

Adoption of the Legal Aid Directive in the EU: Step Forward to end class Justice?

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1. Introduction

On November 4, 2016 after the European Parliament and then, the European Council gave their final approvals, the Directive (2016/1919/EU) on the right to legal aid for citizens suspected or accused of a criminal offence and for those subject to a European arrest warrant, was published in the official journal of the European Union. EU member states were given 30 months to transpose the directive to their national legislation across the EU by May 2019 (with the exception of Denmark, Ireland and the UK).

The Directive on Legal Aid is the last in a series of 6 groundbreaking directives foreseen as the Roadmap¹ for strengthening procedural rights of suspected or accused persons in criminal proceedings adopted by the Council in November 2009 that collectively have the potential to bring about significant improvements on defence rights across the EU. Legal aid is about ending class justice: every person charged with a crime has the right to be treated equally and to defend themselves, regardless of their financial or social circumstances. Legal aid is crucial, both as a right for suspects and accused persons, but also because it underpins the equality of arms. Legal aid is one of the most important safeguards for the fairness of criminal proceedings, and ensures that the right to a fair trial is not reserved for those able to afford a lawyer. It is a foundation for

¹ http://ejusticia.net/images/uploads/pdf/Swedish_Roadmap_July_09.pdf

enjoyment of other rights in the criminal justice system, – and yet research shows that it is the Achilles heel in many European countries. In many countries legal provisions are inadequate to ensure effective implementation and from a practical perspective there is no system of legal aid in place. In Belgium, for instance, only between 10 and 20 per cent of the population is eligible for legal aid; In Italy – 2 to 3 per cent; in Poland, it depends on the charge, and there are no clear criteria for eligibility; In Greece there is no legal aid during early investigation stage in police custody. Most countries in Europe do not have effective quality assurance mechanisms and it is common that when you get legal aid it will be provided by trainee lawyer.

2. Process of Adoption

Initial efforts by the EU to legislate on procedural defence rights in one instrument took place in 2004 when the Europe Commission issued a proposal for a Framework Decision on certain procedural right in criminal proceedings. With the deepening integration among the EU member states, and broadening of measures to guarantee high degree of safety of the EU citizens there was a recognition that there was a need to balance these measures with rights of suspected and accused persons in order to ensure fairness of criminal proceedings. This attempt ended in failure in 2007 when the proposal was blocked by several member states, even though it was quite watered down at the end after many attempts of finding a commonly acceptable compromise among all member states. Some countries argued that there was no need for such instrument since there was the European Convention for human Rights while others claimed that national standards and practices were already sufficient. It was against his background that Ed Cape, Roger Smith, Taru Spronken and myself decided to produce a study to demonstrate actual state of defendants rights in selected EU member states.² The Swedish Presidency in 2009 managed to bring the agenda back with a so called

² Ed Cape, Zaza Namoradze, Roger Smith, Taru Spronken, *Effective Criminal Defence in Europe*, Intersentia, Antwerp, 2010

step by step approach under the Swedish Roadmap³ which would see the selected procedural rights to be legislated individually, one of which was a Directive on Access to a Lawyer and legal Aid. In 2010 I participated in a planning meeting that was convened by the European Commission at which the Commission suggested for tactical reasons to split this directive into two, and move the legal aid directive to be the last. The Commission argued that otherwise in the given economic and political situation in Europe it would most likely fail again. At that moment this did not necessarily seem to be a better approach and many of us at that meeting feared that moving legal aid to the end also could mean that it could have been dropped entirely, while the EU could still make a progress on the others. It almost happened this way, as explained below, but in retrospect, the risk has paid off.

