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An empirical study of suspects' rights at the investigative stage of the criminal process in nine EU countries

INSIDE POLICE CUSTODY 2



Ed Lloyd-Cape

Comparative Report

Acknowledgements

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Executive summary

In 2009 the European Union (EU) adopted a 'roadmap' of procedural rights in criminal proceedings, with the aim of introducing EU legislation covering a range of procedural rights for suspected and accused persons, to come into force over a number of years. The rationale was to enhance the trust on the part of criminal justice actors that is necessary to facilitate mutual recognition of judgements and judicial decisions, and police and judicial co-operation. No less important was the need to reassure citizens that the EU will protect and guarantee their fair trial rights.

The first three Directives adopted under the programme – on the right to interpretation and translation, the right to information, and the right of access to a lawyer – came into effect in October 2013, June 2014, and November 2016 respectively. Under the Directives, member states were required to introduce the laws, regulations and administrative provisions necessary to give effect to the provisions contained in them.

The research reported here, which was primarily funded by the European Commission, and also by the Open Society Justice Initiative, is the first to examine the implementation in practice of all three Directives. The research was carried out in nine member states - Austria, Bulgaria, Hungary, Italy, Lithuania, Poland, Romania, Slovenia and Spain – between September 2016 and December 2018. Using an empirical method, the research sought to obtain data not only on the laws and regulations adopted by the respective countries, but also on how the procedural rights actually work in practice.

The research method used was adapted from that used in a previous study, also funded by the European Commission, published in 2014 as *Inside Police Custody: An Empirical Account of Suspects' Rights in Four Jurisdictions* (Intersentia, Cambridge). The aim was to use observations in police stations, including in police interrogations, and interviews with key criminal justice personnel which, together with baseline information obtained by desk reviews of domestic laws, regulations and procedures, would provide a nuanced account of how procedural rights are experienced by suspected and accused persons in real cases.

Access to police stations for the purposes of the research was successfully negotiated nationally in four of the member states, Austria, Lithuania, Romania and Slovenia. The national authorities in Spain would not grant access, but the authorities in the Basque region of Spain were willing to do so.[1] Despite repeated attempts by the national research teams and the project management team to secure access in the remaining countries - Bulgaria, Italy, Hungary and Poland – the relevant authorities, both the police and relevant government ministries, would not grant permission for researchers to conduct observations in police stations. This, in effect, provided the basis for the first, and possibly the most important, research finding; that the authorities in some countries are unwilling to expose their institutions, particularly the police, to objective research designed, not to criticise, but to discover how an important set of EU-wide standards work in routine cases.

The Directives require member states to transmit the measures adopted to give effect to them to the European Commission. The authorities in all of the countries in the study complied with this obligation. However, the value of this requirement is limited because the national authorities do not have to provide

[1] It should be noted that whilst references are made to Spain in the Executive Summary, the research was conducted only in the Basque region, and whilst some laws referred to are applicable nationally, regulations and practices reported by the researchers may not be valid throughout Spain.

any contextual information, nor specify how the measures reflect each aspect of the relevant Directive. It was clear that in some countries in the study, considerable effort had been made to ensure that the provisions of the Directives were transposed, at least as far as laws and regulations were concerned. However, this was not the case in other countries, and in all of the countries there were examples of failures to adequately transpose certain provisions, for example: failure to impose a requirement to take into account the particular needs of vulnerable suspects or accused persons when informing them of their procedural rights; no explicit provision that a detained suspect be allowed to keep the letter of rights throughout their detention; limitations on free interpretation of lawyer/client consultations; no provisions designed to guarantee the competence of interpreters; power to derogate from the right of access to a lawyer outside of the circumstance prescribed by the Directive.

The countries of greatest concern, with regard to transposition of the Directives, are Bulgaria and Romania. The three Directives which are the subject of this study are all expressed to apply to persons from the time that they are made aware by the competent authorities, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence. The official view adopted in Bulgaria is that the initial 24-hour period of police detention is an administrative procedure, and that therefore the Directives do not apply. In Romania, the police have power to take a person to a police station prior to formal arrest and this, similarly, is treated as an administrative procedure which does not attract the protections afforded by the Directives. Thus, the Directives are deemed not to apply to persons who are, de facto, arrested or detained.

However, even if the relevant laws faithfully reflect the requirements of the Directives, this is not sufficient to ensure that procedural rights are respected in practice. In respect of the right to interpretation and translation, procedures for determining the need for interpretation were inadequate in all of the countries in the study. Whilst the letter of rights was available in a range of languages in a minority of countries, this was not the case in the majority, and since prompt access to an interpreter was often not possible, many suspects who did not speak or understand the relevant language were not informed of their procedural rights in a language that they understood. Mechanisms for ensuring that competent interpreters were available to interpret at police stations were often found to be either non-existent or inadequate, a state of affairs that was contributed to by the lack of a robust national register of interpreters, and low levels of remuneration.

The law in most of the countries in the study regulates, with some degree of precision, the time at which information about procedural rights must be provided to suspected and accused persons, and in most cases, this is sufficient to comply with the requirements of the Directive on the right to information. However, in many of the countries, the letter of rights does not cover all of the rights required by the Directive, and whilst most countries have a standard letter of rights, it was found to be lengthy and complex in all of them, so that many suspected and accused persons, particularly those with vulnerabilities or those who have language difficulties, are unable to fully understand them. The laws of many of the countries do not require that detained suspects be allowed to keep the letter of rights in their possession, but even in those that do, this is often not permitted in practice. Oral information about procedural rights is often provided in a formalistic way, and in some countries the evidence suggests that the police discourage suspects from exercising their procedural rights, and in some cases, even prevent them from doing so.

Perhaps the greatest difficulties disclosed by the research concern the right of access to a lawyer. Generally, the laws of all of the countries in the study provide for such a right (subject to the limitations already explained in respect of Bulgaria and Romania) but, with the exception of a minority of counties, most detained suspects in most countries do not, in practice, have access to a lawyer at the early stages

of the criminal process. Where suspects do have access to a lawyer, the research discloses significant concern in most countries about their quality and competence, particularly in respect of legal aid or ex officio lawyers. Many duty lawyer or ex officio schemes do not guarantee that a competent lawyer is available and willing to attend the police station at short notice, and even where a lawyer does attend, the facilities for private consultation are often inadequate or non-existent.

A number of recommendations, directed at the European Commission and pan-European institutions and organisations, are prompted by the research findings. A full list is provided at the end of the Comparative Report, and recommendations directed at national governments and organisations are set out in the country reports (see Appendices).

General

- Appropriate action should be taken by the European Commission to ensure that the Directives are faithfully and completely transposed into national laws, regulations and processes in all member states.
- The European Commission should enter into discussions with the governments of Bulgaria and Romania regarding the point at which, and the circumstances in which, the Directives are regarded as being applicable.
- If further procedural rights Directives are adopted, consideration should be given to including a requirement that member states report on transposition of the Directive, indicating the action taken, and the consequent national position, in respect of each Article.
- Given the importance of empirical, observational, research in establishing how the standards set out in the Directives work in practice in member states, the European Commission should enter into discussions with national governments with a view to encouraging and facilitating empirical research in respect of procedural rights.
- The European Commission should actively consider whether to propose a European Union standard regarding the electronic recording of interrogations, and of the process by which suspected and accused person who are detained are informed of their procedural rights, in order to enhance transparency and accountability.

Right to interpretation and translation

- The European Commission should consider ways of encouraging and facilitating consideration within, and between, member states of appropriate guidance on workable mechanisms for assessing, and the relevant criteria for determining, the need for interpretation.
- The European Commission should discuss, with both the relevant professional bodies and commercial providers, the question of making remote interpretation available, especially for the purposes of conveying the information required at the early stages of detention.
- The European Commission should: (a) discuss with member states that have not introduced a national registration system for interpreters and translators their plans for introducing such a scheme; (b) consider, together with the appropriate professional bodies, the competence requirements that should be applied to such schemes; and (c) encourage member states to adopt commercially realistic rates of remuneration for interpreters and translators.
- Given the difficulties in some countries of accessing competent interpreters, especially those who can interpret less frequently encountered languages, the European Commission should consider, together with the relevant professional bodies, what action can be taken to ensure the availability of such interpretation.

Right to information

- The European Commission should enter into discussions with the relevant authorities of member states with a view to ensuring that: (a) the respective letters of rights are drafted in simple and accessible language, fully comply with the requirements of the Directive, and are available in a range of languages; (b) the law expressly provides for suspected and accused persons to be given an opportunity to read the letter of rights; (c) mechanisms are put in place to ascertain whether suspected and accused persons understand the rights of which they are notified, and the implications of waiver; and (d) the law expressly provides for a right of detained suspected or accused persons to keep the letter of rights in their possession (in accordance with Article 4 of the Directive on the right to information).
- The European Commission should, in line with the recommendation above concerning electronic recording, consider whether to propose an EU-wide standard regarding electronic recording of the process by which notification of procedural rights is provided, in order to ensure that the requirements regarding notification of procedural rights are complied with.
- The European Commission should confirm that the right of access to documents that are essential to effectively challenging the lawfulness of arrest or detention must be routinely provided, and is not dependant on a request by the suspected or accused person, or their lawyer.

Right of access to a lawyer

- The European Commission should, in line with the recommendation above concerning electronic recording, consider whether to propose an EU-wide standard regarding interrogations, in order to ensure that the rights of the suspected or accused person, and the role of the lawyer, are adequately protected.
- Working with the relevant European professional bodies, the European Commission should seek to establish standards for admission to and the operation of duty lawyer schemes, and standards regarding training for lawyers who advise and assist detained suspected or accused persons (having regard to Article 7 of the Directive on the right to legal aid). With regard to training, the European Commission should publicise the training materials developed by the SUPRALAT project (available at http://www.salduzlawyer.eu/training/theoretical-materials/).
- The European Commission should closely monitor the measures adopted for the purposes of transposition of the Directive on the right to legal aid, in order to ensure that schemes for applying a means test, and the arrangements for remunerating lawyers, do not undermine the obligation to make legal aid of an adequate quality available for suspected and accused persons who are detained during the course of criminal investigation.

1. Introduction

1.1 The nine country study of suspects' rights at the investigative stage of the criminal process

This comparative report is based on empirical research carried out in nine European Union (EU) member states, examining the rights of suspects and accused persons – the right to interpretation and translation, the right to information, and the right of access to a lawyer – as they are applied and experienced in practice at the investigative stage of the criminal process. The research was carried out by partner organisations in the nine countries, co-ordinated by the Irish Council for Civil Liberties (ICCL).

The partner organisations are –

The Ludwig Boltzmann Institute of Human Rights, Austria
The Bulgarian Helsinki Committee, Bulgaria
The Hungarian Helsinki Committee, Hungary
Associazione Antigone, Italy
The Human Rights Monitoring Institute, Lithuania
The Helsinki Foundation for Human Rights, Poland,
The Association for the Defence of Human Rights in Romania – the Helsinki Committee, Romania
The Peace Institute, Slovenia
Rights International, Spain

The project was primarily funded by the European Commission under an Action Grant, JUST/2015/Action Grants, reference number 4000008627 'Inside Police Custody: Application of EU Procedural Rights'. The action grant funded the research in eight countries. Research in the ninth country, Spain, was funded by the Open Society Justice Initiative. The project was co-ordinated by the ICCL on behalf of the Justicia Network.

The primary objective of the project was to measure the practical operation of suspects' rights at the investigative stage, and to use this evidence to conduct national advocacy directed at improving respect for those rights in practice. It is well established in relation to criminal processes that there is often a significant gap between legal norms and the practical application of those norms. Thus, in addition to establishing and describing the legal norms in the nine countries, the research sought to explore how they operate in practice by conducting observations in police stations and carrying out interviews with key criminal justice personnel. In this way, the project was designed to contribute knowledge concerning the impact of key aspects of the EU procedural rights roadmap, to identify both good and poor systems, procedures and practices, and to make recommendations, both at the national and EU levels, directed at the improvement of procedural rights at the investigative stage in EU Member states.

Work on the project was carried out between September 2016 and December 2018, although the periods during which fieldwork was carried out varied depending on a range of factors in each country. However, fieldwork in all countries was conducted after the respective transposition dates of the EU Directives concerning the three sets of rights which were the subject of the study (see further section 1.2). In other words, when the fieldwork was carried out, member states should already have introduced the laws,

regulations, and administrative provisions necessary to give effect to the respective Directives. Therefore, the project provided a timely opportunity to discover how the actions taken by member states were working in practice, and to make an assessment of whether they complied with the requirements of the respective Directives both in principle and in practice.

The study builds upon earlier research projects examining procedural rights at the investigative stage of the criminal process. In particular, the study sought to adapt the methodology developed for the EU funded project that was published in 2014 as *Inside Police Custody: An Empirical Account of Suspects' Rights in Four Jurisdictions* (Intersentia, Cambridge, 2014). That study also examined the three sets of rights that are the subject of this study – in England and Wales, France, the Netherlands, and Scotland. However, the fieldwork for that study was carried out before any of the three EU Directives had come into force. A further study, using a similar methodology, was carried out in three non-EU states – Georgia, Moldova and Ukraine – between 2013 and 2016.[2]

As noted earlier, the current project was co-ordinated by the ICCL, and managed by an experienced project management team consisting of representatives from the ICCL and the Open Society Justice Initiative (OSJI), together with the project research consultant, Professor Ed Cape of the University of the West of England, Bristol, UK. Both the OSJI and Professor Cape had been members of the teams that carried out the first Inside Police Custody project, and the subsequent project in Eastern Europe. The first meeting of the whole project team took place in London in September 2016. A two-day fieldwork training course for researchers from all national research teams was held, also in London, in January 2017. The training was designed to acquaint researchers with the processes, methods and research instruments to be used in the fieldwork, and to train them in those methods. A third meeting was held in Brussels in June 2018 to discuss initial results, analysis and plans for national advocacy. The project management team also held regular telephone conferences with research teams to discuss progress, and any problems arising.

The research project consisted of four major elements: desk reviews; empirical research; analysis and report writing; and national advocacy. The first two elements require further explanation.

Desk reviews

National teams were required to research and write desk reviews regarding their national systems. The overall purpose of the desk reviews was to provide a critical, dynamic account of the system and processes in each country in the study, using existing sources of information, in order to provide a context against which data collected during the research study may be understood. The objective was two-fold: firstly, to serve as a baseline concerning the laws, regulations, institutions and procedures relevant to the realisation of suspects' procedural rights in each jurisdiction; and secondly, to equip the country researchers with sufficient contextual knowledge to undertake the empirical work. The desk reviews also included relevant information from existing sources about criminal justice systems and processes using, for example, official and other statistics, official reports and existing research (if any).

Empirical research

Following the method adopted in the first *Inside Police Custody* project, the original plan for the empirical stage of the research consisted of three elements.

[2] See also the report by the European Union Agency for Fundamental Rights, Rights of suspected and accused persons across the EU: translation, interpretation and information (Vienna, 2016); and the report prepared by the Bulgarian Helsinki Committee and partners, Right to a lawyer and to legal aid in criminal proceedings in five European jurisdictions: Comparative report (Sofia, 2018) (available at https://tinyurl.com/ybe3cbqe).

Direct observations
In order to observe criminal justice practitioners as they go about their daily routine work, researchers were to be located in a number of police stations, and also accompany a sample of lawyers advising clients at police stations. The purpose was to understand the implementation of suspects' rights from multiple perspectives and to gain a deeper insight into practical influences and constraints upon working practices. Researchers were asked to keep a narrative log of their observations.

Interviews
It was planned to conduct semi-structured interviews with a number of police officers and lawyers. In order to enable researchers to secure relevant information and to ask appropriate questions, the interviews were planned to take place after the observation stage of the research was completed. This meant that researchers would be able to probe answers that did not reflect their observations, and gain insights into the motivations that influenced practice. Research teams were provided with interview pro-formas that could be adapted to local circumstances.

Analysis of case pro-formas
Case pro-formas (one for cases observed by researchers when based in police stations, and another for researchers when based with lawyers) were adapted from the first Inside Police Custody study with a view to enabling researchers to secure some quantitative data: for example, about the proportion of suspects who sought to exercise their right of access to a lawyer, socio-demographic characteristics of suspects, the time taken for lawyer/client consultations, and the proportion of suspects who exercised their right to silence.

It was anticipated that national research teams would have to adapt the methodology, and the research instruments, to take account of local circumstances. However, some national research teams had to radically revise their research methodology as a result of lack of co-operation, at a political and administrative (that is, relevant government ministries) level, and on the part of the police. Despite the fact that observational research in police stations has been conducted in previous projects in a range of countries with the co-operation of the relevant authorities, that the research was funded by the European Commission, and that assurances were provided regarding the confidentiality of research data (so that no person or location could be identified from any published data, and that research data would be stored securely), agreement for researchers to be based in police stations and/or to accompany lawyers to police stations, was not forthcoming in a number of countries in the study. Whilst access to police stations by researchers was secured in Austria, Lithuania, Romania and Slovenia, it was not forthcoming in Bulgaria, Italy, Hungary or Poland. In Spain, agreement could not be obtained at the national level, but the national research team was able to secure permission to conduct observational research in police stations in the Basque region.[3] Italy may be regarded as a special case. Whilst permission to observe in police stations was not secured, generally suspects are not interviewed by the police following arrest, but appear at an arrest validation hearing where, depending on the procedure adopted, they may be questioned by a judge. Nevertheless, many provisions of the EU Directives apply where a person is arrested and detained, and observations conducted at police stations would have enabled data to have been obtained about implementation of these aspects of the Directives.

In those countries in which observational research could not be carried out, other methods of seeking data about how procedural rights at the investigative stage work in practice were developed and adopted. Such

[3] It should be noted that whilst references are made to Spain throughout the report, the research was conducted only in the Basque region, and whilst some laws referred to are applicable nationally, regulations and practices reported by the researchers may not be valid throughout Spain.

methods included, for example, interviews of arrested detainees in prison awaiting a validation hearing, interviews of former detainees, an enhanced number of interviews of lawyers and of police officers, and interviews of interpreters. Further information about the research methodology adopted in particular countries is provided in the country reports.

The EU Directives require member states to transmit the text of measures adopted to give effect to the Directives to the European Commission, and require the Commission to submit reports to the European Parliament and to the Council assessing the extent to which member states have taken the necessary measures in order to comply with the Directives. This project, in common with similar research previously conducted, demonstrates that even if legislative and other measures are adopted to give effect to the Directives, it does not follow that the requirement of the Directives are given effect in practice. Even if the provisions of the Directives are faithfully reflected in national legislation and regulations, the nature of the provisions in the Directives is such that effective implementation is reliant on a range of other factors, including financial and other resources, detailed regulation of processes and procedures, and the professional cultures of criminal justice officials and lawyers. The best way of obtaining reliable and comparable data on practical implementation of the Directives, and on the ways in which they are experienced by criminal justice actors, lawyers, and suspects and defendants, is by fieldwork-based research involving observation (including in police stations). A failure by the relevant government ministries, officials and institutions in member states to facilitate, and to co-operate with, such research will mean that the European Commission, and ultimately the EU itself, will not have an adequate basis for assessing either compliance with, or the effectiveness of, its policies and legislation in this field. Moreover, it will mean that member states will forgo the opportunity to effectively regulate and improve their criminal justice systems and processes, having particular regard to procedural rights and, ultimately fair trial. This is true for both the EU Directives which are the focus of this research, and for the other Directives adopted under the EU procedural rights roadmap.

1.2 The European Union context

In 2009 the EU adopted a ‘roadmap’ of procedural rights in criminal proceedings, with the aim of introducing EU legislation on a range of procedural rights for suspected and accused persons, to come into force over a number of years.[4] The EU had, over a decade or more, introduced extensive legislation on police, prosecution and judicial co-operation and mutual recognition (most notably, the European Arrest Warrant (EAW)), and it was recognised that this should be matched by measures that would protect the rights of individuals in criminal proceedings and those who are the subject of an EAW. The legislative mechanism to be adopted was the EU Directive, which would require EU member states to introduce legislation, regulations and other measures that ensure that the provisions of the Directive are complied with in domestic law. The Lisbon Treaty enhanced the role of the Court of Justice of the European Union (CJEU), and it has competence to deal with questions of interpretation of the Treaty and of Directives. In doing so, it must also take account of the principles, rights and freedoms embodied in the Charter of Fundamental Rights of the EU. National courts may, in criminal proceedings, ask the CJEU to give a preliminary ruling on a question of interpretation of a Directive during the currency of a case, and there is an expedited procedure in cases where the accused is in detention. Further, the European Commission has the power to refer a case to the CJEU on the grounds that a member state has failed to fulfil its

[4] *Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings*, 1 July 2009, 11457/09 DROIPEN 53 COPEN 120.

obligations. A finding that a member state has not brought its national legislation into compliance may result in financial penalties being imposed by the CJEU.

In drafting the Directives, full account was taken of the relevant provisions of the European Convention on Human Rights (ECHR), and of European Court of Human Rights (ECtHR) case law. However, the EU legislation was informed by a concern that the ECHR regime was not sufficiently able to ensure that national authorities comply with their responsibilities to safeguard the procedural rights of suspected and accused persons. Some of the limitations are practical, in particular the backlog of cases to be dealt with by the ECtHR, leading to lengthy delays before cases are considered and judgements delivered. However, other limitations are systemic. The mechanisms for enforcing ECtHR decisions are relatively weak, and applications can only be made to the court after all domestic avenues of appeal have been exhausted. Of particular significance is the fact that the court considers the procedural rights of suspected and accused persons within the context of whether, overall, the proceedings were fair. Together with the fact that the court can only consider principles in the context of the facts of cases taken before it, the result has been that whilst the ECtHR has been successful in establishing general minimum standards, it cannot develop a comprehensive set of procedural standards, nor general guidelines on how they could or should be implemented.

The EU Directives, together with the enhanced enforcement regime resulting from the Lisbon Treaty, are able to remedy some of these weaknesses and, whilst detailed implementation of the standards is the responsibility of member states (with, in certain respects, a wide margin of appreciation), the Directives are more comprehensive and more detailed than the relevant ECtHR jurisprudence.

The three Directives that are the subject of the current study are the Directive on the right to interpretation and translation, the Directive on the right to information, and the Directive on the right of access to a lawyer. The provisions of the Directives are briefly described here, and are more fully explored in the relevant sections of the report.

1.2.1 The Directive on the right to interpretation and translation

The Directive on the right to interpretation and translation was adopted on 20 October 2010, with a transposition date of 27 October 2013.[5] The Directive provides that suspected and accused persons in criminal proceedings who do not understand the language of the proceedings: must receive interpretation assistance free of charge during police interrogations, for communication with their lawyer, and at trial; and must be provided with a written translation of documents that are essential for them to exercise their right to defence, including the detention order, the indictment, the judgement and other documents that are essential. Similar rights and obligations also apply in proceedings for the execution of an EAW. It appears from the language of the Directive that the rights and obligations regarding translation only apply to documents provided by the relevant authorities, and not to documents produced by the suspect or accused. Whilst waiver at the instance of the suspect or accused is permitted in respect of translation, provided that they have received prior legal advice or have otherwise obtained full knowledge of the consequences of such a waiver, there is no provision for waiver in respect of interpretation.

[5] 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.

Member states must ensure that interpretation and translation is made available where necessary, and in respect of the former, must ensure that a procedure or mechanism is in place to ascertain whether suspected or accused persons speak or understand the language of the proceedings and whether they need the assistance of an interpreter. The rights are not limited to persons who cannot speak or understand the language because their first (or only) language is other than that used in the proceedings, but also apply to those who cannot do so because, for example, they have a speech or hearing impediment.

Member states must take concrete measures to ensure that the interpretation or translation provided is of a sufficient quality to safeguard the fairness of proceedings, and in furtherance of this objective, must endeavour to establish a register or registers of independent interpreters and translators who are appropriately qualified. Suspected or accused persons must, in accordance with procedures in national law, have a right to challenge a decision that there is no need for interpretation or translation, and a right to challenge the quality of interpretation or translation.

1.2.2 The Directive on the right to information

The Directive on the right to information was adopted on 22 May 2012, with a transposition date of 2 June 2014,[6] and regulates three sets of rights: the right to be informed about procedural rights; the right to be informed of the reason for arrest or detention, and about the accusation; and the right of access to case materials.

Right to be informed of procedural rights
Suspected or accused persons, irrespective of whether they are arrested or detained, must be provided promptly, orally or in writing, of certain rights: the right of access to a lawyer; any entitlement to free legal advice; the right to be informed of the accusation in accordance with Article 6 of the Directive, and the right to remain silent (Art. 3). Where a person is arrested or detained, they must be provided promptly with a written 'letter of rights', which they must be given an opportunity to read and allowed to keep throughout the time that they are deprived of their liberty (Art. 4). In addition to the information provided in accordance with Article 3, the letter of rights must contain information about: the right of access to case materials; the right to have consular authorities and one person informed; the right of access to urgent medical assistance; the maximum time that the person may be deprived of their liberty before being brought before a judicial authority; and basic information about the possibility of challenging the lawfulness of the arrest, obtaining a review of the detention, or making a request for provisional release. In both cases, the information must be provided in simple and accessible language. In the case of the letter of rights, if such a document is not available in the appropriate language, the information contained in it may be provided orally in a language that the suspected or accused person understands, followed up with an appropriate translated letter of rights 'without undue delay'. Where a person has been arrested for the purpose of the execution of an EAW, they must be provided promptly with an appropriate letter of rights containing information about their rights in accordance with Framework Decision 2002/584/JHA.

Right to be informed of the reasons for arrest/detention, and about the accusation
Under Article 6 of the Directive, Member states must ensure that: suspected or accused persons are

[6] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.

promptly provided with information about the criminal act they are suspected or accused of having committed, in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence (Art. 6(1)); and suspected and accused persons who are arrested or detained are informed of the reasons for their arrest or detention, including the criminal act they are suspected or accused of having committed (Art. 6(2)). Recital 28 states that the information specified in Article 6(1) must be given, at the latest, before the first official interview by the police or other competent authority, 'and without prejudicing the course of ongoing investigations'. This suggests that such information may be withheld if providing it would cause such prejudice.

Detailed information, including the nature and legal classification of the offence, as well as the nature of participation of the accused, must be provided to the accused, at the latest, on submission of the merits of the accusation to a court (Art. 6(3)). The suspected or accused person must be promptly informed of any change in the information provided, for example, if new material information comes to light. Thus, the Directive differentiates between the level of information that must be provided at different stages, but leaves significant room for interpretation, both generally and in specific cases, as to the precise amount of information that must be provided at a particular stage of the criminal process.

Right of access to case materials
Article 7 provides for two rights. First, where a person is arrested or detained at any stage, member states must ensure that documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention are made available to the arrested person or their lawyer (Art. 7(1)). Second, member states must ensure that access is granted at least to all material evidence in the possession of the competent authorities, whether for or against the suspect or accused, to them or to their lawyer, in order to safeguard the fairness of the proceedings and to prepare the defence (Art. 7(2)). In relation to the latter provision, access must be granted in due time to allow the effective exercise of defence rights, and at the latest upon submission of the merits of the accusation to the judgement of the court (Art 7(3)). Derogation in relation to the disclosure obligations in Article 7(2) and 7(3) is permitted if, provided it does not prejudice the right to fair trial, access may lead to certain consequences such as serious threat to the life or fundamental rights of another person (Art. 7(4)). Access under Article 7 must be provided free of charge.

Common provisions
In order to verify that information has been provided in accordance with the Directive, member states must ensure that this is noted using a recording procedure specified in the law. Suspected and accused persons must have the right to challenge failure or refusal to provide information in accordance with the Directive.

For the purposes of this project, which is primarily focused on the procedural rights of suspects in police custody, the right of access to documents under Article 7(1) is clearly relevant. It may appear that, at the early stage of the criminal process, the right of access under Article 7(2) is not relevant. However, it is important to note that many jurisdictions have out-of-court disposal schemes and/or expedited proceedings in certain types of case, some of which avoid court hearings altogether. If Article 7(2) is narrowly interpreted, then suspected or accused persons may be required to make decisions about the disposal of their case without an adequate right of access to material evidence.

1.2.3 The Directive on the right of access to a lawyer

The Directive on the right of access to a lawyer was adopted on 22 October 2013, with a transposition date of 27 November 2016.[7] The Directive sets out the right of access to a lawyer, the right to have a third person informed of a deprivation of liberty and to communicate with a third person, and the right (where relevant) to communicate with consular authorities.

