Member States shall take the necessary measures to ensure that suspects, accused persons and requested persons have the right, upon their request, to have the lawyer providing legal aid services assigned to them replaced, where the specific circumstances so justify.*
- *In 2020 a Regulation proper to the functioning of legal aid was issued by the Athens Bar Association in an attempt to provide solutions to chronic problems that have been observed and concern the legal community as a whole.*

According to article 3 of Law 3226/2004, as replaced by article 43 of Law 4689/2020, for criminal cases, the only requirement for lawyers to be registered in the list of legal aid lawyers is to have at least five (5) appearances as defense or representation counsel in support of the charge, regardless of whether these appearances were made for misdemeanor or felony acts.

According to the Legal Aid Regulation of the Athens Bar, legal aid lawyers must have knowledge of criminal law and criminal procedure, which is proven either by attending seminars or by presenting advance payment receipts from criminal courts. Also, with the existing legal aid system, the lawyer is only controlled in terms of the number of representations he makes, in order not to exceed the amount of 15,000 per year, as stipulated by law. Otherwise, there is a complete lack of any mechanism for controlling and supervising the free legal aid system, and in particular, there is a lack of any control over the quality and adequacy of the services provided.

Parallel to this lack of provision of any actual control, one might argue as well that the minimum legal fees – in misdemeanor cases quite low – paid to the appointed lawyer discourages colleagues from adding their name in the Bar's list. A serious issue that financially burdens even further legal aid's lawyers is the unacceptable delay in their payments that in previous years often attained 1 to 2 years & only recently started to function regularly but still with a more than 3 to 6 months delay.

Problems faced in everyday court life (inadequate quality, lack of experience, inadequate time and facilities for the preparation of defence, lack of adequate funding, delays in payment), invalid in practice the requirement for efficient legal aid in criminal proceedings.

In recent years, more and more European States have adopted mechanisms to control the quality of legal aid provided, such as :A continuous training and specialization of legal aid providers, B self-evaluation, peer-review and/or by legal aid beneficiaries and other legal professionals, C regular monitoring by a specialized body, D the operation of a complaints mechanism, E the possibility of choosing the legal aid provider, etc.



Training of lawyers on various areas of EU Law (TRAVAR)

María Barbancho Saborit

**Selected aspects of issuing and executing the
European Arrest Warrant in the recent CJEU case
law**

Madrid, 3-4 December 2024



Co-funded the European Union

In the framework of this presentation, the following issues will be discussed:

1. What constitutes a judicial authority for the purpose of issuing or executing a EAW (Article 6 of the EAW FD) and why it is important?
2. What is the two-step test for the execution of a EAW and how it influences the possible impact of deficiency of the rule of law?
3. What are grounds for non-execution of the EAW (focusing on double criminality and ne bis in idem rule)?

***Article 6 of the Council Framework Decision of 13 June 2002 on the EAW and the surrender procedures
between Member States (2002/584/JHA)***

1. The **issuing judicial authority** shall be the judicial authority of the issuing Member State which is **competent to issue a EAW by virtue of the law of that State.**
2. The **executing judicial authority** shall be the judicial authority of the executing Member State which is **competent to execute the EAW by virtue of the law of that State.**
3. Each Member State **shall inform** the General Secretariat of the Council of the competent judicial authority under its law.

WHY DO WE FOCUS ON IT?

→ **MUTUAL TRUST**

Article 82 Treaty on the Functioning of the EU

1. Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83.

→ **SAME STANDARDS AND VALUES. MUTUAL RECOGNITION = LACK OF PRIOR AUTHORITY**

- facilitates and accelerates the cooperation between enforcement authorities in different Member States;
- aims at tackling the challenge of cross-border crime while respecting the right of both criminals and victims;
- based on mutual trust- mutual trust regarding basic rights, guarantess. It is possible only due to numerous directives, regulations and framework decision. A consequence of it. It shows that whole European law system is like connecting vessels

THE FRAMEWORK DECISION – RECITALS

(5) *The objective set for the Union to become an area of freedom, security and justice leads to **abolishing extradition** between Member States and **replacing it by a system of surrender** between judicial authorities. Further, the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. **Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice (...)***

(8) *Decisions on the execution of the European arrest warrant must be subject to **sufficient controls**, which means that a judicial authority of the Member State where the requested person has been arrested will have to take the decision on his or her surrender.*

Case C-510/19, Openbaar Ministerie (Faux en écritures), judgment 24.11.2020

1. *The concept of 'executing judicial authority' within the meaning of Article 6(2) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, constitutes **an autonomous concept of EU law** which must be interpreted to the effect that it covers the authorities of a Member State which, without necessarily being judges or courts, participate in the administration of criminal justice in that Member State, acting independently in the exercise of the responsibilities inherent in the execution of a European arrest warrant and which exercise their responsibilities under a procedure which complies with the requirements inherent in effective judicial protection.*

2. *Article 6(2) and Article 27(3)(g) and 27(4) of Framework Decision 2002/584, as amended by Framework Decision 2009/299, must be interpreted as meaning that the public prosecutor of a Member State who, although he or she participates in the administration of justice, may receive in exercising his or her decision-making power an instruction in a specific case from the executive, does not constitute an 'executing judicial authority' within the meaning of those provisions.*

Case C-452/16 PPU, Poltorak, judgment of 10.11.2016

Police services are not covered by the term „judicial authority“.

