



**RIGHT TO A LAWYER AND TO LEGAL AID  
IN CRIMINAL PROCEEDINGS IN FIVE  
EUROPEAN JURISDICTIONS:  
COMPARATIVE REPORT**



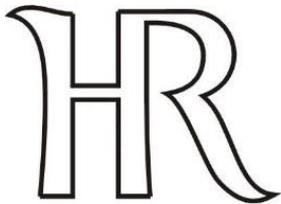
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*Sofia, 2018*

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## CONTRIBUTORS

**The Bulgarian Helsinki Committee (BHC)** is an independent non-governmental organisation for the protection of human rights, established in 1992. The objectives of the organization are to promote respect for the human rights of every individual, to stimulate legislative reform to bring Bulgarian legislation in line with international human rights standards, to trigger public debate on human rights issues, to carry out advocacy for the protection of human rights, and to popularize and make widely available human rights instruments. The BHC has profound experience in carrying out field research and analytical work in the area of access to justice, procedural rights in criminal proceedings and prevention of ill-treatment in places of detention. Since 2006, the BHC has been conducting annual surveys among prisoners, aiming to establish the scale of the use of physical force by police and custodial staff against suspects and accused persons, as well as the dependence between the use of force and other factors, such as ethnic origin. Within the framework of several EU-funded projects, the BHC is actively engaged in monitoring and reporting on the process of national transposition of the EU measures on procedural rights in criminal proceedings.

The **Helsinki Foundation for Human Rights (HFHR)** is a non-governmental organization established in 1989 by the members of the Helsinki Committee in Poland, whose mission is to develop standards and a culture of human rights in Poland and abroad. Since 2007, the HFHR has consultative status with the UN Economic and Social Council (ECO-SOC). The HFHR promotes the development of human rights through educational activities, legal programs, as well as participation in the development of international research projects (e.g. reports in the cooperation with the European Union Agency for Fundamental Rights).

The **Human Rights Monitoring Institute (HRMI)** is a non-governmental, non-profit human rights organisation. Since its establishment in 2003, HRMI has been advocating for full compliance of national laws and policies with international human rights obligations and working to ensure that rights are real and effective in practice. HRMI's team of lawyers and public policy experts conducts research, drafts legal and policy briefings, compiles reports to international human rights bodies, undertakes strategic cases before domestic and international courts, provides expert consultations and legal services, engages in national and international projects, and delivers conventional and distance trainings to law enforcement officers and other professionals. HRMI's primary activity areas are rights of crime victims, rights of suspects and accused in criminal cases, prohibition of discrimination, protection of privacy and digital rights, freedom of expression.

The **Hungarian Helsinki Committee (HHC)** is a leading human rights organisation in Hungary, existing since 1989 and working towards a world in which everyone receives protection against human rights abuses. In previous years, it focused its efforts to defend the rule of law and a strong civil society in a shrinking democratic space, to defend the right to asylum against inhuman government policies and increasing xenophobia, and to defend the rights of detainees and fairness in the criminal justice system. The HHC defends human rights through various means, including strategic litigation, monitoring, evidence-based advocacy, pioneering research and innovative training. Since 1989, it has provided free-of-charge legal assistance to over 28,000 people in need, and has already brought over 25 cases before the

European Court of Human Rights in which the violation of the European Convention on Human Rights was established. In 2017, the HHC was awarded with one of the world's most prestigious privately founded human rights prizes, the Calouste Gulbenkian Prize, and was also among the three finalists for the 2017 Václav Havel Human Rights Prize of the Council of Europe.

**The Peace Institute** – Institute for Contemporary Social and Political Studies – is a private, independent, non-profit research institution founded in 1991 by individuals who believed in peaceful conflict resolution, equality and respect for human rights standards. The Institute uses scientific research and advocacy activities aimed at creating and an preserving open society capable of critical thought and based on the principles of equality, responsibility, solidarity, human rights and the rule of law. The Institute develops interdisciplinary research, educational and awareness-raising activities in the areas of social science, humanities, anthropology and law, in five thematic fields: human rights and minorities, politics, media, gender and cultural policies. It acts as an ally of vulnerable groups and acts against discrimination in partnership with them. It is a visible research and civil society stakeholder in Slovenia, the region and on the international level and a leading resource in the fields of its operation. It acts in partnership with other similar stakeholders (institutes, universities, non-governmental organisations) as well as with residents on the local, regional and international level.

This report was compiled by **Krassimir Kanev**, chair of the Bulgarian Helsinki Committee.

# INTRODUCTION: THE PROJECT AND THE RESEARCH METHODOLOGY

This comparative report on the right to a lawyer and to legal aid in criminal proceedings in Bulgaria, Hungary, Lithuania, Poland and Slovenia was prepared in the framework of the project “Strengthening procedural rights in criminal proceedings: effective implementation of the right to a lawyer/legal aid under the Stockholm Programme”. The project is co-financed by the DG Justice and Consumers of the European Commission. Five non-governmental organizations from those countries, the Bulgarian Helsinki Committee, the Hungarian Helsinki Committee, the Helsinki Foundation for Human Rights in Poland, the Lithuanian Human Rights Monitoring Institute and the Slovenian Mirovni Institute undertook to implement a variety of activities aiming at monitoring the implementation of the EU law related to the right to access to a lawyer and to legal aid in criminal proceedings; increasing the knowledge of the relevant EU standards among the stakeholders and strengthening of their capacity to implement them; facilitating communication and coordination between different legal practitioners and researchers in the process of implementation; identifying and promoting good practices.

Part of these activities involved producing five evidence-based studies on the implementation of the right to access to a lawyer and legal aid – one for each of the above countries. The present comparative report is compiled on the basis of these country studies. According to the original design, the country studies were to be focused on the implementation of Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European Arrest Warrant (EAW) proceedings, as well as of Recommendation 2013/C 378/03 on the right to legal aid for suspects or accused persons in criminal proceedings. In the course of the implementation of the project the European Parliament and the Council adopted Directive (EU) 2016/1919 of 26 October 2016 on legal aid for suspects and accused in criminal proceedings and for requested persons in EAW proceedings. Some of the country studies therefore took into consideration the implementation of this directive as well.

The country studies used a variety of methods to study the implementation. They include a detailed examination of the legal frameworks of the five countries, including the changes made as a result of the transposition of the directive. This desk research includes also gathering official statistics on access to a lawyer and the right to legal aid. In addition, the national partners hired researchers who surveyed 150 case files in each country to collect relevant information. They also conducted interviews with police officers, prosecutors, legal aid administrators, convicted prisoners and other relevant stakeholders and organized two focus groups with legal aid lawyers in each country to provide qualitative input on the practicalities in the provision of legal aid across the five jurisdictions.

The country reports contain valuable information on the general picture, gaps and domestic challenges in the implementation of the right to access to a lawyer and the right to legal aid. They also contain policy recommendations aiming at the improvement of implementation. The reports were used in the capacity-building, advocacy and awareness raising activities among key domestic stakeholders.

Each partner organization organized workshops involving police officers, prosecutors, judges and lawyers. This is the first tier of bearers of increased knowledge on the implementation of the directives/recommendation. A handbook, including the country reports, a paper on international standards and other materials was prepared for each participant during the workshops. The second tier, involving key stakeholders from the broader professional community, was accessed through different e-learning/dissemination channels envisaged in the framework of advocacy and awareness raising activities. In addition, the project aims at disseminating the key finding of the research to a variety of civil society actors – legal reform NGOs, faculties in universities, students and media.

## 1. INTERNATIONAL STANDARDS

The right to legal assistance and legal defence of suspected and accused persons in criminal proceedings is an element of the Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings (the Roadmap), adopted by Council Resolution on 30 November 2009. In December 2009, the European Council included the Roadmap in its programme: "An open and secure Europe serving and protecting citizens" (Stockholm Programme). The right in the Roadmap is formulated as Measure C: Legal Advice and Legal Aid. It is accompanied by five other measures concerning the right to translation and interpretation in criminal proceedings (Measure A), information on rights and information about the charges (Measure B), communication with relatives, employers and consular authorities (Measure D), special safeguards for suspected or accused persons who are vulnerable (Measure E) and a Green Paper on pre-trial detention (Measure F). All these measures are aimed at the effective implementation of various provisions of the Charter of Fundamental Rights of the European Union.

The Council Resolution on the Roadmap foresees the adoption of legislative and other measures to strengthen the rights of the suspected and the accused. Such measures have already been initiated in the implementation of Measure C, as well as of other measures. These include the abovementioned directives as secondary legislation. Two other documents from the Stockholm Programme formulate additional standards concerning the right to legal assistance and legal defence with regard to vulnerable groups. These are Directive (EU) 2016/800 of the European Parliament and the Council of May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, and the European Commission Recommendation of November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings.

The provisions of the directives are brief and leave a wide margin of interpretation. The latter as specified by the directives include the European Court of Justice's (ECJ) case law in interpreting the EU law, as well as the case law of the European Court of Human Rights (ECtHR, the Court) in interpreting the applicable provisions of the European Convention on Human Rights (ECHR, the Convention).<sup>1</sup>

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<sup>1</sup> See Article 14, as well as recitals 53 and 54 of Directive 2013/48/EU, recitals 66 and 67 of Directive (EU) 2016/800, recitals 10, 14, 17 and 23 of Directive (EU) 2016/1919. Recital 16 of the Recommendation on vulnerable persons refers to Article 13 of the UN Convention on the Rights of Persons with Disabilities.

Directive 2013/48/EU obliges the member states to guarantee that the suspects and the accused „[...] have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively”.<sup>2</sup> This opportunity includes access to a lawyer before their interrogation by the police, during some investigative acts (identity parades, confrontations and crime scene reconstructions) which the suspects or the accused are required or permitted to attend, as well as immediately after their arrest or when they are summoned to appear before a competent court, depending on which of these four events is the earliest. The lawyer must have the right “[...] to be present and participate effectively when [suspects and accused are] questioned”.<sup>3</sup> The suspects and the accused should have the right “[...] to meet in private and communicate with the lawyer representing them”, and their communication with the lawyers representing them should be confidential<sup>4</sup>. The member states should provide the necessary general information to make it easier for the suspect or the accused to find a lawyer.<sup>5</sup> Directive 2013/48/EU allows a temporary derogation of the immediate contact with a lawyer after the arrest, as well as of the presence of a lawyer in the above-mentioned three investigative acts, only in exceptional circumstances and only at the pre-trial stage.

The scope of Directive 2013/48/EU excludes administrative penal proceedings before an administrative body for minor offences, for which the law of the member state does not impose deprivation of liberty as a sanction. In such cases, its safeguards only apply to proceedings in a court with jurisdiction in criminal matters.<sup>6</sup> In addition, Recital 13 stipulates that proceedings in relation to minor offences, which take place in a prison, and proceedings in relation to offences committed in a military context should not be considered criminal proceedings. In both cases, the narrowing of the directive’s scope contradicts ECtHR’s case law which does not exclude such proceedings from the scope of Article 6, §3c of the Convention.<sup>7</sup>

In defining their object and scope, Directive 2013/48/EU and the other directives in the Roadmap underline that they lay down minimum rules on the access to legal defence or legal aid in criminal proceedings, and are applied to “[...] suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence, and irrespective of whether they are deprived of liberty”.<sup>8</sup>

The formal initiation of criminal proceedings cannot be regarded as a starting point for the application of safeguards to suspected persons. Furthermore, Directive 2013/48/EU

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<sup>2</sup> Directive 2013/48/EU, Article 3.1.

<sup>3</sup> Directive 2013/48/EU, Article 3.3(b).

<sup>4</sup> *Ibid.*, Article 3.3a, Article 4.

<sup>5</sup> *Ibid.*, Article 3.4.

<sup>6</sup> *Ibid.*, Article 2.4.

<sup>7</sup> For criticism of this approach, see Peers, S., T. Hervey, J. Kenner, A. Ward. *The EU Charter of Fundamental Rights: A Commentary*, Oxford and Portland: Hart Publishing, 2014, pp. 1337-1338. To avoid this contradiction, Article 14 and Recital 13 stipulate that the restrictions should be applied without prejudice to member states’ obligations under the Convention.

<sup>8</sup> Directive 2013/48/EU, articles 1 and 2. See also Directive (EU) 2016/1919, articles 1 and 2; Directive (EU) 2016/800, articles 1 and 2.

explicitly states that it is applied also “[...] to persons other than suspects or accused persons who, in the course of questioning by the police or by another law enforcement authority, become suspects or accused persons”.<sup>9</sup> This provision thus expands the scope of the directive even beyond the suspected and the accused persons although its practical implementation, especially in situations where the persons are not detained, might be problematic as it depends almost exclusively on the discretion of the law enforcement body.<sup>10</sup>

Directive 2013/48/EU allows for temporary derogations to the right of access to a lawyer or to the right to have a third person informed of the detention in a limited number of hypotheses – in cases of geographical remoteness of a suspect or accused persons who are detained; where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person or where immediate investigative action is imperative, as well as where informing a third person may have similar consequences on the life, liberty and integrity of a person or on the investigation. Article 8 of the Directive requires that such derogations must be proportionate and not go beyond what is necessary, be strictly limited in time, not be based exclusively on the gravity of the offense and not prejudice the overall fairness of the proceedings.<sup>11</sup>

Directive (EU) 2016/1919 lays down safeguards for exercising the right to legal aid provided by the state to suspected and accused persons who are detained, who have a right to legal aid in criminal proceedings under the Union or the national law or who take part in the above-mentioned investigative acts (identity parades, confrontations and crime scene reconstructions). The restrictions of the directive’s scope are the same as those of Directive 2013/48/EU. It also applies to European arrest warrant proceedings.<sup>12</sup> In laying down the legal aid standards, Directive (EU) 2016/1919 generally follows the case law of the ECtHR, spread over a wider material and personal scope. Like Article 6, §3c of the Convention, it stipulates that suspected and accused persons without sufficient resources have a right to legal aid when this is in the interest of justice. The directive and its recitals define, albeit generally, the main interests of justice, as well as the powers of the law enforcement bodies to act in order to ensure compliance in specific cases.

Directive (EU) 2016/800 which concerns procedural safeguards for suspected and accused children repeats largely the standards on the access to legal aid laid down in Directive 2013/48/EU, including the limitations and the derogations. In some respects, however, it foresees additional safeguards. One of these relates to the presumption that the child is provided effective legal assistance. Consequently, where Directive 2013/48/EU speaks of “access to a lawyer without undue delay”, Directive (EU) 2016/800 requires member states to “[...] ensure that children are assisted by a lawyer without undue delay” (Article 6.3). Directive (EU) 2016/800 also includes a safeguard which is not found as a common standard in the 2013 directive: “Where the child is to be assisted by a lawyer in accordance with this

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<sup>9</sup> Directive 2013/48/EU, Article 2.3. In such cases, according to Recital 21 “[...] questioning should be suspended immediately” and may be continued only when the person is notified of his rights under the directive and is provided an opportunity to exercise them.

<sup>10</sup> Winter, L.B. “The EU Directive on the Right to Access to a Lawyer: A Critical Assessment” in: Ruggeri, S. (ed.), *Human Rights in European Criminal Law*, Heidelberg, etc.: Springer, 2015, p. 114.

<sup>11</sup> Directive 2013/48/EU, Article 8.

<sup>12</sup> Directive (EU) 2016/1919, Article 2.

