

PAPER ON 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

Legal aid under Directive 2016/1919 – a step forward in strengthening procedural guarantees in criminal matters, but further initiatives are still needed

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I. LEGAL AID AS A FUNDAMENTAL RIGHT

[Equal footing]

1. In an ever more sophisticated legal and economic ecosystem, even many adults of normal intelligence are unable to fully comprehend all substantive issues determining their legal position, and all the particular details of proceedings conducted in their case. The lack of thorough understanding of the merits of a case, of intricacies in procedure, and further of what is at stake and might be the consequences of judicial or other enforcement authorities' decisions, all undermine effective participation in trials and can lead to negative consequences for interested parties¹.
2. In criminal matters an individual (legal entity) is rarely on an equal footing with police officers, prosecutors, and judges accustomed to the procedures within which they act. In the worst case an inability to understand the procedural and substantive rights of a suspect or accused may result in convictions and sentences of imprisonment².
3. A systemic counter tool thus exists to remedy the sophistication of law –access to a lawyer to guide and assist a party through the judicial proceedings in order to ensure procedural balance. As a crucial support for fair trial in all proceedings where an individual is confronted with the judicial machine, the right to access to a lawyer is enacted as fundamental right. Two headlight provisions in this respect are article 6(3)c of the European Convention on Human Rights and article 47(2) of the Charter of Fundamental Rights of the European Union.
4. The formal declaration of the right to access to a lawyer does not however constitute a solution *per se*. In order to fulfil its function and achieve its goal it must be effective. The effectiveness of right to a lawyer has different dimensions, but one of these is the accessibility of legal assistance for those who cannot afford to pay lawyers' fees by their own means.

¹ Case S.C. vs THE UNITED KINGDOM, ECHR, judgment of 15th June 2004, Application no. 60958/00;

² We should not be naïve and believe that it is a practice with no exceptions for jurisdictions to ensure that parties effectively participate in proceedings; jurisdictions very often focus on the formal aspect of procedural guarantees. Generally blaming judges for a formal approach to the justice they render would not lead to any constructive conclusions, since one of the overall reasons for this is that the justice system is overwhelmed. Statement based on the experience.

[Legal aid]

5. This issue is addressed by the concept of legal aid which consequently is in itself constitutive of a fundamental right. The European Convention of Human Rights (art. 6(3)c) and the Charter of Fundamental Right of the European Union (art. 47(3)) provide for the right to be given free legal assistance if a person does not have sufficient resources to pay for this, and (respectively) if the interests of justice so require or should this be necessary to ensure effective access to justice.
6. The scope of legal aid will certainly follow the scope of the primary right, which is the right to access to a lawyer but which might, however, vary according to the nature of the proceedings.
7. In most legal systems, criminal proceedings are divided into two parts i.e. preparatory proceedings (investigation) and trial before the court. Since both stages serve the same aim, meaning to establish guilt of the accused, legal aid should be available during both of these.

[Preparatory proceedings]

8. The availability of legal aid in preparatory proceedings is pivotal, since it is at this stage that criminal charges crystallise for the suspected person as result of relevant findings being made and evidence being gathered. At the same time, there is a momentum in criminal proceedings whereby different issues substantial for the matter may be addressed and resolved, or determined, e.g. pre-trial detention or even discontinuation of the proceedings.
9. Further, even though in many legal systems the prosecuting authorities conducting preparatory proceedings have a duty to gather both incriminating and exculpatory evidence, this is not common practice. Therefore, this opens room for evidentiary initiatives by the party, provided he/ she is aware of this and knows what to look for and what to produce for the case files.
10. It should also be taken into account that the defence strategy, which will influence further actions in the matter, starts to materialise from the very moment when a person starts to be suspected. It is thus crucial to ensure that this strategy is not irremediably weakened. This may however occur especially at the beginning of an investigation, with the emphasis put on deprivation of liberty, when a person is the most vulnerable in confrontation with the enforcement authorities and might start to incriminate him/herself.
11. The European Court of Human Right repeatedly stresses in its case law the importance of assistance from a lawyer for suspected persons at the earliest stage of proceedings, i.e. police interrogation. The Court emphasises that the suspect's particular vulnerability can be properly compensated in most matters only by the assistance of a lawyer, who is seen as a safe harbour and especially as protection against self-incrimination [Salduz vs Turkey³, Ibrahim and others vs the UK, etc.].