Key points:

- *The principle of separation of powers.*
- *In the light of the context of the EAW FD, the entire surrender procedure between Member States is to be carried out under judicial supervision.*
- *The principle of mutual recognition is founded on the premise that a judicial authority has intervened prior to the execution of the EAW for the purpose of exercising its review – the issue of an arrested warrant by a non-judicial authority, such as a police service, does not provide the executing judicial authority with an assurance that the issue of that EAW has undergone the necessary approval.*

Case C-477/16, PPU, Kovalkovas, judgment of 10.11.2016

A ministry of justice is not covered by the term 'issuing judicial authority' and the EAW that was issued by it cannot be regarded as a 'judicial decision'.

Key points:

- *The principle of separation of powers.*
- *The role of central authorities is limited to practical and administrative assistance for the competent judicial authorities. Member States cannot substitute the central authorities for the competent judicial authorities in relation to the decision to issue the EAW.*
- *The issue of an arrest warrant by a non-judicial authority, such as the Lithuanian Ministry of Justice, does not provide the executing judicial authority with an assurance that the issue of that EAW has undergone the necessary judicial approval.*
- *The Lithuanian Ministry of Justice, and not the judge who imposed the custodial sentence decision, takes the ultimate decision to issue the EAW.*

Joined cases C-508/16 (OG) and C-82/19 PPU (PI), judgment of 27.05.2019

The concept of an ‘issuing judicial authority’ within the meaning of Article 6(1) EAW FD does not include public prosecutors’ offices of a Member State, which are exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as a minister for justice, in connection with the adoption of a decision to issue an EAW.

Key points:

- *The EAW system entails a dual level of protection of procedural rights and fundamental rights, which the requested person must enjoy. In addition to the judicial protection provided at the first level, at which a national decision, such as a national arrest warrant, is adopted, there is the protection that must be afforded at the second level, at which an EAW is issued.*
- *The ‘issuing judicial authority’ must be capable of exercising its responsibilities objectively, taking into account all incriminatory and exculpatory evidence, without being exposed to the risk that its decision-making power be subject to external directions or instructions, in particular from the executive.*

Case C-489/19 PPU, Parquet de Vienne, judgment of 9.10.2019

The concept of a 'European arrest warrant' referred to in Article 1(1) EAW FD must be interpreted as meaning that EAWs issued by the public prosecutor's offices of a Member State fall within that concept, despite the fact that those public prosecutor's offices are exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as a minister for justice, in the context of the issue of those arrest warrants, provided that those arrest warrants are subject, in order to be transmitted by those public prosecutor's offices, to endorsement by a court which reviews independently and objectively, having access to the entire criminal file to which any specific directions or instructions from the executive are added, the conditions of issue and the proportionality of those arrest warrants, thus adopting an autonomous decision which gives them their final form.

Key points:

- *The courts responsible for the endorsement of EAWs meet the requirement of objectivity and independence. However, the Austrian public prosecutor's offices cannot be regarded as satisfying that requirement,*
- *Nevertheless, decisions relating to the issue of an EAW, adopted in accordance with the Austrian system, can be regarded as satisfying the minimum requirements on which their validity depends as regards the objectivity and independence of the review carried out when those decisions are adopted.*
- *The court responsible for endorsing arrest warrants is not bound by the results of the investigation conducted by the public prosecutor's offices and must not be limited to the indications and grounds for the injunction set out by them and may, at any time, order additional investigations or carry them out itself.*

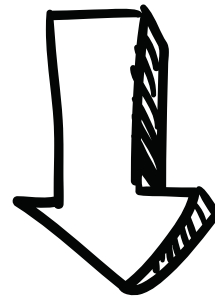
Case C-509/18, Prosecutor General of Lithuania, judgment of 27.05.2019

The concept of 'issuing judicial authority' within the meaning of Article 6(1) EAW FD includes the prosecutor general of a Member State, who, although institutionally independent from the judiciary, is responsible for the conduct of criminal prosecutions and whose legal position, in that Member State, affords the prosecutor general a guarantee of independence from the executive in connection with the issuing of an EAW.

Key points points from the CJEU decision:

- *To participate in the administration of criminal justice the prosecutor general's legal position in that Member State safeguards not only the objectivity of the prosecutor general's role but also affords the prosecutor general a guarantee of independence from the executive in connection with the issuing of an EAW.*

**WHAT CONSTITUTES A JUDICIAL AUTHORITY
FOR THE PURPOSE OF ISSUING OR EXECUTING AN EAW?**



IF THE EXECUTING JUDICIAL AUTHORITY HAS EVIDENCE OF SYSTEMIC OR GENERALISED DEFICIENCIES CONCERNING THE INDEPENDENCE OF THE JUDICIARY IN THE ISSUING MEMBER STATE WHICH EXISTED AT THE TIME OF ISSUE OF THAT WARRANT OR WHICH AROSE AFTER THAT ISSUE, MAY THAT AUTHORITY DENY THE STATUS OF 'ISSUING JUDICIAL AUTHORITY' TO THE COURT WHICH ISSUED THAT ARREST WARRANT?