The right of access to a lawyer
Member states must ensure that suspected and accused persons have the right of access to a lawyer in such time and in such manner so as to allow the person concerned to exercise their rights of defence practically and effectively (Art. 3). Access must be allowed without delay and, in any event, must be permitted from the earliest of:

(a) before questioning by the police or other law enforcement or judicial authority;
(b) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act;
(c) without undue delay after deprivation of liberty;
(d) where they have been summoned to appear before a court having criminal jurisdiction, in due time before the court hearing.

The Directive explicitly states that suspects and accused persons must have the right to: meet their lawyer in private prior to any questioning; have a lawyer present when questioned and for the lawyer to be able to participate effectively; and, to have a lawyer present, as a minimum, at the investigative or evidence-gathering acts specified in the Directive (identity parades, confrontations and crime-scene reconstructions), where those acts are provided for under national law and the suspect or accused is required or permitted to attend.

A person arrested under an EAW must have the right of access to a lawyer in the executing state. The Directive specifies that the right shall include the right: of access to a lawyer in such time and in such a manner as to allow the requested person to exercise their rights effectively and without undue delay from the time that they are deprived of their liberty; to meet and communicate with the lawyer; and the right for their lawyer to be present and, in accordance with national laws, to participate during a hearing by the executing judicial authority.

The right of access to a lawyer may be waived, although this is without prejudice to national laws requiring the mandatory presence or assistance of a lawyer. However, for a waiver to be valid the suspect or accused person must have been provided, orally or in writing, with clear and sufficient information in simple and understandable language about the content of the right to a lawyer and the possible consequences of waiving it. Any waiver must be given voluntarily and unequivocally.

In addition to the exception regarding minor offences (see section 1.2.4 below), there is provision for temporary derogation from the right of access to a lawyer at the pre-trial stage on the grounds of geographical remoteness (Art. 3(5)), or on the basis of specified compelling reasons (Art. 3(6)).

[7] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed jupon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

Unlike the Directive on the right to interpretation and translation, this Directive does not contain any provisions regarding quality assurance relating to the provision of legal assistance, although the Directive on legal aid does contain a provision regarding the quality of legal aid services (see section 1.2.5 below).

Rights regarding information to and communication with third parties
Suspects or accused persons who are deprived of their liberty must have the right to have at least one person, such as a relative or employer, nominated by them, informed of their deprivation of liberty without delay. If the suspect or accused person is a child, member states must ensure that the holder of parental responsibility of the child is informed of the deprivation of liberty as soon as possible, and of the reasons for it; unless it would be contrary to the interests of the child, in which case another appropriate adult must be informed. Temporary derogation from the right concerning information to third parties is permitted on the basis of specified compelling reasons: an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person; or an urgent need to prevent a situation where criminal proceedings could be substantially jeopardised (Art. 5(3)).

In addition, suspects or accused persons who are deprived of their liberty must have the right to communicate without undue delay with at least one third person, such as a relative, nominated by them, although this may be limited or deferred 'in view of imperative requirements or proportionate operational requirements' (which are illustrated in Recital 36).

These rights also apply to a requested person in EAW proceedings in the executing state.

Right to communicate with consular authorities
Suspects or accused persons who are non-nationals and who are deprived of their liberty must have the right to have the consular authorities of their state informed of the deprivation of liberty without undue delay, and to communicate with those authorities, if they so wish. Such persons also have the right to communicate with those consular authorities, and to have legal representation arranged by them. These rights also apply to a requested person in EAW proceedings in the executing state.

Common provisions
Where the power to temporarily derogate from the right of access to a lawyer, or to have a person informed of deprivation of liberty, or to communicate with a third party, is put into effect, it must: be proportionate and not go beyond what is necessary; be strictly time-limited; not be based exclusively on the type or seriousness of the alleged offence; and not prejudice the overall fairness of the proceedings.

The particular needs of vulnerable suspects and accused persons must be taken into account in fulfilling the obligations under the Directive.

Member states must ensure that suspects or accused persons, and requested persons in EAW proceedings, have an effective remedy in the event of a breach of rights under the Directive. The Directive is not prescriptive as to the nature of such remedies, but where evidence has been obtained in breach of the right to a lawyer, or in cases where a derogation from the right was authorised under Article 3(6), any assessment of such evidence must respect the rights of the defence and the fairness of the proceedings (see further, Recital 50).

1.2.4 Common issues under the three Directives

All three Directives apply to persons from the time that they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence, until the conclusion of the proceedings. This formulation accords with the autonomous interpretation of the concept of 'charge' adopted by the ECtHR, initially in the case of *Eckle v Germany:*

> 'Charge', for the purposes of Article 6 par. 1 (Art. 6-1), may be defined as the 'official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence', a definition that also corresponds to the test whether 'the situation of the [individual] has been substantially affected'.[8]

Attempts to circumvent the application of procedural rights by, for example, delaying notification that a person is alleged to have committed an offence, the inappropriate use of administrative rather than criminal powers, or by treating a suspect as a witness, have been repeatedly, and consistently, disapproved of by the ECtHR.[9]

Thus, broadly, the Directives apply to persons who have been arrested and/or detained on suspicion of having committed a criminal offence, and may also apply to persons who are suspected of having committed a criminal offence but who have not (yet) been arrested or detained; although in either case there may be further conditions to be satisfied before any particular right under a Directive is applicable.

Whilst procedures at the early stages of the criminal process, and relevant terminology, differ as between member states, most of the countries in the study have implemented the Directives in accordance with this approach; so that the procedural rights encompassed by the Directives apply to suspected persons who have been arrested or detained, and to those who, for example, attend at a police station voluntarily in connection with a suspected offence. However, Bulgaria stands out as an exception to the common understanding of the application of the Directives. The category of 'suspected person' does not appear in the Bulgarian Criminal Procedure Code that was introduced in 2006. Police detention (which may last for up to 24 hours before requiring judicial sanction) is not regarded as being part of criminal proceedings. This is despite the fact that one of the grounds for police detention is that they are in possession of information that indicates that a person has committed a crime. As a result, many of the procedural rights required by the Directives do not apply to persons detained by the police on suspicion of having committed a criminal offence. The police are entitled to conduct an 'investigative' or 'exploratory' conversation with a person in police detention, and whilst the results of such a 'conversation' do not amount to evidence, evidence of the 'conversation' can be put before a court through the evidence of the officers conducting it. This, in our view, amounts to a clear failure to faithfully transpose the Directives in Bulgaria.

The position in Romania has some similarities to that in Bulgaria. Whilst the criminal procedure code provides for persons to be subjected to police arrest, to whom the relevant procedural rights apply (at least in principle), there is also provision for 'administrative leading to the police station'. This amounts to a deprivation of liberty, which may last for up to 24 hours. However, it is not regarded as a criminal procedure, and the procedural rights that follow from an arrest do not apply to persons subjected to this procedure. Again, in our view, this amounts to a clear breach of the provisions of the Directives.

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[8] ECtHR 15 July 1982, Eckle v Germany, No. 8130/78, para. 73, when the formulation was first adopted.
[9] See, for example, ECtHR 21 April 2011, Nechiporuk and Yonkalo v Ukraine, No. 42310/04, and ECtHR 14 October 2010, Brusco v France, No. 1466/07.

The three Directives contain a similarly worded exception regarding minor offences: where the law of a member state provides for the imposition of a sanction regarding minor offences by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed to such a court, the Directive only applies to the proceedings before a court following such an appeal. The Directive on the right of access to a lawyer also provides that the exception applies to minor offences where deprivation of liberty cannot be imposed as a sanction.

It should be noted that the approach to articulating rights differs slightly both between, and within, the three Directives. Sometimes the rights of suspected and accused persons are expressed as an obligation on member states to ensure that a particular right is provided; for example, 'Member State shall ensure that suspects and accused persons have the right of access to a lawyer…' (Directive on the right of access to a lawyer, Art. 3(1)). On other occasions they are expressed in the form of an obligation on a member state without expressly stating that they concern a right; for example, 'Member States shall ensure that suspected or accused persons who do not speak or understand the language… are provided, without delay, with interpretation…' (Directive on the right to interpretation and translation, Art. 2(1)). Such variances in drafting may be interpreted as reflecting nuanced differences between various aspects of the Directives which may have practical implications. For example, the obligation of a state to ensure that interpretation is provided to a person who does not speak or understand the language may suggest, or be treated as suggesting, that a mere claim by a suspect or accused that they do not speak or understand the language is not sufficient, by itself, to put the state under an obligation. However, whilst it is not expressed as a right in Article 2(1), Article 2 is headed 'Right to interpretation' and it is expressed as a right in Article 2(3). It is argued, therefore, for the purposes of this research at least, that such differences in wording are irrelevant, and that a provision of a Directive will amount to a right of the suspected or accused person whether or not it is directly expressed as such.

1.2.5 Other procedural rights Directives

Although the research project was primarily concerned with the practical implementation of the first three Directives under the EU procedural rights roadmap, it should be noted that three further Directives have been adopted, one of which came into force during the period that the project was being conducted, and two of which come into force in 2019.

The first of these, the Directive on the presumption of innocence and the right to be present, was adopted on 9 March 2016, with a transposition date of 1 April 2018.[10] This provides that suspects and accused persons are to be presumed innocent until proved guilty according to law. In support of this principle, the Directive imposes a number of obligations on member states, including a prohibition on public references to guilt, and provisions regarding the public presentation of suspects and accused persons, the burden of proof, and the right to silence and the right of a person not to incriminate themselves. In addition, it includes a number of provisions regarding the right of an accused to be present at their trial.

The Directive on procedural safeguards for children who are suspects or accused persons was adopted on 11 May 2016, and comes into effect on 11 June 2019.[11] This is the longest and most complex of the six

[10] Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.
[11] 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.

Directives adopted under the procedural rights roadmap, and contains a series of provisions designed to ensure that children who are suspects or accused persons in criminal proceedings (and those who are the subject of an EAW in the executing state) are able to understand and follow those proceedings, and able to exercise their right to a fair trial, and to prevent children from re-offending and to foster their social re-integration (Recital 1). In particular, such children must be informed of their rights in simple and accessible language, must normally be accompanied by a person holding parental responsibility, and must normally be assisted by a lawyer.

Note that whilst it was originally envisaged under the procedural rights roadmap that a Directive would cover vulnerable suspects and accused persons in criminal proceedings, there is no specific Directive concerned with the rights of people who are vulnerable (other than children). As noted above, the Directive on the right of access to a lawyer does require that the particular needs of vulnerable suspects and accused persons must be taken into account; and the Directive on the right to information does state that in providing information to a suspect or accused person about their procedural rights, the language used must take into account the particular needs of those who are vulnerable. However, a non-binding Commission Recommendation, issued on 27 November 2013, encourages member states to adopt a series of mechanisms and procedures in order to 'strengthen the procedural rights of all suspects or accused person who are not able to understand and to effectively participate in criminal proceedings due to age, their mental or physical condition or disabilities'.[12] To facilitate these, vulnerable persons should be promptly identified, with recourse to medical examination in order to determine their degree of vulnerability and their specific needs.

The Directive on legal aid was adopted on 26 October 2016, with a transposition date of 25 May 2019.[13] Broadly, the Directive provides that suspects and accused persons in criminal proceedings who have a right to a lawyer under the Directive on the right of access to a lawyer (EU Directive 2013/48/EU), must be entitled to legal aid if they are:

- deprived of their liberty
- required to be assisted by a lawyer in accordance with EU or national law
- required or permitted to attend an investigative or evidence-gathering act.

The right to legal aid also applies to requested persons in EAW proceedings who have a right of access to a lawyer under the Directive on the right of access to a lawyer, upon arrest in the executing state.

States are permitted to make legal aid conditional on satisfaction of a merits and/or a means test, although the merits test must be deemed to have been met where a suspect or accused person is brought before a court or judge in order to decide on detention at any stage of the proceedings, and during detention. This would include persons who are arrested and detained by the police. Member states must take measures, including with regard to funding, that are necessary to ensure that there is an effective legal aid system of an adequate quality, and that legal aid services are of a quality adequate to safeguard the fairness of the proceedings (with due respect for the independence of the legal profession).

[12] Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspect or accused in criminal proceedings (2013/C 378/02), available at https://tinyurl.com/y8pc6hlz.
[13] 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.

2. The right to interpretation and translation

2.1 Transposition of the Directive

Member states were required by the terms of the Directive to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 27 October 2013, and to transmit the text of those measures to the Commission (Art. 9(1) and (2)). The governments of all of the countries in the study did introduce some measures, and reported having done so to the Commission. However, the extent and level of detail of such measures varies considerably. It is apparent that some states went to considerable lengths in order to ensure that their laws and regulations comply with the various requirements of the Directive, whereas others appear to have taken a minimalist approach, in some cases avoiding key obligations imposed on them by the Directive.

In broad terms, the rights to interpretation and translation conferred by the Directive apply 'to persons from the time that they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings' (Art. 1(2)). The right to interpretation applies to suspected or accused persons 'who do not speak or understand the language of the criminal proceedings concerned' (Art. 2(1)). The right to translation applies to suspected or accused persons who do not understand the language of the criminal proceedings concerned (Art. 3(1)). Whilst the term 'suspected or accused persons' is not defined, it is clear that the rights are not confined to persons who have been formally arrested, nor to persons who have been detained in criminal proceedings. It is the case that the rights apply (only) from the time that a person is made aware that they are suspected or accused of having committed a criminal offence, but the case-law of the ECtHR has consistently held that authorities cannot avoid fair trial rights by the use of linguistic or procedural artifices.[14] The key questions in determining whether the rights conferred by the Directive apply are whether a person is, in fact, suspected or accused of having committed and criminal offence, and whether 'the situation of the [person suspected or accused] has been substantially affected'.[15]

The approach taken by the government of Bulgaria to transposition of the Directive is the same as for the other Directives examined in this study, that is, that it only applies to suspects and accused persons after the filing of pre-trial proceedings. As a result, under domestic law, the right does not apply to persons who have been detained by police on suspicion that they have committed a crime. The police can interrogate a person so detained, and whilst any statement made by the person cannot directly be used as a ground for conviction, such a statement can be included in the file, and thus be considered by a court when determining guilt, through the testimony of the police officers concerned (and see section 1.2.4 above). In our view, it is difficult, if not impossible, to sustain an argument that the situation of such a detained person has not been substantially affected.[16] The measures adopted by Bulgaria also suffer from other deficiencies: the law refers to persons who do not 'speak' Bulgarian, and does not explicitly extend the right to interpretation to those who do not 'understand' Bulgarian; the obligation on the police, where the

[14] See, for example, ECtHR 21 February 1984, *Ozturk v Germany*, No. 8544/79; and see section 1.2.4 above.
[15] ECtHR 15 July 1982, *Eckle v Germany* No. 8130/78, para. 73.
[16] Note, for example, that a law in Scotland that permitted the police to detain a person suspected of a criminal offence without arresting them, and to interrogate them without access to a lawyer was, following extensive consideration of ECtHR case-law, held by the UK Supreme Court to be incompatible with Art. 6 of the ECHR. See *Cadder v HM Advocate* [2010] UKSC 43.

conditions regarding interpretation are fulfilled, is expressed in permissive rather than mandatory terms; there is no explicit provision regarding the right to interpretation; and no provision regarding record-keeping.

In Romania, the criminal procedure code provides for a right to interpretation throughout criminal proceedings. It is clear, therefore, that the right to interpretation applies to persons who are the subject of police arrest. However, the law provides for 'administrative leading to the police station' which amounts to a de facto deprivation of liberty, which may last for up to 24 hours. The view taken by the Romanian authorities is that since this is an administrative, as opposed to a criminal procedure the rights associated with criminal procedure, including the right to interpretation and translation, do not apply (see, further, section 1.2.4 above). Again, in our view, the de facto situation is such that the Directive does apply to persons who are the subject of this procedure. There are further ways in which Romanian law does not fully respect the requirements of the Directive. In particular, interpretation for lawyer/client consultations is only free in cases where legal assistance is mandatory, and the right to (free) translation of essential document is limited to the indictment and the final decision.

The restrictive approach to transposing the Directive into domestic law in Bulgaria and Romania may be contrasted with the more expansive approach adopted in a number of the other countries in the study. In Austria, interpretation and translation rights apply from the time of 'initial suspicion', rather from the time that a person is officially made aware of suspicion, and in Spain, the rights apply to persons who are being investigated or who are accused in respect of all procedural actions taken in relation to which their presence is necessary. To an extent, the Spanish provisions go beyond what is required by the Directive, but they provide a good example of a desire to respect not just the letter, but the spirit, of the Directive – and the other 'roadmap' provisions – which, as expressed in Recital 14 of the Directive, is to ensure the right to fair trial. Lithuania and Hungary provide further examples of a considered, and detailed approach to transposing the provisions of the Directive into domestic law.

One common problem, noted here and expanded upon below, concerns the question of determining the need for interpretation and translation. Implementation of this aspect of the Directive requires consideration, and regulation, of the process by which need is to determined, and of the relevant criteria to be applied in making such a determination. Most, if not all, of the countries in the study have failed to regulate the process by which need is to be determined.

2.2 Identifying the need for interpretation/translation

The Directive provides that member states must ensure that a procedure or mechanism is in place to ascertain whether suspected or accused persons speak and understand the language of the proceedings and whether they need the assistance of an interpreter (Art. 2(4)). Since Article 2(1) requires that suspected or accused persons who do not speak or understand the language of the proceedings are provided with interpretation without delay, it follows that the procedure or mechanism for identifying need should be operative from the very early stages of the criminal process. The Directive provides only limited guidance with regard to the procedure or mechanism that may be adopted. Recital 21 states that such a procedure or mechanism implies that the competent authorities verify in any appropriate manner whether the suspected or accused person speaks or understands the language of the proceedings and whether they need the assistance of an interpreter, 'including by consulting the suspected or accused persons

concerned'. The Directive contains no similar provisions regarding identification of whether a person understands the language of the proceedings for the purposes of translation.

Ascertaining the need for interpretation and, to a lesser extent, translation is not necessarily a straightforward enterprise, especially when the conditions and circumstances attending upon the early stages of the criminal process are taken into account. Although the rights covered by the Directive do not only apply to persons arrested and detained by the police, this prototypical example serves as a useful lens through which to view the potential practical difficulties. A person arrested by the police will normally be taken to a police station within a short period of time. Once at the police station, the police will normally interrogate them (whether in the form of an official interview, or informal 'conversation'), and they may carry out other investigative actions involving or requiring the presence of the suspect. Depending on the jurisdiction, decisions will be taken about whether to initiate proceedings, whether to refer the case to a prosecutor or a judicial officer, and whether to detain or seek authority to detain the suspect pending their appearance before a court. At various points in the process, the suspect must be informed of the reasons for the arrest and detention, provided with information about the criminal act of which they are suspected, informed of their procedural rights and asked if they wish to exercise them and, if interrogated, asked potentially complex questions about factual circumstances and their state of mind. They may also, of course, consult with a lawyer. Normally strict, and relatively short, time-limits will apply to this part of the process.

In such circumstances, determining whether a suspect speaks or understands the relevant language, and whether they speak or understand the language at a level that enables them to understand potentially complex legal terminology and concepts, and to respond in a way that faithfully represents what they would wish to say if they could be understood in their own language, is a potentially difficult and complex task. The difficulty may be compounded by the need, if the suspect apparently does not speak or understand the relevant language to a sufficient level, to determine what language, or languages, they do speak or understand. The difficulties may be further exacerbated if the suspect cannot read or has limited reading ability. Furthermore, the suspect may, on the one hand, not be co-operative or, on the other, may be overly willing to give the impression that they speak or understand the relevant language at a higher level than is in fact the case. Once the need for interpretation has been established, the police then need to be able to contact an appropriate, competent, interpreter who is either able and willing to provide interpretation remotely or, more commonly, is able and willing to attend the police station promptly.

In most of the countries in the study, responsibility for determining the need for interpretation is placed on the police, although sometimes this is a matter of practice rather than of law or regulation. In Slovenia, primary responsibility for determining need rests on the police, but internal police guidelines provide that the police must give the suspect an official list of interpreters enabling them to choose (although it must be questioned whether a suspect in such circumstances is in a position to make an informed choice). It might be argued that giving suspects the power to determine whether they need an interpreter recognises the right to an interpreter as a true right of the suspect. However, Article 2(1) of the Directive places responsibility on the state to ensure that suspected or accused persons are provided with an interpreter if they do not speak or understand the language of the proceedings and, for a variety of reasons, a suspect may decide that they do not need an interpreter when, in fact, they do not have a sufficient command of the relevant language.

Whilst the Directive requires interpretation to be provided if it is determined that a suspect or accused does not speak or understand the language of the proceedings, in Bulgaria the police are, nevertheless,

given a discretion to secure interpretation even though the need for it has been established. It is difficult to reconcile this with the explicit terms of Article 2(1) of the Directive.

Although, in the majority of countries in the study, the police have responsibility for ascertaining need at the investigative stage of criminal proceedings, in none of them was the procedure by which need is to be determined regulated (contrary to Art. 2(4) of the Directive), nor the relevant criteria explicitly articulated. Thus, the police are left to determine both the need for interpretation, and the language by which communication may be conducted, in an ad hoc manner. In Austria, for example, police officers reported that their practice is to ask suspects to read out passages of text, and to err on the side of caution; and in Poland, some officers told researchers that they ask the suspect to write out a passage in Polish. In Spain, police officers were observed to assess language ability by reference to the suspect's responses to their questions and by asking them whether they understand what is being said.

The lack of a recognised and uniform procedure for determining need almost certainly contributed to the finding in many of the countries in the study that police officers often resort to ploys to avoid the need to arrange for interpretation. For example, in Slovenia, where a suspect speaks Serbian, Croatian or English, the police tend to interpret themselves even if they may not be sufficiently proficient in that language. In Hungary, lawyers reported that where suspects speak a less commonly encountered language, the police try to persuade them to accept interpretation in English. And in Lithuania, it was found that whilst suspects who have no, or a poor, understanding of Lithuanian are provided with an interpreter, this was not the case for suspects who have average proficiency in the language. This was also found to be the case in Italy. However, the lack of an adequately regulated procedure for determining need is not the only apparent cause. In Romania, for example, the police complained that it was difficult to find interpreters willing and able to attend the police station in order to interpret – citing low fees and delays in payment. More generally, lawyers in some countries explained the reluctance of the police to engage interpreters by reference to the consequent delays that this would cause to the investigation.

2.3 Interpretation at the initial stages of detention

Article 2(1) of the Directive requires that interpretation be provided to suspected and accused persons 'without delay'. This requirement should be read in conjunction with the obligations under the Directive on the right to information to promptly inform suspected or accused persons of specified procedural rights (Arts. 3 and 4), the criminal act they are suspected or accused of (Art. 6(1)) and, if arrested or detained, the reasons for their arrest or detention (Art. 6(2)). Recital 25 of that Directive states that, where necessary, suspected or accused persons should be provided with translation or interpretation of the information that must be provided into a language that the person understands.

In practice, these obligations will be difficult to achieve without an effective mechanism for identifying the need for interpretation and the relevant language, and structures, resources and procedures designed to ensure that appropriate, competent interpretation is available at short notice, and at whatever time of day or night the interpretation is required. To an extent, the difficulties may be ameliorated (although not removed altogether), by the use of remote interpretation (by telephone or video-link), and by the availability of standard texts (in particular, the letter of rights) in a range of languages.

The need for prompt interpretation presented challenges in all of the countries in the study. In all countries, an interpreter was rarely, if ever, present at the initial stages of detention, even though the need for interpretation had been identified, or was subsequently identified. A critical and widespread problem, identified above, concerns the difficulty the police face, even if they have identified the need for interpretation, in finding an interpreter willing and able to attend the police station at short notice. In Romania, amongst other countries, it was reported that the police sometimes resort to Google Translate in order to convey at least some information to the suspect. In Bulgaria, the police resort to informal contacts with interpreters, who are not necessarily competent in the relevant language; and interpreters complained that the police expected them to provide oral translation of the letter of rights free of charge. However, there are a number of other causes. In some countries, as already alluded to, the procedure for identifying the need for an interpreter is unregulated and/or unclear, and it may not become apparent that interpretation is needed until an interrogation has commenced. For example, in Lithuania, police interviewees told the researchers that arresting officers often do not record information about the need for interpretation and, as a result, this only becomes known during the first interrogation. In Spain, it appears to be the routine practice for the interpreter to be asked to attend only at the time that the lawyer is expected to attend. As a result, suspects who do not speak or understand the language will have little or no understanding of what is happening at the initial stages, including what they are suspected of, why they have been detained, and what their procedural rights are. At the same time, the police will sometimes continue with procedural acts relating to the investigation. In Hungary, for example, researchers found that the police sometimes carry out certain procedural acts before the arrival of an interpreter.

In some of the countries in the study, such as Lithuania, Poland, Slovenia (where it is available in 23 languages in addition to Slovenian) and the region of Spain in which the research was conducted, translations of the letter of rights are available to the police, although they are not necessarily used. In Spain, for example, it was found that oral information regarding procedural rights was always given in Spanish, even where officers had ascertained that the suspect did not understand the language. Further, in the cases observed, whilst translations of the letter of rights were available in a range of languages, they were not used because, officers said, ‘the interpreter will explain it’. In some other countries, such as Bulgaria, no translations of the letter of rights are available, but interpreters were not called in to orally translate it. There is legal provision for remote interpretation in some of the countries, such as Lithuania and Austria, but facilities are not available in all police stations and in practice it is rarely used.

2.4 Interpretation of lawyer/client communications

The Directive provides that, where necessary for the purpose of safeguarding the fairness of proceedings, interpretation must be made available for communication between a suspected or accused person and their lawyer in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural application (Art. 2(2)). By Article 4, such interpretation must be free of charge (irrespective of outcome). If a suspect is to be interrogated by the police in connection with the suspected offence in respect of which they have been arrested or detained, there would be very few, if any, circumstances, where interpretation would not be necessary for the purpose of safeguarding fairness.

In some of the countries in the study, such as Austria, Lithuania and Hungary, a right to free interpretation for lawyer/client communications is explicitly set out in the law. However, other countries, such as Slovenia and Bulgaria, have not faithfully transposed the Directive in this regard. In Slovenia, the law does not

provide for it; even though the letter of rights states that free interpretation is available for interpretation of lawyer/client communications, it requires court authorisation, which does not facilitate interpretation for this purpose at the pre-court stages. In Bulgaria, whilst not explicitly provided for by law, interpretation of lawyer/client communications is understood to come within the general right to interpretation, but in practice this does not appear to result in free interpretation being made available. In Italy, whilst the law provides for free interpretation, research indicates that the interpreter sometimes does not arrive until after the validation hearing has commenced, so that in such cases the interpreter is not available to enable the lawyer to communicate with his or her client in advance of the hearing. In Romania, the law provides for free interpretation for the purpose of lawyer/client communications only in cases where legal assistance is mandatory, which is clearly not compliant with the requirements of the Directive.

Even in those countries where free interpretation is available for lawyer/client communications, there is concern amongst lawyers regarding the independence of interpreters and confidentiality, which is underwritten by the fact that it is the norm for the same interpreter to provide interpretation both for police purposes and lawyer/client communication, and that the interpretation is normally arranged by the police (and in Lithuania, may be an in-house police interpreter, and in Austria, may be a police officer). In Poland, for example, confidentiality is not absolute, and lawyers expressed concern that a court may order disclosure by an interpreter. As a result of such apprehensions, in some countries, such as Hungary and Lithuania, lawyers appeared to, or said that where possible they, try to communicate with clients without using an interpreter.

2.5 Interpretation during interrogations

Article 2(1) of the Directive explicitly provides that interpretation must be provided, where the suspected of accused person does not speak or understand the language of the proceedings, ‘during police questioning’. With the exception of Bulgaria and, to the extent described earlier, Romania, the law in the other countries in the study provides for interpretation during police interrogations; although it should be noted that in Italy the police do not normally carry out interrogations.