³ Case Salduz vs Turkey, ECHR, Grand Chamber, judgement of 27th November 2008, Application no. 36391/02; Case Ibrahim and others vs the United Kingdom, ECHR, Grand Chamber Judgment of 13th September 2016, Applications nos. 50541/08, 50571/08, 50573/08 and 40351/09;

12. Additionally, taking account of the continuing complexity of the legal and also economic ecosystem, a lawyer already stepping in for the defence at the stage of preparatory proceedings may establish a fruitful dialogue with the prosecuting authorities by helping them to investigate and see different sides of the case. Depending on circumstances, a lawyer may also provide arguments to terminate proceedings, which independently of being in the best interest of the party, might also be in the interest of Justice.

[Trial]

13. For the same reasons as mentioned above, legal aid as an aspect of right of access to a lawyer is important at the stage of criminal proceedings when an accused is brought before a court. Additionally, however, a lawyer's support seems to be justified when the accused enters the courtroom, which like a scene in a theatre is governed by specific rules and where psychology also plays an important role.

[Time gap]

14. The starting point for materialisation of the right to request access to a lawyer is commonly considered to be the moment when a person is presented with criminal charges or is arrested and put in custody.
 15. However, we cannot ignore the situation of persons not yet formally presented with charges, but who the prosecuting authorities are interested in and who are being heard not just as simple witnesses, but still not yet as suspects (a person against who a notification of a suspected offence is brought before the prosecuting authorities). Their hearing may generate negative consequences for them should they be unable to understand how to effectively exercise their rights and not be assisted by a lawyer. Therefore, also at this stage, a person who might be presented with charges should be given the opportunity to make use of the right to defence and to access a lawyer with all consequences stemming therefrom, including a right to ask for legal aid.
 16. A moment when the right to access a lawyer is considered as crystallised does not necessarily coincide with its effective application, especially if a person cannot afford to pay for legal assistance. Since legal aid depends on fulfilment of prerequisites related to financial means of the suspect or merits of the case, it is generally accorded by the competent authority after examining the eligibility of the requesting party. This may generate a gap in effective application of the right to access to a lawyer as between a moment of the request for legal aid and a moment of decision to grant it a party is without legal assistance although some investigative acts may be pursued
 17. This issue of gap in access to a lawyer is addressed under the concept of so called provisional legal aid, comprising legal assistance which is provided as soon as a person who becomes or may become a suspect (or accused) requests legal assistance that he or she will benefit from until a decision is made on according legal aid.
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[Transnational dimension of legal aid]

18. Finally, taking account of globalisation and the opportunity to freely travel, the right to access to a lawyer also has a transnational dimension. The vulnerability of a suspect who does not speak the language of procedure seems to be obvious. This demands that their rights to a fair trial are duly balanced with respect to the enforcement authorities. Legal aid, including provisional legal aid, should therefore normally also apply to foreign citizens.
19. In a perfect world, legal aid for foreign citizens (and in general terms – legal assistance) would be provided by lawyers who speak a foreign language that the suspect understands. This, however, still seems to be wishful thinking and is a challenge for new generations.

[Issues taken into consideration]

20. The issues presented above had been taken into consideration during the process of building the area of freedom, justice and security within the European Union. The process of adopting legal instruments on the European level providing for fundamental procedural guarantees took more than 15 years [taking as its starting point the moment of adoption of the Framework Decision of 2002 on the European Arrest Warrant (EAW)⁴ and as the end point the adoption in 2016 of the last directive implementing the Road map for strengthening procedural safeguards in criminal matters]. Whereas these guarantees are to greater or lesser extent enshrined in the domestic legislation of Member States.
21. The right to legal assistance was framed in Directive 2013/48 of the right of access to a lawyer in criminal proceedings⁵ (hereinafter “**Directive 2013/48**”), which was subsequently supplemented by Directive 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons⁶ (hereinafter “**the Directive**” or “**Directive 2016/1919**”). Although both Directives regulate the matter of legal assistance in a comprehensive manner and are necessarily completed by other directives adopted within the framework of the Road map, some of the issues inherent to effective application of the right to legal assistance finally remained uncovered as provisional legal aid.