**Joined cases C-354/20 PPU and 412/20 PPU,
Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission), judgment of 17.12.2020**

Systematic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State, which existed at the time of issue of that warrant or which arose after that issue are insufficient, on their own, to consider that all courts of that Member State fail to fall within the concept of 'issuing judicial authority'.

Key points from the CJEU decision:

- *The existence of deficiencies does not necessarily affect every decision that the courts of that Member State adopt.*
- *Denying the status of 'issuing judicial authority' to all judges or courts of that Member State would extend the limitations that may be placed on the principles of mutual recognition and mutual trust beyond exceptional circumstances. It would also mean that courts of that Member State could no longer submit references to the CJEU for preliminary rulings.*

Case C-216/18 PPU, Minister for Justice and Equality (Deficiencies in the system of justice), judgment of 25.7.2018

THO-STEP TEST

Where the executing judicial authority ... has material ... indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter, on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, that authority must determine, specifically and precisely, whether, having regard to his or her personal situation, to the nature of the offence for which he or she is being prosecuted and the factual context in which the European arrest warrant was issued, and in the light of the information provided by that Member State pursuant to Article 15(2) of that framework decision, there are substantial grounds for believing that that person will run such a risk if he or she is surrendered to that Member State. (§ 52)

Joined cases C-354/20 PPU and C-412/20 PPU, Openbaar Ministerie (Independence of the issuing judicial authority), judgment of 17.12.2020

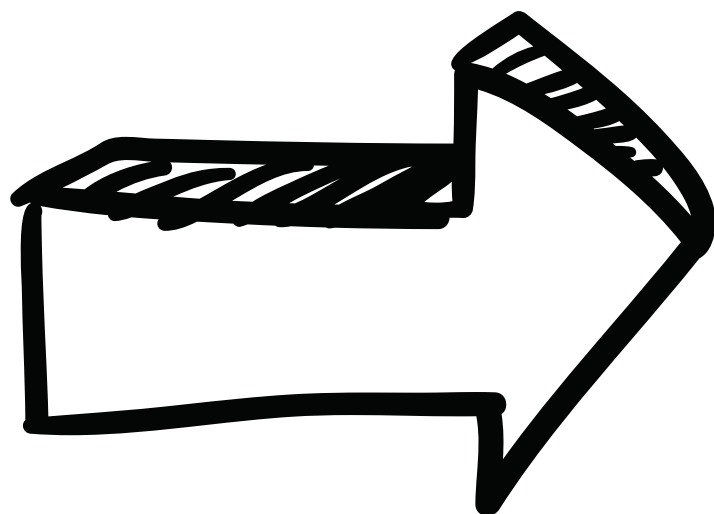
*In that regard, it should be recalled that (...) Article 1(3) of Framework Decision 2002/584 must be interpreted as meaning that, where the executing judicial authority, which is called upon to decide whether a person in respect of whom a European arrest warrant has been issued for the purposes of conducting a criminal prosecution is to be surrendered, **has material (...) indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter, on account of systemic or generalised** deficiencies so far as concerns the independence of the issuing Member State's judiciary, that authority must determine, specifically and precisely, whether, **having regard to his or her personal situation, to the nature of the offence for which he or she is being prosecuted and the factual context in which the European arrest warrant was issued, and in the light of the information provided by that Member State pursuant to Article 15(2) of that framework decision, there are substantial grounds for believing that that person will run such a risk if he or she is surrendered to that Member State.***

Case C-158/21, Puig Gordi and Others, judgment of 31 January 2023

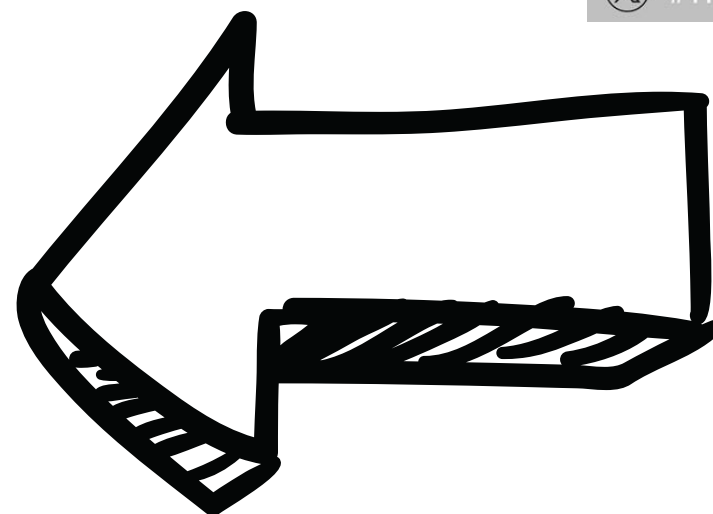
*Similarly, where a person for whom a European arrest warrant has been issued claims that he or she will be exposed to a risk of infringement of the second paragraph of Article 47 of the Charter on the ground that he or she will be tried by a court of the issuing Member State which does not have jurisdiction to do so, but the executing judicial authority considers that the information at its disposal does not constitute objective, reliable, specific and properly updated information to demonstrate the existence of systemic or generalised deficiencies in the operation of the judicial system of that Member State or deficiencies affecting the judicial protection of an objectively identifiable group of persons to which that person belongs, **that authority cannot refuse to execute** that European arrest warrant on the ground alleged by that person.*

