INSIDE POLICE CUSTODY 2

An Empirical Study of Suspects’ Rights at the Investigative Stage of the Criminal Process in Nine EU Countries
About the Association for the Defence of Human Rights in Romania-the Helsinki Committee (APADOR-CH)

The association for the Defence of Human Rights in Romania—the Helsinki Committee (APADOR-CH) is a non-governmental, not-for-profit organization established in 1990. Its mission is to take action for the protection of human rights and the establishment of equilibrium when they are in danger or infringed upon.

APADOR-CH works for: the development of efficient legal and institutional mechanisms for respecting human rights and monitoring relevant institutions; the improvement of the legislative framework and of the practices regarding the right to free assembly and association, freedom of expression, right to private life; the development of practices and institutional mechanisms for increasing transparency and good governance; initiation of strategic litigation in cases which deal with infringement upon human rights; the monitoring of: police abuses, regulations and practices in the field of national security which have an impact on human rights; regulations and practices concerning deprivation of liberty.
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1. INTRODUCTION

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

This report is based on research carried out in Romania as part of a research project in which empirical research was 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 June 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.

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 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 *Inside Police Custody* project, the original plan for the empirical stage of the research consisted of three elements.

**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 to accompany a number 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 *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 Lithuania and Romania, it was not forthcoming in Austria, Bulgaria, Italy and Hungary. 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. 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 methods included, for example, interviews of arrested detainees in prison awaiting a validation hearing, an enhanced number of
interviews of lawyers, interviews 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 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 measure 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 EUROPEAN UNION CONTEXT

In 2009 the EU adopted a ‘roadmap’ of procedural rights in criminal proceedings, with the aim of adopting EU legislation on a range of procedural rights for suspected and accused persons, to be introduced over a number of years. The EU had, over a decade or more, introduced extensive legislation on police, prosecution and judicial cooperation 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

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1 Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings, 1 July 2009, 11457/09 DROIPEN 53 COPEN 120.
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 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 suspects and accused. Some of the limitations are practical, in particular the backlog of cases to be dealt with by the ECtHR, leading to lengthy delays in consideration of and judgements in respect of cases taken before it. However, others were 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 was the fact that the court considered the procedural rights of suspects and accused within the context of whether, overall, the proceedings were fair. Together with the fact that the court could only consider principles in the context of the fact of cases taken before it, the result has been that whilst the ECtHR has been successful in establishing general minimum standards, it could not 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 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.\(^2\) The Directive provides that suspects 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.

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 mechanisms 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 the 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,\(^3\) 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.

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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 they understand, 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: suspects or accused persons are 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 suspects 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 of 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 suspect or accused must be promptly informed of any 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 Art. 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. Suspects 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. The Directive sets out rights 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 suspects 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; to 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

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4 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 upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.
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 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)).

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 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,\(^5\) and thus certain provisions of a Directive may apply to a person who has not (yet) been arrested. However, there may be further conditions to be satisfied before any particular right under a Directive is applicable.

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.

Note that the approach to articulating rights differs slightly as 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 difference 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.

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\(^5\) See ECtHR 15 July 1982, *Eckle v Germany*, No. 8130/78, para. 73, when the formulation was first adopted.
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.\(^6\) 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.\(^7\) This is the longest and most complex of the six 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’.\(^8\) 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.

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\(^7\) 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.

The Directive on legal aid was adopted on 26 October 2016, with a transposition date of 25 May 2019.\(^9\) 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).

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1.3 National Context

1.3.1 Research methodology in Romania

The purpose of this research was to gather empirical data about the practical implementation of procedural rights of suspects and defendants in police custody. In Romania, being in “police custody” means the application of three preventive deprivation of liberty measures: “administrative leading” \(^{10}\) to the police station, police arrest and pre-trial detention. This research study focuses mainly on the rights of suspects and defendants which are heard in view of their police arrest.\(^{11}\)

In 2017, over a period of 42 days (July-December), APADOR-CH representatives have observed the daily routines of police officers and lawyers in 2 police stations in Romania and how the delivery of procedural rights operates in practice during police hearings.

This is the first observational research in police stations ever done in Romania by a non-governmental organization. Getting access was difficult and required a lot of negotiations over a period of 8 months (November 2016-July 2017). Access to police stations in Romania can be done only with the approval of the General Inspectorate of the Romanian Police (IGPR). In November 2016, APADOR-CH sent an official letter to IGPR, explaining the aim of the project and asking for a meeting. By January the organization had received no official reply. Following several phone calls and email exchanges, in February 2017, APADOR-CH representatives met the head of the project implementation unit of IGPR and talked extensively about the need to access two police

\(^{11}\) The Constitution establishes that police detention cannot exceed 24 hours – this is the limit for the initial police arrest; the legislative framework on the basis of which other deprivation of liberty preventive measures operate will also be mentioned in this report.
stations. The organization followed up on the meeting, however, by the end of March 2017 there was still no official reply. On 28 of March, the organization sent official letters to the Prosecutor’s Office Attached to the High Court of Cassation and Justice, the Ministry of Internal Affairs and the Ombudsman, asking for help.

On the 13th of April 2017, the lead researcher met with the General Prosecutor, the latter agreeing to help with approaching the Romanian Police. In May he contacted IGPR and in June, APADOR-CH had another meeting with the Romanian Police, which agreed to create a special working group to analyse the organizations’ requests. At the end of June 2017, an official confirmation letter arrived, including information on the exact 2 police stations where the observational research would take place, as well as specific conditions which would govern the visits.

Although it was not possible to choose which police stations to observe (suggestions were made), the researchers were allowed not only to be physically present in the police stations but also to attend police interviews.

One of the designated police stations is located in the capital, Bucharest, while the other is situated at the local level. Both of them are average sized, city police stations and as it turned out, not so busy. The two settings provided plenty of opportunities for observations.

The actual start of the police visits in July was preceded by a period of research and study of the national legislation concerning procedural rights of suspects and defendants as well as of the EU Roadmap Directives and existing reports concerning their implementation (Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings; Directive 2012/13/EU on the right to information; Directive 2013/48/EU on the right to access to a lawyer). The aim was to directly assess the extent to which the legislation in force and the procedures taking place while the suspect/defendant is in police custody are in compliance with the EU standards.

The permission obtained from the head of the Romanian police meant that the researches did not have to justify their presence in the police station every time they went. During the informal conversations with police officers, the experts learned that many of them were surprised that anyone would spend their time observing police activity considering it took place within normal parameters “I have not hit anyone in 10 years”12. A few were suspecting that APADOR-CH’s presence in police stations meant spying on their activity and reporting back to their superiors.

Dozens of hours were spent on the hallways. In one police station, the researchers would go and sit at a certain table, waiting to be invited to attend hearings when and if they occurred. This “dead time” allowed for observation of what was habitually going on and also for informal talks with police officers. Many were open and ready to talk about their activity and have provided useful information for the purpose of this research. In the beginning, the days and hours were randomly selected but the monitoring strategy gradually changed over time, in order to maximize the chances to attend police hearings. Because there was so much “dead time”, following an agreement with some

12 Police officer, September 2017.
police officers, there was an understanding that they would call the researchers whenever hearings were about to happen.

Therefore, the monitoring activity was a combination of unannounced visits and agreed upon attendance to hearings and it soon became clear to the researchers that during the 6 months observation period they were not allowed to attend all hearings: “I wanted to call you the other day, when we had a defendant who beat his wife severely but then I thought it is probably better if I don't because I could not have acted the way I wanted to, tell him the things I wanted to tell him. Because he has a lot of rights but he does not deserve them.”

APADOR-CH representatives attended only 10 police hearings of suspects and defendants. But they provided an excellent opportunity to fill in standardized observation sheets (see Annex 1), take notes, and talk to lawyers, police officers and some of the suspects/defendants, after the hearings were over. The shortest hearing attended lasted 1 hour and the longest 12 hours (involving 3 co-suspects). It should be mentioned that not all hearings attended by the researchers involved suspects/defendants deprived of liberty. Only 5 of the suspects were heard in view of their 24 hours initial police arrest. The other 5 were under criminal investigation but not deprived of liberty; their hearings happened to be scheduled while the researchers were monitoring police station activity. This situation allowed for a comparison of the way procedural rights operate in practice for these two categories of suspects/defendants.