II. BUILDING THE AREA OF FREEDOM, SECURITY AND JUSTICE

⁴ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, O.J. L 190, 18.7.2002, p. 1–20;

⁵ 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, O.J. L294, 6.11.2013;

⁶ 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, O.J. L 297, 4.11.2016;

22. The Tampere European Council on 15 and 16 October 1999⁷ launched the European Area of Freedom, Justice and Security (the Area) where inter alia necessary approximation of the Member States' legislation and judicial cooperation would foster the development of prosperity, secure peace and ensure security for all in respect of human right. When constructing the Area all these values and aims should be identically handled.
23. Judicial cooperation in criminal (and civil) matters would be grounded on mutual recognition of judicial decisions rendered in different Member States, seen as a cornerstone of cooperation between Member States and based on their mutual trust in their respective legal systems.

[Focus on security]

24. One of the first instruments to be processed was the procedure of surrender between Member States of suspects or accused persons for the purpose of conducting criminal proceedings, or of persons convicted to enforce final convicting decisions. This instrument was aimed at replacing hitherto instruments on extradition.
25. In 2002, Member States still using the unanimity voting procedure adopted the Framework Decision on the European Arrest Warrant that has provided for the procedure of surrender of requested persons between Member States. The governmental stage of the procedure was abandoned and surrender had to follow as a result of recognition by the requested Member State of an arrest warrant issued in the requesting Member State.
26. The Framework Decision was adopted in the particular circumstances of international and human shock after the World Trade Centre attack on 9 September 2001. Understandably, this could be a factor in speeding the legislative process and also disturbing the balance that ideally should be pursued between freedom, justice and security. In fact, while construing the EAW scheme focus was placed on security, leaving freedom and fairness (as dimensions of justice), including fundamental guarantees, behind. The Framework Decision thus determines prerequisites for surrender and the procedure, but remains silent as to the procedural rights of the requested person but for the exception of article 1(3)⁸ of the Decision. The article 1(3) states that the Directive should not have "the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6

⁷ Tampere European Council 15 and 16 October 1999, Presidency Conclusions, http://www.europarl.europa.eu/summits/tam_en.htm;

⁸ And apart from recital 12 of the Framework Decision that states: (1) "This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union(7), in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that this person's position may be prejudiced for any of these reasons. (2) This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media.

of the Treaty on European Union”. However, the jeopardy for or breach of human rights, including procedural safeguards, has not been enacted as a ground for refusal to surrender a person to the requesting Member State.

[Assumption of the same level of protection of human rights]

27. The assumption inferred from the Bosphorus⁹ case law of the ECHR might also be a reason for not specifically addressing the issue of fundamental human rights, including procedural guarantees. One of the implications of the this case law was that that since all the EU Member States were members of the European Convention on Human Rights, the EU as such ensured the same level of protection as enshrined in the Convention. Consequently, the Member States could reciprocally presume that all of them ensure the same level of protection of fundamental rights.
28. The reality however turned out to be different – the threshold of fundamental human rights protection in Member States varied from state to state, which led Member States to hamper cooperation in judicial matters by opposing recognition of judicial decisions rendered by other Member States. In relation to the EAW, even the Court of Justice of the EU recognised the fundamental rights as possible ground for refusal to surrender a requested person, although this was not the explicit ground for refusal. The Court first took this position in the Melloni¹⁰ case and further in the Caldararu¹¹ case in respect to detention conditions that may entail inhuman or degrading treatment, or torture.
29. The mutual recognition of judicial decisions and mutual trust thus required European action in order to harmonise the standards for respecting human rights and effectively applying procedural guarantees in order to ensure fair trial.

[Restoring the balance]

30. The Treaty of Lisbon amending the European construction brought in grounds through article 82 of the Treaty on the Functioning of the European Union for approximation of domestic legislation in respect to the rights of individuals in criminal proceedings. The EU has provided the legislative tools of directives to this end.
31. Therefore, a Road map for strengthening procedural safeguards in criminal matters was adopted in November 2009. This defined six priorities in which legislative actions were required, and which among others covered legal advice and legal aid. Six directives were subsequently adopted in pursuit of the road map, including Directive 2016/1919 on legal aid. The balance between security, freedom and justice thus started to be restored.
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⁹ Case of Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi vs Ireland, ECHR, Grand Chamber, judgement of 30th June 2005, Application no. 45036/98;

