JUSTICE

Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings

FRA EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

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Foreword

Protecting the rights of anyone suspected or accused of a crime is an essential element of the rule of law. Courts, prosecutors and police officers need to have the power and means to enforce the law – but trust in the outcomes of their efforts will quickly erode without effective safeguards to control how their powers are actually used.

Such safeguards take on various forms. Everyone is presumed to be innocent until found guilty by a court of law. People have the right to remain silent and not incriminate themselves. They should be told why they are being arrested or what they are being charged with. They should also be told what their rights are, including that they have the right to a lawyer. In certain situations, people also have a right to interpretation and translation.

EU Member States are bound to protect these rights, but do not necessarily define or apply them in the same way. This, too, can weaken trust – including between Member States, interfering with effective cooperation in matters relating to the EU's area of freedom, security and justice.

Based on interviews with over 250 respondents in eight Member States, this report looks at how certain key criminal procedural rights are applied in practice. FRA reached out to judges, prosecutors, police officers, lawyers and staff of bodies that monitor prisons; as well as defendants who were either arrested in the country in which they were charged or in another EU country based on a European arrest warrant.

The research shows that procedural rights can be undermined in different ways. Some police officers treat suspects like witnesses to avoid triggering their rights. Others use such legalistic language when informing people of their rights, or of the charges against them, that the information is of little help. Even individuals who do manage to secure a lawyer often get to speak to them only briefly or in busy corridors, hampering proper representation. Language issues can bring additional hurdles. Finally, cases involving European arrest warrants require navigating two different legal systems, leaving even more room for error.

We hope that highlighting these challenges encourages Member States to step up their efforts to ensure that criminal procedural rights are applied both effectively and consistently throughout the EU.

Michael O'Flaherty
Director

Country codes

Code	EU Member State
AT	Austria
BE	Belgium
BG	Bulgaria
CY	Cyprus
CZ	Czechia
DE	Germany
DK	Denmark
EE	Estonia
EL	Greece
ES	Spain
FI	Finland
FR	France
HR	Croatia
HU	Hungary
IE	Ireland
IT	Italy
LT	Lithuania
LU	Luxembourg
LV	Latvia
MT	Malta
NL	Netherlands
PL	Poland
PT	Portugal
RO	Romania
SE	Sweden
SI	Slovenia
SK	Slovakia
UK	United Kingdom

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Glossary

Accused person	Any person who has been formally charged with an offence before a court.
Arrest	An action of apprehending persons by police and taking them into police custody.
Charge	An official notification given to an individual by the competent authority of an allegation that he/she has committed a crime, also referred to as 'accusation'.
Child	Any person below the age of 18 years.
Defendant	Any person subject to criminal proceedings initiated by relevant authorities due to suspicion of he or she having committed a crime. The person remains a defendant until the conclusion of the proceedings, which is understood to mean the final determination of the question as to whether or not the person has committed the criminal offence. This conclusion of proceedings includes, where applicable, sentencing and the resolution of any appeal. It includes the following: person of interest; suspect or accused person (see further separate definitions of these three categories in this glossary).
Deprivation of liberty	Arrest or detention, including when police apprehends a person and questions him/her without a judicial decision or any warrant. That person may be set free after questioning; however, deprivation of liberty applies if during some period of time, he/she was not allowed to leave police custody.
European arrest warrant	An arrest warrant based on the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (EAW) valid throughout all Member States of the European Union. Once issued by one Member State (the so-called 'issuing Member State'), it requires another Member State (the so-called 'executing Member State') to arrest and transfer a criminal suspect or sentenced person to the issuing state so that the person can be put on trial or complete a detention period.
Executing Member State	See under 'European arrest warrant'.
Issuing Member State	See under 'European arrest warrant'.
Law enforcement authority	National police, customs or other authority that is authorised to detect, prevent and investigate offences and to exercise authority and coercive force.
Lawyer	Any person who is authorised to pursue professional legal activities, including to advise people about the law and to represent them in court. More specifically, in the context of this report, it includes defence lawyers, as persons authorised to advise and represent defendants.
Legal aid	System of funding accessible to people with insufficient or no means to cover professional legal help and costs of proceedings themselves.
Monitoring bodies	National statutory bodies monitoring detention facilities, usually working for National Human Rights Institutions (NHRIs), playing an important role in strengthening the implementation of procedural rights of suspected and accused persons in criminal proceedings, ensuring the effective implementation of EU legislation, in particular, by monitoring the implementation of safeguards for national procedural rights in practice.

Person of interest	Any person suspected by police of having committed a crime, but where there is insufficient evidence to press formal charges against that person. Such a person may be questioned as a witness and only later – depending on the evidence available – their status might change to that of a suspect.
Pre-trial detention	Deprivation of a defendant's liberty prior to the conclusion of a criminal case.
Questioning	Any interview of a person by police, a prosecutor or a judge, during which they are asked questions about their possible involvement in a crime.
Surrender procedure	Transfer of a person arrested on the basis of a European arrest warrant from one EU Member State (executing country) to another EU Member State (issuing country). See also 'European arrest warrant'.
Suspect	Any person who has been informed by relevant authorities that they are suspected of having committed a crime.
Witness	Any person who has been summoned to give testimonies. Unlike a suspect, such a person can be compelled to take the oath requested by the procedure to ensure that any statements made to the judge are truthful. However, a witness can refuse to give a statement as evidence when there is the possibility of self-incrimination.

Acronyms

Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CPT	European Committee for the Prevention of Torture and Inhumane or Degrading Treatment (CPT)
EAW	European arrest warrant
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FRA	European Union Agency for Fundamental Rights
ICCPR	International Covenant on Civil and Political Rights

Key findings and FRA opinions

This report investigates how several European Union (EU) Member States implement – in practice – legal provisions on certain defence rights of persons suspected or accused of crime.

Articles 47 and 48 of the Charter of Fundamental Rights of the European Union (Charter) guarantee various rights of defendants in criminal proceedings. These include the presumption of innocence, the right to a defence, the right to a fair trial and the right to an effective remedy. The Roadmap for strengthening procedural rights in criminal proceedings (Roadmap)[1] spells out these rights in further detail. In addition, the Roadmap's measures considerably strengthen the procedural rights of persons arrested pursuant to a European arrest warrant (EAW).

EU Member States have been incorporating these measures into their national laws. The EU Agency for Fundamental Rights (FRA) assessed how they are being implemented in practice across several Member States. This report presents its main findings, focusing on the right to information, and to access an attorney, both in domestic criminal proceedings and when an EAW is issued.

Previous FRA research on specific procedural rights – for example, the right to information, translation and interpretation – showed that these rights are given varying scope and are applied differently across Member States. Similarly, the rights at issue in this report are not consistently implemented across the EU. This report aims to bring these inconsistencies, and other implementation challenges, to the attention of EU institutions, Member States and legal professionals. It also provides advice on possible improvements.

1 Council of the European Union (2009), Resolution of the Council on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ 2009 C 295, Brussels, 30 November 2009.

Note on coverage

This report summarises the views of professionals and defendants in eight EU Member States: Austria, Bulgaria, Denmark, France, Greece, the Netherlands, Poland and Romania. FRA selected these countries to cover different regions and legal traditions. All of these states apply the EAW. In addition, all of them – except for Denmark, because of its specific opt-out agreement – are bound by the Roadmap's measures. All EU Member States, however, regardless of any opt-out regime, are bound by the minimum standards of defence rights as developed in the case law of the European Court of Human Rights and embodied in the Roadmap's instruments.

Procedural rights in domestic criminal proceedings

The various rights guaranteed by the Charter and outlined in the Roadmap include defendants' right to information in criminal proceedings from the moment they are aware they are suspected of having committed a crime; the right to silence and the privilege against self-incrimination; and the right to access a lawyer. FRA's research highlights several challenges when it comes to accessing these rights.

Informing defendants about their rights in an effective manner

FRA's fieldwork shows that authorities in the eight EU Member States covered in this report inform defendants about their criminal procedural rights in various ways. Most practitioners and defendants agree that defendants receive this information before the first official questioning. However, the information given differs in its scope and content, and in how it is conveyed. This ranges from law enforcement authorities providing defendants with comprehensive information, both in writing and orally, to authorities handing defendants a written leaflet about rights without further explanation.

Several factors determine whether or not defendants receive information about their rights in an effective manner. These include, among others:

- law enforcement officers assigning defendants a procedural status other than that of a suspect – for

example person of interest, witness, person invited for an 'intelligence talk' – during the first phases of the criminal proceedings, in cases in which the person is in fact suspected;

- barriers to defendants accessing information due to particular vulnerabilities, such as language barriers, a lack of education, a disability or intoxication with alcohol or drugs;
- the overall accessibility of the format in which the information about rights is provided;
- authorities not having practices to verify a defendant's understanding of the information provided, especially when no lawyer is present.

Directive 2012/13/EU on the right to information in criminal proceedings provides, in Article 3 (2) and Article 4, that information about rights should be given orally or in writing, in simple and accessible language, taking into account any particular needs of vulnerable defendants. Only when defendants are deprived of liberty do the relevant authorities have to provide them with a written 'letter of rights', drafted in simple and accessible language so that it can be easily understood by a lay person without any knowledge of criminal procedural law. Accordingly, the directive stresses the need for people to actually understand the information provided. Relevant case law of the European Court of Human Rights (ECtHR) also establishes requirements of accessibility of information, as only a defendant's effective understanding of rights makes it possible for him or her to exercise those rights.

FRA opinion 1

EU Member States should put in place safeguards to ensure that individuals can effectively exercise their right to be informed about their criminal procedural rights as soon as they are suspected of having committed an offense. For instance, Member States should provide further guidance to relevant law enforcement authorities on how to verify defendants' understanding of the information they receive about their rights. Authorities should, in particular, pay attention to situations in which defendants may be disadvantaged through a language barrier, a lack of education or a physical or intellectual disability or by being in a state of intoxication.

EU Member States could also consider making it obligatory for the relevant authorities to provide information to defendants about their rights in both written and oral formats, using non-technical and accessible language, regardless of whether or not a defendant is deprived of their liberty.

Treating defendants as witnesses

FRA's research identifies cases in which law enforcement authorities question a person as a witness or 'informally' ask them questions, even when there are plausible reasons for suspecting that person's involvement in a crime. This means that defendants do not receive information about their rights as a suspect – in particular, the right to remain silent and not to incriminate themselves. FRA's research also highlights instances in which law enforcement authorities establish informal practices so that defendants' self-incriminatory statements, made as a witness, can be later used against them legally in the course of the proceedings – for example, by questioning former witnesses again, this time as defendants, and asking them if they stand by their previous statements.

Directive 2013/48/EU on the right of access to a lawyer guarantees rights to persons who become suspects in the course of questioning by the police. In addition, Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings requires Member States to respect the right to silence and the privilege against self-incrimination. Those rights are also recognised by the ECtHR.

FRA opinion 2

Whenever a person is suspected of having committed an offense, that person should be informed and should be made aware of their rights from the outset of the proceedings. EU Member States should call on relevant national authorities to eliminate practices of placing defendants under a different procedural, 'pre-suspect', status and therefore of failing to inform them of their rights.

Facilitating defendants' direct and prompt access to legal assistance

Respondents in FRA's research highlight the crucial importance of defendants having access to legal assistance – especially from the very beginning of criminal proceedings. Respondents argue that defendants deprived of liberty, in particular, face difficulties in accessing lawyers directly and/or in private. For example, police officers or defendants' relatives call lawyers on their behalf. Sometimes, these calls are significantly delayed after the moment of arrest or detention. When such 'indirect' or delayed contact occurs, defendants cannot obtain advice at an early stage, such as to remain silent. Lawyers cannot ask questions that may help them to prepare an effective defence. Moreover, findings show that defendants deprived of liberty do not always have the possibility of talking to their lawyers in private be-

fore the first questioning. Instead, where conversations happen at all, they are often short and/or take place in public corridors in the presence of police officers.

According to the standards of the ECtHR and the requirements set out in Directive 2013/48/EU on the right of access to a lawyer, defendants should have access to a lawyer without undue delay and the confidentiality of their communication should be respected.

FRA opinion 3

EU Member States should ensure that relevant safeguards are in place to allow the effective exercise of the right to a lawyer. In this context, EU Member States should provide further guidance to law enforcement authorities to facilitate prompt, direct and confidential access to a lawyer before the first questioning of defendants deprived of their liberty. Such guidance should also highlight the need for confidential access, to allow defendants to have a private conversation with a lawyer and to obtain legal advice as soon as possible after an arrest.

In general, Member States should ensure that, when defendants want their lawyers present, law enforcement authorities delay questioning and refrain from any procedural activities until the lawyer arrives. This should apply regardless of whether or not the defendant is deprived of liberty.

Providing accurate and clear information about the charges against a defendant and reasons for their arrest

Respondents in FRA's research indicate that very often, when informing defendants about the accusations (charges) against them and the reasons for arrest, authorities tend to limit themselves to indicating the relevant provisions of criminal law, using technical language, and not specifying the actual allegations. In addition, in some cases, both persons deprived and persons not deprived of liberty receive information about the accusation after some delay, and suspects deprived of liberty learn about the grounds for arrest only after being detained for some time. This creates practical challenges for building an effective defence and impedes a defendant's ability to challenge deprivation of liberty, especially for defendants who do not benefit from legal assistance.

Directive 2012/13/EU on the right to information obliges Member States to promptly inform defendants about the necessary details of the criminal act that they are suspected of having committed and about the reasons for their arrest. The ECtHR has also reiterated this obligation.

FRA opinion 4

EU Member States are encouraged to put in place necessary safeguards to ensure that suspects receive an accurate description of the charges against them, which should include both the legal classification and the facts (i.e. details of the alleged wrongdoing). Equally, any person arrested should know why they are being deprived of their liberty. Accordingly, national authorities should provide such defendants with information about not only the essential legal provisions, but also the factual grounds for their arrest. To this end, EU Member States should provide further guidance to national authorities on how to ensure that the information about the accusation and the reasons for arrest be provided as soon as possible, and be as detailed and as clear as possible.

Surrender proceedings under the European arrest warrant

Persons arrested pursuant to an EAW benefit from the right to the presumption of innocence, the right to a defence, the right to a fair trial and the right to an effective remedy, as set out in Articles 47 and 48 of the Charter. The measures introduced pursuant to the Roadmap more specifically outline what these rights entail.

In accordance with Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, defendants should benefit from interpretation and translation services to the extent set by this directive. In addition, pursuant to Directive 2012/13/EU on the right to information, defendants should receive a written letter of rights drafted in simple and accessible language. In addition to the procedural rights set by this directive, in accordance with Framework Decision 2002/584/JHA (EAW Framework Decision), persons arrested pursuant to an EAW have a right to receive information about the warrant and its contents, the possibility of consenting to transfer and a right to legal assistance. Directive 2013/48/EU on the right of access to a lawyer, confirming the right to access a lawyer in both the executing and the issuing Member State, further specifies the scope of the right to legal assistance.

FRA's fieldwork shows that defendants in EAW proceedings ('requested persons') face similar challenges to those involved in domestic criminal proceedings (see FRA opinion 1, in particular). Moreover, requested persons can face additional challenges, particularly given the cross-border nature of EAW cases.

Informing defendants about their rights in an effective manner

In EAW cases, language barriers frequently impede individuals' ability to benefit from their right to information about their rights, including to a lawyer. Respondents also highlight problems with understanding the possibility of consenting to the transfer to another EU Member State, which is also their right. Requested persons often misunderstand such information. Several respondents indicated that, as a result, they made decisions that were contrary to their interests.

FRA opinion 5

EU Member States should ensure that relevant safeguards are in place to allow the effective exercise of the right to information. EU Member States should encourage competent national authorities to find ways of verifying that defendants, especially those who do not speak the national language, have understood the information provided to them. EU Member States might consider cooperation on access to interpretation services (for instance, by sharing a pool of interpreters available via a secure phone line). National authorities should also take measures to explain to anyone arrested on an EAW, in detail and in simple language, what it means to consent to a transfer to another EU Member State. This explanation should clearly cover the defendant's deprivation of liberty and forced transport to the Member State that asked for their transfer, as well as the subsequent proceedings that will take place there.

Ensuring effective legal representation in both the issuing and executing Member States

FRA's research shows that, overall, the right to be assisted and represented by a lawyer in surrender proceedings under an EAW is respected in executing Member States. However, the main practical problems arise from language barriers. Given the cross-border nature of EAW proceedings, which frequently involve defendants who do not speak the national language, ensuring access to interpretation services at the initial stage of the proceedings – and, in particular, facilitating communication with lawyers – is one of the most important safeguards of fair proceedings.

In addition, Member States do not effectively provide defendants (requested persons) with information about their right to access a lawyer in the issuing Member State. This leads to problems in defendants exercising this right in practice. One reason for this is that executing authorities do not feel competent to comment on laws in other states. In practice, relatives of defendants and/or lawyers in executing Member States often fill this gap by resorting to their own private contacts, including through different professional associations, hence facilitating defendants' access to legal representation in issuing Member States.

FRA opinion 6

EU Member States must ensure that the right of the accused to appoint and be assisted by a lawyer in both the executing and issuing Member States is fully respected, with the executing Member State ensuring early access to interpretation services.

In relation to the enjoyment of the right to a lawyer in the issuing Member State, the competent authority of the executing Member State should, without undue delay, provide the requested person with information about this right, and undertake the necessary steps to facilitate the appointment of a lawyer in the issuing Member State when requested persons wish to exercise this right. In particular, EU Member States should ensure that relevant authorities have in place practical arrangements to facilitate the effective exercise of this right.

Practical arrangements should ensure that executing authorities inform persons arrested on an EAW, both orally and in writing, of their right to have access to a lawyer in the issuing Member State in the language of the person requested. In addition, these should ensure that executing authorities take further positive steps in assisting persons requested under an EAW to access a lawyer in the issuing Member State. This would require a systematic solution. For example, the issuing Member State could provide a list of associations of lawyers together with the EAW or let defendants make a call abroad to the relevant association. To this end, EU Member States are encouraged to make use of all the networks available to them, such as the Contact Points of the European Judicial Network and/or Eurojust.

Introduction

"In principle, they [defendants] should be informed, and get informed. The question is that sometimes, before lawyers arrive, defendants are invited to tell everything what happened, to share, because thus they will allegedly get smaller sentences, or otherwise 'dire consequences' will follow, etc. Those are avenues used and, if the detained person is more vulnerable, more shy, as many people are in that situation for the first time, they start writing long explanations where they tell even what they are not asked of or even what is further from the truth with the only thought to leave the detention place as soon as possible."
(Lawyer, Bulgaria)

Procedural rights are safeguards that help justice to be done in practice. Their goal is to ensure ultimate justice for everyone. Most importantly, everyone is innocent until proven guilty. There are other crucial requirements of a fair trial – such as the right to remain silent, the right to a professional defence, and the right to present exculpatory evidence. Substantive criminal law prohibits certain behaviour. Procedural criminal law delineates the roles and the extent of power of courts – the impartial arbiter – and of the parties to the proceedings – the prosecution and defence, which present evidence for their case. Criminal procedural rights exist to help ensure that courts sentence and punish individuals only when evidence of guilt is present and properly presented.

"I have to say that this is a quite unfair practice. Off the record and before the first hearing, prosecutors, but mainly police, very often encourage defendants to confess or to make a plea bargain. They also encourage defendants not to seek lawyers' help, suggesting that such a lawyer will only cash in the client and will complicate the entire proceeding."
(Lawyer, Poland)

"I didn't have a lawyer because no one informed me verbally about such a right during the first questioning."
(Defendant, Poland)

Persons suspected and accused of crimes in the course of national proceedings, as well as persons arrested pursuant to a European arrest warrant, have a number of procedural rights. These rights should be defined similarly and apply in similar ways in all EU Member States. This not only helps to ensure the same level of safeguards for each defendant, but also to reinforce mutual trust. To bring the criminal justice systems of EU Member States closer together, and in turn contribute to the strengthening of mutual trust, the EU adopted the Roadmap for strengthening procedural rights in criminal proceedings[2] and measures aimed to codify, at EU level, existing procedural rights stemming from the European Convention on Human Rights (ECHR).

Note on terminology: 'defendants'

The report uses the generic name 'defendants' to refer to suspects who are not deprived of their liberty; arrested persons; and persons arrested pursuant to an EAW. However, it always specifies whom the specific findings concern.

At the European Commission's request, FRA assessed how these rights are being implemented in practice across several Member States. This report focuses on selected rights to address the European Commission's request and feed into its report[3] on the implementation of Directive 2013/48/EU on the right of access to a lawyer.[4]

Scope and purpose

The main aim of the research was to examine how authorities fulfil, in practice, their obligations regarding the procedural rights of defendants in certain contexts. With respect to national proceedings, the report focuses on two scenarios. The first involves persons who are suspected of a crime, are summoned for questioning, but are not deprived of their liberty. The second involves persons who are suspected of a crime and are arrested, meaning they are deprived of their liberty. In addition, the report presents findings regarding persons arrested pursuant to an EAW.

2 Council of the European Union (2009), Resolution of the Council on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ 2009 C 295, Brussels, 30 November 2009.
3 European Commission (2019), Report from the Commission to the European Parliament and the Council on the implementation of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty'. Reference: COM(2019) 560.
4 Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ 2013 L 294.

FRA ACTIVITY

This project continues a line of research conducted by FRA on procedural rights, which to date includes:

- *Victims' rights as standards of criminal justice (2019)* – this is Part I of a series of four reports entitled *Justice for victims of violent crime;* it outlines the development of victims' rights in Europe and sets out the applicable human rights standards.
- *Proceedings that do justice (2019)* – Part II of the series *Justice for victims of violent crime* focuses on procedural justice and on whether or not criminal proceedings are effective, including in terms of giving a voice to victims of violent crime.
- *Sanctions that do justice (2019)* – Part III of the series *Justice for victims of violent crime* focuses on sanctions and scrutinises whether or not the outcomes of proceedings deliver on the promise of justice for victims of violent crime.
- *Women as victims of partner violence (2019)* – Part IV of the series *Justice for victims of violent crime* focuses on the experiences of one particular group of victims, namely women who endure partner violence.
- *Children's rights and justice – Minimum age requirements in the EU (2018)* – this report outlines Member States' approaches to age requirements and limits regarding child participation in judicial proceedings, procedural safeguards and the rights of children involved in criminal proceedings, as well as issues related to depriving children of their liberty.
- *Child-friendly justice (2017)* – this project was based on interviews with justice professionals and police, as well as with several hundred children involved, as victims or witnesses, in criminal judicial proceedings.
- *Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers (2016)* – this report provides an overview of Member States' legal regulations in respect of framework decisions on transferring prison sentences, probation measures and alternative sanctions, as well as pre-trial supervision measures, to other Member States.
- *Rights of suspected and accused persons across the EU: translation, interpretation and information (2016)* – this report reviews Member States' legal frameworks, policies and practices regarding the right to information, translation and interpretation in criminal proceedings.
- *Handbook on European law relating to access to justice (2016)* – this publication summarises the key European legal principles in the area of access to justice, focusing on civil and criminal law.
- *Opinions* on draft EU legislation in the area of criminal justice, produced at the request of the EU institutions.

The report looks at how authorities in select Member States apply relevant secondary EU legislation – and, in particular, measures implementing the Roadmap on criminal procedural rights. It gives special consideration to defence rights as established under:

- Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in EAW 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;
- Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings;[5]
- Directive 2012/13/EU on the right to information in criminal proceedings.[6]

This report aims, on the basis of fieldwork research, to produce evidence that can assist Member States in their efforts to enhance their legal and institutional response to the fundamental defence rights of persons subject to national criminal proceedings and EAW proceedings. It builds on FRA's 2016 reports on the rights of suspected and accused persons regarding translation, interpretation and information in criminal proceedings[7] and on criminal detention and alternatives in EU cross-border transfers.[8] Those reports analysed differences in legislation and

5 Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ 2010 L 280.

6 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ 2012 L 142.

7 FRA (2016), *Rights of suspected and accused persons across the EU: translation, interpretation and information*, Luxembourg, Publications Office of the European Union (Publications Office).

8 FRA (2016), *Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers*, Luxembourg, Publications Office.

policies. The current report focuses on the actual application of these policies in practice.

Chapter 1 provides a legal overview of the standards applicable in EU Member States. Chapter 2 deals mainly with the right to information and discusses how law enforcement authorities inform defendants about their rights and how defendants perceive this information. Chapter 3 deals with the right to a lawyer. It first analyses the findings regarding informing defendants about this right, then assesses the exercise of this right in practice. Chapter 4 discusses the right to information and the right of access to a lawyer in respect of persons targeted by an EAW.

Methodology and challenges

This report is based on interviews conducted in 2018 in Austria, Bulgaria, Denmark, France, Greece, the Netherlands, Poland and Romania.

Overall, 252 respondents were interviewed. These included 169 criminal justice professionals – judges and prosecutors, police officers, lawyers and staff of statutory bodies that monitor detention facilities,[10] such as inspectors visiting places of detention. It also included 83 defendants – 48 arrested in the state in which they were charged and 35 arrested in another EU country based on an EAW (see Table 1). Respondents were identified through the personal contacts of bar associations and specialised associations, as well as through lawyers interviewed for this research.