It was not possible for researchers to accompany lawyers to other police stations. Even if they would have agreed to participate in the study, they wouldn’t have had access to the specific police stations they were going to unless permission was granted by the Romanian Police. To fill in this gap, APADOR-CH representatives talked as much as they could after the hearings with 7 of the lawyers which accompanied suspects/defendants in the 2 designated police stations. During May-July 2018, in order to gather more information concerning some problematic observed practices, the researchers also interviewed 4 senior lawyers which are part of the organizations’ network of legal experts.

Due to the nature of the observational research undertook but also having in mind report length constraints, the first chapter concerning the legal framework will only concentrate on the rights of suspects and defendants who are placed in police arrest. It will also contain a brief overview of the Romanian criminal justice system and processes. Chapters two, three and four will gradually add to this legislative overview, as they are concerned with the transposition and practical implementation of three EU procedural rights directives (Directive 2013/48/EU on access to a lawyer; Directive 2012/13/EU on the right to information; Directive 2010/64/EU on the right to interpretation and translation). Chapter five contains conclusions and recommendations.

APADOR-CH would like to thank the General Inspectorate of the Romanian Police and the Prosecutor’s Office Attached to the High Court of Cassation and Justice for their contribution in the carrying out of this research and especially to the police officers and lawyers who have generously shared their insights.

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13 Police station visit, September 2017.
The organization would like to further emphasize that the observations were empirical in nature, therefore they do not have the value of a scientific study. The conclusions are based on a limited number of observed individual cases (with no statistical relevance). Therefore, one cannot draw general conclusions concerning the situation at the level of the entire Romanian Police. In addition, during the project implementation, the discussions with representatives of the Police revealed a positive attitude towards the need to ensure and respect the effective procedural rights of suspects and defendants.

1.3.2 The criminal justice system in Romania

According to the 2014 Romanian Criminal Procedure Code (CPC), the criminal procedure has four phases: the criminal investigation, the preliminary chamber phase\(^{14}\), the trial phase and the enforcement of the final decisions.\(^{15}\)

The criminal investigation formally begins when the judicial bodies issues an ordinance in this sense. Before this happens, some minimal verifications are carried out to make sure the notification (complaint, denunciation, finding act, ex officio notification) meets the legal requirements.\(^{16}\) The commencement of the criminal investigation always happens in rem (with regards to the deed), even if the author of the alleged offence is indicated in the notification act; the author has no specific procedural quality and can be heard as a witness.\(^{17}\) The in personam criminal investigation begins once there is sufficient evidence to trigger a reasonable suspicion that a person has committed the

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\(^{14}\) The latest amendments to the Criminal Procedure Code adopted by the Parliament in June 2018, but not yet in force, eliminate the preliminary chamber altogether. According to the criminal procedure code, the preliminary chamber judge (Articles 342-348) verifies the legality of the indictment ordered by the prosecutor, verifies the legality of the evidence gathered and the procedural acts undertaken by the criminal prosecution bodies, settles complaints against the orders of non-prosecution or non-indictment as well as other situations expressly provided by the law. The duration of the preliminary chamber procedure (in writing) is of a maximum of 60 days. The preliminary chamber judge shall return the case to the prosecutor’s office if he/she has found that evidence was unlawfully obtained.

\(^{15}\) Law no. 135/2010 on the Code of Criminal Procedure (Legea nr. 135/2010 privind Noul Cod de Procedură Penală).
act in relation to which the criminal proceedings were initiated. The person becomes a suspect; the in personam criminal investigation does not mean the setting into motion of the penal action. If, in the course of the criminal investigation, evidence is gathered that a person has committed an offence, the prosecutor orders the commencement of the criminal action and the suspect becomes a defendant. The initiation of the criminal proceedings does not amount to trial. During the criminal investigation various scenarios are possible: there can be an order for the closure of a case, the criminal investigation can be discontinued (through an ordinance) or the case can be referred to the court through an indictment.

The criminal investigation is carried out by either the judicial police under the supervision and control of the prosecutor, or directly by the prosecutor, for major crimes. The prosecutor is the only one entitled to decide on important aspects during the investigation, such as requesting the rights and freedoms judge to order various measures, including the pre-trial arrest, searches, wiretapping etc. The prosecutor is also in charge with the progress of the criminal investigation, the termination of the investigation by sending someone to trial or by closing the investigation. The rights and freedom judge has duties related to deciding the limitation of various rights, especially personal freedom, but only during the criminal investigation. During the next stages of the proceedings, his duties are taken over by the preliminary chamber judge and later by the trial courts.

For the purposes of this research study, reference will be made only to the suspect and the defendant as subjects of the criminal proceedings. The suspect is the person in relation to which there is a reasonable suspicion, based on evidence, that he/she committed an offence stipulated by the criminal procedure code. The defendant is the person who has been formally charged and against whom a criminal investigation has been initiated, becoming part of the criminal proceedings.

Deprivation of liberty preventive measures: the police arrest

Deprivation of liberty has no general definition according to the Romanian legislation. It refers to custodial sentences for adults (prison, life imprisonment), deprivation of liberty educational measures for minors (admission to an educational or detention centre) as

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21 Article 77 CPC.
22 Article 82 CPC.
well as deprivation of liberty preventive measures such as police arrest, pre-trial detention and house arrest.\textsuperscript{23}

In addition to the deprivation of liberty provided for by the Criminal Procedure Code, there is the measure of leading someone to the police station (\textit{măsura administrativă a conductorii la secție}), a deprivation of liberty measure provided for indirectly by the Romanian Police Act \textsuperscript{24} and internal regulations of the police. The measure of leading someone to the police station can last up to 24 hours and are not deducted from the custody of up to 24 hours\textsuperscript{25}. Shorty named “administrative leading to the police station”, this measure is in fact a deprivation of liberty similar to the police arrest stipulated in the criminal procedure code. They both last 24 hours but the procedure of the administrative leading to the police station is not regulated in a manner that guarantees any rights for the persons who are applied this measure.

For the purposes of this study, the following legislative analysis refers only to the rights of suspects and defendants who are deprived of liberty as a consequence of the application of the measure of police arrest. The Constitution establishes that police detention cannot exceed 24 hours – this is the limit for the initial police arrest.\textsuperscript{26} The criminal investigation body (police officer) or the prosecutor can order this measure, through a motivated formal order.\textsuperscript{27} If the prosecutor wants to further apply another deprivation of liberty measure such as pre-trial detention, he will have to notify the judge 6 hours before the expiry of the 24 hours.\textsuperscript{28} In this case the judge has to rule on the prosecutors’ request within the 24 hours period.\textsuperscript{29}

The rights of a person placed under police arrest can be divided in two categories: i) rights prior to the moment this measure is ordered ii) his/her rights after this measure has been taken.