¹⁰ Case C-399/11 Stefano Melloni vs Ministerio Fiscal, Court of Justice of the European Union, Grand Chamber, judgement of 26th February 2013;

¹¹ Joined Cases C-404/15 and C-659/15 PPU Aranyosi and Căldăraru, Court of Justice of the European Union, Grand Chamber, judgement of 5th April 2016;

III. DIRECTIVE 2016/1919 – LEGAL AID ON THE EUROPEAN LEVEL

33. This Directive frames the legal aid scheme and obliges Member States to make it available to suspects and accused persons in criminal matters, as well as to persons requested to be surrendered under the EAW procedure. The main purpose of implementing the Directive is to make effective the right to access to a lawyer in criminal matters as provided for by Directive 2013/48.
34. The deadline for the Member States to implement the Directive into their domestic legislation has been fixed for 25 May 2019. It is by this time that the Member States should introduce the principles that result from the Directive that will allow them to achieve the aim transpiring from the directive – to render the right to access to a lawyer effective also for those who cannot afford to pay for legal assistance.

[Minimum rules]

35. The rules as provided by the Directive are minimum rules aimed at harmonisation of the Member State's legislation as to the minimum standards for legal aid in criminal matters. This implies that while implementing the Directive to domestic legislation, the Member States cannot go below the threshold as provided in Directive 2016/1919. At the same time, they may establish higher standards although they should not be too sophisticated in order not to become obstacles to the mutual recognition of judicial decisions. Therefore, although the directive, which contrary to the regulation does not apply directly in the Member States' legislation, gives Member States discretion in how to scope and precisely regulate legal aid, this direction has its limits in smooth judicial cooperation.
36. Within the discretion to which the Member States are entitled, and still within the aim of rendering the right to access to a lawyer effective, a Member State may consider broadening the scope of legal aid to provisional legal aid, which was in fact the core concept behind the Directive at its early drafting stage.

[Provisional legal aid – a progenitor of Directive 2016/1919]

37. The first draft of what later became Directive 2016/1919 was entitled the directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in the European arrest warrant procedure. The draft provided a scheme of legal assistance financed by the state from the moment when a person is deprived of liberty until the moment when a decision on granting legal aid is formally taken by a competent authority. Through this solution, the European legislator wished to deal with the problem of the gap in effective defence and access to a lawyer during a period of particular vulnerability of a person who is suspected and arrested, but (claim to be) unable to appoint a lawyer by his or her own financial means and has to await a decision on whether or not he/she will be granted legal aid. The draft directive also framed legal aid for requested persons in the EAW procedure.
38. The focus shifted during the legislative process, the final directive concentrating on legal aid entailing legal assistance financed by the State but applying only upon and from the judicial decision by a competent authority.

39. Although the scope of the provisional legal aid as provided in the draft directive was limited (because it would apply to persons deprived of liberty), the solution envisaged would be a considerable step forward in making effective the defence right and access to a lawyer. Therefore, it is regrettable that the final directive does not cover this issue.
40. At the same time, one cannot deny that the comprehensive framing of legal aid as an institution is an utterly valuable input of the European Union in enabling effective right to defence. Adopting a directive mainly focusing on provisional legal aid would certainly create a patchwork system of rules and would not be complementary to the Directive on the right to access to a lawyer, because legal aid as such would remain non-harmonised. However, provisional legal aid remains an issue to be addressed whether on the European or national levels.

A. Scope – who is entitled to legal aid under Directive 2016/1919

41. The aim of Directive 2016/1919 is complementary to Directive 2013/48, and so the Directive 2016/1919 needs to be read in conjunction therewith. Thus, it is necessary to refer to Directive 2013/48 in determining the situations in which legal aid should at least be made available, as that Directive determines the general conditions when the right to a lawyer crystallises in criminal matters.