Table 1: Number of interviewees per Member State and target group

Member State	Defendants in national proceedings	Defendants in EAW proceedings	Lawyers	Police officers	Judges and prosecutors	Members of bodies that monitor detention facilities	Total number of interviewees
AT	5	5	6	4	6	3	29
BG	5	6	6	5	4	3	29
DK	5	4	4	6	6	4	29
FR	10	3	8	8	7	5	41
EL	6	4	6	5	5	3	29
NL	4	2	7	7	4	2	26
PL	7	7	6	7	9	3	39
RO	6	4	4	6	7	3	30
Total	48	35	47	48	48	26	252

Source: FRA, 2019

FRA's research also dealt with other rights, such as the right to have a third person informed upon arrest and the right to a judicial review of the deprivation of liberty. However, owing to the limited scope of this report, these rights are not discussed. Details concerning these rights are outlined in the country reports, which form the basis of this report (available on FRA's website).[9]

The right to legal aid and its regulation by the domestic legislation of EU Member States are also outside the scope of this research, given the complexity of this subject, which requires a separate, dedicated, study. Nevertheless, some aspects of legal aid regarding, in particular, the EAW proceedings are set out in Section 4.3.

The fieldwork research was conducted by FRA's multidisciplinary research network, FRANET.[11] Interviews covered arrests and charges carried out from December 2016 to June 2018, to gather the most recent information and data available.

Respondents replied to a predefined questionnaire covering defence rights as reflected in primary and secondary EU law. The interviewers did not share the questionnaire with any respondent in advance. The interviewers could ask follow-up questions or request clarifications

9 See FRA's webpage on the country reports.

10 Staff of statutory bodies that monitor detention facilities, usually working for national human rights institutions, play an important role in strengthening the implementation of the procedural rights of suspected and accused persons in the criminal justice system. The help ensure the effective implementation of EU legislation, in particular by monitoring the implementation in practice of safeguards for national procedural rights.

11 For more information, see FRA's webpage on FRANET.

and encouraged respondents to speak freely and draw on their personal experiences.

Interviews were audio recorded and documented in the interview reporting templates. Owing to the sensitivity of this topic, defendants were in general reluctant to take part, and some objected to the audio recording. Moreover, police officers, judges and prosecutors often did not allow their interviews to be recorded, either as a personal choice or because of legal restrictions.

The professionals interviewed were asked questions about both national criminal proceedings and EAW proceedings. Defendants, on the other hand, were divided into two groups: those arrested in the course of national proceedings and those arrested because of an EAW. Chapters 2 and 3 of this report reflect the responses provided by defendants arrested in national proceedings. Chapter 4 refers to answers provided by defendants arrested pursuant to EAWs in any Member State.

1 Key international and EU law standards – overview of procedural rights in criminal proceedings

1.1 International standards

Procedural rights in criminal proceedings have been long established and widely recognised at the international, European and national levels. At the international level, they were first established and recognised by the Universal Declaration of Human Rights[12] and the International Covenant on Civil and Political Rights (ICCPR).[13] Article 14 (1) of the ICCPR recognises the general right to a fair trial in criminal proceedings, while Article 14 (3) further specifies the minimum procedural rights guaranteed for anyone charged with a criminal offence. These include, for instance, the right to information, the right to legal assistance, the right to legal aid and the right to interpretation. Besides the key international human rights instruments, several other international treaties, such as the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[14] set out a series of minimum safeguards in criminal proceedings, including the period immediately after the deprivation of liberty.

A number of legal instruments ratified by the EU Member States also recognise the criminal procedural rights of persons belonging to specific groups that could be vulnerable, such as children, persons with disabilities or third-country nationals. For example, the Convention on the Rights of the Child[15] and the Convention on the Rights of Persons with Disabilities.[16] For a more detailed overview of international legal standards, please see FRA's report on the *Rights of suspected and accused persons across the EU: translation, interpretation and formation*.

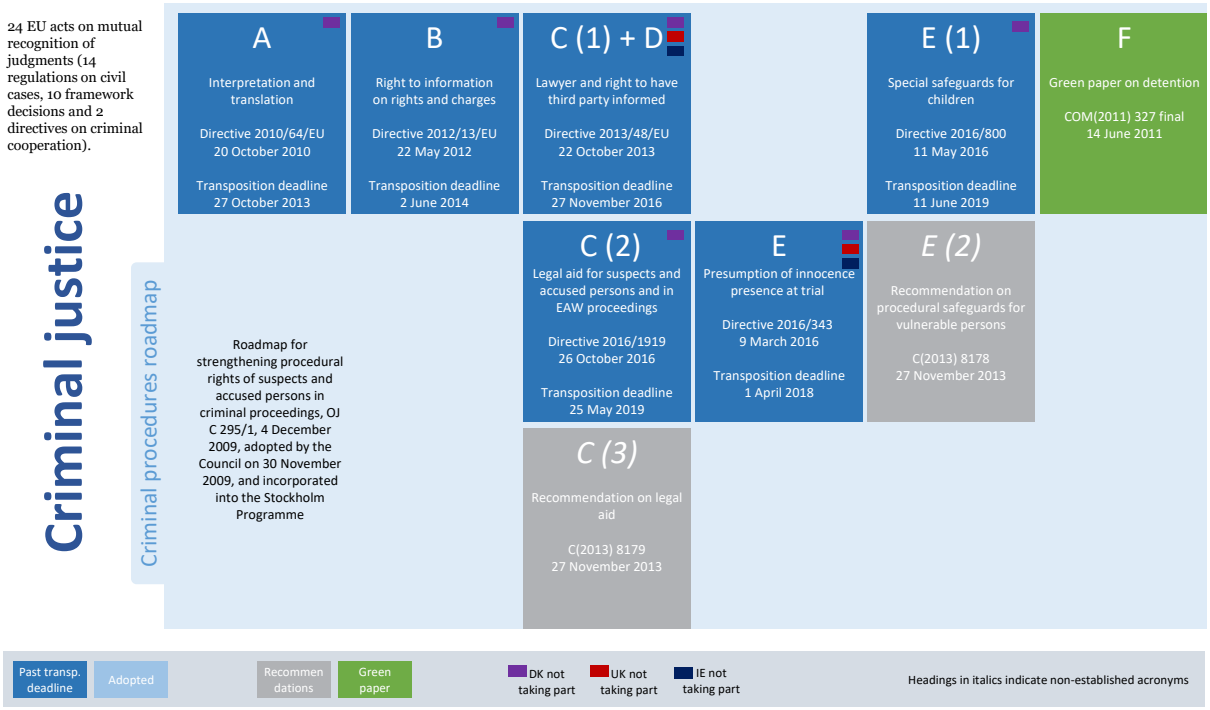
1.2 European and EU law standards

At the European level, the main instruments on criminal procedural rights are the ECHR[17] and the Charter of Fundamental Rights of the European Union (Charter).[18] These are further interpreted and delineated by the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU).

In the ECHR, Article 6 lays down the minimum criminal procedural rights. Article 6 (1) of the ECHR provides for the right to a fair trial, guaranteeing equality of arms and the right to adversarial proceedings, as well as the right to a prompt and public hearing by an impartial and independent court. Article 6 (2) and (3) imposes several additional requirements applicable to criminal proceedings. Article 6 (2) introduces the presumption of innocence. Article 6 (3) includes specific aspects of fair trial rights[19] and sets out the five minimum rights that an accused person has in criminal proceedings:

12 United Nations (UN), Universal Declaration of Human Rights, 10 December 1948, Art. 11 (1).
13 UN, International Covenant on Civil and Political Rights, 16 December 1966, Art. 9 (2), Art. 14 (1) and Art. 14 (3).
14 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984.
15 UN, Convention on the Rights of the Child, 20 November 1989, Art. 40 (2) (b).
16 UN, Convention on the Rights of Persons with Disabilities, 13 December 2006, Art. 13.
17 Council of Europe, European Convention on Human Rights, ETS No. 005, 1950, Art. 5 (2) and Art. 6.
18 Charter of Fundamental Rights of the European Union, OJ 2012 C 326, Art. 6, Art. 47 and Art. 48.
19 ECtHR, *F.C.B. v. Italy*, No. 12151/86, 28 August 1991, para. 29; ECtHR, *Padalov v. Bulgaria*, No. 54784/00, 10 August 2006, para. 30; ECtHR, *Windisch v. Austria*, No. 12489/86, 27 September 1990, para. 23; ECtHR, *Lüdi v. Switzerland*, No. 12433/86, 15 June 1992, para. 43; ECtHR, *Funke v. France*, No. 10828/84, 25 February 1993, para. 44; ECtHR, *Saunders v. the United Kingdom*, No. 19187/91, 17 December 1996, para. 68; ECtHR, *Gäfgen v. Germany*, No. 22978/05, 1 June 2010, para. 169; ECtHR, *Sakhnovskiy v. Russia*, No. 21272/03, 2 November 2010, para. 94.

Figure 1: Roadmap on the procedural rights of suspects and accused persons in criminal proceedings



Source: FRA, 2019

- the right to be informed promptly, in a language understandable to the suspect, of the detail of "the nature and cause of the accusation against them";
- to have adequate time and facilities to prepare a defence;
- to defend oneself in person or through legal assistance of one's own choosing or, if one cannot afford it, "to be given it free where the interests of justice so require";
- to examine, or have examined, witnesses and to ensure their attendance and examination;
- to have the free assistance of an interpreter if one cannot understand or speak the language used in court.[20]

At the EU level, the Charter is the primary instrument setting out the procedural rights of individuals in criminal proceedings. The Charter applies in respect to the Member States only when they are implementing Union law (Article 51). Article 52 (3) of the Charter ensures consistency between the Charter and the ECHR. It establishes that the rights in the Charter, which correspond to the rights in the ECHR, have the same meaning and scope as those in the latter,[21] adding that EU law can extend the rights and provide a higher level of protection. Articles 47 and 48 spell out the right to an effective remedy and the right to a fair trial, which correspond to Articles 6 and 13 of the ECHR.

At the EU level, in 2009, the Council of the European Union adopted the Roadmap.[22] This resolution, which was included in the multiannual Stockholm Programme, set out the EU priorities for the period 2010–2014 in the area of justice, freedom and security.[23] Following that, to promote mutual trust and facilitate mutual recognition of judicial decisions, and to promote police and judicial cooperation in criminal matters, pursuant to Article 82 (2) (b) of the Treaty on the Functioning of the European Union, the EU adopted directives establishing minimum standards on the rights of individuals in criminal proceedings. Directives, by their nature, indicate common goals, while detailed legislation is left to the domestic law of the Member States. By contrast, regulations apply as a whole in all Member States without the need for implementing measures. With directives, it is especially important in the area of criminal law for states to have a margin of appreciation in achieving the same goal.

20 See ECtHR, Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial, updated on 31 December 2018.
21 CJEU, C-612/15, *Nikolay Kolev and Others*, 5 June 2018, para. 105.
22 Council of the European Union (2009), Resolution of the Council on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ 2009 C 295, Brussels, 30 November 2009.
23 European Council (2010), The Stockholm Programme – an Open and Secure Europe Serving and Protecting Citizens, OJ 2010 C 115, Brussels, 4 May 2010, point 2.4.

Directives on basic rights in criminal proceedings

Under EU law, the following instruments set out the basic rights for defendants in the course of criminal proceedings:

- **Directive 2010/64/EU** was adopted on 20 October 2010, with an implementation deadline of 27 October 2013. It sets out the common minimum standards with regard to translation and interpretation in criminal proceedings to help ensure that the right to a defence is fully exercised.
- **Directive 2012/13/EU** was adopted on 22 May 2012, with an implementation deadline of 2 June 2014. It lays down the minimum standards on the right to information in criminal proceedings.
- **Directive 2013/48/EU** was adopted on 22 October 2013, with an implementation deadline of 27 November 2016. It establishes the minimum rules on the rights of suspected or accused persons in criminal proceedings to access a lawyer, to have a third party informed upon deprivation of liberty and to communication with third persons and consular authorities while deprived of liberty.
- **Directive (EU) 2016/343** was adopted on 9 March 2016, with an implementation deadline of 1 April 2018. It aims to strengthen certain aspects of the right of suspects or accused persons in criminal proceedings to be presumed innocent until a final determination is made and the right to be present at the trial in criminal proceedings.
- **Directive (EU) 2016/1919** was adopted on 26 October 2016, with an implementation deadline of 25 May 2019. It establishes the minimum rules on the right to ordinary legal aid for suspects and accused persons in criminal proceedings and for persons subject to an EAW.
- **Directive (EU) 2016/800** was adopted on 11 May 2016, with an implementation deadline of 11 June 2019. It specifically focuses on children and establishes the minimum standards across all Member States on the rights of children who are suspected or accused in criminal proceedings and the rights of children subject to EAW proceedings.

All of these directives apply to the criminal proceedings as a whole – from the pre-trial stage, including investigation, to the trial stage and until the final determination of the proceedings, including any possible sentencing and appeal. These directives also apply to EAW proceedings. In addition, Directive 2013/48/EU applies to all cases in which deprivation of liberty is imposed.

The Roadmap sets out a step-by-step approach towards establishing a catalogue of procedural rights of suspects and accused persons in criminal proceedings. It calls for the adoption of six measures: Measure A, the right to translation and interpretation in criminal proceedings; Measure B, the right to information in criminal proceedings; Measure C, access to a lawyer and legal aid in criminal proceedings; Measure D, the right to communicate with family and consular services; Measure E, special safeguards for vulnerable suspects; and Measure F, a green paper on pre-trial detention.

The aim of the minimum criminal procedural safeguards laid down in these directives is to ensure a fair trial. As the CJEU states, the right to a fair trial is of "cardinal importance as a guarantee" that all the rights of individuals and the rule of law will be safeguarded.[24] EU Member States are free to provide a higher level of protection to suspected and accused persons in criminal proceedings. The level of protection, however, should never fall below the standards provided by the ECHR and stipulated by the relevant international and European instruments mentioned above, to which EU Member States are party.

24 CJEU, C-216/18 PPU, *LM*, 25 July 2018, para. 48.

2 Selected defence rights: information about rights and their exercise in practice

KEY FINDINGS

- Authorities in the eight EU Member States covered by this report inform defendants about their procedural rights in criminal proceedings in different ways. The information differs in both its scope and how it is conveyed. This ranges from providing complete information, both in writing and orally, to handing out only a simple written leaflet about rights without giving defendants any further information.
- Defendants may not be fully aware of their procedural rights owing to several factors. These include relevant authorities treating the defendants other than as a suspect at the initial stage of the criminal proceedings; a lack of practices to improve the accessibility of information, taking into account defendants' vulnerabilities; and a lack of practices for verifying defendants' understanding of the information provided by the relevant authorities.
- Individuals are sometimes questioned as a witness or are 'informally' asked questions by law enforcement authorities, when in fact there are plausible reasons to suspect the person's involvement in a crime. Hence, they should be provided with comprehensive information about their rights – in particular, the right to remain silent, as required by the legislation. In addition, law enforcement authorities sometimes establish informal practices so that defendants' self-incriminatory statements, which they make as witnesses, can be later used against them legally in the course of the proceedings. For example, they question former witnesses again, this time as defendants, and ask them if they stand by their previous statements.

This chapter examines the views of the interviewed professionals and defendants on the information provided about defence rights in national proceedings, and on how these rights are exercised in practice. The defence rights discussed are, and as outlined in Directive 2012/13/EU, the right to information, the right to be informed about the accusation, the right to be informed about the reasons for arrest and the rights of defendants to defend themselves or to remain silent and not incriminate themselves.

2.1 Legal overview

The right to information in criminal proceedings aims to ensure that defendants receive the necessary information concerning the accusation and reason for their arrest, so that they are able to effectively exercise their rights and defend themselves effectively. The right to information in criminal proceedings originates from Articles 5 and 6 of the ECHR, which are reflected in Articles 6, 47 and 48 of the Charter. Article 6 (3) (a) of the ECHR specifically lists the right to information about the accusation as a minimum safeguard in criminal proceedings, while Article 5 (2) provides for the right of arrested persons to be informed of

the reasons for their arrest and any charges against them. Although the ECHR does not specifically set out the right to information about procedural rights, the ECtHR ruled that authorities must ensure that the accused has sufficient knowledge of their right to legal assistance and legal aid, and of their right to remain silent and not incriminate themselves.[25]

At the EU level, Directive 2012/13/EU on the right to information establishes common minimum rules governing the right to information in criminal proceedings and EAW proceedings by building on the general rights established in Articles 47 and 48 of the Charter.[26] It includes rules on the right to information about:

- procedural rights
- the accusation
- the reasons for detention, for persons deprived of liberty
- the right to access a lawyer and any entitlement to free legal advice
- the right to interpretation and translation and the right to remain silent.

Relevant authorities should provide this information orally or in writing, in simple and accessible language, taking account of the particular needs of vulnerable suspects or vulnerable accused persons.[27] The ECtHR similarly highlighted the importance of taking into account the vulnerabilities – such as intoxication or other mental or physical conditions – of suspects or accused persons.[28] In addition, Directive 2012/13/EU requires that persons deprived of liberty receive a written 'letter of rights'.[29]

The authorities should 'promptly' provide relevant information to persons concerned, that is, "at the latest before the first official interview of the suspect or accused person".[30] This concurs with the case law of the ECtHR.[31] According to the ECtHR, guarantees also apply to witnesses whenever they are suspected of a criminal offence, as the formal status of the person is immaterial.[32] Delaying the provision of information to a person who has allegedly committed an offence or treating a suspect as a witness, rather than as a suspect, is a circumvention of the application of procedural rights.[33]

Directive 2012/13/EU on the right to information obliges relevant authorities to inform persons deprived of liberty about the reasons for their arrest or detention, including information on the criminal act that they are suspected or accused of having committed.[34] According to the case law of the ECtHR,[35] this information is necessary to enable defendants to challenge their arrest before the court. Therefore, defendants should, as soon as possible, receive the information in a way that ensures they understand why they are being arrested.

While detailed information on the criminal act that they are accused of must be conveyed 'promptly', this information need not be provided in its entirety by the arresting officer at the actual moment of arrest.[36] Whether or not the content and promptness of the information provided are sufficient is assessed on a case-by-case basis.[37] In general, the ECtHR has interpreted 'promptly' to mean that several hours is within the appropriate range and in compliance with Article 5 (2),[38] but several days is too long.[39]

25 ECtHR, *Padalov v. Bulgaria*, No. 54784/00, 10 November 2006, para. 54; ECtHR, *Aleksandr Zaichenko v. Russia*, No. 39660/02, 18 February 2010, para. 38; ECtHR, *Panovits v. Cyprus*, No. 4268/04, 11 December 2008, paras. 65 and 72.
26 CJEU, C-612/15, *Nikolay Kolev and Others*, 5 June 2018, para. 88.
27 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, Art. 3 (2), Recital (26).
28 ECtHR, *Płonka v. Poland,* No. 20310/02, 31 March 2009, paras. 37–38.
29 Art. 4 requires that the written 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.
30 Directive 2012/13/EU, Recital (19).
31 ECtHR, *Brusco v. France,* No. 1466/07, 14 October 2010, para. 47; ECtHR, *Panovits v. Cyprus*, No. 4268/04, 11 December 2008; ECtHR, *Padalov v. Bulgaria*, No. 54784/00, 10 August 2006; ECtHR, *Pischalnikov v. Russia*, No. 7025/04, 24 September 2009.
32 ECtHR, *Brusco v. France*, No. 1466/07, 14 October 2010, para. 47.
33 See, for example, ECtHR, *Nechiporuk and Yonkalo v. Ukraine*, No. 42310/04, 21 April 2011, para. 264; ECtHR, *Brusco v. France*, No. 1466/07, 14 October 2010, para. 47.
34 Directive 2012/13/EU, Art. 6 (2).
35 ECtHR, *Van der Leer v. the Netherlands*, No. 11509/85, 21 February 1990, para. 28; ECtHR, *L.M. v. Slovenia*, No. 32863/05, 12 June 2014, paras. 142–143.
36 ECtHR, *Khlaifia and Others v. Italy*, No. 16483/12, 15 December 2016, para. 115; ECtHR, *Fox, Campbell and Hartley v. the United Kingdom*, Nos. 12244/86, 12245/85, 12383/86, 30 August 1990, para. 40; ECtHR, *Murray v. the United Kingdom*, No. 1430/88, 28 October 1994, para. 7.
37 ECtHR, *Fox, Campbell and Hartley v. the United Kingdom*, Nos. 12244/86, 12245/85, 12383/86, 30 August 1990, para. 40.
38 *Ibid.*, para. 147.
39 *Ibid.*, para. 42; ECtHR, *Saadi v. the United Kingdom*, No. 13229/03, 29 January 2008, para. 84; ECtHR, *Shamayev and Others v. Georgia and Russia*, No. 36378/02, 12 April 2005, para. 416; ECtHR, *Van der Leer v. the Netherlands*, No. 11509/85, 21 February 1990, para. 28; ECtHR, *X v. the United Kingdom*, No. 7215/75, 5 November 1981, para. 66; ECtHR, *Rusu v. Austria*, No. 34082/02, 2 October 2008, para. 43.

In relation to the manner and extent to which the accused is informed of the accusation and the reasons for arrest, the ECHR, the Charter and Directive 2012/13/EU on the right to information have no special regulations.[40] The CJEU held that the manner in which information is provided must not undermine the objective of Article 6 of Directive 2012/13/EU, must be in accordance with the principle of a fair trial and must enable suspects or accused persons to prepare their defence.[41] The ECtHR also requires that authorities provide full and detailed information on the accusation.[42] The extent of the 'detailed' information depends on the particular circumstances of each case. The ECtHR considers it necessary for authorities to provide sufficient information for the accused to understand fully the charges against them and have adequate time to prepare their defence.[43]

When defendants do not understand the language of the proceedings, they should receive a translation of the essential documents, including information about the accusation.[44] Moreover, interpretation must be provided for all oral communication.[45] The present research did not address the right to interpretation in detail. An earlier report by FRA, published in 2016 and entitled *Rights of suspected and accused persons across the EU – translation, interpretation and information*, includes a detailed overview of the legal framework and Member States' policies on the right to interpretation.

All of the Member States covered by this report – except Denmark, because of its specific opt-out agreement[46] – adopted Directive 2012/13/EU on the right to information. In all Member States, the relevant statutes oblige authorities to inform suspects about their rights, including the right to remain silent. In Austria, such information should be provided as soon as possible. The method – orally or in writing – is not mentioned, except for when the person is arrested, in which case the information is provided via a letter of rights.[47] In Bulgaria, there is an obligation to present written information about rights together with the accusation.[48] In Denmark, the authorities must inform suspects either orally or in writing before the questioning.[49] In Greece, all suspects should be informed immediately, either orally or in writing, of their rights.[50] In France, before any questioning, a police officer must inform a suspect of the accusation and their rights, although there is no regulation regarding whether this should be verbal or written.[51] In the Netherlands, a suspect who is arrested should be informed of their rights, including the right to remain silent, immediately; whenever the person is deprived of their liberty, such information is to be provided in writing. A suspect who is not arrested receives information about their rights before the first police interview.[52] In Poland, a suspect should be informed in writing about their rights prior to the first interrogation.[53] Finally, in Romania, the law prescribes only that suspects should be informed about their rights.[54]

40 CJEU, C-287/16, *Gavril Covaci*, 15 October 2015, para. 62; ECtHR, *Pelissier and Sassi v. France* [GC], No. 25444/94, 25 March 1999, para. 53; ECtHR, *Drassich v. Italy*, No. 25575/04, 11 December 2007, para. 34; ECtHR, *Giosakis v. Greece* (no. 3), No. 5689/08, 3 May 2011, para. 29; ECtHR, *Osman Kane v. Cyprus*, No. 33655/06, 13 September 2011.
41 CJEU, C-287/16, *Gavril Covaci*, 15 October 2015.
42 ECtHR, *Pelissier and Sassi v. France*, No. 25444/94, 25 March 1999, para. 52.
43 ECtHR, *Mattoccia v. Italy*, No. 23969/94, 25 July 2000, paras. 60–61.
44 Directive 2010/64/EU, Art. 3 (1) (3).
45 CJEU, C-287/16, *Gavril Covaci*, 15 October 2015, para. 32.

46 European Union (2012), Consolidated version of the Treaty on the Functioning of the European Union, Protocol (No. 22) on the position of Denmark, OJ 2012 C 326, Art. 1 and Art. 2.
47 Austria, Criminal Procedure Code *(Strafprozessordnung 1975)*, BGBl. Nr. 403/1977, last amended by BGBl. I Nr. 32/2018, §§ 50 and 171 (4).
48 Bulgaria, Criminal Procedure Code *(Наказателно-процесуален кодекс)*, 29 April 2006, Art. 219 in connection with Art. 55.
49 Denmark, the Administration of Justice Act, Consolidated Act No. 1255 of 16 November 2015 with amendments *(Retsplejeloven, lovbekendtgørelse nr. 1255 af 16 November 2015 med senere ændringer)*.
50 Greece, Criminal Procedural Code *(Κώδικας Ποινικής Δικονομίας)* (OG A' 228/8 October 1986), Art. 99A.
51 France, Code of Criminal Procedure, Art. 61-1-1.
52 Netherlands, Code of Criminal Procedure (*Wetboek van Strafvordering*), 15 January 1921.
53 Poland, Code of Criminal Procedure, Art. 300.
54 Romania, Criminal Procedure Code, Art. 78 and Art. 83.

2.2 Findings: how is the right to information implemented in practice?

The majority of police officers, prosecutors, judges and defendants across all of the Member States studied said in the interviews that authorities carrying out investigations – in most cases, police or prosecutors – do inform defendants about their defence rights and the accusation in writing, orally or both, at the latest before the first questioning. This is true of both those deprived of liberty and those not deprived of liberty – differences in the way rights are communicated to these two categories are discussed in this chapter.

While most practitioners and defendants agree that defendants are informed, practices across Member States differ concerning the type and format of the information provided, when it is provided and by whom.