Article but no lawyer is present, the competent authorities shall postpone the questioning of the child, or other investigative or evidence-gathering acts [...] for a reasonable period of time in order to allow for the arrival of the lawyer or, where the child has not nominated a lawyer, to arrange a lawyer for the child”.<sup>13</sup>

The material and the personal scope of the directives in the Roadmap seem wider than the scope of the similar provisions of Article 6, §3c of the European Convention on Human Rights and Article 14, §3d of the International Covenant on Civil and Political Rights. Both these provisions guarantee a right to a lawyer after the person is “charged with a criminal offence”. Even though the ECtHR case law widens the meaning of a “criminal charge”, in some judgments the Court accepts that it is legitimate to obtain a self-incriminating statement after questioning of a person suspected for having committed a serious criminal offense in the absence of a lawyer and without any indication that he had been informed of his rights during police detention in a situation where “[p]olice questioning was used only to determine the necessity of initiating criminal proceedings”.<sup>14</sup>

In its landmark judgment in the case of *Salduz v. Turkey* of 2008 the Grand Chamber of the ECtHR ruled that Article 6 § 1 of the Convention requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right.<sup>15</sup> The Court’s post-*Salduz* case law however was controversial. On the one hand, in a number of judgments it accepted that the right to legal assistance does not arise only in relation to the eventual questioning of the suspected person by the police and the risk of him/her making self-incriminating statements but in any case where he/she was denied a lawyer irrespective of whether his/her statements have a bearing on the fairness of the subsequent proceedings.<sup>16</sup> On the other hand, in other judgments the Court considered that there would be a violation of the right of access to a lawyer only if the subsequent proceedings “as a whole” had been unfair. The latter trend ultimately prevailed with the recent Grand Chamber judgment in the case of *Simeonovi v. Bulgaria*.<sup>17</sup> This judgment brings the Court’s standards back to the pre-*Salduz* case law in many respects. It signifies the ultimate submission of the right of legal assistance and legal defence in the pre-trial stage to the “fairness of the process as a whole” by allowing for the possibility for unlawful restrictions of the access to a lawyer and for subsequent unlawful actions by law enforcement officials at the national level if the Court decides that the proceedings as a whole had been fair. The Court also refused to impose a requirement for positive obligations on the states and to reverse the burden of proof in the proceedings before the Court.<sup>18</sup>

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<sup>13</sup> Directive (EU) 2016/800, Article 6.7. See also Recital 27.

<sup>14</sup> CEDH, *Hovanesian c. Bulgarie*, n° 31814/03, Arrêt du 21 décembre 2010, § 37.

<sup>15</sup> ECtHR, *Salduz v. Turkey*, No. 36391/02, Grand Chamber judgment of 27 November 2008, § 55.

<sup>16</sup> Cf. e.g.: CEDH, *Dayanan c. Turquie*, n° 7377/03, Arrêt du 13 octobre 2009; ECtHR, *Aras v. Turkey (No.2)*, No. 15065/07, Judgment of 18 November 2014.

<sup>17</sup> ECtHR, *Simeonovi v. Bulgaria*, No. 21980/04, Grand Chamber judgment of 12 May 2017.

<sup>18</sup> In its recent judgment in the case of *Ibrahim and Others v. the United Kingdom* of 2016 the Grand Chamber comes up with a “non-exhaustive list” of ten factors to be taken into account in order to assess the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings (ECtHR, *Ibrahim and Others v. the United Kingdom*, Nos. 50541/08 et al., Grand Chamber judgment of 13 September 2016, § 274). These include a number of aspects of the proceedings, including the collection, the possibility to challenge and the use of evidence, but not whether a lawyer had taken part in all that.

The ECtHR clarified its approach to restricting the right to access to a lawyer immediately upon detention in several judgments. The most important of these is the Grand Chamber judgment in the case of *Ibrahim and Others v. the United Kingdom* of 2016. In it the Court saw no problem in conducting “safety interviews”, in the course of which the detainees did not make self-incriminating statements but found a violation of Article 6 § 3c with regard to one of the applicants because his questioning was not interrupted when he started making self-incriminating statements as a witness; he was not warned about the possible consequences and was not provided opportunity to access a lawyer. The decision to continue his questioning had no basis in domestic law, and the initial procedural deficiency was not dealt with in the subsequent judicial proceedings, which were not fair as a whole.<sup>19</sup> It seems that the emancipation of the right to legal assistance and legal defence from the overall assessment of the fairness of the proceedings would be a key issue in the future development of the standards. While the Roadmap directives end the debate by giving this right independent status, the ECtHR case law with the *Simeonovi* judgment continued to maintain its subordinate role. There is however no such alternative for the EU member states. They are obliged to transpose the right as an independent one in their national legal systems and practices in accordance with the requirements of the directives.

## 2. SCOPE OF THE RIGHT TO A LAWYER AND TO LEGAL AID IN CRIMINAL PROCEEDINGS

### *a. Suspected or accused*

The legal systems of the five countries involved in the project regulate the status of suspected and accused in criminal proceedings in different ways. Some provide for the formal status of both categories in their codes of criminal procedure whereas others use just one of the categories.

In the **Polish** Code of Criminal Procedure (Article 71 § 1) a person is considered “suspect” if the order has been made about presenting the charges against him/her, or the charges have been presented to him /her directly (without the order) in relation to interrogating him/he as a suspect. A person who has been formally charged or was subjected to other formal motions, is considered to be “accused”. In accordance with Article 71 § 3 of the Polish Code of Criminal Procedure, whenever the term “accused” is used generally in the code, such provisions shall apply to the suspect as well. The code also uses the term “suspected person”, which is not defined anywhere in the code. A suspected person has not been presented with charges, yet there are certain data indicating that he/she may have participated in an offence which, however, are insufficient to bring charges.

The **Slovenian** Criminal Procedure Act also contains separate definitions of suspects and accused persons. A “suspect” is a person against whom the competent government agency undertook, before the introduction of criminal charges, a specific act or measure because grounds existed to suspect that he/she had committed or participated in the commission of

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<sup>19</sup> *Ibid.*, §§ 301-311.

a criminal offense. An “accused” is a person against whom a formal criminal investigation is conducted or against whom a charge, indictment or private charges have been filed. The Slovenian system distinguishes also the “defendant”, a person against whom the indictment has become final.

In **Lithuania** the law uses two concepts – “suspected” and “accused”. “Suspected” is used at the pre-trial stage whereas “accused” is used at the trial stage. At the pre-trial stage the term has a broad meaning – suspected is a person who is arrested on a suspicion of having committed a criminal offense or who is interrogated about the criminal offense he/ she is suspected of committing or who is called for interrogation based on the “notice of suspicion”. The latter is a document drafted by the investigating police officer, which describes the circumstances of the offence and the corresponding article of the Criminal Code criminalizing it. All suspects are eventually served a notice of suspicion. But the Lithuanian law also protects them before the notice is served. E.g. if the person is arrested in the act, he/she becomes a suspect and can enjoy the procedural rights from the moment of the arrest. In any case he/she will be served a notice of suspicion in the police station before interrogation.

The situation with the **Hungarian** system is similar. There the person against whom a criminal investigation is undertaken become a “suspect” and is informed about the charges against him/her at the beginning of the first interrogation. This is the so-called “communication of the suspicion”. This is the key point at which the person becomes a “suspect”. Persons taken into police custody are not regarded as suspects since the suspicion has not been formally communicated to them. (If, however, they are caught in the act, they are entitled to the right of a lawyer from the beginning of the arrest.) There are no separate categories of “suspect” and “accused” at the pre-trial stage. The suspect becomes “accused” at the trial stage after he/she is indicted and the case is referred to the trial court. In **Bulgaria** no separate category of a “suspect” exists in the Code of Criminal Procedure. The guarantees under the Directive 2013/48/EU are believed to be applicable by some commentators only after the person becomes “accused”, i.e. after he/she is presented with the charge of having committed a criminal offense. According to this narrow interpretation, the directive does not apply to persons who have been detained on the grounds of Article 72, para. 1, item 1 of the Ministry of Interior Act, for whom there is information that they have committed crimes. They are not considered “suspects” or “accused” although they can be questioned by the police about their crimes while in detention. The statements they provide cannot be used as a ground for conviction but the information can enter their criminal files through the testimonies of the police officers. Although these persons have a right to a lawyer and a possibility to obtain legal aid, the authorities have no obligation to provide the latter obligatory to some categories (e.g. children) during police custody.

### *b. Persons other than suspected or accused*

Implementation of the requirements of Article 2.3 of Directive 2013/48/EU may be tricky as it allows some margin of appreciation to the law enforcement authorities, which is difficult to check. The legislation in all the five countries involved in the project provide for some possibilities for addressing the procedural rights of those persons who are questioned without having a formal status of a “suspected” or an “accused”. Yet, practice in some of them seems to be problematic.

In **Slovenia** the right to access to a lawyer applies from the moment when the suspicion concentrated on a particular person (suspect). Since the adoption of the 2003 amendment of the Criminal Procedure Act, the police are obliged to inform the person of his/her rights, if in the course of collecting information, they establish that there are grounds to suspect that this particular person had perpetrated or participated in the perpetration of a criminal offence. The police are obliged to inform the person before they start to collect information from the suspect. Even if the police investigation has not yet concentrated on a particular person as a suspect, the police officer collecting information should stop the person and inform him/her of his/her rights, if he/she spontaneously confessed or if from his/her statement the police officer concluded that he/she might be the perpetrator of the criminal offence.

In **Lithuania** the Code of Criminal Procedure prohibits interviewing persons as witnesses if they could give information about an offense in which they are involved unless they themselves agree to it. Such persons are called “special witnesses”. If during the special witness’s questioning it appears that the person might be involved in the offense, then procedurally he/she turns into a suspect “who is interrogated about the criminal act he/she is suspected of committing”. In such a case the questioning should be terminated and the person should be allowed to exercise all his/her procedural rights.

In **Hungary** those taken into police custody cannot be questioned as witnesses. However, if a person is not taken into police custody and heard as an “ordinary” witness, that witness testimony may be used later on in the procedure also if the concerned person becomes a defendant. An earlier research from 2010 showed that it is an existing police practice (termed “calling somebody to account” in police jargon) to question persons in police custody without a formal commencement of the criminal proceeding even though this practice has no legal basis. As this informal questioning takes place before the beginning of a criminal procedure, the police are not formally obliged to inform the arrested person about his/her rights as a suspect or the suspicion. Officers write a report on what the future suspect said, and the report is attached to the case file, however it also happens that information provided this way makes its way into the record of the formal interrogation, since if someone makes a confession while being “called to account”, he/she will be easily pressed to repeat it at the formal interrogation, especially if the defence counsel is not present at the first interrogation. However, this problem has not been raised any more by stakeholders in the research underlying the present report.

Under the **Polish** system a person not being a party to the proceedings (e.g. witness) may retain an attorney if the interests of the person so require. However, the court, or the state prosecutor (in the preparatory proceedings), may refuse to allow the attorney to participate

in the proceedings if he/she deems that the interests of the person not being a party to the proceedings do not require this (Article 87 of the Polish Code of Criminal Procedure). The first President of the Supreme Court pointed at the failure to implement the directive due to the improper guarantee of access to a lawyer to a “person suspected”, i.e., for instance, a witness who provides self-incriminating information when giving testimony.

In **Bulgaria**, anyone could be summoned to appear for questioning outside formal criminal proceedings by the police or another law enforcement agency, including the military, the military police and the agents of the National Agency “State Security”. Those detained as suspected of crime may also be questioned orally and/ or may be instructed to give written statement. In both cases, the authorities may ask questions that implicate involvement in crime. However, they are not under an obligation to notify the person questioned on his/ her rights in criminal proceedings, since, formally, the detention is an administrative measure. In principle, police detainees have the right of access to a lawyer and legal aid, but these rights are limited and rarely exercised in practice. Most importantly, for suspects in police detention access to a lawyer is never obligatory, regardless of the seriousness of the offence or the existing vulnerabilities of the detainee (age, mental disabilities, command of language). On the other hand, persons, interrogated as witnesses in criminal proceedings have the privilege to refuse to answer incriminating questions as well as the right to be consulted by a lawyer. According to the national jurisprudence, if a person, interrogated as a witness is later constituted as an accused person, his/ her witness statements should not be considered as an evidence in trial. Nevertheless, national authorities are not obligated to suspend the questioning of witnesses, who in the course of the questioning become suspects or accused persons, in order to allow them to fully benefit from the rights, attached to their new capacity in criminal proceedings.

### *c. Applicability of the right to proceedings related to minor offenses*

Most countries involved in the project provide for the application of the right to a lawyer to cases related to minor offenses, including those envisaging deprivation of liberty. The legal systems regulating adjudication of minor offenses differ from country to country. The only country where the right applicability of the right to a lawyer to proceedings related to minor offenses is in question is Lithuania after the recent amendments of the Administrative Offenses Act although there too the strict application of the case law of the ECtHR may require some adjustments.

First, in **Hungary** Directive 2013/48/EU is applicable in cases where a minor, not criminal offence (petty offence) is punishable with confinement under the Petty Offence Act, along with certain other cases listed by the Petty Offence Act which are also adjudicated by the court. In such cases, the police conduct a so-called preparatory procedure aimed at clarifying the circumstances of the case, identifying the perpetrator and finding and securing the evidence. The police may also take into petty offence custody a perpetrator who is caught in the act punishable with confinement, if it is decided that a so-called fast track court procedure is to be conducted in his/her case. Petty offence custody shall be implemented in a police jail and as a main rule, can last 72 hours. Secondly, decisions on petty offences by other authorities (e.g. local government offices, the police or the national tax office) may eventually be reviewed by the court, and Directive 2013/48/EU is also

applicable to these court proceedings. In any phase of the petty offence proceeding, the petty offence defendant may be represented by his/her legal guardian or the adult he/she or his/her legal guardian retains in writing. The petty offence defendant may at any point of the proceeding withdraw the retainer he/she or his/her legal guardian has given. The representative of the petty offence defendant has the right to be present at any procedural act, and to file motions, make comments and pose questions in any phase of the proceeding. The representative may communicate with the petty offence defendant he/she represents without supervision throughout the entire proceeding. Mandatory representation is only envisaged by the Petty Offence Act in so-called fast track court proceedings. It states that “the police shall appoint a counsel, if the petty offence defendant does not have one. The decision to appoint a counsel is not subject to appeal, but the petty offence defendant may – in a justified petition, and only once – request the appointment of another counsel.” Under the Petty Offence Act, the police notify the counsel about the time and date of the hearing, and provide him/her with the possibility to get acquainted with the case materials and to consult the petty offence defendant before the hearing.

In **Slovenia** minor offenses can be prescribed by a government decree and an ordinance of a self-governing local community. Minor offences are actions that violate the law, government decrees and self-governing local communities’ ordinances, which are as minor offences and a sanction for them is prescribed. The proceedings regarding minor offences are prescribed by the Minor Offences Act. Before the first interrogation, the defendant in the minor offences proceedings must be informed of the right to engage a lawyer who can be present at the hearing. Article 67 of the Minor Offences Act stipulates application by analogy of the provisions of the CPA concerning submissions and records (which includes recording of the request for a lawyer, the lawyer’s presence during hearings, etc.), deadlines, interrogation of the suspect/accused person, examination of witnesses, search of premises, etc. Minor Offences Act too provides for the right to access to a lawyer. Before the first interrogation, the defendant in the minor offences proceedings must be informed of the right to take a lawyer that can be present at the interrogation. Similarly, as in criminal proceedings, accused persons have the right to retain a defence counsel of their choosing. Only lawyers may be retained as defence counsels, but they may delegate articulated clerks to deputise for them. The law does not prescribe mandatory legal assistance in minor offence proceedings. Legal aid in minor offence proceedings before courts is ensured by the Legal Aid Act under the same conditions as in the general procedure.

In the **Polish** legal system, liability for minor offences only applies if the action has social consequences and is prohibited by the act in place at the time when they were committed under the penalty of arrest, restriction of liberty, fine of up to PLN 5,000 or a reprimand (Article 1 of the Minor Offences Procedure Code). In matters related to minor offences, the Polish Code of Criminal Procedure only applies where stipulated so in the Minor Offences Procedure Code. Under that law the defendant has the right to have a lawyer, including the right to use the aid of a defence counsel, of which he ought to be instructed. The same right is also vested in a person “against whom there are justified grounds to draw up a motion for penalty” (Article 54 § 6 of the Minor Offences Procedure Code). A procedure in cases pertaining to minor offences ensures the right of access to a lawyer to an arrested person who has been caught in the act of committing the offence or immediately afterwards (Article 46 § 4 of the Minor Offences Procedure Code). In proceedings related to minor

offences, the person charged must have a defence counsel if: 1) he is deaf, dumb, or blind; 2) there is good reason to doubt his sanity (Article 21 of the Minor Offences Procedure Code). The following cumulative circumstances constitute conditions for the appointment of an *ex officio* defence counsel: interest of justice and inability to bear the costs of defence without prejudice to the person's and his family's necessary support and maintenance.

In **Lithuania** cases concerning minor or “administrative offences” when or if they reach court are examined by courts of general jurisdiction, i.e. courts that can hear civil, criminal, and administrative offences cases. The latter are examined under the “administrative offences procedure”. This procedure borrows a lot from the criminal procedure, but it is a separate order of proceedings described in the Administrative Offences Act. The latter has been changed in its entirety recently, the new edition having taken effect since the beginning of 2017. One of the major changes was that administrative arrest was done away with completely and is no longer a sanction that can be ordered for an administrative offence.