However, in practice, the position is not necessarily unproblematic. In Slovenia, if interpretation is identified as being required, investigative acts are postponed until the interpreter arrives, but only up to a maximum of two hours (although no such time limit is provided for the in the EU Directive). In Spain, in the one relevant case that was observed by researchers, having waited for an interpreter for two hours, both the police and the suspect’s lawyer (successfully) sought to persuade the suspect to waive their right to an interpreter (although there is no provision for waiver of interpretation in the EU Directive). In Lithuania, it was common practice for the interrogation to be conducted in a language understood by the suspect (especially in the case of Russian) even if an interpreter was present.

2.6 Translation of documents

The Directive provides that where a suspected or accused person does not understand the language of the proceedings, they must be provided within a reasonable period of time with a written translation ‘of all documents which are essential to ensure that they are able to exercise their right of defence and to

safeguard the fairness of the proceedings' (Art 3(1)). The phrase 'essential documents' is not exhaustively defined, but is expressed to include any decision depriving a person of his or her liberty, a charge or indictment, and any judgement (Art. 3(2)). Oral translation of essential documents, or an oral summary, is permitted on condition that this does not prejudice the fairness of proceedings.

The law in Bulgaria does not provide for a right to translation of documents during the police detention phases since, as noted earlier, it does not regard the Directive as applying during this stage. In Romania, the law provides for free translation only in respect of the indictment and the final decision, which is clearly not compliant with the Directive. The law in the other countries in the study broadly provides for the translation of essential documents as prescribed by the Directive, and lawyers in some of the countries stated that transposition of this requirement has led to improvements. In a number of the countries in the study, such as Lithuania and Slovenia, translation of documents at the initial stages of criminal proceedings is normally provided orally (although this is not provided for in the Lithuanian criminal procedure code). No major concerns were disclosed by the research about oral translation as such, although in Italy there was concern that in agreeing to oral translation, the suspected or accused person loses their right to challenge the lack of translation.

The major issue raised in the research in respect of translation concerns the interpretation of the phrase 'essential documents'. In some of the countries, the phrase is interpreted fairly fully. For example, in Slovenia, the obligation to translate documents applies to the indictment, summons, decisions regarding deprivation of liberty, court judgements, court decisions on the exclusion of evidence and regarding the rejection of proposed evidence. In addition, the suspected or accused person can make an application to the court for other relevant documents to be translated. In Lithuania, any document which the criminal procedure code requires to be served on a suspect must be translated, which includes the decision to treat the person as a suspect, decisions regarding bail, the indictment, court judgements, decisions of appellate and cassation courts, and requests to change the legal classification of the alleged offence. Concern has been expressed that the law does not specify translation of decisions to impose restrictive measures (pre-trial detention), although in practice such decisions are translated. In Austria, the law also provides for translation of decisions depriving a person of their liberty, any charge or indictment, and any judgement. However, concern has been expressed about a legal provision that makes written translation of whole files an exception. In Hungary, the law provides for free translation of decisions and other documents addressed to the suspected or accused person, but this does not extend to other documents such as the records of procedural actions. Further, the majority of lawyers interviewed complained about the length of time that passes before translated documents are made available to them.

2.7 The quality of interpretation/translation (and complaint)

A major issue raised by the research concerns the quality of interpretation (and, to an extent, translation), and the related issue of complaint in the event of failure or refusal to provide interpretation or translation, or inadequate interpretation and translation. The Directive deals with the issue of quality by requiring member states to take concrete measure to ensure that the quality of interpretation and translation is sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their rights of defence (Art. 5(1)). In order to achieve this, member states must endeavour to establish a register or registers of independent interpreters and translators who are appropriate qualified, and that such a register or

registers must be made available to lawyers and relevant authorities (Art. 5(2)). Further, member states must ensure that interpreters and translators be required to observe confidentiality regarding interpretation and translation provided under the Directive (Art. 5(3)). With regard to complaint and enforcement, suspected or accused persons must have the right to challenge, in accordance with procedures in national law, a decision that there is no need for interpretation or translation, or the quality of the interpretation or translation provided.

Slovenia, Romania, Austria, Poland and Hungary all have national registers of certified interpreters and translators, although a variety of approaches has been adopted regarding who may be included on the register. In Slovenia, for example, 'court' interpreters must pass an examination in order to be certified, and in Hungary, a certificate must be obtained from one of the authorised institutions, including some universities. Bulgaria also has a registration system, but it appears that interpreters have refused to co-operate with it, and have refused to register, because of low remuneration rates and also because a registered interpreter can be fined for refusing to interpret in a particular case. It was not within the aims of the research to examine the process of certification or registration, nor to seek to assess whether certification or registration provides a sufficient guarantee of competence to interpret or translate in criminal proceedings.

Lithuania does not have a register of interpreters or translators, and there are no certification requirements other than in respect of sign language interpreters. The Lithuanian Translators' Association does have a Code of Ethics, but this only applies to members of the association. In Italy, a list of certified translators is compiled by each court (and in a recent development, these are now used to create a national list of certified translators). However, it is up to each court to determine the conditions for certification – some require applicants to pass an examination, but others do not – and, therefore, there is no national system of quality control applicable to those who may be registered. In Spain, a law was introduced three years ago to establish a national register of certified interpreters/translators, but this law had not been implemented at the time that the research was conducted. The police do have to complete an evaluation form where an interpreter is used. This includes the officer's evaluation of whether the interpretation was accurate. Whilst the police interviewed indicated that this system works well, it is difficult to see how a police officer can evaluate the quality of interpretation if they are not themselves proficient in the language concerned.

Whilst the first four countries referred to above have complied with the requirements of the Directive, at least to the extent of creating a national register, there is a significant lacuna in the attempt to assure quality of interpretation and translation since in all of those countries the police may use interpreters or translators who are not registered or certified in certain circumstances; in particular if a registered or certified interpreter or translator is not available. The evidence suggests that what is intended to be an exceptional procedure is, in practice, often the norm. In Slovenia, the evidence suggests that the police normally used their own list of 'contracted' interpreters, who may or may not be registered. The position is similar in Austria, where the police lists may also include police officers. In the case of 'low-level' suspected crimes, Austrian police may use persons who are not on the list, such as family members. In Romania, the police may use 'trusted' individuals. In Hungary, the police may use a non-certified interpreter if no certified interpreter is available.

Thus, even in those countries who have sought to implement the quality assurance mechanisms set out in the Directive, there are significant impediments to the aim of ensuring that interpreters and translators are appropriately qualified and competent. Further, as the Hungarian researchers point out in their national

report, in the absence of electronic recording, it is difficult if not impossible to ensure, ex post facto, that any interpretation that was provided was competent and accurate.

The research findings also raise the issues of independence and confidentiality as matters of concern. As already noted, in Lithuania, use is made of in-house interpreters, and police officers may act as interpreters in Austria. Furthermore, in many of the countries in the study there are no legal provisions directed at guaranteeing confidentiality. The widespread use of unregistered or uncertified interpreters is also of concern because such persons are not governed by professional codes of conduct. Researchers witnessed interpreters acting inappropriately, for example, by browbeating the suspect ('Go back to your country if you don't want to abide by Spanish laws'), or by taking over the questioning from the police interviewer (Lithuania).

In most of the countries in the study, a further issue related both to the availability of interpreters and translators, and quality, is the low level of remuneration. In Italy, for example, interpreters are paid approximately five Euros per hour, and they may not be paid for more than two years.

With regard to challenging decisions not to provide interpretation or translation, or the quality of the interpretation or translation provided, whilst most of the countries do have such mechanisms, they are not normally specific procedures, but rather general remedial procedures incorporated into the trial process. This can mean that their effectiveness in practice is limited, especially in respect of challenging the quality of interpretation or translation. In a recent case in Spain, the Supreme Court accepted that imprecision or errors in translation are 'unfortunately frequent and practically inevitable'. However, it went on to hold that in order for the court to take such deficiencies into account, the accused must be able to show that it led to adverse consequences; for example, the deficiency in translation undermined the defence, or prevented the accused from properly explaining his or her version of events. Whilst this may be possible in the case of a written translation, it would be very difficult to demonstrate that poor quality interpretation had such an impact, especially in the absence of an electronic recording.

2.8 Conclusions

The governments of all of the countries in the study have reported to the European Commission that they have introduced measures in order to transpose the requirements of the Directive on the right to interpretation and translation. Whilst some governments have clearly sought to regulate the various aspects of the right to interpretation and translation in some detail, further legal, procedural and regulatory changes are required in most countries in the study in order to faithfully and fully comply with the requirements of the Directive.

Most obviously, Bulgaria and Romania should amend their approach to this Directive, and the other Directives, so that they are treated as applying to all persons who are suspected or detained in respect of a criminal offence, who are, de facto, arrested or detained, irrespective of the domestic classification of such arrest or detention. This would then entail the introduction of laws and procedures designed to ensure that the requirements of the Directive apply in such circumstances.

Identifying the need for interpretation or translation is particularly problematic at the early stages of the criminal process, for the reasons articulated in section 2.2 above. Therefore, unless sole responsibility

for identifying need is placed on suspects and accused persons themselves (which is problematic for the reasons set out in section 2.2), there needs to be a clear procedure, and clear criteria, for determining need. Unfortunately, none of the countries in the study have been able to achieve this (and therefore do not comply with Article 2(4) of the Directive). In most countries, initial responsibility for determining need is placed on police officers, often the officers who carried out the arrest or who are conducting the investigation, and they are put in the position of having to determine need without clear regulation, protocols or guidance. One consequence of this is that police officers either resort to ad hoc approaches to determining whether a suspected or accused person speaks or understands the relevant language (which means that they are very dependent on the attitude and skills of the particular officer), or seek to avoid responsibility for determining need altogether (which approach is often encouraged by the difficulty of finding an interpreter willing and able to attend the police station at short notice).

Assuming that the need for interpretation is identified, responsibility is then generally placed on the police to secure an interpreter. Whilst the Directive permits remote interpretation (Art. 2(6)), this was provided for in only a minority of the countries in the study, and even in those countries was found to be rarely used. Finding a competent, appropriately qualified, and independent interpreter who is willing and able to attend the police station sufficiently promptly was problematic in many of the countries. A number of reasons may be identified as causing or contributing to this problem. Whilst around half of the countries have a national system for registering or certifying interpreters, the criteria for certification or registration varied, and in some cases were apparently not robust. In any event, in all of those countries the police were permitted to arrange for an uncertified or unregistered interpreter to attend if an appropriately qualified one was not available, and what may have been intended to be an exceptional procedure was, in practice, often the norm. Undoubtedly, the difficulty in obtaining interpreters is compounded, in most of the countries, by the low, and uncommercial, fees payable, resulting in interpreters being reluctant or unwilling to attend police stations.

Three further problems identified by the research should be mentioned here, most of which could be relatively easily resolved provided that there is sufficient will to do so. First, whilst the Directive is clear that interpretation and translation provided under the terms of the Directive is to be provided free of charge to the suspected or accused person (Arts. 4.), this has not been adequately transposed into the domestic laws of a number of countries. In Slovenia, Bulgaria and Romania, for example, there are various limitations on free interpretation for lawyer/client consultations. Second, whilst the concept of ‘essential documents’ for the purposes of translation has been interpreted fairly fully in a number of countries in the study (for example, Slovenia and Lithuania), this is not the case in Bulgaria (which does not provide for translation of documents during the police detention phase), and Hungary (where the right does not apply to documents which are not addressed to the suspected or accused person, such as the records of procedural actions). The third issue concerns translation of the letter of rights. Article 4(5) of the Directive on the right to information provides that member states must ensure that suspected or accused persons receive the letter of rights in a language that they understand, although there is provision for oral translation on a temporary basis. In a number of countries, such as Lithuania, Poland, Slovenia and Spain, the letter of rights is available in a range of languages. However, in a number of other countries, no translations are routinely available which, given the difficulties in securing the services of an interpreter, results in needless delays and, in some cases, a failure to ensure that suspected or accused persons are informed of their procedural rights in a language that they understand. It would seem obvious that the costs of making translations available, at least in respect of the languages most frequently encountered, would easily be balanced by the financial and other benefits accruing from their routine availability.

3. The right to information

3.1 Transposition of the Directive

Member states were required by the terms of the Directive to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 2 June 2014, and to transmit the text of those measures to the Commission (Art. 11(1) and (3)). The governments of all of the countries in the study did introduce measures, and reported having done so to the Commission. However, as with the Directive on interpretation and translation, the extent and level of detail of such measures varies significantly. Again, some States went to considerable lengths in order to ensure that their laws and regulations comply with the various requirements of the Directive, whereas others appear to have taken a minimalist approach, in some cases avoiding key obligations imposed on them by the Directive. Half of the countries in the study reported to the EC that they adopted only one or two measures in order to transpose the Directive, but Hungary reported that it had adopted 31 measures, and Lithuania, 19 measures. In some countries, such as Lithuania, the measures initially adopted by way of transposition were subsequently supplemented by further provisions.

The Directive on the right to information adopts the same approach to scope as the Directive on interpretation and translation in that it applies from the time a person is made aware by the competent authorities of a Member State that they are suspected or accused of having committed a criminal offence until the conclusion of proceedings. Whilst the right to information about rights (Art. 3), the right to be informed about the criminal act of which a person is suspected or accused (Art. 6(1) and 6(3)), and the right of access to material evidence (Art. 6(2)), always apply to such persons (although at different stages of the process), the provisions regarding the letter of rights (Art. 4), information about the reasons for arrest or detention (Art. 6(2)), and documents that are essential to challenging the lawfulness of the arrest or detention (Art. 7(1)), only apply to suspected or accused persons who have been arrested or detained.

The restrictive approach which was adopted by Bulgaria and, to a lesser extent, Romania regarding the application of the Directive on interpretation and translation, was also taken in respect of the Directive on the right to information; and the same concerns about this approach also apply (see section 2.1 above). However, it is important to note that, in the case of Bulgaria, this does not mean that those who are subjected to police detention have no procedural rights under domestic law, as is explained further below.

Whilst aspects of the right to information in criminal proceedings formed part of domestic law in most, if not all, of the countries in the study before transposition of the Directive, broadly it is the case that transposition resulted in significant developments in the laws of many of the countries. For example, in Slovenia, a right to information applicable to persons deprived of their liberty had been protected by the constitution since 1991. However, on transposition, the right to information about procedural rights was extended, making it applicable to all detained persons (previously it only applied to persons detained for longer than six hours), by including a right to interpretation of the information provided, by requiring that the information be provided both orally and in writing, and by providing for a right of access to case materials. Similarly, a right to information was recognised by the Spanish constitution prior to the coming into force of the Directive, but transposition resulted in the criminal procedure code being amended so that persons who are arrested must be immediately informed of the reason for arrest and ‘the facts attributed

to them', and that information regarding procedural rights must be provided in writing, in simple and accessible language, and in a language that the person understands.

3.2 Information about procedural rights and the 'letter of rights'

There are two distinct aspects of the right to information about procedural rights established by the Directive. First, all suspects and accused persons, irrespective of whether they are detained, must (as a minimum) be promptly informed of the specified rights 'in order for those rights to be exercised effectively' (Art. 3(1)). The information specified may be provided orally or in writing, but must be provided in simple and accessible language, taking into account any particular needs of vulnerable suspected or accused persons. (Art. 3(2)). The rights specified in the Directive are:

(a) the right of access to a lawyer;
(b) any entitlement to free legal advice and the conditions for obtaining such advice;
(c) the right to be informed of the accusation, in accordance with Article 6 of the Directive;
(d) the right to interpretation and translation; and
(e) the right to remain silent.

Second, suspected and accused persons who are arrested or detained must be provided promptly with a written letter of rights, must be given the opportunity to read it, and must be allowed to keep it in their possession throughout the time that they are deprived of their liberty (Art. 4(1)). The letter of rights must be drafted in simple and accessible language (Art. 4(4)), and member states must ensure that suspected or accused persons receive the letter of rights in a language that they understand. If the letter of rights is not available in the relevant language, the information may be provided orally in a language that the person does understand, but a written letter of rights in a language that the person understands must subsequently be given to them without delay (Art. 4(5)). The information specified for inclusion in the letter of rights are the rights covered by Article 3, plus the following:

(a) the right of access to case materials;
(b) the right to have consular authorities and one person informed;
(c) the right of access to urgent medical assistance;
(d) the maximum period suspects or accused may be deprived of their liberty before being brought before a judicial authority; and
(e) basic information about any possibility of challenging the lawfulness of the arrest, obtaining a review of detention, or making a request for provisional release (Art. 4(2) and (3)).

The obligations in the Directive to inform suspected and accused persons of their procedural rights are clearly and precisely expressed and, in principle, ought to have been relatively straightforward for Member states to transpose into domestic law. However, evidence from the research demonstrates that whilst some states have faithfully transposed the requirements, others have not. Furthermore, even in those countries where the provisions have been faithfully and accurately transposed, this has not necessarily been reflected in practice. In view of the wide range of research findings, a brief account of the findings for each country in the study is set out below.

3.2.1 Lithuania

The law requires that the letter of rights be served on a person at the time of their arrest or detention or, if the person is not arrested or detained, at the beginning of the first interrogation (which, in respect of persons not arrested or detained, goes beyond the requirements of Article 4 of the Directive). There is a national, standard, letter of rights approved by the Prosecutor General, and the list of rights contained in the letter of rights corresponds to those set out in the Directive. The letter of rights is available in five languages, in addition to Lithuanian, and if the suspect does not understand one of these languages, the law requires that it be explained orally by an interpreter, and that it should subsequently be translated into a language understood by the suspect. The letter of rights is both lengthy and complex, essentially reproducing relevant parts of the criminal procedure code and using technical language. By contrast, the standard letter of rights for use in European Arrest Warrant cases is shorter and expressed in more simple language. There is no simplified form of the letter of rights, and whilst the police have a general obligation to explain procedural rights, they are not under an explicit obligation to explain it, for example, to children or vulnerable suspects, nor to ensure that a suspect understands it. The Human Rights Monitoring Institute have proposed a simplified form of the letter of rights, but this has not been adopted.

The observational research found that the police normally do serve the letter of rights as required by national law, and sometimes serve it again, or check that it has been served, at the beginning of each interrogation. However, in some observed case, the letter of rights was not served until after the interrogation had commenced, or at the end of the interrogation. Some suspects said that the letter of rights had not been served on them, or that it had, but that they had not been allowed to keep it in their possession, and this experience was endorsed by a number of lawyers. Practice was found to vary in terms of the time given for suspects to read the letter of rights. Some suspects were given as much as 15 minutes to read it, whereas others were given no time to read it. None of the lawyers observed addressed the question of procedural rights in the consultation with their client, and in the two observed cases involving children, the lawyers did not seek to explain the rights to their clients.

3.2.2 Slovenia

The law requires that where the police have grounds to suspect a person of a criminal offence, they must provide information about specified rights, which accords with Article 3 of the Directive. Where a person is deprived of their liberty, a letter of rights must be served on them immediately. The letter of rights must be provided in a language that the suspect understands, but if it is not available in the relevant language, an oral translation may be provided, and a letter of rights in a language that the suspect understands served on them later. A standard letter of rights, which covers the rights specified in Article 4 of the Directive, has been prepared by the police, and it is available in 22 languages in addition to Slovenian. There is no procedure for dealing with suspects who cannot read, and no requirement for the police to ensure that the suspect understands the notice.

In observed cases, the initial information was normally provided at the time of deprivation of liberty, and the letter of rights was normally served when the person was taken to a police station or detention facility. However, some of the suspects interviewed said that the information had not been fully provided, or that it was provided so rapidly that they were unable to understand it. This accords with the findings of previous

research, and was also confirmed by lawyers interviewed for this research, who also stated that in their view, whilst many suspects have a superficial knowledge of their procedural rights, they are often not aware of the details nor how to exercise them. There is some evidence, from lawyers interviewed for this research, and from previous research, that where the police are investigating without arresting a person, they sometimes do not stop questioning and inform the person of their rights even though there are grounds for suspecting that the person has committed an offence.

3.2.3 Romania

The law provides that before 'hearing' a suspect or defendant, the police must give them a written notice of their rights. However, the law is not clear about how and when this should be done, and there is no provision regarding suspects who cannot read, or those who are vulnerable. There is a standard letter of rights, but it is expressed in technical language; it largely consists of extracts from the criminal procedure code. A revised letter of rights was introduced after the fieldwork for this research was completed, but it is not known whether it represents an improvement on the previous version. The standard letter of rights is only available in Romanian.

The police were observed to routinely inform suspects of their rights. However, this was normally done in a manner that did not allow for the suspect to effectively exercise them. In many cases, the suspect was simply asked to sign a sheet of paper that was put in front of them, and in only three cases was the suspect observed to read it. Whilst police officers sometimes orally informed the suspect of their rights, this was often done in a manner designed to dissuade the suspect from exercising them. In one case, involving a child, the officer concerned did carefully inform the suspect of his rights, but this was unusual. Those suspects who had a lawyer were generally better informed of their rights, but this was because they were explained to the suspect by the lawyer.

3.2.4 Bulgaria

As explained earlier, the Bulgarian authorities do not regard the Directive as applying to the initial police detention. Nevertheless, the law does require that whenever a person is deprived of their liberty, they must be informed of the grounds for detention, the suspected offence, and their rights under the Ministry of the Interior Act. The latter requires that a detained person be informed of their right to appeal the legality of detention, their right to a lawyer, and the right to have a third party informed. However, it does not include the other rights set out in Article 4 of the Directive. The law does not specify how the information is to be provided, nor the time within which a written notice must be provided.

In practice, the written notice of rights is served with the detention order, but there is a wide variation in the time within which the order is served depending, in part, on where the person was detained, whether a search was conducted, etc., and it could be up to five hours after the initial detention. In the cases observed, the police did give suspects time to read the notice of rights. However, suspects interviewed for the research generally said that this was not their experience. They also informed researchers that police officers would often tell them what to write, for example, 'I don't want a lawyer'. An examination of over 180 records showed that requests for a doctor, for a third party to be informed, or for a special diet, were rare.

3.2.5 Spain

The law provides that all arrested persons must be immediately provided with written information about their procedural rights, in simple and accessible language, and in a language that they understand. The rights specified are in accordance with those required by the Directive. The law also provides that an arrested person is entitled to keep the letter of rights during their detention. There is no standard letter of rights used by all police forces; each force devises its own letter of rights, in accordance with guidelines provided by the National Judicial Police Co-ordination Commission. The letter of rights used by the police in the region in which the research was conducted consists of a reproduction of the relevant articles of the criminal procedure code. As a result, it is expressed in technical language, and is difficult for suspects to understand.

The police informed researchers that oral information on rights is given at time of arrest, and this was confirmed in interviews of arrested persons. Observations showed that within one hour of arrival at the police station, suspects are routinely given written notification of their rights, and are asked about whether they want to exercise them. The information on rights was normally provided by an officer reading the text of the letter of rights. In some cases the officer provided an explanation of the rights set out in the notice, but in a minority of cases, the information was not fully provided. The suspect was then given a copy of the notice to read and sign; the document was then scanned (so it could not be altered), and placed in a locker with the suspect's possessions. Whilst the relevant law states that the suspect is entitled to keep the letter of rights in their possession, regulations qualify this by stating that this should be 'in a manner that is compatible with the physical safety of the person' whilst they are detained at the police station. Observations showed that in practice, detained suspects were never allowed to do so; ostensibly on the grounds of safety.

3.2.6 Austria

The law provides that a person must be informed of their procedural rights upon or immediately after arrest, and no later than the first interview of the suspect. It is expressly provided that an interview cannot take place unless information on rights has been given, and that the product of an interview can only be used in evidence if the information requirements have been complied with. There is a standard 'infosheet' (letter of rights), which is available in German and 47 other languages, and the law requires that this be provided to suspects who are detained. The letter of rights is generally compliant with Directive in terms of the rights covered, except that it does not contain information about the right of access to case materials. In addition, the information about the right to legal aid is somewhat confusing, a fact confirmed in interviews with both police officers and suspects. The law requires that information about rights must be provided in a comprehensible manner, taking into account the needs of the suspect. However, police officials, lawyers and experts, and some suspects interviewed, agreed that the language used is not designed to be easily understood. A linguistic expert employed for the purposes of the research concluded that a significant proportion of suspects would be unable to understand it. There is no provision for special arrangements to be made for conveying information to vulnerable suspects. Further, there is no explicit provision that the suspect be allowed to keep the letter of rights.

In practice, suspects are provided with the letter of rights at the time that the detention protocol is being completed. The suspect is asked to sign to confirm that they have received it. The computer programme

for use in police interviews, introduced in 2018, requires the information on rights to be provided before details of the interview can be entered. However, lawyers expressed concern that this does not prevent interviewing officers from reading out the rights quickly, or only partially and, in the absence of electronic recording, it is difficult, if not impossible, to assess in retrospect whether the information was appropriately provided in a comprehensible manner. This is of particular concern because some officers were found to seek to deter the exercise of procedural rights, for example, by saying to suspects 'You don't need a lawyer', or 'I'm assuming that you want to provide testimony'.

3.2.7 Hungary

The revised criminal procedure code provides that suspects must be informed about their procedural rights 'when their participation in criminal proceedings commences'. The code also provides that suspects or accused persons who are arrested or detained must be promptly provided with information about their rights in writing, in simple and accessible language. However, since the provisions prescribing the written notification of rights are contained in regulations governing places of detention (such as the Penitentiary Code), detainees are usually only served with the letter of rights after they have been questioned as a suspect and have been transferred to a place of detention; although a new investigation decree gives the police a discretionary power to serve the letter of rights at the time of the first encounter with the authorities, and at the latest when the first procedural act commences. The electronic interrogation protocol includes all of the rights required by the Directive, but this is only relevant in an interrogation, and provides no guarantee that that the information requirements have been fully complied with.

There are two standard letters of rights (one for use in police detention facilities and the other in penitentiaries), but the version in use at the time that the research was conducted did not include all of the rights required by the Directive, and was both lengthy and expressed in complex language. Previous research has demonstrated that the letter of rights cannot be understood by a large proportion of the relevant population. A revised letter of rights has since been introduced, but it was not possible to check whether the problems of incompleteness and lack of comprehensibility have been rectified. The law states that if a suspect is unable to read or write, or if the letter of rights is not available in a language that they understand, they must be given the information orally in the presence of two witnesses. It further provides that suspects who are detained must be allowed to keep it in their possession.

3.2.8 Italy

The law provides that suspects must be informed of their rights at the time of the arrest or at the time of the first police interview. Where a person under investigation is not arrested, they must be notified of their rights at the conclusion of the preliminary investigation (which is clearly not in compliance with Article 3 of the Directive). The letter of rights, which the law provides must be in a 'clear and accurate form', must be provided to persons who are detained. If the letter of rights is not available in a language that the suspect understands, the suspect may be orally informed of their rights, followed up by a written notice in the relevant language when available. A model letter of rights has been issued in Italian and five other languages (although more may be available at local level), and the rights specified in it are in accordance with the requirements of the Directive. There is no provision regarding suspects who are blind or who

cannot read, and no provision for suspects to be given time to read the document, or to keep it in their possession during detention. When a detained person appears before a judge, the judge must verify that the required information has been given, and provide or complete the information where necessary.

The research shows that information regarding rights is normally given in practice as required by the law. However, interviews with those who were, or who had been, detained shows that awareness of rights depends on the right concerned; they were generally aware of the right to a lawyer, but not necessarily of the right to legal aid or the right to silence. There is also concern that those for whom Italian is not their first language, and vulnerable suspects, do not understand the notification. Researchers found that sometimes the letter of rights was read to the suspect, but that they were not given a copy of it. Most of the suspects interviewed said that had been given oral notification of their rights, but a third of them said that they had not been given the letter of rights, and this was more likely if they were not Italian.

3.2.9 Poland

Polish law provides for separate letters of rights for arrested persons and for suspects, which are attached to the report of arrest and the transcript of interrogation respectively. Arrested persons must also informed about the grounds for detention, and be provided with a copy of the letter of rights and the report of arrest. The letter of rights for suspects is much longer that letter of rights for arrested person, and the language is rather formal. Standard letters of rights are prepared by the Minister of Justice (who is also a Prosecutor General).

3.3 Information about the reasons for arrest/detention, and the suspected offence

3.3.1 Information about the reasons for arrest/detention

Article 6(2) of the Directive requires member states to ensure that suspected or accused persons who are arrested or detained are informed of the reasons for their arrest or detention, including the criminal act they are suspected or accused of having committed. The Directive does not specify the time within which such information must be provided. However, Article 5(2) of the ECHR provides that information about the reasons for arrest must be provided promptly, and thus a promptness requirement should be read into Article 6(2) of the Directive.

