

The impact of the new legal aid regime on national proceedings – Polish case

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Cracow, 3 March 2017



Directive 2013/48 on the right of access to a lawyer

- **Opportunity approach** (PL, DE, AT)
 - the person is entitled to have a lawyer and the State will not prevent this lawyer from being present during the criminal proceedings
 - (BUT often broader scope of access)
 - **Guarantee approach** (FR, NL, LT)
 - If there is no lawyer of the choosing of the person, the state ensures his/her presence
 - (BUT often narrower scope of access)
- Thus: some of the guarantee approach Member States will not need to adapt its system to Directive 2016/1919

Approach in Directive 2016/1919

Art. 4.1. 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. 4.3. Where a Member State applies a means test, it shall take into account all relevant and objective factors, such as the income, capital and family situation of the person concerned, as well as the costs of the assistance of a lawyer and the standard of living in that Member State, in order to determine whether, in accordance with the applicable criteria in that Member State, a suspect or an accused person lacks sufficient resources to pay for the assistance of a lawyer

Legal aid – means test

Art. 78.1 CCP: A suspect, who does not have a defence counsel of his own choice, may request the appointment of a defence counsel *ex officio* , **if he can duly prove that he is unable to bear the costs of defence without prejudice to the necessary maintenance of himself, or his family.**

Obligatory defence

- under 18 years of age,
- deaf, mute or blind,
- there is a justified doubt whether his ability to comprehend the meaning of his deed or to control his behaviour was not, at the time of committing the offence, excluded or significantly reduced,
- there is a justified doubt whether the condition of his mental health allows him to participate in the proceedings or to conduct his defence in an independent and reasonable manner.
- if the court deems it necessary due to other circumstances impeding the defence.
- in the proceedings before the circuit court, if he is charged with an indictable offence. In such a case, the attendance of the defence counsel at the main trial is obligatory.

Accelerated proceedings

- if the perpetrator has been apprehended in the act of committing an offence or immediately thereafter, arrested and brought before the court by the Police within 48 hours with a motion to examine the case in accelerated proceedings

Art. 517j § 1. CCP: In order to make it possible for the accused to use the assistance of a defence counsel, in accelerated proceedings **advocates and legal counsels shall be on duty** in the time and place determined in separate provisions.

Recent changes

- increase effectiveness
 - Possibility to appoint the defence counsel for a specific procedural act (art. 78§1a CCP)
 - Appointment of the defence counsel without delay (art. 81a§2 CCP)
- still flawed practice
- no effective sanctions in case of breach

Right to legal aid in EAW proceedings

Directive 2016/1919

Art. 5.1. – (...) requested persons have a right to legal aid upon arrest pursuant to EAW

Art. 5.2. - requested persons who are the subject of EAW proceedings ***for the purpose of conducting a criminal prosecution*** and who exercise their right to appoint a lawyer in the issuing Member State *to assist the lawyer in the executing Member State in accordance with Directive 2013/48/EU* have the right to legal aid in the issuing Member State for the purpose of such proceedings in the executing Member State, in so far as legal aid is necessary to ensure effective access to justice

→ unconditional legal aid in executing state vs. conditional legal aid in issuing state

Legal aid in EAW proceedings in PL

- Right of access to a lawyer in PL as the issuing and executing state (but no guarantee) – stemming from general provisions of CCP and confirmed by the Constitutional Court
- No specific provision on the right to legal aid to appoint a lawyer in the issuing Member State to assist the lawyer in the executing Member State assisting, when „necessary to ensure effective access to justice” (most EAW cases in PL as the issuing state – currently under 3000/year)

Remedy

- Only if violation of the provisions of procedural law might have affected the contents of the judgment (art. 438 CCP)
→ Art. 8 of Directive 2016/1919 – generally obligation to ensure an effective remedy in case of breach of a right to legal aid (+ no flexible recital!)

Conclusions

1. Provisions of Directive 2016/1919 leave some margin of interpretation and clarification, also for the Court of Justice of the EU
2. In PL right to legal aid formally exists to a large extent but in practice is prone to abuse – no effective remedies
3. Perhaps obligation to appoint a lawyer before the first hearing is the only solution
4. Need for regulation of right of access to legal aid in PL as issuing state to assist a lawyer in the executing state



Thank you for your attention!