

Implementation of the Legal Aid Directive in Spain

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ABSTRACT

The vast differences among the national standards for granting legal aid pushed the European Commission to propose common minimum rules in order to harmonize this right. This initiative was intended to ensure the effectiveness of the right of access to a lawyer, because the right of access to a lawyer can only be genuine if free legal aid is guaranteed when necessary. On the one hand, the implementation of the (finally adopted) Directive 2016/1919 into national law raises new questions; on the other hand, it has also been useful in resolving legal inconsistencies. This is the case in Spain, where the parliament implemented the Directive in 2018. This article informs the reader about the main contents and deficiencies of this implementation and on how Spanish judges have influenced the Spanish legislator with their jurisprudence by applying European standards even before the entry into force of Directive 2016/1919.

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I. Introduction

Following the adoption of the 2013 Directive on the right of access to a lawyer,¹ both the Council and the European Parliament urged the Commission to present a legislative proposal on free legal aid at its earliest convenience. The Commission's initiative was consolidated as a "Proposal for a Directive of the European Parliament and of the Council on legal aid for suspects or defendants in custody and free legal aid in European arrest warrant proceedings."² The diversity of national standards for the recognition of this legal aid (such as personal scope, time, or extent of its recognition and application as well as on the organisation of the service or the systems of remuneration for the work carried out,³ among others) initially led the Commission to focus on harmonisation when providing due legal aid to any person deprived of liberty or arrested while a European Arrest Warrant (EAW) is being executed. However, Member States asked for this guarantee to be extended to all persons suspected or accused of a criminal offence within the European Union.⁴ The Commission's initiative finally resulted in the adoption 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.⁵

This Directive should increase confidence between Member States in national criminal justice systems and thus facilitate the mutual recognition of decisions in criminal justice matters. To that end, States undertake to give effect to the right to free legal aid as part of the fundamental right of defence.

A definition of "legal aid" can be found in Art. 3 of Directive 2016/1919 as "funding and assistance from the Member State ensuring the effective use of the right of access to a lawyer." This concise definition includes two very important points: First, legal aid assistance is state-funded, thus the States determine both the conditions and requirements for granting legal aid and the amounts for and organisation of implementing the EU rules. Secondly, the subject matter of free legal aid is so closely linked to the right of access to a lawyer that the scope of Directive 2016/1919 cannot be separated from the scope of Directive 2013/48. The following takes up these two considerations and examines them especially against the background of the implementation of the legal aid Directive into the Spanish legal system.

II. Implementation of the Legal Aid Directive: The Spanish Case

Directive 2016/1919 was to be transposed into national law by 5 May 2019. Spain did so by means of Law 3/2018 of 11 June 2018, which implemented Directive 2014/41/EU regarding the European Investigation Order in criminal matters (EIO).⁶ The Spanish legislator implemented the Directive within the framework of the two aforementioned premises: (1) the right to free legal aid is closely linked to the fundamental right to defence through its relation to the right of access to a lawyer, and (2) the State is committed to assuming the costs and to establishing a payment system. In the following, section 1 deals with the extension of the right to legal aid in criminal proceedings for minor offences (despite the fact that the assistance of a lawyer is not mandatory here), with how Spanish law provides for the right to request replacement of the appointed lawyer, and with the new problem on the right of legal persons to legal aid that arose during the course of implementation of the Legal Aid Directive. Section 2 outlines the solution adopted by the Spanish legislator to finance legal aid services.

1. The right to legal aid as to enable the right to access to a lawyer being effective

Concerning the first premise of Directive 2016/1919, the Spanish Law of Free Legal Aid (hereinafter LAJG⁷) met almost all the requirements of the Union legislation and only needed to be amended in three respects:

- To include special consideration of the specific needs of persons in vulnerable situations;
- To extend the right to legal aid and representation to defendants accused of minor offences in criminal proceedings (where legal assistance is not mandatory), if the defendant requests for legal assistance or if the court requires legal assistance in order to guarantee equality in the proceedings;
- To recognize the right of the applicant of legal aid to request the replacement of the designated lawyer.