Case C-819/21, Staatsanwaltschaft Aachen, judgment of 9 November 2023

*[The authority must] determine whether there is **objective, reliable, specific and duly updated material indicating that there is a real risk of breach**, in the issuing Member State, of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter, on account of systemic or generalised deficiencies so far as concerns the independence of that Member State's judiciary. (...) If that is the case, the competent authority of the executing Member State must, as a second step, determine, specifically and precisely, **to what extent the deficiencies identified in the first step may have had an impact on the functioning of the courts of the issuing Member State which have jurisdiction over the proceedings brought against the person concerned** and whether, having regard to that person's personal situation, the nature of the offence for which he or she was tried, and the factual context of the sentence in respect of which recognition and enforcement are requested, and, where appropriate, to additional information provided by that Member State pursuant to that framework decision, there are substantial grounds for believing that such a risk has actually materialised in the present case.*



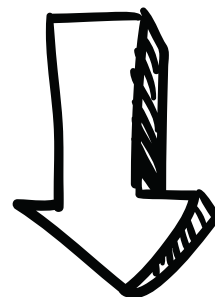
CJEU



ECHR

SYSTEMIC DEFICIENCIES AS A PREREQUISITE OF THE INDIVIDUAL ASSESMENT

IF DEFICIENCIES ARE PROVEN...



...ON WHAT GROUND THE EXECUTION OF THE EAW

SHOULD BE REFUSED?

ARTICLE 3 EAW FD, GROUNDS FOR MANDATORY NON-EXECUTION OF THE EAW:

1. The offence on which the EAW is based is covered by **amnesty** in the executing Member State,
2. The executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State (**ne bis in idem**),
3. The person who is the subject of the EAW **may not, owing to his age, be held criminally responsible for the acts** on which the EAW is based under the law of the executing state (eg. Case C-367/16, Piotrowski).

ARTICLE 4 EAW FD, GROUNDS FOR OPTIONAL NON-EXECUTION OF THE EAW:

1. **Double (dual) criminality**, except in the form of tax- or duties-related crimes: in one of the cases referred to in Article 2(4), the act on which the European arrest warrant is based does not constitute an offence under the law of the executing Member State; however, in relation to taxes or duties, customs and exchange, execution of the EAW shall not be refused on the ground that the law of the executing Member State does not impose the same kind of tax or duty or does not contain the same type of rules as regards taxes, duties and customs and exchange regulations as the law of the issuing Member State,
2. **Precedence of domestic prosecution**: the person who is the subject of the EAW is being prosecuted in the executing Member State for the same act as that on which the EAW is based,
3. **Domestic decision not to prosecute**: the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the EAW is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings,

4. **Statue of limitation:** the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law,

7. **Ne bis in idem in non-EU (third) States:** the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country, **national or resident of the executing Member State:** the EAW has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law;

8. **Territoriality:** the EAW relates to offences which:

(a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such; or

(b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.

ARTICLE 4A EAW FD, TRIAL IN ABSENTIA

With the exception of the situations provided for in art. 4a (1)(a-d), the executing judicial authority may also refuse to execute the EAW issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision.

Case 396/22 Generalstaatsanwaltschaft Berlin, judgment of 21.12.2023

Article 4a (1) of the Framework Decision as amended by Framework Decision 2009/299 must be interpreted as meaning that national legislation transposing that provision, which generally precludes an executing judicial authority from executing a European arrest warrant issued for the purposes of executing a sentence, where the person concerned did not appear in person at the trial resulting in the decision concerned, is contrary to that provision of EU law. A national court is required, taking into consideration the whole body of its domestic law and applying the interpretative methods recognised by that law, to interpret that national legislation to the greatest extent possible, in the light of the text and the purpose of that framework decision.

Case C-261/09, Mantello, judgment of 16 November 2010

The concept of 'same acts' in Article 3(2) EAW FD constitutes an autonomous concept of EU law. In circumstances such as those at issue in the main proceedings where, in response to a request for information within the meaning of Article 15(2) EAW FD made by the executing judicial authority, the issuing judicial authority, applying its national law and in compliance with the requirements deriving from the concept of 'same acts' as enshrined in Article 3(2) EAW FD, expressly stated that the earlier judgment delivered under its legal system did not constitute a final judgment covering the acts referred to in the arrest warrant issued by it and therefore did not preclude the criminal proceedings referred to in that arrest warrant, the executing judicial authority has no reason to apply, in connection with such a judgment, the ground for mandatory non-execution provided for in Article 3(2) EAW FD.

Key points:

- *The concept 'same acts' has been interpreted as referring to the nature of the acts, encompassing a set of concrete circumstances which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected*
- *Whether a case has been 'finally judged' must be determined by the law of the Member State in which judgment was delivered.*
- *The EAW was though to be something more than just a national arrest warrant, therefore ne bis in idem should be analysed not only with reference to the judgments issued by the issuing member state.*

Case C-268/17, AY (Mandat d'arrêt – Témoin), judgment of 25 July 2018

Article 3(2) EAW FD nor Article 4(3) EAW FD can be relied on in the case, where a decision of a public prosecutor's office which terminated an investigation opened against an unknown person, during which the person who is the subject of the EAW was interviewed only as a witness.

