

**Abstract: “The European Public Defender – Requirements for legal aid in national and transnational criminal proceedings from a European perspective”**

This thesis investigates whether Europeanisation of defence rights, i.e. the influence of the European Convention on Human Rights (“ECHR”), the European Charter of Fundamental Rights (“CFR”) and the EU Directive on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (“Directive 2016/1919”), improves the status of defence rights at the EU and the national level. The first chapter introduces the topic and the difficulties of legal aid in criminal proceedings and as well as the terminology of the thesis. In the second chapter, Art. 6 para. 3 lit. c) ECHR and Art. 48 para. 2 CFR are analysed to establish the contents of a human rights-based concept of legal aid in the EU. These results are complemented in the third chapter with those guarantees derived from the interpretation of Directive 2016/1919 and combined to form the finalised European concept of legal aid (“*the European public defender*”). The fourth chapter exemplifies the effects of Europeanisation at the national level by investigating the effects on the German system of legal aid in criminal proceedings. On this basis, the hypotheses of a positive impact of Europeanisation on legal aid in criminal proceedings can be affirmed in the fifth and final chapter.

The thesis bases its examinations on an observation of the status quo in the legal aid system in Germany and the insufficient protection of indigent defendants in that system. On the one hand, those deficiencies are aggravated in cross-border criminal investigations and by the ongoing expansion of transnational prosecutorial competences, on the other hand European legal frameworks, like the ECHR and the CFR, as well as harmonising EU directives, harbour opportunities for defence rights. and the accessibility of legal aid in transnational criminal proceedings in the European Union. Due to the recent adoption of Directive 2016/1919, the hypothesis is established that the combined effect of a human rights-based approach and EU harmonisation may impact legal aid in criminal proceedings positively.<sup>1</sup>

The thesis develops the first part of the European concept of legal aid by analysing Art. 6 para. 3 lit. c) ECHR and Art. 48 para. 2 CFR. In a first step, the thesis starts to examine the human rights foundation to the right to legal aid in criminal proceedings as found in Art. 6 para. 3 ECHR, the oldest and most thoroughly adjudicated right to legal aid in criminal proceedings in the EU. Adding to those findings, Art. 48 para. 2 CFR is taken into consideration.

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<sup>1</sup> Cf. Chapter 1.

Although this newer basis for defence rights is largely based on the contents of its ECHR counterpart (cf. Art. 52 para. 3 CFR), Art. 48 para. 2 CFR is construed to contain independent guarantees complementing those of the ECHR, especially complementing the ECHR guarantee to legal aid with a transnational scope.<sup>2</sup> To complete the European concept the contents of Directive 2016/191 are analysed and incorporated. Directive 2016/1919 has a special role in this analysis as it is, on the one hand to be construed in the light of the ECHR and the CRF, but on the other hand serves as a potential instrument to go beyond those prescribed guarantees and thus further the development of defence rights independently. All three legal instruments combined thus make up the concept of the “*European Public Defender*”. In a second step, those findings were taken to assess the effect of this European concept of legal aid on defence rights on the national level and for transnational proceedings.<sup>3</sup>

According to the findings of the thesis, the concept of the “*European Public Defender*” comprises the conditions, guarantees and the legal framework of effective legal aid in criminal proceedings. According to this concept, the defendant is entitled to free legal assistance when he is either indigent and/or when the interests of justice so require. Legal aid in criminal proceedings can be accorded either when one or when both of these criteria are fulfilled. Although especially the “*interests of justice*” are a condition open to discretionary interpretation by the courts, the interests of justice mandate in certain situations, i.e. the deprivation of liberty, the risk of incurring a custodial sentence and for juvenile defendants, that legal assistance be made accessible to a defendant.<sup>4</sup> The thesis states that the guarantee of legal aid in criminal proceedings mandates for early access to a criminal lawyer as soon as a defendant is made the subject of any investigating procedure and/or as soon as they request the assistance of a lawyer.<sup>5</sup> This comprises not only the right of that lawyer to attend such measures, but also to actively participate and ask questions on behalf of the defendant.<sup>6</sup> The defendant is thus able to influence the proceedings by requesting legal assistance. This participatory role of the defendant is enhanced by the right of the defendant to opt for a lawyer of their choice<sup>7</sup> as well as compensatory mechanisms in the legal systems of the member states that to be used in case of procedural failings in the investigation or trial stage.<sup>8</sup> Furthermore the thesis

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<sup>2</sup> Cf. Chapter 2.

<sup>3</sup> Cf. Chapter 3.

<sup>4</sup> Cf. Chapter 2 A. II., B. III. 2., Chapter 3 A. III.

<sup>5</sup> Cf. Chapter 2 A. III. 2. b), Chapter 3 A. IV. 3.

<sup>6</sup> Cf. Chapter 2 A. III. 2. a), Chapter 3 A. IV. 2.

<sup>7</sup> Cf. Chapter 2 A. III. 2. b), Chapter 3 A. IV. 3.

<sup>8</sup> Cf. Chapter 2 A. III. 2. c), B. III. 5., Chapter 3 A. IV. 4.

states essential elements that constitute the structural framework for effective legal aid in criminal proceedings. Essential framework criteria are firstly, freedom of charge arising from the required legal assistance and secondly, establishing a functional and effective quality monitoring system that ensures the expertise of the lawyers providing legal aid as well as the financial structure to support the legal aid system.<sup>9</sup> These findings also extend to transnational criminal proceedings and enable defendants in cross-border criminal investigations to have equivalent access to free legal assistance by benefiting from simultaneous free legal assistance in the issuing as well as the executing member state.<sup>10</sup>

To answer the question as to how Europeanisation impacts defence rights on the national level the thesis concludes with an outlook on the current German system of legal aid in criminal trials and the present attempts to revise this system by the Federal Ministry of Justice and Consumer Protection (*Bundesministerium für Justiz und Verbraucherschutz*, “BMJV”). Merely applying the developed European concept of criminal legal aid to the current German system demonstrates the need for profound reform. This European concept, and especially Directive 2016/1919, will require extensive improvements in favour of defence rights: With ideal implementation of this concept the defendant would benefit from earlier and more extensive access to legal aid, more effective mechanisms to compensate for procedural failings in the investigation phase and a higher qualitative standard with regard to those lawyers effecting legal services. The thesis concludes that Europeanisation of legal aid in criminal proceedings achieves positive impulses for legal aid that have been politically impossible on the national level for decades. However, the positive effect of Europeanisation is largely dependent on an accurate transposition by the legislators, something that seems critical when observing the current legislative proposals by the BMJV.

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<sup>9</sup> Cf. Chapter 2 A. IV., B. III. 4., Chapter 3 A. V.

<sup>10</sup> Cf. Chapter 2 A. III. 1. b), B. III. 3., Chapter 3 A. VI.