#### *d. Applicability of the right to European arrest warrant proceedings*

In all project countries the right to a lawyer is applicable also to European arrest warrant proceedings in the same way as to criminal proceedings. The present study however is not focused on them specifically, which is why there will be no further discussion on the specificities of the implementation of the EU law to such proceedings.

### 3. ACCESS TO A LAWYER

#### *a. Legal frameworks*

The legal systems of the project countries regulate access to a lawyer for different categories of participants in criminal proceedings in different ways. Some provide for such access for all categories in their constitutions whereas others regulate this matter through their procedural laws and other regulations.

In **Hungary**, Article XXVIII(3) of the Fundamental Law of Hungary stipulates the following: “Everyone under a criminal procedure shall have the right to defence in all stages of the procedure.” Accordingly, under Article 5(1) of the Code of Criminal Procedure, the defendant shall have the right to defence. The defendant may defend himself/herself, or may be defended by a defence counsel at any stage of the proceeding. The court, the prosecutor or the investigating authority shall guarantee that the person against whom the procedure is conducted may exercise his/her right to defence in the way and manner stipulated by the law. Having a defence counsel is mandatory in certain cases prescribed by the Code of Criminal Procedure. Only an attorney may act as a defence counsel – defence may be provided on the basis of either a retainer or appointment by the competent authority.

In **Poland**, in accordance with Article 245 § 1 of the Code of Criminal Procedure, the arrested person, shall be immediately given the opportunity to contact a lawyer or a legal counsel upon demand and by any means available, and also to talk directly with them. The submission of a request to contact a lawyer should be registered in the record of the arrest.

When it comes to a suspect, in accordance with the Code, on a motion from the suspect he/she shall be allowed contact and shall be searched in presence of a retained counsel. The absence of the counsel however shall not prevent the search from being conducted (Article 301 of the Polish Code of Criminal Procedure). Additionally, a person not being a party to the proceedings (e.g. a witness) may also retain an attorney if the interests of the person so require. The court, or the state prosecutor (in the preparatory proceedings), may refuse to allow the attorney to participate in the proceedings if they deem that the interests of the person not being a party to the proceedings do not require this (Article 87 of the Code of Criminal Procedure). The Code of Criminal Procedure sets forth detailed provisions concerning access to a lawyer in accelerated proceedings. In such proceedings, the suspect must be given a possibility to contact his/her defence counsel without the presence of third persons. For the purpose of accelerated proceedings, the Code introduces the obligation of stand-by shifts for designated lawyers and legal counsels (Article 517j of the Code of Criminal Procedure). Nonetheless, as the proceedings are accelerated, the time for preparation of the defence is shortened as well.

Article 31(6) of the Constitution of **Lithuania** establishes that each and every person who is suspected or accused of having committing a crime has the right to defence and the right to a lawyer, from the moment they are apprehended or interrogated for the first time. In a ruling of December 2014 the Constitutional Court has interpreted this right to be absolute, one that cannot be denied or restricted on any grounds and under any circumstance. The court further noted that it follows from the Constitution that it is required to flesh out this constitutional right in law. The public authorities have a duty to ensure that these rights can be exercised in real terms. The right to defence is understood to be a set of rights allowing one to fight the allegation (charge) set against them, or to mitigate their liability. This right may be exercised by either the person defending him- or herself, or by doing so through legal counsel. As such, the right to counsel is considered to be one of the components of the right to defence. The right to counsel includes the right to select and call upon any counsel, and, if lacking the financial means to do so, the right to demand that counsel be appointed for you. According to Article 47(1) of the Code of Criminal Procedure lawyers (otherwise referred to as „advocates“) and, in some cases, lawyers’ assistants may act as counsel in criminal proceedings.

According to Article 29 of the Constitution of **Slovenia** anyone charged with a criminal offense has a right to conduct his/her own defence or to be defended by a legal representative. This right is further specified in the Criminal Procedure Act. The suspects and accused persons have the right to retain a defence counsel of their choosing, however this does not mean that they can hire just any person to defend them in criminal proceedings. Only lawyers may be retained as defence counsel but they may delegate articulated clerks to deputise for them. Article 67/1 of the CPA stipulates that the accused have the right to a lawyer during the entire duration of the criminal proceedings. The wording of this provision is not entirely accurate, as this would mean that the right to a lawyer applies only when the criminal proceedings formally begin. In fact, criminal proceedings in its basic form, begin with the court’s ruling on (judicial) investigation. However, several other provisions of the CPA clearly stipulate the right to a lawyer also in earlier stages of the pre-trial proceedings, including the preliminary police procedure.

In **Bulgaria** Article 56 of the Constitution guarantees the right to legal assistance before any state body as a fundamental right to all individuals. It also proclaims the right to legal representation of detainees and accused persons from the outset of the detention or the criminal proceedings, as well as the right to legal protection in all stages of judicial proceedings. However, national legislation does not attach a common level of protection to the constitutional right of access to a lawyer to all persons, subject to criminal charges. The Criminal Procedure Code lays down a detailed regulation of the procedural rights of the accused and the corresponding obligations of the authorities. Accused persons are entitled to the right of access to a legal counsel (professional lawyer or a close relative) from the time they are officially notified about the accusations until the conclusion of the criminal proceedings against them. The realization of any investigative or other evidence-gathering acts with the participation of the accused persons, prior to informing them on the right of access to a defence counsel and immediately allowing them an opportunity to contact one would be considered a violation of their right to defence. The Criminal Procedure Code also envisage several occasions of mandatory representation by a professional lawyer, based on the seriousness of the offence or the vulnerability of the accused persons, including in cases of detention. Persons, detained by the police or other law-enforcement authorities, including suspects of crime, are also guaranteed the right of access to a lawyer from the outset of the detention. However, they are not entitled to mandatory legal representation, as is the case with accused persons, detained in the course of formal criminal proceedings. Furthermore, legal aid is guaranteed only to those suspects, detained by the police or the customs authorities.

### *b. Points in time for access and restrictions*

As a general rule the legislative frameworks in the project countries contain provisions guaranteeing access to a lawyer for “suspects” and “accused” in accordance with their understanding of these concepts. The deficiencies and the incompatibilities of the latter with Directive 2013/48/EU reflect on the effective exercise of the right in practice from the earliest stages of the proceedings. Problems in that regard seem to exist in all project countries.

In **Hungary**, under Joint Decree 23/2003.(VI. 24.) of the Minister of Interior and the Minister of Justice, as a main rule, the suspect may exercise his/her criminal procedural rights from his/her first interrogation on (this is when the suspicion is communicated and he/she formally becomes a suspect), however, “the right to defence shall be guaranteed from the very first procedural act that the investigating authority conducts against the concerned person upon the suspicion of a criminal offence” (e.g.: summoning the concerned person for the first interrogation, or the issuing of an arrest warrant), meaning that the concerned person shall be provided with the possibility of exercising his/her right to defence from the time of these actions, even if they are preceding the actual initial interrogation. In relation to suspects deprived of their liberty, it is an additional safeguard concerning access to a lawyer that Article 4(4) of the Joint Decree claims the following: a person who is taken into police custody because he/she was caught in the act of committing a criminal offence, shall have the right to defence from the outset of the arrest. Furthermore, the Joint Decree stipulates that after a decision has been made about the deprivation of liberty – in cases falling under Article 4(4), from the outset of the arrest – the concerned person shall be provided with the possibility of retaining a lawyer before his/her first interrogations is

started. The Joint Decree has since 1 June 2007 guaranteed the right to defence to those who are taken into police custody because they have been caught in the act of committing a criminal offence. Before that date, this had not been the practice (since until the first interrogation and the communication of the suspicion within its framework, these persons were not regarded to be formal “suspects”), so it was an important step forward. However, it remains a shortcoming that the Joint Decree still fails to expressly extend the right to defence (before the first interrogation) to those who are taken into police custody under Article 33(2)(b) of the Police Act upon the simple suspicion of having committed a criminal offence (the differentiation between this group and those who are taken into custody, because they have been caught in the act, is very difficult to explain).

The **Polish** Code of Criminal Procedure does not contain any detailed regulations pertaining to the grounds for the restriction of the right of access to a lawyer. The only provision that refers to the defence counsel’s participation in proceedings to take evidence is Article 317 § 2. The Code does not set forth any clear indications as to the duration or proportionality of such restrictions. The provision only refers to “particularly justifiable circumstances” and “the interests of the investigation”. Both restrictions, as well as the right to have a third party informed of the arrest must be proportionate and not go beyond what is necessary; be strictly limited in time; not be based exclusively on the type or the seriousness of the alleged offence; and not prejudice the overall fairness of the proceedings. Yet, in the course of the interviews with legal practitioners it appeared that the core problems related to access to a lawyer occur at the earliest stages of the proceedings. Particularly problematic is the procedure based on Article 308 of the Code of Criminal Procedure, i.e. the preliminary questioning, which, although allows the collection of considerable amounts of data, is not secured with procedural guarantees, like the guarantee of the right to a lawyer. This in fact is an interrogation of a suspect without the participation of a lawyer.

In **Slovenia** Article 4/2 of the Criminal Procedure Act guarantees the right to access a lawyer from the moment of apprehension onwards. What is considered the moment of apprehension is not only important in relation to the right to access a lawyer, but also in relation to the suspect’s privilege against self-incrimination. In accordance with the law, apprehension is any deprivation of liberty that involves forced detention. It includes arrest, police detention and detention on remand. The process of acquiring the suspect’s statement without a lawyer present is not considered a police interrogation under the Criminal Procedure Act. Interrogation can only take place in the presence of the suspect’s lawyer. The official note of the suspect’s statement in this case cannot be used as evidence in court. To be able to use the suspect’s statement in court, a lawyer needs to be present during interrogation. This means that these rules also apply if the suspect states that he/she does not want to retain a lawyer. The Criminal Procedure Act does not allow for any temporary derogations of the right of suspects and accused persons to a lawyer. The right to be defended by a legal representative is a constitutionally guaranteed human right, listed among legal guarantees in criminal proceedings of Article 29 of the Slovenian Constitution. Human rights and fundamental freedoms provided by this Constitution may exceptionally be temporarily suspended or restricted during a war and state of emergency.

The **Lithuanian** Code of Criminal Procedure provides that the right of access to counsel is guaranteed "from the moment of arrest or the first interrogation". At the time research

data collection, the Code of Criminal Procedure did not explicitly provide that the right to counsel is came into existence prior to questioning. Accordingly, Lithuanian lawyers who participated in the study were critical of their assessment of whether the right to counsel is in fact guaranteed from the moment of detention. While arrest may last up to 48 hours, the detainee must be questioned as a suspect within 24 hours of being delivered to the institution responsible for the pre-trial investigation. The Code of Criminal Procedure was amended in May 2017, and Article 50 now specifically states that an arrested person is allowed a private meeting with a lawyer prior to the first interrogation.

In the context of formal criminal proceedings **in Bulgaria**, the right of access to a defence counsel is guaranteed from the moment one is officially notified by the competent authorities that he/ she is accused of committing a criminal offence. Persons, who are detained are also entitled to access to a defence counsel, but detention under the Criminal Code of Procedure is possible only upon prior official notification of the accusations. In other words, under Bulgarian criminal law, detention could never be the first event, undertaken against a person on suspicion of having committed a crime. Whenever detention of suspects is deemed necessary, the measure is imposed by the police or another law enforcement authority, but outside criminal proceedings. Suspects are entitled to a lawyer from the outset of the detention, but the results from the empirical research suggested that it is of no practical significance. According to the experience of the persons interviewed, information about the right of access to a lawyer for police detainees is either provided after questioning or not provided at all. These statements correspond to the results of the criminal case files study, where it was established that out of 67 cases of defendants, initially detained by the police as suspects of crime, only one has actually benefited from legal assistance during the time of detention. Moreover, lawyers in the focus groups complained that in the cases where they were retained by relatives of suspects, held in police custody, they were refused immediate access to their clients, on the basis of not having a valid power-of-attorney or using the Usually, lawyers are allowed in the police station only once the first interrogation of the suspect is over. Another disturbing finding was that in 66% of the cases the suspected or accused persons did not have a lawyer during their first questioning. In 64% of the cases the suspected and accused made initial self-incriminating statements without consulting or participation of a lawyer.

### *c. Attending of investigative and evidence-gathering activities*

It appears that in the project countries compliance with Directive 2013/48/EU regarding the attendance by the counsel of the suspect/accused of investigative and evidence-gathering activities envisaged in it depends on how they view its scope in the national systems. While at the formal stage of the proceedings some countries allow for a wider participation of the lawyers in different evidence-gathering activities compared to those envisaged in the directive, at the stages where it is not clear whether the latter applies, there are some serious issues of compliance.

The **Polish** Code of Criminal Procedure provides for admission of the defence counsel to participate in procedural actions that cannot be subsequently repeated at the trial (Article 316 § 1 of the Polish Code of Criminal Procedure). Additionally, if requested, the defence counsel appointed in the case should be admitted to participate in other actions as part of the investigation. In accordance with the Code, however, “in a particularly justifiable case,

the state prosecutor may, by means of an order, deny the request to admit the defence counsel to participate in an action if the interests of the investigation so require". The interviews with professionals conducted in Poland confirm that defence counsels appointed for individual cases are usually admitted to participate in the aforementioned actions. Nevertheless, the Criminal Law Codification Committee emphasized that the Code of Criminal Procedure "does not contain any provisions concerning the presence of the suspect's lawyer during any actions with the participation of such suspect", including the presentation pursuant to 74 § 3 of the Code.

In **Slovenia** the Criminal Procedure Act includes the right of the lawyer to attend all investigative and evidence-gathering acts, which the suspects and accused persons are required or permitted to attend during the judicial pre-trial proceedings. In the preliminary police procedure, the lawyer may submit evidence, suggest to the police to establish certain facts, files an appeal against police detention and participate in all investigative acts performed by the police. However, the lawyer may not be present during informal police activities that are not considered formal investigative acts prescribed by the Criminal Procedure Act, such as gathering information from witnesses. Identity parades are not considered specific investigative acts, but a specific form of examining witnesses, as it takes place within the judicial investigation. The Criminal Procedure Act stipulates, that both the accused and his/her defence counsel may attend the examination of a witness. The same applies to confrontations. The accused may be confronted with a witness or another accused if their statements diverge on important facts. It is considered a specific form of interrogation or examination, and since the lawyer is allowed to be present both during examination of witnesses and interrogation of the accused, he can also be present during confrontations. The lawyer may also attend reconstruction of the scene of a crime, performed within the judicial pre-trial proceedings. The investigating judge must in an appropriate manner inform the accused and his defence counsel when and where the investigative acts which they are entitled to attend will take place, except where there is a danger in delay. If the accused has a defence counsel the investigating judge shall as a rule notify only the latter.

Compared with Directive 2013/48/EU the **Lithuanian** Code of Criminal Procedure provides for a broader scope of the lawyer to participate in evidence-gathering activities. Counsel has the right to attend the interrogation of the suspect, as well as any other action involving the latter. This includes interrogations, identity parades, checking the suspect's statement on the spot (if the suspect's statement is checked), experiments involving the suspect, confrontations et al. If the action is being carried out at the request of the suspect or their counsel, counsel may participate irrespective of the participation of the suspect. Suspects and their defence counsel, as well as other parties to the proceedings, are given the right to pose questions in interrogations that take place during the pre-trial investigation, have access to the records of investigative actions taken at their request, as well as comment on the contents of these records. The Code sets out two specific limitations on this right. Firstly, the pre-trial judge may rule that the suspect and their counsel are prohibited from participating in the interviews of witnesses or victims that happen to be minors, if there is a risk that the suspect will exert influence on them. Secondly, suspects and their counsel may be removed from the place of the interview when anonymous witnesses or victims are being interviewed. This must be sanctioned by the pre-trial judge. The suspect and their

counsel retain the right to pose questions to the victim or witness through the pre-trial judge.