Basically, the last two modifications have led to changes in the Spanish system by filling legislative gaps, some of which had already been highlighted and resolved by the jurisprudence of the lower courts. But there is a new problem not yet solved: the right to legal aid of all legal persons with no financial resources for litigation.

a) Right to free legal defence and representation in criminal proceedings for minor offences

Art. 2(1) of Directive 2016/1919 states that it applies to suspects or defendants in criminal proceedings who are entitled to access to a lawyer under Directive 2013/48. Directive 2013/48 provides for the right to access to a lawyer in all criminal proceedings. A contradiction arose in Spanish criminal proceedings for minor offences. This is a simplified procedure, provided for the prosecution of minor offences of injury or ill-treatment, “petty theft *in flagrante delicto*”, threats, coercion, and of insults. The procedure is based on an oral hearing, at which the complaint or claim, if any, is read out. Then the witnesses presented by the accusing party are heard first, followed by the statement of the accused and witnesses on his/her behalf.⁸ On the one hand, the assistance of a lawyer is not required in such trials for minor offences when it carries a penalty of a fine of no more than six months.⁹ On the other hand, as the criminal proceedings are conducted before a criminal court, the Spanish regulation falls within the scope of Directive 2013/48. The Directive requires the assistance of a legal professional before the accused is questioned by the police or by another law enforcement or judicial authority,¹⁰ unless he/she validly waives, i.e. if there is evidence of his/her express wish to waive and if the waiver is informed and unequivocal.

In this situation, Spanish Provincial Courts had considered that, if an entitled person exercises the right to legal assistance requesting a counsel, then the right to legal assistance deploys all its effects even in cases where domestic legislation provides that assistance of a lawyer is not mandatory. This means that the defendant can request free legal assistance if he or she proves to have insufficient resources for litigation.¹¹ Thus, the Provincial Court of Madrid allowed an appeal stating that “the right to legal counsel [...] is fully effective in the trial of a misdemeanour [...] as in any other criminal proceedings. The specialty [...] is that the right to legal assistance is optional or waivable, which is not possible in proceedings for a crime. But if you choose to be assisted by counsel, this right is fully effective.”¹² This line of case law has been taken into account by the Spanish legislator. The inclusion of the right to free legal assistance in criminal proceedings for minor offences required an amendment of the LAJG. In this point, the Spanish legislator adopted the approach that the lower courts had taken towards European standards even before their implementation, based on the close link of the right to legal aid with the right to access to a lawyer. The amended law establishes that the right to legal aid includes free defense and representation by a lawyer and a procedural

representative in judicial proceedings, when the intervention of these professionals is legally required or when their intervention is expressly required by the court or tribunal by means of a reasoned order to guarantee the equality of the parties in the proceedings.¹³

b) Right of the person receiving free legal aid to request the replacement of a designated counsel

According to the Legal Aid Directive,¹⁴ Member States shall adopt the necessary measures, with due respect for the independence of the legal profession, to ensure that legal aid services are of an appropriate quality to safeguard the fairness of proceedings. And if needed, they shall take the necessary measures to ensure the right to have the lawyer providing legal aid services assigned to them replaced.¹⁵ The Union rule therefore entails the competence of the judge to act of his or her own motion, if necessary, to guarantee quality assistance, the simple appointment of a lawyer not being sufficient. This way of acting was already followed by Spanish judges, even before the entry into force of the Directive, whenever they considered it necessary to safeguard the fundamental right of defence.¹⁶

The LAJG incorporates the right to request the replacement of a designated counsel into the new Art. 21 *bis*,¹⁷ as a measure linked to the quality of the assistance provided. This amendment raises the level of protection, since this right had not previously been contemplated. Spanish law also enables to request substitution by another *ex officio* lawyer or to appoint a lawyer of the defendant's own choice,¹⁸ although this one is not an unlimited right. The right of defence entitles the defendant to change his/her lawyer if he/she has lost confidence in the person originally appointed (or wishes to appoint a lawyer of his/her own choice). However, this request can be rejected, without infringing the right of defence, if the request is arbitrary in the court's opinion, i.e., unreasonably motivated or unjustified.¹⁹

- Because the *ex officio* defence in the case does not indicate any lack of work before the court;
- Because the shortcomings or disagreements are irrelevant or manifestly unjustified;
- Because a delaying strategy is evident or because there is a calculated lack of attention to the right of defence.