The law in all of the countries in the study requires information about the reason for arrest or detention to be provided, generally at the time of the arrest or detention, or immediately afterwards. In Romania, the criminal procedure code provides that a suspect must be informed of the reasons for arrest immediately after arrest, but arrest may take place some time after the initial detention. In most of the countries, the obligation is expressed in general terms, but in Spain, the law is explicit as to the information that must be provided: (a) the place, date and time of arrest; (b) the place, date and time of (suspected) commission of the offence; (c) the criminal act that has given rise to the arrest, with a brief summary of the facts, and

(d) the information from which participation of the suspect has been deduced. Evidence from most of the countries in the study suggests that information about the reasons for arrest or detention is routinely given, although in some countries there appears to be some delay before it is provided.

The major issue concerns the level of information that is provided. In Spain, observations conducted by the researchers indicated that the explanations of the reason for arrest are generally comprehensive. However, in many of the other countries, such as Slovenia, Austria, Hungary and Italy, the evidence suggests that the explanations given tend to be brief, stereotypical and/or vague. The ECtHR has found against Bulgaria in a number of cases because the detention orders noted only the relevant legal provisions, without describing the factual grounds for the detention.

3.3.2 Information about the suspected offence

Article 6(1) of the Directive provides that member states must ensure that suspected or accused persons are promptly provided with information about the criminal act they are suspected or accused of having committed. This may be contrasted with Article 6(3), which provides that detailed information on the accusation must be provided no later than on submission of the merits of the accusation to a court. This suggests that the information that must be provided initially may be more limited but, as Article 6(1) states, the information must be provided in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence. This is particularly relevant because most suspects will be interrogated during the investigative process. Thus Recital 28 of the Directive states that the information required by Article 6(1) must be provided no later than the first official interview of the suspect by the police or other competent authority and, subject to any prejudice to the ongoing investigation, should include a 'description of the facts, including, where known, time and place, relating to the criminal act that the persons are suspected or accused of having committed and the possible legal classification of the alleged offence… in sufficient detail, taking into account the stage of the proceedings when such a description is given, to safeguard the fairness of the proceedings and allow for an effective exercise of the rights of the defence'.

Although the law of all the countries in the study requires that information about the suspected offence be provided to the suspect or accused person, there is variation regarding the timing of the duty to provide information, and the law in some countries is not in compliance with the requirements of the Directive. In Slovenia, the law provides that if, in the course of gathering evidence, the police have grounds to suspect that a person has committed an offence, they must inform the suspect of the offence of which they are suspected and the grounds for that suspicion. In Austria, the law provides that a suspect must be informed of the criminal act of which they are suspected without delay unless this would endanger the investigation, but does not regulate the extent of the information that must be provided. However, in Lithuania, the information does not have to be provided until the first interrogation, and whilst it is normally served at the beginning of the interrogation, in two of the observed cases, it was not served until the end. In Bulgaria, the law is such that information about the suspected offence only has to be provided once it is decided to arraign the accused, which is normally towards the end of the 24 hour period of police detention (during which time the police may conduct an 'exploratory conversation'). Thus, the requirement that the information be provided promptly is not complied with in a number of countries.

A concern in a range of countries in the study is that the information provided is not sufficient 'to safeguard the fairness of proceedings and allow for an effective exercise of the rights of the defence'. In Spain and Italy, the evidence suggests that the relevant information is normally sufficient to satisfy the requirements of the Directive. However, in Slovenia, the lawyers interviewed indicated that whilst information about the suspected offence is always provided, information concerning the grounds for suspicion is not. The practice in Hungary appears to be similar, with lawyers indicating that the police tend to simply refer to the relevant legal provision, without any explanation or reasoning. In Austria, the information regarding the suspected offence is 'rudimentary or vague'; but the Supreme Court has, in effect, undermined the requirements of the Directive by holding that the provision of comprehensive information at the investigative stage is 'barely possible'.

3.4 Access to case materials and documents

Article 7 of the Directive contains a number of provisions regarding the right of access to case materials. Article 7(1) provides that where a person is arrested and detained at any stage of criminal proceedings, member states must ensure that documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrested or detention, are made available to arrested persons or their lawyers. Article 7(2) concerns a broader right; access to all material evidence in the possession of the competent authorities. Access to such material must be granted in due time to allow the effective exercise of the rights of the defence, and at the latest upon submission of the merits of the accusation to the judgement of a court. There is provision for derogation from the right of access to material under Article 7(2), but not from the right of access to documents under Article 7(1). Access to documents or materials under Article 7 must be provided free of charge, but this right may be limited to providing the suspected or accused person, or their lawyer, with the opportunity to view the relevant documents or materials. Recital 34 states that the right of access to case materials is without prejudice to provisions of national law providing for fees for documents to be copied or to be sent the person concerned.

Of particular interest in respect of suspected or accused person who are detained by the police is the right of access to documents under Article 7(1) since it concerns the ability of such persons to challenge the lawfulness of their arrest or detention, and which may, therefore, have an impact on their immediate circumstances. It should be noted, however, that the right of access to case materials under Article 7(2) is not irrelevant at the investigative stage, particularly because the right to be informed about the accusation under Article 6(1) is relatively limited and, especially where out-of-court disposals or speedy trial procedures are available and employed, there may be no other opportunity for a suspected or accused person to have access to case materials. As a result, a suspected or accused person may have to make a decision about whether to consent to, or co-operate with, such procedures without having full information about the evidence.

Arguably, the right of access under Article 7(1) is not confined to circumstances where a suspected or accused person does challenge the lawfulness of the arrest or detention, but provides for access to documents so that the suspected or accused person is in a position to make an informed decision about whether there are grounds to challenge their arrest or detention. Whilst Recital 30 states that such documents should be made available before a competent authority is called to decide upon the lawfulness of the arrest or detention, it goes on to provide that access must be 'in due time to allow the effective

exercise of the right to challenge the lawfulness of the arrest or detention'. The concept of documents that are 'essential' to challenging the lawfulness of arrest or detention is not defined, but Recital 30 suggests that it may include both documents and, where appropriate, photographs, audio and video recordings. Since, by virtue of Article 5(1)(c) of the ECHR, arrest for an offence requires 'reasonable suspicion' that the person has committed an offence, essential documents may include those documents, such as police reports or witness statements, which provided the foundation for the suspicion.

Some of the countries in the study amended their legislation specifically to give effect to Article 7(1) of the Directive. This was the case in Lithuania and Spain, for example. In Slovenia, the law provides that suspects have the right to documents that are necessary to challenge the lawfulness of the detention, but only after the person has been detained for six hours. In Spain, the law was amended to give effect to Article 7(1), and it provides that the right of access cannot be limited in any circumstances. However, problems arose in practice because the law provided for a right of 'access' to 'essential elements' (rather than an obligation on the relevant authorities to make essential documents available), and 'essential elements' was interpreted restrictively. However, the Constitutional Court has held that relevant documents should be shown, or handed over, to the suspected or accused person. In addition, whilst the court held that 'essential documents' should be determined on a case-by-case basis, it gave examples of the types of documents which should be made available: for example, the report of the facts, where it includes accusations by a party that incriminate the arrested person, and documentation containing incriminating testimonies, as well as the content of the expert scientific reports that establish a link between the facts being investigated and the arrested person.

The law in Romania, Austria and Hungary provides, in principle, that a suspected or accused person has a right of access to case materials throughout criminal proceedings, including during the investigative phase, but in all cases this is the subject of limitations which may mean that access to documents essential to challenging the arrest or detention is not available during the early stages of the criminal process. In Romania, the right of access is only applicable after a person becomes a defendant, and does not apply during police arrest. In Hungary, where the former version of the criminal procedure code was found to be in breach of the ECHR in this respect, under the revised code, where a prosecutor seeks pre-trial detention, a copy of the case files substantiating the application must be attached to it and must be provided to the accused and his or her lawyer. The position is similar in Poland. This does not go far enough to satisfy the requirements of Article 7(1) since a suspected person may have grounds to challenge their arrest or detention during the initial phase of detention, and before any such application is made by the prosecution. The general right of access to case material, including during the investigative phase, would appear to satisfy the requirements of the Directive, but it is subject to exceptions, which Article 7(1) does not permit. However, a point of good practice is that the law requires that a record be made of what case materials have been disclosed, and the time that access was permitted. In Austria, access can be refused in certain defined circumstances, but a blanket reference to the need to avoid prejudice to the investigation is not permitted.

In Bulgaria, access to case materials is only permitted after the formal indictment, and even then, access can be refused on the basis that it may obstruct the investigation. It appears that this is also the case in respect of documents that are essential to challenging the lawfulness of the arrest or detention which, if it is the case, is contrary to the provisions of Article 7(1). Italy did not amend its law in order to transpose this aspect of the Directive, the view being taken that the law was already in compliance with the Directive. However, in practice, whilst access to case materials is generally provided in sufficient time to enable the exercise of defence rights, this is not always the case in respect of custodial interrogations and validation hearings.

A number of general problems with access to case materials were identified by the research. First, where the law provides the relevant authorities with a discretion to withhold materials, they generally interpret this power broadly. This was reported to be the case in Lithuania, Slovenia and Bulgaria. Second, in a number of countries, requests to access the case material results in a lengthy delay before access is granted. However, this was not the case in Austria where, if a suspect has a lawyer, they are generally able to inspect the case files prior to interrogation; and in Hungary the law provides that access must be provided at a time and in a manner that enables the defence to prepare and, in any event, at least one hour before the commencement of a relevant hearing. A third problem is one of cost. Generally, copies of documents have to be paid for, although in some countries such as Austria and Italy, this is not the case if the suspected or accused person is in receipt of legal aid. Fourth, whilst under Article 7, the obligation to make available or provide access to relevant document and materials rests with the relevant authorities (since the obligation is placed on member states to ensure that they are made available or that access is provided), it appears that in many of the countries, the onus is placed on suspected or accused persons, or their lawyers, to make a request. The terms of Article 7 are such that relevant documents or materials should be routinely disclosed, rather than relying on a request being made. Finally, in the absence of a requirement, as exists in Hungary, to record what documents have been disclosed, suspected and accused persons, and their lawyers, cannot be sure that they have been able to see all of the relevant documents. This was explicitly referred to by lawyers in Austria, some of whom believed that the police keep ‘hand files’ which they do not disclose.

3.5 Conclusions

The governments of all of the countries in the study have reported to the EC that they have introduced measures in order to transpose the requirements of the Directive on the right to information. However, the extent of the measures adopted, and their effect in practice varies considerably, although some common themes can be identified.

The obligation to inform suspected and accused persons of their procedural rights, orally and/or in writing, is provided for in the law of all of the countries in the study. However, precision as to the timing of the provision of information, and circumstances in which such information is to be provided, is sometimes lacking. In the majority of countries, such as Lithuania, Slovenia, Italy, Spain, Hungary and Austria, the law provides that information on rights must be provided at the time of arrest or detention, or no later than the first interrogation. In Bulgaria, the law does state that a suspect must be informed of certain rights when they are deprived of their liberty, but given the general approach to the applicability of the Directive, this does not include all of the rights and information specified in the Directive. In Romania, whilst the law provides that a written notice of rights must be given to a suspect before ‘hearing’ them, it is not clear about precisely when and how this should be done. In those countries in which the law is relatively precise, this was reflected in the fact that notification of rights was generally provided as required, although researchers found instances where notification of rights was delayed. Furthermore, even in such countries, the provision of information about procedural rights was, in practice, often a formality, there being no obligation on the police to ensure that the suspect understands their rights, and little or no attempt to explain them.

Most of the countries in the study have a standard letter of rights, although in Spain each force has the responsibility to devise its own, albeit with national guidance. In some countries, including Bulgaria and

Austria, the letter of rights does not include all of the rights and information specified in Article 4 of the Directive (and this was also the case in Hungary in respect of the version of the letter of rights that was in use at the time that the research was conducted). Despite the fact that the letter of rights is drafted nationally in most countries, in almost all of them it was found to be lengthy and complex, often consisting of extracts from the criminal procedure code or similar legislation. This is despite the fact that the Directive clearly states that the letter of rights must be drafted in 'simple and accessible language' (Art. 4(4)). As a result, it was found in many of the countries that a significant proportion of suspects do not, or are unlikely to be able to, understand notification of their procedural rights.

The difficulties in suspects understanding their procedural rights was exacerbated in many of the countries by a number of factors in addition to the way in which the letter of rights is drafted, and the lack of an obligation on the police to explain them. First, whilst the Directive explicitly requires that suspects be given the opportunity to read the letter of rights, this is not reflected in the law of most of the countries; and in practice, in most countries, suspects were not given an opportunity by the police to do so. Furthermore, in some countries, it was found that police officers actively discouraged suspects from reading the notification of rights, and from exercising them. Second, whilst the Directive requires that detained suspects be allowed to keep the letter of rights in their possession throughout their detention (Art. 4(1)), this is not explicitly provided for in the law of most of the countries in the study. It is provided for by the law in Spain, but in practice the police were found to routinely circumvent this by relying on a clause designed to ensure the physical safety of detained persons. Third, whilst some of the countries, especially Slovenia and Austria, have translations of the letter of rights available in a large number of languages, this is not the case in the majority of countries, and in Romania, no translations are available. Whilst the law in most of those countries provides for oral translation of the letter of rights, as was explained in section 2 of this report, interpretation is often not available in practice at the early stages of the criminal process. As a result, those suspects who do not speak or understand the language of the proceedings are often left in ignorance of their procedural rights, at least at the early stages of the criminal process. It was also found that in many of the countries, there was no relevant regulation or protocol dealing with the notification of rights to suspects with vulnerabilities, such as children.

The law in all of the countries requires information about the reasons for arrest to be provided at the time of, or following, an arrest, and evidence from the research suggests that this obligation is routinely complied with. However, in Bulgaria and Romania, a formal arrest may take place some time after the initial detention, or de facto arrest, so that the requirement of promptness is not satisfied. The major issue affecting many of the countries in the study, although not Spain, is the level of information that is provided. The research found that such information is often provided in a stereotypical fashion which does not explain the reasons for arrest by reference to the concrete circumstances of the case. In many of the countries, the position is similar with regard to information about the suspected offence. Article 6(1) of the Directive requires that information must be provided in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of defence rights, and no later than the first official interview. Whilst this is reflected in the law of most of the countries in the study, in Bulgaria, provision of the information may be delayed until arraignment, which may be towards the end of the 24 hour period of detention. Whilst, in practice, the provision of the information is sometimes delayed in a number of the countries, the major concern in the majority of countries is, again, the level of information that is provided. The description of the information given by the researchers in Austria, as being 'rudimentary or vague', is typical of the position in most countries, other than Spain and Italy where the evidence suggests that the level of information normally provided is sufficient to satisfy the requirements of the Directive.

The most important aspect of the Article 7 rights of access to case documents and materials during the period that a person is under arrest or in initial detention is the right under Article 7(1) to documents which are essential to challenging that arrest or detention. Such documents may provide the basis for demonstrating that the arrest or detention is unlawful and that the suspected or accused person should be released. The Directive does not provide for an exception to the right of access under Article 7(1), and since the obligation is placed on member states to ensure that relevant documents are made available to arrested persons or their lawyers, it should not depend on the arrested person challenging the legality of their arrest or detention. Indeed, a person who is arrested or detained may not know that there is a basis for challenging the legality of their arrest or detention unless that are given access to such documents.

Whilst a number of countries have legislated to provide for a right of access, this has often been done in such a way as to limit the obligation on relevant authorities to disclose such documents. In Romania and Bulgaria, the right of access does not apply during the initial period of police detention, and in Hungary relevant documents are only disclosed if and when a prosecutor seeks pre-trial detention. In many of the countries, access to relevant documents is only to be provided if the arrested or detained person makes an application, whereas the wording of Article 7(1) clearly implies that the relevant authorities must routinely make such documents available. It is also apparent that there is some lack of clarity, or even confusion, about the meaning of ‘essential’ documents, and what is entailed by the requirement that they be made ‘available’. In Spain, this was resolved by the Constitutional Court which, whilst holding that determination of which documents are essential is case-specific, articulated the types of documents that may be ‘essential’, and held that such documents must be shown or handed over to the arrested person or their lawyer. This was an important clarification, and one which the relevant authorities of other countries may wish to take notice of.

4. The right of access to a lawyer

4.1 Transposition of the Directive

Member states were required by the terms of the Directive to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 27 November 2016, and to transmit the text of those measures to the Commission (Art. 15(1) and (3)). The governments of all of the countries in the study did introduce some such measures, and reported having done so to the Commission. However, as with the other two Directives which are the subject of this study, the pre-existing law regarding access to a lawyer at the investigative stage, and the extent and level of detail of the measures adopted to transpose the Directive into domestic law, varies considerably.

As with the other Directives with which this research is concerned, the Directive on the right of access to a lawyer applies to suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities, by official notification or otherwise, that they are suspected or accused of having committed an offence (Art. 2(1)). The Directive applies to suspects or accused persons irrespective of whether they have been deprived of their liberty, although the research focuses on those who have been arrested or otherwise detained. The Directive is expressly applied to persons who, in the course of questioning by the police or other law enforcement authority, become suspects or accused persons (Art. 2(3)). Where the law of a member state provides for the imposition of a sanction (other than the deprivation of liberty) by an authority other than a criminal court, and the imposition of such a sanction can be appealed or referred to such a court, the Directive only applies to the proceedings before the court. However, the Directive does apply if the person is deprived of their liberty (Art. 2(4)). Member states must ensure that suspects and accused persons have the right of access to a lawyer in such time and in such manner so as to allow them to exercise their rights of defence practically and effectively (Art. 3(1)). The Directive expressly provides that suspects and accused persons must have access to a lawyer without delay before being questioned by the police or other law enforcement or judicial authority, upon the carrying out of an investigative or other evidence-gathering act (in accordance with Art. 3(3)(c)), or after deprivation of liberty, whichever is the earliest (Art 3(2)). Temporary derogation from the right of access to a lawyer at the pre-trial stage is permitted, but only in strictly defined circumstances (Art. 3(5) and (6), and Art. 8).

In the majority of countries in the study, the law provides for a right of access to a lawyer on or following arrest or detention. In some countries, such as Spain, Italy and Slovenia, this is a long-standing right, although in some of these countries the right was expanded and/or regulated in greater detail for the purpose of transposition of the Directive. For example, in Spain, the regulation of what the right of access to a lawyer means was extended, so that it now specifically includes advice to a person about the consequences of giving or refusing consent to investigative procedures, and a right to a private consultation with a lawyer before and after interrogation. The major exceptions to this general approach are Romania and Bulgaria. In Romania, the right of access to a lawyer does not apply in the case of administrative leading to a police station, which normally precedes formal arrest. In Bulgaria, as with the other Directives, the official view taken was that the Directive does not apply during the initial police detention (see section 1.2.4 above). The law does provide for a right of access to a lawyer from the moment of detention but, in many respects, it does not comply with the Directive. In particular, it does not provide for a right to a private consultation with the lawyer prior to police questioning, nor for a right

to have a lawyer present during the 'exploratory conversation', and neither does it require the police to explain the content of the right nor the consequences of waiver. As a result, the Bulgarian partner in this research concluded that, in practice, there is no effective right of access to a lawyer during the initial stages of police detention.

The right of access to a lawyer is limited, in some of the countries, either by regulating the time that the police or investigative body are required to wait for a lawyer to attend, or by permitting the police to continue to carry out investigative acts during the period before a lawyer attends upon the suspect. In Slovenia, for example, whilst the police cannot interrogate a suspect who has exercised their right to a lawyer, this delay in proceeding is limited to two hours. If this results in an interrogation being conducted in the absence of a lawyer, the product cannot be used as evidence, although previous research has demonstrated that a record of such an 'informal' interrogation is kept on file and is therefore available to the trial judge.

The Directive on the right of access to a lawyer does not require the mandatory attendance of a lawyer at any stage of the criminal process. Rather, it provides for a right of access to a lawyer, which suspected and accused persons can waive (subject to national laws on mandatory defence) on condition that they have been provided with clear and sufficient information in simple and understandable language about the content of the right and the possible consequences of waiving it, that any waiver is given voluntarily and unequivocally, is revocable, and that the decision is recorded (Art. 9). It should be noted that Article 6 of the Directive on procedural safeguards for children does require member states to introduce mandatory defence for children, including at the police station stage, although this does not come into force until June 2019. Italy and Spain do have a system of mandatory defence; in Italy it cannot be waived, and in Spain it can only be waived in road safety cases. Romania also has a system of mandatory defence, although this does not apply to a person who is the subject of administrative leading to the police station. Hungary and Poland have a system of mandatory defence for certain categories of suspects or accused persons, or certain categories of cases; for example, where the suspect has certain vulnerabilities, or is a child (for certain procedural actions), or where the suspected offence carries a sentence of five years' imprisonment or more. The other countries do not have mandatory defence at the initial investigative stage although some, such as Slovenia, require mandatory defence at certain other stages of criminal proceedings. Lithuania has legislated for mandatory defence for suspects under arrest, and this comes into force in January 2019.

It would seem that in those countries that have a mandatory defence system, there is no provision for derogation from the right of access to a lawyer. Those countries that do not have mandatory defence take different approaches to the question of derogation. In Lithuania, the right of access to a lawyer is absolute (which exceeds the requirements of the Directive). In Austria, on the other hand, there is provision for derogation if access to a lawyer would jeopardise the investigation, which has been criticised on the grounds that it is too broad and vague, and is open to inappropriate use by investigative authorities.

The Directive on the right of access to a lawyer does not require that legal aid be made available to suspects who want to exercise their right to a lawyer, but who do not have the means to pay for the lawyer. The Directive on the right to information requires that suspected or accused persons be informed of any entitlement to free legal advice and the conditions for obtaining such advice (Art. 3(1)(b)), but this does not amount to a substantive obligation on member states to make legal aid available. However, the Directive on the right to legal aid, when it comes into force in May 2019, will require legal aid to be available for those who have the right of access to a lawyer under the Directive on the right of access to a lawyer.

Whilst a member state will be able to apply a means test, the merits test must be deemed to be satisfied for suspects or accused persons who are detained, and a decision taken on eligibility at the latest before questioning by the police, other law enforcement authority, or by a judicial authority (Arts. 4 and 6). On the evidence of this research, transposition will require extensive modification of laws and procedures in some of the countries; in a number of countries in the study, the lack of an effective legal aid scheme is one of the reasons why, in practice, very few suspects have a lawyer at the investigative stage unless they pay privately.

Lithuania has already started the process of preparing for transposition of the Directive on the right to legal aid, and in a provision that will come into force in January 2019, a lawyer will be mandatory for suspects under arrest, to be paid for by legal aid granted without a means test. However, in some of the countries that do, in principle, make legal aid available at the investigative stage, the system is not effective. This is due, in part, to low eligibility levels, low remuneration rates, and extensive delays before lawyers are paid. Two examples, which illustrate some of the problems, will suffice. In Slovenia, the police are required by the criminal procedure code to inform detained suspects that a lawyer will be appointed if: (a) they cannot afford a lawyer; and (b) it is in the interests of justice. There are, however, no criteria for applying these two eligibility conditions, and in practice a lawyer is rarely appointed under this procedure. As a result, this and previous research has demonstrated that if a suspect cannot afford to pay for a lawyer, they do not have a lawyer at the investigative stage. In Hungary, in mandatory defence cases, the investigating or prosecuting authority appoints a lawyer if the suspect has not done so, but they have to repay the costs if convicted. Personal cost exemption (legal aid) is available in other cases, and if granted, the suspect is exempted from paying the costs irrespective of the outcome of the case. However, the financial eligibility threshold is low (although homeless people, those living in temporary accommodation and refuges are deemed to be eligible), and in practice the scheme is rarely used. The evidence suggests, in many of the countries in the study, that fear of the costs implications deters many suspects from exercising their right to a lawyer, and that this fear is sometimes encouraged by the police.

4.2 Arrangements for providing legal assistance

The Directive on the right of access to a lawyer places responsibility on Member states to make the necessary arrangements to ensure that suspects and accused persons who are deprived of their liberty are in a position to effectively exercise that right, unless they have waived it (Art. 4(4)). The Directive is not prescriptive about how this should be done, although Recital 28 states that such arrangements might include the provision of a list of available lawyers from which the suspect or accused person may choose. It does not, unfortunately, explicitly require the competent authorities to make contact with a lawyer, where a suspect or accused person wishes to exercise their right, although the wording of Article 4 implies, at the least, that the authorities should facilitate such contact. Whilst a list arrangement provides recognition of the significance of the principle that a person should be able to choose their lawyer, who they are more likely to trust, it embodies significant limitations, particularly if it is the principle, or only, method by which a lawyer may be appointed. Many suspects, particularly those who have not previously been arrested or detained, will have no informational basis on which to base their choice. Furthermore, as was found in a number of the countries in the study, if such a list includes lawyers without reference to their areas of practice, competence, or willingness to act, then this can result in delay and frustration, not only for suspects, but also for the police. In addition, a list – as contrasted with an effective duty lawyer scheme –

provides no guarantee that an appropriately qualified and experienced lawyer will be available at the time, and in the location that they are required.

Some countries (both in the study, and elsewhere) have sought to deal with such practical issues by developing duty lawyer schemes, with a single point of contact, and with conditions both for inclusion in the scheme, and regarding the obligation of scheme members to accept and deal with cases appropriately. In Spain, if a detainee nominates a private lawyer, the police call that lawyer directly, or try to locate him or her via the local Bar Association. There is a duty lawyer scheme, and to be included in the scheme a lawyer must have been a member of the relevant bar association for at least three years, have completed a specified course, and passed an assessment. In the locations where the research was conducted, between two and five lawyers were on call at any time. If a detainee exercises their right to a lawyer, but does not nominate a private lawyer, the police contact a call-messaging centre which, in turn, contacts a lawyer on duty. The duty lawyer then contacts the police station to obtain details and makes arrangements to attend. Police regulations require that, where a suspect exercises their right to a lawyer, the police must seek to contact a lawyer within one hour of that request. Researchers found this approach to be effective in guaranteeing the right of access to a lawyer. Duty lawyer schemes are also in operation in Lithuania and in Hungary, although in the latter country, only at weekends and on public holidays. In Austria, an 'arrest hotline' together with a 'stand-by legal counselling service' have been established, although it is evident that there are a number of problems, including the way in which the police explain the schemes to suspects.

In some of the other countries, the procedure for contacting a lawyer was such that the right of access to a lawyer was undermined to a greater or lesser extent. In Slovenia, if a suspect nominates a private lawyer, the police seek to contact them, and then allow the suspect to speak to them on the telephone. If a suspect does not nominate a lawyer, the police show them a list of lawyers in order for them to choose. However, the list, which is compiled by the bar association, includes all lawyers in the area, and is not confined to those who practice criminal law. The problems with such a scheme are illustrated by one observed case: the police had to call four lawyers before finding one who practised in criminal law and who was willing to act. Police officers said that this was a general problem, and that it was almost impossible to find a lawyer willing to act outside of office hours. There is no duty lawyer scheme, although lawyers interviewed said that they would like one to be established. Similar problems were experienced in Bulgaria where, police officers told researchers that lawyers do not answer telephone calls out of office hours.

In some countries, there is evidence that the police seek to circumvent established procedures for appointing lawyers. In Hungary, historically there were concerns about the use of 'pocket' lawyers; that is, lawyers who had an inappropriate relationship with the police and who were less likely to safeguard their clients' interests. The revised criminal procedure code places responsibility for choosing and arranging for a lawyer on the local bar association, but if it fails to do so within one hour, the police may still appoint a lawyer. Opinions of persons interviewed differed as to whether the police give effect to a decision by a suspect to exercise their right to a lawyer; some said that the police do contact a nominated lawyer, whereas others indicated that they rarely, or never, do so. In Romania, the bar associations compile lists of legal aid lawyers, but some police officers said that they preferred to deal with nominated lawyers, and lawyers interviewed said that instead of using the bar association lists, some officers would contact their 'preferred' lawyer.