Rights of the suspects/defendants in relation to police arrest

The suspect/defendant has the right to be heard before the measure of police arrest is taken. The assistance of a lawyer is mandatory during the hearing (either private lawyer or a legal aid lawyer appointed by the state).\textsuperscript{30} Before the hearing, the criminal

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\textsuperscript{23} Criminal Code, Criminal Procedure Code, Law 254/2013 on the execution of sentences and custodial measures.
\textsuperscript{24} Romanian Police Act (\textit{Legea nr. 218/2002 privind organizarea și funcționare Poliției Române}; 9 May 2002 republished 25 April 2014, art. 31 (1) (b).
\textsuperscript{25} Article 209 (3) of the Criminal Procedure Code.
\textsuperscript{26} Romanian Constitution, article 23 para. 4.
\textsuperscript{27} Article 209 Criminal Procedure Code.
\textsuperscript{28} Article 209 para 16 CPC.
\textsuperscript{29} Article 225 para 2 CPC.
\textsuperscript{30} Article 209 (5) CPC.
investigation body or the prosecutor is obliged to inform the suspect/defendant about the right to be assisted by a lawyer. 31 He has the right to personally notify his private lawyer or can ask the police officer or the prosecutor to do so. 32 The lawyer has the obligation to present himself at the headquarters of the judicial organ in maximum 2 hours since the notification. In case he does not come, the police officer or the prosecutor will appoint a legal aid lawyer. Before the hearing, the criminal investigation body or the prosecutor has the obligation to inform the suspect/defendant about his right to remain silent, also drawing the attention on the fact that anything he will declare could be used against him. 33

These rights, which the suspect/defendant has prior to his police arrest, are supplemented with those in relation to the hearing: 34 He/she has the right to be informed before the hearing about the general rights provided by the criminal procedure code to suspects/defendants, respectively: 35 the right to remain silent during the criminal proceedings; he will also be informed that there shall be no negative consequence in doing so but if he chooses to give a statement, the declaration will be used as evidence against him; the right to be informed about the facts for which he is investigated and their legal classification; the right to access the casefile, in accordance to the law; the right to have a chosen lawyer and if he does not have one, to be appointed a legal aid lawyer, in cases where legal aid is mandatory; the right to suggest evidence (under the conditions provided by the law), to raise exceptions and draw conclusions; the right to benefit free of charge from an interpreter when he/she does not understand, cannot express himself/herself well in Romanian; the right to be informed about his rights; other rights provided by the law.

At the beginning of the hearing, the suspect/defendant has the right to be informed about his/her procedural quality; the fact (as provided by the criminal law) of which he is suspected of having committed and its legal classification. The person will be handed a copy of the police arrest warrant which he/she can challenge before its expiration date. 36 Immediately after the arrest, the suspect/defendant has the right to personally notify or ask the judicial organ to inform a member of the family or another person about his deprivation of liberty and the place where he is arrested. 37 If the person arrested is not a Romanian citizen, he or she has the right to notify the diplomatic mission or the consular authority of his state. 38

31 Art. 209 (6) CPC.
32 Art. 209 (7) CPC.
33 Art. 209 (6) CPC.
34 Provided by art. 108 CPC.
35 Art. 83 CPC.
36 Art. 209 (15) CPC.
37 Art. 210 (1) CPC.
38 Art. 210 (2) CPC.
The arrested person has to sign that he/she has been informed, in writing, about the right of access to emergency medical assistance and about all other general rights previously mentioned above.\textsuperscript{39} The suspect/defendant will be similarly informed about the maximum duration of the police arrest as well as about the right to complain against this measure.\textsuperscript{40}

The rights of the suspects’/defendants’ lawyer

Legal aid is mandatory (through private lawyer or in lack thereof through a state appointed legal aid lawyer) when: the suspect or defendant is a minor, admitted to a detention or educational centre; the suspect or defendant is placed under police arrest or pre-trial detention, during the preliminary chamber procedure or the trial in cases for which the law provides a sentence which is bigger than 5 years for the crime allegedly committed\textsuperscript{41}, in cases where the judicial organs (criminal investigation bodies, prosecutors, judges) appreciate that the suspect or defendant cannot defend himself, as well as other cases provided by the law.

During the criminal investigation, the lawyer of a suspect or an accused person has the right to attend the procedural acts of the criminal investigation if he/she makes a request which has to be approved by the prosecutor. There are also exceptions to this rule, in cases of special supervision measures (technical surveillance) or if body or automobile searches in case of flagrant crimes happen.\textsuperscript{42} As a rule, except in the cases where the presence of a lawyer is mandatory his non-attendance does not prevent the carrying out of procedural acts of the criminal investigation.

The lawyer can request to be informed about the date and time of the criminal investigation procedural acts and about court hearing. The information can be done through telephone, fax, e-mail, or any other means and shall be noted as such in a written record.\textsuperscript{43}

The lawyer has the right to access all casefile materials throughout the entire duration of the criminal proceedings.\textsuperscript{44} This right cannot be abusively exercised or limited. Case file consultation implies the right to read its documents, the right to write down data or information from the case file and the right to obtain photocopies at the client’s expense.\textsuperscript{45}

\textsuperscript{39}Art. 83 CPC.
\textsuperscript{40}Art. 209 (14) CPC.
\textsuperscript{41}Article 90 CPC.
\textsuperscript{42}Article 92 CPC.
\textsuperscript{43}Article 92 (2) CPC.
\textsuperscript{44}Art. 92 (8) CPC.
\textsuperscript{45}Article 94 (2) CPC.
The lawyer of the suspect or defendant has the right to benefit of the time and necessary facilities for the preparation and realization of an effective defence.46

2. Right to interpretation and translation

During July-December 2017, the researchers did not have the opportunity to observe how interpretation rights are guaranteed by police officers and lawyers during police hearings. All suspects/defendants were Romanian citizens and presented no vulnerability which would have required interpretation services. Therefore, the following analysis, on the compliance of national legislation with the requirements of the Directive 2010/64/UE on the right to interpretation and translation, will primarily be a legislative analysis. Following a few interviews with lawyers and police officers, some practical implementation issues will also be raised.

The Ministry of Justice considers that the above mentioned Directive has been fully transposed into national legislation, although some of its requirements remain unaddressed.47

The Criminal Procedure Code provides for free of charge interpretation throughout the entire criminal proceedings for suspects and defendants who do not understand or cannot communicate in Romanian.48 When legal assistance is mandatory, the suspect or the defendant has the right for interpretation, also free of charge, for communicating with his lawyer. Only the indictment49 and the final decision50 in a case are translated free of cost. The law does not provide for the free translation of the deprivation of liberty decision as well, falling short of Directives’ standard concerning the translation of essential documents. Thus, according to Article 3 (2) of the Directive “essential documents shall include any decision depriving a person of his liberty, any charge or indictment, and any judgment.”

In order to also ensure quality of interpretation, the Legal Interpreters and Translators Act51 was amended in 2016, providing that interpreters have to be certified and included in a registry held by the Ministry of the Justice, upon request52. The Ministry of Justice

46 Article 92 (8) CPC.
48 Article 12 (3) CPC.
49 Article 329 CPC.
50 Article 407 CPC.
51 Legea nr.178/1997 pentru autorizarea și plata interpretelor și traducătorilor folosite de Consiliul Superior al Magistraturii, de Ministerul Justiției, Parchetul de pe lângă Înalta Curte de Casație și Justiție, Direcția Națională Anticorupție, de organele de urmărire penală, de instanțele judecătorești, de birourile notarilor publici, de avocați și de executori judecătorești
52 Available at http://old.just.ro/MeniuStanga/Listapersoanelorautorizate/Traducatori/tabid/129/Default.aspx. Before this amendment, a person could act as a legal translator/interpreter even if he/she did not pass an examination verifying their legal terminology knowledge, but only on the basis of a general language test or a case file review checklist done by the Ministry of Justice. Currently, according to the law, it is the
list shall be communicated to police stations, the prosecutors’ offices and to the courts.\textsuperscript{53} In case there are no interpreters available for a certain language, trusted individuals can be used.\textsuperscript{54} Although currently the law provides for stricter conditions for certification of legal interpreters and translators, there is no mechanism in place for the verification of the quality and accuracy of the interpretation/translation during criminal proceedings.\textsuperscript{55} This is contrary to Article 2 (8) and Article 3 (9) of the Directive which stipulate that both the interpretation and the translation need to have a sufficient quality in order to ensure the fairness of the procedure.\textsuperscript{56} According to official statistics, during 2014-2016, there were 1417 defendants requesting an interpreter at the level of the lower courts; 2335 defendants requesting an interpreter at the level of tribunals and 1579 requesting an interpreter at the level of courts of appeal.\textsuperscript{57} The languages for which interpreters were most often requested were: Arabic, Turkish, Italian, Chinese, English, and French. Unfortunately, data is not collected in relation to the number of persons who have requested an interpreter during the criminal investigation phase.\textsuperscript{58} This is contrary to Article 7 of the Directive concerning the record keeping of such procedures which would guarantee and ensure the effective exercise of such rights.\textsuperscript{59}

