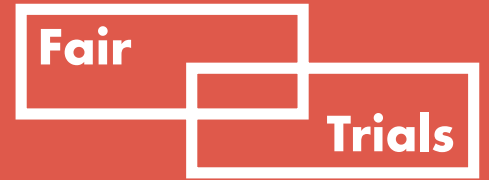


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# European arrest warrant defence toolkit

**The right to a lawyer and legal aid**



**Fairness, equality, justice**

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**Stream**

Strengthening Trust in the European Criminal Justice Area through Mutual Recognition and the Streamlined Application of the European Arrest Warrant

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## Introduction

European Arrest Warrant (EAW) proceedings are arguably one of the most complex proceedings a person can find themselves involved in. They usually involve arrest and detention in a foreign state, and surrender to another Member State either to face a criminal trial or to serve a prison sentence.

Without access to legal assistance, it would be very difficult for the requested person to understand and effectively exercise their rights, including where necessary challenging the issuing and execution of the EAW. Therefore Article 12(2) of the Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedure between Member States (FD EAW) guarantees the requested persons a right to legal counsel in the executing state.

The complexity of EAW proceedings lies with the fact that they require knowledge of at least two legal systems – those of the executing state and the issuing state. Recognising that it is not possible for a single lawyer to have the required legal expertise and knowledge of the official languages of all Member States to assist the requested person effectively in the EAW proceedings, Directive 2013/48/EU<sup>1</sup> on the right to a lawyer grants the requested person a right to dual legal representation. Thus, in addition to the legal assistance in the executing state, the requested person also has a right to a lawyer in the issuing Member State.

Dual legal representation enables genuine reasons for refusal of the execution of an EAW to be properly argued therefore, the intervention of a lawyer from the issuing Member State is essential to help both the lawyer in the executing state and the executing judicial authority verify any grounds for refusal to execute the EAW swiftly as possible.<sup>2</sup> Many, if not most, rights of the requested person in EAW proceedings can only be exercised effectively by the two lawyers in cooperation.<sup>3</sup> Where the requested person does not have a lawyer in the issuing Member State, EU law obliges Member States to cooperate in order to facilitate their appointment.<sup>4</sup>

In practice, access to a lawyer in the issuing state remains problematic. Member States have not put in place systems that enable effective cooperation in the exchange of information on the appointment of lawyers and the availability of

<sup>1</sup> Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty OJ L 294, 6.11.2013, p. 1–12.

<sup>2</sup> Handbook on the EAW for Defence Lawyers “How to Defend a European Arrest Warrant”, Part I: Understanding the EAW Framework Decision, European Criminal Bar Association (ECBA), 2017, Chapter H1. “[How can a lawyer in the issuing state help me?](#)”

<sup>3</sup> Handbook on the EAW for Defence Lawyers “How to Defend a European Arrest Warrant”, Part I: Understanding the EAW Framework Decision, European Criminal Bar Association (ECBA), 2017, Chapter H1. “[How can a lawyer in the issuing state help me?](#)”

<sup>4</sup> Article 10(5) of the Directive 2013/48/EU.

legal aid.<sup>5</sup> Thus it often falls on the lawyers in the executing Member State to search for a lawyer in the issuing state using their own means and connections. This is even more difficult where the requested person does not have the financial means to appoint a lawyer and is reliant on legal aid in the issuing state.

This section of the defence toolkit provides a brief legal analysis of the nature and scope of the right to a lawyer and legal aid in the EAW proceedings. It does not attempt to represent a comprehensive in-depth analysis of all legal and practical issues concerning right of access to a lawyer and access to legal aid, but rather provides a brief guidance for understanding EU law as it currently stands, as well as the practice of regional courts in that regard.

This chapter of the defence toolkit highlights the challenges faced by the defence and suggests some steps that can be taken to enable more effective access to a lawyer and legal aid in EAW proceedings.

We recommend that you use this chapter together with other chapters on: access to a lawyer and legal aid, the right to information and translation, and access to case file. **Click here to find them all on the Fair Trials website.**

As part of this project, Fair Trials produced an accompanying film for each chapter, **click here to watch them on YouTube.**

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<sup>5</sup> Report from the Commission to the European Parliament and the Council on the implementation of 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 person informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, 26.09.2019, Section 3.10.2.

# Right to access a lawyer

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In this section of the defence toolkit, we will briefly lay out the legal sources and the scope of the right to a lawyer in the executing and issuing state, including timing of access and confidentiality.