Although the reform provided for the *ex officio* appointment of the lawyer, and his/her replacement at the request of the defendant, Spanish law says nothing about the possibility of the judge to order the lawyer to be replaced, by his or her own decision rather than at the request of the defendant (be it that the lawyer was chosen by the defendant or be it that he/she was appointed *ex officio*). The reform therefore did not seize the opportunity to take up the respective case law of the lower Spanish courts to resolve this question.

c) Legal persons' right to legal aid in the Spanish criminal justice system

The right of legal persons to legal aid triggered new challenges that arose from implementation of the Legal Aid Directive. The problem emerged as a consequence of the criminal liability of legal persons if it is established and the legal person qualifies for free legal aid within the framework of the right of access to a lawyer. According to Art. 4(1) of Directive 2016/1919, Member States shall ensure that suspects and accused persons who lack sufficient resources to pay for the assistance of a lawyer have the right to legal aid if so required in the interest of justice. The Directive neither includes legal persons into its scope nor excludes them from its scope.

Criminal liability of legal persons is known in Spain since 2010.²⁰ Spanish legislation only provides for legal aid to legal persons in so far as they pursue purposes of social or public interest and who lack sufficient resources for litigation.²¹ Furthermore, Associations aiming at the promotion and defence of the rights of

victims of terrorism and associations aiming at the promotion and defence of the rights of persons with disabilities are also entitled to free legal aid, regardless of the resources for litigation.²² The question now arises as to what the situation of legal persons is other than those included in the law. Should they be entitled to free legal aid if they are accused in criminal proceedings without having the resources to litigate? The answer should be in the affirmative, as legal representation is certainly necessary from the moment that the criminal liability of legal persons is established. However, granting legal aid to all legal persons does not seem possible at the moment in Spain, unless the Spanish legislator expressly provides for the respective legislation to include all legal persons in the national legal aid scheme.

2. Financing legal aid

As mentioned above, the second major point of Directive 2016/1919 deals with the obligation of States to bear the costs and establish a system of payment for free legal aid services. Free legal aid is included as a compulsory service in the Spanish law for lawyers and procedural representatives and, consequently, payment for the services is regulated as compensation: “the professionals who provide the compulsory legal aid service shall be entitled to compensation in the form of indemnification.”²³ This means that this amount is not subject to VAT.²⁴

Setting the right fees for lawyers providing legal aid services is closely related to the quality requirement. If the fees are too low, lawyers will not be willing to devote the time and effort to providing high-quality service. Practice shows that providing legal aid as a service is onerous, and the question arises as to how to pay for this service. Since the costs of legal aid could prevent it from being effective, the European Economic and Social Committee proposed the creation of a European solidarity fund to cover the costs at the European level.²⁵

The Spanish legislator has chosen to regulate the financial support as a subsidy from the budgets of the Autonomous Communities (abbreviated in Spanish as CC.AA.), whose public administrations are responsible for the implementation, care, and operation of the free legal aid services provided by the Bars and Lawyers’ Associations.²⁶ The decentralization may lead to significant differences in the amounts of the fees, depending on the Autonomous Community. Such a scheme risks breaking with essential principles, such as equality before the law, the right to judicial protection, and the right to defence. In order to mitigate friction, a proposal was introduced to amend the Free Legal Aid Regulation (RAJG) implementing the Legal Aid Act, in order to establish a State Advisory Council in which all public administrations and bodies involved are represented. This proposal is still debated.