In practice, the interpreters are appointed by police officers, prosecutors and judges to provide services in a specific case.\textsuperscript{60} But there is no standard procedure governing the selection of an interpreter. Criminal investigation bodies or the courts can either call randomly someone from the Ministry of Justice list or designate specific responsive certified interpreters (whom they have worked with before and are trustworthy).\textsuperscript{61} Contrary to the Directives’ requirements (Article 2 (4)), there is no procedure stipulated

\textsuperscript{53} Article 2, Law 178/1997.  
\textsuperscript{54} Article 15, Law 178/1997.  
\textsuperscript{55} Interview with lawyer, May 2018.  
\textsuperscript{56} Article 2 (8) of Directive 2010/64/UE on the right to translation and interpretation „interpretation provided under this Article shall be of a quality 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 right of defence”; Article 3 (9) “translation provided under this Article shall be of a quality 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 right of defence”.  
\textsuperscript{57} Reply of the Ministry of Justice to a FOI request, 25.10.2017.  
\textsuperscript{58} Idem 11.  
\textsuperscript{59} Article 7 of Directive 2010/64/UE on the right to interpretation and translation „member States shall ensure that when a suspected or accused person has been subject to questioning or hearings by an investigative or judicial authority with the assistance of an interpreter pursuant to Article 2, when an oral translation or oral summary of essential documents has been provided in the presence of such an authority pursuant to Article 3(7), or when a person has waived the right to translation pursuant to Article 3(8), it will be noted that these events have occurred, using the recording procedure in accordance with the law of the Member State concerned.”  
\textsuperscript{60} Article 5, law 178/1997.  
\textsuperscript{61} Interview lawyer, June 2018.
by the law concerning the assessment for the need of interpretation. The criminal procedure code only provides that before a hearing, the suspect/defendant will be asked if he/she needs an interpreter. Most of the interviewed lawyers and police officers emphasized that this assessment is done on the basis of “objective criteria” (the person is a foreign citizen or is disabled).

Some police officers have also complained that sometimes it is difficult to find an interpreter during the 24 hours police arrest deprivation of liberty but also during later phases of the criminal investigation. Among the reasons enumerated are: the very low interpreter fees and the fact that they are reimbursed with delay; the fact that interpreters are called late at night and they fail to answer the police officers’ calls; and also the fact that there are no sanctions if the interpreter does not respond to calls. In the absence of an interpreter, informal interpretation are adopted by police officers. One such example is the usage of google translate. Although the Directive 2010/64/UE on the right to interpretation and translation does allow for the use of technology to enhance interpretation, it is highly questionable if such a means guarantees the rights of suspects and defendants in the early stages of the criminal investigation.

As a consequence of the legislative analysis and empirical observations, APADOR-CH recommends:

- The existing legislative framework should be amended in order to cover important requirements of the Directive 2010/64/UE on the right to interpretation and translation. Thus:

  - In accordance with Article 2 (4) of the Directive, legislation should be adopted 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.

  - According to Article 2 (5) and 3 (5) of the Directive, the legislation should clearly stipulate the right to challenge a decision regarding the need for interpretation/translation and/or its quality.

  - In accordance with Article 2 (8) and 3 (8) of the Directive, a law should be adopted for the establishment of a mechanism for the verification of the quality and accuracy of the interpretation and translation during the criminal proceedings.

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62 Article 107 CPC.
63 Police officer interview, September 2017.
A system should also be put in place in order to raise complaints concerning the quality of interpretation and translation.

In order to ensure quality, the fees for interpreters and translators should be increased and timely payment should be provided.

According to Article 3 (3) of the Directive, the legislation should also stipulate that the decision depriving a person of its liberty should also be among the essential documents which need to be translated.

Legal provisions should also provide 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.

The Romanian Police and prosecutors’ offices should habitually collect data in relation to the number of persons who have requested an interpreter during the criminal investigation phase, in accordance with Article 7 of the Directive.

3. Right to information

According to the Ministry of Justice\textsuperscript{64}, in October 2017 the Directive 2012/13/EU on the right to information during the criminal proceedings has been fully transposed into national legislation with the adoption of the letter of rights for suspects or accused persons during criminal procedures.\textsuperscript{65} Despite full transposition, this chapter points out to the fact that significant problems remain concerning the effective notification on rights and on the accusation as well as access to the casefile. None of the

\textsuperscript{64} Reply of the Ministry of Justice to an APADR-CH FOI request, 25.10.2017.

\textsuperscript{65} Its content is regulated by article 108 CPP and the Ministry of Justice Order no. 1274/2037/111/1123/2017 concerning the letter of rights for suspects or accused persons during criminal procedures who have been deprived of their liberty or the persons arrested in view of executing a EAW, in force since 4 October 2017.
suspects/defendants which were heard between October-December 2017 were handed letters of rights by police officers.

Given the above mentioned circumstances, the researchers’ observations concerning the notification about rights have in view the legislative framework and practice prior to the adoption of the letter of rights (which has not fundamentally changed).

**Effective information about rights**

The Directive on the right to information imposes standards in relation to the manner in which rights, as they exist in national laws, are notified. The emphasis is on ensuring that rights are conveyed effectively, to enable their exercise\(^{66}\).

According to the Romanian Criminal Procedural Code, the judicial bodies are under the obligation to conduct the criminal investigation and the trial observing the due process guarantees and the rights of the procedural subjects\(^{67}\). As already mentioned in the first chapter, the suspect and the defendant have the right to: not incriminate themselves; be informed about the deed they are under investigation for; access the casefile; a lawyer of choice or in its absence, a legal aid lawyer, when the legal assistance is mandatory; propose evidence, raise objections and plea; not to give any statements during the criminal proceedings and their attention shall be drawn to the fact that their refusal to make any statements shall not cause them to suffer any unfavorable consequences, and that any statements that they do make may be used as evidence against them; have an interpreter free of charge when they cannot understand, express themselves well or communicate in Romanian, access a mediator, when allowed by the law, be informed on his/her rights\(^{68}\).

The law also provides that before hearing a suspect or a defendant, the judicial body (police officer or prosecutor) shall communicate his/her rights and obligations in writing.\(^{69}\) The suspect/defendant has the obligation to sign that he has been informed and if he refuses to do so, this will be recorded in a separate written record.\(^{70}\) The law

\(^{66}\) Article 3, the Directive 2012/13/EU on the right to information during the criminal proceedings “Member States shall ensure that suspects or accused persons are provided promptly with information concerning at least the following procedural rights, as they apply under national law, in order to allow for those rights to be exercised effectively: 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; d) the right to interpretation and translation; e) the right to remain silent; 2) Member States shall ensure that the information provided for under paragraph 1 shall be given orally or in writing, in simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons”

\(^{67}\) Article 8, Criminal Procedure Code.

\(^{68}\) Articles 78-83 CPC.

\(^{69}\) This covers the rights specified in Articles 3 and 4 of the Information Directive. See Article 3 above; Art. 4 (1) “Member States shall ensure that suspects and accused persons are arrested or detained are provided promptly with a written Letter of Rights. They shall be given an opportunity to read the Letter of Rights and shall be allowed to keep it in their possession throughout the time that they are deprived of liberty”.

\(^{70}\) Article 108, CPC.
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\textsuperscript{71} (without, in fact, the person being informed of the existence and content of each right provided by law).

In practice, a person who is about to be heard in view of the 24 hours police arrest will be handed a written note containing his/her rights. The suspect/defendant is informed twice about his general rights\textsuperscript{72}: before the first hearing and then after his arrest. The information may also be triple or quadruplicate, if police arrest will be followed by the measure of pre-trial detention (which also implies an information about general rights).