## Right to a lawyer in the executing state

Article 11 of the FD EAW specifies the rights of the requested person in EAW proceedings. Given that the FD EAW was adopted in 2002, that is before the Lisbon treaty incorporating the Charter into primary EU law and the adoption of the Procedural Rights Directives, it only lists four distinct rights: right to information, right to consent to surrender, right to legal assistance in the executing state and the right to interpretation.

Regarding the right to legal assistance in the executing Member State, Article 11(2) of the FD EAW provides:

**“A requested person who is arrested for the purpose of the execution of a European arrest warrant shall have a right to be assisted by a legal counsel and by an interpreter in accordance with the national law of the executing Member State.”**

Case-law of the European Court of Human Rights (ECtHR) sets several requirements for the process and competence of a ‘remedy’ to be considered effective under the European Convention for the Protection of Human Rights and Fundamental Freedoms:

In the context of EAW proceedings, the requested person is often arrested or detained in a foreign country where they are unlikely to already have a familiar lawyer. They most probably don’t know how to appoint a lawyer in that state and don’t speak the language of the proceedings and therefore can’t really read that information without assistance. Therefore according to the recital 45 of the Directive 2013/48/EU on the right to a lawyer, the executing Member State “should make the necessary arrangements to ensure that requested persons are in a position to exercise effectively their right of access to a lawyer in the executing Member State, including by arranging for the assistance of a lawyer when requested persons do not have one, unless they have waived that right.” Such arrangements should include legal aid and they could, as suggested by recital 45, take the form of a list of available lawyers from which requested persons could choose.

Directive 2013/48/EU on the right to a lawyer provides further detail about the right to a lawyer in the executing Member State. According to Article 10(2) of the directive, the content of the right to a lawyer in the executing state includes three further aspects:

- Timely access, i.e., the right to access the lawyer in such time and manner that allows them to exercise their rights effectively and, in any event, without undue delay from deprivation of liberty;
- The right to meet and communicate with the lawyer;
- The right to have the lawyer present and, in accordance with national law, participate in a hearing before the executing judicial authority.

Regarding participation in the hearing before the executing judicial authority, recital 42 of the Directive 2013/48/EU provides further explanation. Where a lawyer participates in a hearing before the executing judicial authority, the lawyer may, *inter alia*, in accordance with procedures provided for under national law, ask questions, request clarifications, and make statements. Thus, the lawyer plays an active role in the hearing of the requested person before the executing judicial authority.

The role of the lawyer in the executing state is an important one. A hearing before the executing judicial authority is the only time in the EAW proceedings where the requested person has a right to be heard directly by a judicial authority before a decision on surrender is taken.<sup>6</sup> The executing judicial authority takes two important decisions: it decides on need to continue detention of the requested person in the executing state, as well as takes a decision on whether or not to execute the EAW and surrender the requested person to the issuing state. Thus, the role of the lawyer in the executing state is to ensure that the EAW proceedings are conducted fairly, and in accordance with the Framework Decision, including considering the content of the EAW to ensure it is valid as well as considering any refusal grounds, and that the person has been correctly identified.<sup>7</sup>

In practice, access to a lawyer in the executing state is less problematic than in the issuing state. Requested persons generally are entitled to the same rights to access a lawyer after the arrest as the suspects or accused persons in national criminal proceedings.<sup>8</sup> In many Member States, legal representation is mandatory in the EAW proceedings.<sup>9</sup>

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<sup>6</sup> See section [Judicial Review](#) of the defence toolkit.

<sup>7</sup> Handbook on the EAW for Defence Lawyers “How to Defend a European Arrest Warrant”, Part I: understanding the EAW Framework Decision, European Criminal Bar Association (ECBA), 2017, Chapter D. “[What should I do if I am retained or appointed in an EAW case in the Executing State?](#)”

<sup>8</sup> Report from the Commission to the European Parliament and the Council on the implementation of 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 person informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, 26.09.2019, Section 3.10.1.

<sup>9</sup> Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings, European Union Agency for Fundamental Rights (FRA), September 2019, Chapter 4.2.2., p. 64.

## Right to a lawyer in the issuing state

Right to a lawyer in the issuing state is guaranteed by Article 10(4) of the Directive 2013/48/EU on the right to a lawyer. It states:

**“The competent authority in the executing Member State shall, without undue delay after deprivation of liberty, inform requested persons that they have the right to appoint a lawyer in the issuing Member State. The role of that lawyer in the issuing Member State is to assist the lawyer in the executing Member State by providing that lawyer with information and advice with a view to the effective exercise of the rights of requested persons under Framework Decision 2002/584/JHA.”**

The role of the lawyer in the issuing state is thus to assist the lawyer in the executing state with information that would help the requested person exercise their rights more effectively. Those rights include the right to verify and challenge the validity of the EAW, as well as raise any grounds for non-execution of the EAW, many of which require familiarity with the penal system, including prison conditions, and criminal proceedings in the issuing state.