The research finds a discrepancy between the categories of people interviewed in terms of their perceptions of how effectively defendants are informed about accusations – for example, to what extent they are provided with clear and easy-to-understand information. Judges, police and prosecutors usually report that defendants are effectively informed, while defendants themselves sometimes report a different experience. The lawyers interviewed have views more similar to those of defendants than the other categories of interviewees. Lawyers in the majority of Member States report problems in practice with the effective provision of information about rights and the accusation.

2.2.1 Ensuring the right to information of persons not deprived of liberty

In many Member States, professionals report differences in how defendants not deprived of liberty and those deprived of liberty receive information about their rights and the accusation. In contrast to the situation of persons deprived of liberty, defendants not deprived of liberty are, in various Member States, often summoned in writing for questioning as either a suspect or a witness and have time to read and process the information, and contact a lawyer, who will then be with them from the first questioning.

For example, in Austria, police officers claim that the majority of defendants, in particular those who are questioned without being deprived of their liberty, are already well informed about the accusation and their right to remain silent or to defend themselves before they present themselves at the police station. The lawyers interviewed observe that police officers are more eager to inform defendants about the accusation when a defence lawyer is present (for further information, see Section 2.2.5 on the role of a lawyer, and Chapter 3).

A common trend reported in several Member States is providing non-detained persons with information orally on certain, 'most crucial', rights, for example the right to a lawyer and the right to remain silent. This is often done in addition to providing written information. For example, a gendarme in France elaborated on the importance of informing defendants of their right to a lawyer orally by telephone, because it:

"allows the suspect to plan ahead if they want a lawyer and to come with one to the police station. If the suspect is not informed of this right beforehand and they want a lawyer when they arrive at the police station, we will not be able to question them, we will have to make another appointment. Which is the advantage of informing them of the right to a lawyer beforehand."
(Police officer, France)

In Austria, defendants who are not deprived of liberty also receive a summons to questioning by telephone, and receive initial information on the accusation. In addition, defendants receive oral and written information about the accusation immediately before the questioning starts. Police, prosecutors and judges say that both defendants deprived and defendants not deprived of liberty receive information on their right to remain silent and to defend themselves, both orally and in writing. Several police officers in Poland also stated that defendants are in some cases informed orally that they have a right to remain silent and to have access to a lawyer.

In Denmark, all of the law enforcement officers interviewed state that they inform suspects about the accusation orally as soon as contact is made. Most of the law enforcement officers qualify this by specifying that, in some situations, they will initially inform the suspect of the accusation in a general manner, and wait until the situation has calmed down before explaining the full details. This applies both to defendants not deprived of liberty and to defendants deprived of liberty. Half of the law enforcement officers also state that, in some cases in which persons are not deprived of liberty, the suspect will be informed of the accusation by telephone or post if the police are not able to contact them by other means. One of the law enforcement officers states that he thinks this will be done by email in the near future.

With regard to defendants in the Netherlands who are not detained, the law does not specify how they should be informed, but uses the Dutch verb mededelen, which translates as 'to inform' or 'to communicate', without specifying whether this communication should be oral, in writing or both. Professionals report

that defendants not deprived of their liberty are generally informed about the accusation brought against them by letter, or sometimes over the phone, when invited for questioning. Several professionals – lawyers and police officers – describe the information on accusation in the letter as being quite brief:

"They often receive a letter, or a phone call. And it's a standardised letter. With very concise information. So often there is a date in it and the charge. So, suspicion of, well, assault, and committed on that date, full stop. That's it. [...] And then the date is wrong [...] sometimes there are a lot of mistakes in the letter."
(Lawyer, the Netherlands)

2.2.2 Ensuring the right of persons deprived of liberty to information about their rights

In contrast to those not detained, persons deprived of liberty have additional rights, such as the right to information on the reasons for the arrest, including the criminal act that they are suspected or accused of having committed. Receiving and understanding the reason(s) for arrest or detention as soon as possible is key to enabling the defendant to challenge the deprivation of liberty. Persons deprived of liberty should receive a written letter of rights outlining their procedural and security rights,[55] meaning that, whenever a person is deprived of their liberty, authorities should 'promptly' hand them a letter describing their procedural rights. Persons deprived of liberty should have time to read this letter and should be able to keep it throughout the whole time of their deprivation of liberty. Apart from this additional guarantee, persons deprived of liberty should be informed about their rights and the accusation in the same way as persons not deprived of liberty, namely before the first questioning.

It should be noted that, in some Member States, police can detain a person outside the scope of criminal investigation. Those persons enjoy their rights as people deprived of liberty but not as suspects in criminal proceedings (for example in Bulgaria) (see, in particular, Section 2.2.3 for the practical implications of this kind of arrest). In all eight Member States, professionals claim that defendants who are deprived of their liberty receive brief information on the accusation, reasons for the arrest and their rights, such as the right to remain silent, orally from the police when they are arrested and at the police station, and they receive more detailed information in writing once in police custody.

However, professionals in some Member States note that there are practical challenges and maintain that the provision of this information is sometimes delayed or it lacks detail. For example, respondents in the Netherlands highlight instances in which police officers provide only general information about the accusation during arrest, for example often limited to a reference to the relevant article of the Penal Code. In addition, they refer to cases in which a defendant is informed about the accusation not during the arrest, but only when they meet with their lawyer before the first questioning.

As a lawyer from Romania put it:

"Yes, they are informed about the facts. In practice a problem arises because this description of the facts is vague, which does not allow for an effective defence."
(Lawyer, Romania)

Overall, the defendants interviewed – those deprived of their liberty in the course of national proceedings – give mixed responses on whether or not they received information about their rights and the accusation, in comparison with what other interviewees said. Defendants' views and experiences also focus on whether or not information – if received – is received in a clear way and understood.

In all countries but Greece, the majority of defendants interviewed received information about the crime they were charged with on first contact with the police. In Greece, only one of six defendants states that police explained charges to him upon arrest but did not explain any of his procedural rights at that time. The remaining five defendants say that police did not inform them about charges at the time of arrest. Three out of six defendants in Romania say that they were informed by police about the accusation on first contact, one defendant was not immediately notified and the remaining two could not remember. Two out of five defendants in Austria say that they were not informed, or not effectively informed, about the accusation by the police when they were arrested. In France, while the majority of defendants interviewed say they were informed of the principal rights that they had in police custody (7 out of 10 defendants), two note that there was a delay between the arrest and the notification of their rights, and another defendant complains about the excessive speed at which these rights were notified to him.

Regarding information on the reasons for arrest, again, whereas the majority of the remaining categories of interviewee (other than defendants) believe that the right to be informed about the reasons for arrest is respected, there is some discrepancy between the views of professionals in certain Member States. For example, in Poland, whereas the police and prosecutors state that the information is provided immediately after arrest, the lawyers tend to disagree with this

55 Directive 2012/13/EU, Art. 3.

statement and claim that this information is provided only after some time.

Similarly, in France, apart from the majority of police and gendarmes, who report that the defendants receive this information as soon as they are arrested, despite the law not expressly obliging them to do so, the lawyers and judges are mainly divided about when the defendant receives that information. For example, three of the prosecutors and judges state that the principle reasons for the arrest are indicated at the moment of the arrest, whereas the remaining four consider that this information is instead given after the transport of the defendant to the police or gendarmerie station.

Prosecutors and judges also state that the information varies depending on the circumstances of the arrest. One prosecutor explains the practical difficulty of giving information to the defendant at the moment of arrest due to the absence of police officers on the spot, as judicial police often carry out the arrest. According to him, "[a] period of five or six hours can never be allowed but it can easily be between 15 and 45 minutes if the investigators can provide explanations".

Findings in Denmark also point to diverging perspectives. Several professionals – two lawyers, one representative of a monitoring body and one law enforcement officer – offer possible explanations for this: first, the confusion of an arrest situation may influence whether or not defendants understand or remember that they received information about the reasons for their arrest. Defendants deprived of their liberty are placed in an inherently stressful situation and the impact of this is apparent in both their understanding of their rights and their ability to exercise them. The level of stress and the complexity of a situation might indeed explain the perception of interviewed defendants who either did not remember if they were informed about certain rights immediately after the arrest or just did not understand the information.

Second, the chaos of an arrest situation can postpone the actual communication of the information. A lawyer in Denmark comments that:

"[T]he arrest can be very, very turbulent. I recently had a client who was woken up in the middle of the night and ripped out of his bed in his night suit. With the purpose of DNA testing and such. It was very unclear for him. [...] In a case like this, it can be a bit unclear what the exact reason is."
(Lawyer, Denmark)

Findings show that Member States' authorities convey information on the reasons for the arrest in two forms: in writing only, or orally after the arrest and then in writing in the form of an arrest record. The defendants interviewed state that they do not always have enough time to read the document and police sometimes urge them to fill it in quickly. One interviewee from a Bulgarian monitoring body notes that detention orders do not typically include a description of the reason for detention, although they should:

"The ground for detention is not detailed in the order. If the person is arrested because there is evidence of a crime, this is also not described in the order. The order is filled in as briefly as possible. So the person does not get information [...] at least from these documents it is unclear what the reason for detention is, since the detainee has no idea what is meant by, for example, Article 72, Paragraph 1, Item 2, 3, 4. This is not reliable information."
(Member of a monitoring body, Bulgaria)

However, interviewees in other Member States – Austria, Denmark, Greece, the Netherlands and Poland – reveal that, in most cases, the reasons for arrest are also explained orally in addition to in writing. For example, in the Netherlands, defendants may also hear about the reasons for their arrest from the assistant prosecutor of the police. This may form part of the assessment of the lawfulness of the arrest, or part of the assessment for the extension of police custody. Although one lawyer interviewed often encounters defendants who do not know the reason for their arrest, the findings do not confirm that this is a common occurrence.

Regarding information on the reasons for the arrest, defendants' experiences on receiving such information are split: the majority of defendants in Austria, the Netherlands, Poland and Romania note they received this information immediately after arrest, while the majority of those in Bulgaria, Denmark, France and Greece note that they did not. However, given the small number of interviewees within the specific categories in each Member State, generalisations should not be made about each country as a whole.

However, in Romania, for example, when asked about the reasons for the arrest, all arrested persons make reference to information on the accusation in their answers. This may indicate that they are not given proper explanations of why they are deprived of liberty, as they believe that they were arrested only because of the alleged offence of which they were accused, and not for other reasons, such as a risk of absconding or obstructing the investigation.

Defendants report being detained for some time without any information regarding the justification or reasons for their arrests (two interviewees in Poland and one in Bulgaria) or not being informed at all (three interviewees in Bulgaria).

"No [they did not tell me why they were detaining me], not at all. I asked them – well, for what? What is going on, for what, I want to know what is happening, what is this all about? – Well, get in [the car]. For what, for what – you will learn there [at the police station]."
(Defendant, Bulgaria)

In France, several defendants consider that the investigators limited themselves to indicating to them the legal grounds of the detention or simply did not want to inform them of the reasons for the arrest. In general, the defendants tend either to confuse the reasons for the arrest with the accusation or with the legal definition of the offence or to consider that they did not receive this information.

Problems in practice concerning the effective enjoyment of one's right to remain silent

A particularly serious issue that arose from interviews with both practitioners and defendants is the issue of law enforcement creating barriers to the enjoyment of the defendant's right to remain silent.

This was an issue mentioned, principally by lawyers and defendants, in Austria, France and Romania.

A police officer in Austria states that, if defendants who are apprehended by the police but not in pre-trial detention make use of the right to remain silent, the police might, in certain cases, perceive a 'danger of collusion', which is a legitimate reason for pre-trial detention. The interviewee presents this as 'leverage' of the police:

"If he does not want to tell me anything, he does not have to tell me [...] Of course, if he does not say anything to me about the case, he will be at risk of danger of suppression of evidence and he will [be remanded in custody] if he's lying, he brings no light into the case, and it will continue to provide danger of suppression of evidence, then he'll [be remanded in custody] too. [...] So in principle we chat a bit and if they want to go free then they should tell the truth. That is little challenge when you do the job for a long time."
(Police officer, Austria)

Several law enforcement officers in France mention a similar phenomenon, referring to it as:

"the little game between the person in custody and the investigator, which allows to pull the strings during the interview according to the defendant's statements. [...] The defendant remains unclear about the things we have available and it allows us to question them in the direction that suits us."
(Police officer, France)

Another law enforcement officer referred to this practice as a bit like "a game of poker".

One staff member from the monitoring body was particularly critical, saying not only that the defendants did not know exactly what charges they faced or what they risked during police custody, but also that investigators even tried to lead them to incriminate themselves: "They will use means of pressure to draw out elements under duress or intimidation".

A judge interviewed in France also alludes to this, and was concerned that:

"the defendant is not really informed of their rights until they arrive at the police or gendarmerie station. That poses the big problem of spontaneous remarks written in the procedures before the notification of rights took place. There is a vacuum which I interpret as a 'right to pursue' (droit de suite) in favour of the investigators."
(Judge, France)

Lawyers in Romania complain that defendants do not understand the way the police inform defendants about their right to remain silent and to not incriminate themselves: the defendants are handed a written report (proces verbal) on the accusation against them and their rights, which are listed as they are provided in the Criminal Procedure Code, and then the defendants are requested to sign it. Lawyers from Austria and France also indicate that a reason for insufficient information being provided on the accusation and on the right to remain silent, and for the lack of effort to make defendants understand, is police tactics, namely to try to obtain as much information as possible in the early stages of proceedings. In contrast, the police officers interviewed consider that all defendants understand both the accusation and the right to remain silent; this could also explain why police do not make efforts to better explain this information, as they consider that the information provided orally and in writing is sufficient.

A lawyer in Bulgaria describes a practice whereby defendants are 'invited' – but, in the lawyer's view, really pressured – by the police to share informally with them "everything they know" before the lawyer arrives:

"because thus they will allegedly get smaller sentences, or otherwise 'dire consequences' will follow, etc. Those are avenues used and, if the detained person is more vulnerable, more shy, as a lot of people are in that situation for the first time, they start writing long explanations where they tell even what they are not asked of or even what is further from the truth with the only thought to leave the detention place as soon as possible."
(Lawyer, Bulgaria)

Although most of the lawyers in Denmark state that law enforcement officers generally inform suspects about their right to remain silent, they have all heard of cases in which this was not done, typically when lawyers are not present. One lawyer describes a situation that can arise:

"What we hear a lot is that when we are not present – but then it is something we hear from the clients afterwards – then we hear them say: 'Well but then he questioned me and afterwards he told me: "I also have to tell you that you have the right to remain silent" '. So that is turned upside-down. We hear that a lot. [...] But I don't know whether this is what really happens. The police always deny that this is how it happens."
(Lawyer, Denmark)

Defendants' experiences on having received information on the right to remain silent again highlight gaps in the provision of information in practice in many Member States.

For example, in Greece, only one defendant out of the six interviewed claims to have been informed about the right to remain silent and to not incriminate himself, and only after the questioning. The police officer read the statements the interviewee had made during questioning aloud, and then announced to him that he could use his right to remain silent:

A: "I was told that I have the right to remain silent, when the questioning finished [...]"
Q: "Did you know before that you had this right?"
A: "I did not know that I had the right to remain silent [...] When I was informed at that time, I did not think that I could exercise it [...]"
(Defendant, Greece)

Similarly, only one (out of six) arrested persons in Romania declares that the police told him about the right to remain silent at the time of apprehension. Two arrested persons explain that they were informed only by the prosecutor, while two others mention that they were given their rights on a piece of paper after having been in custody for up to 24 hours. The sixth interviewee who was not informed of his rights by the police did not provide details of whether the prosecutor informed him or not. Two of the arrested persons who declare that police informed them about the accusation immediately after their apprehension specifically mention that the police did not inform them of the right to remain silent.

One defendant in Austria highlights how the police put pressure on defendants who want to make use of their right to remain silent:

A: "I told him 'I do not say anything now', he told me 'that is of no use, then you will be here until you say something and this prolongs everything'. He put me under pressure."
Q: "That means that you then made a statement because of that?"
A: "Exactly, for sure. Because I have two children at home, I did not think that I will go into pre-trial detention, I already had my date for getting the electronic shackle. That was a little ... the police officer shaped it that way."
(Defendant, Austria)

Another defendant in Austria reports how the police discouraged her from making use of her right to remain silent:

"Well, they did explain things to me, and so on, but – they always said: '[name], it's better if you testify than if you stay silent' [...] If you say nothing then it only gets worse for you. Then I simply talked and talked [...]"
(Defendant, Austria)

2.2.3 Questioning outside a formal criminal procedure – when do rights take effect?

Informal questioning

Directive 2013/48/EU on the right of access to a lawyer also covers situations in which persons, such as witnesses, become suspects or are accused during questioning by the police or other law enforcement authorities. Pursuant to Recital (21) of Directive 2013/48/EU, in such situations, the police should immediately suspend the questioning until the person is made aware that they are now considered a suspected or accused person and can fully exercise their rights.[56] Such situations also relate to the rights provided under Directive 2012/13/EU on the right to information in criminal proceedings, as, once a person is made aware by the competent authorities that they are a suspect or is accused, the competent authorities have an obligation to inform the person about that procedural rights.[57]

In some Member States, authorities sometimes question people without making it clear what their status is, for example whether they are considered a witness or a suspect. Lawyers interviewed in Bulgaria refer to "informal intelligence talks", in Greece to "the grey zone" and in Poland and Romania to "informal questionings". These are situations when police ask 'a person of interest' questions, recording their answers in 'police memos', but without entering this information into official case files. The obligation to inform defendants about their rights takes effect from the moment the person is aware that

56 Directive 2013/48/EU, Recital (21).
57 Directive 2012/13/EU, Art. 2 (1) and Recital (19).

they might be suspected of committing an offence.[58] By contrast, witnesses do not enjoy the protection offered to suspects: they are obliged to tell the truth, although they cannot be forced to incriminate themselves.

Interviewees in Bulgaria discuss the practice of police not questioning people as witnesses but just 'informally' asking questions without informing them of their rights, while they may in fact already be a suspect. Those persons might be summoned to the police station for a 'talk'. Several of the lawyers interviewed discuss these 'intelligence talks', as some police officers also call them. The lawyers claim that such talks are often the first ground on which police call likely defendants/persons of interest to appear, rather than first formally calling them as witnesses. A number of interviewees highlight the fact that such talks can adversely affect a defendant's situation, as persons who are called for such 'talks' have no express rights. According to one interviewee, they are sometimes not even entered in police station registries, with their lawyers, if present, left to wait outside because these are only 'talks'. Half of the lawyers interviewed mention that police – without informing them about their rights – attempt to gain as much information as possible from the person of interest or ask them for explanations in writing. One police officer who mentioned these informal 'intelligence talks' maintains, however, that they do inform the persons of interest about their right to defend themselves and their right to remain silent. One of the lawyers elaborated on this:

"First, they catch someone, take him to the police without giving him a detention order. And they say 'We are having a conversation'. So, when the attorney comes, they say 'Wait, he is not detained to have right of defence, we are just talking'. This guy, he is not notified of anything, he does not know why he is there, they just start asking 'Where were you, do you know this or that person?' and so on. As for an attorney – forget about it!"
(Lawyer, Bulgaria)

Police in Bulgaria have a right to detain a person for 24 hours outside the scope of criminal proceedings.[59] A similar measure applies in Romania.[60] Persons detained for 24 hours by the police might not yet be suspects, but whatever they say might be recorded:

"If he makes the mistake of talking [outside the proceedings] and he is heard, the criminal investigation body will insist on the aspects he has mentioned."
(Lawyer, Romania)

The majority of the lawyers interviewed from Poland refer to the so-called 'police official memos' (*notatka służbowa*), which can capture the content of defendants' statements made in the course of unofficial questioning/conversations before the official opening of the criminal proceedings:

Q: "Are the testimonies of suspects given before law enforcement officers outside the procedural framework of proceedings, not during an interview, taken into account at subsequent stages of the proceedings?"
A: "Yes, unfortunately. These are the so-called 'official memos' [notatki służbowe], which, if you ask me, are a relic of the bygone era. Sometimes these memos include information on the testimony of a suspect. [...] It's a widespread practice to prepare official notes – quasi-records – from questioning a person without informing them about their rights and forcing them to sign these documents."
(Lawyer, Poland)

As one lawyer explained, in theory, such memos cannot be used instead of testimonies given on record. However, the majority of lawyers noted that the police have found ways to bypass this prohibition. In particular, police officers testify as witnesses on account of defendants' statements made during informal questioning. In addition, if the memo's author testifies during the proceedings, the memo can be admitted as evidence. If the memo's author does not testify, the memo still remains in the case file and the judge can access it. As interviewee notes, such memos are not a full transcript of what the suspect stated in an informal setting, but instead are a summary, and the police encourage suspects to sign such documents.

Witnesses becoming suspects

A different situation from the 'informal talks' mentioned above is when it becomes clear during the questioning that a witness should instead be treated as a suspect. At this stage, authorities should stop the questioning, inform the person that they are now a suspect and make sure to inform the person of their rights, in particular the right to remain silent. Failure to do so might constitute a violation of the guarantees that, according to the ECtHR, also apply to witnesses whenever they are suspected of a criminal offence, as the formal qualification of the person is immaterial.[61] Findings show that in many countries – for example Austria, Denmark, France, the Netherlands and Poland – authorities generally inform people about their rights as soon as they are regarded as a suspect instead of a witness.

58 Directive 2012/13/EU, Art. 2.1.
59 Bulgaria, Ministry of the Interior Act *(Закон за Министерството на вътрешните работи)*, 27 June 2014, Art. 74.
60 Romania, Romanian Police Act *(Legea nr. 218/2002 privind organizarea și funcționare Poliției Române)*, 9 May 2002, republished 25 April 2014.
61 ECtHR, *Bandaletov v. Ukraine*, No. 23180/06, 31 October 2013, para. 56; ECtHR, *Ibrahim and Others v. UK* [GC], Nos. 50541/08, 50571/08, 50573/08 and 40351/09, 13 September 2016, paras. 272–273 and 299; ECtHR, *Brusco v. France*, No. 1466/07, 14 October 2010, para. 47.

"The right approach is as follows: as soon as I realise that the status of the person changes and I ask my questions in another direction, I should interrupt the witness questioning and start a defendant questioning including new legal instructions. I do not know if all officers proceed this way, not to say: surely not, because of course, it is always practical to harmlessly summon and ask people as witnesses and then to ask more, more, more, and actually they incriminate themselves. But this is not the right procedure and I would never proceed this way, because at latest before the court, this will be a good target for the defence lawyers."
(Police officer, Austria)

However, in almost all countries except Denmark, witness statements remain in the case file and judges can admit them as evidence or read and take them into consideration.

Several lawyers in Romania highlight a practice whereby police question former witnesses again, this time as suspects, and ask them if they stand by their previous statements. This allows authorities to legally use the information they provided as a witness against them.

"Usually the questioning as a witness is finalised and immediately after that, or sometime later, they are called again to be questioned: 'we have changed your standing, taking into consideration the new issues which have emerged, and you will become a suspect [...]'. They will be handed a written record and will be informed about this new standing as a suspect. Some use the statement made as a witness and ask the suspect if they want to keep it and write it again, and that is to the police officer's advantage. If the lawyer does not subsequently request, during the preliminary chamber stage, annulment of this statement or its exclusion on grounds that it was originally taken as a witness and was self-incriminatory, then the statement remains valid and we have relative nullity, not absolute nullity. These tricks are used in practice."
(Lawyer, Romania)

The same practice seems to take place in Bulgaria, according to one lawyer; the authorities take previous witness statements as guidance and ask the defendant questions based on the witness statements, which otherwise are inadmissible evidence.

"In principle, a defendant's testimony as a witness is not taken into account [...] But what we do in Bulgaria, totally illegitimately, as far as I understood, the ECtHR decided that it is a faulty practice for operatives, when they speak with someone, to later testify as witnesses about what they were told and the sentence to be based on that indirect testimony. I also think this is very wrong."
(Lawyer, Bulgaria)

"Of course they read the witness testimony, they take it into account. And then they ask questions based exactly on what the defendant said as a witness [...] They take it into account, but they cannot use it under the law, the court cannot write in its reasoning 'as witness, the defendant said this and this, as defendant he/she said other things, there is a contradiction, we will credit what he/she said as a witness', that is not possible."
(Lawyer, Bulgaria)

People who testified after police arrested them, for example in France and Greece, reported that investigators did not always indicate their status before the questioning:

A: "I had not given a statement or anything all that time [...] and a month later this document [summons to appear] came to me without saying if I am a witness, a defendant, what I am. In fact, when we asked at the police station what this was [...] they said it was nothing, he is to go and give a statement and then he is free to go. Without having any sort of former engagement with the police I could not have known and was somewhat upset. [...] I went on my own voluntarily, without the presence of a lawyer."
Q: "OK, and when you appeared in front of the judiciary officer for questioning did she make it clear if you were examined as a witness?"
A: "No, that was not made clear. It is just an additional statement; there is nothing to be afraid of [...] I signed this document and they told me that I have to go to the prosecutor."
Q: "Because you are considered to be a suspect?"
A: "Yes, then they told me and sent me to the prosecutor. [...] I appear to the prosecutor, who is kind of moody, don't know why, and he said 'I wonder about you, how you got involved with these people', holding that case file and staring at me. He gave me no chance to explain myself [...] After that, they informed me that I cannot leave the country and I have to report every 1st and 16th of every month."
(Defendant, Greece)

2.2.4 How authorities verify that the accused has understood the information provided

EU law does not contain specific provisions on the obligation of the authorities to verify that defendants understand the information provided, so few formal procedures to verify understanding exist across the Member States researched. Findings show that police officers do provide additional explanations to defendants in some Member States. However, this often appears to happen only at the request of the defendant, as one judge in Poland explains:

"Sometimes, people say: 'I have no idea what's going on'. Then we say: 'your wife says that you beat her and that you pull her'. So, we explain the charges in a simpler way and in more colloquial language."
(Judge, Poland)

One police officer in Denmark explains that she usually tries to explain the accusation, which she considers to be formulated in formal and legal language, and translate it into everyday Danish so that a suspect can understand; however, she is clear that this is not obligatory:

"I make a big deal out of explaining it to them, and I usually ask if they understand [...] Some of it is stated very formally with a lot of paragraphs and laws and 'confer' and this and that, and then you usually know that they will not understand it. So you read it to them and then you explain the charges in Danish. That is what I usually do. It is not something that you have to do."
(Police officer, Denmark)

Professionals from other Member States also refer to personal efforts to ensure understanding, for example police, prosecutors and judges in Bulgaria and France, and police in the Netherlands. However, findings show that this appears to be far from standard practice, and a gap in the law leads to rights becoming ineffective.

