

Rights of the accused in criminal proceedings under UE Directives

Right to legal aid
Directive (EU) 2016/1919
ECtHR case law
The Italian system

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Legal aid is the vital means of access to justice.

It contributes to enhancing people's trust in the justice system, and it enhances the legitimacy of the State.

UN Principles and Guidelines elaborated by the Human Rights Committee (2012).

It is the first international instrument dedicated to the right to legal aid:

«Legal aid is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law. Legal aid is a foundation for the enjoyment of other rights, including the right to a fair trial, as defined in article 11, paragraph 1, of the Universal Declaration of Human Rights, a precondition to exercising such rights and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process.»

UN Principles and Guidelines, par. 8

Legal aid is defined as «legal advice, assistance and representation for persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence and for victims and witnesses in the criminal justice process that is provided at no cost for those without sufficient means or when the interests of justice so require.....»

European region

Article 6 ECHR - Right to a fair trial

3. *Everyone charged with a criminal offence has the following minimum rights:*

...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require...

European Union

Charter of Fundamental Rights of the European Union 2007, which became legally binding as EU primary law in December 2009.

Article 47 - Right to an effective remedy and to a fair trial

Par. 3 Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Article 48 - Presumption of innocence and right of defence

Par.2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

Criminal proceedings

Directive 2016/1919 on legal aid for suspects or accused persons and for requested persons in European arrest warrant proceedings.

Ensures the effectiveness of the right of access to a lawyer (provided for under Directive 2013/48/EU) 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 in EAW proceedings.

The Directive sets *minimum* rules across EU: Member States are perfectly free to set higher standards and provide in their national law that, in certain circumstances, legal aid should also be provided to suspects and accused persons who are not deprived of liberty.

Directive 2016/1919

Criteria for granting legal aid, quality standards and remedies in case of breach.

Inspired by the Charter, ICCPR and, notably, by the ECHR (including the ECtHR's case law).

The Directive 2016/1919 should apply in these situations:

- 1) when suspects or accused persons are deprived of liberty
- 2) when suspects or accused persons are required by law to be assisted by a lawyer ("mandatory assistance"), and
- 3) when such persons are required or permitted to attend certain investigative or evidence-gathering acts, including (as a minimum) identity parades, confrontations, and reconstructions of the scene of a crime.
- 4) when a persons faces with a European arrest warrant (EAW).

Directive 2016/1919 Key points:

A) Eligibility criteria: means and merit test

Art. 4(2): a suspect or accused person has the right to legal aid when two conditions are fulfilled:

- x) lack of sufficient resources, and
- x) the interests of justice must require legal aid to be provided.

In order to determine whether these conditions are fulfilled, the Member States may apply a means test, a merits test, or both.

In the context of a merits test, when Member States determine whether the interests of justice require that legal aid be provided, they should take into account the

- seriousness of the criminal offence,
- the complexity of the case, and
- the severity of the sanction at stake (Art. 4(4)).

These criteria come straight from the case law of the ECtHR

B) Safety net

The merits test is considered to have been met in any event in the following two situations (Art. 4(4), second sentence):

X) when 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 this Directive; and

x) during detention.

"Detention" in this context has a restricted meaning: it refers to pre-trial (or provisional) detention, i.e., excluding post-trial detention, which refers to the period when a person serves a sentence.

C) Timely decision

Member States should grant legal aid without undue delay and, at the latest, before questioning or before an investigative or evidence-gathering act, as referred to in Art. 2(1) of the Directive, is carried out (Art. 4(5)).

D) Competent authority

Decisions on whether or not to grant legal aid and on the assignment of lawyers should be made by a *competent authority* without undue delay. Member States should take appropriate measures to ensure that the competent authority makes its decisions diligently, respecting the rights of the defence (Art. 6(1)).

In the recitals, it is clarified that the competent authority should *be an independent authority* that is competent to take decisions regarding the granting of legal aid, e.g., a legal aid board or a court, including a judge sitting alone.

E) Information on the refusal

F) Effective remedy

G) Attention to vulnerable people

Suspects, accused persons, and requested persons must:

- be informed in writing if their request for legal aid is refused (Art. 6(2));
- have an effective remedy under national law in the event of a breach of their rights under the directive (Art.8) ;
- see their particular needs taken into account if they are vulnerable (Art. 9).

H) Quality of the service

Member States should take necessary measures, including those with regard to funding in order to ensure that:

X) there is an effective legal aid system of an adequate quality;
and

X) legal aid services – namely services provided by a lawyer who is funded by legal aid – are of a quality adequate to safeguard the fairness of the proceedings (Art. 7(1)).