[Scope of the right to access to a lawyer - starting point for determining scope of the right to legal aid]

42. According to Directive 2013/48, the right to access to a lawyer applies from the moment when a person is made aware by the competent authorities of a Member State, by official notification or otherwise, that she/ he is suspected or accused of having committed a criminal offence. The right to access to a lawyer applies irrespective of whether the suspects or accused persons are deprived of liberty.
43. The right to access to a lawyer applies until the final conclusion of proceedings intended to determine whether the suspect or accused person has committed the offence, and – depending on circumstances – to determine proportionate sanction.
44. Although Directive 2013/48 does not expressly provide for the definition of the suspected or accused persons, this definition may however be inferred from the wording of article 2(1) of this Directive, which implies that for the purpose of its implementation and application, the accused or suspect should be defined by the Member States as a person who has been presented with criminal charges. This should limit potential variations as to the scope of application of the right to access to a lawyer, should the status of the suspect or accused be attributed in the legislation of one of the Member States not at the moment of presentation of charges, but during further proceedings. This could undermine the aim of the Directive to render the right to access to a lawyer effective.

[The scope of application of legal aid]

45. Within the scope of right to a lawyer as determined by Directive 2013/48, there is subsequent intervention from Directive 2016/1919 specifying which suspected or accused persons entitled to access to a lawyer are entitled to legal aid.

46. According to the Directive [article 2(1)], legal aid should be formally available from the very moment of presentation of charges if a person suspected or accused is:
- a) deprived of liberty,
 - b) required to be assisted by a lawyer in accordance with EU or national law, and thus when legal assistance for a suspect or accused is mandatory (e.g. persons with psychological illnesses, vulnerable, or under a certain age),
 - c) required or permitted to attend investigative or evidence-gathering acts, especially identity parades, confrontations, reconstructions of the scene of a crime.
47. At the same time, the Directive takes into account of the dynamic nature of criminal proceedings. Therefore, it stresses that availability of the legal aid implies that it should also be possible for the legal aid to be obtained by a person who was not initially suspected or accused, but acquired this status in the course of questioning by the police or by another law enforcement authority [article 2(3)].

[Dual defence]

48. The Directive also takes into account the cross-border dimension of criminal cases and provides for so called dual legal aid that should be made available to persons requested under the EAW procedure, in both the requested and requesting Member State [article 2(2)].
49. Therefore, under the Directive, persons who are requested under the EAW and who have the right to access to a lawyer according to Directive 2013/48 should be given the opportunity to benefit from legal aid from the moment of their arrest. This legal aid should be ensured in the first place by the Member State requested to surrender the person, from the moment of his or her deprivation of liberty, until the moment of surrender or until the decision to refuse the surrender becomes final.
50. At the same time, legal aid should also be made available to the requested person in the State that issued the EAW. A condition for providing the legal aid in the issuing State is, however, that the person is requested for the purpose of conducting the criminal proceedings in the issuing State and that he or she wants to exercise her/his right to appoint a lawyer in the issuing State in order to assist the lawyer in the requested State. In such case, legal aid in the requested State should be mirrored in the issuing State.
51. The aim of this solution is to establish a dual defence, implying cooperation and mutual assistance by duty lawyers in the requested and requesting States in order to ensure that all rights of the requested person will be respected. Further, depending on circumstances, this cooperation may allow for the building of arguments before the executing State authorities to justify that one of the grounds for refusing enforcement of the European Arrest Warrant in the matter does arise.
52. At the same time, it should be noticed that Directive 2016/1919 limits the scope of the dual legal aid to situations where a person is requested for the purpose of conducting criminal proceedings, leaving apart the purpose of enforcement of a custodial sentence. However, it cannot be argued that there is no need for legal aid to be available for a requested person, including dual legal aid, bearing in mind detention

conditions in particular. These conditions are considered as amounting to inhuman and degrading treatment or punishment in several Member States, or even torture, imperatively forbidden by the European Convention on Human Rights and the Charter of Fundamental Rights of the EU. According to Court of Justice of the European Union case law, these conditions may constitute grounds for refusal to surrender a person. It would also be naïve to consider that all final judgements within the European Union are exempt from any judicial error.

53. Legal aid at the enforcement procedure stage should in general be considered in future as a remedy or supplementary tool for the effective right to defence.

[Eligibility]

54. In all situations that the Directive defines as materialising the right for legal aid, a person who *prima facie* can request the legal aid must meet the prerequisites of eligibility for legal aid in order to benefit from it, as grounded on case merits or financial means criteria, or both. Additionally, granting the legal aid should be in the interest of Justice (article 4 – see below).