During the police station monitoring period, the researchers have observed that even though police officers promptly inform suspects/defendants about their rights, they fail to do it in a way as to allow for those rights to be exercised effectively. The written notification in fact means that a piece of paper is put in front of the suspect/defendant to be signed, a copy will be given to him/her and one will stay in the case-file document. Only 3 suspects have read the written notification prior to the hearing and only one of them carefully, because he was distrustful of his legal aid lawyer and he also had a previous criminal record.\textsuperscript{73} In relation to reoffenders, police officers have the tendency to think that they don’t need to be informed about their rights because they already know them and the procedure.\textsuperscript{74} Asked about whether suspects/defendants are given enough time to read the written notification about rights, an interviewed lawyer declared “yes, but they don’t really read; taking into consideration the emotional state they are in…they want to get as quick as possible to their problem, their accusation…They don’t really understand that their rights are very important and should be explained to them more extensively. But this is because they do not know the procedure and why it is good to find out”\textsuperscript{75}

In some cases police officers also informed suspects about their rights orally (this happens especially in cases when the person does not read or write).\textsuperscript{76} The researchers attended a hearing of an illiterate, Roma suspect who did not have a lawyer (legal aid was not mandatory) and who could not read. His rights were orally enumerated to him but it was not clear if he understood them. He was asked if he wanted to give a statement, the police officer adding that he could benefit of a more lenient sentence if he recognized being guilty.\textsuperscript{77} Although the suspect was in a visible vulnerable position (declared he was HIV infected, very tired, and incoherent), he gave a statement of recognition which he signed with great difficulty. Although the police officer could have appointed an ex-office lawyers (since the law allows him to do it in cases he appreciates the person cannot defend herself), he failed to do so and also notified him about his rights in a dissuasive manner.

\textsuperscript{71} Under article 83, 209 and 210 CPC.
\textsuperscript{72} Provided by article 83 CPC.
\textsuperscript{73} Police station hearing, October 2017.
\textsuperscript{74} Police officer interview, September 2017.
\textsuperscript{75} Interview with lawyer, June 2018.
\textsuperscript{76} Interview with lawyer, June 2018.
\textsuperscript{77} Police station hearing, September 2017.
In another case, although the suspect was informed both in writing and orally about his rights (especially related to access to a lawyer and right to remain silent), it was obvious that police officers wanted to get a statement from him and advised that “sometimes it is better to just give a statement”. In some cases, the right to silence is presented in a manipulative manner, as if not giving a statement means that you have something to hide.

In yet another case of a suspect who was a first time offender, the police officer did not inform him about his right to remain silent and the consequences of doing/not doing so. The person was not deprived of liberty, did not have a lawyer because he could not afford one (and legal aid was not mandatory) and was not really sure if he should give a statement or not. He was advised by the police officer that he can give a declaration in order to build his defence. He was subsequently handed a written notification on his rights; the suspect started asking questions to which he got dissuasive, fragmented information. For example, he inquired if he could consult his casefile and was informed that only the prosecutor can grant him access (but he was not told how to do that and the insinuation was that he was not going to get permission anyway).

Upon request from the defendant, in one case, the police officer explained legal terms contained in the written notification (which means that they are not easy to understand). But it appears that there are also many suspects and defendants who are embarrassed if they do not know how to read or write or do not understand and are fearful to ask for explanations.

As a good practice example, before the hearing of a minor, the police officer has also taken a pro-active approach in informing the suspect about his rights, explaining the procedure and the risks of committing another offence. However, not all vulnerable suspects/defendants seem to be treated with the same consideration. In the case of a Roma suspect deprived of liberty, who was drunk at the time of the hearing, information about rights was done in writing, even though it was obvious he could not read in that state of mind. After the statement was taken, the police officer asked the lawyer to read it, but he refused to do so, just signing it.

The researchers observed that in the situations where the suspect/defendant had a chosen lawyer, he/she was more effectively informed about rights. But this was not to the credit of police officers but to that of the lawyers who either advised them to remain silent or explained them their rights. Two interviewed lawyers complained about the fact that police officers have the expectation that they should be explaining to their clients both their rights as well as the accusation “my job is to defend him, not explain him what he is accused of. I should be also understanding that”. In relation to the information

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78 Police station hearing, October 2017.
79 Interview with lawyer, June 2018.
80 Police station hearing, October 2017.
81 Police station hearing, October 2017.
82 Interview with lawyer, June 2018.
83 Police station hearing, August 2017.
84 Police station hearing, September 2017.
85 Interview with lawyers, May 2018, June 2018.
and explanation on rights, one police officer also emphasized that it is the lawyers’ role to ensure that they are conveyed effectively.\textsuperscript{86}

**Information about the suspected offence and reason for the police arrest**

Immediately after the arrest, the CPC provides that the suspect/defendant must be informed, in a language that he understands, of the offence of which he is suspected and the reasons for his arrest.\textsuperscript{87} This provision of the criminal procedure code is criticized because the notification about the suspected offence should be done much earlier, during the hearing in view of the police arrest, therefore prior to taking this measure.

During the police station hearings attended, researches have observed that in most cases, where the evidence against the suspect/defendant was conclusive, he/she was informed during the questioning about the suspected offence. In two cases, the police officers were carrying out the hearing in a way that was leaving the description of the deeds of which the arrested persons were suspected of very vague. There is not much empirical data coming out of this observational research to support a definitive conclusion in relation to the information about the suspected offence. Nevertheless, one of the interviewed lawyers has pointed out that article 6 of the ECHR is constantly being violated due to the way suspects/defendants are informed about the accusations and the description of the facts, from the very minor offences to the more serious ones “criminal investigation bodies claim it is the duty of the lawyer to explain to their clients what their accusations are. But I cannot explain the accusation, I can only defend him. The accusation has to be explained by the police officer or the prosecutor; and this is a big problem”.\textsuperscript{88}

**Access to the casefile materials**

The Criminal Procedure Code regulates access to all case files materials\textsuperscript{89}. This right applies throughout the entire duration of the criminal proceedings for both the suspect and the defendant and their lawyers. Case file consultation implies the right to read its documents, the right to write down data or information from the case file and the right to obtain photocopies at the client’s expense.\textsuperscript{90}

\textsuperscript{86} Interview with police officer, September 2018.
\textsuperscript{87} Article 209 (2) CPC.
\textsuperscript{88} Interview with lawyer, June 2018.
\textsuperscript{89} Article 94 CPC.
\textsuperscript{90} Article 94 (2) CPC.
In reality, the legislation is restrictive for the suspect, whose right to consult the file is restricted until he becomes a defendant.\textsuperscript{91} The right to consult the casefile refers only to the preventive measures ordered by the rights and liberties judge (pre-trial detention, house arrest, judicial oversight) but does not apply also to police arrest which is ordered by the criminal investigation bodies or the prosecutor. The preventive measure of police arrest can be ordered both against the suspect and the defendant. In practice, the suspect is merely being informed about the charges against him and he can give a statement. This situation is contrary to Article 7 (1) of the Directive on the right to information which stipulates that “\textit{where a person is arrested and detained at any stage of the criminal proceedings, Member States shall 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 arrested persons or to their lawyers}.”

None of the suspects/defendants or their lawyers had consulted the documents in their casefile before the police hearings attended by the researchers. As already mentioned, in one observed case, while the hearing was taking place, the lawyer admitted that he did not know how to advice his client \textit{“I do not know what to tell you and whether you should testify about your friend, I do not know the case.”}\textsuperscript{92}

In relation to the implementation of Article 7 of the Directive 2012/13/EU on the right to information during the criminal proceedings, concerning access to the casefile materials, APADOR-CH has already drawn the attention to several problematic aspects.\textsuperscript{93}

According to the current legislation, the possibility of case file restriction is formulated in rather general, large, ambiguous terms. During the criminal investigation and within a reasonable time, the prosecutor shall decide upon the date and duration of the case file consultation. This right may also be delegated to criminal investigation bodies.\textsuperscript{94} On a reasoned basis, only the prosecutor may restrict the case file consultation for a maximum period of 10 days if it could harm the proper conduct of the criminal investigation.\textsuperscript{95}

Since the law does not provide for a time limit for approving the request, the practice differs greatly and this can lead to abuses. Depending on the prosecutor, the request may be granted on the spot, generally within 10 days, but it may also be denied two