4.3 Exercising the right to a lawyer

The Directive provides that member states must make necessary arrangements to ensure that suspects and accused persons who are deprived of their liberty are in a position to exercise the right of access to a lawyer effectively (Art. 3(4)). Further, it provides that, without prejudice to national laws requiring mandatory presence or assistance of a lawyer, member states must ensure that in relation to any waiver of the right, the suspect or accused person has been provided, orally or in writing, with clear and sufficient information in simple and understandable language about the content of the right and the possible consequences of waiving it, and that any waiver is given voluntarily and unequivocally (Art. 9(1)). This is reinforced by a requirement that a waiver must be noted, including the circumstances under which waiver was given, using a recording procedure in accordance with the laws of the country concerned (Art. 9(2)). Yet, whilst the law in most of the countries in the study provides that suspects who are arrested or detained have a right of access to a lawyer at the investigative stage, in most of them (especially those that do not have provisions for mandatory defence), a relatively small proportion of arrested and/or detained suspects actually have a lawyer during their initial detention.

Some of the countries in the study, for example, Austria and Lithuania, have faithfully transposed the Directive requirements regarding waiver. However, others have not. In Hungary and Poland, whilst the law requires that a detained suspect must be informed of the right to a lawyer, it does not require that they be informed of the content of that right, nor of their right to waive it. In Romania, there is no legal obligation on the police to explain the consequences of waiver. This failure in transposition is exacerbated in some countries by the fact that either there is no requirement to record the process, or that any requirement that does exist is not observed in practice; for example, in Slovenia.

There is clear evidence, in respect of those countries that have not adequately transposed the relevant provisions, that this can contribute to detained suspects not being able to make a free and informed choice about whether to exercise their right to a lawyer. In Slovenia, researchers observed the police in a number of cases to refuse to contact a lawyer where the suspect had requested a state funded lawyer; and the researchers concluded that waiver is not, in effect, voluntary for those who cannot afford to pay for a lawyer. In Hungary, there is evidence that some police officers pressurise suspects to waive their right to have a lawyer present in interrogations, and also seek to undermine the right of access by interviewing suspects as witnesses. By way of contrast, In Spain, where legal assistance is mandatory, researchers observed no case where the police sought to influence the decision made by a suspect (regarding whether to appoint a private or a duty lawyer), nor offer a recommendation as to a particular lawyer.

Whilst adequately regulating the process by which suspects choose whether to exercise their right to a lawyer reduces the types of problems identified above, it does not necessarily eradicate them. This may because, as was found in Lithuania, there are still instances where the police seek to discourage suspects from exercising their right to a lawyer. However, the decision whether to exercise the right of access to a lawyer is influenced not only by the police, but also by other factors. Lack of clarity about entitlement to legal aid, coupled with concern about cost, is clearly an instrumental factor. The prospect of delay is another, exacerbated by the fact that in a number of countries, it is difficult to find competent lawyers willing and able to attend the police station at short notice, especially outside of office hours. A factor, in some countries, is doubt about whether a lawyer can, or will be willing to, provide *effective* assistance to a detained suspect. Such doubt may be encouraged by the police, and is sometimes a doubt shared by lawyers, particularly where the provisions on disclosure of case-related information are such that lawyers are able to obtain little relevant information prior to police interrogations. A further factor, identified in

a number of the countries, is the formal, passive approach adopted by some lawyers, especially legal aid lawyers (see further section 4.6 below). Finally, there was some evidence that some suspects were concerned that asking for a lawyer would be regarded as an indication of guilt.

4.4 How legal advice and assistance is provided

Whilst the Directive requires that suspects or accused persons have the right of access to a lawyer without delay, it is not prescriptive as to the nature of such access. The Directive clearly requires that it should include access in person, since it provides that the suspect/accused has a right to meet the lawyer and have the lawyer present during questioning, and that the lawyer must have the right to attend certain investigative or evidence-gathering acts (Art. 3(3)). However, it does not make specific reference to other forms of access, particularly access by telephone. In practice, this may be important since the lawyer may wish to delay personal attendance until an interrogation takes place, and also because a suspect may be further detained for some time following any interrogation. During such periods, a suspect may well wish to speak to the lawyer both to seek advice, and to seek assurance that someone outside of the police or investigative agency is taking an active interest in their plight. There are some dangers, however, of permitting telephone consultations since, as has been found in research conducted in other countries, lawyers may make inappropriate use of telephone consultations in order to avoid personal attendance.

In a number of countries in the study, such as Bulgaria, Poland and Lithuania, there is no legal provision for telephone contact between a suspect and their lawyer. The law of some other countries, however, explicitly provides for it. In Spain, the law provides that if a lawyer is not immediately available, the detained suspect must be allowed to communicate with them by telephone (although in the cases observed, this was never done). Similarly, in Hungary, the criminal procedure code allows for telephone consultation prior to an interrogation, and in Slovenia researchers observed some cases where a (privately instructed) lawyer spoke to their client on the telephone.

Where telephone consultation is permitted, a major concern of lawyers was lack of confidentiality. In some cases, such as in Hungary, this was clearly justified since there were no facilities or arrangements for confidential telephone communication.

4.5 The initial lawyer/client consultation

The Directive explicitly provides that the right of access to a lawyer includes the right of a suspect or accused person to consult with a lawyer prior to questioning by the police or another law enforcement or judicial authority (Art. 3(2)(a)). The Directive does not explicitly refer to the purpose of such a consultation, but (in accordance with the wording of Article 3(1)), the purpose is, at least, to enable the suspect or accused person to exercise their right of defence practically and effectively. Thus, for example, a consultation conducted prior to an interrogation should enable the suspect to make an informed decision about whether to ask for interpretation and/or translation, whether they want a third party notified of their arrest or detention, whether they want the lawyer present during the interrogation, and whether to exercise their right to silence. However, that is a minimal conception of the purpose of the

initial consultation, and Recital 12 makes reference to the case law of the ECtHR concerning the right of access to a lawyer which, broadly, encompasses 'the whole range of services specifically associated with legal assistance'. In its decision in *Dayanan v Turkey* (ECtHR 13 October 2009, No. 7377/03), the court described these as including discussion of the case, instructions by the suspect, the investigation of facts and search for favourable evidence, preparation for interrogation, the support of the suspect, and the control of the conditions of detention (at para. 32). To this might be added, especially for a suspect who has not previously been arrested or detained, or who has previously not met the lawyer concerned, communications designed to build the trust required between a lawyer and their client. Not all of these matters would, of course, have to be dealt with at an initial consultation, although many of them are relevant.

In a number of the countries in the study, the law already provided for a right of a suspect to consult with a lawyer prior to interrogation before the Directive came into effect; although in some, such as Spain, transposition of the Directive led to such a right being introduced. However, even in those cases where a lawyer attends the police station in person, consultations often do not occur prior to interrogation or, if they do, are short in duration. In Spain, all of the lawyers interviewed described the introduction of the right to consultation prior to interrogation as the most important innovation resulting from transposition of the Directive. Yet, in the cases observed for the purposes of the research, few lawyers were seen to have a consultation with their client before the interrogation, an observation which was described by police officers as representing the norm. In Italy, the first consultation does not normally take place at the police station, but only shortly before the validation hearing. Of course, as described previously, in many of the countries in the study, lawyers attend the police station in relatively few cases so the question of an initial consultation is, for that reason, irrelevant in most cases.

The Directive does not prevent limitations being placed on the number or duration of consultation (see Recital 22). In some countries, such as Lithuania, Poland and Slovenia, there are no limitations, but in others, such as Austria, such limitations are imposed, either by regulations or ministerial decree (a maximum consultation of 30 minutes in Austria). In Hungary, following complaints about such limitations, the revised criminal procedure code provides that the police must allow a minimum of one hour for lawyer/client consultations. In any event, in practice, and despite the potentially extensive matters to be dealt with, the research found that lawyers rarely devote much time to the initial consultation. Whilst in Hungary, lawyers said that they took between 10 and 30 minutes, in Romania researchers found that the initial consultation lasted, on average, five minutes; and in Lithuania, consultations took between five and 10 minutes.

One factor which may affect the time that lawyers are willing to devote to consultations concerns the confidentiality of such consultations, and the physical circumstances in which they take place. In few of the countries in the study did there appear to be appropriate facilities that would allow for lawyer/client consultations to be conducted in private. In Romania, Poland and Lithuania, researchers noted that given the absence of private facilities, consultations were often carried out in cells, corridors, or interrogation rooms where there was no guarantee of confidentiality, and often in the presence of one or more police officers; and this was also sometimes the case in Italy. In Bulgaria, the few consultations that were conducted were normally carried out in the office of the investigating police officer. In this respect, the confidentiality guarantee in Article 4 of the Directive is routinely flouted in respect of lawyer/client consultations conducted at the investigative stage of proceedings in at least half of the countries in the study.

4.6 Police interrogations and the role of the lawyer

The Directive specifically provides that suspects and accused persons must have the right to have their lawyer present when questioned by the police or other investigative agency, and that the lawyer must be able to 'participate effectively'. This is qualified, to a certain extent, by the provision that such participation be in accordance with procedures under national law, but such procedures must not 'prejudice the effective exercise and essence of the right concerned' (Art. 3(3)(b)). Recital 25 states that national laws may regulate the participation of a lawyer during questioning, provided that such procedures do not prejudice the effective exercise and essence of the right; and the lawyer may, inter alia, in accordance with such procedures, ask questions, request clarification and make statements, which should be recorded in accordance with national law. Clearly, these provisions are carefully worded, giving Member states a (potentially significant) discretion to limit interventions by the lawyer acting for the suspect or accused person. However, the parameters of such discretion are yet to be tested in the CJEU. Beyond that, the role of the lawyer in interrogations is not regulated by the Directive although, in addition to the case-law of the ECtHR (noted in section 4.5 above), the professional rules or codes applicable to lawyers generally provide that they are to act in the best interests of their client. The Directive on the right of access to a lawyer does not contain provisions regarding the right to silence, although the Directive on the right to information, whilst not requiring that Member states legislate for a right to silence, requires that suspects and accused persons be informed of it (to the extent that it is regulated by national laws). The right to silence is not referred to in the ECHR, but the ECtHR has held that the right to silence and the right of a person not to incriminate themselves are 'generally recognised international standards which lie at the heart of the notion of a fair procedure.[17] Furthermore, the ECtHR has linked these standards to the role of the lawyer at the investigative stage, stating that the vulnerabilities that are inherent in the circumstances where a suspect is detained 'can only be properly compensated for by the assistance of a lawyer whose task it is, amongst other things, to help ensure respect for the right of an accused not to incriminate himself'.[18]

As noted in section 1.1 above, the research was inhibited in five of the countries in the study by the refusal of the relevant authorities to allow researchers to be based in police stations, or to observe interrogations. As a result, data on police interrogations and the role of the lawyer in those countries had to be obtained by alternative means, such as by interviews with police officers, lawyers, and former suspects.

Generally, the laws of the countries in the study provide for a right of a suspect to have a lawyer present during interrogations, although there is no such right during the initial period of police detention in Bulgaria (which clearly amounts to a breach of Article 3(3)(b) of the Directive). In Italy, as noted earlier, the police normally do not conduct interrogations. With regard to the role that can be performed by the lawyer in interrogations, a number of countries regulate this in a way that is broadly in conformity with the Directive. In Slovenia, there are no limitations on what a lawyer can do during interrogations. In Lithuania, the criminal procedure code provides that the lawyer has the right to actively participate in all procedural actions where the suspect is present or which are carried out at the request of the suspect or their lawyer. In Hungary, the revised criminal procedure code provides that the lawyer can consult with their client during the course of procedural acts (including interrogations), and may put questions to the suspect, make comments, and initiate motions. In Austria, a lawyer has the right to ask questions, request clarification and make statements during the interrogation, and may intervene if the suspect is asked leading questions, trick questions or ambiguous questions. However, whilst a lawyer/client consultation is

[17] See, for example, ECtHR 25 February 1993, *Funke v France*, No. 10828/84.
[18] ECtHR 27 November 2008, Grand Chamber, *Salduz v Turkey*, No. 36391/02.

permitted at intervals, this has to be during 'natural breaks' so that it does not interrupt the course of the questioning. In practice, the role of the lawyer is further restricted in Romania; the criminal procedure code does not specify what a lawyer is permitted to do during interrogations, and in effect it is for the police to determine how much a lawyer can intervene, although some police officers appeared to be unclear about what types of intervention they should permit. Whilst it may be argued that the restrictions in Austria are within the discretion afforded to member states by the Directive, they are used to discourage suspects from exercising their right to a lawyer, and it is apparent that Romania has failed to ensure that lawyers can actively participate in interrogations.

Spain provides an interesting example of how domestic courts may reinforce and clarify legal provisions regarding the role of lawyers in interrogations; but also how this may have a limited impact on policing practice. The Criminal Procedure Act, and internal police regulations, provide that a lawyer can intervene in interrogations and, at the end, can ask for elaboration on any point, and ask for a record to be made. This has been elaborated upon by the Constitutional Court, which has held that among the functions of the lawyer during interrogations is that of giving the client 'due technical advice on how to conduct themselves during questioning, including the option of remaining silent, as well as on their right to check the accuracy of what has been transcribed in the minutes of the statement once the procedure has concluded'. However, in practice, the police have interpreted the role of the lawyer as being confined to asking questions or requesting clarification at the end of the interrogation. In the one observed case where the suspect elected to make a statement, the police interviewer warned the lawyer that she could not intervene.

Data on how the police and lawyers interact during interrogations, and how lawyers operate during interrogations, is limited because of the refusal by the authorities in some countries to permit observations, referred to earlier, and as a result of the fact that relatively few suspects exercised their right, or were able to exercise their right, to a lawyer, and even if they did, the fact that it was difficult to find a lawyer who was willing and able to attend the interrogation. It is clear, however, that there is significant variation across the countries in the study. In Spain, where observations were permitted, it was noted by researchers that the police were generally reluctant to take statements from suspects, and in the one observed case where the suspect wished to make a statement, this was discouraged by both the police and the suspect's lawyer. In Hungary, where observations by researchers of interrogations were not permitted, most lawyers interviewed said that the police do not normally interfere with their work, although a minority said that they did so, for example, by not allowing for lawyer/client consultations during interrogations, or by making them sit some distance from their client; which was also confirmed by the official from the Commissioner of Fundamental Rights who was interviewed. In Austria, lawyers reported that in the great majority of cases, a lawyer does not attend the initial interview, except in serious cases, and that this is particularly the case in legally-aided cases because of the procedure for applying for legal aid – a lacuna which is not adequately filled by the stand-by system referred to in section 4.2 above. In Romania and Lithuania lawyers, especially legal aid lawyers, were found generally to act in a passive manner, doing little or nothing to actively participate in the process in the interests of their client. This was graphically illustrated by a lawyer in Lithuania who, when asked by the researcher if they objected to the researcher's presence, said "I make no decisions here, everything depends on the investigator. I'm just an observer, just like you'. Lawyers in Slovenia said that their presence in police interrogations generally leads the police to act in a more, formal, respectful manner towards the suspect.

Police attitudes towards lawyers varied both across, and within, the countries in the study. In some countries, such as Bulgaria, they were generally negative. In Austria, attitudes were mixed. Some believed that the involvement of a lawyer increases reliance on the right to silence, and that their presence at interrogations has no positive effect. Others, however, said that having a lawyer present was in their interests as it served as a guarantee that procedural right had been respected. Similar views were expressed by police officers in Slovenia and Romania. However, such attitudes need to be treated with some caution, especially where the police have an influence over the choice of lawyer, and where lawyers are generally passive. The fact that a lawyer was present at an interrogation may well be treated by the courts as a sufficient guarantee that the rights of the suspect were respected, even though the lawyer did little or nothing to protect those rights. Indeed, some police officers in Romania said that they used their power to call in a legal aid lawyer tactically. It is noteworthy that both police officers and lawyers interviewed in Spain were positive about their relationship, and such mutual respect was supported by observations conducted by the researchers.

4.7 The quality of legal advice and assistance

The Directive on the right of access to a lawyer, unlike the Directive on the right to interpretation and translation, imposes no obligations on member states regarding quality. It may be that this was partly out of respect for the importance of the independence of the legal professions. However, the Directive on legal aid, the transposition date of which is 25 May 2019, contains a number of such provisions. First, member states must ensure that there is an effective legal aid system that is of an adequate quality, and that legal aid services are of a quality that is adequate to safeguard the fairness of proceedings (with due respect for the independence of the legal profession) (Art. 7(1)). Second, member states must ensure that adequate training is provided to staff involved in legal aid decision-making (Art. 7(2)). Third, member states must take appropriate measures (with due respect for the independence of the legal profession and for the role of those responsible for training lawyers) to promote the provision of adequate training to lawyers providing legal aid services (Art. 7(3)). Fourth, member states must take measures necessary to ensure that suspects, accused persons and requested persons have the right, upon their request, to have the lawyer providing legal aid service assigned to them replaced where the specific circumstances justify this (Art. 7(4)).

It has been noted elsewhere in the report that in a number of the countries in the study, the legal aid systems (to the extent that they exist) are not effective in ensuring that adequately competent legal aid lawyers are available to suspects when they are in police detention, and that in some countries the procedures for applying for legal aid are such that it is not, in practice, available for such suspects. Duty lawyer schemes (or similar) do exist in a number of the countries, but generally they do not ensure that appropriately qualified and competent lawyers are promptly available to detained suspects when and where they are needed. Generally, there is little or no attempt to control the quality of those lawyers admitted to duty lawyer or *ex officio* schemes, and in some countries there is not even an attempt to ensure that lawyers admitted to the scheme are knowledgeable and experienced in criminal law. In the majority of the countries in the study, including Hungary, Romania, Lithuania and Bulgaria, there is significant evidence of, and concern about, the poor quality of legal aid and *ex officio* lawyers. They were often found to be more reluctant than private lawyers to personally attend the police station and were often, at best, passive, and at worst, overly inclined to align themselves with the police.

A notable exception to this overall picture is Spain, where lawyers were observed to be generally respectful and attentive when advising and assisting clients, taking time to allow their clients to express themselves, and asking them about the facts and circumstances concerning the suspected offence(s). They normally took an interest in the exercise of their clients' rights, ensuring that they had been informed of them, and inquiring whether they had been able to exercise them. The only major concern, as noted in section 4.5 above, was that in many of the cases observed, lawyers did not make used of the relatively new right to consult with their clients before interrogation. It is noteworthy that, of all the countries in the study, Spain has the most developed approach to quality assurance. As noted in section 4.2 above, in order to be a member of a duty lawyer scheme, a candidate must have been a member of the relevant bar association for a minimum of three years, have completed a specified course, and passed relevant assessments. It is also, arguably, relevant that they operate within a well-regulated context regarding the right of access to a lawyer for suspects in police detention, and regarding the role of the lawyer in such circumstances.

4.8 Conclusions

The law in all of the countries in the study provides for a right of access to a lawyer. In some cases, such a right pre-dated transposition of the Directive, but the Directive resulted in the right being modified or expanded, and regulated in greater detail. However, in a number of countries the right is limited in a way that is not in conformity with the Directive. In Romania, the right of access to a lawyer does not apply to the procedure described as 'administrative leading to the police station' even though this may be a prelude to an arrest. In Bulgaria, the law does provide for a right of access to a lawyer from the moment of detention by the police, but there is no provision for a right to a private consultation with the lawyer, nor for a right to have a lawyer present during an 'exploratory conversation'. Given these, and other limitations, the Bulgarian researchers concluded that there is no effective right of access to a lawyer during the initial stages of police detention.

A number of the countries have a system of mandatory defence, either in all cases (such as Italy and Spain) or for certain categories of suspect or offence (such as Hungary). Romania and Slovenia have systems of mandatory defence, but they do not apply at the initial stages of detention. Lithuania is introducing mandatory defence for suspects under arrest from January 2019. However, in a number of countries, the right of access to a lawyer is, in effect, limited by regulating the time that the police have to wait for a lawyer before proceeding with investigative actions such as interrogation (or 'informal' interview), or by permitting investigative actions to be conducted before a lawyer arrives at the police station. Whilst the circumstances in which, under the Directive, the right of access to a lawyer may be derogated from is strictly limited, in a minority of countries the derogation provisions are not confined to the circumstances required by the Directive.

Effective exercise of the right of access to a lawyer is, in practice, limited by a range of factors. A major problem in many of the countries in the study is that, in practice, the right of access to a lawyer is severely limited by the lack of legal aid, or by procedures for applying for legal aid which mean that it is not effectively available at the early stages of the criminal process. This is a major reason why, in many countries, whilst the law provides for a right of access to a lawyer, very few persons who are arrested or detained actually have a lawyer during that period. Furthermore, there is evidence in some countries that the police use fears about the cost of having a lawyer to deter suspects from exercising their right. It is

clear that the governments of a number of countries in the study will have to introduce major reforms in order to comply with the requirements of the Directive on the right to legal aid, the transposition date for which is in May 2019.

Some of the countries have a duty lawyer scheme and in some of those, such as Spain, they were found to be well-regulated and effective in ensuring that a lawyer is available to advise and assist detained suspects. However, particularly in those countries that do not have a duty lawyer scheme, the difficulties in identifying a lawyer willing to attend the police station was found to be frustrating and time-consuming for the police, and undermined the right of access to a lawyer for those detained suspects who either did not already know of a lawyer, or who could not afford to pay for a lawyer privately. Such difficulties meant that the police would, in some countries, seek to discourage detained suspects from exercising their right to a lawyer, or would contact their 'preferred' lawyers. Whilst some countries have faithfully transposed the provisions of the Directive regarding the processes by which detained suspects are informed of their right of access to a lawyer and make decisions about whether to exercise the right, others have not. In Spain, where legal assistance is mandatory, there was no evidence that the police sought to influence the decisions of suspects. However, in many other countries researchers found that suspects' decisions to exercise their right were not recorded, police discouraged, pressurised or even instructed suspects not to ask for a lawyer, or refused to contact a lawyer when one had been requested. This was facilitated by the fact that in most of them the process lacks transparency so that it is difficult, if not impossible, for suspects or their lawyers to subsequently satisfy a court that their right of access to a lawyer had been impeded or denied.

Where detained suspects were able to exercise their right to a lawyer, the ability or willingness of lawyers to actively participate, and to act in their clients' best interests was often limited. In part, this was because of legal limitations placed on participation by lawyers, but also because lawyers in some countries either did not possess the necessary knowledge and skills, or were not able or willing, to provide competent and effective legal advice and assistance – factors that are linked to the lack of a competence threshold for membership of duty lawyer or ex officio schemes, low rates of remuneration, lack of appropriate facilities (for example, for lawyer/client consultations), and failure by the lawyers' professional bodies to articulate the role of lawyers at the investigative stage. In a number of countries, there is a variety of limitations on the work of lawyers; limiting the time allowed for lawyer/client consultations, failing to provide confidential facilities in which they can take place, and limiting interventions that are permitted during police interrogations. It is important to note, however, that such limitations were not found in all countries. For example, in Slovenia, Poland and Lithuania, there are no limitations on the participation of lawyers during interrogations. In Spain, the Constitutional Court has spelt out an active role for lawyers during the questioning of their clients. However, in Austria limitations are placed on lawyer/client consultations during interrogations, and in a number of countries the police actively prevent lawyers from intervening whilst questioning is taking place. For example, in Spain, despite the ruling of the Constitutional Court, it was found that the police interpret the role of the lawyer as being confined to asking questions or requesting clarification only at the end of the interrogation.

The research also found that, for a range of reasons, many lawyers in many of the countries, particularly legal aid or ex officio lawyers, played a very limited, passive role. This may, in part, be because acting for clients at the police station is a relatively new role, particularly when it involves advising and assisting during interrogations, and it is a role for which many lawyers are ill-equipped. The findings of the research support the need for the various quality requirements set out in Article 7 of the Directive on legal aid, and it is clear that governments and relevant authorities in many of the countries in the study have a great

deal of work to do in order to comply with them. The findings also suggest that bar associations in many of those countries need to assess the way in which duty law and ex officio schemes need to be modified in order to ensure that competent, motivated lawyers are available for detained suspects who wish to exercise their right of access to a lawyer. In addition, they should assess the training that lawyers who advise and assist clients in police detention may, or are required to, undertake, focusing on the knowledge and skills that lawyers need in order to fulfil the objective, articulated in Article 3 of the Directive on the right of access to a lawyer, of enabling suspects and accused persons to 'exercise their rights of defence practically and effectively'. A useful e-learning training resource for lawyers advising and assisting at the police station has been developed by the EU funded SUPRALAT project.[19]

However, the findings also suggest that in order for this objective to be achieved, a number of other factors must be considered, and appropriate action taken. The research shows that in many of the countries, lawyers often do not have the time, facilities or information to enable them to provide competent and informed advice and assistance at the early stages of the criminal process. In all of those countries in respect of which there is evidence of poor quality of legal aid or ex officio lawyers, there is justified concern about the low levels of remuneration, uncertainty about whether the lawyer will be paid and, in some countries, about the length of time before which they are paid.

[19] Available at http://www.salduzlawyer.eu/training/theoretical-materials/.

5. Conclusions and recommendations

5.1 Conclusions

The objective of the EU procedural rights programme is to establish minimum standards governing key aspects of criminal procedure across member states. The rationale was to enhance the trust on the part of criminal justice actors that is necessary to facilitate mutual recognition of judgements and judicial decisions, and police and judicial co-operation. No less important was the need to reassure citizens that the EU will protect and guarantee their fair trial rights. The Directives issued under the procedural rights programme, which were adopted following extensive consideration and discussion amongst member states and other interested parties, require state authorities to introduce the laws, regulations and administrative provisions necessary to give effect to the provisions contained in them. The reference to regulations and administrative provisions is an implicit recognition of the fact that laws alone are not sufficient to guarantee effective implementation of procedural rights. Whilst appropriate laws are a pre-requisite, if suspected and accused persons are to be able to exercise their procedural rights on a routine basis, such laws need to be supported and underwritten by appropriate regulations, institutions, procedures, protocols, resources, and professional cultures that embody an understanding that procedural rights are rights of suspected and accused persons.

The research reported here, which was primarily funded by the European Commission, and also by the Open Society Justice Initiative, was designed to seek data on, and to understand, how the procedural rights encompassed by the first three Directives adopted under the procedural rights programme work in practice. Those three Directives – on the right to interpretation and translation, the right to information, and the right of access to a lawyer – deal with procedural rights that are fundamental to a fair and just criminal process. The research, which was carried out in nine EU member states between September 2016 and December 2018, sought to establish and describe the legal norms relevant to those three Directives, and to explore how they operate in practice. In order to do this, the project team adapted the methodology used in a previous European Commission funded study, which entailed conducting observations in police stations (including in police interrogations), observing the work of lawyers, and interviewing key criminal justice personnel. In this way, objective data could be obtained on the routine practices that provide the context in which the rights covered by the Directives are experienced.

Access to police stations for the purposes of the research was successfully negotiated nationally in four of the member states, Austria, Lithuania, Romania and Slovenia. The national authorities in Spain would not grant access, but the authorities in the Basque region of Spain were willing to do so. Despite repeated attempts by the national research teams and the project management team to secure access in the remaining countries - Bulgaria, Italy, Hungary and Poland – the relevant authorities, both the police and relevant government ministries, would not grant permission for researchers to conduct observations in police stations. This lack of transparency was disappointing, not only because it limited the researchers' ability to obtain data on how procedural rights actually work in practice, but also because it meant that the relevant governments and institutions missed an important opportunity to obtain valuable information which might have enabled them to be assured that procedural rights were being effectively implemented or, on the other hand, to discover ways in which they could be improved. Two examples of the value of observational research, concerning the letter of rights, will suffice. In Lithuania, the law requires that the letter of rights be served at the time of arrest, or at the beginning of the first interrogation. Observations

showed that, whilst this was normally done, on some occasions the letter of rights was not served until after the interrogation had commenced, or sometimes even at the end of the interrogation. In Spain, the law provides (in accordance with the Directive on the right to information) that suspects are entitled to keep the letter of rights in their possession in a manner that is compatible with their physical safety. In the cases observed, suspects in detention were never allowed to keep the letter of rights in their possession – the exception regarding the need to protect physical safety was routinely used to prevent suspects from keeping it in their possession. Whilst, in the absence of observation, it is possible for researchers to ask former suspects about their experiences regarding the letter of rights, concerns raised by them are easily dismissed by the relevant authorities on the basis that this source of information is unreliable. The findings of observational research are, by contrast, incontrovertible.