Improvement is needed to help defendants to understand their rights

Overall, law enforcement officers in some Member States appear to believe that defendants understand their rights.

In contrast, many defendants and some practitioners (primarily lawyers) in all eight Member States report that defendants often do not understand their rights, rendering these rights ineffective in practice. The main problems relate to police not explaining rights in a clear manner – for example, giving them a document containing complicated legalese with no further explanations – and police not properly checking if defendants understood what they were told.

Overall, the majority of lawyers in most countries appear to believe that defendants do not understand their rights in practice. They give varying reasons for this, including defendants not understanding their rights owing to:

- a hurry to get procedures over and done with (lawyers in Bulgaria);
- stress or the psychological state of the defendant, especially if they are in this position for the first time (lawyers in Bulgaria and Greece);
- a perceived link between a defendant's level of education and understanding of rights, with more highly educated defendants showing better understanding (in the experience of a monitoring body representative in Bulgaria, for example);
- police not making an effort to ensure that defendants understand their rights, and instead simply reading the rights and asking if defendants understood them (lawyers in Bulgaria and France);
- problems in how information about rights is conveyed (lawyers in Austria, Bulgaria, France, the Netherlands, Poland and Romania).

In reference to the final point about problems in how information is conveyed, lawyers described many examples of defendants receiving information only in written form, which in practice does not contribute to an understanding of rights. As one representative of a monitoring body from Bulgaria explained, how the information is provided – as a written declaration, which the defendant is expected to read, fill in and sign – is not appropriate and makes the information difficult to understand.

A lawyer in the Netherlands reports that the information provided to detained defendants concerning accusation is often limited to a reference to an article of the Penal Code or the type of offence. Professionals in France, Poland (lawyers, judges and prosecutors) and Romania (lawyers) make similar observations concerning information on rights being limited to legal definitions, which does not promote an effective understanding of rights.

One lawyer in Romania explains that, while defendants are technically informed about the accusation brought against them, "[the defendant] is not properly informed. The facts are not well described, and they don't really understand what act it is all about. And he is informed (it appears in writing somewhere) but he does not understand what it is all about. And this happens both in the case of arrested and non-arrested persons [...]".

The experience of defendants in Poland highlights the issue of authorities fulfilling their legal obligation to inform defendants about their rights, but in a way that does not allow effective understanding, matching what many professionals say on this issue. For example, three out of the six defendants interviewed did not read the document they received outlining their rights, as their level of stress was too high for them to concentrate. In one case, the interviewee did not read the information provided to him regarding his rights, as he did not believe that these rights had any applicability in practice:

"I didn't even read it, since these rights have little to do with what actually goes on in our criminal justice system [...] these rights are only on paper."
(Defendant, Poland)

In addition to the above-mentioned factors, a defendant's experience of the criminal justice system (for example prior charges) can influence their understanding of their rights, according to lawyers in Bulgaria and Poland, for example. As one police officer describes:

"Repeat offenders know the law. They know how to use it, what to quote. Those who have scarcely come into contact with the justice system confuse procedural reality with movies."

(Police officer, Poland)

When asked if they understood all the information that the police gave to them, defendants gave mixed accounts. One exception seemed to be understanding information about the accusation, where most defendants seemed to understand, particularly with regard to serious charges such as those involving offences against health or life or where a person is caught in the act of committing a crime.

The account of one arrested person in Romania, however, is a good example of why, even when a defendant is caught in the act, there is still a need to inform them about the accusation. The interviewee committed an offence at 03.00 a.m., fled the scene and was apprehended shortly afterwards. Police took him to the station and informed him about the accusation informally only later that morning, after he insisted on it.

"I kept asking that gendarme [...] what I was being charged with, because I did not know. I kept thinking that the drunkard I beat was dead and I was worried: why were they not telling me anything? In the morning the gendarme found out and he told me that it was serious, that the man was a police officer and now they were charging me with battery against a police officer."
(Defendant, Romania)

The majority of defendants had not experienced police officers making efforts to verify if they had understood their rights.

For example, despite the divided opinions of professionals in Bulgaria on whether or not defendants' understanding of rights is verified, defendants in Bulgaria are unanimous that authorities make no efforts to verify the level of understanding of their rights. Similarly, in the Netherlands, most of the defendants indicate that the police did not verify if they understood their rights. In France, while the majority of defendants (6 out of 10) say that they understood their rights without difficulty, three of these say they understood only because of their prior knowledge, and none of the ten defendants highlights any effort made by the investigators to verify whether or not they understood. By contrast, the majority of the defendants in France consider that the investigators did not give them any explanation of their rights and even sought to induce them to make a mistake. Another defendant said, "the police did everything so that I did not understand [my rights]".

Defendants not speaking the language of the proceedings

Findings show that the decision to involve an interpreter (or not) depends on an assessment made by law enforcement authorities of defendants' ability to communicate in the language of the proceedings. However, the level of defendants' understanding of the language may be self-reported and this information is not always verified.

The majority of professionals across the researched Member States report that, in practice, it is difficult to assess the quality and accuracy of the interpretation, especially in connection with the verification of a defendant's understanding of their rights. Professionals from all researched Member States state that there is no official procedure to verify the quality and accuracy of a provided interpretation. Official lists of certified and sworn interpreters serve as a benchmark to safeguard the quality of the interpretation provided.

Based on interviewees' statements, the real problem with defendants who are third-country nationals is the correct identification of their language. In many cases, authorities have to rely on available interpreters, who then identify a defendant's spoken language.

For more details on national regulations regarding the right to interpretation and translation, see FRA (2016), Rights of suspected and accused persons across the EU: translation, interpretation and information, Publications Office.

Promising practice

Electronic systems to enhance understanding

The computer-assisted legal instructions (PAD system) in **Austria** – which have been in place since 2018 – provide easy-to-understand legal instructions, including information about the accusation and defendants' right to defend themselves or to remain silent and not incriminate themselves. This procedure of computer-assisted legal instructions takes place before the questioning starts and the defendants have to confirm orally and in writing whether they want to exercise their rights or not. The police officer documents the defendant's answer for each right and only then may the questioning start.

In the older system, defendants received written information about the accusation and their rights in legal language, which was difficult to understand. Interviewed police officers and one prosecutor state that the newly implemented PAD system provides easy-to-understand information about rights.

Many of the law enforcement officers and one of the public prosecutors refer to the electronic case-handling system employed by the Danish police when they describe how law enforcement officers inform suspects, both those not deprived of liberty and those deprived of liberty, about their procedural rights.

When commencing new questioning, law enforcement officers in **Denmark** use an electronic case-handling system to enter a new report into the system. As part of these reports, law enforcement officers have to 'tick off' which rights they have informed suspects about. Interviewed professionals describe this practice as a means of ensuring that suspects receive information about their rights. However, one of the law enforcement officers considers that, while the system can serve as a set of guidelines, it can also function as a pretext for inaction, as it can lead to law enforcement officers entering a kind of 'autopilot' mode and thereby disregarding the immediate context.

This perspective is also evident in some of the interviews with lawyers, who criticise the fact that the police might sometimes forget to inform defendants about certain rights because they do not have to state in the report that they have done so, as these procedural rights are included as a standard element of these reports. Thus, the practice of incorporating standard formulas into police reports entails both benefits and challenges.

2.2.5 Role of lawyers

Given that defendants might not always receive an oral explanation of their rights prior to questioning, as illustrated in Section 2.2.1 and Section 2.2.2, the role of lawyers becomes particularly important in allowing defendants to understand their rights in practice, the accusation and the reasons for arrest. For example, in Romania, one lawyer explains that defendants "are handed a written record which contains the rights and obligations of the suspects or accused persons stipulated in the Criminal Procedure Code. But in practice this is regarded as a mere formality, a piece of paper is put before them, a separate discussion about its content and their rights does not take place, this is generally seen as being the lawyers' job to do".

One police officer appears to confirm the criticisms voiced by the lawyers, namely that police officers are the only ones responsible for explaining the reasons for arrest:

Q: "What do you do when they don't understand?"
A: "I pass the responsibility to the lawyer, let him explain better."
(Police officer, Romania)

In Greece, for defendants not deprived of liberty, findings also highlight that authorities assume that defendants present themselves with a lawyer and so there is no need to wonder whether they understood their rights or not.

In Denmark, most of the judges interviewed and all of the public prosecutors state that it is a part of the job of the defence lawyer to act as an "active control" in terms of verifying that suspects understand their rights. One of the prosecutors states that it can also be in the interest of the police to have a lawyer present at the questioning:

Q: "So the police actually have an interest in having the lawyer present?"
A: "Yes, I would say so. The police and the prosecution service actually have an interest in having a lawyer present in a huge number of cases, also to explain the client what this is actually all about."
(Prosecutor, Denmark)

In Bulgaria, half of the lawyers interviewed and one police officer mention the significant role of the lawyer in explaining rights to defendants:

"With the help of the lawyer they can get further acquainted with the pre-trial case materials [...]"
(Police officer, Bulgaria)

One lawyer expresses her belief that clarifying rights is one of the main tasks of the lawyer and that, in practice, if a lawyer is present, then authorities will leave all of the clarifications to him/her:

"If the defendant has a lawyer, it is clear [...] they always clarify to the defendant their rights [...] If the defendant has a lawyer, investigative authorities quite often leave to him/her to clarify to the defendant what their rights are."
(Lawyer, Bulgaria)

Another lawyer in Bulgaria sees the presence of a lawyer as a circumstance that gives authorities a free pass to not explain rights at all:

"But if the defendant brings their lawyer, no rights are read [...] Out of a hundred cases I have had, rights only get read about once [...]"
(Lawyer, Bulgaria)

3 Right to be advised and represented by a lawyer

KEY FINDINGS

- Police sometimes discourage defendants from exercising their right to a lawyer. For instance, they tell them that the case is simple and that there is no need for the presence of a lawyer; or that proceedings are just beginning and lawyers are not needed at the initial stage.
- Defendants deprived of liberty particularly face practical difficulties in accessing lawyers directly. Sometimes law enforcement authorities or defendants' relatives contact lawyers on their behalf. This can mean the call is significantly delayed, depriving defendants of the opportunity to obtain legal advice – such as to remain silent – at an early stage. In addition, the indirect nature of the contact deprives lawyers of the opportunity to ask questions that may help them to prepare an effective defence.
- Defendants deprived of liberty are not always allowed to talk to their lawyers in private before their first questioning. Instead, conversations – when they happen at all – are short and/or take place in public corridors in the presence of police officers.

This chapter presents the findings related to the right to access a lawyer by defendants who are and defendants who are not deprived of liberty. After a brief legal overview, it discusses the modalities of providing information about this right and then moves on to the actual exercise of this right, analysing its various elements.

The fieldwork aimed to establish if, in practice, all defendants, irrespective of whether they are deprived of their liberty or not, are aware of and enjoy in practice the possibility of talking to a lawyer before their first questioning by the authorities, and exercise this right in all its aspects.

The right to legal aid and its regulation in Member States is outside the scope of this research, as it is a complex issue that requires a dedicated study. However, Section 4.3 mentions some aspects of legal aid in relation to EAW proceedings. In practice, once a lawyer is appointed, it should not matter whether they are a legal aid lawyer or privately hired, as their role should be the same, namely to advise and represent their clients.

Member States have different systems regarding legal aid, meaning that the state covers the costs of legal representation entirely or partly; ex officio representation, meaning that the authorities appoint a lawyer but defendants are liable for the costs; on-duty lawyers and private lawyers; and mandatory and optional legal representation. This report does not discuss these differences. Certain aspects relating to legal aid are mentioned only in reference to the practical exercise of the defendant's right to access a lawyer.

3.1 Legal overview

The right of access to a lawyer is an essential procedural right of suspected and accused persons in criminal proceedings guaranteed by both Council of Europe standards and EU law. The ECHR guarantees this right in Article 6 (3) (c)[62] and the Charter guarantees it in Article 48 (2). Directive 2013/48/EU on the right of access to a lawyer gives more details on this right. The European Committee for the Prevention of Torture and Inhumane or Degrading Treatment (CPT) recognised this right as one of the three most crucial rights in protecting against the risk of ill-treatment in cases of deprivation of liberty.[63]

As can be clearly seen from the findings presented in this report, the right of access to a lawyer plays a significant role in facilitating other procedural rights, such as the right of the accused not to incriminate themselves, the right to competent and effective legal advice and the right to have adequate facilities for the preparation of a defence. The ECtHR has repeatedly considered that the right of access to a lawyer is a fundamental procedural safeguard of the right of an accused person not to self-incriminate.[64] The ECtHR, by referring to the recommendations of the CPT, also highlighted the importance of the right of access to a lawyer as "a fundamental safeguard against ill-treatment."[65]

According to the ECHR standards, a person should have access to legal assistance from the moment there is a 'criminal charge' against them within the autonomous meaning of the ECHR,[66] namely when the domestic authorities have plausible reasons for suspecting that person's involvement in a criminal offence.[67]

Directive 2013/48/EU on the right of access to a lawyer is the third in a series of directives adopted by the EU as part of the Roadmap. It lays down the minimum rights of access to a lawyer for suspects or accused persons in criminal proceedings and for the execution of an EAW. It specifies in Article 3 (2) that the accused or suspected persons have the right to access a lawyer without undue delay, from the earliest of the following:

- before the interrogation by the police or other law enforcement or judicial authority;[68]
- when the authorities are carrying out certain investigative or evidence gathering acts;
- after the deprivation of liberty;
- when the person has been summoned to appear before a criminal court.[69]

The right of access to a lawyer includes the right to meet in private and communicate with the lawyer; the right for the lawyer to participate effectively[70] when the suspected or accused person is being questioned or heard by judicial authorities; and the right for the lawyer, as a minimum, to attend certain investigative or evidence-gathering acts including identity parades, confrontations and reconstructions of the scene of a crime.[71]

A very important aspect also covered by the directive is when persons, such as witnesses, become suspects or are accused during questioning by the police or other law enforcement authorities. In such situations, the police should immediately suspend the questioning and can proceed only if the person learns that they are now considered a suspect or an accused person and can exercise their rights fully.[72] This aspect, although covered by Directive 2013/48/EU on the right of access to a lawyer, in practice relates to the right of information in the first place because, once a person becomes a suspect, the authorities should inform this person about all of their procedural rights, including the right to a lawyer. In this report, Section 2.2.3 deals with this issue.

62 ECtHR, *S v. Switzerland*, Nos. 12629/87 and 13965/88, 28 November 1991; ECtHR, *Marcello Viola v. Italy*, No. 45106/04, 5 October 2006.
63 Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (1992), *2nd General Report on the CPT's Activities*, Strasbourg, Council of Europe, 13 April 1992, para. 36; Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (2019), *28th General Report of the CPT*, Strasbourg, Council of Europe, 26 April 2019, para. 66.
64 ECtHR, *Salduz v. Turkey*, No. 36391/02, 27 November 2008, para. 54; ECtHR, *Jalloh v. Germany*, No. 54810/00, 11 July 2006, para. 100.
65 Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (2001), Report to the Turkish Government on the visit to Turkey carried out by the CPT, Strasbourg, Council of Europe, 8 November 2001, para. 61.
66 ECtHR, *Simeonovi v. Bulgaria*, No. 21980/04, 12 May 2017, para. 110.
67 ECtHR, *Truten v. Ukraine*, No. 18041/08, 23 June 2016, para. 66, ECtHR, *Bandaletov v. Ukraine*, No. 23180/06, 31 October 2013, paras. 61–66, concerning voluntary statements made by an applicant as a witness.
68 Recital (20) of Directive 2013/48/EU specifies that the directive does not apply to preliminary questioning by the police or by another law enforcement authority with the purpose of identifying the person concerned, verifying the possession of weapons or other similar safety issues or before the subject has been identified.
69 Directive 2013/48/EU, Art. 3 (2) (a) and (d).
70 Effective participation is defined in Recital (25) as "the lawyer may inter alia, in accordance with such procedures [any procedures under national law], ask questions, request clarification and make statements, which should be recorded in accordance with national law".
71 Directive 2013/48/EU, Art. 3.
72 *Ibid.*, Recital (21).

Restriction of right of access to a lawyer and fairness of the proceedings as a whole

While, according to the ECtHR, the right of access to a lawyer is "one of the fundamental features of a fair trial",[73] this right is not absolute. It is possible to temporarily restrict the right of access to a lawyer in exceptional circumstances, considering the particular circumstances of the case.[74] Such compelling reasons include "an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case",[75] as in such instances there is a duty on the authorities to protect the right of potential or actual victims under Articles 2, 3 and 5 (1) of the ECHR.[76]

In 2008, the ECtHR established the principles (a two-stage test) to consider when a restriction on the right of access to a lawyer is compatible with the right to a fair trial.[77] First, the test takes into account if there were compelling reasons for restricting the right for a defendant to have access to a lawyer; second, it considers whether or not such a restriction irretrievably prejudiced the overall fairness of the criminal proceedings.[78] Drawing from its case law, the ECtHR set out a non-exhaustive list of factors for assessing the impact of procedural failure at the pre-trial stage on overall fairness, including the vulnerability of the applicant (age and mental capacity) and the possibility of challenging the authenticity or the quality of the evidence.

Directive 2013/48/EU also set out exceptional circumstances during the pre-trial stage that allow for temporary derogations.[79] Such circumstances could include geographical remoteness, which would mean it would not be possible to ensure access to a lawyer without undue delay after deprivation of liberty.[80] In addition, Member States may temporarily delay exercising the right to access a lawyer for compelling reasons, including an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person and an urgent need to prevent a situation in which criminal proceedings might be jeopardised.[81]

Waiver of rights: Article 9 of Directive 2013/48/EU

An accused person may choose not to have a lawyer. In such cases, according to the established ECtHR standards, certain minimum safeguards are necessary.[82] The waiver of right, whether explicit or tacit, must be established in an unequivocal manner and must be voluntary and informed.[83] It must essentially satisfy the "knowing and intelligent" waiver, so the suspected or accused person must be aware of their rights. The ECtHR held that, before it can be found that a suspected or accused person has implicitly, through their conduct, waived their right, it must be shown that this person could have reasonably foreseen the possible consequences of their conduct.[84]

The directive also sets out a framework through which suspected and accused persons can waive their right of access to a lawyer at any stage of proceedings, including EAW proceedings, subject to certain conditions[85] building on the ECtHR standards. First, the accused or suspected person must know about the details of the right of access to a lawyer and the consequences if they decide not to exercise this right. Such information must be clear and sufficient, in simple and understandable language. Second, the waiver must be given voluntarily and unequivocally.[86] The decision to waive the right must

73 ECtHR, *Simeonovi v. Bulgaria*, No. 21980/04, 12 May 2017, para. 112; ECtHR, *Salduz v. Turkey*, 27 November 2008, para. 51; ECtHR, *Dvorski v. Croatia*, No. 25703/11, 20 October 2015, para. 76; ECtHR, *Dayanan v. Turkey*, No. 7377/03, 13 October 2009; ECtHR, *Ibrahim and Others v. the United Kingdom*, Nos. 50541/08, 50571/08, 50573/08 and 40351/09, 13 September 2016, para. 255; ECtHR, *Beuze v. Belgium*, 9 November 2018, para. 123.

74 ECtHR, *Salduz v. Turkey*, 27 November 2008, para. 55; ECtHR, *Ibrahim and Others v. the United Kingdom*, Nos. 50541/08, 50571/08, 50573/08 and 40351/09, 13 September 2016, para. 258.

75 ECtHR, *Simeonovi v. Bulgaria*, No. 21980/04, 12 May 2017, para. 117; ECtHR, *Ibrahim and Others v. the United Kingdom*, Nos. 50541/08, 50571/08, 50573/08 and 40351/09, 13 September 2016, para. 259.

76 ECtHR, *Ibrahim and Others v. the United Kingdom*, Nos. 50541/08, 50571/08, 50573/08 and 40351/09, 13 September 2016, para. 259.

77 ECtHR, *Salduz v. Turkey*, 27 November 2008, para. 55; ECtHR, *Ibrahim and Others v. the United Kingdom*, Nos. 50541/08, 50571/08, 50573/08 and 40351/09, 13 September 2016, paras. 263–265.

78 ECtHR, *Ibrahim and Others v. the United Kingdom*, Nos. 50541/08, 50571/08, 50573/08 and 40351/09, 13 September 2016, paras. 263–265; ECtHR, *Simeonovi v. Bulgaria*, No. 21980/04, 12 May 2017, para. 118.

79 Directive 2013/48/EU, Art. 3 (5) and (6).

80 Directive 2013/48/EU, Art. 3 (5); see also Recital (30), which specifies the cases of geographical remoteness as "in overseas territories or where the Member State undertakes or participates in military operations outside its territory". Recital (30) also further specifies that, where there is no immediate access to a lawyer possible owing to geographical remoteness, Member States should ensure communication by telephone or video conference, unless this is impossible.

81 Directive 2013/48/EU, Art. 3 (6) (a) and (b); see also Recital (32), which further specifies substantial jeopardy to criminal proceedings as "destruction or alteration of essential evidence" or "interference with witnesses".

82 ECtHR, *Pischalnikov v. Russia*, No. 7025/04, 24 September 2009, para. 77; ECtHR, *Ibrahim and Others v. the United Kingdom*, Nos. 50541/08, 50571/08, 50573/08 and 40351/09, 13 September 2016, para. 272.

83 ECtHR, *Sejdovic v. Italy*, No. 56581/00, 1 March 2006, para. 86; ECtHR, *Kolu v. Turkey*, No. 35811/97, 2 August 2005, para. 53; ECtHR, *Colozza v. Italy*, No. 9024/80, 12 February 1985, para. 28; ECtHR, *Pischalnikov v. Russia*, No. 7025/04, 24 September 2009, para. 77.

84 ECtHR, *Simeonovi v. Bulgaria*, No. 21980/04, 12 May 2017, para. 115.

85 Directive 2013/48/EU, Art. 9 and Art. 10 (3).

86 ECtHR, *Aleksandr Zaichenko v. Russia*, No. 39660/02, 18 February 2010; ECtHR, *Yoldas v. Turkey*, No. 27503/04, 23 February 2010.

be recorded.[87] In addition, authorities must inform the suspected or accused persons of the possibility of revoking a waiver at any point in time during the proceedings. The waiver of right, however, is not applicable to cases in which national law requires mandatory professional defence. Relevant national laws further regulate this; for example, it is typical that, in certain particularly serious cases, such as murder, or in cases involving child defendants, national laws would require the presence of a lawyer. In these cases, a lawyer's assistance is obligatory.

Similarly, the ECtHR has also considered the "knowing and intelligent waiver" standards as applicable to the defendant's own informed choice of a lawyer.[88] The ECtHR, in its recent case law, repeatedly reiterated the importance of having recourse to a lawyer of one's own choosing from the initial stage of the proceedings as a means to ensure effective defence to any person charged with a criminal offence.[89] Although subject to certain restrictions, pursuant to the case law of the ECtHR, the right of everyone charged with a criminal offence to a lawyer of their own choosing should be respected and the national authorities must respect defendants' free choice of legal representation.[90] This is particularly true when a member of a vulnerable group, such as a child defendant, waives their right to a lawyer of their own choice. In such cases, the ECtHR considers that the defendant lacking information about the parents' choice of lawyer is a violation of Article 6 of the ECHR.[91]

3.2 Providing information about the right to access a lawyer

According to Directive 2012/13/EU on the right to information, authorities should promptly provide suspects or accused persons with information about the right to access a lawyer.[92] This section discusses how and when this information is conveyed and highlights any practical challenges identified during the interviews. This section deals separately with defendants deprived and those not deprived of liberty.

3.2.1 Defendants not deprived of liberty

Across all of the Member States researched, the majority of police, judges and lawyers state that defendants not deprived of their liberty are informed about the right to be advised and represented by a lawyer prior to the first official questioning by the police.

In general, research shows that authorities provided this information in writing, orally or both. In Austria, Bulgaria, France and the Netherlands, most defendants receive this information in the written summons requesting a police interview. When defendants do not receive advanced written summons, the format varies. In Denmark and Greece,[93] defendants receive oral information at the time of the interview or formal charging. In Austria, if defendants have not received written summons, the notification of rights is oral, using an electronic system before an interview with the police. The computer generates instructions that police officers read out, after which defendants are specifically asked if they wish to make use of their right to legal representation. Their response is documented and they are asked to sign the document.[94] Similarly, in Bulgaria, defendants not deprived of their liberty are asked to sign the minutes of questioning as proof that they were informed. In France, Poland and Romania, the majority of the police officers interviewed say that authorities inform defendants about the right to legal advice orally and in writing before the first questioning of the defendant as a suspect.

While it is agreed across all Member States that, in theory, defendants not deprived of liberty are informed of their right to be advised by a lawyer, a number of practitioners raise concerns that this is not always respected or effective in practice. Often, lawyers especially highlight some challenges.