\textsuperscript{91} Article 94 (7) CPC.
\textsuperscript{92} Police hearing, October 2017.
\textsuperscript{94} Article 94 (3) CPC.
\textsuperscript{95} Article 94 (4) CPC; In 2015 the Ministry of Internal Affairs issued an order establishing some organisational measures to ensure the exercise of the right to consult the case file.\textsuperscript{96} According to this order, the request will be forwarded to the competent prosecutor for approval within two working days from receipt (Article 4 (1)). If approved, the criminal investigation bodies will issue, within a reasonable time, an order mentioning the date, hour and duration of the case file consultation (Article 5).
weeks after the request was made.\textsuperscript{96} In some cases, copying of the case materials is not done in a timely manner in order to be useful for the defence, as the time that passes between the request to study the case file and its approval by the prosecutor is sometimes very long.\textsuperscript{97} There are lawyers who have argued that the prosecutors’ disposal to restrict access to the case materials is shortly motivated and it might be useful to that the criminal procedure code would stipulate the concrete cases in which access to the case file may be restricted.\textsuperscript{98}

When it comes to the maximum of 10 days’ interdiction to study the case file, the text is ambiguous as it stipulates that the limitation may not exceed the maximum of 10 days but it may be interpreted in the sense that other unlimited number of limitations, not exceeding 10 days, may follow. In the case of limiting the access to the case file, the criminal procedure code does not provide for a total maximum duration (in practice, the prosecutor may say that he/she has restricted the access for 10 days for one reason, and later they may restrict it to an additional 10 days, on grounds that another reason emerged. The criminal procedure code provision\textsuperscript{99} should be changed to be clearer, stipulating that the total number of days for which the case file consultation will be restricted shall not exceed 10 days. As it is now, the law only provides that the restriction shall not exceed 10 days, leaving unclear the situation of the maximum number of days for which restriction in a casefile may be ordered.

The maximum limitation of 10 days applies only for the defendant, not for the suspect. For the suspect, the law does not provide a time limitation for the interdiction to consult the file.\textsuperscript{100} The same restriction applies to the lawyer of the suspect.\textsuperscript{101}

The criminal procedure code also does not provide the same right for the suspect, the defendant and the lawyer to challenge restrictions. When the lawyer lodges a complaint against the restriction of access the case file, the hierarchal superior prosecutor has to solve the problem and communicate the solution, as well as its motivation within a maximum of 48 hours.\textsuperscript{102} By comparison, when the suspect or the defendant makes a similar complaint, it will, according to the law, be processed within 20 days.\textsuperscript{103} This type of “discrimination” in relation to the lawyer is not justified. The decision of the hierarchically superior prosecutor could be challenged before a judge, which is not the case right now.

Studying the case materials is free of charge, but photocopying the documents is not and it can be quite costly for a defendant who is in pre-trial detention and has no financial means. Moreover, legal aid does not cover the copies of the criminal files.

\textsuperscript{96} Anca Ioana IUGA, lawyer, Cluj Bar; Mihaela Musan, Lawyer, Brasov Bar, interviews, 15.05.2017.
\textsuperscript{97} Mihaela Musan, Lawyer, Brasov Bar, interview, 15.05.2017.
\textsuperscript{98} Mihaela Musan, Lawyer, Brasov Bar, interview, 15.05.2017.
\textsuperscript{99} Article 94 (4) CPC.
\textsuperscript{100} Article 94 (7) CPC.
\textsuperscript{101} In the old version of the CPC (1968), the interdiction to study the casefile was equal for the suspect and the defendant/ accused person (a maximum of 15 days). In the new version, the suspect is basically eliminated from the category of subjects who have access to the case file for reasons of preventing tampering with the investigation.
\textsuperscript{102} Article 95 (2) CPC.
\textsuperscript{103} Article 338 CPC.
(volumes of case materials of hundreds, thousands of pages). There are no special provisions in the criminal procedure code related to case file consultation by the defendants who are in pre-trial detention. If they do not have a lawyer, they may not study the case file even if they make a request. In the best case scenario they are granted a little time in the courtroom, under escort in the box. Often, legal aid lawyers also study the case file in the courtroom, at the beginning of a hearing, making a very superficial defence.

Clearly, one of the most striking remarks made during the observational research was the formal manner in which police officers informed suspects and defendants about their rights. Although this is done timely before the hearing, in most of the cases, a piece of paper would be presented to them to read, the main preoccupation of the police officers being to get it signed and carry on with the procedure. Only 3 of the 10 suspects and defendants read the written notification containing their rights and in only one case it can be assumed that the person understood them. In just 5 of the 10 observed cases, did the judicial body notify them about the right to remain silent and in two of the cases this was done in a dissuasive way, even in the presence of a lawyer. There were no cases in which the police officer or the lawyer explained the suspect or defendant the meaning of the right to silence or the consequences of remaining silent. In two of the cases, the chosen lawyers advised their clients to remain silent with no further explanations. With few exceptions, police officers and lawyers alike did not provide further explanations or clarifications regarding the list of rights and in none of the cases did they check whether the suspect or defendant understood their rights.

The content of the written notification was technical, consisting of an enumeration of the rights as they are stipulated by the criminal code. During the time of the observational research, the newly introduced letter of rights (October 2017) was not available in the police stations, therefore its impact on the understanding of rights could not be assessed.

It is also important to note that only the police station in Bucharest was equipped with an audio-video camera (to record interviews) which police officers used while the researchers were attending the police hearings. However, it was obvious that it was not often used because most of them were just learning how it functioned. During a conversation with a senior lawyer he told the researchers that “during my 20 years’ experience, it is the second time I see an audio-video camera used in this police station". It is not a very often encountered practice in Romania for police hearings to be audio-video recorded, but it appears that even when criminal investigation bodies have the necessary equipment, they don’t use it.

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106 Interview with lawyer, October 2017.
As a consequence of the legislative analysis and empirical observations, APADOR-CH recommends:

- The letter of rights should be made available in simple and accessible language both in Romanian and other languages at the level of all courts, prosecutors’ officers and police stations.

- The Ministry of Internal Affairs should issue guidelines on when and how the letter of rights should be provided. According to Article 3 of Directive 2010/13/EU, the information should be provided both orally and in writing. Letter of rights should be drafted in a simple and accessible manner (Article 4), in a language that the suspect/defendant understands. Guidelines should also be issued for situations in which when suspects or accused persons do not know how to read or write or find themselves in other vulnerable situations.

- In accordance with the provisions of Directive 2012/13/EU, police officers should receive trainings in order to increase their skills and knowledge on how to better communicate with suspects/defendants in a simple and accessible manner, with consideration given to the specific characteristics of persons participating in the criminal proceedings.

- The Ministry of Internal Affairs should provide the necessary resources for the equipment of all police stations with audio-video cameras.

- The Criminal Procedure Code should be amended in order to make clear the maximum number of days for which restriction in a casefile may be ordered by the prosecutor.

- In order to avoid a violation of Article 6 ECHR and national legislation, police officers and prosecutors should properly inform suspects and defendants about the reason for arrest and the suspected offence. Sanctions should be applied in cases where they fail to do so.

4. Access to a lawyer
The Ministry of Justice claims that the EU Directive on the right to access to a lawyer has been fully transposed into national law. However, some of its provisions are still not addressed by the Romanian legislation. One example is Article 9 which requires that suspects/defendants be fully informed of the possible consequences of waiver. This implies an obligation of the criminal investigation bodies to explain the consequences of a waiver.

In addition, significant issues remain when it comes to the proper implementation of the Directive. The most important aspect is related to creating the necessary conditions for an effective participation of the defence during police/court interrogations which is closely linked to access to the casefile in due time (both before the first police interrogation and the first pre-trial detention hearing). Other older problems remain unsolved: ensuring the privacy of communications between lawyers and suspects or accused persons during criminal investigations; providing general information to facilitate accessing a lawyer for suspects or defendants who are not deprived of liberty; the poor quality of legal aid, directly linked to the low level of fees of state paid legal aid lawyers. There is also no legal obligation for criminal investigation bodies to explain the consequences of a waiver or of the fact of not having a lawyer.

The data gathered during the police station observational research adds to the already existing information about the implementation of the EU Directive, focusing on how access to a lawyer and legal aid are guaranteed during initial police arrest hearings.