Appointing a lawyer in the issuing Member State before the requested person is surrendered by the executing Member State can, in some cases, help prevent surrender altogether. For example, the lawyer in the issuing state may be able to obtain a revocation of the EAW by arranging that the charges are dropped before its execution.<sup>10</sup> In principle, lawyers in the issuing state are uniquely positioned to provide such assistance because of their knowledge of the issuing Member State’s legal system and also the language of the proceedings.

In practice, the fulfilment of their role may be undermined by the lack of access to the case file in the issuing state, which contains essential information for the defence to verify the legal aspects of the proceedings. See more this in the ***Right to access the case file*** part of the defence toolkit.

The appointment of the lawyer in the issuing state is almost entirely dependent on the assistance of both the executing and issuing states’ authorities. Firstly, the executing state needs to inform the requested person about the right to appoint a lawyer in the issuing state in a language they understand. Secondly, the requested person must receive information on how to appoint a lawyer and where necessary also how to receive legal aid. Member States, especially the issuing Member State, have an obligation to provide such information and to facilitate the appointment of the lawyer in the issuing state:

<sup>10</sup> Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings, European Union Agency for Fundamental Rights (FRA), September 2019, Chapter 4.2.3., p. 64.



**“Where requested persons wish to exercise the right to appoint a lawyer in the issuing Member State and do not already have such a lawyer, the competent authority in the executing Member State shall promptly inform the competent authority in the issuing Member State. The competent authority of that Member State shall, without undue delay, provide the requested persons with information to facilitate them in appointing a lawyer there.”<sup>11</sup>**

Recital 46 of Directive 2013/48/EU suggests that information provided by the competent authority of the issuing Member State could include a current list of lawyers, or the name of a lawyer on duty in the issuing State, who can provide information and advice in European arrest warrant cases. Where such a list does not already exist, Member States could request that the appropriate bar association draw up such a list.

In practice, the information about how to appoint a lawyer for the requested person in the issuing Member State is not exchanged and not readily available to the requested person. This means that they do not have the assistance needed to appoint the lawyer timely or that this task is effectively put on the lawyer in the executing state. This is even more complicated where the requested person requires legal aid as information about procedures to apply for legal aid may be in a language that neither the requested person nor their lawyer speak.

Given the ongoing effort to digitalise justice in the EU,<sup>12</sup> exchange of information on the appointment of a lawyer should be an obvious goal. They should allow for quick transfer of the information on appointment of a lawyer in the issuing state to the requested person allowing for a timely appointment of a lawyer and more effective exercise of a right to prepare defence in the EAW proceedings.

As a lawyer in the executing state, you should insist on the executing and the issuing state’s judicial authorities’ assistance in the appointment of the lawyer in the issuing state. Relying on Article 10(5) of the Directive 2010/43/EU on the right to a lawyer, you can insist on the executing judicial authority contacting the issuing judicial authority in order to receive the information on lawyers available to assist in the EAW proceedings. You should do it immediately as the strict time limits for EAW proceedings continue to run regardless of whether or not the lawyer in the issuing state is appointed.<sup>13</sup>

For more practical suggestions, see **What to do?** on page 14.

<sup>11</sup> Article 10(5) of the Directive 2013/48/EU.

<sup>12</sup> For more on digitalisation of justice in the EU see [the digitalisation of justice webpage on the European Commission website](#).

<sup>13</sup> Article 10(6) of the Directive 2013/48/EU.

## Modalities of access to a lawyer

### *Practical arrangements*

Directive 2013/48/EU on the right to a lawyer details the content of the right to a lawyer in the executing state. In addition to the timing and manner of the access, which must allow for the effective exercise of the requested person's rights, Article 10 of the directive guarantees the right to meet and to communicate with the lawyer in the executing state. These are two distinct aspects of access to a lawyer. Regarding the right to communicate with the lawyer in the executing state, recital 44 of the Directive 2013/48/EU on the right to a lawyer states:

**“Requested persons should have the right to communicate with the lawyer representing them in the executing Member State. It should be possible for such communication to take place at any stage, including before any exercise of the right to meet with the lawyer. Member States may make practical arrangements concerning the duration, frequency and means of communication between requested persons and their lawyer, including concerning the use of videoconferencing and other communication technology in order to allow such communications to take place. Such practical arrangements should not prejudice the effective exercise and essence of the right of requested persons to communicate with their lawyer.”**

Thus, in addition to the right to meet in person, the requested persons, whether detained or not, have the right to communicate with their lawyer in the executing state. This right can be exercised whenever necessary before and after meeting the lawyer in person. Member States may, and where the requested person is in detention, must assist in making practical arrangements to give the requested person access to the means of communication such as telephone or videoconferencing technology.