Legal professionals in Poland raise a practical concern and doubt the effectiveness of the provision of these rights in writing. A lawyer pointed out that the letter delivered to defendants who are not deprived of liberty is hard to understand, obscure and legalistic:

"The letter is a bare piece of paper. I don't recall any instance in my practice when [informing] would take a more communicative, direct form. Such manner of informing would, from the perspective of a police officer, be an encouragement for a person to exercise their right to a lawyer or to remain silent. It doesn't work this way."
(Lawyer, Poland)

Even when defendants not deprived of their liberty understand the rights in question, the defendants may actually be discouraged from exercising these rights. For example, in Bulgaria, France and Romania, police sometimes tell defendants that legal counsel is expen-

87 Directive 2013/48/EU, Art. 9 (2).
88 ECtHR, *Dvorski v. Croatia* [GC], No. 25703/11, 20 October 2015, paras. 78 and 101; ECtHR, *Martin v. Estonia*, No. 35985/09, 30 May 2013, paras. 90–93.
89 ECtHR, *Dvorski v. Croatia* [GC], No. 25703/11, 20 October 2015, para. 78.
90 *Ibid.*, para. 79.
91 *Ibid.*, paras. 101–102.
92 Directive 2012/13/EU, Art. 3.1 (a).
93 It is police officers' responsibility to inform suspects about the right to legal representation before the prosecution is initiated, when no charges have been addressed to them. Therefore, according to one judge, there is no obligation from the judicial authorities.
94 For more details, see Chapter 2, Section 2.2.4.

sive or that they do not need it given that they are near the beginning of the procedure, thereby discouraging them from exercising their rights:

"They are being informed that they have the right to hire a lawyer, but this information is presented in a manipulative manner, something like: 'you don't need a lawyer, we are at the beginning and you don't need a lawyer'."
(Lawyer, Romania)

A lawyer from France describes the same practice and claims that defendants hear the following from the police:

"You do not need a lawyer, we just want to ask you about this or that point, and a lawyer will slow down the proceedings."
(Lawyer, France)

Another lawyer adds that, if during the interview the defendant asks for a lawyer, the police officer might reply:

"Listen, we have almost finished, I have two or three questions left to ask, let's not waste time having a lawyer come."
(Lawyer, France)

A lawyer from Denmark also experienced this attitude from police officers:

"To be completely honest, not always [are defendants properly informed]. I cannot back this with anything else than my experiences and subjective assumptions of what goes on. Sometimes, one could imagine that it would be an advantage for the police to go through with the first questioning without the presence of a lawyer. [...] And sometimes, people [defendants] say that they were not informed [...]"
(Lawyer, Denmark)

In some Member States, lawyers raise the issue of police asking questions outside formal questioning.[95] In Bulgaria, for example, practitioners raise concerns over the practice of 'informal intelligence talks' held with persons who have not been called in as witnesses or have not yet been formally charged, so the obligation to inform persons about this right has not taken effect. Two of the lawyers interviewed mention that, in these cases, persons do not receive any information about their right to a lawyer. The information provided in these informal talks is later used in the proceedings through the 'by proxy' testimony of the police officers who conducted the talks.

"Bulgarian authorities have regulated, in some internal acts, because there are no norms publicly available, the so-called intelligence talks, which we learn about through the questionings of police officers as witnesses in the criminal proceedings. Then we find out that persons under suspicion are put into a situation to have to talk to police and tell them everything about the case without being clarified, neither about their right to a lawyer, nor about the right to remain silent. And then their statements are joined to the case as testimony of the questioning officers."
(Lawyer, Bulgaria)

Similarly, in Greece, interviewees refer to a 'grey area' in practice where those who have been neither formally charged nor arrested during the preliminary investigation stage could be questioned without being informed about their right to a lawyer. One interviewee refers to situations in which the status of the person is not yet determined and the police could question them without the presence of a lawyer. From the account of a lawyer, it would seem that younger defendants are more vulnerable in front of police, although, again, this depends on the officer:

"Look, it depends again, of course, on the police officer [...] I do not want to say that everybody acts like this [...] But sometimes the police officers, when they want to get specific information [...] For them the lawyer may be a problem [...] Not for everyone. For some [...] For some, the lawyer is a problem and they treat him as a problem [...] I have this experience with my clients who were students [...] because they [police] do this when they feel they can [...] Usually with people 20 to 25 years old [...] They kept my clients under police custody for two hours [...] although they [clients] were saying 'we want to communicate with the lawyer', they did not allow them."
(Lawyer, Greece)

Commenting on these flawed ways of providing information, lawyers emphasise that proper and concrete information is crucial, especially at the very beginning of the investigation against a person, as a lack of proper information contributes to a lack of awareness of the importance of legal assistance at an early stage of proceedings.

"People simply can't understand they might use this help and that it matters a lot for their procedural situation at the early stage."
(Lawyer, Poland)

3.2.2 Defendants deprived of liberty

Across Member States, interviewees indicate that, for the most part, defendants deprived of liberty are informed of their right to legal defence in much the same manner as those defendants not deprived of their liberty. The vast majority of professionals agree that this information is provided orally (Denmark), in writing

95 For more details, see Chapter 2, Section 2.2.3.

Encouraging well-informed decisions about legal representation

Lawyers from the Netherlands believe that the police do not provide adequate explanations at the beginning of questioning and even try to influence defendants by emphasising the time it may take to arrange a lawyer. A pilot project that is being carried out by the police in the city of Breda addresses this issue by having each defendant make this decision based on brief contact with a lawyer by video connection. For this pilot project, defendants who choose not to be represented by a lawyer are nonetheless put in touch with a lawyer on duty by video connection. This lawyer can then explain the possible advantages of having a lawyer to the defendant. The pilot project aims to ensure that defendants make a well-informed decision about legal representation.

(Austria) or in both manners (Bulgaria, France, Greece, the Netherlands, Poland and Romania), depending on national rules. In some states, persons deprived of liberty might have some additional rights. For example, in France, all persons in custody have a right to speak to a lawyer for 30 minutes and, according to the majority of professionals interviewed, they are informed of this right before the first police questioning.

In general, professionals agree that defendants should receive the information concerning the right to a lawyer as soon as possible; however, some lawyers and members of monitoring bodies highlight delays. Two members of the monitoring bodies from Bulgaria state that they have witnessed either this practice of delaying the provision of this information or cases in which defendants were even advised not to call a lawyer.

Defence lawyers in particular sometimes challenge the effectiveness of providing this information. What becomes clear in relation to defendants deprived of their liberty is that the situation is much more critical than that for defendants who remain at liberty. Defendants deprived of their liberty are placed in an inherently more stressful situation and the impact of this is apparent in both their understanding of their rights and their ability to exercise them. In most cases, people deprived of liberty receive this information through a letter of rights, which, according to a lawyer from Poland, is not very effective:

"The letter of rights just quotes the law, it is hermetic, legalistic. It can be incomprehensible for many people, even those with higher education, especially if they are stressed. For a person with lower education, it is in my opinion completely incomprehensible. It's not a formula like in the Miranda warning [a formula used by the police in the US, informing defendants upon arrest about their rights in short and accessible language]."
(Lawyer, Poland)

The level of stress and the complexity of a situation might indeed explain the perception of the defendants interviewed who either did not remember if they received the information that they had a right to a lawyer immediately after the arrest or just did not understand this information. This was observed in all of the Member States researched. The largest proportion of defendants who did not remember being informed was in Bulgaria (three out of five) and the smallest proportion in France (1 out of 10).

Three out of the six defendants interviewed in Poland, in their first reaction to this question, said that they were not informed and another two arrested persons claim that, out of stress, they did not read the letter handed to them. Indeed, this could explain the divergence between the two categories. Interestingly, two persons admitted later in the interview that they had received a written letter of rights before questioning. This may testify to the fact that, when defendants receive information in writing from the police, they do not really perceive it as them being informed by the police. This handing out of a leaflet may simply not be sufficiently memorable for defendants, especially in a stressful situation, if they encounter the police in such a way for the first time.

"It's very possible [that the police inform defendants about their rights immediately after their arrest]. However, a person such as me, who doesn't have any experience in cooperating with police or any other law enforcement officers, [...] when arrested can't think properly."
(Defendant, Poland)

Three out of the five defendants interviewed in Bulgaria say that they did not receive any information about their right to contact a lawyer. Instead, for two of them, the police called a lawyer directly, and one was told that he would not need a lawyer, because the proceedings were going to be suspended. One interviewee did not remember being informed that they could contact a lawyer, but recalls that the right to contact a lawyer was among the items in the declaration they were requested to sign. Two defendants interviewed in Denmark state that the police did inform them about the right to contact a lawyer and one is not sure if they were informed. Some of the defendants interviewed state that the police did not inform them about their right to contact a lawyer before their pre-trial detention hearing (Grundlovsforhør). One of these two defendants specifically states that he asked for a lawyer several times during the arrest and at the police station, but he did not receive a response. In Austria, France, Greece and Romania, the majority of defendants state that they were informed about the right

to contact a lawyer. One testimony from Romania sheds light on the fact that, sometimes, defendants are not in a position to remember or process that sort of information:

"They treated me well, but I regret not calling a lawyer. They did not tell me I had the right to a lawyer; if I had known this, I would not have given a statement. I had taken ethnobotanical drugs, I had no idea what was going on with me [...]"
(Defendant, Romania)

One police officer from the Netherlands highlights a dilemma in cases of minor offences because defendants who choose to be represented by a lawyer may have to stay at the police station overnight, whereas defendants who do not want a lawyer may be able to leave relatively quickly. This interviewee therefore finds it difficult to determine how much he should explain about the pros and cons of having a lawyer in these cases because he does not want to influence the decision of the defendant:

"Look, the problem is, the [on duty] lawyers come until 8 pm; after 8 pm there will be no more [on duty] lawyers for that day. If I have a shoplifter at a quarter past 8 who says, I want a lawyer, to which he has a right, then I say, ok, a lawyer. But I know that this means he will have to stay [at the police station] the whole night because he will have to have spoken to a lawyer first. We work until 10 pm. So that is a strange rule where the right to a lawyer can go against the interests of the defendant. Because without a lawyer the case might have been solved within two hours. They make use of the right to a lawyer, but it also means they are held at the police station for longer."
(Police officer, the Netherlands)

3.3 Exercising the right to a lawyer

3.3.1 Cost: deciding whether or not to have a lawyer

When the national rules do not entitle the defendant to cost-free legal aid, legal expenses might constitute a practical barrier to exercising the right to access a lawyer. The interviewees were asked if defendants worry about the costs and consider the financial aspect while deciding whether to use legal assistance or not.

States have different systems regarding legal aid and its scope, and this report does not discuss these aspects.

In those countries where defendants not deprived of liberty have no access to cost-free legal representation, the question of lawyers' fees is an issue. This is the case in Austria and, as a lawyer notes, this might be problematic for defendants:

"The costs are always a topic regarding legal representation, because the reimbursement of costs in the case of an acquittal is minimal. Until an indictment is filed no reimbursement of costs takes place anyway, and then in case of an acquittal the reimbursement is so minimal that they always have to carry additional costs. Also, the insurances often only provide a restricted coverage of costs, so costs are always an important topic."
(Lawyer, Austria)

Two defendants interviewed in Austria state that they were not satisfied with the legal-aid lawyer, but did not have money to pay for a better (private) lawyer.

A: "I already asked how he can be removed, but you can't remove him [public defence lawyer]."
Q: "Whom did you ask?"
A: "I asked the officer if you can get another one or something, and then she said: only with money. Great. Me as prisoner? They cut everything for me, you don't get money in here, you don't get money, especially not in custody. And then I asked if I can still remove him somehow. She said: no, if you can't afford one, then that's your lawyer. And that really does annoy me a bit."
(Defendant, Austria)

In addition, the relevant laws in Bulgaria and Denmark exempt defendants from paying the costs of legal representation only if they are acquitted. In the view of one interviewee, authorities clearly emphasise that fact, presumably to dissuade defendants from seeking legal aid:

"Defendants are worried about costs, because when the right to legal aid is clarified [...] people are always also told that, if they are sentenced, they will not be reimbursed the costs for the legal aid used."
(Lawyer, Bulgaria)

Another interviewee, however, indirectly opposed her colleague, saying that defendants with previous convictions do not worry that ultimately they will have to pay for legal aid because, in practice, the state will not be able to recover the money if the defendants are in a difficult financial situation:

"They are not worried at all, because it is clear for them that they would usually even not pay those costs. They are usually in a very bad financial situation, execution writs are issued against them, but those costs could not be practically collected."
(Lawyer, Bulgaria)

The interviews conducted in Greece reveal that, for some defendants, especially those deprived of liberty, the financial cost of a private lawyer might be an obstacle that they cannot overcome. According to one lawyer, defendants deprived of liberty might spend months in detention without access to a lawyer, only to learn that they can actually request an ex officio lawyer. She was

referring to a case in which foreign defendants accused of trafficking were detained before trial because they did not have an address in the country.

"An ex officio appointment is made, but when? When these people are in prisons for 6 or 12 or in the case of felonies 18 months maximum [...] They remain detained, etc., and in the end, when the time limit is exhausted, the prison officers inform them that they are entitled to request the ex officio appointment of a lawyer [...]"
(Lawyer, Greece)

One defendant from Poland explicitly states that he gave up on his defence and deemed his case doomed, believing that hiring a lawyer would only add to the costs:

"I didn't have a lawyer because no one informed me verbally about such a right during the first questioning. And later – I can't tell the exact reason. Maybe it was so because a decent lawyer of choice is costly and I thought that my case was lost anyway."
(Defendant, Poland)

Another defendant interviewed in France was not satisfied with his duty lawyer, so he decided to employ a private lawyer to give him a better defence. The lawyer was very expensive, which was a problem, as he was a student and did not have a lot of income:

"It is double jeopardy (punishment), you are deprived of your liberty for something and you have done absolutely nothing and on top of that there are lawyer's fees which rise to 1,300 euros."
(Defendant, France)

However, a police officer from France presented the police point of view in a very candid way:

"This question of knowing who pays the lawyer is of little interest to the police because it is something which will come later on in the procedure, for the police force, it is incidental. What counts for the police force, is to carry out the questioning."
(Police officer, France)

3.3.2 Assistance with accessing a lawyer

Especially for defendants deprived of liberty, getting in touch with a lawyer might be problematic. In recognition of this difficulty, Directive 2013/48/EU obliges the authorities to make sure that suspects deprived of liberty are able to exercise the right to access a lawyer in practice.[96]

Defendants not deprived of liberty

Across the Member States researched, defendants not deprived of their liberty most commonly arrange for the provision of a lawyer themselves, after receiving the summons for questioning, and rarely benefit from any assistance from the police. When police officers do provide assistance, the usual practice is that defendants not deprived of their liberty are given access to a list of lawyers to choose from, drawn up by the ministry of justice or the bar association, for example (Bulgaria, Denmark, France, Greece, Poland and Romania). In some states, it is possible to ask for the assistance of a duty lawyer. This is the case in France, where the majority of the professionals interviewed – lawyers, investigators, prosecutors and judges – say that a defendant who does not know a lawyer could have a duty lawyer appointed by the bar president, in accordance with the law.[97] However, the duty lawyer remains a privately hired lawyer and not a legal-aid lawyer.

Almost all interviewed police officers and judges in Austria state that defendants not deprived of their liberty are entitled to initial legal counselling by the standby legal counselling service available at local police stations. However, the lawyers and police officers interviewed disagreed about whether or not defendants not deprived of their liberty are sufficiently informed of this fact. Whereas police officers state that they inform defendants of this right, lawyers disagree. This service also works overnight. In Greece, defendants not deprived of their liberty may request that the court appoint a lawyer before questioning by an investigative judge.

Lawyers interviewed in Bulgaria and Poland raise concerns regarding the appropriate role of police officers in the selection of lawyers. In Bulgaria, lawyers mention the relationship between state-appointed lawyers and law enforcement authorities in the context of police officers recommending their friends. Similarly, in Poland, both lawyers and judges emphasise that police officers and prosecutors should not indicate particular lawyers, as it would create the potential for manipulation/conflict of interest.

Defendants deprived of liberty

The research shows that police assistance is needed much more for defendants deprived of liberty. In cases of defendants deprived of liberty, police might actually play a decisive role during the decision-making process regarding whether to hire a lawyer or apply for a legal aid. A lawyer from Poland notes that, sometimes, police might lead defendants into thinking that, if they quickly cooperate with the police, they might be released from custody:

96 Directive 2013/48/EU, Art. 3 (4) and Recital (28).

97 Art. 61-1-5 of the Code of Criminal Procedure.

"I have to say that this is a quite unfair practice. Off the record and before the first hearing, prosecutors, but mainly police, very often encourage defendants to confess or to make a plea bargain. They also encourage defendants not to seek lawyers' help, suggesting that such a lawyer will only cash in the client and will complicate the entire proceeding."
(Lawyer, Poland)

This places a significant degree of responsibility on the police to provide objective information. As discussed in Section 3.2, this can lead to challenges in practice. Nevertheless, police officers, judges and prosecutors across the Member States agree that, if a defendant wants a lawyer's assistance and does not know any lawyer, they will provide their assistance. However, the type of this assistance varies.

In some states, the only assistance police can offer is to provide a list of lawyers. Almost all of the police officers and judges interviewed in Austria say that defendants who want to make use of their right to a lawyer, but do not know a lawyer, are provided with the contact list of the stand-by legal counselling service. The initial telephone counselling is cost-free. If the defendants want to have a lawyer present, they will have to pay for this. This service also works overnight.

All of the members of the monitoring bodies interviewed in Bulgaria note similar practices and state that the only way in which police assist defendants, if at all, is by providing them with the contact details of lawyers and then either giving them a phone to make the call or calling the lawyer directly on their behalf. These interviewees were unanimous in stating that no other type of assistance is offered.

"If they [defendants] need to use a phone and are unable to cover the costs or have no mobile phone to call, they are provided with a phone. They [lawyers' contacts] are available, as a standard, in all detention facilities. There is a list of ex officio lawyers, which is accessible. The relevant bar association provides it to each local police station and places of criminal detention. It contains the names, phone numbers, and from which bar association the lawyers are. There is no such practice that I know [to provide assistance in other ways, such as internet access], only a phone."
(Member of a monitoring body, Bulgaria)

In addition, in Greece, police hand defendants a list of lawyers:

"We give them the list of lawyers of the bar association [...] They insist on asking us about who is a good lawyer, but we cannot answer this question [...] The same practice is applied with regards to the European arrest warrant."
(Police officer, Greece)

All police officers in Romania agree that, if defendants choose to appoint a lawyer themselves, they are allowed to contact them directly by phone or through family or acquaintances.

In some countries, the police officers call a lawyer. For example, in France, police call a lawyer appointed by the president of the bar association. One lawyer, however, criticises the investigators for not always making the effort to contact him directly: "I see that they are sometimes content to call the office, even outside of business hours, whereas they have our mobile phone number". Similarly, in the Netherlands, police will call a lawyer on duty. All police officers and all lawyers also indicate that this system of lawyers on duty does not work at night. Lawyers on duty accept calls between 7.00 and 20.00. One lawyer and one police officer explain that exceptions are sometimes made for child defendants to prevent them from having to stay overnight at the police station.

In Denmark, where it is mandatory for persons deprived of liberty to be represented by a lawyer at their pre-trial detention hearing, the police contact the court and a lawyer is appointed for the pre-trial detention hearing. One of the lawyers elaborates on this point:

A: "[I]t is not even possible to be deprived of liberty in Denmark without a lawyer. A lawyer has to be present. [...] They can't get around not getting a lawyer. And if they do not choose one themselves, the court will choose someone. They have to be represented by a lawyer. And if they want to change their lawyer, they cannot get rid of the old lawyer before they have a new one. That is not possible."
Q: "So there is never a vacuum?"
A: "Never."
(Lawyer, Denmark)

Police helped all of the defendants interviewed from Denmark to obtain representation by a court-appointed lawyer at their pre-trial detention hearing (Grundlovsforhør), which is mandatory. Four (out of five) of the defendants state that they did not have any influence over the choice of lawyer. Two of them state that they were not even aware of this right. More than half of the defendants chose to change their lawyer following the pre-trial detention hearing.

Interviews conducted in Poland indicate that police will call a lawyer, but the defendant should indicate the name of the lawyer. Police will make that call even at night, but only after a custody record is drawn up. As one respondent notes, the custody record has to be prepared and signed by the defendant before any contact is made with a lawyer because it contains all the defendant's requests, including the request to contact a lawyer, and it forms the basis for further activity by a given police officer. Some lawyers criticise the fact that the police make the call and not the defendants themselves.

"They can tell the police the name of an attorney, and the officer is free to establish the phone number, but doesn't have to. The worst part is that even if they know the phone number, the police will still call for them. We're talking to the police. This is how laughably 'direct' it is. For me, this is something very opposite to a direct contact. There's also a mention of an email contact but this is obviously fiction."
(Lawyer, Poland)

"If someone is informed that they have a right to contact a lawyer, they usually imagine an American movie, in which someone is given a phone and has an opportunity to contact anyone. In the Polish reality it doesn't look like this – the right to contact a lawyer means that the police call the indicated person or attorney and inform them that this person had been arrested."
(Lawyer, Poland)

One of the defendants interviewed, however, expresses his disappointment that the police did not call a lawyer for him despite his believing that they did.

"This is my lack of awareness of my rights and my inability to exercise them even when I receive information about them. I was stupid to assume that giving the police the number for a person who could provide me with legal assistance would initiate the entire procedure – the police would notify the lawyer and wait until they show up. That was my impression for the better part of the evening, but then when the police handcuffed me and transferred me to jail, I realised that reality looks completely different."
(Defendant, Poland)

As a result, in a system when police make the call, the defendants have no control over whether or not that call is actually made, which prevents not only direct contact but also a lawyer's involvement at all.

When a person does not have any details to contact a lawyer, some of the professionals interviewed note that the police could provide a list of lawyers or indicate some institution to contact. However, often, police officers and prosecutors note that such persons can get a lawyer either through a motion for legal aid or by contacting their family members, who can make appropriate arrangements.

"Let's be honest, if this is a normal person then there is some contact person provided whom we inform about the arrest. And at this point it works like this: we inform this person that, say, her son was arrested and [we say] 'Ma'am, he asks you to get him a good lawyer.' So then the mother searches [for a lawyer] and then someone comes and says that the mother has sent them [...]"
(Police officer, Poland)

Lawyers often indicate that the help of relatives is the most effective way to secure legal assistance. For this reason, defendants rely greatly on the help of their families. A number of interviewees emphasise the role of family members or friends in securing defendants' access to a lawyer. Lawyers from Poland agree that a detained person who has no relatives or friends has a huge problem finding a lawyer:

"This depends on the good will. A detainee is not really engaged in securing legal assistance for himself. The family is mostly engaged. If a detainee doesn't know a lawyer, then it depends on the activity of their family what this defence would look like."
(Lawyer, Poland)

As a result, defendants with no fixed circle of relatives, or foreigners, find themselves in a more dire situation.

Lawyers, however, point out that family members often do not have enough details about the case, in particular on the whereabouts of the detainee. As one lawyer notes, either the police do not inform family members appropriately or family members simply do not remember the information because of stress. One interviewee implies that perhaps police officers are not trained sufficiently on how to provide such information:

"When it comes to the rights of an arrested person, it can be stated that they are disregarded. Numerous times, I encountered a situation in which a member of a family calls and informs me that one of their relatives has been arrested. The member of the family has no clue what happened [...] the police informed them only that a person was arrested and the police will question this person next day [...] I don't know whether the police are specially trained for this, but it'd be better if they provided minimum information."
(Lawyer, Poland)

As a result, lawyers search various police stations, while time is passing. Thus, access to a lawyer is further delayed.

"There are cases when I can't find a person. I know where they've been arrested, by whom, where they should be. I start looking for them. I get nothing from the duty officer, the chief, commander. Nobody knows a thing. A man has vanished into thin air. After two days I find them exactly in the same unit where I was looking for them."
(Lawyer, Poland)

This shows that reliance on a third person in arranging a lawyer is insufficient from the perspective of securing access to a lawyer, especially if the attitude of police officers is such that they would rather obstruct this access. A member of the monitoring body from Poland describes the system as follows:

"If there's a direct demand for contacting an attorney, then I think the officers won't do anything to prevent this from happening. But they won't make an effort to facilitate this contact on their own. They don't think this serves their interests and make their work easier."
(Member of a monitoring body, Poland)

A lawyer from Bulgaria points to another aspect related to difficulties in accessing a defendant by a lawyer. Lawyers can see their clients only after a specific officer is assigned to the case to give permission for a lawyer's visit and this usually takes time. During that time, 'informal talks' are held.[98]

"Difficulties are purely practical, the duty officers tell us permission should be given by the officer working with the detainee and often, since this is shortly after the person's detention, such an officer is not assigned yet, i.e. no one can take responsibility and permit the lawyer's visit [...] So we wait for an officer to be assigned and meanwhile police are holding informal 'talks' which is a circumvention of the defendant's right to have a lawyer from the very beginning, who can advise whether the person should speak or not."
(Lawyer, Bulgaria)

In the same vein, another interviewee mentions that lawyers' access to detainees can be prevented through various other means, such as having lawyers wait for several hours before being given access to detainees. However, in the view of the interviewee, the defendant should be able, from the moment they enter the police station, to call their family and a lawyer.

