

A. »Legal Aid« in Germany?

- There is no »legal aid« for suspects and accused persons in Germany
- A system of »mandatory defense« (§§ 140 ff. StPO) serves as a functional equivalent to »legal aid«
 - Stipulation of situations where a defendant *must* have a defense counsel
 - Appointment by the presiding judge or an investigate judge
 - Lawyer gets fees from the state, but fees are part of court costs which convicted person has to bear
- **Implementation of Directive (EU) 2016/1919 within this system of »mandatory defense«**

B. Delay in implementation

2016, Oct 26: Directive (EU) 2016/1919; to be implemented by 5 May 2019

2018, Feb: Lawyers and scholars present draft bill on implementation

2018, Oct: Draft bill published by the Federal Ministry of Justice

2019, Jun: Draft bill introduced by the German government

2019, Dec: Law enters into force (»Gesetz zur Neuregelung des Rechts der notwendigen Verteidigung«)

C. »Merits test«

I. Material criteria

- **List in § 140 StPO, including**
 - accusation with a felony
 - accused is to be brought before a competent court or judge in order to decide on detention
 - accused is in detention
 - mandatory defense »appears necessary because of the seriousness of the offence, or because of the difficult factual or legal situation, or if it is evident that the accused cannot defend himself.«
- Generally in conformity with Directive (EU) 2016/1919, in particular Art. 4 (4).



II. Temporal criteria

- *Ex officio* (§ 141 [2] StPO; exceptions apply):
 - accused is about to be brought before a competent court or judge in order to decide on detention
 - accused is in detention
 - it becomes evident that the accused cannot defend him-/herself, or
 - accused is requested to reply to the bill of indictment (*investigation closed!*)
- *On explicit request* (§ 141 [1] StPO):
 - decision and (if applicable) appointment without delay and *before questioning*
 - questionable dependence on **explicit request**: »mandatory« but not really »mandatory«?
 - accused only has to be informed (unspecifically) about the material criteria, but receives explicit information of having to bear the costs if convicted
- *Questioning by the police while deprived of liberty*: »Yes, but« (§ 141a StPO):
 - No requirement of mandatory defense »where there is an urgent need to avert imminent adverse consequences for the life, liberty or physical integrity of a person«
 - No requirement of mandatory defense »where imperative to prevent substantial jeopardy to criminal proceedings«
 - If the accused has already requested appointment of mandatory defense: exceptions apply only with his/her explicit consent
- Conformity with Directive (EU) 2016/1919, in particular Art. 4 (5)? Some doubts:
 - Dependence on *explicit request*, though Recital 18 Directive (EU) 2016/1919 states: »Given in particular the needs of vulnerable persons, such a request should not, however, be a substantive condition for granting legal aid.«
 - Exception based on Art. 3 (6) Directive 2013/48/EU, but only applied to mandatory defense
 - AG *Bobek*, Opinion of 7.11.2019 – C-659/18 (VW) = ECLI:EU:C:2019:940, mn. 62: »derogations provided for in Directive 2013/48 must be construed narrowly« and »may be applied only in »exceptional circumstances«.«
 - ↪ extremely narrow interpretation of § 141a StPO, or violation of Directive (EU) 2016/1919?

D. Selection & Quality

I. Who decides?

- accused given chance to select defence counsel
- appointment by the presiding judge or an investigate judge
- exceptionally, emergency appointment by public prosecutor's office

II. Criteria?

- accused: (near) *carte blanche* to select any lawyer (or law professor) in Germany
- judge/public prosecutor: (near) *carte blanche* to select
 - ... lawyer specialized in criminal defence (»Fachanwalt«) or
 - ... lawyer who has stated he/she is interested in mandatory defence cases

III. Quality?

- Minimum quality for lawyers: professional education (university + two years of mandatory training + two state examinations)
- But no enforceable requirement for further education; no peer review; no evaluation; ...
- Is this sufficient for »an effective legal aid system that is of an adequate quality«, and for »legal aid services [that] are of a quality adequate to safeguard the fairness of the proceedings« (Art. 7 (1) Directive [EU] 2016/1919)?

E. Conclusion

- German »merits test« generally meets European standard, but is hard to understand (Right to Information?)
- Dubious exceptions in temporal application (questioning by the police)
- Quality of legal aid:
 - quality of selection process?
 - quality of lawyers providing mandatory defence?