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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND
THE COUNCIL**

**on the implementation of 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**

1. INTRODUCTION

The right to legal aid is enshrined in Article 47, third paragraph, of the Charter of Fundamental Rights of the European Union¹ and Article 6(3)(c) of the European Convention on Human Rights.

Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings² (the ‘Directive’) aims to strengthen the right to a fair trial in criminal proceedings by laying down common minimum rules on the right to legal aid.

The Directive is the sixth instrument adopted under Article 82(2)(b) of the Treaty on the Functioning of the European Union (TFEU)³, which provides the legal basis for adopting minimum rules on ‘the rights of individuals in criminal procedure’. The Directive applies in 25 Member States⁴.

The EU has adopted the following five other directives in this field:

- the Directive on the right to interpretation and translation⁵;
- the Directive on the right to information⁶;
- the Directive on the right of access to a lawyer and communication with third persons while being deprived of liberty⁷;
- the Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial⁸; and
- the Directive on procedural safeguards for children⁹.

These directives help enhance mutual trust and, by doing so, strengthen the principle of mutual recognition of judgments and other judicial decisions.

The European Commission has already published implementation reports on the first four directives¹⁰. Article 10(2) of the Directive similarly requires the Commission to submit a report to the European Parliament and to the Council on the Directive’s implementation.

¹ OJ C 326, 26.10.2012, p. 391.

² OJ L 297, 4.11.2016, p. 1; corrigendum: OJ L 91, 5.4.2017, p. 40.

³ OJ C 326, 26.10.2012, p. 47.

⁴ In accordance with Protocol No 21 and Protocol No 22, respectively, Ireland and Denmark are not bound by the Directive. Therefore, they are not considered in this assessment.

⁵ Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, OJ L 280, 26.10.2010, p. 1.

⁶ Directive 2012/13/EU on the right to information in criminal proceedings, OJ L 142, 1.6.2012, p. 1.

⁷ Directive 2013/48/EU 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, p. 1.

⁸ Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ L 65, 11.3.2016, p. 1.

⁹ Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ L 132, 21.5.2016, p. 1.

This report is primarily based on information that the Member States provided to the Commission when notifying national measures transposing the Directive. It also draws on publicly available information from the European Union Agency for Fundamental Rights¹¹ and from Commission-funded studies by external stakeholders¹².

The report focuses on the measures Member States have taken so far to transpose the Directive¹³. It assesses whether Member States have fully and correctly transposed the Directive and whether national legislation achieves the Directive's objectives and fulfils its requirements.

The Court of Justice of the European Union has interpreted Directive 2013/48/EU on some occasions¹⁴. Such interpretation is also relevant for assessing compliance with the Directive and has been taken into account in this report.

2. GENERAL ASSESSMENT

According to Article 12 of the Directive, Member States had to transpose the Directive into national law by 25 May 2019. By this date, 4 Member States – Germany, Greece, Croatia and Malta – had not communicated all the necessary measures to the Commission. As a result, in July 2019, the Commission launched infringement proceedings under Article 258 TFEU against these Member States for failing to communicate their transposing measures. All of these Member States have since complied with the obligation, and the infringement proceedings have been closed.

The approach to transposing the Directive varies between Member States. Some Member States introduced specific legislative measures explicitly transposing the rights under the Directive alongside other legal or practical implementation measures. Other Member States considered that their existing measures were already broadly in line with the Directive's requirements, and did not adopt any specific transposing measures.

While the absence of dedicated transposing provisions is sometimes remedied at least to some extent by means of practical implementation measures and case law, this is not always the case. In a number of Member States (22), national provisions are thus insufficient to fully

¹⁰ COM(2018) 857 final, COM(2018) 858 final, COM(2019) 560 final and COM(2021) 144 final.

¹¹ Study done by the European Union Agency for Fundamental Rights, *Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceeding*. Available at [Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings \(europa.eu\)](https://european-council.europa.eu/media/en/press-communications/infographic/infographic-rights-in-practice-access-to-a-lawyer-and-procedural-rights-in-criminal-and-european-arrest-warrant-proceedings/europa.eu).