Regarding the right to meet with the lawyer in the executing state, recital 43 of the Directive 2013/48/EU on the right to a lawyer states:

**“Requested persons should have the right to meet in private with the lawyer representing them in the executing Member State. Member States may make practical arrangements concerning the duration and frequency of such meetings, taking into account the particular circumstances of the case. Member States may also make practical arrangements to ensure safety and security, in**

**particular of the lawyer and of the requested person, in the place where the meeting between the lawyer and the requested person is conducted. Such practical arrangements should not prejudice the effective exercise and essence of the right of requested persons to meet with their lawyer.”**

In principle, principle the requested person should be able to meet and communicate with their lawyer as long and as frequently as necessary in order to guarantee effective exercise of their rights. Where effective communication between the requested person and the lawyer requires the assistance of an interpreter, this should be taken into account making the means of communication or meeting facilities available to the requested person for longer or more frequently. Any limitations or arrangements in this regard cannot undermine the essence of the right to communicate with the lawyer and to prepare effectively for the hearing in the EAW proceedings. This means that any practical arrangements, including means of remote communication or security arrangements in detention, must guarantee the confidentiality of conversations and be available for as long as necessary to effectively prepare for the hearing in the requested person’s individual case.

It is unclear whether these aspects of the right to access to a lawyer also apply to the same extent to the lawyer in the issuing state. According to Article 10(4) of the Directive 2013/48/EU on the right to a lawyer, the role of the lawyer in the issuing state is “to assist the lawyer in the executing Member State by providing that lawyer with information and advice with a view to the effective exercise of the rights of requested persons”. This would imply that the focus in appointing the lawyer in the issuing state is on the cooperation between the two lawyers in order to gather and exchange information that would help representing the requested person before the executing judicial authority. However, the fact that the lawyer is appointed for the requested person implies that the lawyer in the issuing state should be able to communicate directly to their client and that this communication should also be facilitated by the authorities of the executing Member State, especially where the requested person is detained.

Where practical arrangements made by the authorities do not guarantee sufficient time to discuss the requested person’s case in detail, review evidence and to prepare for the hearing before the executing judicial authority, you should request additional time to be allocated for meeting or communicated with your client. If the requested person is detained, it is likely that the administration of the detention facility is responsible for these practical arrangements. Where restrictions placed on your communication or possibility to meet with your client have negatively impacted your ability to prepare for the hearing, raise this issue with the executing judicial authority.

## **Confidentiality**

In order to be in a position to provide effective legal assistance, it is essential for lawyers to have a confidential space to talk with their client. Confidentiality of communications with lawyers applies in EAW

proceedings to the same extent as it applies to communications in national criminal proceedings. Article 4<sup>14</sup> of the Directive 2013/48/EU on the right to a lawyer protects all forms of communication with the lawyer:

**“Member States shall respect the confidentiality of communication between suspects or accused persons and their lawyer in the exercise of the right of access to a lawyer provided for under this Directive. Such communication shall include meetings, correspondence, telephone conversations and other forms of communication permitted under national law.”**

Recital 33 provides a detailed clarification on the scope of the right to confidentiality. It states, in part, that Member States should “respect the confidentiality of meetings and other forms of communication between the lawyer and the suspect or accused person in the exercise of the right of access to a lawyer provided for in this Directive, without derogation.” This obligation to respect confidentiality not only implies that Member States should refrain from interfering with or accessing such communication but also that, where suspects or accused persons are deprived of liberty or otherwise find themselves in a place under the control of the State, Member States should ensure that arrangements for communication uphold and protect confidentiality.<sup>15</sup> This applies not only to the traditional means of communication such as telephone or in-person meetings, but also communication via videoconference and other digital means.

The right to confidential communication can only be restricted in exceptional circumstances and only if justified by “compelling reasons”, which means, for the purposes of the Directive 2013/48/EU on the right to a lawyer, “objective and factual circumstances” pointing to suspicion that the lawyer is involved with the suspect or the accused person (or in this case the requested person) in a criminal activity.