It’s worth stressing again that not all hearings attended by the researchers involved suspects and defendants deprived of liberty. Only 5 of the suspects were heard in view of their 24 hours initial police arrest and they were all assisted by lawyers. The other 5 were under criminal investigation but not deprived of liberty; their hearings happened to be scheduled while the researchers were monitoring police station activity. This situation allowed for a comparison of the way procedural rights operate in practice for

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107 Ministry of Justice official letter of 22 December 2017, responding to APADOR-CH’s FOI request. According to it, the EU Directive on the Right of access to a lawyer has been finalized through the adoption of Law no. 236/2017 on modifying and completing law 302/2004 concerning the international judicial cooperation in criminal matters.

108 Article 9 of Directive 2013/48/EU “Without prejudice to national law requiring the mandatory presence or assistance of a lawyer, Member States shall ensure that, in relation to any waiver of a right referred to in Articles 3 and 10:
(a) 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 concerned and the possible consequences of waiving it; and
(b) The waiver is given voluntarily and unequivocally.
2. The waiver, which can be made in writing or orally, shall be noted, as well as the circumstances under which the waiver was given, using the recording procedure in accordance with the law of the Member State concerned.
3. Member States shall ensure that suspects or accused persons may revoke a waiver subsequently at any point during the criminal proceedings and that they are informed about that possibility. Such a revocation shall have effect from the moment it is made”.


110 Idem 2.

111 Idem 2.
these two categories of suspects/defendants. 3 of the 10 persons heard did not have a lawyer present\textsuperscript{112}, in 5 cases the criminal investigation bodies appointed legal aid lawyers and 2 suspects/defendants had private lawyers.

The researchers have observed lawyers’ behavior during police station hearings, from the moment they arrived in the police station until the hearing was over.

**Organization of the legal aid system**

As already mentioned in the legislative framework chapter, legal aid is mandatory for persons deprived of liberty.\textsuperscript{113} The right of the suspect or accused person to be assisted by a lawyer before they are questioned by the police, any other law enforcement or judicial authority is extensively detailed in the Romanian legislation. This right cannot be waived, except in cases where legal assistance is not mandatory.

In Romania, lawyers are organized as liberal profession and have their own organization-the National Union of the Romanian Bar Associations- as well as the local bars at the level of every county. During police arrest, if the suspect/defendant does not have a chosen lawyer, the criminal investigation bodies will take all necessary measures to ensure that a legal aid lawyer is appointed. The national legal aid system is organized and managed by the local bar associations. Each bar association in the country has a list of legal aid lawyers, appoints legal aid lawyers and oversees the quality of services provided. When a request is made to the bar association for legal aid, the bar will appoint a lawyer based on their availability. Bar associations have a list of lawyers who have signed up for providing legal aid. If the suspect or accused person needs a legal aid lawyer during the criminal proceedings, the police or the prosecutor makes a request to the local bar association.\textsuperscript{114} In court, when legal assistance is mandatory the judge will take all necessary measure to appoint a legal aid lawyer.\textsuperscript{115}

During the observational research, one police officer stated that he prefers to cooperate and call specific lawyers “This is simpler for me. The lawyer comes, signs and does not ask what I did, I explain him the situation, namely that I did nothing illegal. This way he does not bother me.” Interviewed lawyers have also testified to the fact that instead of calling the bar associations which should appoint a lawyer, some police officers prefer to directly call certain lawyers before a police hearing occurs.\textsuperscript{116} It appears that despite the existence of a well-established, randomized procedure for the appointment of legal aid lawyers, there are cases in which the independence of legal aid lawyers while attending initial police hearings is questionable.

\textsuperscript{112} Legal assistance was not mandatory in these cases.
\textsuperscript{113} Art. 90 CPC.
\textsuperscript{114} Article 91 para 1 CPC.
\textsuperscript{115} Article 361 para 4 CPP.
\textsuperscript{116} Police station monitoring visit, September 2017.
\textsuperscript{117} Interview with lawyers, 13-15 June 2018.
Access to a lawyer without undue delay, privacy of communications

The law does not prescribe a time limit in which the suspect or accused person has to be provided with access to a lawyer once they have been effectively deprived of their liberty. He/she has the right to be assisted by a lawyer from the moment of the initial hearing in view of the police arrest or pre-trial detention.\textsuperscript{118} There are no situations provided for in the law when access to a lawyer by someone deprived of liberty can be delayed.\textsuperscript{119} In case the suspect/defendant has a private lawyer, he/she can call him personally. In general, it takes legal aid lawyers 2 hours to arrive at the police station while chosen lawyers arrive much earlier (half an hour, 1 hour). In some cases, police officers have used this waiting period to ask suspects questions in relation to the facts of the case.\textsuperscript{120}

The lawyer-client consultation took place on the police station hallways and oftentimes in the hearing room, under the close visual supervision of police officers. During all hearings to which the researchers attended, the consultation happened in the presence of several other police officers. Usually, due to lack of space, the hearing room would also be the room where police officers carried on their daily activities. Even though the law provides that the contact between a lawyer and his client should not be hindered or controlled, directly or indirectly, by any state organ,\textsuperscript{121} lawyers have complained that there is no privacy if they meet their clients at the police station. In relation to this aspect, one police officer stated that "privacy between a suspect/defendant and his lawyer is not normal as long as he/she is in state custody, especially because of the high likelihood that he/she will be placed in police arrest or pre-trial detention".\textsuperscript{122}

Once arrived at the police station, lawyers spent an average of 5 minutes discussing the case with their clients. The shortest communication witnessed has been 1 minute long and the longest lasted 10 minutes. In the case of a minor accompanied by his mother to the police station, it was disturbing to observe that the legal aid lawyer representing him not only did not talk to his client but hasn’t once looked at him during the whole hearing.\textsuperscript{123} All she was preoccupied with was performing the paper signing formalities.

Access to the casefile materials

\textsuperscript{118} Article 209 para 5, article 219 para 6, and article 225 para 5 CPC.
\textsuperscript{119} Article 89 para 2 CPC.
\textsuperscript{120} Police station hearing, October 2017.
\textsuperscript{121} Article 89 para 2 CPC; article 36 of Law 51/1995 on the organization and practice of the lawyer’s profession.
\textsuperscript{122} Idem 13.
\textsuperscript{123} Police station hearing, August 2017.
All the 5 legal aid lawyers observed were meeting their clients for the first time and none of the lawyers had access to the case file prior to the meeting. Access to the casefile documents at the point of the initial questioning by the police represents a major challenge for lawyers who want to make an effective defence. The pressure on the judicial organs in relation to the 24 hours police arrest expiration is also high. This means that although access to all case files materials for the defendant and their lawyers throughout the entire duration of the criminal proceedings is well regulated by the law, it almost never happens in practice before the initial police arrest hearing. Under these circumstances, at least a proper amount of time spent communicating with the client is essential to building the defence strategy. Instead, what the researchers observed was that the conversations were very short. Only 2 of the 7 lawyers have advised their clients to remain silent.

**Effectiveness of the defence**

Researchers could not observe during the lawyer-client private consultations. It was not possible to find out if and how they informed their clients about their rights and made sure they understood them and the procedure. But it is safe to say, given the amount of time spent communicating, that it wasn’t meaningful in terms of building defence. During the hearings, with the exception of 2 suspects who had been advised to remain silent, the other 5 persons deprived of liberty did not know how to behave during the hearings. Moreover, with the exception of one chosen lawyer, the attitude of all other 6 observed defenders oscillated between indifference/passivity and arrogance/mockery towards their clients.

Even though it is the police officers’ obligation to inform suspects/defendants about their rights, the role of the lawyer should also be to enable access to other defence rights. What the lawyers’ role established in practice seems to be is merely making sure that procedures are carried out in accordance with the law but not also securing effective oral and written communication of rights.

In one case, while the suspect was giving his statement, the lawyer interrupted saying “You are talking nonsense. He admits to guilt, police officer!” At the end of the hearing the same lawyer did not let her client read the statement, advising him to just sign it “let it be, you don’t trust what the police officer has written?”

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124 Article 94 of the Criminal Procedure Code (CPP) regulates access to all case files materials. The right applies. Case file consultation implies the right to read its documents, the right to write down data or information from the case file and the right to obtain photocopies at the client's expense. In practice, / prosecutor, the lawyer has very limited time to study the case-file because of the pressure of the 24 hours police arrest expiration.