In **Hungary**, the counsel may be present – beyond the interrogation of the suspect – at the questioning of witnesses whose hearing was motioned by the defence (the counsel or the suspect) and also at confrontations that are held with the participation of such witnesses– the defence counsel shall be notified about these investigative acts. The counsel may pose questions to the suspect and the witness. In addition, both the suspect and the counsel may be present at the hearing of the expert, the inspection of scenes and objects, the reconstruction of events and identity parades. They also have the right to put forth evidentiary motions, make observations and pose questions to the expert. The authorities may exceptionally decide not to notify the defence about these second category of acts if “the urgency of the investigative act” so justifies. The defence must not be notified if the protection of a person participating in the proceeding cannot be guaranteed in any other way. Under Joint Decree 23/2003. (VI. 24.) of the Minister of Interior and the Minister of Justice, with the exception of investigative acts that “brook no delay”, the defence counsel shall be notified about investigative acts at which he/she can be present (including obviously the questioning of the suspect) in due time, but at least 24 hours before the act is scheduled to take place. However, under Article 179(1) of the Code of Criminal Procedure, detained suspects must be questioned within 24 hours from the commencement of the detention, which means that if a suspect is taken into police custody and then into 72-hour detention (the temporary deprivation of the suspect’s liberty without a judicial decision), it is not possible to notify the defence counsel about his/her scheduled interrogation with at least 24 hours in advance. If the suspect claims before the interrogation that he/she has already retained a lawyer and asks that the lawyer be notified about the questioning, the investigating authority shall notify the counsel via fax or e-mail, or if it is not possible, via telephone. (In relation to appointed defence counsels the law does not determine the desired method of notification.) In accordance with Article 3(3)(b) of Directive 2013/48/EU, the facts related to the notification, presence or absence of the defence counsel shall be recorded in the minutes of the interrogations, however, research results show that this is often not done adequately.

It is important to point out that in the investigation phase the mandatory nature of defence (see the details under the merits test of legal aid) does not mean that the defence counsel’s presence at the investigative acts is also mandatory. This means that the authorities will question the suspect also in cases of mandatory defence if the – adequately notified – defence counsel does not appear for any reason. (As opposed to the investigation, in the court phase the hearing cannot be held in the defence counsel’s absence if defence is mandatory.) In addition, research results support the conclusion that the timeliness of notifying defence counsels raises problems primarily in relation to the first questioning of suspects arrested and taken into 72-hour detention. According to previous research, besides the delays in notifications it was also a frequent problem that the notifications were sent by authorities at a time and in a manner that did not give counsels a realistic chance to attend the first interrogation. In the absence of any pertaining rule, practice varies on whether the police wait up for the lawyer letting them know that he/she can only arrive to the interrogation later than the scheduled time, or not. Thus, research results show that in the investigation phase, provisions related to the notification and the presence of the counsel,

or – in some cases – the lack of such provisions may lead to deficient implementation of the requirement set forth in Article 3(1) of Directive 2013/48/EU, according to which “Member States shall ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively”. In addition, these circumstances can in practice eliminate the “effectiveness” of exercising the right of access to a lawyer as required by Article 3(4) of Directive 2013/48/EU in terms of suspects or accused persons who are deprived of their liberty.

In **Bulgaria**, although the police could perform various *de facto* investigative and other evidence-gathering acts, such as questioning, identity parades, experiments, there is no special provision, guaranteeing that suspects, who are required to attend these acts, have the right to have their lawyers also present. Participants in the focus groups testified that even when appearing at the police station as retained lawyers, police authorities normally did not allow them to consult and be present during questioning of their clients. The case files study revealed that records from questioning of suspected persons prior to the initiation of the criminal proceedings against them or during the criminal proceedings but without following the prescribed legal procedure, are presented to the court by the prosecutor and are then included in the court case file. Formally, police records from such investigative and other evidence-gathering acts do not have evidential value in criminal proceedings for failure to comply with the rules of the Criminal Procedure Code. However, the mere fact that these illegally obtained evidences remain part of the case file is concerning. Essentially, the court does not examine the circumstances under which statements are taken, whether suggestive or coerced police conduct was used, nor the use of procedural safeguards effective for securing the privilege against self-incrimination. Under the Criminal Procedure Code, accused persons have the right to have their lawyer participating in investigative and other evidence-gathering acts with their participation, unless they have expressly waived their right. Such acts include bringing charges by serving a charge sheet, interrogation, identity parade, experiment, including reconstruction of crime scene, cross-examination, examination of witnesses before a judge, presenting the results of the investigation. Where the participation of the accused and/ or his lawyer in investigative or other evidence-gathering acts is not required, the investigative authority has the discretion to permit them to attend such acts, provided that their attendance would not impede the investigation.

#### *d. Facilitating the access through provision of general information*

The legislation of the project countries in general envisages provision of general information and measures, which law enforcement authorities must take in order to facilitate the access to a lawyer for suspected and accused persons. In cases where formal proceedings are instituted, the legislation and the practice in general comply with the requirements of Directive 2013/48/EU. The compliance is more problematic in situations over which the guarantees of the directive are at issue, as in Bulgaria.

In **Poland**, according to the Code of Criminal Procedure, the person arrested and the suspect must be informed of their rights. Additionally, the Code imposes an obligation on the Minister of Justice to prepare instruction forms (“letters of rights”), in the form of decrees. Pursuant to Article 300 § 1 sentence 2 of the Code, the instructions shall be given to the

suspect in writing and the suspect should confirm their receipt with his/her signature. The record concerning arrested persons also contains the statement: "I have been informed about the reasons for my arrest and about my rights. I confirm having received the ... [select the relevant letter of rights]". The Code does not stipulate a separate instruction for the accused, but provides a list of the rights and duties that he should be instructed on.

In **Slovenia**, when deprived of their liberty, suspects and accused persons are immediately informed of their rights, which include among others the right to legal assistance of a lawyer of their own choosing and the possibility if they do not have the means to retain a lawyer by themselves, to have one appointed by the police at the expense of the state if this is in the interest of justice. The protocol is that the police officer facilitates the detainees first contact with the lawyer by making the phone call. After the contact is made, the police officer allows the detainee to talk to the lawyer. A list of lawyers, provided by the Bar Association of Slovenia, is available to detainees to choose from. According to Article 148/6 of the Criminal Procedure Act, if the lawyer does not arrive until the time determined by the police, an official note of the statement of the suspect is made. The note includes the legal instruction given to the suspect, the statement of the suspect and, if the suspect wants to make a statement on the offence, the essence of his/her statement and comments thereon. If the detained person decides to entertain his/her right to access to a lawyer, the police must enable him/her to do so as soon as possible.

Article 45 of the **Lithuanian** Code of Criminal Procedure guarantees that every party to the proceedings, including suspects or accused persons, must be informed of their procedural rights. The general duty to clarify these rights lies with investigating police officers, prosecutors and judges. This information must be served to the suspects in writing prior to their first questioning by the police, together with a notification of the suspicions arrayed against them. Specifically, suspects must be served a letter of rights, in a form approved by the Prosecutor General. Separate provisions of the letter envisage that the suspected person shall have the right to defend himself/herself in person or through a defence counsel of his/her own choice. This right shall be guaranteed from the moment of detention or first interrogation. In the event the suspected person does not have sufficient means to pay for legal assistance, he/she shall be provided it free of charge in accordance with the procedure laid down in the law regulating provision of legal aid guaranteed by the State.

In **Hungary**, immediately after the communication of the suspicion the suspect must be informed of his/her right to choose or to request the appointment of a defence counsel. If the participation of the defence counsel is mandatory in the procedure, the suspect also has to be informed that unless he/she retains a defence counsel in three days, the prosecutor or the investigating authority will appoint a counsel for him. If the suspect declares that he/she does not wish to retain a defence counsel, the prosecutor or the investigating authority will immediately appoint a defence counsel. As opposed to Article 9(1)(a) and Article 9(3) of Directive 2013/48/EU, the Code of Criminal Procedure does not prescribe that the suspect must be provided with information about the content of the right to access to a lawyer as well as about the possible consequences of waiving it and the possibility of revoking the waiver subsequently at any point during the criminal proceedings. A defence counsel may primarily be retained by the defendant, but a retainer may also be given by the legal guardian or an adult relative of the defendant. The defendant is free to choose his/her

retained counsel. Regional bar associations keep the register of attorneys, and the list is published on their websites. If the defendant is detained, the court, prosecutor or investigating authority conducting the proceeding shall immediately notify the detaining institution about the name and availability of the retained defence counsel.

In **Bulgaria**, the Legal Aid Act lays down a general obligation on national authorities to provide information on the right of accused and detained persons to be represented by a retained or appointed lawyer. Such information ought to be provided immediately after the arrest or accusation writing. In the case of police detention, detainees shall be given a written declaration about their rights in police custody. The same information is however provided to any police detainee, regardless of the ground for detention; its prime aim is to serve as a safeguard against torture and ill-treatment and it makes no reference to procedural rights in criminal proceedings. Police officers should be able to provide a list of duty legal aid lawyers, from which detainees could choose. In the case of formal criminal proceedings, the law imposes a general obligation upon the court, the prosecutor and the other investigative authorities to explain to the accused persons their procedural rights, including their rights to access to a lawyer and legal aid, and to ensure possibility for these rights to be exercised. The right of access to a lawyer must be expressly stated in the formal notification of the charges, copy of which is served to the accused. If accused persons are summoned for questioning or for other investigative actions, the summons must contain information on their right to appear with a lawyer. Furthermore, pursuant to Article 97(2) of the Criminal Procedure Code, investigative authorities must inform the accused of his/ her right of access to a legal counsel prior to realization of any investigative action with his/ her participation and enable her/ him to contact a lawyer, without however having the obligation to provide a list of lawyers, from which the accused could choose. The Criminal Procedure Code does not envisage a unified document that could be regarded as a “letter of rights” for accused persons, who are detained, as required by Directive 2012/13/EU on the right to access to information in criminal proceedings.

## 4. LEGAL AID

### *a. Legal frameworks*

The project countries use different systems of legal aid. The mechanisms of its provision are also different. Provision of legal aid for suspects and accused depend on the substantive and personal scope, which the project countries give to Directive 2013/48/EU in their national legislations.

In **Lithuania**, The Law on State-Guaranteed Legal Aid (SGLA), adopted back in the year 2000, established a system of state-guaranteed legal aid for persons who were unable to properly defend their rights and legitimate interests dues to their financial condition. Currently, legal aid provided by the state in civil, criminal and other cases is divided into primary and secondary legal aid. Primary legal aid encompasses the provision of legal information and legal advice, as well as the preparation of documents meant for state or local authorities. Hour-long legal consultations are usually provided by specialists at the legal departments of various municipalities. Secondary legal aid is understood to mean state-guaranteed

assistance from a lawyer in judicial proceedings: drafting documents, conducting the defence, representing their client in proceedings, as well as representing the latter's interests when settling disputes out of court. Secondary legal aid is provided to persons that fall below the wealth and annual income threshold set by the government. In some cases, secondary legal aid is provided regardless of any particular person's wealth and income, for example, where the participation of counsel is mandatory under the Code of Criminal Procedure, where persons cannot make use of their wealth or income for objective reasons, where they are provided for in residential care facilities, and other similar situations. Secondary legal aid is provided by lawyers and, in some cases, by lawyers' assistants. The State-Guaranteed Legal Aid Service enters into agreements with lawyers that were successful in the tendering process. Primary legal aid is organized by the municipalities, whereas secondary legal aid is handled by the State-Guaranteed Legal Aid Service, which has branches in several cities.

Since 2008 in **Slovenia**, legal aid in judicial pre-trial (and trial) phase of the criminal proceedings, is no longer determined by the Criminal Procedure Act, but by the Legal Aid Act that prescribes the national legal aid scheme for all judicial proceedings. In the Slovenian legal system, the mechanism for guaranteeing mandatory legal assistance is separate from the legal aid scheme. The provisions concerning mandatory legal assistance, remain within the scope of the Criminal Procedure Act. Mandatory legal assistance does not in itself provide representation free of charge. The court may rule for reimbursement of these expenses from budgetary funds (if defence counsel has been appointed and the payment of the fees and necessary expenses of defence counsel would imperil the sustenance of the accused or of persons whom he/she is bound to support). Under these conditions, mandatory legal assistance becomes free legal aid and the application of the Legal Aid Act is thus excluded. Since the 2011 amendment of the Criminal Procedure Act, the police are bound to inform a suspect who has been deprived of liberty, that if he/she does not have the means to retain a lawyer by him/herself, the police will, upon request of the suspect, appoint a lawyer for him/her at the expense of the state if this is in the interest of justice. In practice this possibility is not used often. If a suspect requests a lawyer at the expense of the state, the police must consider both conditions - does not have the means to retain a lawyer and that appointing a lawyer is in the interest of justice. The law does not offer any criteria for interpreting the latter. It is considered, that the police would appoint a lawyer in the most serious crimes, in very complicated cases and where personal circumstances of a suspect call for legal representation in the earliest stages of proceedings.

In **Poland**, the principles of appointment of a defence counsel by court are regulated in the Polish Code of Criminal Procedure and apply to both court and preparatory (pre-trial) proceedings. The court (president of the court or referee) decides whether to appoint a defence counsel *ex officio* based on the financial standing of the accused/suspect (Article 78 of the Code of Criminal Procedure). Additionally, a defence counsel is appointed by court in cases related to mandatory defence (Article 79 -80 of the Code of Criminal Procedure) if the accused does not have a lawyer of his choice. The system of out-of-court legal aid is regulated in the Act of 5 August 2015 on free of charge legal aid and legal education. Although the obligation to ensure legal aid is vested in municipalities and poviates, but the aid granted as part of the system is a one-time aid and does not encompass the possibility to appoint an *ex-officio* defence counsel for the purpose of criminal proceedings.

In **Hungary**, having a defence counsel is mandatory in certain cases stipulated in the Code of Criminal Procedure (see in detail below). These so-called “mandatory defence” grounds are established by the proceeding authority, and in these cases the defendant may not decide to participate in the procedure without a defence counsel. In the Hungarian system, this equals the “merits test” in terms of the Recommendation on legal aid. The proceeding authorities may consider beyond the cases of mandatory defence whether the right to a fair trial, i.e. the interests of the defendant require the appointment of a defence counsel. In addition, if it is foreseen that due to his/her financial situation, the defendant will be unable to pay the costs of the procedure, authorities may grant him/her so-called personal cost exemption. If such cost exemption is granted, upon the defendant’s request the authorities shall appoint a defence counsel for him/her. In the Hungarian system, this equals the “means test” in terms of the Recommendation on legal aid. Article 179(3a) of the Code of Criminal Procedure stipulates that the suspect shall be informed that if it is foreseen that due to his/her financial situation he/she will be unable to pay the costs of the procedure, and he/she can verify this in accordance with the relevant legal norms, upon his/her request or the request of his/her counsel, the prosecution or the court may grant him/her personal cost exemption. The information shall also extend to the fact that if the cost exemption is granted, the fees and costs of the *ex officio* appointed defence counsel will not only be advanced, but also borne by the State. However, the research revealed significant shortcomings concerning the information of defendants about personal cost exemption at this point in the procedure. In the court phase, the accused person is informed in writing about the right to legal aid when he/she is summoned or when he/she is served the bill of indictment without being summoned. It is an important difference for the defendant between appointment based on mandatory defence and appointment based on cost exemption that in the latter case the fees and costs of the appointed defence counsel are borne by the State even if the defendant is found guilty at the end of the proceeding, whereas if the appointment is based on a case of mandatory defence, then the State only advances these items, and if the defendant is convicted he/she must repay the advanced amounts as part of the legal costs.

In **Bulgaria**, the legal aid system is organised and coordinated by the National Legal Aid Bureau and the 27 regional Bar associations. Legal aid is provided by certified attorneys-at-law, registered with the Legal Aid Bureau. On 31 December 2016 there were 5 588 lawyers, registered. In case of police detention or detention by customs authorities, suspects have the right to legal aid in the form of legal representation by an *ex officio* lawyer. The cost for legal aid, granted to police detainees in Bulgaria is born by the budget of the Legal Aid Bureau and is not subject to reimbursement, but detainees are not informed of this fact. Moreover, legal aid is not guaranteed with respect to persons, detained as suspects of crime by authorities, acting under Military Police Act, Anti-Terrorism Act, National Agency “State Security” Act. On the other hand, under the Criminal Procedure Code, legal aid is available during both the investigative and the trial phase of the proceedings. It is granted where legal representation by a lawyer is mandatory, provided that the accused party has not retained a lawyer by her/ his own choosing. The accused is also eligible for legal aid, if the following conditions are cumulatively fulfilled: the applicant lacks sufficient financial resources to meet the costs of the defence; representation by a lawyer is required in the interests of justice and the applicant wishes to be represented by a lawyer. If convicted, beneficiaries of legal aid must reimburse the entire costs of legal aid, regardless of their

financial situation. The principle of continuity in the legal representation by the same lawyer applies to the formal stages of the criminal proceeding, but not to the stage of the police proceedings.