¹² See for example the project coordinated by the Hungarian Helsinki Committee on the right to a lawyer and to legal aid in criminal proceedings in five European jurisdictions, comparative report available at [Right to lawyer and legal aid COMPARATIVE REPORT 2018.pdf \(helsinki.hu\)](https://www.helsinki.hu/sites/default/files/2018-06/Right_to_lawyer_and_legal_aid_COMPARATIVE_REPORT_2018.pdf), and the project led by the Lithuanian Law Institute, 'Enhancing the quality of Legal Aid: Common Standards for Different Countries', information available at [Enhancing the quality of Legal Aid: Common Standards for Different Countries | LTI \(teise.org\)](https://www.teise.org/en/enhancing-the-quality-of-legal-aid-common-standards-for-different-countries).

¹³ The Commission organised two expert meetings with representatives of the Member States in January and October 2018 to discuss and facilitate Member States' work on transposing and applying the Directive.

¹⁴ See in particular the judgments of 5 June 2018, *Kolev and Others*, C-612/15; of 19 September 2019, *Rayonna prokuratura Lom*, C-467/18; and of 12 March 2020, *VW*, C-659/18.

comply with certain key provisions of the Directive. This is particularly the case where the scope of the national measures is narrower than set out in Article 2 of the Directive (11 Member States are concerned).

The compliance assessment has also disclosed other shortcomings in 22 Member States, in particular in relation to the requirement to grant legal aid without undue delay, and at the latest before questioning or before investigative or evidence-gathering acts are carried out.

Such failure to comply with all provisions of the Directive negatively affects the effectiveness of the rights under the Directive. The Commission will take every appropriate measure to remedy all identified shortcomings, including by initiating infringement proceedings pursuant to Article 258 TFEU.

3. SPECIFIC POINTS OF ASSESSMENT

3.1. Scope (Article 2)

Article 2(1) sets out the scope of application of the Directive's requirements. The Directive applies to suspects and accused persons in criminal proceedings who have a right of access to a lawyer pursuant to Directive 2013/48/EU and who are:

- (a) deprived of liberty;
- (b) required to be assisted by a lawyer in accordance with Union or national law; or
- (c) required or permitted to attend an investigative or evidence-gathering act, including as a minimum the following:
 - (i) identity parades;
 - (ii) confrontations;
 - (iii) reconstructions of the scene of a crime.

In many Member States (14), national measures giving effect to the Directive's rights are in line with the Directive, even though they might not expressly transpose Article 2(1). However, compliance issues have been identified in the national laws of 11 Member States. Compliance issues relating to the transposition of Article 2(1) are particularly serious as they often also impact the scope of national provisions implementing specific rights under the Directive. This is particularly the case where suspects as understood by the Directive are not recognised as such at national level, where legal aid is only available once formal charges are issued, or where national laws do not cover all forms of deprivation of liberty during which legal aid should be granted.

Article 2(2) of the Directive provides that the Directive's rights apply to requested persons who have a right of access to a lawyer pursuant to Directive 2013/48/EU upon their arrest in the executing Member State. Compliance issues have been identified in 12 Member States because they failed to transpose the 'upon arrest' requirement.

Of all Member States, 7 made use of the option to exclude minor offences from the scope of the transposing measures (Article 2(4) of the Directive). While the national law of most of the Member States (5) that made use of this option complies with the limitations stipulated in the Directive, the national law of 2 Member States appears not to be fully compliant.

3.2. Definition (Article 3)

Article 3 of the Directive defines legal aid for the purposes of the Directive as funding by a Member State of the assistance of a lawyer, enabling the exercise of the right of access to a lawyer. Recital 8 of the Directive states that legal aid should cover the costs of the defence of suspects, accused persons and requested persons, and that when granting legal aid, the competent authorities of the Member States should be able to require that suspects, accused persons or requested persons bear part of those costs themselves, depending on their financial resources.

Beyond what is stated in recital 8, the issue of recovery of legal aid costs, while relevant, is not directly addressed by the Directive. Nevertheless, in some cases, national provisions on cost recovery can have an impact on the assessment of specific requirements of the Directive as regards the point in time at which the decision on legal aid is taken or as regards legal certainty.

Of all Member States, 19 enable cost recovery in one or more specific circumstances, such as:

- in 12 Member States, in the case of conviction, taking due account of the financial and/or family situation of the person or even irrespective of this situation, or where the criminal proceedings are terminated due to circumstances that do not exonerate the person such as the expiration of the statute of limitations, or amnesty;
- in 8 Member States, where it emerges that the person was not entitled to legal aid, provided false statements, failed to cooperate or abused legal aid, or did not notify the authorities that the grounds for granting legal aid no longer existed, or where costs of legal aid were incurred negligently; and
- in 4 Member States, where the financial situation of the beneficiary of legal aid has improved.