Legal aid in EAW proceedings

Requested persons should have the right to legal aid in both the executing State and the issuing State (if they appoint a lawyer in that State).

Legal aid for the lawyer in the issuing State into the text, but subject to two conditions (Art. 5(2)):

- a) the provisions on legal aid for the lawyer in the issuing State should only apply to EAWs issued for the purpose of conducting a criminal prosecution, and
- b) legal aid should only be provided "in so far as such aid is necessary to ensure effective access to justice". (taken from art. 47 of the Charter)

There is no merits test as regards legal aid in EAW proceedings (for both the lawyer in the executing and in the issuing State). Such merit is presumed to exist where an EAW has been issued. However, Member States may apply a means test (Art. 5(3)).

Regarding the costs for the lawyer the Directive states that the executing State should bear the costs of legal aid for the lawyer appointed in that State. Hence, the issuing States have to bear the costs of legal aid for assistance by lawyers who have been appointed in its own State to support the lawyer in the executing State.

Legal aid in European region

European Convention for the Protection of Human Rights and Fundamental Freedoms (1950, ECHR), in art. 6 recognizes the right of anyone charged with a criminal offence

“to defend himself/herself in person or through legal assistance of his own choosing or, if he/she has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.”.

Art. 6 ECtHR - Criminal limb

The right to legal aid is the third and final right encompassed in Article 6 § 3 (c) on fair trial.

Right to free legal aid:

- if they do not have ‘sufficient means’ to pay for legal assistance (the financial or means test),
- where the ‘interests of justice’ so require (the merits test).

In the interpretation and application of the ECHR, the ECtHR plays a key role

Art. 32 of the ECHR provides:

The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols

The ECtHR looks at access to justice for a citizen in a particular procedure.

It does not evaluate national legal aid systems as such.

The Court decides on a case by case basis, as it ascertains whether or not in the specific case there has been a violation of the Convention.

Legal aid applies throughout the entire proceedings, from police questioning to the appeal (Salduz v. Turkey [GC], 27 November 2008).

“[T]he concept of fairness enshrined in Article 6 requires that the accused be given the benefit of the assistance of a lawyer already at the initial stages of police interrogation” (Panovits v. Cyprus (2009))

ELIGIBILITY CRITERIA

The right to free legal aid is subject to **two determining conditions**, which are to be considered **cumulatively** (Quaranta v. Switzerland, § 27). 452.

Means Test

Merits Test

MEANS TEST (from the decisions of the ECtHR):

- the accused must show that he lacks sufficient means to pay for legal assistance (*Caresana v. the United Kingdom* (dec.)). He need not, however, do so “beyond all doubt”; **it is sufficient that there are “some indications” that this is so or, in other words, that a “lack of clear indications to the contrary” can be established** (*Pakelli v. Germany*, Commission report, § 34; *Tsonyo Tsonev v. Bulgaria* (no. 2), § 39).
- The burden of proving lack of sufficient means should be borne by the person who pleads it.” (*Croissant v. Germany*, 1992)
- In any event, the ECtHR cannot substitute itself for the domestic courts in order to evaluate the applicant’s financial situation at the material time but instead must review whether those courts, when exercising their power of appreciation in assessing the evidence, acted in accordance with Article 6 § 1 (*R.D. v. Poland*, § 45).

- there will be no violation of Article 6 (1) if an applicant falls outside the legal aid scheme because his/her income exceeds the financial criteria, provided the essence of the right of access to a court is not impaired. States are not obliged to spend public funds to ensure total equality of arms between the assisted person and the opposing party, “*as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the adversary*” (Glaser v. the United Kingdom, 19 September 2000, para. 99; Santambrogio v. Italy, 21 September 2004, para. 58).

Merits test - where the interests of justice so require:

- the seriousness of the offence
- the severity of the penalty at stake
- where deprivation of liberty is at stake, the interests of justice always call for legal representation (Benham v. the United Kingdom [GC], § 61; Quaranta v. Switzerland, § 33; Zdravko Stanev v. Bulgaria, § 38).

- the complexity of the case (*Quaranta v. Switzerland*, § 34; *Pham Hoang v. France*, § 40; *Twalib v. Greece*, § 53)
- the personal situation of the accused (*Zdravko Stanev v. Bulgaria*, 2012, § 38), that is the capacity of the particular accused to present his case – for example, on account of unfamiliarity with the language used at court and/or the particular legal system – were he not granted legal assistance (*Quaranta v. Switzerland*, § 35; *Twalib v. Greece*, § 53).

