

# The Right to Legal Aid in the EU Legal Order

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# The Principle of “equality of arms”

- The procedural notion of maintaining a “fair balance” between the parties
  - each party must be afforded a reasonable opportunity to present her case – including her evidence – under conditions that do not place her at a substantial disadvantage in comparison the other party (Regner v. the Czech Republic [GC], ECHR § 146; Dombo Beheer B.V. v. the Netherlands, ECHR § 33).
  - inherent in the broader concept of a fair trial and is closely linked to the adversarial principle
- equilibrium of procedural rights and privileges
  - requires that there be a fair balance between the opportunities afforded the parties involved in litigation (for example, each party should be able to call witnesses and cross-examine the witnesses called by the other party).

# Relational and Substantial Equality

- The CJEU repeatedly held the principle of equality of arms is an integral element of the principle of effective judicial protection of the rights that individuals derive from EU law
  - Art 47 Charter

- C-169/14 *Sanchez Mocillo and Abril García*:

“It is settled case-law that the principle of equality of arms, together with, among others, the principle audi alteram partem, is no more than a corollary of the very concept of a fair hearing that implies an obligation to offer each party a reasonable opportunity of presenting its case in conditions that do not place it in a **clearly less advantageous** position **compared with** its opponent.”

# Part of the Fair Trial “Package”

- claim of violation of equality of arms “*will be considered in the light of the whole of Article 6 (1) because the principle of equality of arms is only one feature of the wider concept of a fair trial, which also includes the fundamental right that proceedings should be adversarial*”. (ECtHR, Ruiz-Mateos v. Spain, No. 12952/87, 23 June 1993, para. 63;)
- CJEU, C-199/11, *Europese Gemeenschap v. Otis NV and Others*  
“**The principle of equality of arms, which is a corollary of the very concept of a fair hearing** (Joined Cases C-514/07 P, C-528/07 P and C-532/07 P Sweden and Others v API and Commission [2010] ECR I-8533, paragraph 88), implies that each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.  
As the Advocate General has observed in point 58 of his Opinion, the aim of equality of arms is to ensure a balance between the parties to proceedings, guaranteeing that any document submitted to the court may be examined and challenged by any party to the proceedings. Conversely, the harm which a lack of balance will be likely to cause must, as a rule, be proved by the person who has suffered it.”
- If there is a “equality of arms” issue related to a particular (national) court proceeding the CJEU will not limit its scrutiny to the question of procedural equivalence but can engage in examining any aspect of the fair trial guarantee as provided by Art 47 of the Charter
  - breach of some narrow aspect regulated by fair trial Directives opens a door to wider Art 47 scrutiny

# Legal Aid

## Requirement of Equality of Arms

- In some circumstances the principle of equality of arms may require the provision of financial support to allow a person of limited means to pay for legal representation
  - the right of effective judicial protection with its precondition in the form of the right of access to judicial protection should be ***accessible to all*** individuals
    - material/financial status can be hindrance
    - states to take steps to ensure minimal substantive equality in terms of opportunity to access to proceedings;
      - indirect discrimination logic
    - setting up appropriate legal aid systems is the condition of the equality before the law (justice for all)
      - legal aid includes both assistance by a lawyer and dispensation from payment of the costs of proceedings
- *Airey v Ireland* (ECHR, App no 6289/73, [1981])

# Legal Aid under the EU Charter

- Article 47 of the Charter provides a right to legal aid to those who lack sufficient resources ***so far as this is necessary to ensure effective access to justice.***
  - “*where the absence of such aid would make it impossible to ensure an effective remedy*” (Explanations relating to the EU Charter of Fundamental Rights, OJ 2007 C303/17)
  - applies to proceedings relating to all rights and freedoms arising from EU law
    - Council ***Directive 2003/8/EC*** to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes (OJ 2003 L 26, p. 41, and corrigendum OJ 2003 L 32, p. 15)
      - ‘(5) This Directive seeks to promote the application of legal aid ***in cross-border disputes*** for persons who lack sufficient resources where aid is ***necessary to secure effective access to justice.*** The generally recognised right to access to justice is also reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union [‘the Charter’].
    - ...
    - (11) Legal aid should cover pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings, legal assistance in bringing a case before a court and representation in court and assistance with or exemption from the cost of proceedings.’