3.3. Legal aid in criminal proceedings (Article 4)

Article 4(1) and (2) of the Directive requires Member States to ensure that suspects and accused persons have the right to legal aid when they lack sufficient resources to pay for the assistance of a lawyer (means test) and/or when the interests of justice so require (merits test). This leaves a certain discretion to Member States. In principle, they may maintain the structure of their various legal aid systems as long as the application of their relevant national rules does not limit or derogate from the rights and procedural safeguards ensured under the Charter of Fundamental Rights of the European Union and the European Convention on

Human Rights, as interpreted by the Court of Justice and by the European Court of Human Rights (recital 17, last sentence, of the Directive).

The related recital 18 of the Directive states: ‘Member States should lay down practical arrangements regarding the provision of legal aid. Such arrangements could determine that legal aid is granted following a request by a suspect, an accused person or a requested person. Given in particular the needs of vulnerable persons, such a request should not, however, be a substantive condition for granting legal aid.’

It has been found that 3 Member States require submitting a formal request for legal aid, and do not provide any options for legal aid to be granted *ex officio*. Therefore, the requirement to submit a formal request in these Member States can have the effect of a substantive condition for granting legal aid in the sense of recital 18 of the Directive. However, in one of these Member States, this is mitigated by the fact that national law ensures that the criminal authorities inform the person concerned of their right to legal aid and by the fact that the national bar association can advance costs and fees until a formal decision is taken.

While 5 Member States apply only a means test, and 3 Member States only a merits test, 16 Member States apply both a means and a merits test. Of all Member States, 1 has not exercised the option to subject the right to legal aid to means or merits testing. As a result, the right to legal aid is unconditional and the Member State has not transposed Article 4(2), (3) and (4) as it is not applicable in the national context.

In 19 of the Member States applying a means test, the law seems to comply with Article 4(3) of the Directive, which requires these Member States to 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 the 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. The Member States applying a means test use various criteria for determining eligibility for legal aid. Of all Member States, 9 rely on general clauses, for instance general references to the applicant’s socio-economic or financial situation, thus allowing for more flexibility. By contrast, 12 have laid down more detailed provisions setting specific criteria and/or a fixed threshold. Only in 2 Member States applying a means test, national measures do not fully comply with Article 4(3) of the Directive. In one of them this is due to a presumption that certain categories of suspects and accused persons have incomes above the threshold for obtaining access to legal aid. Such presumption also excludes the possibility of being granted legal aid in future proceedings, irrespective of the nature of such proceedings and of the procedural status of the person concerned. In the other, non-compliance with Article 4(3) is due to the absence of specific criteria for assessing the financial situation of the person concerned, coupled with the fact that the means test is applied only at the end of the proceedings, when deciding on the potential recovery of costs.

The first sentence of Article 4(4) of the Directive requires Member States applying a merits test to take into account the seriousness of the criminal offence, the complexity of the case and the severity of the sanction at stake, in order to determine whether the interests of justice require legal aid to be granted. Of all Member States applying a merits test, 7 have laid down specific criteria for such tests in the strict sense of the term. The vast majority (18) of the

Member States that apply a merits test have systems for mandatory defence that amount to merits testing as mentioned with respect to Article 2(1)(b) of the Directive (see Section 3.1 of this report). The national laws of 5 Member States also contain general references to the interests of justice, but only 1 Member State applying a merits test relies solely on such general reference. In this Member State, the court applies the criterion of ‘interests of justice’ in a discretionary manner, depending on the circumstances of the case. However, in actual fact, where suspects or accused persons satisfy the requirements of the means test, the court will – according to reports by stakeholders – automatically consider that granting legal aid is in the interests of justice and will therefore consider the requirements of the merits test to be satisfied too.

The second sentence of Article 4(4) of the Directive lists situations in which the requirements of the merits test must be deemed to have been met, namely:

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

In 11 Member States applying a merits test, compliance issues relating primarily to point (a) above have been identified. These issues primarily concern cases where a decision on pre-trial detention is taken while a person has not (yet) been deprived of liberty. However, compliance issues have also been identified in cases where a person has already been taken into custody by the police.