[Subject matter limitation]

55. In the event that a suspect, accused or person requested under the EAW procedure has been considered as meeting all requirements within the application of the eligibility test, the Directive introduces a limit as to the scope of granted legal aid.
56. The Directive states that legal aid should not be abstractly accorded to concerned persons due to their status but should be granted only for the purposes of criminal proceedings in which the person concerned is suspected or accused of having committed a criminal offence, and thus in relation to which the person has requested the legal aid.

[Attenuations]

57. The right to access to a lawyer not being absolute, the Directive [article 2(4)] introduces some attenuation in certain situations to the rule of availability of legal aid for suspected or accused persons or persons requested under the EAW procedure.
58. Specifically, this relates to situations where according to the law of a Member State, the sanction for minor offences, such as traffic offences or contraventions (strict liability offences of minor blameworthiness) is imposed in the first place by an authority other than a court having jurisdiction in criminal matters, and whose decisions may be challenged before such a court. According to the Directive, legal aid should apply at the stage of proceedings before a court having jurisdiction in criminal matters.

[Temporary derogations]

59. Since the right to legal aid is dependent on the right to access to a lawyer, it may be argued that the scope of the right to legal aid will also be determined by the exceptions to application of the right to access to a lawyer as defined in the Directive 2013/48.

60. Therefore, by reference to articles 3(5) or (6) of Directive 2013/48, there can be temporary derogation from the right to legal aid to the extent justified by the particular circumstances of the case, if a compelling reason occurs. These compelling reasons are a situation where:
- a) there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person,
 - b) immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings.
61. Further, there could also be temporarily derogated to legal aid in a case where the geographical remoteness of a suspect or accused person makes it impossible to ensure the right of access to a lawyer in its legal aid form without undue delay after deprivation of liberty.
62. In any case, a temporary derogation for application of the right to legal aid should respect the following requirements
- a) be proportionate and not go beyond what is necessary,
 - b) be strictly limited in time,
 - c) not be based exclusively on the type or the seriousness of the alleged offence
 - d) not prejudice the overall fairness of the proceedings,
 - e) be authorised only by a duly reasoned decision taken on a case-by-case basis, either by a judicial authority, or by another competent authority on condition that the decision can be submitted to judicial review.
63. The above–specified temporary derogations (legitimate delaying of providing legal aid) define boundaries that cannot be trespassed leading to a breach of the right to legal aid.

B. Mechanism for providing legal aid

64. Directive 2016/1919 provides for frameworks for Member States to regulate the procedure of granting legal aid, especially regarding by whom, how and when legal aid should be granted to a suspect, accused or person requested under the EAW procedure. The Directive also emphasises the issue of the quality of legal aid.

[Who]

65. The Directive states in very general terms that the assignment of legal aid should be decided by a competent authority, without however defining who a competent authority should be. Therefore, the Directive leaves it to Member States' discretion to decide which competent authorities will have jurisdiction on issues of legal aid. At the same time, the Directive indicates in its recital 24, that the competent authority should be independent, which should limit the scope of institutions that may be considered as competent for deciding about assignment of legal aid.
66. It is unambiguous that the Directive considers a court, including a judge sitting alone, as an authority predestined to decide on legal aid (as being independent). Whether

other authorities or bodies would be considered as independent depends on the domestic legal system.

67. The Directive also addresses urgent situations and states that in such cases the temporary involvement of the police and the prosecution should also be possible if this is necessary for ensuring legal aid in timely manner.

[When]

68. The Directive does not provide specific rules on how the process of deciding on legal aid should be initiated. In its recital 18, the Directive mentions a request for legal aid by the suspect, accused person or requested person as the triggering factor. At the same time, it stresses that account be taken especially of vulnerable persons, such a request should not be made a substantive or mandatory condition for granting legal aid in criminal matters. Should this be the case, this would imply that using the right to legal aid would be conditional upon the sole will and procedural due diligence of the concerned person. However, not every suspect or accused may be capable of understanding the significance of this right.
69. Therefore, while the principle for granting legal aid would be that it is accorded upon request by the person concerned, there should be situations where legal aid would be decided upon the initiative of the competent authority (apart from situations of mandatory legal aid).
70. The Directive requires legal aid to be granted without undue delay. This implies that all procedures and mechanisms intended for granting legal aid should be tailored to be effective and time-saving.
71. Although the Directive does not define what the meaning of “undue delay” is, it imposes that legal aid be granted at the latest before questioning by the police, by another law enforcement authority or by a judicial authority, or before the investigative or evidence-gathering acts. This requirement may thus be a remedy for the time gap in effective access to a lawyer, which may occur between the moment that criminal charges are presented, when the right to a lawyer materialises, and a formal decision to grant the legal aid.