The Directives require member states to transmit the measures adopted to give effect to them to the European Commission. The authorities in all of the countries in the study complied with this obligation. However, the value of this requirement is limited because the national authorities do not have to provide any contextual information, nor specify how the measures reflect each aspect of the relevant Directive. It was clear that in some countries in the study, considerable effort had been made to ensure that the provisions of the Directives were transposed, at least as far as laws and regulations were concerned. However, this was not the case in other countries, and in all of the countries there were examples of failures to adequately transpose certain provisions. In Austria, whilst the legal provisions on information about procedural rights are fairly comprehensive, there is no requirement to take into account the particular needs of vulnerable suspects or accused persons (as required by Art. 3(2) of the Directive on the right to information), and no explicit provision that a detained suspect be allowed to keep the letter of rights throughout their detention (as required by Art. 4(1)). In Slovenia, Bulgaria and Romania, there are various limitations on free interpretation of lawyer/client consultations despite the fact that there is a clear obligation to provide for free interpretation, irrespective of outcome, in Articles 2(2) and 4 of the Directive on the right to interpretation and translation. Many other examples of failures to fully transpose the provisions of the Directives into national laws are provided throughout this report.

The countries of greatest concern, with regard to transposition of the Directives, are Bulgaria and Romania. The three Directives which are the subject of this study are all expressed to apply to persons from the time that they are made aware by the competent authorities, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence. This reflects the case-law of the ECtHR, which has consistently held that the procedural rights under Article 6(3) of the ECHR apply from the time that the situation of the suspect or accused has been substantially affected. The official view adopted in Bulgaria is that the initial 24-hour period of police detention is an administrative procedure, and that therefore the Directives do not apply. In Romania, the police have power to take a person to a police station without formally arresting them and this, similarly, is treated as an administrative procedure which does not attract the protections afforded by the Directives. Thus, the Directives are deemed not to apply to persons who are, de facto, arrested or detained.

Another generic issue concerns the transparency of processes, and the ability of suspected and accused persons to challenge failures to comply with national laws that reflect Directive requirements. In most countries, the processes for challenging the way in which procedural rights are implemented are incorporated into the general trial process, which makes it difficult for suspected and accused persons to contest their application in particular circumstances in a way that provides an effective remedy. This difficulty is exacerbated by the fact that, in those countries that have schemes for out-of-court disposals or speedy trial, there may never by a trial process during the course of which a challenge may be made.

Moreover, even in those countries where laws or regulations provide for written records to be made of certain procedures, the research shows that these are often completed in a formalistic or self-serving way. In many of the countries in the study it was found, for example, that suspects were informed of their procedural rights in a formalistic manner that did not enable the suspect to understand them, or to make informed decisions about whether to exercise their procedural rights. In some countries, it was found that some police officers would either discourage suspects from exercising them, or prevent them from doing so. Written recording requirements are ineffective in disclosing such practices and, in practice, can make it more difficult for suspected and accused persons to challenge them. It has been found, in other countries, that alternative ways of assuring compliance, such as placing responsibility for informing suspects of their procedural rights on officers independent of the investigation, and electronic recording of the information-giving process and of interrogations, has been effective in ensuring that procedural rights are complied with, and in making the processes sufficiently transparent to enable them to be effectively challenged. Regulating for such mechanisms should be actively considered in order to ensure that the procedural rights embodied in the Directives are effective.

It was noted earlier that whilst appropriate laws and regulations are a pre-condition for procedural rights to be effectively available, they are not sufficient. In order to ensure that procedural rights are routinely available for suspected and accused persons, a 'whole-system' approach is needed, which recognises the context in which procedural rights are to be implemented, and which makes connections between the various factors which determine whether they are effectively available.

The conditions under which procedural rights have to be given effect at the early stages of the criminal process, where a suspected or accused person has been arrested and/or detained, are such that decisions and processes have to be made or completed relatively quickly, and often in difficult circumstances. From the police perspective, this requires clear and relatively simple protocols and procedures, and mechanisms – for example, to secure interpretation, or to contact an appropriate lawyer – that are designed to work with a minimum of effort and delay. From the perspective of suspected and accused persons who, particularly if they have not been arrested or detained before, are likely to be apprehensive and potentially vulnerable, it requires clear information (in a language that they can understand) about their position, and their rights, and mechanisms and facilities to ensure that they can make decisions about, and exercise, their rights as effectively as possible. Whilst some of the countries have, to varying extents, catered for such a context, in many of them, there are significant practical obstacles which impede effective realisation of the objectives of the Directives.

With regard to the right to interpretation and translation, whilst the laws of all of the countries in the study provide for such a right for persons arrested and/or detained (subject to the specific limitations identified in respect of Bulgaria and Romania), the research identified a number of practical problems. Whilst in some, although not all, countries the law is clear about who has responsibility for determining the need for interpretation (and in Italy and Slovenia, responsibility is place on the suspected or accused person themselves), in none of them is the procedure for determining need, nor the criteria to be applied, effectively regulated. The result is that police officers are left to determine need on an ad hoc basis, which is heavily reliant on the skills and attitudes of the officer concerned. The letter of rights is available in a range of languages in some countries (in Slovenia, in 24 languages), but in others the police have to rely on an interpreter being available to orally translate it, which results in delay and, in some cases, suspects not being informed of their procedural rights in a timely fashion, if at all. Around half of the countries have a national system for registering and/or certifying interpreters, but in some of them, the criteria for registration or certification are not sufficiently robust to ensure that they include only

competent interpreters, and in any event the police often have the power to circumvent the obligation to use a registered or competent interpreter. Low levels of remuneration for interpreters is a common problem which, in turn, affects both levels of competence and the willingness of interpreters to attend police stations, especially at short notice or out-of-office hours. Whilst remote interpretation is, in principle, available in a minority of countries, it is rarely if ever used.

The law in most of the countries in the study regulates, with some degree of precision, the time at which information about procedural rights must be provided to suspected and accused persons, and in most cases, this is sufficient to comply with the requirements of the Directive. The laws of all countries provide for a letter of rights, although in many countries in the study the letter of rights does not cover all of the rights required by Article 4 of the Directive on the right to information. Most countries have a standard letter of rights, but regrettably most were found to be lengthy and complex, so that many suspected and accused persons, particularly those with vulnerabilities or those who have language difficulties, are unable to fully understand them. Thus, most countries do not comply with the requirement in Article 4(4) of the Directive on the right to information that they be drafted in simple and accessible language. These problems, together with the failure in some countries to require that suspects and accused persons be given an opportunity to read the letter of rights, and the failure to require that suspected and accused persons be allowed to keep them in their possession (Art. 4(1)), can be relatively easily remedied. Greater consideration is needed to deal with the problems, in practice, of ensuring that the police comply with the requirements concerning the letter of rights, and also those associated with the various obligations to provide sufficient and meaningful information concerning arrest, detention and the suspected offence, and to provide access to relevant documents and materials.

Perhaps the greatest difficulties disclosed by the research concern the right of access to a lawyer. Generally, the laws of all of the countries in the study provide for such a right (subject to the limitations already explained in respect of Bulgaria and Romania), but (with the exception of a minority of counties, notably Spain), most detained suspects in most countries do not, in practice, have access to a lawyer at the early stages of the criminal process. Where suspects do have access to a lawyer, the research discloses significant concern in most countries about their quality and competence, particularly in respect of legal aid or ex officio lawyers. A range of factors appears to be at work to limit effective access to competent legal advice and assistance. In some countries, the police discourage or prevent suspects from exercising their right to a lawyer, or encourage them to use a lawyer preferred by the police, sometimes facilitated by the lack of a recording requirement so that the process is not transparent. Many duty lawyer or ex officio schemes do not guarantee that a competent lawyer is available and willing to attend the police station at short notice, and even where a lawyer does attend, the facilities for private consultation are often inadequate or non-existent. Such problems are often exacerbated by a failure to disclose relevant information about the suspected offence, limitations on what the lawyer may do during interrogations, and low levels of remuneration.

The governments of Bulgaria and Romania should (preferably in discussion with the European Commission) give fresh consideration to their approach to the applicability of the Directives, which is important not only in respect of the three Directives considered in this study, but also the Directives that have to be transposed during 2019. However, the research demonstrates that the governments of the other countries in the study have, to varying extents, sought to faithfully transpose the Directives into domestic law. Researchers were able to identify both good examples of legal provisions regarding procedural rights, and effective approaches and schemes for delivering them. Nevertheless, serious attention does have to be paid, in all of the countries in the study, to how the rights encompassed by

the Directives work in practice, and to the processes, protocols and resources that are devoted to them. Having regard, in particular, to the requirements of the Directive on access to legal aid, concerning both the availability of legal aid and the quality of legal aid services, relevant government ministries should engage in constructive discussion with bar associations, in order to ensure that suspected and accused persons arrested and/or detained are able to exercise their right of access to a competent lawyer who is willing and able to advise and assist them during their detention.

Effective implementation of procedural rights is not a one-off enterprise, but requires an open-minded approach based on information and engagement with the relevant stakeholders. It is to be hoped that this research has contributed to that process.

5.2 Recommendations

The recommendations set out below are directed at the European Commission and pan-European institutions and organisations. Recommendations directed at national governments and organisations are set out in the country reports (see Appendices).

General

- Appropriate action should be taken by the European Commission to ensure that the Directives are faithfully and completely transposed into national laws, regulations and processes in all member states. Initially, this may involve discussions with national governments, especially in the case of relatively minor failures in transposition. In the case of major failures of transposition, or where national governments fail or refuse to engage in meaningful discussion, the European Commission should consider using its powers to refer the matter to the Court of Justice of the European Union.
- The European Commission should enter into discussions with the governments of Bulgaria and Romania regarding the point at which, and the circumstances in which, the Directives are regarded as being applicable, in order to ensure that they are applied in the circumstances envisaged by the respective Directives.
- If further procedural rights Directives are adopted, consideration should be given to including a requirement that member states report on transposition of the Directive, indicating the action taken, and the consequent national position, in respect of each Article. National governments should, in any event, conduct such an exercise in preparing for transposition, and thus such a requirement should not be overly burdensome. With regard to Directives that have been adopted, but which are still to come into force, the European Commission should discuss with member states how they should comply with the reporting requirement in order to ensure that the Commission has a clear picture regarding transposition.
- Given the importance of empirical, observational, research in establishing how the standards set out in the Directives work in practice in member states, the European Commission should enter into discussions with national governments with a view to encouraging and facilitating empirical research in respect of procedural rights.
- The European Commission should actively consider whether to propose a European Union standard regarding the electronic recording of interrogations, and of the process by which suspected and accused person who are detained are informed of their procedural rights, in order to enhance transparency and accountability.

Right to interpretation and translation

- The European Commission should consider ways of encouraging and facilitating consideration within, and between, member states of appropriate guidance on workable mechanisms for assessing, and the relevant criteria for determining, the need for interpretation.
- The European Commission should discuss, with both the relevant professional bodies and commercial providers, the question of making remote interpretation more available, especially for the purposes of conveying the information required at the early stages of detention, such as information about the reasons for arrest and detention, initial information about the suspected offence, and procedural rights.
- The European Commission should: (a) discuss with member states that have not introduced a national registration system for interpreters and translators their plans for introducing such a scheme; (b) consider, together with the appropriate professional bodies, the competence requirements that should be applied to such schemes; and (c) encourage member states to adopt realistic rates of remuneration for interpreters and translators in order to comply with the quality requirements of Article 5(1) of the Directive on the right to interpretation and translation.
- Given the difficulties in some countries of accessing competent interpreters, especially those who can interpret less frequently encountered languages, the European Commission should consider, together with the relevant professional bodies, what action can be taken to ensure the availability of such interpretation.
- The European Commission should encourage the relevant authorities in member states to issue guidance on the meaning of 'essential documents' for the purposes of Article 3(1) of the Directive on the right to interpretation and translation (translation of documents).

Right to information

- The European Commission should enter into discussions with the relevant authorities of member states with a view to ensuring that: (a) the respective letters of rights are drafted in simple and accessible language, fully comply with the requirements of the Directive, and are available in a range of languages; (b) the law expressly provides for suspected and accused persons to be given an opportunity to read the letter of rights; (c) mechanisms are put in place to ascertain whether suspected and accused persons understand the rights of which they are notified, and the implications of waiver; and (d) the law expressly provides for a right of detained suspected or accused persons to keep the letter of rights in their possession (in accordance with Article 4 of the Directive on the right to information).
- The European Commission should, in line with the recommendation above concerning electronic recording, consider whether to propose an EU-wide standard regarding electronic recording of the process by which notification of procedural rights is provided, in order to ensure that the requirements regarding notification of procedural rights are complied with.
- The European Commission should confirm that the right of access to documents that are essential to effectively challenging the lawfulness of arrest or detention must be routinely provided, and is not dependant on a request by the suspected or accused person, or their lawyer.

Right of access to a lawyer

- The European Commission should, in line with the recommendation above concerning electronic recording, consider whether to propose an EU-wide standard regarding electronic recording of the process by which notification of procedural rights is provided in order to ensure that the right of access to a lawyer is properly notified, and to avoid police officers from circumventing the right.
- The European Commission should, in line with the recommendation above concerning electronic

recording, consider whether to propose an EU-wide standard regarding electronic recording of interrogations, in order to ensure that the rights of the suspected or accused person, and the role of the lawyer, are adequately protected.

- The European Commission should enter into discussions with relevant member states in order to ensure that the right of access to a lawyer is not defeated or undermined by laws permitting the police to proceed with interrogations or informal interviews before a suspected or accused person who has exercised their right of access to a lawyer has, in fact, had such access.
- Working with the relevant European professional bodies, the European Commission should seek to establish standards for admission to and the operation of duty lawyer schemes, and standards regarding training for lawyers who advise and assist detained suspected or accused persons (having regard to Article 7 of the Directive on the right to legal aid). With regard to training, the European Commission should publicise the training materials developed by the SUPRALAT project (available at http://www.salduzlawyer.eu/training/theoretical-materials/).
- The European Commission should closely monitor the measures adopted for the purposes of transposition of the Directive on the right to legal aid, in order to ensure that schemes for applying a means test, and the arrangements for remunerating lawyers, do not undermine the obligation to make legal aid of an adequate quality available for suspected and accused persons who are detained during the course of criminal investigation.

Appendices

A.1 Austria – Conclusions and Recommendations

Major issues

Police officials, lawyers as well as former suspects confirmed the positive developments in recent years regarding the rights of suspects during criminal proceedings. With the transposition of the Directives, these developments are continued.

The transposition of the Directives required amendments, but many of the guarantees were already enshrined in the Austrian Code of Criminal Procedure (StPO). A positive impression relates to the fact that among police officials consulted, procedural safeguards were also emphasised as protection for their own work and regarded as important, in particular with respect to the interest that the results of investigation proceedings 'hold up' in court. Despite general positive developments, there are, however, several challenges in the application of certain aspects of the different Directives.

For instance, police officials reported the effort required to find qualified interpreters. Due to the significant demand for certain languages and the, by now, low pay, this poses difficulties. Often it also leads to the recruitment of not sufficiently qualified persons from the police's own list of interpreters. Assigning insufficiently competent interpreters not only leads to situations wherein protocols do not adequately reflect the statements that were made during an interview but puts the additional burden of examining their competence prior to the interview on the police officials. Additionally, initial interventions are usually conducted without translators, which is not without its problems. The fact that the Letter of Rights for detained persons has been issued in 47 languages deserves a positive mention. Equally worthy of mentioning is the fact that video translation is being utilised in some police offices and positive experiences are being made with it.

Despite improvements, i.e. through the easier and more accessible language in the new electronic system for protocols of interviews (PAD NG), the information about rights appears to be purely a matter of duty in many cases, wherein formal correctness is the main concern as opposed to the accused persons` understanding of their rights. In some cases, the information about rights is also undermined – occurring in ways that the police officer might not be fully aware of ('I'm assuming you want to make a statement.') or in ways that directly aim towards receiving a statement from a person ('You'll be able to go home earlier.'). The wording of the Letter of Rights currently in use (information sheet for detained persons, information sheet for the stand-by legal counselling service) is very complex in parts. In cases of suspects who are not arrested it must further be considered that currently, summonses are not in all cases distributed in writing but over the phone. Persons under legal guardianship and juvenile accused persons receive summonses directly, their legal representative is not always informed.

Access to materials of the case (case files) has improved over the course of the past years and and does not pose a significant problem for lawyers, however costs are a factor that should not be disregarded. With a view to costs, access to case materials for persons receiving legal aid works well. However, the way access to case files is currently managed at police level constitutes a strain on police resources as well as those of lawyers.

The introduction of the stand-by legal counselling service was an important step towards ensuring that suspected persons can consult with a lawyer during the investigation proceedings free of charge. Currently, the large majority of suspected persons are not legally represented during the investigation proceedings, even though the statements made before the police are highly relevant for the further course of the proceedings. Mandatory defence during the investigation proceedings is currently only envisaged in cases of deprivation of liberty for compulsory medical treatment, i.e. not even for juveniles. Despite the objectively growing number of requests for a stand-by lawyer, the absolute number of calls is still not very high. Potential hurdles discovered were the information on the stand-by legal counselling service given within the information about rights, the uncertainty regarding the fees charged, and in cases where a lawyer is assigned, the bureaucratic modalities of settling the bill. While police officials and defence counsels respect each other's role in principle, the opinion that lawyers not only delay but impede the investigation proceedings was also voiced. The restricted role of the defence counsel during the investigation proceedings currently stipulated in § 164 para. 2 StPO leads to the remark voiced by police officials during the information about rights that 'a lawyer is not allowed to do anything anyway' – which, in turn, frequently leads to a waiver of the right of access to a lawyer. In practice, however, the handling of the role of the defence counsel is significantly less restrictive.

The information about the right to remain silent is provided, yet the wording in the information sheet for detained persons leans towards a statement. In some cases, promises and threats regarding a statement were also made during the oral information about rights.

A general aspect appearing worthy of consideration with regards to the transposition of the Directives was the situation of the interview itself. The interview usually takes place in the offices of the interviewing police officials. While it bears advantages to interview suspects or accused persons in these offices, police officials have pointed out the potential shortage of space during interviews involving several persons (e.g. translator and lawyer). In addition, other persons can disturb the interview – in one interview situation, seven additional persons were present in the room. Another aspect during the interview situation is the requirement for police officials to write a protocol while simultaneously conducting the conversation. Due to this requirement, police officials are partially positioned behind computer screens, making a direct conversation with the suspected person difficult.

Potential violations of the rights of suspected persons, particularly with regard to the lack of legal representation, are hard to prove due to the lack of audio-visual records. To later point out inconsistencies in the protocol during trial seems more likely to lead to the accusation of incredibility against accused persons, which is why defence counsels report that they rather advise against it. Currently, potential violations hardly have legal consequences, because while the violation can be asserted, it often has no palpable effect on the proceedings.

Recommendations

1. The existing processes of assigning interpreters in the investigative stage should, in consultation with experts, be further evaluated, to ensure that all persons listed in the new register of the Federal Ministry of the Interior meet transparent quality standards (regarding linguistic, cultural and professional competence). Even in cases where uncertified interpreters are consulted, quality standards should be guaranteed. Moreover, reform efforts should encompass the evaluation of interpreters, the enhancement of video interpretation services on the basis of 'lessons learned', the

development of ‘vade mecums’ on cooperation between the police and interpreters, as well as the continuous exchange of these professional groups, for instance through inter-disciplinary roundtables.

2. The way police currently inform about procedural rights should urgently be evaluated with regards to accessibility, since the understanding of rights is the prerequisite for their active use. Furthermore, more accessible texts could be drafted for the existing information sheets, with the help of experts on easy and accessible language. In particular, existing uncertainties regarding the allocation of costs of legal representation during the investigation proceedings should be dispelled. Police officers should be further sensitised to the need to inform about rights and obligations not only in a correct, but also in an understandable manner. Above all, the right of access to a lawyer during the investigation proceedings should not be ‘belittled’ – in light of the current practice, it seems important to sensitise police officers accordingly.

3. Summonses for questioning of persons who are not arrested should always be sent in writing and, in case of juveniles and persons with guardians, summonses should always be sent to the legal representative as well, to ensure an effective exercise of rights. It should be explicitly noted in the summons that the consultation of a lawyer is not only a right, but that the exercise of this right does not imply disadvantages for the accused person.

4. A general introduction of electronic files and a comprehensive granting of access to the electronic case files would save resources of all parties involved and should, therefore, be applied in the investigative stage.

5. The right of access to a lawyer during the investigation proceedings, in particular for persons who are later granted legal aid or that are particularly vulnerable (e.g. juveniles) should be strengthened and structured more effectively in the context of the Directive on legal aid for suspects and accused persons in criminal proceedings and the Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings. While in cases of arrested persons, a lawyer should generally always be present during the interview, it would be important to introduce mandatory defence during investigation proceedings at least for juveniles. To waive the right of access to a lawyer should only be possible after consultation with the stand-by legal counselling service.

6. In the framework of police training and continuing education, as well as in the everyday work of police officers, awareness should be increased about the legitimacy of the right to remain silent and about the importance of providing adequate information about this right. This awareness-raising should also lead to the recognition that even the partial use of the right to remain silent is not used against a suspected person.

7. Audiovisual recordings of interviews, which is already used in many other countries, should also be introduced in Austria. Audiovisual recordings that can only be waived in cases where legal representation is present would constitute an optimal approach to documenting the interview and achieving the highest possible value for it as evidence in later proceedings. In addition, it could considerably unburden police officials from having to write minutes and enable them to focus exclusively on the interview of the accused person.

8. Remedies to tackle violations of the rights of suspects and accused persons during investigation proceedings should be strengthened for them to become more effective.

9. Cooperation of relevant stakeholders (ministries, police, bar association) with scientific and independent experts should be fostered for the development of evidence-based measures. Additionally, a view from the 'outside' can often give a positive impulse to existing organisational structures.

A.2 Bulgaria – Conclusions and Recommendations

Major Issues

The Bulgarian criminal justice system reveals serious discrepancies between the police detention and the Directives of the Roadmap for Strengthening Procedural Rights in the European Union. These discrepancies affect the three rights: the right to interpretation and translation, the right to information and the right of access to defence counsel and legal aid. That discrepancy is based on the currently dominating view among law-enforcement bodies, the prosecution and the official doctrine, that the Roadmap Directives are not applicable to police detention, and that detained persons do not have the status of suspects or accused who can benefit from the rights guaranteed in them. Accordingly, a considerable part of the directives has not been transposed in the Bulgarian system. There is a huge discrepancy in the transposition of the guarantees provided for under the directives, between the period after the filing of criminal proceedings and the arraignment of the person concerned as accused and the period of police detention, when that person is suspected of having committed a criminal offence. The non-transposing of the guarantees for one of the rights (e.g., the right to information) leads to violations of another right (e.g., the right of access to defence counsel).

As the police detention is not recognized as part of the criminal proceedings, neither the legislation nor the practice secure compliance with the right of interpretation and translation in accordance with Directive 2010/64/EC. Interpretation during police detention is regulated by the MoIA as a possibility not as an obligation and only for the purposes of familiarizing the detainee with the grounds for police actions and with his/her rights. There is no mechanism for identifying whether the person who is suspected or accused of having committed a criminal offence speaks or understands Bulgarian. In practice, no interpretation is provided for the contacts with the detainee with his/her lawyer. Neither the detention order, nor the letter of rights is made available to the detained person in translation into a language that he/she understands. The remuneration of interpreters, where they are involved, is very low. This discourages professional interpreters to offer their services and prompts the police to use random persons with poor knowledge of the respective languages. The participation of an interpreter/translator in actions during police detention is not recorded in minutes.

Non-compliance with the European law (Directive 2012/13/EC) exists also with regard to the right to information. The most serious problem is with the failure to inform the detainee about his/her right to remain silent. The law allows for a significant flexibility in the time of serving of the detention order. In fact, it is often served several hours after the person is in fact detained. The order does not inform the detainee of the factual basis for detention. The letter of rights is served too late after the detention order. It is not explained in simple language, adapted to the level of understanding of the person concerned. The process of familiarizing with it is rather formalistic and aims primarily at obtaining the detainee's signature. The law does not regulate adequately the right of the person to keep a copy of the letter of rights with him/her during detention.

Transposition of Directive 2013/48/EC on the right of access to a lawyer is similarly problematic in the Bulgarian system due to the non-recognition of police detention as part of the criminal proceedings. Persons who are subject to police detention because of the existence of data that they have committed a criminal offence are deprived of access to a lawyer in practice. With few exceptions, they spend all their period of detention without an effective legal assistance. They are questioned for their alleged offences by field operatives in the form of “exploratory talks” as a rule without a lawyer. The information which they share can go indirectly into their criminal files through the testimony of the field operatives. The latter can become a basis for conviction. The right of access to a lawyer during police detention is ineffective in practice because the law does not prohibit “exploratory talks” if the detainee had asked to be assisted by a lawyer and because there is no obligatory legal assistance for vulnerable detainees. There is no system for contracting lawyers where they have been requested. The pressure on the detainees to waive their right to legal assistance also plays an important role in the lack of effective access to a lawyer during police detention.

Recommendations

Overall recommendations

1. In view of its non-compliance with European law, the Bulgarian criminal justice system and, more specifically police detention, are in need of a serious reform. It should start with recognising the applicability of the Roadmap Directives to the persons detained in police custody because there are data about them that they had committed crimes. They must be recognised as “suspects” under these directives. This is the first and the most important recommendation of the present study.
2. The standards of the Roadmap Directives should cover all types of police detention where the detainee may be held on suspicion of having committed a criminal offence. In addition to the detention under the Ministry of Interior Act, they should cover the detention under the Customs Act, The State Agency for National Security Act, The Military Police Act and the Prevention of Terrorism Act.
3. The scope of the Roadmap Directives should cover also minor offences proceedings, such as those dealt with by Decree No. 904 for combating minor hooliganism and the Law on Public Order at Sports Events despite the fact that they are not deemed to be “criminal proceedings” under the Bulgarian law. The rights guaranteed by the Roadmap Directives should apply from the initiation of these proceedings, usually at the police stations.
4. The overall reforming of the legislation and the practice should be based on a careful examination of the requirements of the directives and of the discrepancies between them and the Bulgarian criminal justice system.

Recommendations on the right to interpretation and translation

1. For the actions conducted with the participation of the detained person during police detention it is mandatory to provide an interpreter/translator in all cases in which the person does not speak or does not understand the Bulgarian language.
2. Interpretation should also be provided for the contacts of the detained person with his/her lawyer.
3. Regulation should be passed to establish a mechanism for identifying whether the person who is suspected or accused of having committed a criminal offence speaks or understands Bulgarian at all stages of criminal procedure, including police detention.
4. The quality of the interpretation/translation provided to the detained person during police detention

should be guaranteed by recruiting qualified interpreters/translators, and the practice of using random persons for that purpose should be abandoned.
5. The remuneration of the interpreters/translators recruited to work both during police detention and after the filing of pre-trial proceedings should be increased to market levels, and the fees should be paid promptly after the completion of the assignment.
6. During police detention, the detained persons should be given written translation into a language they understand of the main documents connected with the detention, as a minimum: the detention order and the letter of rights.
7. The Ministry of Interior should endeavour to establish a register of interpreters/translators.
8. The participation of an interpreter/translator in actions during police detention should be recorded in minutes.

Recommendations on the right to information

1. The detention order, specifying legal and factual grounds for detention, should be issued as soon as the arrested person arrives at the police station following arrest as a suspect of having committed a criminal offence.
2. A copy of the detention order should be given to the detainee in a language he/she understands.
3. The persons who have been detained because there exist data that they had committed a criminal offence should be informed immediately after the detention about their right to remain silent. If they declare that they do not wish to give explanations, no interview is to be conducted with them.
4. The persons who have been detained because there exist data that they had committed a crime should be given access to the materials of the case so as to be able to appeal the legality of their detention.
5. The letter of rights given to the detained persons should be in a language that they understand, and its content should be explained additionally to the detained persons to the extent to which this is necessary for their complete comprehension.
6. The content of the letter of rights signed by the detained persons should be broadened to include the additional guarantees provided for in the Directives of the Roadmap, and a copy of it should be made available to the detained persons during their detention in a language that they understand.
7. Any pressure on the part of the police aiming at waiving the detainee's rights should be prohibited and punished.