# The third Paragraph of Art 47

- C-279/09 **DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland**

“In that connection, the first paragraph of Article 47 of the Charter provides that everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article.

Under the second paragraph of Article 47, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone is to have the possibility of being advised, defended and represented.

The third paragraph of Article 47 of the Charter provides specifically that legal aid is to be made available to those who lack sufficient resources in so far as such aid is ***necessary to ensure effective access to justice***.

According to the explanations relating to that article, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the interpretation of the Charter, the second paragraph of Article 47 of the Charter corresponds to Article 6(1) of the ECHR.”

# The Level of Scrutiny

- C-279/09 DEB

“In that connection, it is for the national court to ascertain whether the conditions for granting legal aid constitute a limitation on the right of access to the courts which ***undermines the very core of that right***; whether they pursue ***a legitimate aim***; and whether there is ***a reasonable relationship of proportionality between the means employed and the legitimate aim which it is sought to achieve***.

In making that assessment, the national court must take into consideration the subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the applicable law and procedure; and the applicant’s capacity to represent himself effectively. In order to assess the proportionality, the national court may also take account of the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts.”



# The “personal” scope of the legal aid doctrine

- Legal aid to Legal persons – ***not impossible***

C-279/09 **DEB**

“It is apparent from the examination of the case-law of the European Court of Human Rights that the grant of legal aid to legal persons is not in principle impossible, but must be assessed in the light of the applicable rules and the situation of the company concerned...

In the light of all of the foregoing, the answer to the question referred must be that the principle of effective judicial protection, as enshrined in Article 47 of the Charter, must be interpreted as meaning ***that it is not impossible*** for legal persons to rely on that principle and that aid granted pursuant to that principle may cover, inter alia, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer...

With regard more specifically to legal persons, the national court may take account of their situation. The court may therefore take into consideration, inter alia, the form of the legal person in question and whether it is profit-making or non-profit-making; the financial capacity of the partners or shareholders; and the ability of those partners or shareholders to obtain the sums necessary to institute legal proceedings.

# Legal Aid in Criminal Proceedings

- Criminal proceedings are inherently unequal in terms of powers and resources available to the prosecution versus the individual.
  - the underlying rationale for defence rights is to balance that inequality by giving rights to suspects and accused persons throughout the whole criminal procedure
  - legal aid is part of that equilibrium equation
  - due to inherent inequality of power the level of scrutiny will be higher
    - practical benefits following from the right to legal aid under Art 47 will be wider in scope
    - judicial inquiry will be more demanding

# Stockholm Roadmap

- Resolution of the Council of 30 November 2009 on a ***Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings*** (OJ 2009 C 295, p.1).
  - 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
  - Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on ***the right to information*** in criminal proceedings
  - 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 2013 L 294, 6.11.2013, p. 1).
  - 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
  - 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 2016 L 65, 11.3.2016, p. 1)
  - Directive 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** (OJ 2016 L 297, 4.11.2016 p.1.; corrigendum OJ L91 5.4.2017, p.40).

# The Aim of the Legal Aid Directive

- directive is the sixth and last of a package of legal instruments adopted in line with Roadmap 2009
  - complements EU rules on access to a lawyer and on procedural safeguards for children who are suspected or accused of crimes and does not affect the rights they define
- ensure that the right to legal aid is provided and is offered in a uniform way across the EU
- common minimum rules concerning ***the right to legal aid*** in criminal proceedings across the EU
  - clear criteria for granting legal aid
    - funding by an EU country to provide a lawyer, allowing those individuals who do not have the resources to cover the costs of proceedings, access to one
  - quality standards and
  - remedies in case of breach

# Scope of Application

## Ratione Personae

- All EU citizens will enjoy the rights set out by the Directive, if they are faced with criminal justice –
  - ***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:
    - deprived of liberty
    - or required to be assisted by a lawyer
    - required or permitted to attend an investigative or evidence-gathering act
  - persons who were not initially suspects or accused persons but ***become suspects or accused*** persons in the course of questioning by the police or by another law enforcement authority
  - persons who are the subject of European arrest warrant proceedings pursuant to Framework Decision 2002/584/JHA (***requested persons***)
- applies to suspects, accused persons and requested persons regardless of
  - their legal status, citizenship or nationality
  - 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