### *b. Scope of the right to legal aid*

As a rule, project countries provide legal aid for suspected and accused in the frameworks of their understanding of the meaning of these concepts in their criminal justice systems. The scope of the provision of mandatory legal aid in criminal proceedings for specific groups seems to play a key role in defining the scope of the right. In several countries other mechanisms for provision of legal aid also play a role, both at the earliest stages of the proceedings (as in Bulgaria) and at the trial stage (as in Slovenia).

**Lithuania** uses what can be described as a mixed model for providing secondary legal aid (representation). The Code of Criminal Procedure outlines specific circumstances where counsel attendance is mandatory to the proceedings – in those cases, secondary legal aid is provided to suspects or accused persons irrespective of their wealth or income. It is presumed that in those circumstances people are in a particularly vulnerable position (for example, by virtue of their age, disability, inability to understand the language of the proceedings or because of the specificity of the proceedings) and the interests of justice require that they be represented by counsel. Investigating police officers, prosecutors and judges may, at their discretion, decide that counsel attendance is also mandatory in other cases - in those circumstances, legal aid is also provided without regard for the person's financial means. This way, the officials assess whether the interests of justice require that counsel attendance be deemed mandatory, perform a merits tests. In all other circumstances, suspect or accused persons may apply to the State-Guaranteed Legal Aid Service (SGLAS), which assesses their wealth and income in accordance with set criteria and decides whether to provide secondary legal aid (representation). In this case, the Service carries out a means test. In certain cases, SGLAS may decide to provide legal aid regardless of the person's wealth or income.

In **Slovenia** there exist two schemes of legal aid – mandatory legal aid and legal aid granted in accordance with the Legal Aid Act. If the suspect or the accused is deaf, mute or otherwise incapable of defending himself successfully, or if the criminal proceedings are conducted against the suspect or the accused for a criminal offence punishable by thirty years of imprisonment or life imprisonment, or if under Article 157 of the Criminal Procedure Act, he/she is brought before an investigating judge. The latter applies in cases where the police deprive a person of liberty. Legal aid in accordance with the Legal Aid Act is only possible for proceedings before courts, therefore suspects cannot acquire legal aid under this law for the preliminary police proceedings. Eligible persons may apply for legal aid in any stage of the proceeding (e.g., upon commencement of a proceeding in court, as well as in any stage of a proceeding that already is in progress). The adoption of a decision on the application for regular legal aid includes the determination of the financial situation of the applicant (means test) and circumstances and assessment of the facts on the matter in relation to which the applicant has filed an application for legal aid (merits test). The law does not contain a presumption that where a person is suspected or accused of an offense, that carries a custodial sentence as a possible penalty, the granting of legal aid is in the

interest of justice. However, with its case law the Supreme Court included such persons as potential beneficiaries of legal aid. The law does not prescribe mandatory legal assistance in minor offence proceedings. Legal aid in minor offence proceedings before courts is ensured by the Legal Aid Act under the same conditions as in the general procedure.

In **Poland**, the Code of Criminal Procedure regulates the cases in criminal proceedings, where the accused must have defence counsel (mandatory defence), i.e. if: 1) he/she is a minor, 2) he/she is deaf, dumb, or blind, 3) there is good reason to doubt whether he/she was capable of recognising the significance of his/her act or whether the control his/her actions was not substantially impaired or limited at the time when the act was committed; 4) there is good reason to doubt whether he/she is mentally fit to participate in the procedure or defend him/herself independently and reasonably (Article 79 § 1 of the Code of Criminal Procedure). Moreover, the accused/suspect must have a defence counsel, when the court deems that necessary because of other circumstances impeding the defence (Article 79 § 2 of the Code of Criminal Procedure). In the cases above, the defence counsel must be present during the trial and the sittings which require mandatory participation of the defendant. In accordance with the Code of Criminal Procedure, the accused must have a defence counsel (mandatory defence) in proceedings before a regional court as a court of first instance if he/she is accused of felony (Article 80 of the Polish Code of Criminal Procedure). In such a case, the participation of defence counsel at the main trial is mandatory. Finally, according to the Code, an accused/ suspect can demand that a defence counsel be appointed to him/her *ex officio*, if he/she can “duly prove that he is unable to pay the defence costs without prejudice to his and his family's necessary support and maintenance” (Article 78 of the Code of Criminal Procedure).

In **Hungary**, according to the Code of Criminal Procedure in the course of the investigation, defence is mandatory if the criminal offense the defendant is suspected of is punishable by a sentence of imprisonment of five years or more; the suspect is detained; the suspect is hard of hearing, deaf and blind, blind or has a mental disability (regardless of his/her mental capacity); the suspect is unfamiliar with the Hungarian language or the language of the procedure; the suspect is unable to defend himself/herself in person for any other reason; the suspect is a juvenile (i.e. he/she was at least 12 years of age but younger than 18 when the offence was committed ); the proceeding concerns a so-called “case of outstanding importance”. If defence is mandatory because the suspect is detained, the appointing of the counsel must take place before the first interrogation. In the court phase, defence is mandatory in more cases. In addition to the above listed cases, defence is mandatory for example in the following cases: if the regional court is the first instance court in the given case, unless the Code of Criminal Procedure stipulates otherwise; if the accused person who has been regularly summoned declares that he/she does not wish to attend the court hearings; or if a supplementary private prosecutor is involved in the case. Personal cost exemption is dependent on the financial situation of the defendant as a main rule, but under certain circumstances (e.g. if the defendant is homeless) personal cost exemption will be granted without the examination of the defendant’s economic situation.

In **Bulgaria**, the system of legal aid covers cost for legal advice and legal representation, provided by an attorney-at-law. Other necessary costs, incurred in the criminal proceedings, such as costs for translation and interpretation, are born by the budget of the respective

judicial authority. The scope of the legal aid scheme for police/ customs authorities' detainees is limited to assistance and representation by a lawyer during the time of detention. It does not extend to representation in formal criminal proceedings. According to the official statistics, in 2016 the number of persons, detained by the police as suspects of crime has been 48 588 and only 25 of them were appointed an *ex officio* lawyer. This negligible number of suspects who have actually benefited from state-funded legal assistance renders the right to legal aid for police detainees without any practical significance. In formal criminal proceedings, legal aid is appointed to accused persons in case of mandatory legal representation. Article 94 (1) of the Criminal Code of Procedure enumerates eight grounds of mandatory defence. In five of them, representation by a lawyer is considered absolutely mandatory (not subject to a waiver, even against the will of the accused party), on the basis of the seriousness of the offence or the vulnerability of the accused persons, without consideration of their financial situation. These cases are as follows: 1) the accused is a child (under the age of 18); 2) the accused suffers from a mental or psychic disabilities, which prevents him/ her from assuming his/ her own defence; 3) the case involves a crime, punishable by life imprisonment or imprisonment of at least 10 years; 4) the accused is detained; 5) the case is heard in the absence of the accused person. In addition, the Criminal Procedure Code prescribes absolutely mandatory representation for certain proceedings before the court. In case the accused does not have sufficient command of Bulgarian language or the interests of the co-defendants are in conflict and one of them has a lawyers, representation by a lawyer is mandatory, but could be waived by the accused. Outside the scope of the absolutely mandatory legal representation, legal aid is available also to accused persons, who cannot afford to hire a lawyers, wishes to be represented by a lawyer and the interests of justice so require. Decision for the award of legal aid to indigent defendants is made upon their express request to the investigative authority or the court, depending on the stage of the proceedings.

### *c. Eligibility – means test and merits test*

In **Lithuania** where provision of legal aid depends on a means test, the law provides for two levels of assistance – at 100% of the legal costs and at 50% of the legal costs. For the first level the annual income of the person should be 9 minimum monthly salaries (3 420 EUR per year). For the second level the annual income of the person should be 13 minimum monthly salaries (4 940 EUR per year). An assessment of the level of personal assets takes into account that person's real estate (housing) and land, movable assets, the value of securities and shares, as well as the money at that person's disposal. When assessing a person's family situation, dependents are said to be minors (including adopted minors) living together with that person and dependent on him/her, children (or adopted children) aged 18-24 who are unemployed, unmarried and studying full-time, as well as others who are living with the person in question and dependent upon the person. The Lithuanian laws do not provide for an assessment of the costs of representation, since lawyers providing secondary legal aid are offered fixed fees for their services. The person is required to fill a declaration in which he/she must specify in detail the types, amount and sources of income for the last 12 months, the type, address and market value of any real estate owned, as well as any other income.

With regard to the merits test, the Lithuanian law provides a non-exhaustive list of circumstances in which the participation of counsel is mandatory due to the interests of justice. In these cases, the person in question is required to call upon counsel – if they are unable to do so, counsel is appointed on their behalf. Contrary to what is stated in the Recommendation and in Directive (EU) 2016/1919, the possibility of a custodial sentence (except for life imprisonment) is not considered to be a ground for mandatory participation of counsel, with legal aid in such cases being provided in accordance with the person's financial means, unless deemed otherwise by the investigating police officer, the prosecutor or the judge. The other grounds provided for in the Recommendation and in the Directive are addressed through an enumeration in the Code of Criminal Procedure of the grounds for mandatory participation of counsel.

In **Slovenia**, legal aid may be granted to persons who, given their financial situation and the financial situation of their families, are not able to meet the costs of the judicial proceeding without causing harm to their social position and the social position of their families. It is deemed that the social position of the applicant and his family is put at risk by the costs of the judicial proceeding if the monthly income of the applicant (personal income) or average monthly income per family member (personal family income) does not exceed the amount of two basic amounts of minimum wage. Since 1 July 2017, the basic amount of minimum wage is 297.53 EUR. The financial situation of the applicant and his family is determined by the Legal Aid Service. For this purpose, the Legal Aid Service acquires *ex officio* the necessary personal data obtainable from existing public data bases.

When assessing the application, circumstances and facts on the matter in relation to which the applicant has filed an application for legal aid approval, are taken into consideration (merits test), particularly:

- the matter is not manifestly unreasonable or the matter is likely to succeed and it is reasonable to institute it or defend it or complain in the proceeding using legal remedies with respect to the outcome of the matter; or
- the matter is important for the applicant's personal and socioeconomic status or the expected outcome of the matter is of vital importance for the applicant or applicant's family.

Other issues related to the merits test in the context of the criminal proceedings are determined in the framework of the mandatory defence scheme.

The **Polish** Code of Criminal Procedure does not stipulate the manner in which the accused should prove that he/she is unable to bear the costs of the defence. The comments to the Polish Code mention the option to deliver "credentials" with material data (earnings, possessions, health condition, family status). In literature, among the circumstances that justify the request based on the provision in question the authors list: remaining unemployed, attending schools, being dependent on one's parents or guardians, bearing responsibility for child support maintenance. Between 1 July 2005 and 15 April 2016, Article 80a of the Polish Criminal Code was in force, stating that at the request of an accused who had no lawyer of his choice, the president of the court or a court referee would appoint an *ex officio* lawyer for such a person in the court procedure. Thus, the granting of a court-

appointed lawyer was not dependent on the necessity to prove that the financial position of the accused was poor. The provision was introduced as a consequence of the 'increasing' contradictoriness at the trial stage of criminal proceedings. The procedure of appointment of an *ex officio* lawyer pursuant to Article 80a of the Polish Code of Criminal Procedure was rarely applied, primarily due to the short period of time when it was in force. Furthermore, the application of Article 80a entailed the risk that the costs of the lawyer would need to be returned, should the case be lost. The provision set forth in Article 80a of the Polish Code of Criminal Procedure was abrogated by the amendment of the Code in April 2016.

In **Hungary** the provisions on personal cost exemption for legal assistance require an assessment of the applicant's economic situation, which is made on the basis of "objective factors" and "all relevant circumstances" are considered. However, defendants are expected to "prove beyond all doubt" that they lack sufficient financial resources to cover the costs of the defence and the proceedings. As explained above, in the Hungarian system the concept of mandatory defence substitutes the "merits test", with some mandatory defence grounds which are established by the proceeding authority. In addition, the proceeding authorities may consider beyond the cases of mandatory defence whether the right to a fair trial requires the appointment of a defence counsel: a defence counsel may be appointed for the defendant *ex officio* or upon request if this is "deemed necessary in the defendant's interest". This also applies to the whole procedure - the only difference is that the scope of mandatory defence scenarios is wider in the court phase of the procedure. The case file review showed that with regard to certain mandatory defence grounds, the practice of authorities varies greatly, especially with regard to the ground the defendant having a mental disability (regardless of his/her mental capacity), or that he/she is "unable to defend himself/herself in person for any other reason".

Research results also showed that the appointment of a defence counsel based on cost exemption happens very rarely, which seem to confirm the HHC's experience that if there is a ground for mandatory defence, it is much more likely that a defence counsel will be appointed on that basis, even if the defendant is indigent and his/her eligibility for personal cost exemption could be examined. This is detrimental to indigent defendants, since if a lawyer is appointed for them on the basis of cost exemption, the State will bear all the costs of the defence even if the defendant is convicted, whereas in cases of mandatory defence, these costs are only advanced, and if convicted, the defendant must reimburse them.

In **Bulgaria**, pursuant to Article 28 (2) of the Legal Aid Act, state-funded legal aid is provided to those, detained under the Ministry of Interior Act and the Customs Act, who are "unable to retain a lawyer of their own choice". However, the legislation does not contain further guidance regarding the determination of the ability of the detainees to retain a lawyer. In criminal cases, outside the scope of mandatory representation by a lawyer, to qualify for legal aid, a person is required by law to satisfy two conditions cumulatively – to lack sufficient financial resources to cover the cost of representation by a lawyer and the interests of justice in the case to require such representation. Regarding the means test, the legislation does not introduce a financial eligibility threshold on applications for legal aid, but each case is examined individually on the basis of the following legally-set criteria: capital of the accused; income of the accused and his/ her family; family, health and employment status; age and other relevant circumstances. Regarding the merits test, the

decision-making authority has very wide discretion to decide whether the “interests of justice” require free legal assistance, as there are no prescribed criteria for exercising the discretion. According to some commenters, the merits test encompasses assessment of the legal and factual complexity of the case, as well as the personal situation of the accused person. Importantly, however, the Criminal Procedure Code does not presume that granting of legal aid is in the interests of justice in all cases where a person is accused of an offense that carries a custodial sentence as a possible penalty, as prescribed by Section 2, para. 12 of the Directive on the Right to Access to a Lawyer.

#### *d. Decision-making on granting legal aid and remedies*

In the project countries decision-making on granting legal aid is in the hands of two types of bodies – those directly involved in criminal proceedings and independent bodies adjudicating legal aid requests for all purposes. In both types of decision-making there seem to be problems with remedies upon refusal.

In **Lithuania**, decisions on secondary legal aid are taken by the State-Guaranteed Legal Aid Service (SGLAS) or one of its regional divisions. When the Service is approached by an investigating police officer, a prosecutor or a judge requesting that counsel be appointed in required circumstances, the Service makes a decision immediately. When a person applies to the SGLAS, the Service makes a decision on legal aid promptly, no later than within five working days. When selecting counsel, the Service must consider the applicant's proposal regarding specific lawyer, but it is not bound to follow it. When counsel is being appointed by the investigating police officer, the prosecutor or the court, they do not have to take into account any requests for specific lawyers – usually, they select a lawyer from the list that is able to come over as soon as possible and participate in the interrogation (or any other procedural acts). Among other things, the decision must include reasons for granting or refusing to grant legal aid, for example, it can explain where exactly the person exceeded the asset or income threshold. The decision is served to the person and contains information on the institution that it may be appealed to, as well as the deadline for appeal. Appeals may be submitted to administrative dispute commissions, the administrative courts and, where appropriate, the Parliament (Seimas) Ombudsmen's Office of the Republic of Lithuania.