Recommendations on the right to access to defence counsel and legal aid

1. The legislation regulating the police detention of persons because there exist data about them that they had committed a crime should guarantee effective access to defence counsel immediately after the detention.
2. The participation of the attorney in the actions in which his/her detained client has been involved during police detention should be regulated in the legislation and it should include both the right to unconditional preliminary contact alone with the detained person, and the right of the attorney to participate in the actions.
3. In addition to the right to access to defence counsel, during police detention it is also necessary to regulate mandatory attorney defence in the same cases in which that has been regulated in the Criminal Procedure Code after charges have been brought up and pre-trial proceedings have been filed.
4. The police authorities should clarify to the detained person in a simple language the content of the right to access to defence counsel and legal aid, as well as the consequences of refusing attorney defence.

5. A remedy in the form of exclusion of evidence should be introduced in the legislation against violations of the right to attorney defence and legal aid during police detention.
6. An effective system of providing legal services out of office hours should be established throughout Bulgaria to include legal assistance during police detention.
7. A system of quality control of services provided by lawyers in police stations should be established at the level of local bar councils.

A.3 Hungary – Conclusions and Recommendations

Major Issues

The right to interpretation and translation

The New CCP has not brought along fundamental conceptual changes in relation to interpretation and translation: its provisions comply with Article 2(1) of Directive 2010/64/EU and ensure the right to use the defendant's mother tongue, national minority language or any other language spoken or understood by the defendant as well as the use of sign language interpretation. At the same time, it is a problem in the practice that the interpreter is seldom involved before the interrogation, even if the police perform procedural acts, which undermines the guaranteeing of procedural rights. It widens the possibilities that the participation of the interpreter may under the New CCP be ensured through telecommunication technologies.

The bylaws of the New CCP have brought along significant improvements in order to ensure compliance with Article 2(2) of Directive 2010/64/EU, when it is expressly stated that the investigating authority shall ensure through the appointment of an interpreter that detained suspects could consult with their defence counsel at the premises of the detention, and that non-detained suspects could use the assistance of the interpreter appointed by the investigating authority in order to consult with their counsel before or after the procedural act. Using an interpreter hired by the defence for the purposes of consultation has remained to be difficult, the new provisions also fail to provide this possibility even for those who could afford to pay for the services of an interpreter.

It is against Article 2(4) of Directive 2010/64/EU that neither the Old or New CCP, nor their bylaws determine any mechanism or procedure "to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter", and no such mechanism has evolved in the practice either. The respondents' experience shows that the police often appoint the interpreter on the basis of the suspect's citizenship. If the suspect speaks any Hungarian, no matter how little that is, no interpreter is appointed, and it happens that investigating officers try to convince suspects speaking rare languages to accept interpretation in English.

The New CCP follows the concept of the Old CCP, when it only requires the translation of those documents that are to be served – a solution which is fundamentally compliant with Articles 3(1) and 3(2) of Directive 2010/64/EU, but neither of the procedural codes have provided the right to the defendants or their counsels to request the translation of those documents that they regard to be essential, which is against Article 3(3) of Directive 2010/64/EU. This results in a situation whereby those indigent defendants who cannot afford to pay for the translation of those documents that the state authorities are not obliged to

have translated, are in a significantly disadvantageous situation compared to wealthy defendants who can pay for this service. Delays in the translation of documents have been mentioned as a serious problem as well.

Neither the Old CCP, nor the New CCP prescribes that a separate decision shall be made about the need for translation or interpretation, so the Hungarian regulation is not compliant with Articles 2(5) and 3(5) of Directive 2010/64/EU.

In accordance with Article 4 of Directive 2010/64/EU, suspects and accused persons are exempted from the costs arising in relation to their language use, irrespective of the outcome of the proceedings.

The CCP provision according to which, if it is not possible to find an interpreter who meets the statutory criteria, any other person having "sufficient knowledge of a certain language" could be appointed as an ad hoc interpreter, may cause problems in practice with regard to the quality of interpretation and translation, as there are no measurable guarantees for what is sufficient, and persons not having a adequate command of a given language may be appointed. The lack of a formalised quality assurance system has also been mentioned as a problem in this regard.

The right to information

The New CCP prescribes that the defendants shall be informed about their rights under Article 3(1) of Directive 2012/13/EU when their participation in the criminal proceeding commences, and also stipulates the requirement of accessibility. As far as the practical implementation of the right is concerned, in the investigation phase defendants are informed of their rights at the beginning of the interrogation in such a way that the investigating officers read out aloud to them the cautions generated by the RobotZsaru NEO electronic system of the police, or provide information on the basis of that. The new version of this template (which was revised due to the coming into effect of the New CCP) contains information about all the rights listed in Article 3(1) of Directive 2012/13/EU. Nevertheless, according to the experiences of interviewees in the IPC research, the main problem is that the provision of information about all the rights is rare, and the way in which the information is provided is usually not accessible. Most respondents mentioned deficiencies with respect to the right of access to the case materials and the right to silence. It is a positive novelty that new rules make it possible that information about procedural rights be provided through "the handing over of a written information leaflet".

In compliance with Article 4 of Directive 2012/13/EU, the domestic legal provisions currently in force prescribe that suspects or accused persons who are arrested or detained are provided promptly with information about their rights in writing, in simple and accessible language and in a language they understand. In accordance with Article 4 of Directive 2012/13/EU, detainees may keep the written Letter of Rights in their possession. However, problems emerged with the accessibility of the above Letters of Rights too. The conclusion that defendants are not informed in a simple and accessible language in Hungary was also substantiated by a survey conducted on a sample of 200 persons by the HHC: we found that the level of comprehensibility of the Letter of Rights we had compiled using the texts produced by the Hungarian authorities was very low, only 38.5%.

As far as providing information about the reasons for arrest or detention and the accusation is concerned, the rules included in the New CCP comply with the requirement included in Article 6 of Directive 2012/13/

EU. No practical deficiencies have been revealed with respect to informing defendants about the reasons for their arrest or detention. On the other hand, in the practice, the requirement set forth in Article 6(1) of Directive 2012/13/EU, according to which information about the criminal act the suspect or the accused person is suspected or accused of having committed "shall be provided promptly and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence", is not fully complied with.

As far as access to case materials is concerned, the New CCP has brought a fundamental – and, in terms of complying with Article 7 of Directive 2012/13/EU, positive – change: under the New CCP, the defence is, by default, entitled to get access to all the case materials already during the investigation, and the law provides for exceptions to this main rule. In addition, the New CCP focuses on "access", and regards the handing out of copies only as one of the means of providing access, putting an end to the hegemony of providing "copies". It is also a positive novelty that it is now prescribed by law and in a wider scope than before that as a rule, records shall be kept of what case materials were accessed by the participants of the criminal procedure and when exactly the access was provided for them. It is also an important improvement that a formal decision shall be delivered about the restriction of the access or the manner of access, and a remedy may be sought against such decisions.

The preamble of Directive 2012/13/EU prescribes that case materials shall be provided to the defendant and the defence counsel in "due time". However, the Old CCP did not set out any deadline as to how long before the hearing on ordering pre-trial detention the prosecutorial motion and the attached case files shall be provided to the defendant and the defence counsel. Research results showed that this legislative shortcoming could result in that the defence did not receive the case files in due time. In order to solve this problem, the New CCP prescribes that access to the case materials shall be provided at a time and in a manner that enables the defence to prepare, but in any case, at least an hour before the hearing starts. In addition, under the new rules investigation judges are authorised to "sanction" by denying the delivery of a decision if for example the defence was not able to access the case materials relied on in the prosecutor's motion in due time.

The changes outlined above facilitate that the right of access to the materials of the case is enforced in the practice in a way that truly contributes to the enforcement of the right to an effective defence. At the same time, we are of the view that as far as the depth of the changes in the practice is concerned, a lot will depend on the practice developed by the judges and courts, as well as on the assertiveness of defence counsels.

Access to a lawyer and legal aid

According to the regulatory concept of both the Old and the New CCP, having a defence counsel is mandatory in certain cases stipulated (e.g. if the criminal offence the defendant is suspected of is punishable with a sentence of imprisonment of five years or more, the suspect is detained, is a juvenile, etc.). Whether these so-called "mandatory defence" grounds are in place is established by the proceeding authority, and in these cases the defendant may not decide to participate in the procedure without a defence counsel: in these cases, if the defendant does not have an attorney, the authorities appoint one for them. In the Hungarian system, this equals the "merits test" in terms of the Recommendation on legal aid.

If it is foreseen that due to their financial situation the defendant will be unable to pay the costs of the procedure or parts of it, authorities may grant them cost reduction, entailing that the fee and the costs of the defence counsel are advanced and borne by the state. In the Hungarian system, this equals the "means test" in terms of the Recommendation on legal aid. With regard to this, it may be raised that conditions for cost reduction are too rigid, and the question arises whether cost reduction is indeed available for all indigent defendants. In addition, research shows that defence counsels are appointed on the basis of the means test very rarely.

The current Hungarian legal framework meets the requirements of Article 3(2) of Directive 2013/48/EU as regards the time from which the right of access to a lawyer is in place, since the right to defence and the right of access to a lawyer are granted to the future defendants even before the suspicion is communicated to them.

Earlier research results showed that in the investigation phase, provisions of the Old CCP related to the notification and the presence of defence counsels at interrogations, or the lack of such provisions could lead to deficient implementation of the requirement set forth in Article 3(1) of Directive 2013/48/EU. The New CCP has brought about positive change in relation to notifying the defence counsels about the interrogation of suspects as well: it sets forth that authorities shall wait for the defence counsel for at least two hours before they can commence with the interrogation. However, as a main rule, the presence of the defence counsel remains non-mandatory at the interrogations of suspects, even if defence is otherwise mandatory. On the other hand, it is a positive development that the New CCP made the presence of the defence counsel mandatory for example at the interrogations of juvenile defendants.

The New CCP introduced an important safeguard also with regard to the time available for consultation when setting out that authorities shall grant one hour for consultation as a minimum if the consultation could not take place earlier due to reasons beyond the defence counsel and the defendant. In addition, new rules make it possible in mandatory defence cases (for example for defendants who are detained or are unfamiliar with the Hungarian language) to consult with their defence counsel before the interrogation via phone, in accordance with Article 3(3)(a) of Directive 2013/48/EU and also Recital 23 of the Directive's Preamble.

In line with Article 3(3)b and 3(3)c, the New CCP sets out that defence counsels may, in addition to the interrogation of the suspect and confrontations, be present at certain further investigative acts, corresponding with Article 3(3)c of Directive 2013/48/EU. As far as the active participation of defence counsels at procedural acts is concerned, the new CCP sets out explicitly that the defence counsel may consult with the defendant also in the course of the procedural acts, and continues to make it possible for the defence counsel to actively participate at interrogations, including the posing of questions, making comments and putting forth motions.

The significant limitation of the defendants' procedural rights, such as the right of access to a lawyer, could – in compliance with Article 12(2) of Directive 2013/48/EU – lead to the exclusion of their testimony as evidence.

As a response to the criticisms of the appointment system under the Old CCP, the New CCP introduced a significant change: it made the selection of the appointed defence counsel the task of the respective regional bar association instead of the proceeding authority, prescribing that selection should be random, but proportionate. On the other hand, it gives rise to concerns that there is still no system "to

ensure the quality of legal aid lawyers" in place in Hungary, opposite to what is required by § 17 of the Recommendation on legal aid. The lack of quality assurance is a problem also because previous research has shown deficiencies with regard to the level of performance of appointed defence counsels as compared to retained defence counsels, e.g. in terms of their presence at investigative acts and their level of active involvement. Thus, indigent defendants represented by appointed defence counsels are still often provided with less effective defence than those who can afford to retain a lawyer. Apart from the fact that appointments were made by the authorities, the causes underlying this difference include the fact that as compared to market rates, the fees of appointed defence counsels are still low. In addition to that, under the Old CCP it was a problem as well that appointed defence counsels were not compensated at all for certain activities that are necessary for carrying out defence work. New rules enhance the situation also in this regard, for example by introducing a "preparation fee".

The assessment of the system of appointments in general is hindered by the fact that no statistical data are available as to the ex officio appointments broken down according to the grounds for appointment.

Recommendations

Recommendations for the legislator:

1. In order to comply with Article 3(3) of Directive 2010/64/EU, legal provisions should provide defendants or their legal counsels the possibility to submit a reasoned request for the translation of documents beyond documents served (and therefore translated) on the basis that they regard those essential for the given case.

2. In order to achieve compliance with the requirements of Articles 2(8) and 3(8) of Directive 2010/64/EU, prescribing that interpretation and translation shall be of a quality sufficient to safeguard the fairness of the proceedings, we recommend the following:

    a. Review the provision in the New CCP saying that if it is not possible to appoint a person having the qualification stipulated in a separate legal regulation as interpreter or translator, "any other person having sufficient knowledge of a certain language could be appointed as an ad hoc interpreter". In relation to that, consider prescribing on a statutory level the aspects to be taken into consideration when establishing that a person has "sufficient knowledge of a certain language" (e.g. language exams, certified experience, citizenship, etc.), or prescribing that the authorities shall establish such rules in a binding internal rule or in another format (e.g. in a manual or guideline) that is accessible for the public and foreseeable.
    b. A quality assurance system with regard to interpreters and translators should be introduced on a statutory level, or it should be prescribed that the police and the courts shall introduce such a quality assurance system.
    c. The mandatory audio recording of interpreted procedural acts should be prescribed so that when doubts about the quality of interpretation are raised, the quality can be reviewed by the proceeding authorities.
3. Steps must be taken to ensure that cost reduction be granted to all indigent defendants irrespective of whether defence is otherwise mandatory in their cases. We recommend reviewing the conditions for granting cost reduction, and performing an impact assessment as to whether the current conditions for

cost reduction – taking into account also the income and financial situation of the defendant population – are adequate for achieving the aim of the institution.

Recommendations for the police, the prison service and the courts

4. In accordance with Article 2(4) of Directive 2010/64/EU, the police should determine a mechanism or procedure "to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter".

5. In order to achieve compliance with the requirements of Article 2(8) and 3(8) of Directive 2010/64/EU, prescribing that interpretation and translation shall be of a quality sufficient to safeguard the fairness of the proceedings, we recommend the following to the police and the courts:

    a. Identify the aspects to be taken into consideration when establishing that a person to be appointed as an ad hoc interpreter has "sufficient knowledge of a certain language" in a binding internal rule or another format (even in lieu of a statutory provision prescribing this). The norms of the internal rule shall be accessible for the public and foreseeable.
    b. A quality assurance system with regard to interpreters and translators should be introduced (even in lieu of a statutory provision prescribing this).
    c. Interpreted procedural acts should be audio recorded (even in the absence of statutory provisions) so that when doubts about the quality of interpretation are raised, the quality can be reviewed by the proceeding authorities

6. The template for the questioning of the suspect in the central template-collection of the RobotZsaru NEO system and those written information notes (Letters of Rights) that defendants are provided with in police jails and penitentiary institutions shall be reviewed, with a view to ensuring that defendants are informed about their rights included in Articles 3 and 4 of Directive 2012/13/EU in an adequate and accessible manner.

7. Both the police and the prison service should facilitate for example by holding trainings that their staff members have the necessary knowledge and skills to be able to communicate with defendants in a simple and accessible language, having regard to the condition and personal characteristics of the person participating in the criminal proceeding, in accordance with the requirements of Directive 2012/13/EU.

8. Based on earlier research, it seems necessary to provide premises in each and every police station where the full confidentiality of communications between defendants and their defence counsels can be guaranteed, while the requirements of safety and security can also be met.

9. The police should take steps to increase the number of suspect and witness interrogations audio- and video recorded, which may, among other things, serve as an important safeguard for ensuring that procedural rights are respected.

Recommendations for the legislature and the bar associations

10. In light of the research results, we recommend that the legislator and the bar associations take steps with a view to ensuring that appointed defence counsels provide their clients with quality legal aid. To this end, we recommend the following:
    a. In accordance with § 19 of the Recommendation on legal aid, a system of accreditation for legal aid lawyers should be put in place and maintained.
    b. In accordance with § 17 of the Recommendation on legal aid, a general system to ensure the quality of the services provided by legal aid lawyers should be in place, based on the regular monitoring and evaluation of the appointment system.

Recommendations for the legislator and for all participants of the criminal procedure

11. With a view to ensuring that the practice of ex officio appointments could be adequately assessed, the concerned state authorities should be obliged to collect relevant data about e.g. the number of and grounds for appointments in the different stages of the proceeding, the amounts paid to cover the fees and costs of appointed counsels, etc.

12. As the country report shows, the New CCP and its by-laws bring along positive changes in several areas in terms of compliance with the Roadmap Directives. However, a lot will depend on the stakeholders participating in the criminal procedure and the practice developed by them in terms of whether the new legal provisions will live up to their promise or not. Therefore, it would be important in our view for both the legislator and the stakeholders participating in the criminal procedure to systematically assess the practice emerging under the New CCP.

A.4 Italy – Conclusions and Recommendations

Major issues

In recent years, recourse to pre-cautionary custody has decreased, as shown by the following data: from almost 200,000 arrests in 2009, it has moved to about 173,000 in 2015. Even the use of prison in the very first phase of deprivation of liberty has diminished: in 2010, 23,008 people entered the penal institutions for a period of less than 3 days, pending the validation hearing and waiting (almost always) for a 'speed trial' ('processo per direttissima'); in 2017 the entrances in prison were 5,992. In 60.4% of cases it was foreign nationals, often without a regular domicile. The decrease is undoubtedly a consequence of the entry into force and application of law n. 9 of 17 February 2012.

Following the transposition of the European Directives 2010/64, 2012/13 and 2013/48, the rights to information, translation and legal assistance have been strengthened.

The right to defence of defendants and suspects is facing major obstacles when defendants and suspects are not native Italian speakers. The transposition of the Directive 2010/64 introduced important innovations such as the free translation of written and oral documents even in the event of a conviction,

as well as the right to the translation of the talks with the defence attorney. The latter, however, is often lacking in effect: in 25% of the cases examined, the interpreters arrived when the hearing was already begun, thus not translating the first interview. This absence was generally due to the lack of personnel in the Court, which forced the interpreters to pass frantically from one hearing to another. Even interpreters, like lawyers, make their first appearance in Court, and not in the police station or in other places where there is deprivation of freedom (except for very rare cases, concerning the most serious crimes). This late appearance has sometimes as a consequence that the foreign national discovers the reasons for his/her arrest only at the time of the hearing.

The research showed a certain lack of confidence in the quality of the interpretation offered by the professionals made available by the Courts and the lack of attention of lawyers and judges to the right to translation, considered a fundamental aspect of the Stockholm Roadmap. The lack of a national register of translators and interpreters – to which little payment is reserved (around 5 Euros per hour), usually paid with several years of delay – is a problem.

Finally, in all the cases examined in which the linguistic level of the interviewees was mediocre (5, on a scale from 1 to 10) no interpreter was called. This is a problematic aspect, partly a consequence of the superficiality with which the judicial authority verifies the linguistic knowledge of the accused.

In relation to the right to information, on the one hand the letter of rights was introduced and practical arrangements were made for it to be effectively disseminated. However, there are still too many stakeholders to whom the letter is not delivered (38% of the prisoners or former prisoners interviewed), most of whom are foreign nationals. It has also been found, in some police stations, the practice of not delivering the letter. Law enforcement officers merely show a copy of it, which they then put away. It was also found that access to the case file by defence lawyers can incur various obstacles. Similarly, the consultation time turns out to be excessively reduced. 25% of the interviewed lawyers said they had less than 5 minutes available to consult the case file and prepare an adequate defence (in the context of validation hearings or ‘speed trials’).

The problem of the lack of confidentiality and of time available for the interviews between lawyers and defendants before the validation hearings and the ‘speed trials’ was identified. It is worth pointing out that the first interview takes place in almost all cases just before the hearing, in the Court, and not in the police station or in the Carabinieri stations. In 16% of the cases examined the confidentiality was not fully respected, due to the presence of some escort agents or more generally because of the places where the talks were held (corridors of the Courts, cells of the Courts in which more people were hosted; corners of the rooms where the hearing takes place). 62.5% of the lawyers said they did not have enough time to prepare for the defence.

The research found that sometimes ex officio lawyers are not present at the hearings, although the law obliges them to be present. The penalties provided are rarely imposed. The code of criminal procedure allows the judge to appoint on the spot and at the moment another defender, with the result that in some cases there are extremely fragmented and ineffective defenses. It is, however, necessary to add that the mechanism with which the defence lawyers ex officio are assigned shifts onto the lawyers all the human and professional costs. In case of non-payment, recovery procedures are actually very complex and payments (as well as in cases of legal aid) can be delayed by as much as eight years.

Recommendations

1. In order to minimize the use of pre-cautionary custody in prison the Ministry of the Interior is recommended to fully implement the law n. 9 of 17 February 2012, to which the practices with which the first deprivation of liberty is implemented must adapt on the entire national territory. Today it does not happen, giving rise to an unequal disparity in the treatment of suspected and accused persons.

2. With the aim of countering the current inequality of means between the parties in the preparation of the defense it is recommended to the Ministry of Justice to introduce the notification of the file by mail / fax together with the communication of the date of the hearing, or alternatively to allow to defenders access to the computer database, in order to extend the time of consultation of the file case;

3. It is also recommended, that provision be made within the Courts, of reserved spaces in which the interviews between defenders and assisted person can be carried out in suitable ways and times.

4. In order to ensure greater access to the right to information about their rights for all persons deprived of their liberty, it is recommended that the Ministry of Justice and the Ministry of the Interior take steps to end the practice of showing the letter of rights without delivering it. This could be delivered in the form of a circular could be enough.

5. With the aim of guaranteeing full and informed participation in the criminal proceedings by defendants and suspects who are not Italian mother tongue, the full implementation of Directive 2010/64 is recommended, and in particular the Government is recommended to establish a national register of translators and interpreters, in order to guarantee greater professionalization of the profession;

6. The Ministry of Justice is recommended to provide legal training for interpreters and translators, in particular on legal language and to adjust the wage grid for translators and interpreters, reducing at best the existing gap with respect to market prices, so as to fully comply with art. 5 of Directive 2010/64, which places the State in charge of ensuring the quality of the translation;

7. The Ministry of the Interior is recommended to translate the letter of rights into the most widely spoken languages among those who are arrested, such as Arabic. A recommended criterion for the identification of languages is the use of statistics on the nationality of arrested foreigners.

8. The legislator is recommended to apply the part of Directive 2010/64 which provides for the possibility of challenging the decision concerning the necessity of a translator/interpreter and to challenge the quality of the translation/interpretation.

It is recommended that the Legislature and the Ministry of the Interior reduce as much as possible the threshold of access to linguistic and cultural mediation, in order to avoid situations such as the discovery only at the hearing of the reasons for which someone is under arrest. In this way it could be verified at the beginning, through an evaluation by the interpreter, the level of knowledge that the person in question has of the Italian language.

A.5 Lithuania – Conclusions and Recommendations

Major issues

The legal framework in Lithuania complies with the basic standards of suspects' procedural rights enshrined in the EU directives. Guarantees of the fundamental procedural rights in criminal proceedings arise from the Constitution and are outlined in detail in the provisions of the Criminal Procedure Code. Suspects and accused persons are guaranteed the right to interpretation and translation, including, where necessary, interpretation of the communication with their lawyer. All suspects must be provided written information about their procedural rights, including the possibility to receive legal aid. The Criminal Procedure Code provides for an active role of a defence lawyer, establishing not only the right but also the obligation to use all legal means of defence. Suspects under arrest have the right to inform a family member or a close relative about the arrest, as well as to notify him/her personally.

In some respects, national laws establish a higher standard of procedural rights than the minimum required by the directives, i.e. the translation of the essential documents must always be made in writing and cannot be substituted with an oral translation, the letter of rights must be served to all suspects and no restrictions on the right to have a lawyer are provided.

The interrogations observed and interviews with specialists in criminal law – lawyers and investigators – revealed certain good practices, as well as practical problems. Due to limited scope of research – information was collected from 54 interrogations in three different police units under of one Chief Police Commissariat – the information collected does not allow to make conclusions as to the prevalence and scale of the identified problems throughout Lithuania. However, the collected data reveals tendencies and problematic areas of practice that deserve attention.

The observed interrogations, interviews with lawyers and with investigators have shown that in practice there are usually no major problems in ensuring that suspects are able to give evidence in their native language or a language they understand. Problems concerning interpretation quality are more frequent when interpretation in rarely encountered languages and (or) of complex legal language is required. Suspects are informed about the content of suspicion against them, and in most observed cases the investigators informed suspects about their right to remain silent and not to give evidence.

On the other hand, in practice sometimes the rights may more be theoretical than effective.
The letter of rights is written in lengthy and complex sentences, citing the provisions of the Criminal Procedure Code, with references to the procedures established in the Criminal Procedure Code or other laws. As observations of interrogations have shown, investigators rarely provide further explanations about the content of procedural rights, apart from listing these rights. The letter of rights is served at the beginning of the interrogation along with several other procedural documents. Thus, the procedure of informing suspects about their procedural rights often becomes more of a formality with little practical use. A more accessible version of the letter of rights is served only to persons subject to a European arrest warrant.

The observed interrogations revealed that waiving a right to have a lawyer cannot be considered completely voluntary in all cases. In the absence of grounds for mandatory participation of a defence lawyer, information on the right to have a lawyer was usually provided very briefly, with the right to have

a lawyer being presented as a mere formality and emphasizing that a lawyer will have to be paid. The obligation provided in the Criminal Procedure Code for the investigators to explain the consequences of waiving the right to a lawyer to a suspect was also carried out inappropriately, by only reassuring the suspect that it will be possible to invite a lawyer later. Such a way of providing information, especially when asking repeatedly whether a suspect indeed needs a lawyer, and/or indicating that with the participation of a lawyer the proceedings will last longer, might amount to pressure on a suspect the right to waive a lawyer. After the entry into force of the provisions on the mandatory participation of a lawyer in interviews with arrested suspects, situations when a suspect is pressured into refusing to have a lawyer should cease. On the other hand, the new provisions will not remedy the problem of legal aid quality.

Lawyers' right to access case materials during the pre-trial investigation is very limited, except for the information on which the prosecutor's request for pre-trial detention is based. This is because the prosecutor, under the Criminal Procedure Code, can refuse access to the case materials when such access, in the opinion of the prosecutor, could undermine the success of the investigation. As mentioned by lawyers interviewed during the research, prosecutors are widely using the discretion granted to them. Therefore, access to the full case file usually becomes possible only after the pre-trial investigation is completed. This might raise issues under the Directive on the right to information, where grounds for refusal to access case file are more limited.

Although the Criminal Procedure Code contains an extensive list of grounds for mandatory participation of a lawyer and investigators often appoint legal aid lawyers on other grounds, the role of legal aid lawyers in criminal proceedings is often only formal. In part of the interrogations observed the role of legal aid lawyers was limited to physical presence in the interrogation room or was passive. Only in one observed case, the legal aid lawyer requested to be allowed to talk with the suspect in private before the interrogation. In addition, three instances were observed, where a lawyer participated in two interrogations at the same time, thus being present only in part of the interrogation. Interviewed lawyers and investigators were also critical about the quality of the legal aid services in criminal cases.

Cases when the lawyer participates in the interrogation only formally or participates only in a part of the interrogation, violates the suspect's right to an effective defence, as the suspect not only receives no legal advice, but his or her situation may also be aggravated. For example, the fact that a lawyer was present in the interrogation may make it more difficult for the suspect to subsequently prove violations of his procedural rights. Moreover, knowing about the formal attitude of legal aid lawyers to the representation of suspect's interests, investigators may prioritise inviting a legal aid lawyer instead of a lawyer designated by the arrested suspect. Thus, the inadequate quality of services provided by legal aid lawyers may indicate a systemic problem, which undermines confidence in lawyers, legal aid and fairness of the criminal proceedings in general.

The research also revealed problems in practical implementation of procedural rights, which resulted from a lack of clear procedures or from a negligent attitude towards the requirements of the Criminal Procedure Code. Observed interrogations of suspects under arrest showed that different investigators structured the interrogations differently: some of them provided information about rights at the beginning of the interrogation, while others served all the documents, including the letter of rights, at the end of the interrogation. Some investigators asked whether the suspect agrees to give evidence, while others did not mention the possibility to stay silent or not to answer certain questions. In addition, interviews with investigators revealed that sometimes a notification of suspicion is served only to suspects who are willing to receive it.