III. Concluding Remarks

The implementation of Directive (EU) 2016/1919 forced the Spanish legislator to amend its legislation on legal aid. As a result, the transposition improved the quality of the regulation, filling gaps and including some solutions already rendered by Spanish courts in their case law. The right to free legal aid provided by defence representatives was extended to criminal proceedings for minor offences. The right of the person receiving legal aid to request the replacement of a designated legal counsel was included. A new problem in relation to the right of legal persons to legal aid arose, however, as the Spanish law on legal aid explicitly only includes certain legal persons and associations, but not all of them. The Spanish courts may decide otherwise on the basis of the text of the Directive; however, an amendment of the Spanish law in this point is strongly

recommended. Regarding the financing of legal aid, the Spanish legislator still has to find solutions in order to mitigate friction that might arise from the decentralization of free legal aid support.

1. 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, O.J. L 294, 6.11.2013, 1.↵
2. COM(2013) 824 final of 27 November 2013.↵
3. In some Member States, lawyers are paid directly, by the hour, or by the State budget; in yet other States, lawyers are paid directly by the bar associations.↵
4. Note by the Chair 15490/14. DROIPE 129 COPEN 278 CODEC 2241, 17 November 2014. Adopted by the EU JHA Council of 4–5 December 2014.↵
5. O.J. L 297, 4.11.2016, 1.↵
6. Spain has chosen to incorporate all the directives on judicial cooperation in criminal matters into a single regulation: Law 23/2014 on the Mutual Recognition of Decisions in Criminal Matters in the European Union (*Ley 23/2014, of 20 November, de reconocimiento mutuo de resoluciones penales en la Unión Europea*). The implementation of the EIO Directive was used to bring Spanish legislation on legal aid into line with the European standard.↵
7. Ley 1/1996 of 10 January, de *Asistencia Jurídica Gratuita*.↵
8. Art. 969 of the Spanish Criminal Procedural Law.↵
9. Art. 967.1 of the Spanish Criminal Procedural Law: "In the summonses issued to the complainant, the injured party and the person under investigation for the trial shall be informed that they may be assisted by a lawyer if they so wish (...) ... for the prosecution of minor offences carrying a fine of at least six months, the general rules of defense and representation shall apply" (i.e., legal assistance is then required). Translation provided by the author.↵
10. Art. 3(2) lit.-a) Directive 2013/48/EU.↵
11. Art. 4(1) Directive 2016/1919: "Member States shall ensure that suspected or accused persons who do not have sufficient resources to pay for the assistance of legal counsel are entitled to free legal aid when the interests of justice so require."↵
12. Judgment of the *Audiencia Provincial* (AP) of Madrid 768/2016 of 28 December 2016. In 2016, the AP Madrid resolved an appeal against a sentence handed down in proceedings for a minor offence of ill-treatment in which the appellant had been sentenced to a one-month fine. The accused was summoned in accordance with the requirements established by law, which included the information that he could be assisted by a lawyer if he so requested, even if in this case legal assistance was not mandatory. The appellant sent a fax to the court stating that he wanted the assistance of a lawyer but that, due to insufficient resources, he was requesting one *ex officio*. The request was denied because the law does not require the assistance of a lawyer in such trials for minor offences (see Art. 962.1 of the Criminal Procedural Law).↵
13. Art. 6 LAJG: "The right to free legal aid includes the following benefits: (...) 3. Free defense and representation by a lawyer and a procedural representative in judicial proceedings, when the intervention of these professionals is legally required or when, in the absence of such intervention, any of the following circumstances arise:
(a) their intervention is expressly required by the court or tribunal by means of a reasoned order to guarantee the equality of the parties in the proceedings;
(b) in the case of minor offences, the person against whom the criminal proceedings are directed has exercised his or her right to be assisted by a lawyer and it is so agreed by the court or tribunal, having regard to the nature of the offence in question and the personal circumstances of the applicant for legal aid." (Translation provided by the author).↵
14. Art. 7(1) lit. b) Directive 2016/1919.↵
15. Art. 7(4) Directive 2016/1919.↵
16. Judgment of *Audiencia Provincial* of Navarra (Section 1) 265/2017 of 13 December 2017 (ECLI:ES:APNA:2017:522): "The duty of the judicial courts to ensure that the defencelessness of the defendant is avoided is protected especially in the criminal process [...]. The Constitutional Court has affirmed in numerous decisions the positive duty to ensure the effectiveness of the defense of the accused or convicted person in criminal proceedings by professionals designated *ex officio*." (Translation by author).↵
17. New Art. 21 *bis* LAJG: "(1) The person receiving free legal aid shall have the right to urge the appointment of new professionals by means of a duly justified request, which shall not suspend the appointment of the professionals already agreed upon." (Translation by the author).↵
18. Spanish Supreme Court Judgement 821/2016 of 2 November 2016, ECLI:ES:TS:2016:4737. The accused was detained in Cádiz (Andalusia) and the trial was to take place in Irun (on the border of France), so the *ex officio* lawyer did not communicate with him until a few minutes before the trial, which prevented him from providing information to prepare the defense properly. His right to defense was violated because a lawyer was appointed to him at the place where the trial was taking place (Irun) and not where he was being detained, and he was neither given the opportunity to appoint a private lawyer, nor was the trial suspended when he resigned his *ex officio* lawyer during the trial.↵
19. Judgment of *Audiencia Provincial* of A Coruña, Section 6, No. 14/2019 of 7 February 2019, ECLI:ES:APC:2019:302.↵
20. By means of Organic Law 5/2010, the Spanish Criminal Code was modified to include a new Art. 31 *bis* establishing criminal liability of legal persons for offences committed by its legal representatives on behalf of and for the benefit of the legal person, and for offences facilitated by the legal person through failure to exercise due control over its employees.↵
21. According to Art. 3.5 LAJG, the phrase "insufficient resources for litigation" refers to a legal person with no sufficient assets and an annual income less than three times the "*public revenue index*" (*Indicador Público de Renta a Efectos Múltiples – IPREM*).↵
22. Art. 2. lit. c) and lit. i) LAJG.↵
23. New Art. 22 LAJG.↵
24. Art. 1 LAJG: "The free legal aid service shall be compulsory under the terms provided in this law. The professional associations may organize the service and exempt the member when there are reasons that justify it." An appeal was lodged with the Supreme Court (SC) against the proposal to amend the Regulations on the organization and operation of free procedural representation, which established the universal and compulsory

