

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

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PARLIAMENT AND OF THE COUNCIL

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular point (b) of Article 82(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee<sup>(1)</sup>,

After consulting the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure<sup>(2)</sup>,

Whereas:

- (1) The purpose of this Directive is to ensure the effectiveness of the right of access to a lawyer as provided for under Directive 2013/48/EU of the European Parliament and of the Council<sup>(3)</sup> by making available the assistance of a lawyer funded by the Member States for suspects and accused persons in criminal proceedings and for requested persons who are the subject of European arrest warrant proceedings pursuant to Council Framework Decision 2002/584/JHA<sup>(4)</sup> (requested persons).
- (2) By establishing common minimum rules concerning the right to legal aid for suspects, accused persons and requested persons, this Directive aims to strengthen the trust of Member States in each other's criminal justice systems and thus to improve mutual recognition of decisions in criminal matters.
- (3) The third paragraph of Article 47 of the Charter of Fundamental Rights of the European Union (the Charter), Article 6(3)(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR) enshrine the right to legal aid in criminal proceedings in accordance with the conditions laid down in those provisions. The Charter has the same legal value as the Treaties, and the Member States are parties to the ECHR and the ICCPR. However, experience has shown that this in itself does not always provide a sufficient degree of trust in the criminal justice systems of other Member States.

- (4) On 30 November 2009, the Council adopted a Resolution on a Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings<sup>(5)</sup> ('the Roadmap'). Taking a step-by-step approach, the Roadmap calls for the adoption of measures regarding the right to translation and interpretation (measure A), the right to information on rights and information about the charges (measure B), the right to legal advice and legal aid (measure C), the right to communicate with relatives, employers and consular authorities (measure D), and special safeguards for suspects or accused persons who are vulnerable (measure E).
- (5) On 11 December 2009, the European Council welcomed the Roadmap and made it part of the Stockholm programme — 'An open and secure Europe serving and protecting citizens'<sup>(6)</sup> (point 2.4). The European Council underlined the non-exhaustive character of the Roadmap by inviting the Commission to examine further elements of minimum procedural rights for suspects and accused persons, and to assess whether other issues, for instance the presumption of innocence, need to be addressed, in order to promote better cooperation in that area.
- (6) Five measures on procedural rights in criminal proceedings have been adopted pursuant to the Roadmap to date, namely Directives 2010/64/EU<sup>(7)</sup>, 2012/13/EU<sup>(8)</sup>, 2013/48/EU, (EU) 2016/343<sup>(9)</sup> and (EU) 2016/800<sup>(10)</sup> of the European Parliament and of the Council.
- (7) This Directive relates to the second part of measure C of the Roadmap, regarding legal aid.
- (8) Legal aid should cover the costs of the defence of suspects, accused persons and requested persons. When granting legal aid, the competent authorities of the Member States should be able to require that suspects, accused persons or requested persons bear part of those costs themselves, depending on their financial resources.
- (9) Without prejudice to Article 6 of Directive (EU) 2016/800, this Directive should not apply where suspects or accused persons, or requested persons, have waived their right of access to a lawyer in accordance with, respectively, Article 9 or Article 10(3) of Directive 2013/48/EU, and have not revoked such waiver, or where Member States have applied the temporary derogations in accordance with Article 3(5) or (6) of Directive 2013/48/EU, for the time of such derogation.
- (10) Where a person who was initially not a suspect or an accused person, such as a witness, becomes a suspect or an accused person, that person should have the right not to incriminate him or herself and the right to remain silent, in accordance with Union law and the ECHR, as interpreted by the Court of Justice of the European Union (Court of Justice) and by the European Court of Human Rights (ECtHR). This Directive therefore makes express reference to the practical situation where such a person becomes a suspect or an accused person during questioning by the police or by another law enforcement authority in the context of criminal proceedings. Where, in the course of such questioning, a person other than a suspect or an accused person becomes a suspect or an accused person, questioning should be suspended immediately. However, it should be possible to continue questioning where the person concerned has

been made aware that he or she has become a suspect or an accused person and that person is able to fully exercise the rights provided for in this Directive.