Where you suspect that any of your communication with the requested person may be subject to surveillance of any kind, including listening to conversations via telephone or videoconference or audio or video surveillance of the meetings, insist on the executing Member State’s obligation to respect confidentiality of lawyer-client communication. Raise this issue before the executing judicial authority or other complaint mechanism available under national law.

For more practical suggestions, see **What to do?** on page 14.

<sup>14</sup> According to Article 10(3) of the Directive 2013/48/EU, the rights provided in Article 4 apply *mutatis mutandis*, to the EAW proceedings in the executing Member State.

<sup>15</sup> Recital 33 of the Directive 2013/48/EU

## Quality of legal services

Lawyers available to assist in EAW cases should also be familiar with other EU cross-border cooperation instruments.<sup>16</sup> Where another, less restrictive cross-border cooperation instrument can be applied in requested person's case being unfamiliar with them can result in surrender of the requested person where it could be avoided. Research shows that lawyers often do not apply for the other EU cross-border cooperation instruments due to lack of knowledge.

This problem is particularly raised regarding the quality of the legal services provided by legal aid lawyers. It has been pointed out by practitioners that in some cases a state-appointed lawyer may lack the proper expertise or language skills. The specialisation or experience of the appointed lawyer is important for EAW proceedings that are of a special nature.<sup>17</sup> In this regard the Commission Recommendation on the right to legal aid for suspects or accused persons in criminal proceedings suggests Member states to:

- Establish and maintain system of accreditation for legal aid lawyers and determine criteria for the accreditation of legal aid lawyers, taking into account best practices.<sup>18</sup>
- Put in place mechanisms that allow the competent authorities to replace legal aid lawyers or require them to fulfil their obligations, if those lawyers fail to provide adequate legal assistance.<sup>19</sup>
- Encourage training, including the development of training programmes for lawyers that provide legal aid services.<sup>20</sup>

Therefore, lawyers available to assist the EAW cases in both the issuing and executing states should not only be appropriately qualified to provide general legal advice, but crucially also familiar with the EU cross-border instruments. Article 7(4) of the Directive 2016/1919 on the right to legal aid obliges Member States to *"take the necessary measures to ensure that suspects, accused persons and requested persons have the right, upon their request, to have the lawyer providing legal aid services assigned to them replaced, where the specific circumstances so justify."* Where the lawyer in the issuing or executing state is not appropriately qualified to

<sup>16</sup> These are [Directive 2014/41/EU](#) of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters; Council [Framework Decision 2009/829/JHA](#) of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention; Council [Framework Decision 2008/947/JHA](#) of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions and Council [Framework Decision 2008/909/JHA](#) of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

<sup>17</sup> Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings, European Union Agency for Fundamental Rights (FRA), September 2019, Chapter 4.3., p. 66.

<sup>18</sup> European Commission, [Recommendation of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings](#), paras 19-20.

<sup>19</sup> *Ibid.*, para. 18.

<sup>20</sup> *Ibid.*, para. 22.

assist your client in EAW proceedings, you can advise the requested person to use the available mechanism to request replacement of the lawyer.



## What to do?

### *In an individual case*

A hearing before the executing judicial authority is the only time the requested person is guaranteed to be heard by a judicial authority in the EAW proceedings. As a lawyer in the executing Member State, you will be the first to be put in contact with the requested person. In this capacity, you are in a position to:

- make sure the requested person fully understands that they have a right to appoint a lawyer in the issuing state
- where the relevant information is not provided to the requested person, request that the executing and, where necessary, issuing judicial authority provide information on how to appoint a lawyer in the issuing state, including a list of available lawyers
- where a lawyer in the issuing state is appointed, work closely with them to secure access to information necessary to exercise the rights of the requested person in the EAW proceedings, including verifying the validity of EAW and raising any relevant grounds for non-execution of the EAW
- where the right to communication or right to meet your client is subject to limitations or practical arrangements make sure they do not undermine your ability to prepare your client's case
- where you suspect that any of your communication with the requested person may be subject to surveillance of any kind insist on the executing Member State's obligation to respect confidentiality of lawyer-client communication. Raise this issue before the executing judicial authority or other complaint mechanism available under national law
- where the lawyer in the issuing or executing state is not appropriately qualified to assist your client in EAW proceedings, referring to Article 7(5) of the Directive 2016/1919 on the right to legal aid you can advise your client to use the available mechanism to request replacement of the lawyer.

### *On a systemic level*

In terms of more efficient access to legal assistance in the issuing state, there are several immediate changes that could have a substantive impact on facilitating access to a lawyer in the issuing state:

- introduction of a list of lawyers available to assist in EAW cases in your state when it acts as the issuing state

- additional training on the EAW and other EU cross-border cooperation instruments for lawyers placed on the list
- introduction of digital solutions to facilitate quick and easy transfer of the information on appointment of a lawyer in the issuing state to the requested person.