Article 4(5) of the Directive requires Member States to ensure that legal aid is granted without undue delay, and 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 referred to in Article 2(1)(c) of the Directive are carried out. In this context, it is noted that 14 Member States provide for provisional or emergency legal aid. Nonetheless, in 22 Member States, compliance issues with regard to Article 4(5) have been identified. In many of these Member States (17), access to a lawyer may be granted in a timely manner (applying Directive 2013/48/EU), but the right to (provisional) legal aid as laid down in Article 4(5) of the Directive is not clearly provided for. Such compliance issues are linked to the incorrect transposition of the scope of the Directive and to the timing with which legal aid is granted, both generally and in specific cases. Furthermore, compliance issues have been identified where submitting a formal request is set as a substantive condition for granting legal aid.

3.4. Legal aid in European arrest warrant proceedings (Article 5)

Article 5(1) of the Directive requires Member States executing a European arrest warrant to ensure that persons requested under a European arrest warrant have a right to legal aid upon their arrest that Member State until they are surrendered or until the decision not to surrender them becomes final.

Of all Member States, 5 have expressly transposed the right to legal aid for persons requested under a European arrest warrant by laying down specific, self-standing provisions. By contrast, the legislation of a large majority (20) of Member States relies on cross-references to general provisions on legal aid in criminal proceedings.

Compliance issues as regards Article 5(1) of the Directive have been identified for 15 Member States and result mainly from the failure to transpose the ‘upon arrest’ requirement as mentioned previously in relation to Article 2(2) (see Section 3.1 of this report). Other compliance issues noted in 6 Member States are linked to national rules making the granting of legal aid conditional on a formal request, or to the incorrect transposition of the time limits for taking a decision on the granting of legal aid, meaning that in effect, while in principle there might be a right to legal aid upon arrest, this would not be guaranteed until a decision is taken.

According to Article 5(2), Member States issuing a European arrest warrant must ensure that requested persons who are the subject of European arrest warrant proceedings for the purpose of conducting a criminal prosecution and who exercise their right to appoint a lawyer in this Member State to assist the lawyer in the Member State executing the European arrest warrant in accordance with Article 10(4) and (5) of Directive 2013/48/EU on the right of access to a lawyer, have the right to legal aid in the Member State issuing the European arrest warrant for the purpose of such proceedings in the executing Member State. National legislation in 12 Member States does not fully comply with Article 5(2) of the Directive mainly due to a lack of specific provisions giving effect to the Directive’s requirement or due to the absence of clear cross-references extending the application of provisions on criminal proceedings or legal aid to cover European arrest warrant proceedings.

Article 5(3) of the Directive provides that the right to legal aid referred to in Article 5(1) and (2) may be subject to a means test in accordance with Article 4(3) of the Directive, which applies *mutatis mutandis*. However, this provision does not envisage the possibility of a merits test in accordance with Article 4(4) of the Directive. More than half (15) of the Member States have opted to apply a means test in accordance with Article 5(3). However, compliance issues noted in 4 Member States result from: (i) the application of a merits test in addition to a means test; (ii) a lack of clarity as to whether only a means test applies; (iii) or shortcomings in transposing Article 4(3) of the Directive that also impact the compliance of national legislation with Article 5(3) of the Directive (see Section 3.3 of this report).

3.5. Decisions regarding the granting of legal aid (Article 6)

Article 6(1) of the Directive requires that decisions on whether or not to grant legal aid and on the assignment of legal aid lawyers must be made, without undue delay, by a competent authority. Member States must also take appropriate measures to ensure that the competent authority takes its decisions diligently, respecting the rights of the defence.

Recital 24 of the Directive explains that the competent authority should be an independent authority that is competent to take decisions regarding the granting of legal aid, or a court, including a judge sitting alone. However, in urgent situations, the temporary involvement of

the police and the prosecution should also be possible in so far as this is necessary for granting legal aid in a timely manner.

In most (23) Member States, decisions on granting legal aid are taken by a court or judge and/or by legal aid offices. Individual legal aid lawyers are usually assigned in cooperation with the national lawyer associations (usually the bar). Lawyers are assigned either based on lists or electronic registries of legal aid lawyers provided or managed by lawyer associations or assigned to individual cases by such an association itself. In 2 Member States, legal aid is entirely organised by the national bar associations and their members. On the other hand, in 4 Member States, bar associations are not directly involved.