- (11) In some Member States an authority other than a court having jurisdiction in criminal matters has competence for imposing sanctions other than deprivation of liberty in relation to relatively minor offences. That may be the case, for example, in relation to traffic offences which are committed on a large scale and which might be established following a traffic control. In such situations, it would be unreasonable to require that the competent authorities ensure all the rights under this Directive. Where the law of a Member State provides for the imposition of a sanction regarding minor offences by such an authority and there is either a right of appeal or the possibility for the case to be otherwise referred to a court having jurisdiction in criminal matters, this Directive should therefore apply only to the proceedings before that court following such an appeal or referral.
- (12) In some Member States certain minor offences, in particular minor traffic offences, minor offences in relation to general municipal regulations and minor public order offences, are considered to be criminal offences. In such situations, it would be unreasonable to require that the competent authorities ensure all the rights under this Directive. Where the law of a Member State provides in respect of minor offences that deprivation of liberty cannot be imposed as a sanction, this Directive should therefore apply only to the proceedings before a court having jurisdiction in criminal matters.
- (13) The application of this Directive to minor offences is subject to the conditions set out in this Directive. Member States should be able to apply a means test, a merits test, or both in order to determine whether legal aid is to be granted. Provided that this complies with the right to a fair trial, the merits test may be deemed not to have been met in respect of certain minor offences.
- (14) The scope of application of this Directive in respect of certain minor offences should not affect the obligations of Member States under the ECHR to ensure the right to a fair trial, including obtaining the assistance of a lawyer.
- (15) Provided that this complies with the right to a fair trial, the following situations do not constitute a deprivation of liberty within the meaning of this Directive: identifying the suspect or accused person; determining whether an investigation should be started; verifying the possession of weapons or other similar safety issues; carrying out investigative or evidence-gathering acts other than those specifically referred to in this Directive, such as body checks, physical examinations, blood, alcohol or similar tests, or the taking of photographs or fingerprints; bringing the suspect or accused person to appear before a competent authority, in accordance with national law.
- (16) This Directive lays down minimum rules. Member States should be able to grant legal aid in situations which are not covered by this Directive, for example when investigative or evidence-gathering acts other than those specifically referred to in this Directive are carried out.
- (17) In accordance with Article 6(3)(c) ECHR, suspects and accused persons who lack sufficient resources to pay for the assistance of a lawyer are to have the right to legal

aid when the interests of justice so require. This minimum rule allows Member States to apply a means test, a merits test, or both. The application of those tests should not limit or derogate from the rights and procedural safeguards that are ensured under the Charter and the ECHR, as interpreted by the Court of Justice and by the ECtHR.

- (18) Member States should lay down practical arrangements regarding the provision of legal aid. Such arrangements could determine that legal aid is granted following a request by a suspect, an accused person or a requested person. Given in particular the needs of vulnerable persons, such a request should not, however, be a substantive condition for granting legal aid.
- (19) The competent authorities should grant legal aid without undue delay and at the latest before questioning of the person concerned by the police, by another law enforcement authority or by a judicial authority, or before the specific investigative or evidence-gathering acts referred to in this Directive are carried out. If the competent authorities are not able to do so, they should at least grant emergency or provisional legal aid before such questioning or before such investigative or evidence-gathering acts are carried out.
- (20) Given the specificity of European arrest warrant proceedings, the interpretation of the provisions of this Directive relating only to requested persons should take into account this specificity and should not in any way prejudice the interpretation of the other provisions of this Directive.
- (21) Requested persons should have the right to legal aid in the executing Member State. In addition, 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 the issuing Member State in accordance with Directive 2013/48/EU should have the right to legal aid in that 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, as laid down in Article 47 of the Charter. This would be the case where the lawyer in the executing Member State cannot fulfil his or her tasks as regards the execution of a European arrest warrant effectively and efficiently without the assistance of a lawyer in the issuing Member State. Any decision regarding the granting of legal aid in the issuing Member State should be taken by an authority that is competent for taking such decisions in that Member State, on the basis of criteria that are established by that Member State when implementing this Directive.
- (22) To ensure effective access to a lawyer by requested persons, Member States should ensure that requested persons have a right to legal aid until they are surrendered, or until the decision not to surrender them becomes final.
- (23) When implementing this Directive, Member States should ensure respect for the fundamental right to legal aid as provided for by the Charter and by the ECHR. In doing so, they should respect the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.
- (24) Without prejudice to provisions of national law concerning the mandatory presence of a lawyer, a competent authority should decide, without undue delay, whether or not to grant legal aid. 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. In urgent situations the temporary involvement of the police and the prosecution should, however, also be possible in so far as this is necessary for granting legal aid in a timely manner.