## Right to legal aid

In the context of the EAW proceedings, Directive 2013/48/EU on the right to a lawyer foresees a clear role for lawyers in the issuing state, and Directive 1016/1919 on the right to legal aid provides the right to legal aid in EAW proceedings.

### The right to legal aid in the executing state

Article 5(1) of the Directive 1016/1919 on the right to legal aid provides the right to legal aid in the executing state:

**“The executing Member State shall ensure that requested persons have a right to legal aid upon arrest pursuant to a European arrest warrant until they are surrendered, or until the decision not to surrender them becomes final.”**

Since the start of the EAW proceedings typically involve the requested person first being arrested, they enjoy similar rights to suspects or accused persons in national criminal proceedings. Although many Member States do not have specific legal aid provisions for EAW cases, the assistance of a lawyer in such proceedings is often mandatory by national law and a lawyer is provided free of charge.<sup>21</sup>

### The right to legal aid in the issuing state

Article 5(2) of the Directive 1016/1919 on the right to legal aid establishes that requested persons also have the right to legal aid in the issuing Member State for the purpose of participating in a criminal prosecution in the executing Member State and in so far as legal aid is necessary to ensure effective access to justice:

**“The issuing Member State shall ensure that requested persons who are the subject of European arrest warrant proceedings for the purpose of conducting a criminal prosecution and who exercise their right to appoint a lawyer**

<sup>21</sup> Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings, European Union Agency for Fundamental Rights (FRA), September 2019, Chapter 4.3., p. 66.

**in the issuing Member State to assist the lawyer in the executing Member State in accordance with Article 10(4) and (5) of Directive 2013/48/EU have the right to legal aid in the issuing Member State for the purpose of such proceedings in the executing Member State, in so far as legal aid is necessary to ensure effective access to justice.”**

It is important to note that Article 5(2) does not entail an obligation for Member States to provide legal aid to the requested person when they are sought in the issuing State to serve a custodial sentence.

Recital 21 of the Directive 2016/1919 on the right to legal aid provides more detail as to how a decision to grant legal aid should be taken in the issuing state:

**“Requested persons should have the right to legal aid in the executing Member State. In addition, requested persons who are the subject of European arrest warrant proceedings for the purpose of conducting a criminal prosecution and who exercise their right to appoint a lawyer in the issuing Member State in accordance with Directive 2013/48/EU should have the right to legal aid in that Member State for the purpose of such proceedings in the executing Member State, in so far as legal aid is necessary to ensure effective access to justice, as laid down in Article 47 of the Charter. This would be the case where the lawyer in the executing Member State cannot fulfil his or her tasks as regards the execution of a European arrest warrant effectively and efficiently without the assistance of a lawyer in the issuing Member State. Any decision regarding the granting of legal aid in the issuing Member State should be taken by an authority that is competent for taking such decisions in that Member State, on the basis of criteria that are established by that Member State when implementing this Directive.”**

This implies that a decision on whether to grant legal aid in the issuing state can be taken in accordance with national law. Generally, there are two tests that can be applied to decide whether legal aid should be granted to a particular person – the means and the merits test.

## Merits test

The merits test essentially relies on the notion of “interests of justice” found in Article 6(3)(c) of the European Convention for the Protection of Human



Rights and Fundamental Freedoms (ECHR). The European Court of Human Rights (ECtHR) suggest relying on several factors to determine whether the “interests of justice” in a particular case require that the suspect or accused person be granted legal aid. These include the seriousness of offence (or a consideration of what is at stake for the person in question), complexity of the case and the personal situation and vulnerability of the suspect.<sup>22</sup>

Where a person’s liberty is at stake, the ECtHR has established that “the interests of justice in principle call for legal representation and if the defendant cannot pay for it himself, public funds must be available as of right.”<sup>23</sup> Article 4(4) of the Directive 2016/1919 on the right to legal aid also states that the merits test shall be deemed to have been met 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 within the scope of the directive; and during detention.