Key points:

- *This provision requires that the requested person has been 'finally judged', which implies that criminal proceedings had previously been instituted against the requested person; it does not extend to persons who were merely interviewed in the course of a criminal investigation, such as witnesses.*

C-665/20 PPU, X (Mandat d'arrêt européen – Ne bis in idem), judgment of 29.04.2021

Article 4(5) of the EAW FD must be interpreted as meaning that, where a Member State chooses to transpose that provision into its domestic law, the executing judicial authority must have a margin of discretion in order to determine whether or not it is appropriate to refuse to execute an EAW. Article 3(2) and Article 4(5) of the EAW FD must be interpreted as meaning that the concept of 'same acts', contained in both provisions, must be interpreted uniformly.

Article 4(5) of the EAW FD, which makes the application of the ground for optional non-execution laid down in that provision subject to the condition that, where there has been a sentence, the sentence has been served, is currently being served or may no longer be executed under the law of the sentencing country, must be interpreted as meaning that that condition is satisfied where the requested person has been finally sentenced, for the same acts, to a term of imprisonment, of which part has been served in the third State in which the sentence was handed down, whilst the remainder of that sentence has been remitted by a non-judicial authority of that State, as part of a general leniency measure that also applies to persons convicted of serious acts and is not based on objective criminal policy considerations. It is for the executing judicial authority, when exercising the discretion it enjoys, to strike a balance between, on the one hand, preventing impunity and combating crime and, on the other, ensuring legal certainty for the person concerned.

Key points:

- *Member States are free to transpose the optional grounds for non-execution listed in Article 4 EAW FD into their domestic law or not. They may also choose to limit the situations in which the executing judicial authority may refuse to execute an EAW, thereby facilitating surrender in accordance with the principle of mutual recognition,*
- *Refusal to execute an EAW constitutes an exception. The Court has repeatedly held that execution of an EAW constitutes the rule, whereas refusal is intended to be an exception to be interpreted strictly. A national law substituting the mere option of refusal in a genuine obligation would transform the refusal from an exception to a general rule.*

C-717/18, X (European arrest warrant – Double criminality), judgment of 3.03.2020

Article 2(2) EAW FD must be interpreted as meaning that, to ascertain whether the offence for which an EAW has been issued is punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 3 years, as it is defined in the law of the issuing Member State, the executing judicial authority must take into account the law of the issuing Member State in the version applicable to the facts giving rise to the case in which the EAW was issued.

Key points:

- *The EAW FD seeks to establish a simplified and more effective system for the surrender of convicted or suspected persons. If the law of the issuing Member State which the executing authority must take into account pursuant to Article 2(2) EAW FD was not the one applicable to the facts giving rise to the case in which the EAW was issued, the executing authority would be required to verify whether that law had not been amended subsequent to the date of those facts. This interpretation would run counter the purpose of EAW FD and, in view of the difficulties the executing authority might encounter in identifying the relevant versions of the law, it would be a source of uncertainty and be contrary to the principle of legal certainty,*

Case C-168/21, Procureur général près la cour d'appel d'Angers, judgment of 14.07.2022

Articles 2(4) and 4(1) EAW FD must be interpreted as meaning that the condition of double criminality is satisfied in a situation in which an EAW has been issued for the purpose of executing a custodial sentence imposed for acts that, in the issuing Member State, are covered by an offence that requires that those acts infringe a legal interest protected in that Member State, where such acts are also covered by an offence under the law of the executing Member State, the infringement of which is not a constituent element of that protected legal interest. The same provisions, read in the light of Article 49(3) Charter, must be interpreted as meaning that the executing judicial authority may not refuse to execute an EAW issued for the purpose of executing a custodial sentence on the ground that only some of the acts constituting that offence in the issuing Member State also constitute an offence in the executing Member State.

Key points:

- *The executing judicial authority must verify whether the factual elements of the offence would also constitute a criminal offence under the law of the executing Member State if they had taken place in the territory of that state. It is irrelevant whether the breach of the legal interest protected under the law of the issuing Member State is also an element of the offence under the law of the executing Member State,*
- *The wording of Article 2(4) EAW FD (i.e. 'whatever the constituent elements or classification') confirms that the EU legislature did not require the existence of an exact correspondence between the constituent elements of the offence or the classification of that offence,*
- *The executing judicial authority cannot refuse to execute an EAW on the ground that only some of the acts constituting a single offence in the issuing Member State on which that EAW is based are punishable under the law of the executing Member State.*



Training of lawyers on various areas of EU Law (TRAVAR)