Adoption of the Legal Aid directive had a roller coaster path since it was issued by the European Commission in November of 2013 that called for only provisional legal aid meant to cover solely the initial stage of criminal proceedings before a final decision on legal aid is taken by national authorities. The Council followed with adopting a similar minimalist approach. This narrow and fragmented approach represented a missed opportunity to respond to significant shortcomings in the accessibility and quality of national legal aid systems across EU member states. It would also undermine implementation of other interlinked directives, especially the directive on Access to a Lawyer, which was adopted in 2013 and entered into force in November 2016. This fragmented approach would leave gaps in protection and that without a wider scope and practical safeguards the proposed Directive would be an empty shell. The rights contained in the Directive on Access to a Lawyer would be illusory for those who are unable to afford a lawyer if not accompanied by support for an effective legal aid system.

The only remaining hope to strengthen the proposed draft was for the European Parliament to take a different approach (in the EU legislative process, after a legislation is initiated by the European Commission, the European Council and the European

³ Resolution of the Council on the Roadmap for Strengthening Procedural Rights of Suspects and Accused Persons in criminal Proceedings.

Parliament adopt their own approaches on the proposed legislation before going into the process of *trilogue* in which these three 3 EU entities conduct negotiations to agree on a final position). This Directive represented a critical opportunity for EU Member States to ensure that every person charged with a crime has the right to be treated equally and to defend themselves, regardless of their financial circumstances. Without a comprehensive Directive on Legal Aid, many of the rights in the Directive on Access to a Lawyer would remain illusory and there was a risk of creating a “two-tier” system of rights, one for the rich and one for the poor. Additionally, certain socio-economic groups could experience greater disadvantage. For example, a research by the Hungarian Helsinki Committee *Last Among Equals*⁴ indicated that Roma are disproportionately affected by lack of legal aid. Growing inequalities across Europe made the case for a comprehensive legal aid Directive even more urgent.

Whilst there are costs implications in providing access to legal aid it was important to recognize that ensuring defence rights from the beginning of the criminal justice process could save significant costs, both monetary and human, at a later stage. For example, providing access to legal aid that results in a suspect being safely and effectively bailed saves the much larger expense required to keep a suspect in pretrial detention. Research⁵ also shows increased costs for the system of unrepresented suspects. The full costs are significant, from the direct costs to the State in wasted resources, to the costs to the community and the detained individual in lost wages, employment and productivity.

Effective legal aid systems also increase the public’s trust in the justice system both in terms of fairness of the proceedings and outcomes. The European Committee for the Prevention of Torture and the UN Subcommittee on Prevention of Torture have both repeatedly emphasized that a functioning and efficient legal aid system is a fundamental safeguard against intimidation, ill-treatment and torture.

⁴ *Last Among Equals*, the equality before the law of vulnerable groups in the criminal justice system, by the Hungarian Helsinki Committee, 2014 Budapest.

⁵ <https://www.opensocietyfoundations.org/sites/default/files/socioeconomic-impact-pretrial-detention-02012011.pdf>

In November of 2014 the European Parliament organized a hearing on the proposed directive at which I was invited to present. In my presentation I focused on the following five points:

Firstly the Scope of the Directive

The proposed Directive envisioned a more limited scope of application than the Directive on the right of access to a lawyer. The Directive on access to a lawyer applies from the time that an individual is made aware that they are a suspect in criminal proceedings, whereas the proposed Directive on legal aid made deprivation of liberty an additional condition. Thus suspects who were, for example, released on police bail would not be eligible for legal aid – regardless of the seriousness of the accusation, or of their means.

The time at which provisional legal aid would come to an end was also unclear. Under the proposed provisions it could be possible for someone to be denied access to legal aid – but be required within a matter of hours to present for police questioning. The scope should thus have been extended, regardless of a decision on legal aid, to cover the period until the suspect appears in court for the purpose of determination of charges. And in any event access to legal aid should have also remained open until the suspect has had a reasonable opportunity to find and engage the services of a lawyer.

The fragmented approach also raised difficulties with respect to the continuity of legal services that had implications for the quality. Overall, there was a need for the proposed directive to fully mirror the directive on Access to a Lawyer.