[Eligibility test]

72. In all situations specified by the Directive as enabling a right to legal aid, a Member State should be in a position to provide such legal assistance to a person who lacks financial means to finance his or her own defence, and if the interest of justice so requires.
73. Therefore, not everyone will be entitled to legal aid but only those who will in the competent authority’s view fulfil all eligibility test requirements. The Directive specifies that this eligibility test might be a means test, or merits tests, or both (art. 4 of Directive). Additionally, the Directive specifies what the competent authorities should take into account when they apply each of these tests.

74. As to the means test aimed at verifying whether a concerned person lacks sufficient resources to pay for legal assistance, the Directive requires that all relevant factors be taken into account, such as the income, capital and family situation of the person concerned, the costs of assistance by a lawyer and the standard of living in that Member State.
75. As to the merit tests, the competent authority should consider such factors as the seriousness of the criminal offence, the complexity of the case and the severity of the sanction at stake.
76. Notwithstanding what might be a result of the merit tests, the Directive requires the merits test to be deemed as met when:
 - a) deprivation of liberty is at stake (thus when the concerned person is brought before a competent court or judge in order to decide on detention at any stage of the proceedings), or
 - b) a person is deprived of liberty.
77. In respect to this latter circumstance of deprivation of liberty, which is a principal circumstance materialising the right to legal aid, it might be concluded that the decision on assignment of legal aid should be automatic provided that the Member State opts for the merits test.
78. In the event, however, that the Member State opts for the means test, independently of the situation of deprivation of liberty, the assignment of legal aid will seemingly always depend on the financial situation of the concerned person. This situation may be remedied if the general condition of interests of Justice is taken into consideration by the competent authority. This general prerequisite however leaves considerable room for discretion in deciding whether the rights of defence can or cannot be fully and effectively exercised by a person whose financial situation does not meet the means test but where he or she still does not appoint a lawyer.
79. Notwithstanding the above, the Directive determines what situations of restraint on liberty do not amount to deprivation enabling the right to legal aid. These situations are the following: (i) identifying the suspect or accused person, (ii) determining whether an investigation should be started, (iii) verifying the possession of weapons or other similar safety issues, (iv) carrying out investigative or evidence-gathering acts such as body checks, physical examinations, blood, alcohol or similar tests, or the taking of photographs or fingerprints (and thus evidence-gathering acts other than these specified in the Directive as necessarily materialising a right to legal aid), (v) bringing the suspect or accused person to appear before a competent authority, in accordance with national law.

[Remedies in case of refusal]

80. In case of refusal to grant legal aid, the Directive imposes on the Member States that they should provide opportunities to challenge a decision, so that the request or need for legal aid might be re-examined.
81. The requirement of putting in place adequate and effective remedies also covers situations where provision of legal aid is delayed in an unjustified manner or when the right to legal aid is undermined by, for example, the poor quality of the provided assistance.

[What]

82. Establishing and organising access to a lawyer, and further a legal aid scheme itself, do not automatically imply that the right to defence is effectively exercised. Effective defence depends on effective legal assistance, which depends on the quality of legal assistance provided. This quality should be high, irrespective of whether the legal assistance is financed by the concerned person him or herself or by the State, and thus cover all the aspects inherent to legal assistance, i.e. communication, advice, representation in court, active participation in evidence-gathering acts and in questioning, psychological support. The lawyer in any case cannot be a decoration at the scene of investigation and trial where the person concerned plays one of the main roles.
83. Thus, the Directive importantly focuses on the quality of legal aid, imposing an obligation on Member States to ensure that legal aid provided to entitled persons is of sufficient quality necessary to safeguard the fairness of proceedings, with due respect for the independence of the legal profession.
84. In order to achieve this aim, the Directive states that the Member States should take all necessary measures, including appropriate funding and training for lawyers providing legal aid in criminal matters, as well as for persons involved in the decision-making process concerning legal aid.
85. According to the Directive, to guarantee that the right to effective legal aid is not undermined, Member States should provide for a remedy that will enable a person to whom legal aid has been granted to request replacement of the lawyer providing legal aid. It is and should be legitimate to imagine that poor quality of legal aid might constitute such grounds.