Agnieszka Gajos

**Application of the European Arrest Warrant in
Poland**

Madrid, 3-4 December 2024



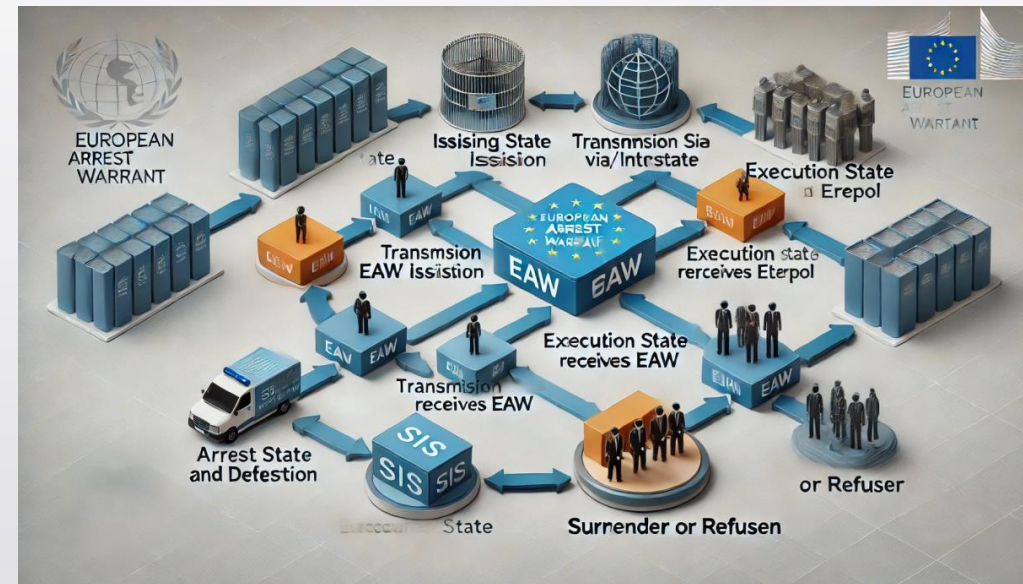
Co-funded the European Union

Application of the European Arrest Warrant in Poland

Introduction and Overview

Overview:

- Introduce the **European Arrest Warrant (EAW)**, emphasizing its importance in facilitating judicial cooperation among EU member states.
- Explain the fundamental role of the EAW in enhancing **cross-border** cooperation, enabling the swift **extradition** of individuals across EU borders for criminal prosecution.
- Highlight how the **EAW** system aims to strengthen the **EU area of justice** while ensuring **individual rights** are protected.



I. Directive 2013/48/EU: Right of Access to a Lawyer in the Context of the European Arrest Warrant



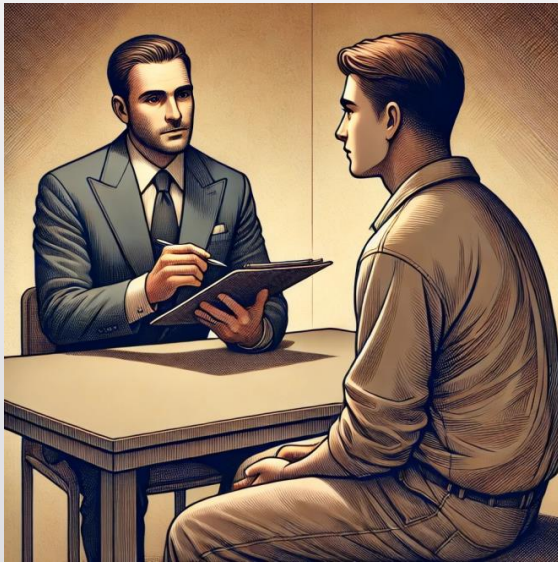
Background and Purpose of Directive 2013/48/EU

- The **Directive 2013/48/EU** guarantees the **right of access to a lawyer** from the moment of arrest under the **European Arrest Warrant (EAW)**.
- It strengthens **procedural safeguards** and aims to provide individuals detained under the EAW with **equal access to legal counsel** and information about their rights.
- This directive was introduced to ensure that **fundamental rights** are upheld, especially in cross-border arrest situations.

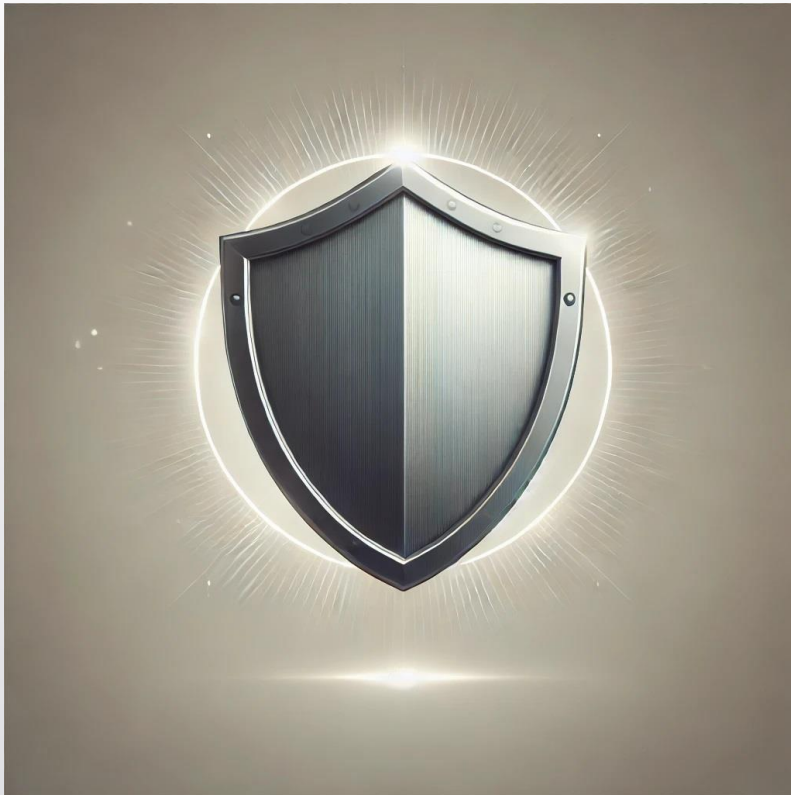


Key Provisions of Directive 2013/48/EU

- **Right to Access a Lawyer from the Start:** This ensures individuals are informed of their right to legal assistance from the moment of their detention under the EAW.
 - This is crucial for ensuring that individuals can seek advice on their situation and proceed in a manner that protects their legal interests.
- **Right to Inform a Family Member or Trusted Person:** Detainees are entitled to notify a family member or trusted contact about their detention.
 - This maintains the detainee's connection with their support network and safeguards against isolation.
- **Right to Contact Consular Officials:** For non-nationals, the right to contact their **consulate** ensures they are not left without language support or guidance on local legal systems.