assignment of its members to the free legal aid service. The SC dismissed the appeal, stating that “the exercise of proxy, a profession in which membership is mandatory, implies the assumption of a series of collegiate obligations, including that of representing in court those who have the right to free legal aid under the terms established by the Bar” (Supreme Court judgment 3242/2014, 29 January 2016, ECLI:ES:TS:2016:413). This statement on the obligatory nature of the service was made by the SC in response to doubt, voiced especially by solicitors, as a result of the interpretation given by the Spanish Directorate-General for Taxation to the ECJ ruling of 28 July 2016 (ECLI:EU:C:2016:605) in case C-543/14 *Ordre des Barreaux francophones et germanophone*. On the basis of this ruling, the Directorate-General considered this payment to be a taxable event for VAT. Spanish VAT legislation stipulates that services provided free of charge and which are compulsory for the taxable person are not subject to VAT (Art. 12(3) Law 37/1992).↵

25. Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings COM(2013) 824 final – 2013/0409 (COD), O.J. C 226, 16.7.2014, p. 63–67: 1.4. “... It would point out that legal aid in such proceedings must not be jeopardised because of the budgetary difficulties facing some Member States, and it wonders to what extent resources could be made available at European level, say in the form of a European fund”.↵
26. This Council will include all administrations with competence in the field of the administration of justice and lawyers/solicitors through their general associations. Its aim is to harmonize, unify and share practices and criteria for action.↵

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