Interviews with lawyers and defendants suggest that sometimes police might delay calling a lawyer or even discourage defendants from having one. Two defendants interviewed in Austria report that the police did not help them access a lawyer. In one case, the police even discouraged a defendant from contacting a lawyer by saying that he would have to pay the lawyer himself. One defendant was informed about the right to a lawyer and asked the police if she should make use of this right. The police then informed her that she would not benefit much from a defence lawyer at this stage of the procedure:

"I couldn't afford one back then. They normally should have provided one immediately for the questioning, I would have preferred that, but they didn't. They told me I can bring one in, but I would pay for him myself. He said 'it's at your expense', that's what he said."
(Defendant, Austria)

Of the defendants interviewed in France, 3 out of 10 tend to consider that the police and gendarmes did not provide them with assistance because the investigators were reluctant to follow up their request.

One person arrested in Poland reports feeling that police did not actually want to call a lawyer:

"I heard: 'we'll call a lawyer later on.' The police's practice is very clear in this regard: they don't allow you to call or contact anyone. They intimidate people mainly in order to force them to confess, and they promise that, after confessing, they will release you."
(Defendant, Poland)

In addition, a lawyer from Greece experienced situations when police discouraged defendants deprived of liberty from calling a lawyer:

"At that moment, they [police officers] say 'we will ask you two or three questions, you will answer, it is simply a formality for us [...] Later, all the relevant documents will be provided to your lawyer who will undertake your defence'."
(Lawyer, Greece)

One police officer from Bulgaria explicitly confirms that, in his opinion, there is no need to contact a lawyer immediately after an arrest:

"When we detain them for 24 hours, they do not need a lawyer. It is only later, when the investigative police steps in and it is decided whether to charge formally or not [...]"
(Police officer, Bulgaria)

In addition, a police officer from France feels that, sometimes, a lawyer's presence could be inconvenient for the investigators:

"You have to ensure that the defendant does not interpret the arrival of the lawyer as something which will get them out of this situation in one fell swoop."
(Police officer, France)

The same police officer states that the arrival of a lawyer is inconvenient in terms of prolonging the proceedings. This supports the feeling of several members of monitoring bodies that investigators may be tempted to dissuade the person in custody from having a lawyer.

A Polish lawyer explains that, from the police's point of view, the presence of a lawyer is not helpful:

"The presence of a lawyer at this initial stage is as inconvenient for them as it can only be. The majority of negative things for the arrestee take place then. Overwhelmed with emotions, especially if this is their first arrest, they are most likely to disadvantage themselves, say things they wouldn't say; things, which can later be used against them."
(Lawyer, Poland)

98 For more details on 'informal talks', see Chapter 2, Section 2.2.3.

The right to remain silent and the effectiveness of defendants being informed about this right was discussed in detail in Chapter 2, Section 2.2, where it was concluded that a lawyer's presence might indeed prevent defendants from incriminating themselves, as otherwise they feel overwhelmed and compelled to talk to the authorities:

"The police prefer cooperating with an arrested person. It's a person who wants to be released, who counts on a release if they say something, which police officers play with, it's their right."
(Lawyer, Poland)

Lawyers, members of the monitoring bodies and defendants interviewed in Greece identified another practical challenge. Defendants are supposed to call lawyers themselves and, in police stations, they may use a pay phone to contact a lawyer or a third person, but they have no access to the internet. There are phone cards available for purchase but, as one lawyer notes, defendants might not have the money to buy a card, as the police seize all the belongings of those they arrest.

Defendants' accounts differ regarding phone calls to lawyers and other people. For example, one defendant was able to call his lawyer and family with the assistance of police. Conversely, another defendant reports that, about two hours after his arrest, he was temporarily taken to a cell in the basement of the police station. There was a card-operated phone there and, although he asked for someone to come and let him make a call, no one listened to him or answered his request. The interviewee tried to use the phone on his own initiative and then a police officer told him aggressively that he should have asked to use it. He hung up and was roughly taken upstairs without having made a phone call. The interviewee expressed the opinion that the police treated him in a way that gave him the impression that they were eager to show or exercise their power but with no apparent reason.

Lawyers, on the other hand, could not be any clearer on how important it is to contact a lawyer at the very outset of the proceedings.

"They [the defendants] don't understand that receiving legal assistance immediately after the arrest may have a crucial impact on the proceedings. This week I had at least two cases in which family members called me a day after the arrest. By that time, my clients had already testified. Their situation had become much more complicated."
(Lawyer, Poland)

3.3.3 Private conversation

For legal assistance to be effective, defendants should be able to speak with their lawyers before giving any statements to the police. According to Article 3 (3) (a) of Directive 2013/48/EU on the right of access to a lawyer, defendants have a right to communicate in private with a lawyer before questioning by police or other authorities. Taking into account what is at stake, this is particularly important for defendants deprived of liberty, and authorities should make this private conversation possible. Defendants not deprived of liberty can arrange a legal consultation in their own time.

This section discusses the findings related to private conversations between lawyers and clients, especially those deprived of liberty, for whom such conversations are, for practical reasons, much more difficult to organise than for defendants not deprived of liberty. Findings show that the practical exercise of this right varies, with police officers in some states fully respecting it, while police officers in other states stretch its scope.

Defendants interviewed in Austria, Denmark, France and the Netherlands generally recall having this opportunity. In Austria, three defendants waived their right to a private conversation with a lawyer in police custody (for unknown reasons), but spoke to their lawyers in private in pre-trial detention. Four out of the five defendants interviewed in Denmark state that they had around 5–10 minutes to talk to their lawyer in private at the pre-trial detention hearing before it began. In particular, one of the defendants does not feel that this was enough time for him to prepare for the pre-trial detention hearing. Eight out of the ten persons inter-

Children's perspectives on criminal proceedings

In the project 'My lawyer, my rights', Defence for Children International (DCI) has conducted fieldwork research in six EU Member States and desk research in an additional 12 EU Member States, asking children about their perspectives on criminal proceedings and experiences with lawyers. One outcome of this project, for example, was that DCI notified the Dutch Minister for Legal Protection that better regulation of access to specialised juvenile justice lawyers was needed.

Based on the findings, DCI published training and awareness-raising tools for legal professionals. These include an awareness-raising video based on the children's interviews during the research phase; a manual for EU Member States on how to ensure the rights of children in conflict with the law; and an international practical guide for lawyers defending children in conflict with the law.

For more information, see the 'My lawyer, my rights' website.

viewed in France state that they had the opportunity to speak with their lawyer before talking to the investigators or between two interviews. Four out of the five defendants interviewed in the Netherlands chose to make use of a lawyer. All four of these defendants had the opportunity to talk to a lawyer in private before the police questioned them. Defendants interviewed in Romania were divided. Three of them mention that they were allowed to talk to their lawyers for a short while (two minutes to half an hour) before the questioning, whereas the other three state that they did not talk to their lawyers at all. In this context, it must be noted that two of the three lawyers who did not talk to their clients at all were *ex officio* lawyers.

The statements of defendants interviewed in Poland suggest that police might view this right in a particular manner. Five of the defendants interviewed talked to their lawyers, but not in private, while one defendant did not have this conversation at all. As the interviewees noted – including all of the defendants – either a police officer is present during the consultation or the consultation takes place in, for example, the corridor.

"The police escorted me to the prosecutor's office and I waited there for half an hour until the prosecutor arrived. My lawyer was already there, so we talked in the presence of the police."
(Defendant, Poland)

"Every conversation with my lawyer took place in the presence of the law enforcement official. He insisted on being present. Despite protests from my lawyer, it ended up with us three sitting together. I established with my lawyer the scope of our cooperation – she was new in this case."
(Defendant, Poland)

Interviewees from Bulgaria and Greece, however, did not recall even having the opportunity to talk to their lawyers before the questioning. Two of the defendants interviewed in Bulgaria had lawyers of their own choice and at their own expense. In both cases, however, the lawyers were not present when the interviewees were arrested and when the police asked them to give written explanations related to the charges they faced. These two interviewees spent about 24 hours in police detention and were able to meet with their lawyers either at the moment of their release or afterwards.

The other two defendants interviewed had lawyers chosen for them by the police, and these lawyers were present only during the court hearing. One of them was in detention for 24 hours before the court hearing. The other spent about two months in detention before the first court hearing took place. These two interviewees did not know their lawyers and were not able to talk to them in private before the hearing. One interviewee met their lawyer directly in the courtroom, the other had a brief meeting at the police station before the hearing, but both share the opinion that their lawyers were not defending their rights properly.

"Do you know when she showed up? Already in a court. She has not familiarised herself with the case, nothing. She just agrees. How can you agree – they want to give me 10 years! I mean, were you acquainted [with the case], and did you read what they accuse me of, for what [...] No. She only shows up in the courtroom, she says I am your lawyer and she sits next to me [...] She is my lawyer – wait, the trial is starting, what kind of a lawyer are you, did you take the case file to read why I am here, for what [...] Instead, she agrees with the prosecutor."
(Defendant, Bulgaria)

Out of the six defendants interviewed in Greece, only one recalls being informed about the right to a lawyer immediately after the arrest. Another was informed after the questioning. For these reasons, none of the defendants talked to the lawyer before the questioning.

3.3.4 Waiting for a lawyer to arrive

Interviewees were asked if police officers wait for the arrival of a lawyer before starting the questioning.

Defendants not deprived of liberty

When it comes to the questioning of defendants not deprived of liberty in Denmark, France, the Netherlands and Romania, interviewees agree that, at this stage of proceedings, in practice, questioning is not likely to go ahead without a lawyer, as defendants are free to schedule the questioning at their convenience. For example, in Romania, with one exception, all the lawyers, police officers and prosecutors interviewed believe that, if defendants want to be represented by their chosen lawyer but this lawyer is not immediately available, the hearing is postponed for up to several days, upon agreement between the parties on a convenient time. One lawyer provides more insight into the practice, insisting that this is not true in cases of serious crimes or crimes in which the offender is caught in the act, when the police actually delay access to a lawyer on purpose:

"In less serious cases, the questioning is postponed, because the interest is not so great, it is postponed for another day and he is allowed to return at a later date with a lawyer. It can even be postponed for a week or 10 days; the criminal investigation body is understanding. If the lawyer is on holiday, for example, this will be accepted. But in more serious cases and concerning flagrant offences, access to a lawyer is delayed as much as possible, and the idea is to obtain as much information as possible from the person before the lawyer comes. Calling a lawyer will be postponed for an hour, two, or three, as much as possible."
(Lawyer, Romania)

Defendants can also choose to proceed with questioning without having their lawyer present. In fact, across all Member States, when defendants not deprived of their liberty choose to proceed with questioning without having their lawyer present, that questioning goes ahead unless representation by a lawyer is mandatory under the specific circumstances, for example in cases of minors. When asked if police inform defendants not deprived of their liberty that they have the right to change their mind and request the presence of lawyer, responses varied. In Austria, the majority of professionals interviewed state that they do not inform defendants of this right. In France, the professionals interviewed tend to agree that they are not obliged to provide this information. Investigators, however, are divided on this subject; while one states that this information is included in the written rights, another says that they are under no obligation to provide this information but that, if a judicial police officer feels the defendant is uncomfortable, they may remind the defendant.

In some states, important distinctions were also raised between cases of defendants called as witnesses and those formally charged (Bulgaria and Greece). When defendants had been formally charged, it was more likely that police officers would wait before proceeding with questioning. For persons called for questioning as witnesses or persons of interest, this is not always the case in practice. In Bulgaria, for example, a third of the lawyers interviewed state that, in the case of witness interviews, police do not wait for lawyers or even actively remove them from questioning. Again, the issue of 'intelligence talks' was raised by a lawyer from Bulgaria, who points out that the police will ask defendants questions without even informing them that they could have a lawyer, let alone wait for one.

"Initially, the police do the following: they hold an informal conversation with the person who is subject of their interest, they ask them questions with no procedural value but still helping them get to know the circumstances of the alleged act [...] there are also the 'explanations' given to investigators on special forms [...] which do not have procedural value either [...] There is also the strategy to question someone two, three, five times as a witness and present them with charges only later [...] authorities [...] know perfectly well there are suspicions against the person but still charge them only later. So what is admissible is only their questioning as a formally charged defendant, but the prosecutors and judges have their subjective impression if the statements are in contradiction. Those statements cannot be formally used but still give indications [...] they stay in the case file, sometimes the pre-trial file contains even the explanations given before police."
(Lawyer, Bulgaria)[99]

Defendants deprived of liberty

When, however, a person deprived of liberty, who cannot freely leave the police premises, is questioned, Directive 2013/48/EU is clear that the defendants have a right to the presence of a lawyer during questioning.[100]

The vast majority of the professionals interviewed in all Member States agree that, in general, police would wait. Any disagreement during the fieldwork research was usually visible between law enforcement officers or prosecutors, who state that they wait the mandated amount of time for lawyers, and lawyers, who disagree.

Where a waiting time is legally mandated, this was deemed to be respected (France, the Netherlands and Romania). It seems from the interviews in the Netherlands that the official maximum waiting time is two hours but, in practice, the police are not very rigid about these two hours and will wait longer if necessary.

Q: "How long do you wait for a lawyer?"
A: "Officially a maximum of two hours. However, the point is: if he [the defendant] wants a lawyer present during the questioning, then he must have a lawyer present during the questioning. And if this lawyer is not present within two hours, then we have to discuss with the assistant prosecutor if we can start nevertheless. Nine out of ten times [the assistant prosecutor] does not risk starting the questioning without a lawyer present when the defendant does want a lawyer. So then we wait longer."
(Police officer, the Netherlands)

However, one lawyer presents a slightly different perspective, expressing concerns that the police may subtly push defendants towards agreeing to questioning without a lawyer by informing the defendant that they can of course wait for a lawyer but that this might take two hours.

99 For more information about informal questioning, see Section 2.2.3.

100 Directive 2013/48/EU, Art. 3 (3) (b).

Q: "Would the law enforcement officers wait with the questioning until the lawyer has arrived?"
A: "Most of the time they will wait. What I do notice, and I think that is problematic, that it is sometimes said: 'Well, you know, we can wait for that lawyer, but that could take as much as two hours. As for me, you can go home after the questioning.' [...] That police officer, who says that, does not have that authority, to decide if he can go home, that is for the assistant prosecutor of the police to decide. It once happened that I arrived at a client (my office is a 10-minute bike ride from the main police station), and my client was totally surprised that I was there already. He said: 'well I actually already said that we could start with the questioning, because the police told me it could be as much as two hours before you would arrive. But now you are here. Yes, now I do want to consult with you.' That is problematic. Look, it is no lie. Because it may well be an hour before I arrive, because I might be at another questioning [...] But it may keep someone [...] it does create a barrier for someone to have a lawyer present."
(Lawyer, the Netherlands)

In France, the waiting time also seems to be around two hours, and all of the lawyers interviewed state that the investigators must wait for the lawyer's arrival to question the defendant. One lawyer, however, insists that "the lawyer must take care not to take long to come because it would delay the work of everyone. For a lawyer, arriving on time is also working intelligently with the police" (Lawyer, France).

All of the police officers interviewed in Romania explain that, to question a person who has been placed in custody for up to 24 hours (*retinere*), it is mandatory to have a lawyer. Therefore, the police will wait for the appointed lawyer for two hours and, if the appointed lawyer does not show up within these two hours, questioning will take place in the presence of an ex officio lawyer.

Q: "Would you wait with the questioning until the lawyer has arrived? If yes, for how long would you wait?"
A: "Of course. About two hours. He usually arrives sooner. But during this time, we talk to the defendant without recording it. The effective statement and any other document are drafted in the lawyer's presence. But if the lawyer does not show up, it doesn't mean that after the two hours of waiting we begin the questioning. We call the bar and they send another lawyer, and we wait. I do not want to exaggerate and claim that there is no hearing without a lawyer, maybe in all this country there are people who would do something like this, but from what I know nobody does any activity with an arrested defendant without a lawyer. Because it would be useless labour, the court would exclude it."
(Police officer, Romania)

Lawyers interviewed in Bulgaria raised another aspect, namely the flow of criminal proceedings in the case of deprivation of liberty and the fact that there are certain deadlines. The police would wait only a couple of hours for the appointed lawyer and, as the presence of a lawyer is obligatory in the case of deprivation of liberty, sometimes state-paid lawyers are initially appointed so that procedural deadlines are not missed.

"Several hours, if the person is being detained [...] the problem comes when authorities detain someone, then officers are nervous, sometimes they appoint legal-aid lawyers almost forcibly, because, if a client of mine is detained and I have a three-day court session, he/she cannot get in contact with me, because my phone is switched off [...] So either another lawyer is authorised, or a legal aid lawyer is appointed [...] But I cannot blame investigators; their deadlines are sometimes very tight [...]"
(Lawyer, Bulgaria)

When the law does not provide for obligatory professional defence from the very beginning of the criminal proceedings, it seems that the police enjoy more discretion. For example, in Austria, in general, lawyers and police officers agree that they will wait when a defendant clearly and explicitly demands that a lawyer be present However, the majority of the lawyers interviewed say that the police will start the questioning when defendants do not insist on the presence of their lawyer and they do not inform the defendants that they may change their mind at any time and request that a lawyer be present. This is true for both types of defendants: those deprived of their liberty and those not.

Police officers, a judge and a prosecutor confirm that the police would start questioning, but maintain that they still inform the defendant that they may change their mind at any time and request a lawyer to be present. If they do change their mind, the police interrupt the questioning and wait for the lawyer or schedule a new appointment if the defendants are not deprived of their liberty.

"If the lawyer is there in due time, then we wait. Otherwise – if the questioning is urgent – we do the questioning without a lawyer. But that has not happened in my life yet. Something else happens much more often – defendants talk to the lawyer on the phone and he [the lawyer] says: 'Listen up, that is the police officer's job and he has to do this, do not talk too much or what do I know, blah blah blah, say what you want, but there is no point in me coming now because in the end, I just sit next to you and I am not allowed to say anything'. And the moment the defendant learns that the lawyer cannot interfere, they do not need him there anyway."
(Police officer, Austria)

A defendant interviewed in Austria, however, claims that he did not agree to answer questions without a lawyer. The police officer told him that they could not wait for a lawyer, as they did not have five hours to wait for his arrival.

All the police officers interviewed in Denmark agree that they will delay the questioning until the lawyer arrives if the suspect wants their lawyer to be present. Some of the lawyers interviewed present a different perspective. They all confirm that, in most cases, the police will delay questioning until a lawyer has arrived, but that there are exceptions to this: half of these lawyers report that they have witnessed or heard of cases in which the police have attempted to start a conversation with a defendant deprived of liberty in the police car when driving away from the scene of a crime.

One lawyer offers yet another perspective on the situation by stating that it is not always obvious when questioning begins and ends and, given this, the dividing line may be unclear. She adds that she is aware of cases in which people state that they wish to remain silent, and then they talk to the police anyway on the assumption that their statements will not be included in a report. She thinks that this might be because they assume that their statements will then be 'off the record'.

According to more than half of the defendants interviewed in Denmark, the police attempted to ask them questions prior to the pre-trial detention hearing, before they had the chance to talk to a lawyer in private. Two of the defendants interviewed went along with the questioning. Neither of these defendants recalls being told that a lawyer could be present at the police questioning or that they could change their mind and request a lawyer to be present. One defendant talked to his lawyer prior to the initial questioning. His lawyer advised him to remain silent, which he did.

The other defendant was not clear-headed at the time of the arrest, since he had been intoxicated on drugs the previous day. Given this, he is somewhat confused about what happened in the situation and does not think that he was informed about the option to have a lawyer present at the police questioning prior to the pre-trial detention hearing.

Interviews conducted in Poland reveal that, in practice, whether or not the police will wait also depends on the lawyer's activity and persistence. Interviewee described this in terms that show a reverse of the logic of rights. In other words, it is not the defendant who enjoys the right to a lawyer and the police who are obliged to ensure it, but rather the burden to secure the enjoyment of the right of access to a lawyer rests on the lawyer him- or herself. As a result, the success of these endeavours, which should derive from the fact that the right is enshrined in legislation, depends on the goodwill of law enforcement representatives.

3.3.5 Use of statements made without the presence of a lawyer

When it comes to the use of statements made without a lawyer being present in cases when the defendant had to or wished to have a lawyer, the situation seems to be quite straightforward in the case of mandatory legal assistance: as the majority of the professionals interviewed across the Member States confirm, these statements are invalid and new questioning must take place.

"If, according to the Criminal Procedure Code, the defendant needs obligatory defence, if, by chance, the investigative police officer or magistrate questioned him/her without a lawyer, this questioning is equal to zero, it has no procedural value. The minutes of questioning are not admissible as evidence because a significant procedural violation has occurred. Thus, the questioning suffers from a fault and, whatever they said, it has no procedural value, it is not admissible as evidence."
(Judge, Bulgaria)

However, regarding the use of statements made by defendants without their lawyer being present when they did not waive this right but when legal defence was not mandatory, the situation is not so clear across the Member States researched. A judge from Austria points out that this issue is not clear cut, as there is no clear prohibition of the use of such statements in place yet in the (Austrian) Criminal Procedures Act:

"That is the big legal question, whether this can be used or not. I believe that judges responsible for main proceedings have used it so far. To be honest, as a magistrate I would struggle to use these statements. But to be honest, I never had such a case."
(Judge, Austria)

Another judge from Austria states that such statements cannot be used, whereas one judge and one prosecutor state that all statements can be used. The lawyers interviewed in Austria are divided exactly in half: half say that those statements can be used and half state that they cannot be used. One of the prosecutors interviewed says that it depends on whether or not the police clearly informed the defendant that they are being questioned as a defendant and informed them about their rights. If it was not clear to the defendant that they were being questioned as a defendant, these statements must not be used. If the defendant is informed about all these things and then requests a defence lawyer, and, while waiting for his arrival, the police talk

to the defendant, this will be recorded as 'file note on what the defendant said off the record'.

The police denied one defendant access to a lawyer and started questioning this defendant about the suspected crime right away. The police justified this by saying that they did not have time to wait for the lawyer. The defendant then started talking and everything was used.

A: "Yes, I told him 'I do not say anything now', he told me 'that is of no use, and then you will be here until you say something and this prolongs everything'. He put me under pressure."
Q: "Does this mean that the police officer's statement made you start talking?"
A: "Yes, exactly, there are three police officers, one standing behind, and two sitting, like for a severe criminal, if I killed somebody."
(Defendant, Austria)

Lawyers from Bulgaria also state that, sometimes, these statements are used. According to half of the lawyers interviewed, if the defendant did not request a lawyer explicitly, or said that the questioning could go ahead without a lawyer, statements can be used later in the proceedings. Another interviewee states bluntly that authorities often 'trick' defendants by convincing them there is no harm in sharing information without a lawyer.

"They would trick the defendant to speak – 'Tell us everything now, no worries' – and he/she speaks, and then he/she claims 'but I wanted a lawyer' and authorities counter 'but we offered a lawyer, defendant did not want one'."
(Lawyer, Bulgaria)

Another interviewee distinguishes between non-formally charged defendants and formally charged defendants, that is, those who are not presented with charges and those who are. The former's statements cannot be formally used, but they are still used through the testimony of police officers and, in some cases, the court give them more credence than the defendant's formal testimony given in the presence of a lawyer during the proceedings. In this regard, the interviewee mentioned the recent ECtHR case against Bulgaria,[101] which found such practices illegal. If the defendant is formally charged, such statements can be used later.

"All explanations given before the person is formally charged, cannot be used directly in the criminal proceedings and, if the defendant is officially charged, they can be used [...] But those explanations, given in the absence of a lawyer and before the person is formally charged [...] this is a violation rarely emphasised upon [...] are joined to the cases as words of the police officers before whom they are given, and there are cases for which that testimony is better credited than the testimony of the defendant himself/herself given in the presence of a lawyer."
(Lawyer, Bulgaria)

Another interviewee explains that statements may be made without a lawyer present because the defendant is under stress or because the authorities make illegitimate promises of a better outcome of the proceedings. Such statements cannot be formally used, but still create a subjective incriminating impression on the authorities reviewing the case later.

"If the person has given testimony, there is a problem, because the testimony might be impacted by emotions, in exchange for a claim that the outcome of proceedings will be better [...] while the investigative authority does not have discretion for such claims [...] he/she is not the one to impose sentences [...] Still, unfortunately, such testimony creates an impression and if the person subsequently denies it [...] this creates a subjective impression and this is understandable."
(Lawyer, Bulgaria)

In fact, lawyers from Bulgaria agree that defendants, regardless of how aware they are of the option of having a lawyer present, are, for lesser crimes, often questioned without a lawyer and are persuaded to admit guilt and agree to a plea bargain with the prosecution. One interviewee says that, in general, authorities do not enable defendants to call a lawyer at a later stage and always think of lawyers as 'obstacles' to the investigation. One interviewee highlights a contrast with more serious crimes, for which defendants are encouraged to find a lawyer because it is easier for authorities to work with a lawyer, including by asking the lawyer to bring the defendant in for questioning.

"I had this case today [...] A boy came, they caught him with 0.5 grams of amphetamine, kept him detained for 15 hours, let him go, brought charges against him and questioned him, and then told him 'Go find a lawyer, don't worry'. And there he comes today, after charges have been brought. The investigator was kind enough [...] I told [the boy] 'Go tell him that I am your lawyer now and he should call me'. And the policeman called immediately and told me 'I will keep you posted' [...] they did explain the right to a lawyer but told him 'Tell us now, don't worry' [...]"
(Lawyer, Bulgaria)

101 ECtHR, *Dimitar Mitev v. Bulgaria*, No. 34779/09, 8 March 2018.

None of the defendants interviewed in Bulgaria recalls being questioned by the police. All of them, however, were requested to give explanations in writing in the absence of a lawyer. As noted by one member of a monitoring body, these explanations would not be accepted as valid evidence in court, but they could be used when deciding whether to undertake further procedural actions against the defendant or to suspend the case.