In **Slovenia**, if in cases of mandatory defence, the accused fails to retain defence counsel by him/herself, the court will appoint one to him. The grounds for mandatory legal assistance will be determined by the (investigating) judge, ruling on the case. However, the formal decision on the appointment of the lawyer will be issued by the president of the court. The president of the court selects the appointed lawyer in the order of the list of *ex officio* lawyers in the territorial jurisdiction of the court, which means that suspects and accused persons do not have the right to choose their *ex officio* lawyer. Under the Legal Aid Act, applications for legal aid approval are decided upon by the Legal Aid Authority organised at the district court based in the region where the applicant has permanent or temporary residence. The Legal Aid Authority conducts the procedure in accordance with the General Administrative Procedure Act, that requires that all the decisions are reasoned. The applicant for legal aid is a party to procedure and therefore receives a copy of the decision. Against decisions issued by the Legal Aid Authority administrative dispute before the

Administrative Court may be instituted. Applicants may choose the attorney, authorised to perform legal aid, and name the attorney in the application. If the applicant does not choose the lawyer, the Legal Aid Authority does so *ex officio* – it appoints a lawyer in the alphabetical order from the list submitted to it by the regional chamber of the Bar Association. At the eligible person's request or on the basis of the eligible person's approval, the Legal Aid Authority may decide to discharge an appointed attorney who fails to perform his or her function properly. The Legal Aid Authority will then replace the discharged attorney with a new attorney. The Bar Association of Slovenia is notified of the discharge.

In **Hungary**, the legal aid counsel is appointed and also selected by the proceeding authority in all cases (in the investigation phase the investigation authority, i.e. most often the police), the defendant has no say in this issue. Regional bar associations keep a register of the lawyers who can be appointed, and the authorities may only choose from this list, but they are completely free to select any lawyer who is on the list. The bar associations are obliged to compile this list in a way guaranteeing that the number of lawyers on it is sufficient to fulfil the tasks stemming from appointments and to sustain the undisturbed functioning of the justice system and that – beyond voluntary application – all lawyers have an equal chance of being included in the list. The bar associations must keep the list up to date and publish the changes on their websites. They inform the authorities about the changes in the list on a continuous basis, within 15 days after a change takes place. In the case of appointments, the appointing decision of the authority substitutes the client's retainer. After the appointment, the defendant must be notified about the name of the appointed defence counsel. If the defendant is detained, the detaining institution shall be immediately informed about the appointed counsel's name and availabilities. The defendant may put forth a justified request for the appointment of another defence counsel, and the appointed defence counsel may also request – also in "justified cases" – that he/she be exempted from the appointment.

It has to be added that the present system of discretionary appointments has for long been strongly criticised by many stakeholders for threatening the right to effective defence, being non-transparent and opening room for abuses; and data show that as a result of the present system, the same few attorneys or law firms are appointed regularly by certain police units. As a response to the criticisms, the new Code of Criminal Procedure, which will enter into force on 1 July 2018, will introduce a significant change: it will make the selection of the appointed defence counsel the task of the respective regional bar association.

An application for personal cost exemption may be filed by the defendant or the defence counsel with the investigating authority (which forwards the request to the prosecution) before the bill of indictment is submitted, or the court, after the indictment has taken place – in this latter case, the application shall be filed within 15 days from the serving of the bill of indictment. After this deadline, an application may only be submitted if the conditions for personal cost exemption arose later or if the procedure was conducted against an absent defendant. The application must be filed in the format determined by a ministerial decree. The court or the prosecutor establishes the financial situation of the defendant (or his/her relatives) on the basis of the data included in the form and the documentation attached and deliver a written and reasoned decision on the application. Decisions on personal cost exemption are subject to review. If the decision is made by the prosecutor, a complaint may

be submitted against it under Article 195 of the Code of Criminal Procedure (the complaint is adjudicated by the superior prosecutor), and the court decision can also be challenged through an appeal to the court of second instance. The complaint and the appeal against decisions of cost exemption have a suspensive effect.

In **Poland**, the accused must have a defence counsel appointed by the court in cases that require “mandatory defence” (i.a. Article 79 -80 of the Code of Criminal Procedure) and the accused (suspect) has no lawyer of his/her choice (Article 81 § 1 of the Polish Code of Criminal Procedure). The president of the court or a court referee appoints the *ex officio* defence counsel based on the list of defence counsels delivered by the bar councils. The following is taken into account: the order of the receipt of applications and the needs stemming from other circumstances that justify the appointment of the specific counsel, as well as the information possessed confirming that there is no conflict of interest between the parties to the procedure. When appointing the lawyer from the list of lawyers developed by the president of the regional court and the president of the court of appeal, the lawyer’s (or legal counsel’s) mailing address is also taken into account, with respect to the place of residence or domicile of the accused and the court’s seat

The ruling/order to refuse to appoint a defence counsel can be complained against to the court competent for the case or to another equivalent composition of the court. A subsequent application based on the same circumstances shall be left without consideration. At a duly justified request of the accused or his/her lawyer, the president or referee of the court can appoint a new lawyer in place of the previous one. The application for appointment of a lawyer by court should be examined immediately. In cases where defence must start immediately, summons may be served on the court-appointed defence counsel in the manner stipulated in Article 137 of the Code of Criminal Procedure (e.g. by telephone).

In **Bulgaria**, decisions for appointment of *ex officio* lawyers to suspects and accused persons are taken by the authority in charge of the particular phase of the proceedings, not by an independent competent body, as prescribed by Section 3, para. 14 of the Directive on the Right to Legal Aid. Where absolutely mandatory legal representation under the Criminal Procedure Code is at stake, the authority should appoint an *ex officio* lawyer by its own motion, provided that the accused does not have a retained lawyer. In cases of voluntary legal representation, suspects and accused persons, who wish to have a lawyer, should apply directly before the decision-making body. The law requires that decisions, denying legal aid are motivated, made in writing and subject to appeal. When legal aid is granted, the appointing authority should immediately contact the local Bar association for selection of an *ex officio* lawyer. In emergency cases, where the defence should start immediately, *ex officio* lawyers are selected from special lists of duty lawyers and are notified about the appointment no later than three hours prior to the scheduled start of the proceedings for which they have been appointed. The law also stipulates that far as possible, national authorities should have regard to the preference and wishes of the suspect or accused person in the choice of the legal aid lawyer. Participants in the focus group strongly criticized the system for administration of legal aid in criminal proceedings. One of their concerns was that very often selection of *ex officio* lawyers is made not by the Bar association, as required by the law, but by the investigating authorities themselves.

Circumventing the statutory procedure, the investigative authorities were choosing only those lawyers, who knew would cooperate to the prosecution. Furthermore, some participants in the focus group reported being pressured into plea bargains by both the prosecutor and the court, who were warning them that unless they agree to proceed with a plea bargain they would either replace with another lawyer or would not select them as legal aid lawyers in future cases. On the other hand, even when cases were distributed by the Bar associations, the procedures followed were said to be not transparent and accountable enough. The filed research also uncovered that usually formal charges were brought against suspects immediately after the completion of the initial 24-hour police detention, with the participation of a legal aid lawyer. However, persons interviewed emphasized that when they were brought in front of the investigative authority, a legal aid lawyer was already present there, without being granted recourse to legal assistance of their own choosing.

### *e. Effectiveness and quality of legal aid services*

Effectiveness and quality of the legal aid services seems to be a serious problem in the project countries. The legal frameworks usually task the bar associations to exercise control in that regard. These are however for the most part general legal provisions and the field studies indicate that quality control is inadequate.

In **Hungary**,= there are no additional statutory conditions that a lawyer must meet besides being a member of the bar association if he/she wishes to be included in the list of lawyers who can be appointed as ex officio defence counsels, thus, there is no accreditation system as required by § 19 of the Recommendation. Nor is there a system “to ensure the quality of legal aid lawyers”, as required by § 17 of the Recommendation. In relation to that, for more than a decade, local and international monitors (e.g. the CPT). and several empirical studies, including those in the framework of the current project, have identified shortcomings concerning the effectiveness of the appointment system and the performance of appointed counsels as compared to retained defence counsels (e.g. in terms of their presence at investigative acts), which are due to the following reasons: the problems of how the selection of lawyers is made, the lack of individual and general quality assurance, and problems concerning remuneration (low hourly rates – currently ca. EUR 16 plus VAT – and the lack of remuneration for certain activities necessary to carry out effective defence).

The major problem in **Poland** is the effectiveness of access to a court-appointed defence counsel at the stage of preparatory proceedings. The application for appointment of a lawyer by court is filed to the entity conducting the proceedings (e.g. police), whereupon it is taken to the prosecution (e.g. together with the motion for preliminary arrest) and, finally, to the court. Depending on the size of the court region, appointment of a defence counsel may take from several to ten or so days. Therefore, it is virtually impossible for a court-appointed lawyer to participate in the court sitting pertaining to preliminary arrest or during the first interrogation of the person as suspect. During the investigation, the respondents would even admit that “particular determination” would be needed to ensure the presence of a court-appointed lawyer in the initial actions. This is problematic especially where there are grounds for mandatory defence. Professionals involved in criminal proceedings expressed the opinion that during the investigation, the motion for expert opinion on the

perpetrator's sanity (c.f. Article 79 § 4 of the Polish Code of Criminal Procedure) is filed only after the interrogation.

Field research conducted in the context of the current project indicates that in the 10 district courts studied lawyers who had attended hearings for pre-trial detention were involved in between 5% and 10% of the cases heard. Similarly, the level of involvement of lawyers especially in cases of petty crimes heard by the district courts is quite low. In the cases within the jurisdiction of district courts, defenders were rarely involved at the stage of preparatory proceedings. In most cases pending before district courts, individuals interrogated as suspects did not make a request for contact with their private defender or appointment of a public one. On the other hand, in cases pending before regional courts, defenders were involved in the majority of examined cases. The necessity to provide a defence attorney in matters that are within the jurisdiction of regional courts resulted, among others, the requirement of mandatory defence in some cases before district courts. However, they rarely participated in court hearings for the application of temporary arrest. In almost every case, the first hearing as a suspect was not associated with the presence of any defender.

In **Lithuania** according to Art 60(2)(16) of the Law on the Bar the Bar Council is responsible for overseeing the quality of the secondary legal aid services provided by lawyers and lawyers' assistants (the governing body of the Lithuanian Bar Association). However, ensuring proper quality of legal services by *ex officio* lawyers has been problematic. In the course of a field study through focus group discussions with different legal professionals, focus group members expressed their concern that some of their colleagues only pay lip service to the proceedings, playing a "token attorney", thus harming their clients and bringing the whole Bar into disrepute. Although it happens rarely, there have been cases where secondary legal aid lawyers would sign the case files *post factum* to show that they participated in the interrogation or some other procedural matter, even though they were in fact absent. Experts pointed out that the quality of the work of legal aid lawyers trails significantly behind private counsel, giving them a score of 5.75 on a scale of 1 to 10. They further noted, when comparing lawyers that provide secondary legal aid full time to those that do it on demand, the latter are seen as better since they are more active and effective. Field research in Lithuania conducted in the context of the current project indicates that engagement of lawyers during pre-trial proceedings was inadequate. 65 of the cases reviewed had a legal aid lawyer attend the first interrogation, private counsel attended 3 interrogations, whereas counsel was absent in 89 interrogations (57% of cases). For all suspects who had counsel, their counsel attended their first interrogation. As for the trial stage, research on criminal files indicates that 22% of the defendants at conventional proceedings were not represented by a lawyer. During discussion about the quality of the performance of SGLA counsel, focus group members expressed their concern that some of their colleagues only pay lip service to the proceedings, playing a "token attorney", thus harming their clients and bringing the whole Bar into disrepute. Although it happens rarely, there have been cases where secondary legal aid lawyers would sign the case files *post factum* to show that they participated in the interrogation or some other procedural matter, even though they were in fact absent.

In **Slovenia**, Article 72/4 of the Criminal Procedure Act states that the dismissal of the appointed (*ex officio*) lawyer and replacement with a new one can also be performed upon the request or with the consent of the accused if the appointed lawyer does not discharge his/her duty properly (e.g. omission of communication with the defendant, passivity at court hearings, poor knowledge of the casefile, missing a deadline and other violations of Attorneys' Code of Ethics). In such a case, the dismissal is decided upon by the president of the court and is reported to the Bar Association. The fact that the law states it can happen at the consent of the accused, means that also e.g. the presiding judge can request the *ex officio* lawyer's dismissal. According to the national case-law (Higher Court in Ljubljana, decision No. VSL Sklep II Kp 18429/2016, 27.10.2016) the presiding judge should take into consideration when deciding upon the accused's request for the dismissal of his *ex officio* lawyer the request and opinion of the accused. Not only formal activities of defence (attendance at the hearings and filing appeals, etc) should be taken into consideration, but also if the lawyer is providing expert assistance and support to the accused so that also the content of the lawyer's activities can be considered effective legal aid. In the above case the court underlined the fact that the lawyer filed in content the same appeal against each detention decision, although the detention decisions differed from one another and even stated different grounds for detention.

Research on criminal files in Slovenia for the purposes of the current project revealed some problems with the effectiveness of legal assistance. Of the 150 files studied, in only six cases the suspects had legal representation during the police interrogation (all of them were not detained and all of them were assisted by retained lawyers). At the trial stage the situation was much better. Yet, at that stage too, 33% of the defendants were not represented. Another problem uncovered during the field research in Slovenia was the very short time the *ex officio* lawyers had to discuss the case with their clients – around 15 minutes in the hallway in front of the court room.

In **Bulgaria** the local Bar associations exercise quality control of the actual services provided by legal aid lawyers. However, there are no clear indicators for the measurement of the quality. The National Legal Aid Bureau, on the other hand, has the power to check with the relevant authorities whether the scope and type of work that is reported in timesheets as performed by legal aid lawyers correspond to the actual situation. It might initiate investigations on particular cases by its own motion or upon complaints, submitted by authorities, granting legal aid or by legal aid beneficiaries. Legal aid lawyers, who are disciplinary sanctioned and those who are found liable for professional misconduct or of incompetency are temporarily ineligible for legal aid assignments and removed from the register of legal aid lawyers. In 2016 there were eight lawyers removed from the register, where only one of the – for professional misconduct. The level of satisfaction of inmates surveyed for this research with the performance of the legal aid lawyers appointed to them was very low. The most common complaint was that lawyers did not demonstrate enough dedication to their cases and spent little time on communication with clients. Lawyers, on the other hand, suggested that quality of legal aid might also be affected by low remuneration of those providing legal aid, as their fees are set lower than the minimum lawyers' fees, applied outside the legal aid system.

## 5. CONFIDENTIALITY OF COMMUNICATIONS

In general, the legal frameworks and the practice of the project countries guarantee confidentiality of communications between the suspect/accused and his/her lawyer in line with the requirements of Directive 2013/48/EU. The situation with the unchecked powers of the prosecutor to be present either in person or through a person authorized by him/her seems to be problematic.

One of the rights of counsel provided for in the **Lithuanian** Code of Criminal Procedure is the right to meet the detained or arrested suspect without third parties being present. The law on criminal procedure does not set a limit on the number of such meetings or their duration, nor does it provide any exceptions to the rule. The Law on the Bar further prohibits inspecting postal items, listening in on phone conversations, controlling information sent through other telecommunication networks or any other form of communication or actions between counsel and client. Typically, detainees are sent to remand prisons for pre-trial detention, but they may be held in a police custody up to fifteen days beforehand. There are no limitations to the number and length of meetings between counsel and suspects in custody. Suspects in remand can meet with counsel in designated facilities during working hours. Detainees are searched after the meeting, but they are allowed to keep documents or notes relating to their case. The management of remand prisons does not check mail to and from counsel. The general rule that detainees must cover the cost of correspondence also doesn't apply in this case. If the detained person wants to communicate with their lawyer via mail, but cannot afford the requisite means (envelopes, stamps, etc.), they must be provided to him or her by the management of the remand prison. The law does not have any special provisions for telephone conversations between detainees and their counsel. Usually, detainees may call a person (or persons) of their choosing once a day, with the length of the call (or calls) not exceeding 15 minutes. The prosecutor or the court may order the management of the remand prison in writing to prohibit the detainee from making telephone calls.