126 Article 94 (1), Article 94 (8) CPC.

127 Police hearing, October 2017.

128 Idem 19.
In another case involving a Roma suspect, the conversation with the lawyer consisted in the latter answering just one question the suspect had addressed. He wanted to know if he would be detained for 24 hours and the information he got was “if the police officer says so, you should trust him.” The police officer leading the hearing emphasized “Indeed, your offence is not so serious but we must take a preventive measure; moreover, you have a criminal record and the objective of your arrest is to prevent future offences.” What was particularly striking about this case was that the suspect was drunk and very agitated while he was giving the statement. He was not advised/informed about his right to remain silent and was just handed a paper containing his rights. Considering his condition, the police officer should have at least read his rights to him. There was an obvious familiarity between the lawyer and the police officer and the whole attitude of the two towards the suspect was patronizing.

Sometimes the attitude of police officers during the hearing has been intimidating. In one case, the whole hearing setting created pressure for the suspect. Other police officers were also present in the room, intervening from time to time. While the suspect was facing the police officer, his lawyer was sitting significantly further behind him. The suspect seemed confused and distressed and several times during the hearing he was turning around to see if his lawyer was still present and looking for reassurance and guidance. The lawyer was passive and did not intervene.

While some suspects/defendants would seek guidance from their lawyer during the stressful moments of a police hearing, others have completely dismissed his presence, refusing to talk to their legal aid lawyer. In one particular case, the suspect was very distrustful of his appointed lawyer. He carefully read the written record containing his rights and gave a statement without consulting him. As already mentioned, in Romania, when a person is deprived of liberty, a lawyer (private or legal aid) will always assist a person during the criminal investigation or the trial, even if they don’t want to or the quality of the representation is questionable. In these situations, the right to legal assistance cannot be waived.

In the case of one suspect, it was very clear he had not understood what the role of his lawyer was. After the hearing, she declared about her lawyer that “he has helped me change my procedural quality from that of a defendant to that of a suspect”. Considering the fact that from a criminal procedure perspective, it is not possible to go back to being a suspect once you have acquired the quality of a defendant, it is very clear that the person had not only not understood the procedure he was going through but also did not know what the role of the lawyer was.

The presence of lawyers in cases where legal aid is mandatory is perceived as “a form of protection for us; if the suspect or defendant refuses to have a lawyer that means that he/she hides something so I will anyway call a legal aid lawyer to just sit there and sign the papers; those with criminal record will generally refuse, but I will call a lawyer

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129 Police hearing, September 2017.
130 Police hearing, September 2017.
131 Police hearing, October 2017.
132 Police hearing, October 2017.
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anyway”.\textsuperscript{134} One police officer has pointed out to the researchers that the role of the lawyer is just to observe that the rights of suspects/defendants are respected by the criminal investigation bodies.\textsuperscript{135} In other words, their role should be one of mere presence, not effective intervention. A few interviewed lawyers have also complained that one of the most challenging aspects of their activity is the fact they are not allowed to ask questions at the right moment during a police hearing\textsuperscript{136}. According to them, they are only permitted to make observations and ask questions (and have them recorded in writing) at the end of a hearing, when they are no longer relevant.\textsuperscript{137}

During the police station monitoring the researchers have not witnessed situations where lawyers wanted to intervene and were prevented to do so. Rather, the majority of lawyers have been passive during hearings, performing a mere formality of signing papers. Out of the 7 lawyers observed (5 appointed by the state and 2 private) only 1 private lawyer stood out as participating actively and effectively during the hearing of his client.

There can be many explanations to justify the lawyers’ passivity during initial police hearings. The simplest one has to do with their legal aid fee. Although they were raised in 2015, fees remain low.\textsuperscript{138} This means that legal aid lawyers must take a lot of cases to make a living at the cost of the amount of time they can dedicate to individual cases. Notwithstanding the importance of this aspect, senior lawyers have emphasized that in the last three years, the decrease in the quality of legal aid has to do with the fact that lawyers attending police hearings are not even specialized in criminal law.\textsuperscript{139} Indeed, in Romania there is no formal system that requires lawyers to be trained or specialised in a particular field of law to be appointed as legal aid lawyer (civil law lawyers often perform legal aid without being experts in the criminal procedure code).\textsuperscript{140} A discussion is still ongoing about whether a requirement of specialisation would constitute a violation of the principle of fair competition according to Romanian law.\textsuperscript{141}

One important factor hindering the effective participation of the defence during the initial police hearing remains the lack of access to the casefile materials. 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 casefile documents, leading to an initial poor defence.\textsuperscript{142}

\textsuperscript{134} Interviews with police officers (23 October 2017-18 December 2017).
\textsuperscript{135} Idem 25.
\textsuperscript{136} Lawyer interview, 15 may 2018.
\textsuperscript{137} Idem 28.
\textsuperscript{138} Following a Protocol between the Ministry of Justice and UNBR, fees are still significantly low. For example, during the whole criminal investigation phase, the legal aid fee for a lawyer representing a victim is around 43 euros which is less than what a private layer makes in an hour of consultation http://www.baroulolt.ro/wp-content/uploads/2015/06/Protocol-2015.pdf.
\textsuperscript{139} Interview with lawyer, 15 June 2018.
\textsuperscript{140} Idem 64.
\textsuperscript{141} January 2018 official reply of the National Union of Bar Associations to APADOR-CH questions about specialization of lawyers.
\textsuperscript{142} Lawyer interview, 15 may 2018.
Another significant barrier to effective participation of the defence is that neither the criminal procedure code nor the law regulating the lawyers’ activity clearly specify what the legal assistance activity during the criminal investigation phase means. In practice, it is at the police officers’ discretion how much the lawyer can intervene. In accordance with Article 3 (3) of the Directive which refers to the right to “participate effectively”, the criminal procedure code should clearly provide when the lawyer can intervene during the hearings of suspects and defendants. It should also contain a clear provision in the sense that, before answering any questions during the hearing, the lawyer has the right to advise his client. Other necessary details should also be stipulated by the criminal procedure code, outlining what legal assistance during the criminal investigation means in practice.

The researches have noticed that this lack of legal clarity about the role of the lawyer and the limit of his legal assistance is confusing for some police officers as well. At some point during one hearing, the lawyer asked the police officer to stop and allow him to talk to this client for a few minutes on the hallway. He granted permission but he was asking his colleagues whether he should have allowed for this break, worrying that the consultation would interfere with his questioning strategy.

In view of the observations made by the researchers in relation to access to a lawyer and legal aid during the hearing in view of the police arrest, APADOR-CH makes the following recommendations:

- The National Association of the Romanian Bars (NARB) should take efficient measures for the organization and control of the randomised system of appointing legal aid lawyers and should sanction those lawyers who avoid/circumvent the system.

- In order to transpose Article 9 of Directive 2013/40/UE, the Ministry of Internal Affairs should adopt guidelines for how hearings should be carried out, detailing the role of the police officers and how the interaction with the lawyers should happen.

- In order to transpose Article 3 (3) of Directive 2013/40/UE, the Criminal Procedure Code and the law regulating the lawyers’ activity should be changed to clearly specify what 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.

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143 Police station hearing, October 2017.
The National Association of the Romanian Bars should also set out clear and detailed rules about the role of the lawyer at the investigative stage. This would ensure quality of the services, together with regular monitoring and evaluation of the appointment system.

- The National Association of the Romanian Bars should set up a specific course on legal assistance during the criminal investigation for lawyers performing legal aid in their first 3 years of practice. It should be mandatory and lawyers should gain accreditation as legal aid lawyers advising at the investigative stage.

- The level of fees of state appointed lawyers should be increased.

5. Conclusions and recommendations
Conclusions

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 casefile documents**

None of the lawyers present during the observed police hearings had read any documents in the casefile before talking to his/her client. The Romanian legislation is limitative 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 casefile 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

- 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.

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

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

➢ 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.

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

➢ 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

➢ 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.

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

➢ 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.

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

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

The Romanian Police
➢ 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.

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

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

➢ 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.

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

National Union of Bar Associations

➢ 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.

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

➢ 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.

➢ To offer accreditation to legal aid lawyers advising at the investigatory stage.