IV. IMPACT OF DIRECTIVE 2016/1919 AND REMAINING ISSUES

86. Directive 2016/1919 is a necessary step forward and achievement in establishing the Area of Freedom, Justice and Security, where the fundamental rights and procedural guarantees are a necessary nexus between freedom and security. Legal aid is an inherent part of the right to access to a lawyer and the articulation of care by the State for respecting the right to defence. The implementation of the Directive will certainly lead to the unification in Member States of a minimal threshold for protection of the right to defence by enactment of legal aid being available in principle in situations as defined in the Directive.

87. To what extent the effectiveness of the right to legal aid and consequently of access to a lawyer in criminal matters will be achieved, will however depend on the Member States, because the Directive leaves a margin of discretion on how to implement the framework organising legal aid to domestic legislation.
88. Further, there are also issues that relate to the legal aid scheme but which remain as for now outside of the perspective being behind the Directive.

[Legal aid inherent to status of the suspect or accused]

89. Firstly, the Directive is cautious in scoping the right to legal aid. Consequently, the Directive does not refer to the standing of the suspected person in general, meaning irrespective of whether he or she is deprived of liberty or not.
90. It should be recognised that it is when a person is deprived of liberty that the right of defence is particularly difficult to exercise.
91. Nevertheless, pre-trial detention, although applied in several cases, is not a rule and pre-trial detention is applied towards a much lesser number of suspects than their total number. From the practical point of view, the scope of application of the Directive as it has been enacted, will be hence quite modest.
92. Further, there is no reason to establish such a demarcation line between suspects and accused in custody and these who are not deprived of liberty. A criminal matter remains a criminal matter, which implies a necessity of defence against criminal liability.

[Provisional legal aid]

93. Secondly, although the Directive tries to prevent a possible time gap in legal assistance during the period between the materialisation of right to access to a lawyer and the moment of a decision being taken on legal aid¹², provisional legal should still be considered. It should be remembered that practical organisation of legal aid schemes will be entrusted to the Member States. It cannot be predicted at this stage whether procedures aimed at granting legal aid will in practice function in such way that legal aid is assigned without undue delay.
94. Further, effectiveness of the legal aid might also be jeopardised by application of temporary derogations to the right to legal aid.
95. Provisional aid seems to be an instrument that might remedy a situation where access to legal aid may be undermined by different circumstances, including pitfalls in organisation and the smooth functioning of decision-making processes.

[Accessory proceedings]

¹² The Directive states that legal aid is granted at the latest before questioning by the police, by another law enforcement authority or by a judicial authority, or before investigative or evidence-gathering acts.

96. Thirdly, the scope of considering legal aid and procedural safeguards should be extended to enforcement procedures and other accessory proceedings. Although their subject matter is not questions of guilt, these nonetheless still remain judicial procedures that also entail a high level of formalism and sophistication. As already stressed, legal assistance as a right should particularly be taken into consideration with regard to EAW procedures launched when a requested person is to serve an imposed imprisonment penalty.

[Funding]

97. Finally, the issue of finance should also be addressed. While handling the issue of quality of legal aid, the Directive mentions that funding financed by the State should be among measures that Member States take in order to ensure a sufficient quality of legal assistance.
98. The financial aspect of the legal aid is thus left to be managed by member States. . It cannot be ignored that legal aid is or will be a burden for Member States' budgets. It is also a truism to state that the subject of money is a difficult one.
99. However, this problem should not be avoided and particularly at the European level. The EU should have a strong voice in this respect. Leaving the decision on how much by way of funds is to be directed to legal aid should not be left at the entire discretion of Member States, as in the worst case scenario lawyers providing legal aid might be deprived of any remuneration for their work or their remuneration might be symbolic.
100. The author of this paper fully recognises that the advocates' profession is a mission, not a business aimed at generating income. However, to continually exercise this mission with devotion, which will also be reflected in a sufficient quality of legal aid, advocates should also be adequately remunerated.