In the absence of a clear procedure on how a suspect's right to notify a close person about his or her arrest should be implemented, this right enshrined in the Criminal Procedure Code is only partially guaranteed in practice. Interviews with the investigators revealed that the police always notify a family member or close relative indicated by the suspect. However, despite a clear statutory provision, there is no uniform practise as to whether suspects should be allowed to notify their family members or close relatives personally. This results in denying such a possibility for some suspects without any specific reasons.

Lack of qualified interpreters and translators capable of providing high quality interpretation and translation services in the criminal proceedings, as well as lack of a register of qualified independent interpreters and translators lead to difficulties in ensuring services' quality and sourcing interpretation and translation for languages that are rarely used in Lithuania.

During the court hearings, suspects and accused are sometimes not allowed to sit next to their lawyers, thus limiting the lawyers' ability to advise, explain the procedure, etc.

On the other hand, during the observations, examples of good practices, applied by investigators, have been observed as well. One such example could be offering the suspect the opportunity to ask questions, after the suspect has been served with the letter of rights and given time to read through it, thus increasing the likelihood that the letter's content will be understood. Another example is inquiring whether medical assistance is required when the suspect has medical problems. Informing the suspects about their right to refrain from giving evidence before beginning the interrogation, as was done by part of the investigators, should also be considered good practice.

Most investigators in the observed interrogations allowed suspects to read through the notification of suspicions against them without rushing, and some offered to answer their questions if something was unclear. Several interrogators also offered suspects the chance to consult with their lawyers in private before the interrogation. These examples, showing the professional attitude of investigators towards procedural rights of suspects, should be encouraged and become part of normal professional practice.

Recommendations

1. Adopt letters of rights compliant with the requirements of EU directives:
    a. Draft a new letter of rights for suspects, providing essential information on procedural rights in simple language, and emphasising that suspects have a right to ask for additional information and explanations from officers. We suggest taking into consideration the alternative text for letter of rights which was drafted by the Human Rights Monitoring Institute which was drafted in compliance with the requirements of the Directive on the right to information
    b. Draft a version of the letter of rights for minors, which includes the rights from the Directive on procedural safeguards for children who are suspects.
    c. Amend the letter of rights in European arrest warrant proceedings, and include the right to not consent to being surrendered to the requesting State.

2. Include provisions in the Criminal Procedure Code which would effectively ensure the right to defence and preclude uncertainties in practice:
    a. Establish a requirement to make audio and video recordings of interrogations. The recordings would be a valuable source of information in deciding arguments whether the suspect's procedural

rights have been breached during interrogation, e.g. whether the defence lawyer and interpreter participated, whether pressure was exerted to waive the right to a lawyer, to give evidence etc.
   b. Establish the right of lawyers to sit next to suspected and accused persons during court hearings.
   c. Establish a requirement that prosecutors' decisions not to allow suspects or their lawyers to access the case file during pre-trial investigation must be based on specific grounds (and not only abstract quotes from the Criminal Procedure Code), which demonstrate the necessity for such restrictions.

3. To adopt sub-statutory acts and harmonize investigators' working practices:
   a. Establish a unified interrogation protocol, and specific time and ways to provide suspects with information on their procedural rights, as well as what documents and when must be served.
   b. Establish that officers filling out the Record of arrest should ask the arrestee whether he or she wants a specific lawyer. The details on the requested lawyer should be included in the record, so that the investigator receiving it could contact the lawyer when planning the interrogation. The official form of the Record of arrest should be amended accordingly.
   c. Clear rules for informing a third party about a person's arrest or for allowing the arrestee to contact a third party should be established, allowing the arrestee to request this not only when the Record of arrest is being filled in, but also later.

4. Adopt measures to improve the quality of interpretation and translation, and legal aid services:
   a. Establish a register of independent and qualified interpreters and translators;
   b. Research reasons for poor quality of legal aid services, and use the collected data to come up with solutions aimed at making the legal aid system more appealing for lawyers of service quality.

A.6 Poland – Conclusions and Recommendations

Major issues

Numerous amendments to the Code of Criminal Procedure (CCP) aimed at implementing the EU legislation concerning suspects' rights resulted in adequate protection of the right to translation and the right to information in criminal procedure. However CCP still does not guarantee effective access to a lawyer for detainees and suspects.

Police officers are rather willing to use the help of an interpreter, because it allows them to conduct the proceedings with a detainee (suspect) more efficiently and it protects them against allegations of unfairness of the proceedings that might be raised at a later stage of the proceedings. The procedure for assessing the need for the assistance of an interpreter varies and depends on individual officers. Therefore, it is worth considering unifying the practice in this area. The decision not to appoint an interpreter does not take the form of a procedural decision subject to judicial control. There is no complaint mechanism for the quality of translation. Furthermore the binding law does not guarantee the absolute confidentiality of legal advice given to a suspect by his lawyer with the help of an interpreter.

The instruction on the rights of detainees and suspects is a basic source of information on their rights, however, due to the rather hermetic language, these instructions in many cases did not fulfill their

information function fully. Placing posters with information about detainees'/suspects' rights at the Police station could be considered.

Information about the reason for arrest is included in the arrest report and is subject to judicial review in the course of examining the legitimacy of arrest. However, the justification of charges is usually very vague and does not contain information about factual basis or about gathered evidence. Before the submission of the indictment to the court, charges are not subject to judicial review.

The scope of the reasons for justifying the refusal of access to the case files corresponds to the acceptable grounds for refusing such access under the Directive 2012/13/EU. There is also a complaint mechanism against the refusal of access to the case file. However, this standard is not met in the case of excluding certain materials of proceedings under Article 250.2b CCP. Such materials may form the basis of a request for detention even though the suspect has no access to them. The basis for the application of pre-trial detention is based on materials disclosed by the prosecutor, not the entire collection of materials. What is more, the actual access to the file before the court's hearing depends largely on the court's organization.

A small number of attorneys/legal counsels taking part in the first procedural step at the Police stations after the arrest confirm the thesis that existing solutions ensuring access to a lawyer are insufficient. As a result, in practice, the organization of legal assistance takes place outside the Police station. The confidentiality of the contact with a lawyer may be limited by the decision of the Police officer, which does not require written justification nor is subject to any control. Rooms at Police units often do not provide adequate conditions for confidential conversation with a lawyer while at the same time protecting against the detainee's escape. Article 245.2 CCP. according to which provisions on lists of defenders in the accelerated procedure should be applied accordingly, is not used in practice. At the Police stations there is no information available about the defenders, in particular the lists of defenders in the accelerated proceedings. Low awareness of Directive 2013/48/EU among professional representatives may result in rare application of the Directive in judicial decisions.

Recommendations

Right to interpretation

1. Taking into account Article 5.3 of Directive 2010/64/EU, an absolute confidentiality regarding the translation of contact with the defender shall be secured.
2. Securing proper technical conditions at police headquarters will allow for wider use of videoconferencing for translation purposes. This would allow for faster access to interpretation. The list of sworn translators kept by the Minister of Justice should always contain contact details such as telephone number and e-mail address.
3. The decision to refuse appointment of an interpreter should be subject to judicial control.
4. The remuneration rates for translators have not changed since 2005 and may turn out to be noncompetitive compared to commercial rates, therefore it is necessary to consider raising these rates.

Right to information

5. Changing the instructions of rights so that they are more legible also at the graphic level should be considered.
6. A written letters of rights should not exclude oral instructions. The officer should make sure - by asking 2-3 additional questions - whether the detainee (suspect) understood the instruction.
7. The right to remain silent should be considered for a detainee who was not charged yet.
8. Instructions should be broadened to contain information about: the right to appeal under Article 302 CCP; right of a witness to appoint a legal representative who could participate in the interrogation; the right to lodge a complaint against refusal of access to files in preparatory proceedings.
9. Exclusion of materials based on article 250.2b CCP, which may be grounds for detention, should be subject to appeal (in order to meet the standard resulting from Directive 2012/13/EU).

Right to access to a lawyer

10. Legislation should clearly indicate the possibility of contacting the defender before the hearing (Article 313 CCP), and not only the possibility of the defence attorney to participate in the interrogation (Article 301 CCP).
11. Limitations on access to a lawyer should meet the standard resulting from the directive 2013/48/EU- at the formal level it should be a decision that can be challenged. At the level of the merits, the basis of this decision must fall within the scope of prerequisites allowed under Directive 2013/48/ EU.
12. Police officers should start applying Article 245.2 CCP and providing the detainees with information on the defenders in the accelerated proceedings.
13. Police units should meet the technical conditions allowing for a confidential conversation between the defender and the client, that will ensure that detainee will not escape from the Police station.
14. Limiting the confidentiality of contact with the lawyer should be an exception, not the rule.
15. Professional self-governments should provide more training on the standards resulting from EU legislation on the rights of suspects, in particular the rights under Directive 2013/48/EU.
16. In order to protect against enforced waiver of the right to a lawyer it should be mandatory to record the course of interrogation when the defender does not take part in it.

A.7 Romania – Conclusions and Recommendations

Major Issues

Overall, the Romanian legislation concerning the suspects' and defendants' rights is compliant with the EU law. However, additional legislative changes and guidelines need to be adopted in order to ensure fair and adequate protection of rights during the first phases of the criminal investigation, namely, the initial police hearings. Significant problems remain concerning the practical implementation of the already existing legal provisions.

Right to interpretation and translation

Researchers did not have the opportunity to observe how interpretation rights are guaranteed by police officers and lawyers during police hearings. All the suspects/defendants in the cases observed were Romanian citizens and presented no vulnerability which would have required interpretation services. Even so, it is very clear that the national legislative framework should be significantly amended in order to cover important requirements of the Directive 2010/64/UE on the right to interpretation and translation.

Interviewed police officers have complained that sometimes it is difficult to find an interpreter during the 24 hours police arrest (and also during later phases of the criminal investigation). One cause for this seems to be the very low interpreter fees (app. 5 euros/hour) and the fact that payment is processed with delay. In many cases there are no sanctions applied if the interpreter fails to respond to the police officers' calls. Moreover, there are cases when in the absence of an interpreter, informal means of interpretation such as Google Translate are used.

Notification of rights

According to the Romanian legislation, criminal investigation bodies, including police officers are obliged to inform suspects and defendants about their rights and duties in writing. The law does not stipulate with clarity how this communication should be done. This omission/ambiguity of the law permits circumventing the actual information of the person, which may be asked to sign, in a statement, a purely formal sentence, in the sense that he has become aware of his rights (without, in fact, the person being informed of the existence and content of each right provided by law).

As of October 2017, suspects and defendants also have the right to a letter of rights. Unfortunately, during the observational research they were not available/provided in the police stations, therefore no assessment can be made about their impact in helping persons in police custody better understand their rights. What can be stated with certainty is that the information provided about rights has been done in a formalistic manner. In practice, police officers are slightly more careful when it comes to persons deprived of liberty because failing to notify them of their rights triggers absolute nullity of the procedure (something they want to avoid). With very few exceptions, police officers did not provide further explanations or clarifications regarding the letter of rights put in front of suspects/defendants and in none of the cases did they check whether the suspect or defendant understood their rights.

The right to silence

In none of the observed cases did police officers or even lawyers explain suspects and defendants the meaning of the right to silence or the consequences of remaining silent/failing to do so. In half of the cases, persons in police custody were also orally informed about this right. In two cases this was done in a dissuasive manner. Senior lawyers interviewed claim that the right to silence is presented by police officers in a manipulative way, as if not giving a statement means that one has something to hide.

Access to case file documents

None of the lawyers present during the observed police hearings had read any documents in the case file before talking to his/her client. The Romanian legislation is limiting for the suspect, whose right to consult

the file is restricted until he becomes a defendant. Lawyers have admitted that it is very difficult to adapt to the way the criminal investigation bodies work, especially their tactic of delaying access to the case file documents, leading to an initial poor defence. According to current legislation, the possibility of case file restriction during the criminal investigation is formulated in general, ambiguous terms, giving a lot of power to prosecutors to deny access to documents.

Legal aid and the Role of Lawyers

Legal assistance is mandatory for persons who are deprived of liberty and under no circumstance can assistance be waived in these situations. For suspects and defendants who are not deprived of liberty and are investigated for minor offences, the police hearings can be carried out in the absence of a lawyer, if they cannot afford one. This is problematic, especially in cases of vulnerable persons, who cannot read or write. Even if the legislation allows criminal investigation bodies to appoint a legal aid lawyer if they consider a person cannot defend herself, this rarely happens in practice. In some cases, for persons deprived of liberty, some police officers chose to call certain lawyers, despite a well-established randomized appointment procedure.

During the police hearings, the researchers had the opportunity to observe the behaviour of both legal aid lawyers and private lawyers. The consultations before the hearings were very short, ranging from 1 minute to 10 minutes long and they usually happened either on the police station hallway or in the hearing room, in the presence of several police officers. There was no pressure coming from police officers concerning the length of these consultations, although in some situations it was not clear to them if they should allow for consultation breaks while the hearing was taking place. The most striking observation while attending hearings has been the attitude of most lawyers, characterized by lack of professionalism towards their clients. They were either indifferent (with minimal intervention) or arrogant, failing to explain what was going on and disregarding the clients' opinion.

With one exception, based on the observations made, the legal assistance can be assessed as ineffective, a mere procedural formality.

Recommendations

Government and Parliament

1. To amend the Criminal Procedure Code and the law regulating the lawyers' activity in order to clearly specify what the legal assistance activity during the criminal investigation phase means. Detailed legislation should provide for the lawyer's right to consult his client before answering any question during the hearing as well as their necessary stipulations for the operation in practice of the right to legal assistance.

2. To amend the Criminal Procedure Code in order to make clear the maximum number of days for which restriction in a case file may be ordered by the prosecutor.

3. To amend the existing legal framework concerning the right to interpretation and translation during criminal proceedings in order to cover important requirements of the Directive 2010/64/UE. Thus:

4. To adopt legislation in accordance with Article 2 (4) of the Directive in order to set in place a mechanism or procedure to determine whether suspects and defendants speak and understand the language of the criminal proceedings and whether they need an interpreter.

5. To adopt legislation in accordance with Article 2 (5) and 3 (5) of the Directive to clearly clearly stipulate the right to challenge a decision regarding the need for interpretation/translation and/or its quality.

6. To adopt legislation in accordance with Article 2 (8) and 3 (8) of the Directive in order to establish a mechanism for the verification of the quality and accuracy of the interpretation and translation during the criminal proceedings.

7. To adopt legislation in accordance with Article 3 (3) of the Directive in order to stipulate that the decision depriving a person of its liberty should also be among the essential documents which need to be translated.

8. To adopt legislation which provides that suspects/defendants and their lawyers have the right to submit a reasoned request for the translation of other documents, on the basis that they regard those essential for the given case.

9. To adopt legislation in order to increase the fees for interpreters and translators so that quality of their services is ensured.

10. To adopt legislation in order to increase the fees of legal aid lawyers so that the quality of legal services is ensured.

Ministry of Internal Affairs

1. To adopt guidelines for how police hearings should be carried out, detailing the role of the police officers and how he interacts with the lawyer.

2. To ensure that letter of rights are available both in Romanian and other languages at the level of all courts, prosecutors' officers and police stations.

3. To issue guidelines on when and how the letter of rights should be provided, especially in situations when suspects or accused persons do not know how to read or write or find themselves in other vulnerable situations.

4. To adopt regulations requiring police officers to explain the consequences of waiver of the right to a lawyer.

5. To provide the necessary resources for the equipment of all police stations with audio-video cameras.

The Romanian Police

1. To take all measures to ensure that police officers receive trainings in order to increase their skills and knowledge on how to better inform suspects/defendants about their rights. This information should

be done in a simple and accessible manner, with consideration given to the specific characteristics of persons participating in the criminal proceedings.

2. To take all measures to sanction those police officers who avoid/circumvent the randomised system of appointing legal aid lawyers.

3. To habitually collect data in relation to the number of persons who have requested an interpreter during the criminal investigation phase.

4. To keep records, in accordance with Article 7 of the Directive 2010/64/UE on the right to interpretation and translation, of the cases when an oral translation or oral summary of essential documents has been provided at the police stations, or when a person has waived the right to interpretation or translation.

5. To ensure timely payment for the interpretation and translation services provided at the police stations.

National Union of Bar Associations

1. To take efficient measures for the organization and control of the randomised system of appointing legal aid lawyers and sanction those legal aid lawyers who avoid/circumvent it.

2. To set out clear and detailed rules about the role of the lawyer at the investigative stage. Together with regular monitoring and evaluation of the appointment system, this would ensure quality of the legal services.

3. To set up a specific course on legal assistance during the criminal investigation for lawyers who choose to provide legal aid and include it in their mandatory curriculum in their first 3 years of practice.

4. To offer accreditation to legal aid lawyers advising at the investigative stage.

A.8 Slovenia – Conclusions and Recommendations

Major issues

The right to interpretation and translation

The right to use one's language within proceedings before state bodies is protected by the Constitution of the Republic of Slovenia. The right to interpretation and translation has been incorporated into Article 8 of the CPA from its adoption in 1994. In 2014, the EU Directive in the right to interpretation and translation was transposed into the national Criminal Procedure Act. As a result, CPA now contains more detailed provisions on how the right to translation and interpretation is ensured, compared to the previous regulations.

Detained suspects have the right to interpretation and the police inform suspects on this right. The suspects receive the information from the police also in writing (a brochure delivered in the language the suspect understands). The suspects must sign that he or she received the information and the police officer who have the information to the suspect also has to sign.

However, in the national law there are no specific provisions on how the need for an interpreter is determined. The law simply states that interpreters are needed if the procedures are not conducted in the language that the parties to the procedure understand. The responsibility to assess the need lies on the police officer conducting police actions. If the officer finds the conversation impossible or that the level of understanding on the suspect's part is not sufficient, the officer will engage an interpreter. In practice appropriate assessment appears to be problematic when the suspect speaks one of the languages of the former Yugoslavia (Croatian/Serbian) or speaks English – languages usually spoken and understood by police officers. It appears that the police too often decide not to engage an interpreter if they are able to communicate with the suspect without the assistance of a lawyer - even if the level of communication is too basic to meet the communication skills needed to appropriately conduct the interrogation, particularly taking into consideration the importance of the suspects statements for the outcome of the criminal proceedings.

The main provision of Article 8 of the CPA does not explicitly mention the right to interpretation of private lawyer/client consultation. For the purposes of legal clarity, it would be much more appropriate if the right to free-of-charge interpretation of lawyer/client consultations was clearly incorporated in the text of Article 8 of the CPA.

Internal guidelines of the police direct towards an oral translation of all documents related to the decision on detention. As a result, in practice mostly oral translation of essential documents related to police detention is provided. In the cases we observed, written translation of the decision on the deprivation of liberty was not provided.

It is also problematic, that the same interpreter is used both for the police communication with the suspect and the lawyer/client consultation, which might affect the interpretation and possibly expose information the suspect and his/her lawyer decided to keep confidential.

The right to information

As the right to information of persons deprived of their liberty is constitutionally protected, this right has been incorporated into the CPA since its adoption in 1994. The EU Directive on the right to information was transposed into the national legal system with the adoption of the 2014 the CPA-M amendment. It appears that the legislative framework is for the most part in compliance with the EU Directive.

The suspect must be informed about the rights immediately when deprived of his or her liberty and they receive information in writing.

Generally, the police in practice informs suspects of their rights. This can particularly be attributed to the usage of standardized forms when drawing up written records of the interrogation/official note of the suspect's statement and preparing written decisions on the deprivation of liberty. However, concerns were raised that this form of informing the suspects of their rights is not very effective, and that the suspects cannot truly understand the content of the rights and how to exercise them.

However, if the obligation to provide written information is not complied with, no specific remedies apply for such cases.

The law also does not explicitly require that suspects are entitled to keep a copy of the written information with them during police detention as required by the Directive.

There is no special brochure available for suspects subject to EAW proceedings as laid down in the Framework Decision 2002/584/JHA.

Amendment CPA-M, transposing the EU Directive on the right to information, introduced into the national criminal procedure law the right to access the materials related to detention. Access to relevant material can be refused, if it could pose a serious threat to the life or the rights of another person, or if the inspection would affect the course of pre-trial proceedings and/or investigation, or if this is dictated by specific reasons of the defence or security of the State. Research findings raise serious concerns that the right to access case materials is not ensured in practice. It appears that the possibility to refuse access as stipulated in Article 157(6) is widely used by the police.

The right to a lawyer and to legal aid

In Slovenia, suspects and accused persons have the right to access a lawyer in pre-trial criminal proceedings. The source of the right is Article 29 of the Constitution of the Republic of Slovenia, and is further determined with the provisions of the CPA.

The law guarantees the right to access a lawyer from the moment of apprehension onwards. Since the 2003 amendment of the CPA, the police are not only obliged to inform the suspect of his/her right to a lawyer when they place him/her in police custody, but also before they want to procure a statement from the suspect. To ensure that suspects could exercise their right to access to a lawyer effectively, the CPA demands from the police to postpone the interrogation until the arrival of the lawyer, if the suspect declares that he/she wants to retain one.

Although the national legislation pertaining to the right to access to a lawyer in police proceedings/proceedings related to police custody is in line with the EU Directive, certain characteristics of the Slovenian criminal system significantly hinder the access to a lawyer for many suspects – particularly those who cannot afford to pay for the lawyer's services.

For the preliminary (police) phase of the proceedings, the law does not prescribe mandatory legal assistance – not even for suspects deprived of their or vulnerable suspects such as children and person with intellectual or psychosocial disabilities. There are also very limited legal provision concerning legal aid in the police phase. Research shows that in practice this possibility is almost never used. Deprivation of liberty in itself is not considered as a circumstance that requires appointing a legal aid lawyer in the interest of justice.

There is also no scheme of duty lawyers that could be contacted in case the suspect who wishes to exercise his/her right to a lawyer does not know which lawyer to call. Such suspects often encounter difficulties when trying to retain a lawyer.

Lawyers are also sometimes reluctant to attend interrogations at the police stations, as they believe that the lack of information and access to police files prevents them from providing effective defence. They

believe that in such circumstances, it is not in the client's best interest that their presence allows for the written record of the interrogation to be used as evidence later in court. However, even the official note of the suspect's statement (made without a lawyer) is kept in the case file through the entire criminal proceedings, including trial and the presiding judge is acquainted with the statement. Furthermore, the official note of the statement often provides the basis for further police investigative action and therefore has an important impact on the course and the outcome of criminal proceedings. This confirms the importance of the lawyer's involvement in the police stage of the proceedings and underlines the need to establish an effective legal aid and mandatory defence system for detained suspects.

Recommendations

To the Government and the State Assembly:

1. To amend the CPA so that the right to free-of-charge interpretation of private lawyer/client consultation is clearly included in the relevant legal provisions;
2. To amend the CPA to extend mandatory legal assistance to police proceedings, similarly as this is arranged in the court phase of the proceedings;
3. To amend the CPA ensuring suspects and accused persons have effective access to legal aid, with clear pathways and conditions from the time they are suspected of having committed a criminal offence, including police detention proceedings;
4. To set up a scheme of duty lawyers that could be contacted by the police to assist the suspect to retain a lawyer if the suspect so requests;
5. To set up a requirement and to ensure training for lawyers that provide representation at the police stage of the proceedings.
6. To clarify in the law that suspects have the right to keep the Letter of Rights with them, while they are detained.

To the Police:

7. To provide clear guidelines to police officers assessing the need for an interpreter in police proceedings to widely ensure professional interpretation to all suspects who do not speak or understand the official language of the proceedings;
8. To provide the suspects with written translation of essential documents related to police detention;
9. To introduce mechanisms for checking whether the suspect understood the information provided by the police; e.g. asking the suspect to repeat the information in his/her own words and providing additional explanations;
10. To ensure access to police documents and materials to suspects and their lawyers for the purpose of effective defence.

A.9 Spain – Conclusions and Recommendations

Major issues

Right to interpretation

The legal framework on the right to interpretation and translation is generally compliant with the provisions of the Directive, as it seeks to ensure access to interpretation at the earliest phase of the arrest. However,

the Official Register of Judicial Translators has not been created yet, in spite of the legal obligation to do so and its importance in order to ensure the quality of the service provided.

Field-research has shown that, in practice, access to interpretation and translation is not provided when detainees are first informed of their rights and the reasons for their arrest. Although the Ertzaintza has the letter of rights translated into a number of languages, agents do not provide suspects with a translated version of the letter but rather read the information in Spanish, even if they are aware that detainees do not understand.

Information on rights at this early stage of arrest is critical and agents should ensure that detainees are provided with a translated version of the letter or take all necessary steps to have the information on rights translated by interpreters over the telephone.

Access to an interpreter during lawyer/client contacts in police premises appears to be well ensured, in general terms. Although the situation where a detainee was convinced to waive his right was extraordinary and does not reveal a pattern, it is to be noted that agents and lawyers shall refrain from acting in such a way and rather seek for alternatives that allow the effective exercise of the right.

Right to information

The provisions of the Criminal Procedure Act on access to information on rights comply with the provisions of the Directive. The practice, as regards the timely disclosure of oral information on rights and reasons for the arrest comply with legal provisions. However, the letters of rights contain a literal reproduction of the text of art. 520.2 of the Criminal Procedure Act, which is not drafted in a simple and accessible language, as requested in the Directive. Although officers tend to use simpler language to explain the content of their rights to detainees, it would be necessary to adapt the drafting of the official forms to make it more accessible.

It stands out from the field-research that detainees are never allowed to keep a copy of the letter of rights, despite the fact that the law does clearly recognize their right to do so.

Regarding access to case materials and documents at police stations, the transposition of the Directive is inadequate. Procedural rules refer to “access to essential elements”, instead of documents, as provided for in the Directive. In addition, guidelines for police forces have been issued that contain a narrow interpretation of the information to be disclosed to detainees and their lawyers.

In practice, some police agents of the Ertzaintza provide lawyers with documents of the police file, although most often agents only give oral information on the facts, indications of participation and reasons for the arrest.

Right to access to a lawyer and legal aid

The normative framework concerning access to a lawyer and access to legal aid in criminal proceedings complies with the Directive.

In practice, the exercise of the right to access to a lawyer is respected, as well as the confidentiality of lawyer/client interviews. The legal aid scheme is organised in an efficient fashion that allows legal assistance to be provided in a timely manner.

However, field-research has shown that the Ertzaintza applies an exception to the mandatory nature of access to a lawyer for arrested persons in cases of arrests carried out by virtue of a warrant. There is no legal basis for this exceptional practice that amounts to a breach of a fundamental right.

In addition, police forces have been interpreting that the role of the lawyer during the statement procedure should be limited to asking questions or requesting clarification only when the arrested person has finished responding to the questions of the police. This interpretation excludes the capacity to, for example, intervene to advise their client not to answer some of the questions of the police and hardly seems compatible with the case law of the Constitutional Court, nor is it compatible with the Directive 2013/48. As regards lawyer's performance, it also stands out from the fieldwork that most lawyers have not yet interiorised the new possibility of having a confidential interview with their clients before the statement procedure.

Recommendations

Right to interpretation

1. Create the Official Register of Judicial Translators and Interpreters for registering those professionals with the corresponding authorisation and qualifications, as provided in the law.
2. Develop practical guidance on how to assess the need for interpretation and translation.
3. Provide detainees systematically with translated versions of Letters of Rights, when available. In cases where there are no translated versions in the language required, request a translation over the telephone in the very first information on rights and reasons for arrest.

Right to information

4. Draft the Letter of Rights in an accessible and clear language.
5. Allow detainees to keep a copy of the letter of rights with them as a rule and only prevent them from doing so in extraordinary circumstances, that should be recorded in the police file
6. Modify the interpretation of the concept of essential elements/documents, in line with the Directive and the interpretation of the Constitutional Court.
7. Organise trainings and issue guidelines for lawyers insisting on the need to systematically ask for available documents to be disclosed to them.

Right to access to a lawyer

8. Ensure systematic access to a lawyer for all detainees with no exception, including in cases of arrests upon a warrant.
9. Ensure that lawyers are allowed to perform their duties during interrogations by actively intervening and counselling their clients, as provided in the Directive.
10. Organise trainings and issue guidelines for lawyers on the importance of holding interviews with their clients under police custody prior to the statement procedure.






















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