Thus, where a Member State provides for the merits test in EAW proceedings, you can argue that it is always fulfilled on account of arrest and possible detention of the requested person in the executing state and potentially also the issuing state after the surrender, as well as the complexity of EAW proceedings which involve at least two jurisdictions. In addition, the requested person is almost always in a vulnerable position if they are arrested in a foreign state and require language assistance.<sup>24</sup>

## Possibility to apply a means test

Article 5(3) of the Directive 2016/1919 on the right to legal aid establishes that Member States may apply a means test when deciding whether to grant legal aid in the context of EAW proceedings:

**“The right to legal aid referred to in paragraphs 1 and 2 may be subject to a means test in accordance with Article 4(3), which shall apply mutatis mutandis.”**

In the context of national proceedings, it may be difficult to find and present evidence proving insufficient means. Difficulties in proving a lack of sufficient means may be exacerbated in the context of EAW proceedings, when evidence of indigency is located in another country.

Directive 2016/1919 on the right to legal aid does not provide a definition of “sufficient means.” Instead, Article 4(3) of the Directive requires States that use a “means test” to take into account “all relevant and objective factors” to determine whether a person has the sufficient means to afford the assistance of a lawyer. It lays out a non-exhaustive list of factors that could be taken into account when making that assessment:

**“Where a Member State applies a means test, it shall take into account all relevant and objective**

<sup>22</sup> See e.g., ECtHR, *Quaranta v. Switzerland*, No. 12744/87, 24.05.2001, paras. 32–38.

<sup>23</sup> ECtHR, *Zdravko Stanev v. Bulgaria*, No. 32238/04, 06.11.2012., para. 38.

<sup>24</sup> ECtHR, *Wang v. France*, No. 83700/17, 28.04/2022, para. 72.

**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, in order to determine whether, in accordance with the applicable criteria in that Member State, a suspect or an accused person lacks sufficient resources to pay for the assistance of a lawyer.”**

These factors are derived from the case law of the ECtHR which requires States to consider all the evidence regarding the circumstances and the personal situation of the applicant in order to determine whether a defendant lacks “sufficient means”.<sup>25</sup> States should also ensure that the way they assess these factors are not discriminatory. For example, the European Commission Recommendation on the right to legal aid for suspects or accused persons in criminal proceedings provides:

**“Where the household income of families is taken into account in the means test, but individual family members are in conflict with each other or do not have equal access to the family income, only the income of the person applying for legal aid should be used.”<sup>26</sup>**

In applying the means test, it may also be relevant to refer to the general principle of effective judicial protection and principle of proportionality under the EU law. In this respect, the Court of Justice of the European Union (CJEU) has ruled that conditions to access legal aid which illegitimately or disproportionately limit the right to legal aid may infringe on the essence of the right to legal aid and violate Article 47(3) of the Charter:

**“The principle of effective judicial protection, as enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, may include the right to be exempted from payment of procedural costs and/or fees due for obtaining the assistance of a lawyer [...]. [I]t is for the national court to ascertain whether the conditions for grant of such aid constitute a restriction of the right of access to courts and tribunals which infringes the very essence of that right, whether they pursue a legitimate aim and whether there is a reasonable degree of proportionality between the means used and the aim pursued.”<sup>27</sup>**

<sup>25</sup> ECtHR, *Pakelli v Germany*, App. no. 8398/78, Judgment of 25 April 1983, para 34; ECtHR, *Zdravko Stanev v. Bulgaria*, App. no. 32238/04, Judgment of 6 November 2012.

<sup>26</sup> European Commission, *Recommendation of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings*, para. 7.

<sup>27</sup> CJEU, *C-156/12 GREP GmbH v Freistaat Bayern*, 13.06.2012, paras. 44-45; see also CJEU, *C-279/09 DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik*



## What to do?

### *In an individual case*

In many cases access to legal aid may be the only way the requested person may be able to appoint a lawyer to represent them in EAW proceedings. This is especially important for the lawyer in the issuing state, which fulfils an essential role in providing the requested person and their lawyer with key information from the issuing state. This is also time sensitive as application for legal aid is another procedural step that needs to be fulfilled while the strict procedural time limits of the EAW proceedings continue to run.

Therefore, as a lawyer in the executing state, we suggest that you:

- make sure that the requested person is given clear and understandable information about the right to legal aid and what practical steps they need to take to apply for it
- where the requested person is not provided with the information, insist on the executing judicial authority contacting their counterpart in the issuing state urgently to provide that information in accordance with Article 10(5) of the Directive 2013/48/EU on the right to a lawyer
- where legal aid is denied on the basis of assessment that does not fully take into account the specific situation of the requested person and their ability to afford legal assistance potentially in two Member States, appeal that decision
- where denial of legal aid results in the absence of a lawyer in the issuing state and subsequently undermines your ability to represent your client effectively in the hearing on detention or execution of the EAW, this should be raised before the executing judicial authority.