- (25) Where legal aid has been granted to a suspect, an accused person or a requested person, one way of ensuring its effectiveness and quality is to facilitate continuity in his or her legal representation. In that respect, Member States should facilitate continuity of legal representation throughout the criminal proceedings, as well as — where relevant — in European arrest warrant proceedings.
- (26) Adequate training should be provided to staff involved in the decision-making on legal aid in criminal proceedings and in European arrest warrant proceedings. Without prejudice to the judicial independence and differences in the organisation of the judiciary across the Member States, Member States should request that those responsible for the training of judges provide such training to courts and judges that take decisions regarding the granting of legal aid.
- (27) The principle of effectiveness of Union law requires that Member States put in place adequate and effective remedies in the event of a breach of a right conferred upon individuals by Union law. An effective remedy should be available where the right to legal aid is undermined or the provision of legal aid is delayed or refused in full or in part.
- (28) In order to monitor and evaluate the effectiveness of this Directive, there is a need for collection of relevant data, from available data, with regard to the implementation of the rights set out in this Directive. Such data include, where possible, the number of requests for legal aid in criminal proceedings, as well as in European arrest warrant proceedings where the Member State concerned acts as an issuing or executing Member State, the number of cases where legal aid was granted, and the number of cases where a request for legal aid was refused. Data on the costs of providing legal aid to suspects or accused persons and to requested persons should also be collected in so far as possible.
- (29) This Directive should apply to suspects, accused persons and requested persons regardless of their legal status, citizenship or nationality. Member States should respect and guarantee the rights set out in this Directive, without any discrimination based on any ground such as race, colour, sex, sexual orientation, language, religion, political or other opinion, nationality, ethnic or social origin, property, disability or birth. This Directive upholds the fundamental rights and principles recognised by the Charter and by the ECHR, including the prohibition of torture and inhuman or degrading treatment, the right to liberty and security, respect for private and family life, the right to the integrity of the person, the rights of the child, the integration of persons with disabilities, the right to an effective remedy and the right to a fair trial, the presumption of innocence, and the rights of the defence. This Directive should be implemented in accordance with those rights and principles.
- (30) This Directive lays down minimum rules. Member States should be able to extend the rights laid down in this Directive in order to provide a higher level of protection. Such higher level of protection should not constitute an obstacle to the mutual recognition

of judicial decisions that those minimum rules are designed to facilitate. The level of protection provided for by Member States should never fall below the standards provided by the Charter or by the ECHR, as interpreted by the Court of Justice and by the ECtHR.

- (31) Since the objective of this Directive, namely setting common minimum rules concerning the right to legal aid for suspects, accused persons and requested persons, cannot be sufficiently achieved by the Member States but can rather, by reason of its scale and effects, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union (TEU). In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.
- (32) In accordance with Articles 1 and 2 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the TEU and to the Treaty on the Functioning of the European Union (TFEU), and without prejudice to Article 4 of that Protocol, those Member States are not taking part in the adoption of this Directive and are not bound by it or subject to its application.
- (33) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the TEU and to the TFEU, Denmark is not taking part in the adoption of this Directive, and is not bound by it or subject to its application,

HAVE ADOPTED THIS DIRECTIVE:

- (1) [OJ C 226, 16.7.2014, p. 63.](#)
- (2) Position of the European Parliament of 4 October 2016 (not yet published in the Official Journal) and Council decision of 13 October 2016.
- (3) 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, p. 1](#)).
- (4) Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States ([OJ L 190, 18.7.2002, p. 1](#)).
- (5) [OJ C 295, 4.12.2009, p. 1.](#)
- (6) [OJ C 115, 4.5.2010, p. 1.](#)
- (7) 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, p. 1](#)).
- (8) 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, p. 1](#)).
- (9) Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 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](#)).
- (10) Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings ([OJ L 132, 21.5.2016, p. 1](#)).