All these factors should be considered, but they do not necessarily need to be added together; any one of the them can justify granting legal aid.

When applying the “interests of justice” requirement the test is not whether the absence of legal aid has caused “actual damage” to the presentation of the defence but a less stringent one

Whether it appears “plausible in the particular circumstances” that the lawyer would be of assistance (Artico v. Italy, §§ 34-35; Alimena v. Italy, § 20). 457.

ECtHR: refusing to provide legal aid on the merits – **because of insufficient prospects of success, or because of a claim’s frivolous or vexatious nature** (for example, the claim is brought merely to cause annoyance) – may also be legitimate (Staroszczyk v. Poland, 22 March 2007, para. 129; Steel and Morris v. the United Kingdom, 15 February 2005, para. 62.)

The interests of justice do not require the automatic granting of legal aid whenever a convicted person, with no objective likelihood of success, wishes to appeal after receiving a fair trial at first instance in accordance with Article 6 of the ECHR. (Monnell and Morris v. the United Kingdom, 2 March 1987, para. 67)

Identifying the conditions (means and merits test) for granting legal aid is a matter for national courts, according to the domestic legislature .

The ECtHR reiterated that legal-aid systems could not function unless the adoption from the states of objective mechanisms, which select cases for which legal aid should be available

General principles drawn from the ECtHR:

- a legal aid system should establish a **fair mechanism** for selecting cases likely to benefit
- the system established by legislature must offer individuals **substantial guarantees to protect themselves from arbitrariness**
- the court should **give reasons for refusing legal aid** and handle requests for legal aid with diligence (Tabor v. Poland, §§ 45-46; Saoud v. France, §§ 133-36).

The choice of the Lawyer

Article 6 (3) (c) of the ECHR also sets out the right to be defended by a lawyer of one's own choosing, which can be subjected to limitations if the interests of justice so require.

The right to free legal assistance is not satisfied by the formal appointment of a lawyer: **this right must be practical and effective** (see Artico v. Italy; Anghel v. Italy, 2013)

General principles drawn from ECtHR case law:

- The court needs to take measures of a positive nature to permit the ex-officio appointed lawyer to fulfil his obligations ‘in the best possible conditions’, such as the adjournment of a hearing or the suspension of a sitting to allow for studying of the case file (Goddi v. Italy, 1984; Sannino v. Italy 2006).
- Competent national authorities are required to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way” (Kamasinski v. Austria (1989).
- An individual who requests a change of legal aid lawyer must present evidence that the lawyer failed to perform satisfactorily (Lagerblom v. Sweden, 2003, par. 60).
- Article 6 § 3 (c) cannot be interpreted as securing a right to have public defence counsel replaced.

Legal aid does not have to take a particular form. States are free to decide how to meet their legal obligations.

As a result, legal aid systems often vary widely. For example, legal aid may take two forms:

- free representation or assistance by a lawyer and/or
- dispensation from paying the costs of proceedings, including court fees.

Across the EU, there is a wide discrepancy in the amount of legal aid expenditure per person, with most Member States spending less than €5 per person and expenditure being cut in many countries.

The Italian system of legal aid

Article 24, par. 3, Constitution (1948):

Everyone can take a legal action to protect its legitimate rights and interests.

Defense is an inviolable right in every stage of the procedure.

The have-nots should have the means to act and defend themselves before any jurisdiction, with special institutions.

The law establishes the conditions and methods for the reparation of judicial errors.

When legal aid is granted the party is exempt from some expenses and the payment of others are borne directly by the State.

Fees:

- for the lawyer
- for the expert
- in criminal proceedings, for the private investigator

and all the expenses relating to the trial.

Fees for the defender, the expert, the authorized private investigator are reduced **by one third** in comparison with the general fees established for these professionals.

The Constitutional Court ruled that this discipline is lawful since it is justified by public interest and the legislator enjoys wide discretion (balance two interests: allow as many as possible poor people to have access to this benefit, from one side, regulate the use of public money, from the other).

One of the most important budget chapter of the Ministry of Justice is related to legal aid.

- **In 2020 the court costs were about 633.000 mln of euros referred to a population of 60 million of inhabitants.**
- **The expenditure on legal aid were about 364.000 mln of euros (approximately 6 euro per inhabitant).**

This sum is constantly increasing.