### *On a systemic level*

Advocacy efforts can focus on the timely and effective access to legal aid in the issuing state through:

- introduction of digital solutions to facilitate quick and easy transfer of the information on appointment of a lawyer in the issuing state to the requested person.
- introduction of digital solutions to facilitate quick and easy electronic application for legal aid.

# Useful sources

## EU law and other legal sources

- Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters. Available in all EU languages.
- Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA). Available in all EU languages.
- Charter of Fundamental Rights of the European Union. Available in all languages.
- 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. Available in all EU languages.
- 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. Available in all EU languages.
- 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. Available in all EU languages.
- 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. Available in all EU languages.
- Council of Europe, Committee of Ministers, [Resolution \(78\) 8 on Legal Aid and Advice](#), 2 March 1978.
- European Commission, [Recommendation of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings](#).

## Toolkits and information

- Fair Trials, [Toolkit on Access to a Lawyer Directive, 2020](#).
- Fair Trials, [Toolkit on the Legal Aid Directive, 2020](#).
- Fair Trials, [Toolkit on the Right to Interpretation and Translation Directive, 2020](#).

- Fair Trials, [Toolkit on the Right to Information Directive](#), 2020.
- Fair Trials, [Toolkit on the Presumption of Innocence Directive](#), 2020.
- Fair Trials, [Toolkit on the Charter of Fundamental Rights of the European Union](#), 2020.
- Fair Trials, [CJEU Preliminary Reference Toolkit](#), 2020.
- EUROJUST website, [section European Arrest Warrant](#).
- [Handbook on the EAW for Defence Lawyers “How to Defend a European Arrest Warrant”](#), Part I: Understanding the EAW Framework Decision, European Criminal Bar Association (ECBA), 2017.

## Guides on application of EU law

- [Handbook on how to issue and execute a European Arrest Warrant](#), European Commission, October 2017. Available in 21 languages.
- [Handbook on the transfer of sentenced persons and custodial sentences in the European Union](#), European Commission, November 2019. Available in 23 languages.
- [Guidelines for deciding competing requests for surrender and extradition](#), EUROJUST, 2019.

## Practice reports and analysis

- [Protecting fundamental rights in cross-border proceedings: Are alternatives to the European Arrest Warrant a solution?](#), Fair Trials, 2020.
- [A Measure of Last Resort? The practice of pre-trial detention decision making in the EU](#), Fair Trials, 2016.
- [European Arrest Warrant – European Implementation Assessment](#), Wouter Van Ballegooij, European Parliament Research Service, June 2020.
- [Implementation Report of Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States](#), European Commission July 2020. Available in all EU languages.
- [Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings](#), European Union Agency for Fundamental Rights (FRA), September 2019.
- [Improving Mutual Recognition of European Arrest Warrants for the Purpose of Executing Judgments Rendered Following a Trial at which the Person Concerned Did Not Appear in Person](#), Hannah Brodersen, Vincent Glerum and André Klip, Maastricht University, 2019.
- [European arrest warrant makes Europe a safer place – factsheet for legal practitioners](#), European Commission, October 2017.

- [EAW Rights – Analysis of the implementation and operation of the European Arrest Warrant from the point of view of defence practitioners](#), Council of Bars and Law Societies of Europe (CCBE), European Lawyers' Foundation (ELF), November 2016.
- [European added value of revising the European Arrest Warrant](#), Micaela Del Monte, European Parliamentary Research Service, 2014.
- [Who qualifies as a judicial authority for the purposes of the European Arrest Warrant?](#), Fair Trials, 2022.

## Case-law

- [CJEU Case-law Analysis Repository](#), STREAM Project, 2022.
- [Country Report Database](#), STREAM Project, 2022.
- [Case law by the Court of Justice of the European Union on the European Arrest Warrant](#), EUROJUST, regularly updated, 8 December 2021.
- [Case-law of the European Court of Human Rights on the right to language assistance in criminal proceedings](#), James Brannan, May 2016.
- [Mapping CJEU Case Law on EU Criminal Justice Measures](#), Fair Trials, July 2020.
- [Guide on Article 6 of ECHR: Right to a fair trial \(criminal limb\)](#), Registry of the European Court of Human Rights, regularly updated. Available in multiple languages.
- [Guide on Article 5 of ECHR: Right to liberty and security](#), Registry of the European Court of Human Rights, regularly updated. Available in multiple languages.
- [Guide on Article 13 of ECHR: right to an effective remedy](#), Registry of the European Court of Human Rights. Regularly updated. Available in multiple languages.

## Practical assistance

- ECBA database: [Criminal Defence Lawyers in Europe](#).

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