"Often from these informal explanations, the police, most often the operative officers, receive one important piece of information that can then be used against the person, but they do not notify the person as it is in the American standard, where, at the very moment of detention they tell him – you have the right to remain silent, and what you say can be used."
(Member of a monitoring body, Bulgaria)

In addition, some of the professionals interviewed in Denmark agree that, in cases in which defendants have asked for legal representation, statements given by the defendant without or prior to receiving the advice of a lawyer may be used later in the proceedings, but state that their value may be limited and they do not constitute independent evidence. Similarly, the majority of the professionals interviewed in France – five out of eight lawyers, four out of seven judges and prosecutors – state that there are no restrictions on the use of the statements that defendants make in the absence of their lawyer.

The same practice appears in other Member States (Greece, Poland and Romania). One prosecutor explains how this works in practice:

Q: "If he made a statement before the lawyer came, is this statement taken into consideration?"
A: "Evidently."
Q: "But he had the right to a lawyer and you questioned him without one."
A: "But who questions without a lawyer present? If the suspect wants to make a statement without the lawyer, I question him. If he wants a lawyer, I question him with the lawyer present."
Q: "Maybe he doesn't know he has the right to a lawyer; he did not pay attention at the beginning when you read him his rights?"
A: "In such a case what can I do? There is also an official record he signs. We're still talking about adults."
(Prosecutor, Romania)

For example, in Greece, professionals agree that these statements are normally used, except statements by persons questioned as witnesses who later become suspects. One of the defendants interviewed recalls that the police forced him to give a statement without his lawyer being present:

"In reality, they threatened me. They told me 'now your mother-in-law will be locked up, your girlfriend will be sent to a prison for minors. Say that you were giving the drugs to two or three of your friends, sign this and the two of them walk'. So I said what am I to do, will I be responsible for the imprisonment of these people? It was my fault after all. In addition, I signed. I didn't tell them anything else."
(Defendant, Greece)

Some of the lawyers interviewed believe that a consultation is of crucial importance. One lawyer from Greece explains that changing initial statements is often disadvantageous and that defendants should stick as closely as possible to their initial statements. This is why they are often advised to remain silent in the preliminary investigations and inquiries. However, in cases in which the defendant's rights have not been respected, the proceedings might be found invalid.

The same also seems to be true in the Netherlands. These statements may be included in case files. However, the findings also indicate that lawyers may contest the use of such statements as evidence, on the basis of the general provision in the Code of Criminal Procedure on the consequences of a procedural defect.[102] Jurisprudence determined that this general provision might apply to statements made by defendants in the absence of a lawyer.[103]

Q: "And is there no limitation on the possibilities of police to use statements of your client when you were not present, later on in the proceedings?"
A: "[...] Well, if such a client actually says it's fine if we already start now, the lawyer will come later, well then he actually gave up his right. Then we cannot really do anything about it. Unless, and that sometimes does happen, then we can actually do something [...] if it is really clear that he did not after all – as a vulnerable person, in a serious case – did not actually understand what right he was waiving or that he was so vulnerable or intoxicated that he couldn't actually waive at that moment, or that we cannot interpret that as a waiving statement, so then we can actually do something about it. Then we can have it excluded. That is actually one of the few exclusion grounds we still have."
(Lawyer, the Netherlands)

Lawyers and police officers interviewed in Poland raise the issue of the length of the proceedings for the appointment of ex officio lawyers. The lawyer would not be appointed for the first questioning because the procedure takes too long. According to one interviewee, even if a motion were filed for a legal-aid lawyer, this would not stop the procedures. As respondent says, the police "will conduct procedural acts with this per-

102 Netherlands, Code of Criminal Procedure (*Wetboek van Strafvordering*), 15 January 1921, Art. 359a (1) (b).
103 Netherlands, Supreme Court (*Hoge Raad der Nederlanden*), ECLI:NL:HR:2018:368, 20 March 2018.

son normally" and "there is no chance to get a legal-aid lawyer [on time for those activities – interviewer's clarification]". The interviewee was very clear about the fact that the defendant would not get the legal-aid lawyer fast enough and instead would get the lawyer "when the court is ready to deal with it".

Available remedies

Professionals from the Member States researched agree in general that there are no specific remedies for use of statements made without a lawyer being present. However, interviewees refer to different legal avenues, for example:

- filing a complaint against the police officer (the majority of professionals from Denmark);
- an inadmissibility complaint (some professionals from Austria and Bulgaria);
- an application because of violation of the rights of the defendant (professionals from Austria and the Netherlands);
- complaining in the main proceedings (*Rüge* in Austria);
- a request for annulment (the majority of professionals from France and Greece);
- an appeal complaint (the majority of professionals from Poland);
- claiming that testimony was given under duress or threat (Bulgaria);
- claiming there was a procedural violation (Bulgaria);
- a motion to the supervising prosecutor (Bulgaria).

According to one lawyer, it is also possible for defendants to file a complaint with the police about the use of statements made without a lawyer present. However, the lawyer believes that this is by no means beneficial to the case. The police may respond that they were wrong and will never do it again, or they will deny that they were wrong, but there will be no implications for the case.

Q: "And are there other possibilities for a defendant to file a complaint or so about the proceedings?"
A: "Yes, that's possible [laughs]. Of course that's possible. There is a nice complaints procedure of the police. Then you file a complaint and you have a talk. And they tell you that we didn't mean it that way. And that it won't happen again. Or they think that they've done nothing wrong. And then the complaint is closed."
Q: "But does that have consequences for the case?"
A: "No. In no way at all."
(Lawyer, the Netherlands)

3.3.6 Role of a lawyer during questioning

In the majority of the Member States researched, the main role of lawyers is before the questioning, when they advise their client. During the questioning, it is rather common for lawyers to remain silent. For example, a lawyer from the Netherlands refers to the official guidelines, which state that a lawyer may make a statement only at the start and at the end of the questioning and may make corrections in the minutes of the questioning. A public prosecutor believes that lawyers must also be positioned in the room in such a way that they cannot communicate non-verbally with the defendant. Two police officers refer to the official rules indicating that interventions by lawyers are not allowed, but both indicate that they are more lenient in practice and will allow some form of intervention by lawyers during questioning if this does not cause too much disruption.

Q: "Is a lawyer allowed to ask questions or explain things to the defendant during questioning?"
A: "Officially no, but it does happen. He is allowed to explain things if the defendant does not understand them. But officially, he cannot ask us questions. He actually just sits there in a passive role. But in practice, it does happen that they [lawyers] interrupt [to ask a question]. Nine out of ten times this is not a problem. You can be very rigid about this, but I don't believe that would work. If he starts answering questions that is a different situation, but an occasional question that does not disturb is not a problem in my opinion."
(Police officer, the Netherlands)

In France, it is also clear that there is a divide between the written law and practice. In theory, lawyers cannot intervene. However, one lawyer noted:

"[In practice, this might depend] heavily on the gendarmerie or police officers who you are faced with. Certain police officers are quite 'open' and will accept that we highlight certain elements during the questioning, that we make some comments to our client, for example to ask them to calm themselves or to be a little more polite with the police officer. Other police officers do not accept us intervening and make it clear to us that it is not the time to speak."
(Lawyer, France)

However, one police officer believes that lawyers should understand their role:

"The law sets out that it is the investigator who asks the questions, and not the lawyer. So there is no dialogue between the lawyer and their client. It is a 'ménage à trois' placed under the control of the investigator, the 'master of ceremonies', who can oppose the questions addressed by the lawyer even if this is not the aim in practice."
(Police officer, France)

As observed in Austria, lawyers are unable to intervene in the questioning of defendants and, for this reason, tend to choose not to be present and instead make sure to advise their clients before the questioning. One police officer says that, in practice, the defendant almost never calls the defence lawyer asking them to come to the questioning. Instead, as soon as defendants hear that the defence lawyer cannot intervene in the interview and that they must remain passive, they waive their right to the presence of a defence lawyer. In addition, the costs of a lawyer are an incentive for defendants to waive their right to the presence of a lawyer during the police questioning: defendants realise that they will not benefit from paying a lawyer who only sits there passively.

Lawyers, however, point out that, in cases of the violation of rights, they will interfere in the questioning to uphold the rights of the defendant. Some police officers support this practice. One police officer reports that lawyers can interrupt the questioning if the police apply inadmissible methods, such as asking trick questions. After the questioning, lawyers go through the minutes of the questioning with their clients and, if something was reported wrong, they insist on amendments. One lawyer says that this is very important, as defendants usually do not dare to insist on these amendments.

Lawyers interviewed from Greece also emphasise that a lawyer's role is to monitor the flow of the questioning and make sure that the defendant's rights are respected; they intervene only if they witness something illegal that infringes the defendant's rights.

A police officer from Denmark very accurately summarised this aspect:

"The role of the lawyer is always the same no matter the situation. In my eyes, he can guarantee that we will not violate human rights."
(Police officer, Denmark)

However, the same police officer added that lawyers should not interrupt during the questioning:

"I usually tell the lawyer, exactly because some are more interruptive than others, but I usually tell them that I do not wish that the lawyer tells the defendant what they should say, but you are always welcome to ask for a break. And then I will leave the room."
(Police officer, Denmark)

All lawyers from Denmark agree that they may request a break and ask questions during questioning, but may not interrupt to advise the suspect on a specific question.

"You cannot interfere with the questioning, since it has to be the suspect's statement, but you can ask for a break, which is especially fair in long questionings. But direct advice on the individual questions, that is not the set-up of the Administration of Justice Act. That is not how it works in practice either. But it is common that, at the end, you [the lawyer] say: 'I think we are missing two things' [...]"
(Lawyer, Denmark)

According to half of the defendants interviewed in Denmark, their lawyers had the opportunity to stop the questioning to advise them. One reports that his lawyer used this opportunity and stopped the questioning several times to talk to the defendant in a private room next door. In addition, the lawyer advised the defendant more than once not to answer a question. The other defendant reports that it was not necessary for the lawyer to make use of the opportunity to stop the questioning, as the lawyer and the defendant were thoroughly prepared.

In Bulgaria and Romania, on the other hand, lawyers have a more active role and may intervene by advising clients, asking questions and even stopping the questioning. All of the lawyers interviewed from Bulgaria unanimously note that lawyers can intervene during questioning by:

- advising their clients;
- asking questions;
- requesting clarifications;
- making statements;
- stopping the questioning and saying that the defendant will not talk any further;
- requesting that questions be reformulated if they are leading;
- requesting that minutes be redrafted to correctly reflect the defendant's answers;
- advising the defendant not to sign the minutes;
- requesting a recess to have a discussion with the defendant.

The only thing lawyers cannot do, according to the majority of the lawyers interviewed, is speak on behalf of the defendant, although one interviewee states that he routinely does so if the defendant is too confused and would not tell the story clearly. Another interviewee notes that a lawyer can 'edit' the defendant's statements, adding details. One particular point that one interviewee states and another indirectly confirms is that lawyers often advise clients not to talk at the initial stage of the investigation when not much is known about exactly what the person is accused of.

With two exceptions, all professionals interviewed in Romania indicate that lawyers do not actively participate at any time during questioning in practice. One lawyer and one police officer state that lawyers can ask questions only at the end:

"The lawyer can discuss confidentially with the client before questioning. The lawyer is present during questioning and can ask questions once the defendant has made their statement. This is also recorded. But the lawyer cannot influence the defendant's statement, by adding 'say this' or 'do not say this'. The lawyer is always present at the questioning. Lawyers sometimes intervene, despite the prohibition on doing so. This is not normal, because the lawyer has already had a confidential discussion with the defendant."
(Police officer, Romania)

Specialised assistance for child defendants

Across the Member States researched, the majority of interviewees regard the mandatory assistance of a defence lawyer as a means of specialised assistance provided to child defendants during questioning.

In Bulgaria, interviewees also report the possibility of educational specialists and psychologists being invited to take part in the questioning. Similarly, according to some interviewees in Poland, certain child defendants – for example, children with mental disabilities – are questioned in the presence of a psychologist. A number of interviewees in Denmark and Romania indicate that social services and child protection services are used to provide specialised assistance. Dedicated, specially equipped questioning rooms are also available for child defendants, as interviewees in Bulgaria and the Netherlands report.

Furthermore, several interviewees in Bulgaria, Denmark, France, Greece and the Netherlands brought up specialised investigators or police units dealing with child defendants as examples of specialised assistance.

For more on FRA's work on child-friendly justice and the procedural safeguards in place when children are involved in criminal proceedings, see FRA (2018) Children's rights and justice – Minimum age requirements in the EU and FRA's research on child-friendly justice.

4

Defence rights of persons arrested on an EAW

KEY FINDINGS

- The provision of information on the possibility of consenting to 'surrender' – transfer to another EU Member State – is a problem specific to EAW cases. Several respondents say they did not understand the meaning of giving such consent, which led them to make decisions contrary to their interests. For example, some believed that they would stay in the country of their arrest, or that they would be allowed to return to the issuing country on their own.
- Given the cross-border nature of EAW cases, language barriers frequently impede the effective enjoyment of defendants' right to be informed, including about the right to a lawyer. This is exacerbated when national authorities do not verify that a defendant understands the information provided, particularly when no lawyer is present.
- Overall, executing Member States respect the right to be assisted and represented by a lawyer in surrender proceedings under an EAW. However, the challenges referred to in domestic proceedings apply equally to surrender proceedings in the executing Member States.
- With regard to providing defendants with information about their right to also access a lawyer in the issuing Member State, as well as the effective access to a lawyer in practice, the findings reveal a systemic deficiency. Executing authorities generally do not feel competent to comment on rights in other countries, so do not inform persons arrested under an EAW of their right to contact and appoint a lawyer in the issuing Member State and/or do not sufficiently assist defendants in appointing a lawyer there. In practice, relatives of defendants and/or lawyers in executing Member States often fill this gap by resorting to their own private contacts, including through different professional associations, hence facilitating defendants' access to legal representation in the issuing Member State.

This chapter analyses to what extent persons who are subject to an EAW enjoy their procedural rights. With the adoption of the EAW Framework Decision, the EU replaced the traditional system of extradition and introduced the expedited surrender of people sought.[104] The main features of the procedure are the non-involvement of the executive in the extradition regime, the judicial character of the procedure, the possibility of consenting to surrender to the issuing Member State, the surrender of a Member State's own nationals and the abolition of double criminality for a list of crimes.[105] All of the Member States in which interviews were held had implemented

104 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision, OJ 2002 L 190, 18 July 2002.

105 For a short description of its mechanism, see also the European e-Justice Portal and, for more detailed information, see European Commission (2017), *Handbook on how to issue and execute a European Arrest Warrant*, C(2017) 6389 final, Brussels, 28 September 2017; and Eurojust (2018), *Case Law by the Court of Justice of the European Union on the European Arrest Warrant*, October 2018 (updated 15 November 2018).

Table 2: Member States where interviews were held and countries of arrest

Member State where interview was held	Number of defendants interviewed	Country of arrest
AT	5	2 – AT 2 – DE 1 – ES
BG	6	2 – EL 1 – RO 1 – ES 1 – DE 1 – PL
DK	4	1 – DK 1 – ES 1 – CH 1 – SE
EL	4	3 – EL 1 – CY
FR	3	2 – ES 1 – RO
NL	2	2 – NL
PL	7	4 – UK 1 – ES 1 – DE 1 – FR
RO	4	1 – CZ 1 – ES 1 – DE 1 – BE

Source: FRA, 2019

the EAW Framework Decision and seven (all but Denmark) had adopted the criminal procedural rights directives.[106]

Defendants who were interviewed about the EAW were mostly serving sentences in the states in which interviews were held. The majority were arrested in different Member States from those in which interviews were carried out.

Table 2 breaks down the number of defendants interviewed in each Member State and the countries in which they were arrested.

All the other categories of interviewees – police officers, lawyers, prosecutors, judges and members of the monitoring bodies – reported only on the situation in their own Member State.

106 See European Judicial Network (EJN), Status of Implementation of EU Legal Instruments; for the status of the implementation of the Framework Decision on the European arrest warrant, see European Judicial Network (EJN) (2018), last reviewed on 5 December 2018; for the status of the implementation of Directive 2012/13/EU, see European Judicial Network (EJN) (2018), last reviewed on 11 October 2018; for the status of the implementation of Directive 2013/48/EU, see European Judicial Network (EJN) (2018), last reviewed on 25 April 2019; and for the status of the implementation of Directive 2010/64/EU, see European Judicial Network (EJN) (2018), last reviewed on 8 March 2019.

4.1 Right to information about procedural rights and the content of the EAW

Article 1 of Directive 2012/13/EU on the right to information extends the right to receive information on procedural rights also to persons who are subject to EAW proceedings. Article 5 of the directive provides that persons arrested on an EAW promptly receive a letter of rights, written in simple and accessible language. According to Annex II of the directive, this letter should inform persons of:

- their right to be informed of the content of the EAW issued against them;
- their right to access a lawyer, including any entitlement to free legal advice and the conditions of obtaining it;
- their right to an interpreter and translation of the EAW;
- the possibility of consenting to surrender;
- their right to be heard by a judicial authority.

4.1.1 Information on procedural rights

The overwhelming majority of interviewees from all categories in Member States reported that persons arrested on an EAW receive information on procedural rights. However, the way that information is provided varies, and findings show that, sometimes, persons arrested are not provided with a letter of rights for EAW proceedings. For example, in France, all judges, prosecutors and lawyers report that persons arrested with an EAW must be informed both in writing and orally of their rights. The competent prosecutor must provide this information. Otherwise, the procedure can be declared null and void. Lawyers highlighted, however, that this is not always the case, since the Court of Cassation has ruled that providing information only orally does not lead to nullity of the arrest.

Interviewees who were arrested on an EAW report on the information provided in the state where they were arrested. As mentioned previously, that was different from the Member State in which interviews were held; therefore, it is difficult to draw distinctions between the eight Member States in which interviews were held. Interviewees highlight other issues, for example delays in providing information and a lack of confirmation that the persons arrested understood their rights. The statements of arrested persons provide some details on how the information is provided in practice.

The majority of defendants targeted by the EAW and interviewed in Austria (three out of five) report that they

were informed of their rights. In particular, two interviewees report that representatives of prison authorities were very friendly and patient and the defendants had the feeling that they could ask questions if they wanted to. However, two interviewees report that they felt that the police did not really care if they understood the information on their rights. Two persons interviewed in Bulgaria were never informed of their rights. Another two report delays in receiving such information. All of them understood the information provided to them, usually with the help of a lawyer. However, as all of the persons arrested report, the authorities had not taken any steps to ensure that they actually understood their rights. In Greece, the situation is more troubling. All interviewees were also in detention at the same time as defendants in domestic crimes, so it was difficult for them to disentangle what information on their rights was provided specifically for the EAW case. All of the interviewees who were arrested in Greece on an EAW report that they were not informed of their procedural rights, either orally or in writing. No one reports receiving a letter of rights or having their rights explained by the prosecutors.

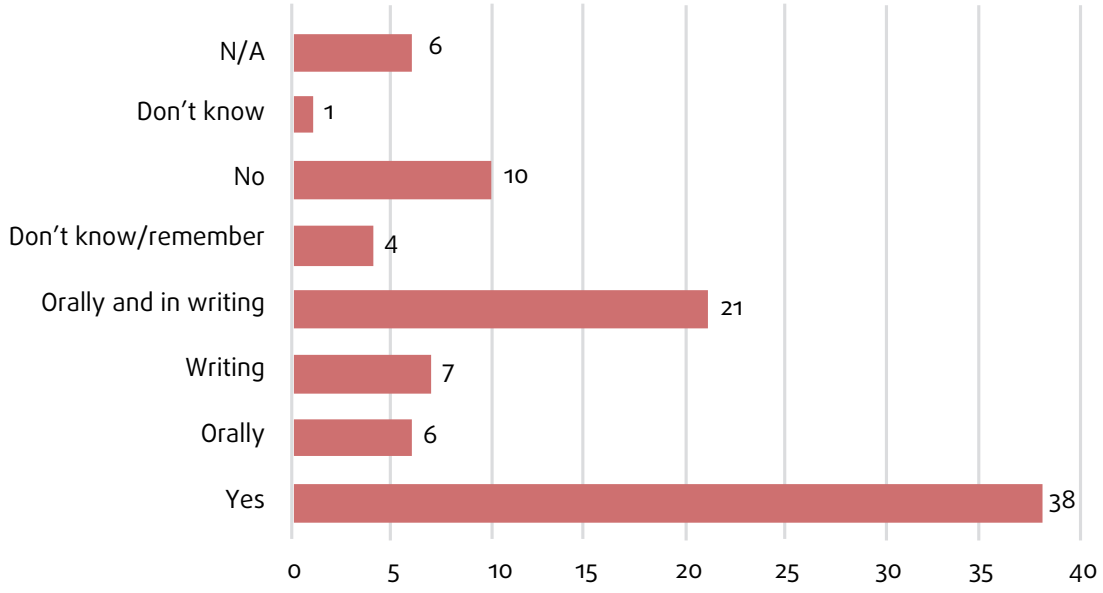
"On the 15th of November 2017 we were brought before the prosecutor in regards to the EAW [...] The secretariat of the prosecutor gave us a paper in Greek language and another in Bulgarian [...] The second informed me about the reason why the EAW was issued in Bulgaria [...] I could not read the warrant in Greek language, but I had to sign [...] There was an interpreter from [North] Macedonia [...] I could understand half of the information he interpreted [...] And I did not know the Greek language."
(EAW defendant, Greece)

In Romania, of the persons interviewed who were arrested in other Member States, half report having received information about their rights both orally and in writing, while one reports that he received such information in writing only and another reports receiving the information only orally. The persons interviewed in France who were arrested in other Member States were informed of their rights, orally and in writing, although one reports delays in being provided with the relevant information and that he was informed only orally. All but one of the persons arrested and interviewed in Poland report having received information both orally and in writing, although the timing concerning when the letter of rights was given varied. For example, one defendant reports that he received information orally at the police station and received the letter of rights only after the court hearing, when he was in detention prior to his surrender. Three interviewees also stress the language barrier. As they did not speak the language of the state in which they were arrested, they were not sure about the information provided to them.

"I must've received some information, but I didn't understand it. I had no information in Polish."
(EAW defendant, Poland)

"Most probably [the police officers] informed me [about my rights], but I am not sure because I did not understand them. The documents given to me to sign were as well in the foreign language [...] I did not understand any information [given to me], both written and oral."
(EAW defendant, Poland)

Figure 2: Are persons arrested on an EAW informed about their procedural rights? Replies from all interviewees from all eight Member States



Source: FRA, 2019

4.1.2 Information on the contents of the EAW and on consent to surrender

The right to receive information on the EAW and its contents is generally respected, findings reveal. When such information is provided usually differs, however, and sometimes issues and delays are noted, especially if a translation is needed. For example, two persons interviewed in France report difficulties in understanding the information provided, as they did not understand the language the police spoke. They underline that no effort was made to help them understand this information, as the investigators in the countries of their arrest did not use an interpreter or seek to provide documents in French. They believe that the police even tended to be threatening or discourteous.

The provision of information on the possibility of consenting to surrender emerged as a problem. Many interviewees report that such information was either not given or misunderstood. For example, all five persons arrested on an EAW interviewed in Austria report that they were not informed of or advised about the possibility of consenting to a surrender. In Romania, half of the interviewed persons arrested on an EAW also report not having received any information or advice on their possibility of consenting to surrender. In several instances, the interviewees arrested had problems with understanding and this led them to take decisions contrary to their interests. For example, persons interviewed in Bulgaria understood the information about the possibility of consenting in different ways. Some were led to believe that they would stay in the country of their arrest or that they would be allowed to return to the issuing country. Another person interviewed in Poland stresses the fact that he did not properly understand the consequences of his consent to surrender.

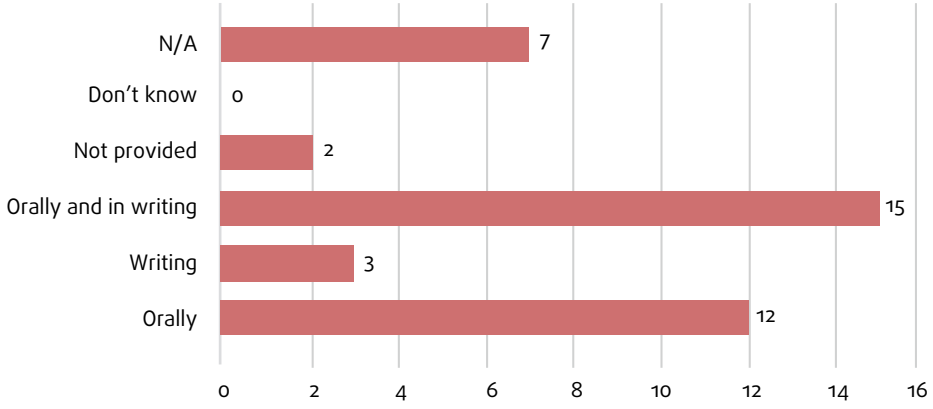
"I made a huge mistake when I agreed to be transferred back to Poland [...] in France the conditions are completely different – in the prison cell there is a shower, toothpaste in a normal tube, plasma TV, razors and normal after shave cream [...] If I had known what I know now, I would've never agreed to be transported back to Poland."
(EAW defendant, Poland)

Only one person interviewed in Denmark reports that both the police in the executing Member State (Spain) and his lawyer gave him advice on the consequences of surrendering. Another of the interviewees in Denmark does not think that he was advised about the matter, but he was very aware of the consequences.