The second - Recovery of Costs

The proposed Directive provided for the recovery of costs from those who are determined to be ineligible for legal aid. This could have had serious consequences, especially as the proposed Directive was silent on eligibility criteria. Given the vulnerability of suspects at the early stages of criminal proceedings – the additional stress and uncertainty around looming financial liability – could influence a suspects' decision regarding access to legal aid. This was a concern that many people would

likely choose to go un-represented – which would impact not only on their right to a fair trial, but also on the effective functioning of the trial itself.

The third - Independence and Quality

As it stood provisions on independence and quality of legal aid were consigned to the non-binding Recommendation.

It was imperative that the appointment of legal aid lawyers would be independent of those actors with an interest in the outcome of the case. There were examples of problems where the police systematically appointed lawyers deemed by them to be the most suitable (Hungary for example).

Factors that help guarantee the quality of services were also missing such as the need for lawyers to have completed specialized training in criminal law, ongoing professional development, fair remuneration and regular monitoring activities. Study on Effective Criminal Defence in Europe identified that majority of countries under the research entirely lacked quality assurance and monitoring mechanism. In many countries legal aid was provided by apprentice lawyers. These points were also made clearly in the recently adopted UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems – which were adopted by all Member States of the United Nations at the General Assembly in December of 2012⁶.

The fourth - the Merits and Means tests.

The accompanying Recommendation contained good guidance for what member states should take into account if they have a merits and means test and how to fairly apply these tests. In many countries across the EU, the means test in particular was an instrument to deeply restrict access to legal aid. In several countries, the financial threshold for the means test is so low that a high proportion of poor defendants are denied legal aid. There was a strong need for the proposed directive to include provisions on the merits and means test.

⁶ <https://www.opensocietyfoundations.org/voices/un-general-assembly-enacts-global-standards-access-legal-aid>

The fifth - importance of systemic approach to mechanisms and management of legal aid

Very few countries in the EU had legal aid legislation or adequate mechanisms or bodies to properly run a legal aid service. Too often we saw fragmented provision of services on an ad hoc basis, with little management or oversight. In many countries even the most basic and essential data on legal aid was not collected, therefore often there was little understanding of the real problems with legal aid and its implications. Neither the directive nor the recommendation included any requirements of this very practical, but crucially important aspect of legal aid. One of the most important questions for national-policymaking on the matter is whether the publicly funded services are provided in the cost-efficient manner. Several countries in Europe which recently undertook a task to reform legal aid systems started with the following consideration: they were spending considerable sums on legal aid but the systems seemed to function poorly, without accountability and transparency, because actually nobody was responsible for it. For example, Lithuanian government efforts which introduced progressive reforms in 2004, among others, resulted in the establishment of a dedicated public institution to manage legal aid. The Netherlands has had an entirely independent Legal Aid Board to administer legal aid for some time. Whilst the precise mechanics of each system could have been left up to the individual member state, the directive had to require that a comprehensive system would be established with aims to ensure accessibility, independence and quality of legal aid services.

In December 2014 the European Parliament Rapporteur on this file Dennis De Jong presented a comprehensive proposal for a directive which covered all stages of the criminal process and included provisions for accessibility, eligibility, quality, and independence. The proposal created a division between 'provisional' and 'ordinary' legal aid which was a useful distinction that built on the initial Commission proposal whilst ensuring the proposed directive's scope would match that of the Access to a Lawyer Directive. To foster support for the proposal for a comprehensive directive, my organization the Open Society Justice Initiative jointly with the Justicia European Rights

Network published twelve country fact-sheets⁷ on legal aid to provide evidence on the deficiencies of legal aid systems across Europe and a compendium of minimum international standards on legal aid⁸. It was critical that in the process of negotiating this directive, there would be good understanding of the realities on the ground and to design the new legislation with an aim to remedy these shortcomings. In May, 2015 the European Parliament Committee on Civil Liberties, Justice and Home Affairs adopted the broader strong proposal, giving supporters a critical lift ahead of what was expected to be a difficult negotiations in *trilogue* going forward to reconcile the different visions among the Commission, the Council and the Parliament.