CONDITIONS FOR ACCESS TO LEGAL AID

Objective conditions

Article 74, Presidential Decree n. 115/2002

In **criminal proceedings** starting in favor of the suspect during preliminary investigation, accused, convicted, person offended by a crime, damaged who intends to become a civil party, liable for civil liability or civilly liable for the pecuniary penalty.

In **the executing phase of an a European arrest warrant** (special procedure replacing the extradition procedure in EU Member State) until the person is surrendered, or until the decision not to surrender him/her becomes final in order to ensure the right of the requested persons to appoint a lawyer in the issuing Member State to assist the lawyer in the executing Member State and vice versa.

Subjective conditions

Who is entitled to legal aid?

- The plaintiff, the defendant, the suspect, the accused, the convicted person, the injured party who intend to become a civil party, the civil party or civilly liable party for the fine;
- the victim of the crime who intends to exercise civil action for compensation related to damage deriving from the crime.
- Italian citizens
- Foreign citizens or stateless persons, provided they are legally present on the national territory
- Non-profit organizations or associations.

MEANS TEST

The income threshold for accessing free legal aid:

an annual income not exceeding € 11,746.68 (updated every two years)

If the person concerned **cohabits** with his/her **spouse, married couple** or other **family members**, the income is the sum of the income earned in the same period by each member of the family, including the applicant.

Special rule for criminal proceedings: the income limit is high of € 1,032.91 for each of the family members living together.

How is determined such an income?

It is embraced a vary broad notion of income.

The Court of Cassation held that has to be taken in consideration every component of income, taxable or not, since it must be ascertained the overall economic capacity of the subject (Cass. Pen. 23223/2016; Cass. Ord. 24378/2019).
(also social pensions)

All income are considered (even those deriving from illegal activities) received or possessed by the subject, even those excluded from the taxable base " (Cass. Ord. 24378/2019), except the illegal sum which are the result of alleged crime object of the specific proceedings in which is requested the admission to such benefit.

How to document the income:

Self-certification on the amount of his/her income.

The foreign applicant (non-EU), as for the income produced abroad, must attach a certificate from the competent consular authority certifying the truthfulness of what is declared in the application, but if it is impossible to obtain can utilise self-certification

Legal aid is admissible only for one lawyer

The Supreme Court of Cassation, (judgment no. 1736/2020) clarified that the person entitled to legal aid may appoint only one lawyer.

The assignment to a second lawyer therefore entails the withdrawal of the benefit, even if one of the two lawyers waives the fees charge.

The Court observed that those who can "afford" to appoint a second defence counsel is not in such a condition to be considered eligible to legal aid.

**Two exceptions set by the Law
linked to MERITS TEST**

Presumption of exceeding the threshold = legal aid is not admissible

Convicted by a final judgment:

- mafia-type association, including foreign ones (Article 416 *bis* of the Italian Criminal Code),
- crimes committed making use of the conditions provided for by art. 416 *bis* of the Criminal Code,
- crimes committed in order to facilitate the activities of mafia-type associations (pursuant to Article 416 *bis* of the Italian Criminal Code),
- criminal association for the purpose of smuggling foreign manufactured tobacco (art. 291 *quater* of Presidential Decree 43/1973);
- illicit production, trafficking and possession of drugs and association for the purpose of illicit trafficking in drugs (articles 73 and 74 c. 1 DPR 309/1990).
- in criminal proceedings for tax fraud/evasion crimes;

BUT

Constitutional Court ruled that it must be admitted rebuttal evidence, in other words to adduce evidence to rebuttal (Constitutional Court, judgment no. 139 of 2010).

The law provides for legal aid regardless any condition of income in the following cases:

- a. Victims of specific crimes: family mistreatment or abuse, genital female mutilation, rape, sexual assault, as well as where committed against minors, crimes referred to pedo-pornography, minors sex trafficking, human beings trafficking , shall be admitted to legal aid regardless means test, in other word although they do not meet the income limits provided by the law.
- b. Unaccompanied foreign minors involved in any judicial proceedings
- c. Children, minors or adults, orphaned as a result of the murder committed by the parent's partner (married or legally separated or divorced, on the other side of the civil union, even if the civil union has ceased , or the person who is or has been linked by an emotional relationship and stable cohabitation) with reference to the related criminal proceedings and to all civil proceedings resulting from the crime, including sentence enforcement .

THE LAWYER

Registered in a special **register**, public, accessible online on the websites of the various Bar Councils. The registration is decided by the Council of the Bar Association.