In 6 Member States, police and prosecutors can also be involved in the decision on legal aid: (i) in specific types or stages of proceedings; (ii) in specific circumstances, such as the deprivation of liberty of a suspected or accused person; (iii) when mandatory defence applies; or (iv) in relation to certain types of legal aid.

In more than half (15) of the Member States, issues have been identified as regards the transposition of Article 6(1) of the Directive. These issues are mainly linked to the timing of the legal aid decision (issues related to the transposition of Article 4(5) of the Directive thus also having an impact on the transposition of Article 6(1) of the Directive) and/or the requirement that a competent authority must make the decision.

In 5 Member States, compliance issues have been identified as regards Article 6(2) of the Directive, which stipulates that suspects, accused persons and requested persons must be informed in writing if their request for legal aid is refused in full or in part.

3.6. Quality of legal aid services and training (Article 7)

Article 7(1) of the Directive requires Member States to take necessary measures, including with regard to funding, to ensure that:

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

This requirement of the Directive is also a matter of practical implementation that may not always require transposition by taking legislative measures, if there is an appropriate legal framework. However, in 3 Member States, no specific rules could be identified in national law giving effect to Article 7(1) of the Directive. Issues have also been found in 11 Member States that have taken specific measures with respect to Article 7(1) of the Directive. These issues are mainly due to the underfunding of the legal aid system, the lower fees paid to legal aid lawyers or the inadequacy of selection systems for legal aid lawyers, which may have negative implications for the quality of legal aid. Special accreditation or selection systems for legal aid lawyers set up in 4 Member States are also not necessarily sufficient in themselves to ensure the quality of legal aid services.

Most Member States have not specifically transposed the provisions of Article 7(2) (23 Member States) and (3) (18 Member States) of the Directive related to the training of staff involved in the decision-making on legal aid and lawyers. Mostly only relevant measures of general nature could be identified. As indicated above, specific transposing measures are not necessarily required for these paragraphs and their implementation might be ensured in practice.

Article 7(4) of the Directive requires Member States 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. Relevant compliance issues have been identified in 11 Member States. In 5 of these Member States, no explicit transposing measures could be identified, but provisions on the free choice of a lawyer, on the relationship between clients and lawyers, and on the professional and ethical conduct of lawyers might be of certain relevance. In 6 Member States, the identified compliance issues are linked to the more limited scope of the national provisions or to a lack of legal clarity.

3.7. Remedies (Article 8)

Article 8 of the Directive requires Member States to ensure that suspects, accused persons and requested persons have an effective remedy under national law in the event of a breach of their rights under the Directive.

Of all Member States, 11 provide for specific remedies for breaches of the right to legal aid, while 14 Member States rely solely on general remedies for breaches of procedural rights. In those Member States having specific remedies, general remedies for breaches of the rights of the defence are also available.

3.8. Vulnerable persons (Article 9)

Article 9 of the Directive stipulates that Member States must ensure that the particular needs of vulnerable suspects, accused persons and requested persons are taken into account in the implementation of the Directive.

In addition to being a child, in many (18) Member States, other specific vulnerabilities are taken into account and typically lead to automatic eligibility to legal aid. This often applies to persons with physical or mental incapacities/disabilities, persons with respect to whom there are doubts as to their ability to defend themselves, or persons with special needs. Account should for example also be taken of the fact of being an asylum seeker, a displaced person, an unaccompanied minor, a foreigner or a person who does not speak or understand the language of the Member State where the proceedings are held.

4. CONCLUSION

The aim of the Directive was to improve the effective application of the right to legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings. Overall, the Directive has provided EU added value by raising the level of protection of persons involved in criminal proceedings.

However, this report highlights that there are still some difficulties in implementing important provisions of the Directive. This is particularly true for national measures that fail to cover the scope of application of the Directive (Article 2 of the Directive) and for shortcomings in relation to legal aid being granted in a timely manner (Article 4(5), Article 5(1) and Article 6(1) of the Directive).

The Commission will continue to assess Member States' compliance with the Directive and will take every appropriate measure to ensure conformity with the Directive's provisions throughout the EU.