As it was expected the negotiations which started in June 2015 during the Latvian Presidency of the EU and continued during Luxemburg Presidency were not giving strong signs of hope as the member states in European Council seemed reluctant to have a strong directive on legal aid. Initial months of the Dutch Presidency in the first half of 2016 also did not seem to offer opportunities that a real progress was possible. There even was a chance of a stalemate which might have led to suspending the negotiations unit uncertain times. The Council was strongly pushing back to maintain the following positions:

- Limiting the scope of the directive to only those who were deprived of liberty
- Minor offences exception
- Excluding short term deprivation of liberty
- Applying interest of justice test to provisional legal aid

⁷ <https://www.opensocietyfoundations.org/voices/unequal-assistance-how-criminal-legal-aid-varies-across-european-union>

⁸ <https://www.opensocietyfoundations.org/briefing-papers/legal-aid-europe-minimum-requirements-under-international-law>

- Cost recovery of provisional legal aid
- Not extending legal aid to those who were not designated as suspects at the initial stage of proceedings
- Not including provision on remedies
- Legal aid in issuing member states in the European Arrest Warrant cases

Unexpected and a kind of 180 degree turnaround happened in the middle of Dutch Presidency – the Dutch Minister of Justice seemed to have become determined to make this file a success story of their Presidency. Negotiations accelerated with an unusual speed but still it seemed rather impossible that necessary progress could have been made to agree with all the provisions in the remaining two months to complete the file. But it did, and the final text was agreed day or two before the end of the Dutch Presidency in June 2016.

3. Legal Aid Directive and its future of implementation

This directive is particularly significant in ensuring that everyone can enjoy the protection of fair trial rights and will be treated equally regardless of their financial circumstances. According to the directive Member States will be required to provide legal aid to criminal suspects and accused persons without delay, at minimum prior to police questioning, investigation and evidence-gathering. This law is conferring to everyone in police custody to exercise the absolute right to seek legal aid. Under the Directive, legal aid must be available to people subject to a European Arrest Warrant, in both the executing and the issuing State. The directive also applies to persons who are not initially designated as suspects. The Directive sets down practical rules for how legal aid systems should operate, requiring an effective and competent legal aid

authority that makes decisions diligently and respects the rights of the defence and requires that Member States must provide adequate funding and training of legal aid decision makers and lawyers. Appointment of legal aid lawyers should be made by independent authorities. It establishes that legal aid services should be of quality adequate to safeguard the fairness of proceedings, with due respect for independence for legal profession. It includes a provision for effective remedies for breaches of the Directive, to strengthen practical implementation. Directive requires data gathering by the member states to be able to assess its implementation which should be sent to the Commission every 3 years and the Commission should produce a report every year for the Parliament and the Council on the implementation.

One major regrettable compromise which was made in this negotiation process was to limit the scope of the directive to deprivation of liberty. While the directive sets out core requirements for the merits and means tests, it remains silent on cost-recovery. We will see in the coming years how these provisions will be applied in practice. The directive has to be transposed into national legislation by May of 2019.

With the 6 directives in place, on the right to interpretation and translation, on letter of rights, on access to a lawyer, presumption of innocence, special safeguards for children and on legal aid, there is a historic opportunity in the 25 member states of the EU to make these new standards in procedural defence rights to be applied equally to all citizens across Europe despite social and financial status and to become core elements the underpin and shape criminal justice institutions and professional cultures of its actors. Importance of this development goes beyond Europe: in the past 10 years there has been a growing number of countries across continents which have shown commitment to improving accessibility and quality of their legal aid systems and have introduced comprehensive legal aid reforms. My own organization has played important role in supporting several of them. Adoption in 2012 of the *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* was an important boost in assisting policymakers and practitioners that are taking legal aid reforms seriously. It summed up importance of legal aid in the following way:

“Legal aid is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law and that it is a foundation for the enjoyment of other rights, including the right to a fair trial...’ and should be guaranteed by the State.

With adding 25 EU member states to the growing number of countries globally an important step is made to end class justice and hopefully equal access to justice is becoming a reality for more and more people.