In **Slovenia** Article 74/1 of the Criminal Procedure Act stipulates that if the accused is in pre-trial detention, defence counsel may communicate with him/her in writing or orally without supervision. This provision only addresses the right of a detained defendant, as communication between defendants who are not detained and their lawyers is free and unsupervised. This provision also applies to suspects in police custody and the custody ordered by the investigating judge. The position of the Constitutional Court is that all persons deprived of their liberty have a constitutionally guaranteed right to free and unsupervised communication with their lawyer, since the Constitution does not differentiate between different types of deprivation of liberty (police custody, pre-trial detention). The Constitution also does not differentiate between the role of the lawyer of a suspect who is detained before criminal proceedings formally begin and the role of the lawyer of a suspect detained during criminal proceedings. The Rules on the Implementation of Remand stipulate that the detainee and his/her lawyer should be allowed to speak in a separate and appropriate room, freely and without supervision. The lawyer can communicate with the detainee at all times, except during meals, when he/she is exercising his/her right to outdoor exercise (two hours per day) and during night's rest. The right of the detainee to free and unsupervised communication with his/her lawyer does not exclude the

right of the authorities to visual supervision of their conversation, with the aim to prevent possible exchange of illicit items. The same applies to telephone conversations. If the investigating judge orders supervision of letters and other packages as well as other contacts of the detainee, the supervision does not apply to letters exchanged between the detainee and his/her lawyer.

In **Hungary**, at the investigation stage the Code of Criminal Procedure does not contain a general provision guaranteeing the possibility of consultation between the defence counsel and the defendant before the questioning (however, this right may be inferred from the defendants' right to have sufficient time and possibility to prepare their defence), but with regard to defendants deprived of their liberty it expressly states that they can consult with the lawyer before the interrogation, and that they have the right to contact their lawyer and consult him verbally or in writing without any supervision. In this respect, it is problematic from the point of view of compliance with Directive 2013/48/EU that if the (retained or appointed) counsel does not appear at the first interrogation, there is no possibility of consultation between the lawyer and the detained client via telephone. It may threaten confidentiality that, as shown by the interviews, not every police building has premises for consultations where the requirements of both confidentiality and security, including the security of guarding detained suspects, can be met simultaneously. The Penitentiary Code confirms – in accordance with Article 4 of Directive 2013/48/EU – the confidentiality of the communication between the counsel and the defendant, when it stipulates that pre-trial detainees may communicate with their respective defence counsels in writing, in person and via telephone without supervision. Consequently, the correspondence between the lawyer and the remand prisoner shall not be controlled, and the remand prisoner may hand over his/her notes concerning the case without supervision by the authorities. If however there is a reasonable ground to presume that the letter received or sent by the pre-trial detainee is not from or not addressed to the defence counsel whose name is indicated on the envelope, the letter must be opened in the detainee's presence, and an official record of the opening shall be made. In cases like that, the degree of supervision shall not extend beyond identifying who the actual sender or addressee is, in compliance with Paragraph (33) of the Preamble of Directive 2013/48/EU. It is problematic that since prison mobile phones were introduced, pre-trial detainees are often compelled to consult with their defence counsels in front of their cellmates. Attorneys also signalled difficulties in terms of getting in contact with defendants detained in penitentiary institutions.

Pursuant to Article 73 § 1 of the **Polish** Code of Criminal Procedure, the accused while under preliminary arrest may communicate with his/her defence counsel without other persons present, or by mail. Yet the Code stipulates an exception to the principle of confidentiality of contacts with the defence counsel. In preparatory proceedings, the state prosecutor who issues his/her permission for such communications may, where particularly justified, demand that he/she or a person authorised by him/her shall be present at such meeting. These restrictions can be introduced within 14 days following the day of the preliminary arrest of the suspect. As emphasised by the Codification Committee, there is no judicial review mechanism in place with reference to decisions issued pursuant to Article 73 § 2 and 3 of the Polish Code of Criminal Procedure. In its judgement of 17 February 2004, the Constitutional Court stated that Article 73 § 2 of the Polish Code of Criminal Procedure is consistent with Article 42 section 2 and Article 78 of the Constitution (case file no. SK

39/02). In the opinion of the Constitutional Court, restriction of the arrested person's contacts with his/her lawyer is not an excessive interference with the right of defence, due to a short-term nature of the restriction. The question of contacts with a defence counsel is also regulated by the Executive Criminal Code, which guarantees confidentiality of the contact of a preliminarily arrested person with his/her lawyer. Furthermore, in line with the Polish Executive Criminal Code, a preliminarily arrested person should be granted the possibility to prepare his defence (Article 215 § 2 of the Polish Executive Criminal Code). The defence counsel's contact with a person deprived of liberty is possible within the working hours of the administration of the prison/custody suite.

In **Bulgaria**, Article 30(5) of the Constitution foresees and protects confidentiality of communications between both professional and non-professional defence counsels and their clients in criminal proceedings. The Attorneys' Act provides a detailed regulation of the confidentiality of communications of lawyers, where all forms of lawyer-client communication, regardless of the nature of the proceedings in relation to which they occur, are protected and could not be subject to inspection, copying, verification or seizure and lawyer-client conversations could not be intercepted or recorded. The Code of Criminal Procedure further stipulates that lawyers should not be questioned as witnesses, concerning information, obtained from their clients. The right of the detainees to meet with their defenders in private is also assured in the Constitution, whereas the Criminal Procedure Code and the Attorney's Act attach this right to the defence counsel, rather than to the detainee. When meetings take place in places of detention, lawyers have the right to hand over and receive papers in relation to the case of his/ her client, the content of which shall not be subject to inspection. Conversation during meetings may not be intercepted or recorded, however meetings may be subject to observation. The Ministry of Interior Act stipulates the right to detainees, including suspects of crime, to meet with a lawyer in private in specially designated soundproofing premises. However, such premises exist almost nowhere. Several participants in the focus groups made statements that, as a rule, lawyer-client meetings in police departments take place in the premises of the investigative authorities, or even – in the presence of the investigative authorities. The Execution of Sentences and Remand Measure Act and the secondary legislation for its implementation regulate lawyer-client communication during detention, pending trial. Lawyers could ask for a meeting with their clients on remand at any time and their meetings are not subject to interception or recording but could be observed by the custodial staff. However, lawyers could waive the right to confidentiality of the communication with the accused and request the meeting to be attended by a custodial officer. There is no legal limitation, regarding the frequency or the duration of the meetings, which take place in specially designated premises. In 2006 the Constitutional Court proclaimed a provision, providing that the entire correspondence of persons, detained on remand is subject to inspection by the custodial administration unconstitutional. Participants in the focus groups expressed concerns over the level of confidentiality of meetings, taking place in pre-trial detention facilities, due to some practical arrangements of the visiting premises.

## 6. INFORMING OF A THIRD PERSON UPON DEPRIVATION OF LIBERTY AND COMMUNICATION WITH THIRD PERSONS

In several project countries there seems to be problems with informing and communication with a third person upon deprivation of liberty. These include lack of legal provisions, which can give effect to this right or provisions that are not in line with the requirements of Directive 2013/48/EU. In addition, in some countries the arresting authorities create impediments to its exercise in practice.

The **Polish** Code of Criminal Procedure does not regulate the question of the arrested person's contact with a third party. The absence of such provisions seems not to satisfy the requirements stipulated in Article 6.2 of Directive 2013/48/EU. The Executive Criminal Code, however, regulates the right to visitation of a person under preliminary arrest. To this end, a consent to visitation must be granted by the authority at whose disposal the person remains (in preparatory provisions this is the prosecutor). According to the Code, a person under preliminary arrest has the right to at least one visitation of his next of kin per month. A refusal of a consent to a visitation can only be granted if there is a well-founded fear that the visitation shall be used: 1) for unlawful hindering of the criminal procedure, 2) to commit an offence, in particular, to abet to commit an offence (Article 217 of the Executive Criminal Code). Such a ruling can be complained against to a superordinate prosecutor or court (Article 217 of the Executive Criminal Code).

In **Lithuania** the Code of Criminal Procedure obliges prosecutors to promptly inform a family member or a close relative of the suspect's choosing of the latter's detention, or if they are not available – any other third person. Where the suspect does not specify such a person, investigating police officers or prosecutors use their initiative to inform his/her family members or close relatives. The suspect is also able to inform his/her chosen person directly. These provisions are applied *mutatis mutandis* during arrest, except in that case the informing is done by the investigating police officer. This right is explained to the suspect in writing, by providing him/her with the letter of rights. When filling out the report for temporary arrest, officers enter the details of the arrestee's family member or another person designated by him/her in the part titled "Suspect's statement regarding informing a family member, a close relative or another person of their choice of their arrest", and then give the designated person a call. This may also be done by the arrestee's lawyer. If the arrestee does not want to have someone notified of their detention, his/her request to that effect is recorded in the report.

In **Slovenia** the right of the defendant to have a third person informed upon deprivation of liberty is a constitutionally guaranteed human right. The Criminal Procedure Act additionally prescribed the deadline of 24 hours in which the court must notify the defendant's family. If the deprivation of liberty lasts less than 24 hours, informing a third person is not mandatory. The Criminal Procedure Act does not set out the exact procedure for informing a third person. The police make an official note of the manner in which the third person is informed and the investigating judge includes it in the record of the defendant's interrogation. If the police orders police detention and brings the detained person to the investigating judge

who then orders pre-trial detention, they both must inform a third person if the defendant so requests. The Criminal Procedure Act does not provide for any specific provision for the realisation of this right in case the suspect/accused person is a child. However, the Police Tasks and Powers Act stipulates that if the detained person is a minor the police must without undue delay orally inform his parent or legal guardians. If the police establish that informing the parents or legal guardians is against the best interests of the child, the police do not inform them – but they must inform the competent social welfare agency. The only derogation of the right to the suspects/accused persons to have a third person informed about the deprivation of liberty the national legislation allows is delaying the notification for up to 24 hours.

In **Hungary**, the Code of Criminal Procedure prescribes that a relative designated by the defendant shall be notified within 24 hours about the defendant's 72-hour detention and the place of the detention; if there is no such relative, another person designated by the defendant may also be notified. There is no possibility of temporary derogation from this provision. However, it is doubtful whether the 24-hour deadline can be regarded as satisfying the requirement of notification "without undue delay" as set forth by Article 5(1) of Directive 2013/48/EU. (It shall be added though that according to the interviews made in the framework of the research, notification is usually done way before the 24-hour deadline expires.) In terms of the Joint Decree 23/2003. (VI. 24.) , when the decision to take the suspect into 72-hour detention is communicated to him/her, he/she must be asked to designate the person he/she wishes to have informed about the deprivation of liberty. The person acting on behalf of the proceeding authority shall write a note about the time and method of notifying the designated relative, or the reason for not carrying out the notification if that is the case. The note is to be handed over to the institution implementing the defendant's detention. If the defendant is a juvenile, the decision on the measure depriving him/her of his/her liberty (including the decision on the 72-hour detention) shall also be communicated to the defendant's legal guardian or caretaker. The Code of Criminal Procedure stipulates that the detained defendant has the right to communicate in a supervised manner in person, in writing or via telephone with his/her relatives, or – based on the permission of the prosecutor before the submission of the bill of indictment or the court in the court phase – with any other person. Communication with a relative may only be forbidden or restricted to prevent interference with the course of justice.

In **Bulgaria**, suspects, who is detained by the police, have the right to have a third person informed about the deprivation of liberty. Upon an express request of the detainee, the arresting authority should immediately contact the person nominated. The law does not envisage any possibility for temporary derogation of the right. However, the legislation lacks specific provisions, establishing the right of children, who are suspected of crime, to have their parents or other significant adults automatically informed about the detention, as required by Article 5 (2) of Directive 2013/48/EU. The results of the present study suggest that in Bulgaria the right to have a third person informed about the detention during police detention is of no practical value. Most persons interviewed claimed that they were not effectively made aware of this right so, by not making an express request to the authorities, they implicitly waived their right. Others said police officers actually refused to contact the persons nominated. When formal criminal proceedings are concerned, Article 63 (7) of the Criminal Procedure Code prescribes an obligation to the arresting authorities to notify

family members of accused persons upon deprivation of liberty and, unless requested otherwise, their employers. Detainees could neither nominate another person to be informed about the detention nor waive the right. If the detained person is a child, criminal authorities must notify his/ her parents and the school principle, provided that the accused is a student, on the detention. In addition, upon admission to the detention facility, custodial authorities should notify the family or other relatives of the detainees on the deprivation of liberty, unless otherwise stated in writing. Under national legislation the right to have a third person informed of the deprivation of liberty is not subject to derogation. During the 24-hour detention by the police, suspects have the right to conduct visits and to receive food parcels, but not to make phone calls. Essentially, persons interviewed about their experience as suspects held in police custody argued that these rights were only theoretical. Prisoners on remand are guaranteed the rights to make outgoing telephone calls, to receive and dispatch letters without restriction in their number and to meet with family members. However, in its recent judgement in *Lebois v Bulgaria*, the ECtHR found a violation of Article 8 of the Convention for failure on the side of the Bulgarian authorities to inform the applicant, who was a foreign national, detained on remand, on the practical details of how inmates in the pre-trial detention facility could exercise their statutory rights to receive visits and use the telephone by publishing them or by making them accessible to the detainees in a standardised form.

## 7. DEROGATIONS

The situation with the possibility for derogations of the right to a lawyer in the project countries as provided for in Directive 2013/48/EU vary. In Slovenia there is no possibility for derogation whatsoever. In other countries such possibilities exist in the framework of the Directive. In still others there seems to be a problem with compliance.

In **Hungary**, the legal framework does not allow for the temporary derogation stipulated in Article 3(5) of Directive 2013/48/EU. There is also no possibility for derogation from the obligation of a third party about detention. The Code of Criminal Procedure allows for temporary derogations in relation to investigative acts other than interrogations of the suspect and of witnesses and confrontations (hearing of the expert, inspection of objects or scenes, reconstruction of events, identity parades) as regulated by Article 3(6) of Directive 2013/48/EU: the authority may exceptionally decide not to notify the defence counsel if “the urgency of the investigative act” so justifies (and if the protection of a person participating in the proceeding may not be guaranteed otherwise, it is obliged to refrain from notifying the counsel). It is positive that seven out of the eight police officers when interviewed for the purposes of this research stated that they had never resorted to this possibility. As of October 2016, if the defence is not notified, the defence counsel and the suspect shall be informed about the investigative act subsequently, and if either the suspect or the counsel requests so, the authorities shall deliver a formal resolution about the decision to not notify the defence, which opens the way for the defence to challenge the decision. According to the reasoning provided by the legislator, the latter amendments were necessary in order to implement Article 8(2) of Directive 2013/48/EU. However, it is still

contrary to Directive 2013/48/EU that only upon the request of the defence shall be such decisions on temporary derogations included into a formal decision.

In **Poland**, the Code of Criminal Procedure does not allow for derogation on the basis of geographical remoteness. Article 317 § 2 of the Code refers to the possibility for restrictions to the right to the lawyer to participate in investigative actions by a decision of a prosecutor in “particularly justifiable circumstances” and “the interests of the investigation”. This decision is not subject to judicial review and does not seem to be in compliance with Directive 2013/48/EU.

In **Slovenia**, the Criminal Procedure Act does not allow any temporary derogations of the right of suspects and accused persons to a lawyer. The right to be defended by a legal representative is a constitutionally guaranteed human right, listed among legal guarantees in criminal proceedings of Article 29 of the Slovenian Constitution. Human rights and fundamental freedoms provided by this Constitution may exceptionally be temporarily suspended or restricted during a war and state of emergency. This is possible only for the duration of the war or state of emergency, and only to the extent required by such circumstances and inasmuch as the measures adopted do not create inequality based solely on race, national origin, sex, language, religion, political, or other conviction, material standing, birth, education, social status, or any other personal circumstance. However, the Constitution stipulates that this provision does not allow (among others) any temporary suspension or restriction of the legal guarantees in criminal proceedings of Article 29.

In **Lithuania** in view of the constitutional the constitutional provision on the right to a lawyer and the way it was interpreted by the Constitutional Court, no derogation of this right as envisaged by Article 8 of Directive 2013/48 can apply. The Code of Criminal Procedure places some restrictions on this right – it can be temporarily deferred if it would prejudice the success of the pre-trial investigation or endanger safety of the suspect’s family members, close relatives or any other person. The Code does not set out the upper limit for deferral. In this case, the limitation contained in Directive 2013/48/EU is narrower than the one in the Code.

In **Bulgaria**, the Criminal Procedure Code does not envisage derogations from the right to access to a lawyer in pre-trial proceedings. The investigative authorities are under obligation to ensure possibility for the accused to contact a lawyer prior to any investigative or other evidence-gathering activity. In principle, domestic legislation on access to a lawyer by suspects during detention by the police other law-enforcement authorities does not explicitly lay down any exceptions to the application of that right either. The right of detainees to have a third person notified about the detention is also not subject to derogations.