Protection Under the European Arrest Warrant



- The directive guarantees that detainees under the **EAW** are protected by **safeguards** such as legal representation and the right to **confidentiality**.
 - These protections ensure the **fair treatment** of individuals, preventing any violations of their rights during the arrest or extradition process.

Waiver and Confidentiality

- Individuals may waive their right to legal counsel, but the waiver must be **voluntary** and made with full understanding of its consequences.
- The confidentiality of **legal consultations** must be upheld, ensuring that any communication between the detainee and their lawyer is protected and cannot be used against them.



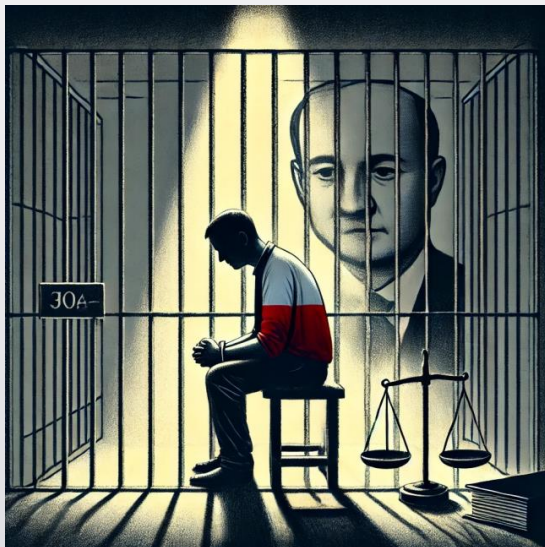
Implementation of Directive 2013/48/EU in Polish Law



- **Immediate Access to a Lawyer:** In Poland, individuals detained under the **EAW** are immediately informed of their right to access a lawyer and to have legal representation throughout the process.
- **Lawyer's Presence During Questioning:** The right to have a lawyer present during questioning is integral to protecting the detainee's rights and ensuring a **fair process**. This is implemented in Polish law in line with **Directive 2013/48/EU**.
- **Confidentiality Protections:** Polish law guarantees **confidentiality** between detainees and their lawyers, preventing unauthorized access to legal communications.

Case Studies for European Arrest Warrant – The Right to Access a Lawyer

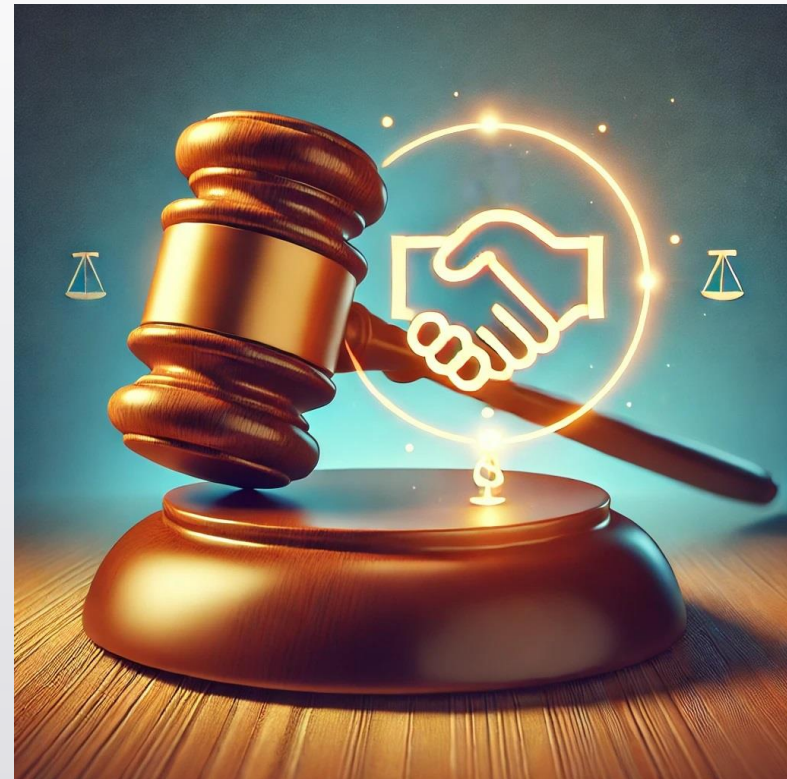
- **Case Study 1: Polish Citizen Detained Without a Lawyer:** A **Polish citizen** was detained in **Germany** under the EAW but was not provided legal counsel during initial questioning. This case underscores the importance of **Directive 2013/48/EU** in ensuring that **access to a lawyer** is granted immediately, without delay, to prevent **abuses** of power.
- **Case Study 2: Foreign National’s Right to Contact Their Consulate:** A **Spanish citizen** detained in **Poland** under the EAW was allowed to contact her consulate, which facilitated her access to a lawyer who spoke her language. This case highlights the importance of the **right to contact consular officials** as stipulated in the directive.