4.2 Right to be advised and represented by a lawyer

Directive 2013/48/EU extends all aspects of the right to be advised, defended and represented by a lawyer, applicable to regular criminal proceedings, to persons who are subject to EAW proceedings (Article 10 (1) (2)). This includes providing information to the persons concerned about their right to access a lawyer, as mentioned in the preceding chapter. Directive 2013/48/EU also establishes the right to 'dual' legal representation in both the executing and issuing Member States. The right to access a lawyer, in particular, includes:

Figure 3: Are persons arrested informed of the contents of the EAW against them? Replies from all interviewees from all eight Member States



Source: *FRA, 2019*

- the right of persons arrested to be informed of their right to appoint a lawyer in the issuing Member State (Article 10 (4));
- the right of persons arrested to have the authorities of the executing Member State inform the authorities of the issuing Member State of their wish to exercise the right to appoint a lawyer there (Article 10 (5));
- the right of persons arrested to be provided with information to help them appoint a lawyer in the issuing Member State (Article 10 (5)).

With regard to the provision of information on the right to access a lawyer, the situation and issues appear to be the same as for the provision of information on all other procedural rights. Information is generally given, mostly orally, but not always in writing. Findings further reveal that the right to be assisted and represented by a lawyer in the executing Member State is generally respected. However, the findings reveal great systemic deficiencies with regard to the right to access a lawyer in the issuing Member State. Both the provision of relevant information on this and especially the practical exercise of this right are deeply problematic.

4.2.1 Information on access to a lawyer

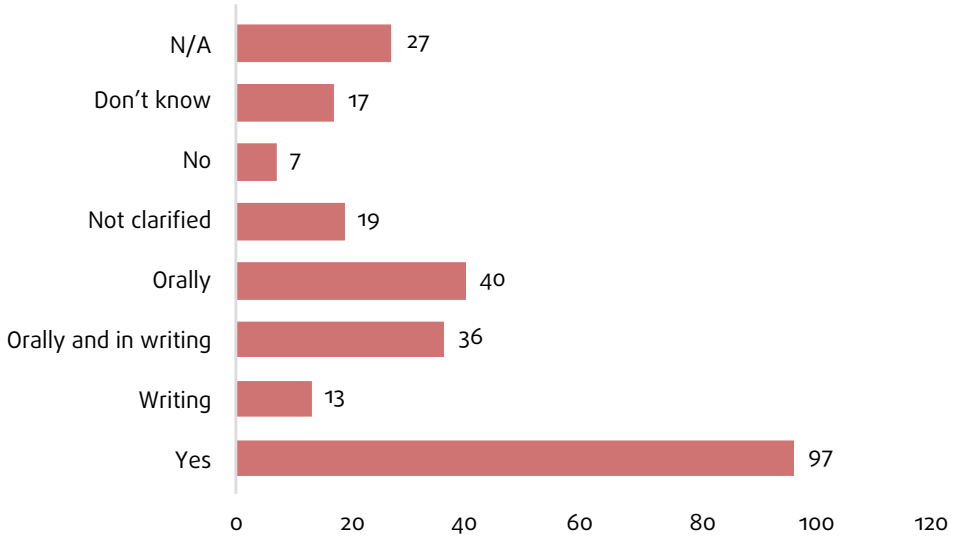
Among the interviewees from Poland who were arrested on an EAW, one was informed of their right to access a lawyer in writing, two were informed orally and one was informed in both ways. Of the six persons arrested and interviewed in Bulgaria, only one reports that he received this information in writing, while two report that they were not given this information at all. In Romania, three of the persons arrested received this information orally and only one received it in writing, although four lawyers from Romania agree that this information is given in writing. In Greece, the prosecutors interviewed say that they provide this information orally only. In Bulgaria, France, Poland and Romania, judges, prosecutors and police officers report that they provide such information both orally and in writing. Lawyers in France highlight, however, that, according to national case-law, providing this information only orally is not considered a breach of defence rights and does not lead to nullity of the arrest.

Lawyers in Bulgaria are divided on whether or not the information is given orally and/or in writing. In Denmark, as professionals confirm, information is provided orally only, as Directive 2013/48/EU is not implemented. In the Netherlands, the two persons arrested and two of the lawyers who were interviewed state that the information provided is detailed and that the executing police officers always emphasise the need to have a lawyer in the executing state.

4.2.2 Exercising the right to be assisted and represented by a lawyer in the executing Member State

It appears that the right to be assisted and represented by a lawyer in the executing Member State is respected in all of the Member States researched. Across all Member States, legal representation is mandatory in

Figure 4: Are persons informed of their right to access a lawyer? Replies from all interviewees from all eight Member States



Source: FRA, 2019

EAW cases and is arranged by executing authorities unless defendants want to contact their own lawyer.

However, certain issues emerge. For example, four persons interviewed in Austria report that the police in the executing Member State did not help them to make arrangements to contact a lawyer. Similarly, persons interviewed in France who were arrested on an EAW in other Member States, with one exception, report not receiving any help in contacting a lawyer, especially because of the lack of proper interpretation. All three interviewees were unable to talk to their lawyers before being questioned by the police. Two of them explain this as being due to the language barrier. Two of the interviewees were represented by a lawyer in court proceedings in the executing Member State, while the other was not. Two of the interviewees from Poland similarly state that they were not able to consult in private with a lawyer, even though a lawyer was provided for the court hearing. In the first case, this was because of a language barrier between the defendant and the lawyer; in the second case, the lawyer was present in the courtroom but the interviewee was in prison and participated in the hearing only by video link.

One defendant interviewed in Bulgaria describes the problem of delays in receiving legal assistance:

"No [I was not able to talk to the lawyer alone]. It was something like five minutes, even less, outside. We entered the courtroom immediately. After that, when we went out, while the interpreter went to the toilet, and as he [the lawyer] spoke a little Russian, I tried, but we could not understand each other what exactly was going on. Meanwhile the interpreter went out and just left."
(EAW defendant, Bulgaria)

Another defendant interviewed in France describes problems with interpretation:

"No, I did not speak to a lawyer at all before the police questioning. It was the police who put pressure on me to sign papers in Spanish which I did not understand, well before I saw a lawyer. And when I saw the lawyer, it was useless since he did not speak French and there was no interpreter. The only time I could speak alone with the lawyer in Spain was a few minutes before the videoconference with the judge. But that did not serve much purpose, he just explained the procedure through an interpreter and that he would apply for bail. I was completely lost in the procedure even after these explanations."
(EAW defendant, France)

4.2.3 Information on and exercising the right to be assisted and represented by a lawyer in the issuing Member State

As noted above, persons arrested on an EAW have a right to 'dual representation', meaning they have a right to access a lawyer in the executing state, where they are arrested, and also in the issuing state, where the alleged offence was committed or a sentence is to be served. Several interviewees highlight the importance of representation in the issuing Member State. A lawyer from Austria explains that the core of her legal advice in case of an EAW is to immediately access legal advice in the issuing Member State, since the EAW can be challenged only on the basis of a few strict legal grounds in the executing Member State. Indeed, as the case law from the CJEU confirms, surrender after arrest on an EAW can be challenged only on the basis of the non-execution grounds provided by its framework decision; these grounds can be mandatory or non-mandatory.[107] This is unless, based on the facts of the case, there is a real risk that the person concerned will be exposed to inhuman or degrading treatment[108] or that they will suffer a breach of their fair-trial rights owing to the lack of independence of the issuing judicial authority.[109] Defence lawyers from the Netherlands with EAW expertise also note the importance of legal representation in the issuing Member State before the transfer of the person arrested, as it can help prevent surrender in the first place. For example, in many instances, it is possible that the lawyer in the issuing state can secure revocation of the EAW by arranging that the charges are dropped before its execution.

A: "I cannot say: 'He did not do it' [what the defendant is charged for in the issuing country]. That is not an argument. But the lawyer, who is arranged over there, can do that. That is also the whole idea about 'double defence'. That you solve the problem."
Q: "While the defendant still is over here?"

107 Under a mandatory ground, the executing authority must not execute the EAW; under a non-mandatory ground, it is optional for the executing court to reject or approve execution of the EAW: Art. 3 and Art. 4 of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision, OJ 2002 L 190, 18 July 2002.
108 CJEU, Joined Cases C-404/15 and C-659/15 PPU [GC], *Pál Aranyosi and Robert Căldăraru*, 5 April 2016, para. 80 et seq. and operative part.
109 CJEU, Case C-216/18 PPU [GC], *LM v. Minister for Justice and Equality*, 25 July 2018.

A: "Well, either the idea is that it is arranged and the EAW is withdrawn. Or when that is not possible, that someone transferred to the issuing country arrives in a situation which has been taken care of. And he already knows 'Well this is the issue', he is informed about the whole proceedings, is informed about his rights in that country, issues have been arranged such as – for instance – for a successful request for release at the time he arrives. You see, my advice for clients is always – the first time we meet: 'You know, the very best result I may achieve for you is the Amsterdam court deciding to refuse your extradition. When that is successful I have done a very good job. However, that means that you have to stay in the Netherlands the rest of your life. Because the minute you cross the border, the whole circus starts all over again.' The signalling for the Netherlands will be suspended but remains the same in all the other Member States. So, the best advice I can give is that you get a very good lawyer in the issuing country. And for sure, you may be able to achieve a lot in some countries."
(Lawyer, the Netherlands)

Another lawyer interviewed in France also emphasises that dual legal representation is beneficial to the person requested and arrested on an EAW. As he reports, the lawyer in the issuing state can try to stop the EAW or limit the length of the sentence for the person concerned if the case is old and the statute of limitations applies, and the individual has not yet been tried in the issuing country. The lawyer in the executing state could challenge the validity of the EAW to give the lawyer in the issuing state time to work on the actual charges.

In five out of the eight Member States in which interviews were held (Austria, France, the Netherlands, Poland and Romania), executing authorities appear to provide information to persons arrested on an EAW regarding their right to contact a lawyer in the Member State issuing the EAW. In France, for example, the prosecutor must inform the arrested person that they can request assistance from a lawyer of their choice or from a legal-aid lawyer in the issuing Member State. Such a request must be transmitted at once to the relevant court in the issuing state. Similarly, in the Netherlands, if a person arrested on an EAW requests a lawyer from the issuing Member State, the public prosecutor has to arrange this through the authorities of the issuing Member State.[110]

However, actually accessing a lawyer in the issuing Member State appears to be problematic, as authorities simply inform persons arrested of their right to have a lawyer in the issuing state, but do not provide any assistance in this regard. Judges and prosecutors from Romania confirm that this is the case when Romania is the issuing state. Lawyers in Poland stress that the responsibility of appointing a lawyer in the issuing Member State lies solely with the person arrested, who must contact a lawyer on their own. For example, very often, lawyers are contacted by a defendant's relatives. The same seems to be the case when lawyers need to get in touch with their counterparts in the other Member State involved, be it an issuing or an executing Member State. In the Netherlands, it also appears that Dutch lawyers in general help defendants to get in touch with lawyers in the issuing Member State. A judge from the Netherlands provides a useful explanation and points out that courts in his country ruled that this duty does not involve actually arranging a lawyer, but instead involves informing the public prosecutor in the issuing state of the defendant's request for a lawyer. In that particular case, the fact that the issuing state did not arrange for the assistance of a lawyer was not considered a valid reason to postpone the surrender of the person arrested. A judge from Austria states that, in his experience, nobody has made use of the possibility of contacting a lawyer in the issuing Member State, although this right is apparently properly explained. The three interviewed persons in Austria arrested on an EAW confirm this, as they report they did not want to have a lawyer in the issuing Member State before their surrender.

In the remaining three Member States researched (Bulgaria, Denmark and Greece), it appears that no information or help is provided in the appointment of a lawyer in the issuing Member State. As two interviewees – a judge from Bulgaria and a prosecutor from Greece – note, the appointment of a lawyer in the issuing Member State is considered a matter for that state only.

"We operate under Greek law [...] If the defendant has a question, the prosecutor informs him about his rights [...] The information about the issuing Member State is not in our competence."
(Prosecutor, Greece)

"In Bulgaria we always notify them that they have a right to a lawyer with regard to the execution of the EAW in Bulgaria [...] But I doubt somebody informs [them] that the person has the right to a lawyer in the other state too. I do not think this is much of an omission, or a violation, because after all we are Bulgarian judges, we know Bulgarian law and we have no way of knowing what rights foreign criminal law accords to the person we are detaining [...]"
(Judge, Bulgaria)

In Denmark, only one police officer reports that persons are informed about their right to appoint a lawyer in the issuing Member State. The other four police officers and all of the judges and public prosecutors interviewed in Denmark are not sure if persons arrested are informed or even if it is actually necessary to inform them. However, all of the lawyers interviewed report that persons arrested are not informed.

110 Netherlands, Dutch Surrender Act *(Overleveringswet)*, 29 April 2004, Art. 21a.

In addition, from all of the interviews with the persons arrested, it appears that receiving both information on and, more importantly, assistance from authorities in contacting a lawyer in the issuing Member State is problematic. All of the persons interviewed in Austria, Bulgaria, Denmark, Greece, Poland and Romania report that they did not receive relevant information or assistance in contacting a lawyer in the issuing state. One person interviewed in Austria even reports that the executing authorities did not allow him to contact his lawyer in the issuing Member State. In the Netherlands, persons arrested report that the police do not provide help in arranging a lawyer in the issuing Member State. Out of the three arrested persons interviewed in France, one knew of this right beforehand, whereas the other two were informed of their right to contact a lawyer in the issuing state. One of these understood that he was only entitled to have a lawyer in the EAW issuing country once he arrived there and not when he was still detained in the executing country. One defendant describes this lack of dual representation rights:

"I did have the phone number of a lawyer in Hungary, but the police didn't let me call. I wrote a request here in prison that I have to speak to the lawyer in Hungary about what happened here and in Hungary, and the police didn't let me. I do not know [why the police refused to contact my Hungarian lawyer]."
(EAW Defendant, Austria))

Other practical issues with regard to dual representation were also identified. Two lawyers in the Netherlands specifically highlight two challenges. The first concerns the financial side: often, lawyers in the issuing country request a pre-payment. This is, however, not always possible. In addition, a state-appointed lawyer in the issuing country may lack the proper expertise or language skills or even willingness to cooperate with the lawyer in the executing state. In particular, a lawyer needs both a knowledge of foreign languages and expertise to handle EAW cases. One lawyer highlights these issues:

"I prefer to use my own network of lawyers. Because, language is a major problem. Then a lawyer is appointed in Hungary to this man, but the lawyer does not speak English or German. Because of this it is not possible to communicate with the lawyer in the other Member State. And a very big problem is the finance and expertise. So, either the lawyer is not at all willing to do something in a legal aid framework of that specific country. Or he does not know anything about criminal law. Sometimes the latter is okay, but when they do not know anything about the EAW, what you can do about it? I have developed my own network of lawyers who do know this."
(Lawyer, the Netherlands)

Promising practice

Ackolwedging requests for specific lawyers

In **Austria**, if the defendant requests a particular lawyer from the issuing Member State, the police will write the name down in the file. This ensures that, if the lawyer gets in contact with the court authority, they already know from the file that the defendant has a lawyer in the issuing country and who that lawyer is, and that the defence lawyer in the executing Member State has already been notified. The representative authority of the issuing country (the consulate) in Austria is informed upon such a request from the defendant.

4.3 Right to legal aid

Directive 2013/48/EU, in Recitals (45) and (48) and Article 11, states that Member States should provide legal aid to persons requested on the basis of an EAW according to their national law, pending EU legislation on this issue. This legislation is Directive (EU) 2016/1919, which should have been implemented by 25 May 2019.

The findings show that, in all of the Member States researched, when they act as executing states, persons arrested by virtue of an EAW are informed and have access to a lawyer free of charge if they cannot afford one. Notwithstanding the overall lack of particular legal-aid provisions with regard to EAW in all of the Member States researched, the assistance of a lawyer in such proceedings is mandatory by national law and a lawyer is provided free of charge.

As a lawyer in France highlights, it is important to provide information to persons arrested on an EAW about the possibility of appointing a lawyer free of charge. For example, one interviewee in Poland reports that he did not apply for a lawyer during questioning by the police simply because he was not informed of his right in an understandable language. However, he was provided with a state-appointed lawyer later before the court proceedings on the execution of the EAW.

The majority of the interviewees arrested on an EAW exercised their right to a lawyer free of charge. Some interviewees elected not to, for example two persons interviewed in Romania and two persons in Poland.

Findings from all states further indicate that persons arrested could not participate in the selection of lawyers, not even by requesting, for example, certain linguistic abilities. For example, in Greece, lawyers are appointed ex officio from a list drawn up by bar associations. In France and in the Netherlands, a lawyer is arranged through the stand-by list of on-duty lawyers. If a lawyer is selected who is not appropriate for the case, this can be addressed by the right of the person concerned to dismiss the first lawyer appointed free of charge and request another one. For example, in Greece, persons arrested can refuse to be represented by the appointed lawyer and request the revocation of the initial appointment and the free appointment of another one. In Bulgaria, if persons arrested are not satisfied with the lawyer appointed, they can ask for another one.

An important issue with regard to lawyers provided free of charge is the quality of the legal services they offer. As mentioned, it can happen that a state-appointed lawyer may lack the proper expertise or language skills. The specialisation or experience of the appointed lawyer is important for EAW proceedings that are of a special nature. For example, three of the persons arrested and interviewed in Austria report that they did not feel effectively represented by their assigned defence lawyers.

Q: "Why did you decide for a private lawyer? Were you not satisfied with the public lawyer?"
A: "Yeah, I was not so satisfied and I think, private lawyer is better in my case."
Q: "Did the police inform you that you had a right to contact a lawyer? If yes, how did they inform you and at which stage of the proceedings?"
A: "Yes, he came to a small appointment [interrogation by the judge, who decides on pre-trial detention] and then I told him, you don't need to come to the big appointment [main trial], I will take a private lawyer. He said all right, fine, you told me that and I told him the name of the new lawyer."
Q: "Did you already know this lawyer?"
A: "I heard it's a good lawyer, in prison."
Q: "So it was not the case that you did not trust the other lawyer?"
A: "They are not the same. A private lawyer and a lawyer provided by the state – do you pay me money or not?"
(EAW Defendant, Austria)

As one member of the prison monitoring bodies from Greece reports, lawyers are not assessed, and bureaucracy and delays in payment do not give experienced lawyers any incentive to accept cases:

"I want to add that this is a system which functions based on bureaucracy without any care for specialised legal aid, because not all cases are the same, and without any assessment as to the level and effectiveness of services provided by lawyers; this system is not performing well. Because the lawyers appointed are not always the best for providing this particular type of defence and because of the extended bureaucracy and the big delays in payment of lawyers who accept to undertake such cases so there is no incentive for lawyers who are more acclaimed, etc.; they have no reason to undertake such cases. But most of all, I repeat, there is no evaluation over the work that is being done on a case in which legal aid is provided and therefore there is no way to exclude specific lawyers from future cases if they are found to perform poorly."
(Member of a monitoring body, Greece)

4.4 Right to interpretation

Directive 2010/64/EU requires that interpretation should be provided free of charge to persons arrested on an EAW (Article 2 (7)). Article 11 (2) of the EAW Framework Decision also includes this right. This right requires that interpretation be of adequate quality and that the persons concerned can challenge the non-appointment of an interpreter or complain about the quality of the interpretation provided.

Differences in legislation and policy with regard to the right to translation, interpretation and information were assessed in the previous FRA report,[111] whereas the current report aims to assess the actual application of rights in practice. The very nature of EAW proceedings, as cross-border proceedings, warrants the use of interpretation much more often than in national proceedings.

Findings indicate that the right to interpretation is enjoyed in practice in EAW cases in all of the Member States researched. All the interviewees, both professionals and persons arrested, confirm this, with the exception of two persons who were interviewed in Romania and one in Bulgaria. In particular, in Bulgaria, one person was provided with interpretation into a language different from their own, albeit with their consent. The same interpreter was used for communications with their lawyer, but different interpreters were used across various stages of the proceedings. One other interviewee from Bulgaria reports being asked to pay for the interpretation costs. In Romania, two of the persons interviewed complain about not being provided with interpretation or with a reasonable explanation for the refusal, although they asked for it.

111 FRA (2016), *Rights of suspected and accused persons across the EU: translation, interpretation and information*, Luxembourg, Publications Office.

However, the stage at which interpretation is actually provided varies. In Poland, for example, findings show that interpretation was provided to interviewees, although at different points and sometimes with a substantial delay. Half of the interviewees had interpretation provided both at the police station and in court, and the other half had interpretation provided for the purpose of the court hearing. In France, of the three persons arrested and interviewed, all had been provided with interpretation during court proceedings, but not before, namely not immediately after their arrest or during police custody. One interviewee mentions that he was not able to communicate with the lawyer who was assigned to him during his arrest, as no interpreter was provided then. In Greece, all of the persons arrested and interviewed also report they were provided with interpretation for proceedings before the competent prosecutor and the court, but not immediately after their arrest. By contrast, in the Netherlands, two persons arrested under an EAW and the two lawyers and judges with EAW expertise report that free-of-charge interpretation is provided for the questioning of the defendant and court proceedings, but also for any contact between the lawyer and the defendant. Two lawyers also report that, sometimes, interpretation is also used in the contact between the lawyers in the issuing and executing countries. In Austria, interpreters are available throughout all procedural steps.

Findings also reveal significant concerns and issues with regard to the quality of interpretation provided. Across all of the Member States researched, there appears to be no mechanism to check the quality of interpretation.

"They explained to me, well, as much as one can call it an explanation. They made signs: 'you shoot someone'. There was no interpreter. Neither at the police station nor at the port. At the police station I had an interpreter in Arabic who was useless because I did not understand [his form of Arabic]."
(EAW defendant, France)

The defendants interviewed in Austria are divided regarding the quality of interpretation; half are satisfied and the other half are not. Two of them state their belief that the police and courts do not check the quality and accuracy of the interpretation in any way, and another expresses his doubts about if this takes place. Similarly, a person arrested who was interviewed in Greece notes that it is not possible for the police and the courts to check the quality and accuracy of the interpretation. In Bulgaria, half of the persons interviewed are also not satisfied with the interpretation and no one reports any methods used by authorities to check the quality of interpretation. Two even note that it was clear that the interpretation was of poor quality. One interviewee had to resort to speaking English directly with the judge because of the poor quality of the interpretation.

"I have given them a choice: in Russian, in Bulgarian or in English. [...] He was trying in both Bulgarian and Russian, but in the end we talked with the judge in English."
(EAW defendant, Bulgaria)

In Poland, although interviewees who had previously been arrested do not express doubts as regards the quality of the interpretation, they report that the quality of interpretation was not checked. In only one case was some attempt at verification made. In Romania, all interviewees highlight concerns and complaints about the quality of interpretation and translation. Only one interviewee who was arrested reports that the Danish judge assessed the quality of interpretation, dismissed the interpreter and rescheduled the pre-trial detention hearing.

"They did not care at all about the fact that I did not understand anything; moreover, they insisted several times that I sign documents that were in Spanish and which I did not understand at all. They kept putting pressure on me and did not want to understand that I do not speak Spanish at all. Of course, I refused to sign the documents, but they were not at all happy with that."
(EAW defendant, France)

Annex

The following are relevant EU legal instruments to contextualise FRA's findings:

- **Charter of Fundamental Rights of the European Union**.[112]
- **Council Framework Decision 2002/584/JHA** of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.[113]
- **Directive 2010/64/EU** of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings, adopted on 20 October 2010, with an implementation deadline of 27 October 2013.[114]
- **Directive 2012/13/EU** of the European Parliament and of the Council on the right to information in criminal proceedings, adopted on 22 May 2012, with an implementation deadline of 2 June 2014.[115]
- **Directive 2013/48/EU** of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, adopted on 22 October 2013, with an implementation deadline of 27 November 2016.[116]
- **Directive (EU) 2016/343** of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, adopted on 9 March 2016, with an implementation deadline of 1 April 2018.[117]
- **Directive (EU) 2016/1919** of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, adopted on 26 October 2016, with an implementation deadline of 25 May 2019.[118]
- **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 in criminal proceedings, adopted on 11 May 2016, with an implementation deadline of 11 June 2019.[119]

112 Charter of Fundamental Rights of the European Union, OJ 2012 C 326, Art. 6, Art. 47 and Art. 48.
113 Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States, OJ 2002 L 190, 18 July 2002.
114 Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ 2010 L 280.
115 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ 2012 L 142.
116 Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ 2013 L 294, Recital (9).
117 Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ 2016 L 65.
118 Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ 2016 L 297.
119 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 in criminal proceedings, OJ 2016 L 132.

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FRA
EUROPEAN UNION AGENCY
FOR FUNDAMENTAL RIGHTS

HELPING TO MAKE FUNDAMENTAL RIGHTS A REALITY FOR EVERYONE IN THE EUROPEAN UNION

Protecting the rights of anyone suspected or accused of a crime is an essential element of the rule of law. Courts, prosecutors and police officers need certain powers to enforce the law – but trust in the outcomes of their efforts will quickly erode without effective safeguards. Such safeguards take on various forms, and include the right to certain information and to a lawyer.

This report looks at how these key criminal procedural rights are applied in practice. It is based on interviews with over 250 respondents in eight Member States, including judges, prosecutors, police officers, lawyers, staff of bodies that monitor prisons, as well as defendants. In highlighting diverse challenges, the report aims to spur efforts to ensure that criminal procedural rights are applied both effectively and consistently throughout the EU.

SUSTAINABLE DEVELOPMENT GOALS

FRA - EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS
Schwarzenbergplatz 11 – 1040 Vienna – Austria
Tel. +43 1580 30-0 – Fax +43 1580 30-699
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