Requirements:

- professional attitude and experience (field of experience – regular attendance in training courses organised by the Bar Association);
- absence of disciplinary sanctions: the professional sanctioned with a disciplinary sanction higher than the warning is automatically removed from the register
- enrolled in the Bar for at least two years

Legal aid Lawyer receives the **remuneration** only and exclusively from the State: if he/she requests or accepts money from the client, he will commit a serious disciplinary misconduct, in violation of the Code of Ethics, and the sanction is decided by the Council of the Bar Association to which he belongs.

Severe disciplinary sanction: suspension from the exercise of the profession for as period of time. (usually months).

LEGAL AID /EX-OFFICIO DEFENSE

Ex-officio defense:

- It is guaranteed to each person, regardless of his income, who has not appointed his own lawyer or has been without one when it is mandatory to have the assistance of a lawyer (for the suspect and accused in criminal proceedings, in civil proceedings only in proceedings before the juvenile court).
- It is appointed by the Judge or by the Public Prosecutor on the basis of a list of lawyers drafted by the Bar Council.
- The lawyer has the obligation to provide legal assistance and can be replaced only for justified reason.
- The cost is borne by the party, unless the requirements for admission to legal aid are met.

The competent Judge within 10 days assesses the admissibility of the submitted application and issues a reasoned decree, deciding in one of the following ways:

- declares the application inadmissible
- accepts the request
- rejects the application.

A copy of the application and the decree that decides on admission to the benefit are sent to the Revenue Agency territorially competent for the verification of the declared income.

When legal aid is granted:

The interested party appoints its own lawyer, choosing the name from those enrolled in the list of lawyers authorized to perform the defence activity at the State expense.

What can be done if the application is rejected

The interested party can appeal the decision within 20 days from the moment in which he/she becomes aware of it.

The appeal is notified to the Revenue Office.

The decision on the appeal can be brought before the Supreme Court.

The appeal does not suspend the execution of the contested decision.

What happens in case of a false statement on the pre-requisites from the applicant?

It is a crime punished with imprisonment from one to five years and with the fine from € 309.87 to € 1,549.37.

It is an aggravating circumstance the fact that as a result of the false statement the party has obtained the admission to legal aid; the sentence implies the withdrawal with retroactive effect, and the return to the State of the sums unlawfully obtained.

Withdrawal of legal aid admission

The decree of admission to free legal aid may be withdrawn by the judge :

- if during the proceedings occur changes in the party income conditions relevant for the purposes of admission to legal aid
- if the conditions for admission do not exist
- if the interested party has acted or resisted in Court with bad faith or gross negligence.

The withdrawal may occur also when:

- the interested party fails to communicate any changes in the income limits
- the certification of the consular authority has not been produced
- ex officio or upon request of the competent financial office submitted any time and, in any case, no later than five years from the definition of the proceedings, in case of ascertained original or supervening lack of income conditions established by the law.

The Law states:

The State has the right to recover any sums paid to the interested party after the withdrawal of legal aid.

Technology and legal aid

Since last September all the *validation requests related to legal aid are filed and forward to the registry of the competent magistrate exclusively by electronic means*. ALL liquidation requests, must be submitted through a specific platform dedicated to the validation of justice expenditure.

Simple procedure:

- **Firstly, is required the registration on the platform.** The liquidation request must be fulfilled with the information required by the procedure and there is the possibility to upload two PDF files containing the documents necessary for the judge to examine the request, such as the fee request, the reference of the number of registration in the list of legal aid counsels, the admissibility decision taken by the Council of the Bar Association).
- **The application form and the attached files are electronically transmitted to the Court by the generation of a unique identification code.**
- **The civil servant in charge at the Court is able to accept or refuse the request (in the latter case, communicating it to the interested party).**
- **The Judge receives the electronic request from the secretary and the decision is uploaded on the electronic file identified by the identification code.**

Positive effects:

Time saving for the lawyer as they are not required to reach the Court to submit the requests; for the administrative staff to receive and process the file faster; for the Judge to decide more rapidly compared to the traditional system for which similar speed cannot be ensured.

This system simplifies but also guarantees transparency: the lawyer using the identification code of the request is able to follow the steps of the procedure and know its status.

Thanks to the agreed protocols signed between the Court and the Bar association the fee amount is agreed and consequently the percentage of **litigation in this item is much reduced**

Find a balance

Governments need to strike a balance between sustainability of the system and fair protection of fundamental rights.

Two kind of risks:

Making legal aid too broad: generating amounts of applications for legal aid impossible to fund

Narrowing too much the scope of free legal aid: excluding too many people from access to justice.

Thank you very much for
your kind attention!