II. Directive 2016/1919: European Arrest Warrant and the Right to Legal Aid in Poland

Background and Importance of Legal Aid in EAW Context

- **Legal aid** ensures that individuals who cannot afford a lawyer are still able to receive **adequate legal representation** under the EAW.
- Directive **2016/1919** establishes that individuals detained under the EAW should have access to **timely legal aid**, ensuring fair representation for those who may not have the financial means to hire a private lawyer.



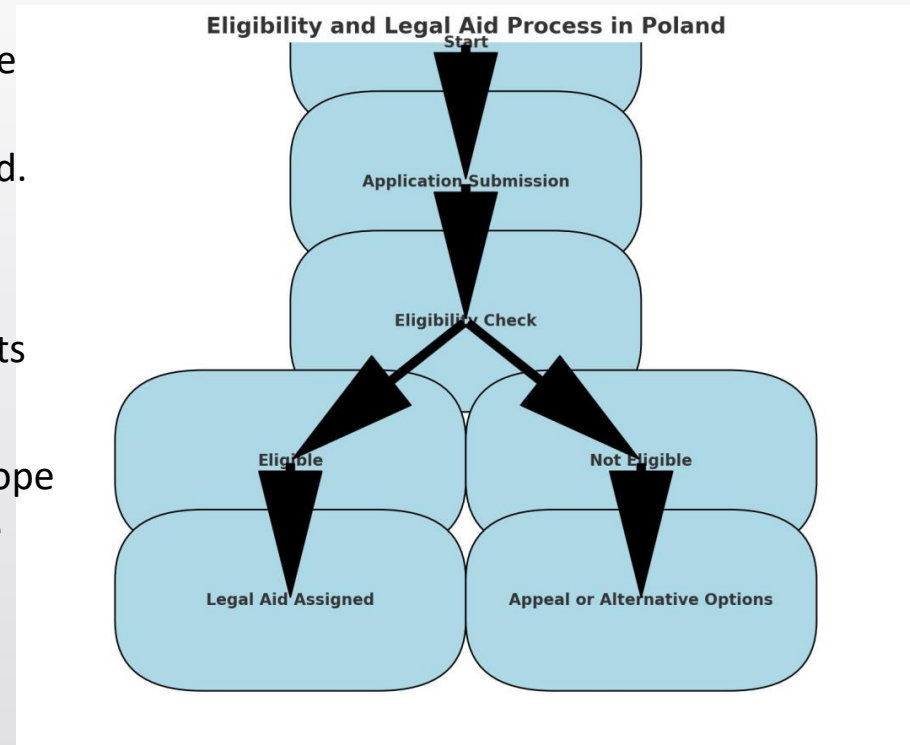
Key Provisions of Legal Aid for EAW Cases



- **Access to Legal Aid:** Legal aid is provided to individuals facing detention under the EAW when they cannot afford to pay for a lawyer.
- **Eligibility Criteria and Assessment:** The process for determining eligibility for legal aid involves an assessment of the individual's **financial situation** and **need** for legal support.
- **Timely Access to Legal Aid:** Legal aid must be **available promptly** to ensure the detained individual is not left without counsel for an extended period, which could harm their defense.

Implementation of Legal Aid in Polish Law for EAW Cases

- **Financial Eligibility Assessment:** In Poland, individuals are assessed for eligibility based on their **financial status** to determine whether they qualify for state-funded legal aid.
- **Clear Criteria and Transparency:** Poland's legal system ensures that the criteria for legal aid are **clear** and **transparent**, allowing detainees to understand their rights and the legal process.
- **Expanded Legal Aid Access:** Poland has expanded the scope of legal aid to ensure that individuals detained under the EAW can receive the necessary legal representation throughout the process.



III. Directive 2016/343: Presumption of Innocence and the Right to Be Present at Trial in EAW Context



Background and Importance



- The **presumption of innocence** is a cornerstone of European **human rights law**, ensuring that no one is treated as guilty before being proven so in a court of law.
- Directive **2016/343** ensures that individuals subject to the EAW are **protected from media prejudice** and that they have the **right to be present** during their trial.

Key Provisions of Directive 2016/343



- **Right to Be Present at Trial:** The defendant has the right to be physically present in court to ensure a **fair trial**.
 - If the individual cannot attend, the trial may proceed via **video link** or other remote methods.

Implementation in Polish Law

- **Upholding the Presumption of Innocence:** Poland's legal framework ensures that **presumption of innocence** is respected and that any violation of this principle is addressed by the courts.
- **Ensuring Trial Presence:** Polish law has provisions to allow for **remote participation** in trials when the individual cannot be physically present, in line with **Directive 2016/343**.





Case Studies for Directive 2016/343

- **Case Study 1: Media Influence on Presumption of Innocence in an EAW Case**
 - This case examines how the **media** influenced the public perception of an individual's **presumption of innocence**, highlighting the need for media regulation in criminal proceedings.
- **Case Study 2: Right to Be Present at Trial via Video Link in an EAW Case**
 - A case where the defendant participated in their trial **via video link** due to geographical constraints, showcasing how ****Directive**