# Deprivation of liberty

- Provided that this complies with the right to a fair trial, the following situations ***do not constitute***:
  - 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

# Scope of Application

## Ratione Materia

- Criminal proceedings allowing a right of access to a lawyer pursuant to Directive 2013/48/EU
- European arrest warrant proceedings pursuant to Framework Decision 2002/584/JHA
- Directive always applies when a decision on detention is taken, and during detention, at any stage of the proceedings until the conclusion of the proceedings
  - Accordingly, in respect of *minor offences* the Directive applies **only to the proceedings before a court** having jurisdiction in criminal matters **if and only** where:
    - the law of a Member State provides for the imposition of a sanction by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed or referred to such a court;
    - deprivation of liberty cannot be imposed as a sanction;

# Falling Within the Scope

- Ratione materie & ratione persone = the Charter applies
  - The authorities of EU countries are bound to comply with the Charter of fundamental rights only when implementing EU law.
  - If a national authority violates the Charter when implementing EU law, national judges (under the guidance of the European Court of Justice) have the power to ensure that the Charter is respected.



# Right to legal aid in criminal proceedings

- suspects and accused persons ***who lack sufficient resources*** to pay for the assistance of a lawyer have the right to legal aid ***when the interests of justice so require***;
  - may apply different test to determine whether legal aid is to be granted:
    - a means test (based on the resources of the person concerned, including income and fortune) and/or;
    - a merits test (based on the need to ensure effective access to justice in the circumstances of the case);
  - must respect the criteria set out to establish these tests,
    - in particular that the merit is deemed to exist where the person is brought before a court for a decision on detention and during detention;
- must grant legal aid without undue delay and — at the latest — before the person concerned is questioned by the police, by another law enforcement authority or by a judicial authority, or before the specific investigative or evidence-gathering acts are carried out.

# Right to legal aid in EAW proceedings

Requested persons have a right to legal aid:

- from the executing EU country,
  - upon arrest until they are handed over to the issuing EU country,
  - or until the decision not to surrender them becomes final;
- from the issuing country,
  - when they exercise their right to appoint a lawyer in the issuing country to assist the lawyer in the executing country in accordance with EU rules on the right of access to a lawyer,
  - in so far as legal aid is necessary to ensure effective access to justice
- This right may be subject to a means test under the same criteria as for criminal proceedings.

# The Interests of Justice Test

## *Means test*

- to determine whether a suspect or an accused person lacks sufficient resources to pay for the assistance of a lawyer MS must take into account all relevant and objective factors,
  - such as the income, capital and family situation of the person concerned,
  - as well as the costs of the assistance of a lawyer
  - and the standard of living in that Member State,.

## *Merits test*

- in order to determine whether the interests of justice require legal aid to be granted MS must take into account
  - the seriousness of the criminal offence,
  - the complexity of the case and
  - the severity of the sanction at stake
- The Presumption of Fulfilment
  - 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
  - during detention

# Competent Authority

- Should be an
  - **independent** authority
  - a **court**, including a judge sitting alone
  - in so far as this is necessary *in urgent situations* the temporary involvement of the police and the prosecution should also be possible for legal aid to be granted in a timely manner
- Have capacity to decide whether or not to grant legal aid and on the assignment of lawyers
  - without undue delay
  - diligently, respecting the rights of the defence
    - adequate training must be provided to staff involved in the decision-making on legal aid

# Effectiveness of the Right to Legal Aid

- Suspects, accused persons and requested persons
  - will be informed in writing if their request for legal aid is refused in full or in part
  - provided with legal aid services of a quality adequate to safeguard the fairness of the proceedings
    - MS shall take appropriate measures to promote the provision of adequate training to lawyers providing legal aid services
  - upon their request have the lawyer providing legal aid services assigned to them replaced, where the specific circumstances so justify

# Effective Remedy

- Member States must 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 this Directive.