## 8. WAIVER

Each project country has a procedure through which the suspects/accused can waive their right to a lawyer at any stage of the proceedings. Wavers in cases of mandatory defence are not possible. The legal frameworks related to the information on the right, as well as on the

possibilities to waive it seem to be deficient in several countries. In some cases, (Bulgaria, Lithuania) the share of the suspects/accused who waive their right to a lawyer is strikingly high. In the Bulgarian case, in addition to the deficient legal framework regulating police detention, this is due also to the reluctance of the government to extend the guarantees provided by Directive 2013/48/EU to interrogation at that stage.

In **Poland**, the procedure relating to waiver of the right to a lawyer is not specified in detail in the Code of Criminal Procedure. Information that the person has been acquainted with his/her rights and obligations is noted down in the record of the arrest/questioning, yet there is no separate column in the record concerning the use of or resignation from the right to contact a lawyer. Therefore, it seems that the legislator assumed that an implied (and not only direct) format of the resignation from the right is permitted. The instructions given to the suspect do not contain information on the possibility to waive the right to a lawyer or the right to withdraw the waiver. The unintelligibility of instructions concerning the right to have a lawyer, combined with the absence of an explicit waiver procedure, may eventually result in the suspects rarely using the aid of defence counsels. With the general wording of the confirmation that the person knows the instructions, included in the records of the arrest and records of questioning, the officers are not asked about the possibility to use a court-appointed lawyer. And if the person arrested/suspect does not express his/her will to use the aid of a defence counsel, it is implied that he/she waives the right to have a counsel. During the field research, it was noted by some respondents that if the provisions of Article 80a of the Polish Code of Criminal Procedure were still in force, it would be necessary to introduce an explicit procedure of waiver of the right to have a lawyer. Therefore, it is appropriate to consider supplementing the records of the arrest and questioning in such a manner as to enable the arrested person or the suspect to express directly their views as to whether they want to have a lawyer.

In **Lithuania** the suspect's desire to have counsel during the pre-trial investigation, as well as any waiver of the right, are noted in the Record of Notification of the Rights of Access to Counsel. The Record does not require that circumstances of the waiver be elaborated upon. Before signing the document, the person is given the information that pursuant to Article 52 of the Code of Criminal Procedure, it has been explained to the suspect that waiving his/her right to counsel does not deprive him/her of the right to have access to counsel later on, at any stage of the proceedings. However, neither police officers, nor the courts are obliged to accept a vulnerable suspect's or accused person's waiver of the right to access to a lawyer. During trial, the suspect's wishes regarding waiving their right to counsel are recorded in the minutes of the hearing. Case law suggests that where the attendance of counsel is mandatory, the waiver of the right to counsel is not deemed to be voluntary if counsel fails to show up at the hearing. According to the Court of Cassation, "the right to counsel may only be waived by the defendant him- or herself, and only when counsel is actually participating in the case and there is a writ of attorney to that effect".

The survey of criminal files in Lithuania found that the suspects were informed of their right to free legal aid in writing prior to their first interrogation 100% of the time. 55% of them waived their right to counsel and their choice was recorded in the document. In all records analyzed, entries were limited to a few words – either "I agree to have a lawyer defend me" or "I waive my right to a lawyer and will defend myself". Lawyers who participated in the

study noted that some suspects waived their right to counsel at their first interrogation because they were not aware of the gravity of their situation and believed that the process will go by quicker without a lawyer involved. According to lawyers, people also worry that they might not have the means to hire counsel, not knowing whether they are eligible for state-guaranteed secondary legal aid based on their wealth and income and whether the costs of representation will later be recovered from them.

In **Slovenia**, the Criminal Procedure Act mentions waiver of the right to a lawyer only in relation to the interrogation of a suspect or accused person by a judge (in pre-trial and in trial phase of the proceedings). In this respect, the Act stipulates that the defendant may be interrogated in the absence of a lawyer only if he/she has explicitly waived that right and defence is not mandatory, or if the lawyer is not present although he/she was notified of the interrogation. Suspects and accused persons may only waive their right to a lawyer if formal defence by a lawyer is not obligatory. If the defendant's statement concerning the right to a lawyer (whether he will waive the right to a lawyer) is not entered in the record, or the interrogation was conducted in violation of the provisions concerning admissibility of interrogation in the absence of a lawyer, the court may not base its decision on the statement of the defendant. Violation of this provision is an absolute substantial violation of provisions of the criminal procedure. Although the law does not provide for any restrictions concerning the withdrawal of the waiver (at any stage of the proceedings), it also does not require from the court to provide any information about the consequences of a waiver or that withdrawal of the waiver is possible at any stage of the proceedings.

In **Hungary**, as opposed to Article 9(1)(a) and Article 9(3) of Directive 2013/48/EU, the Code of Criminal Procedure does not prescribe that the suspect must be provided with information about the content of the right to access to a lawyer as well as about the possible consequences of waiving it and the possibility of revoking the waiver subsequently at any point during the criminal proceedings. However, the defendant may decide at any point during the proceedings to retain a counsel and also to withdraw a retainer given earlier to a lawyer. In cases of mandatory defence waiver is not possible. At the beginning of the first interrogation, or if defence will become mandatory at a later stage of the procedure, then at the commencement of the next interrogation, the suspect's statement concerning the retaining or appointing of a defence counsel (including the waiver of the right to lawyer) shall be recorded, in line with Article 9(2) of Directive 2013/48/EU.

In **Bulgaria**, pursuant to Article 96 of the Criminal Procedure Code, the accused party may at any time during the proceedings, can waive their right to defence counsel, except in cases of absolutely mandatory representation. However, the law does not stipulate an express obligation on the national authorities to provide information, orally or in writing, about the possible consequences of a waiver. Also, there are no guarantees envisaged to ensure that waivers are given voluntarily. The Ministry of Interior Act does not envisage mandatory legal representation by a lawyer. Access to a lawyer could be waived in any case, regardless of the any existing vulnerability of the suspects or the seriousness of the offence of which they have been suspected. Again, no guarantees are envisaged to ensure that waivers are given voluntarily and that suspects understand the consequences of such waivers. In the context of the empirical research it was established that almost all inmates interviewed had waived, at least formally, their rights to access to a lawyer and legal aid during police detention.

However, respondents explained that they have not agreed to the waivers intelligently and voluntarily but were rather misled or discouraged to do so. A significant number of respondents alleged being ill-treated in police custody, which, again, renders the voluntary nature of waivers seriously questionable.

# RECOMMENDATIONS

## Hungary

### For the legislator and the government:

- Grant the right to defence from the outset to those who are taken into police custody on the basis that they are “suspected of having committed a criminal offence”.
- Make the presence of defence counsels as a main rule mandatory if defence is mandatory.
- Define a concrete deadline for notifying the counsel about the suspect’s interrogation which makes it realistically possible for the counsel to appear and also prepare for it.
- Regulate accurately in what ways defence counsels may be notified about investigative acts, and when the counsel can be regarded as adequately notified. Prescribe that counsels shall be notified via telephone about the suspect’s first interrogation.
- Prescribe – especially in relation to detained defendants – that if the defence counsel indicates that he/she can appear at the first interrogation only with some delay, the investigating authorities should within reasonable limits be obliged to wait for the defence counsel to arrive.
- In cases when the presence of the defence counsel is mandatory in the court phase, determine the minimum time with which before the hearing the defence counsel should notify the court that he/she cannot attend; missing this deadline should be sanctionable as a main rule.
- Set out expressly that detained suspects shall be allowed to consult their defence counsel via telephone before the first interrogation if the defence counsel cannot attend the interrogation.
- Prescribe that not only upon the request of the defendant or the defence counsel shall the authority deliver a formal resolution on refraining from the notification of the defence counsel about the questioning of the expert, the inspection, the reconstruction of events and identity parades, but that it would be an automatic obligation if such a decision is made.
- Adopt more detailed rules on how the notification of third persons nominated by persons in 72-hour detention should be carried out.
- Increase the efficiency of the complaint system.
- Take steps to ensure that personal cost exemption is granted to all indigent defendants, e.g. by considering the introduction of “partial personal cost exemption” and reconsidering the strict formal conditions of personal cost exemption so that it would not fall on the defendants to prove “beyond all doubt” their indigence.
- Raise the hourly fee of ex officio appointed counsels to bring it closer to market rates, and review the system of their remuneration in terms of activities covered.

### For bar associations:

- Ensure that the new computerised system of selecting appointed defence counsels to be introduced is transparent and provides for a randomised but even distribution of appointments.
- Take steps to ensure that ex officio appointed defence counsels provide their clients with quality legal aid, e.g. by putting in place and maintaining a system of accreditation for

legal aid lawyers and introducing a general system to ensure the quality of the services, based on the regular monitoring and evaluation.

For the police, the courts, and the penitentiary system:

- Provide premises in every police station where the full confidentiality of communications between defendants and their defence counsels can be guaranteed, while the requirements of safety and security can also be met.
- Speed up the registration of the defence counsels in the system of the penitentiary.
- Ensure that detained defendants placed in multi-occupancy cells can make phone calls to their lawyers outside their cells, without the presence of their cellmates.
- Ensure that defendants are informed automatically and fully about the possibility of personal cost exemption and the conditions of applying for it at the beginning of each procedural stage (also by reviewing relevant official documents used to inform defendants and by ensuring the accessibility of their language), and that they are assisted by the authorities if needed in putting forth an application.
- In order to enable the adequate assessment of the ex officio appointment system, collect relevant data systematically (e.g. number of and grounds for appointments; amounts paid to defence counsels).

## **Poland**

- Instructions on the rights of detainees and suspects need to directly refer to each aspect of the access to a lawyer. The effectiveness of these instructions determines the exercise of the rights contained in them (e.g. requesting a contact with a lawyer or for appointing ex-officio counsel). For this reason, it is necessary to consider changing the form of instructions in such a way as to ensure their greater legibility, so that they can be understood by detainees or suspects. The form of instruction on the rights of a witness should contain information about the possibility of appointing a representative who could take part in the hearing on the basis of Article 87 CCP.
- Secure that all aspects of access to lawyer is guaranteed in the criminal procedure (e.g. contact with the lawyer before the interrogation, possibility of a lawyer to be present during the interrogation of the suspect person). The Code shall recognize right to lawyer also with reference to “suspect person” who has not been formally charged.
- In order to implement the directive, it is necessary to diagnose those situations of the criminal procedure when Code provides for the possibility of limiting the rights contained in the Directive. The existence of such exceptions must be subject to appropriate procedural guarantees resulting, inter alia, from Article 3 para. 5 and 6 and Article 8 of the Directive. Currently, the possible refusal of access to a lawyer does not take the form of a procedural decision that would be subject to judicial review.
- Directive 2013/48/EU does not provide limitations of the right to confidential contact with a lawyer (Article 4). This right, in relation to the detainee and arrested person, is severely restricted in the criminal procedure code, without any procedural guarantees. The situation in this respect has not been improved by the way how the Constitutional Tribunal judgments are implemented. The detained person should also have the right to contact (e.g. by phone) a third party (e.g. a closest person).
- In many cases, the lack of access to a lawyer results from the way the legal aid (ex officio) system functions. Sometimes, a public defender is appointed after a few (dozen) days, especially in large urban centers (due to the number of cases in a given court). It is also

necessary to return to the wording of Article 80 CCP in force before 1 July 2015, which outlined a wider scope of mandatory defence.

- The Code does not regulate the procedure for waiving the right to a lawyer. Such a waiver usually takes the form of not submitting an application for contact with a lawyer confirmed by a signature under the detention protocol or the interrogation protocol (the so-called implied waiver of the right to a lawyer). The creation of procedures for limiting the right to a legal counsel and the procedure for waiving the right to a counsel may be necessary in order to properly implement the obligation arising from Article 12 of Directive 2013/48, i.e. by introducing an effective protection measure (remedy) applicable if there has been a breach of the right to access to a lawyer.
- Regardless of amendments in law that are necessary, it is also important to introduce such changes in the organization of Police stations, prosecutors' offices or district bar councils, which will increase the actual availability of defenders in criminal proceedings. In particular, in order to implement the directive, it is necessary to consider the adjustment of Police stations and prosecutors' offices in such a way that lists of defenders acting on call in accelerated procedures are available there.
- Police stations and prosecutors' offices should allow the detained/suspect persons to have conversation with a lawyer without the participation of a third party, in such a way as to satisfy the requirement of confidentiality resulting from the directive, as well as to allow the Police officers to supervise the detainees. A rule should be introduced according to which a hearing conducted without the presence of a counselor should be recorded.

## **Lithuania**

### Ministry of Justice

- In close consultation with the legal aid lawyers, introduce the organizational and administrative measures necessary to ensure that the system of the State Guaranteed Legal Aid meets the standards of quality and effectiveness. More specifically:
  - develop a system to calculate *de facto* workload of legal aid lawyers and to distribute the workload among lawyers proportionally and fairly;
  - amend the standard agreements concluded with legal aid lawyers, providing for the overtime pay for hours in excess of the workload quota;
  - recalculate the hourly and monthly fees paid to the legal aid lawyers.
- In cooperation with the State Guaranteed Legal Aid Service, Lithuanian Bar Association, and in close consultation with the legal aid lawyers, ensure that a quality assurance system of legal aid is put in place in Lithuania.

### Police Department

- Make all appropriate arrangements to ensure that the suspects that are deprived of liberty have a possibility to consult with their lawyer prior to the first interrogation, without undue restrictions placed on the duration of such consultation.
- Make all appropriate arrangements to ensure that the investigative police officers inform suspects about their right to a lawyer and right to legal aid prior to the first interrogation in simple and accessible language. Take disciplinary measures if police officers directly or indirectly encourage suspects to waive their right to a lawyer.
- Take measures to ensure that minors, persons with mental disability, and persons who do not speak the language of the proceedings in all circumstances and cases are represented by the lawyer from the first interrogation and throughout the investigation.

### State-Guaranteed Legal Aid Service

- In close consultation with the legal aid lawyers, review the administrative requirements imposed on the lawyers in order to minimize the administrative burden. Ensure that the lawyers are not required to violate the principle of confidentiality and are not requested to provide the Service with the information constituting their professional secret.
- Publish information about the procedures for lodging a complaint regarding unsatisfactory legal aid services or a failure to provide such services altogether.
- In cooperation with the Police Department, make all appropriate arrangements to ensure that the arrested or detained suspects have access to the lists of legal aid lawyers and can exercise their right to informed choice of legal assistance as provided for in the Recommendation.

### All of the above listed institutions

- Organize training sessions to introduce the EU law instruments adopted in the framework of the “Stockholm programme” and the related CJEU case-law to the lawyers, law-enforcement officers, judges and decision-makers.

## **Slovenia**

- The legal instruction on the rights of suspected and accused persons should include the information about the possibility to revoke a waiver subsequently at any point during the criminal proceedings

Although the law does not prevent suspects and accused persons from revoking their waiver, the legal instruction as prescribed by the national law does not explicitly state that possibility.

- Suspects should be allowed sufficient time for consultation with their *ex officio* appointed lawyers before they are interrogated by the investigating judge.
- For such consultations, appropriate space that ensures confidentiality should be provided.

Suspects or accused persons summonsed to appear before a court must have sufficient time to consult their lawyer before such appearance. This is usually not the case when suspects are brought before the investigating judge from police custody. Legal defence during the interrogation is mandatory, which is most often performed by *ex officio* appointed lawyers. Field study showed that most often *ex officio* lawyers and their clients have as little as 15 minutes to consult before they appear in court. Confidentiality of their conversation is also at risk, as the consultation usually takes place in the hallway in front of the court room.

- For effective defence during police interrogation, the suspect’s lawyer should be able to inspect police case file. Written record of the police interrogation in the presence of a lawyer can be used as evidence in court. However, lawyers do not have the right to inspect the police case file beyond the criminal complaint.
- The authorities should make sure that in the proceedings for issuing a punitive order, accused persons always have effective access to a lawyer and information on their **rights**. The case file analysis showed that accused persons that are subject to procedures for issuing a punitive order in the summary criminal proceedings, often do not receive any information on their right to a lawyer. Namely, in such proceedings, the accused is often never summonsed before the court or heard by a judge.

- The authorities should consider including information on the possibilities to acquire legal aid in the legal instruction provided to suspects and accused persons, at least when they are being summonsed to appear in court for the first time. Law enforcement authorities are not obliged to provide legal instruction suspects and accused persons concerning the possibility to apply for legal aid.
- The authorities should provide to suspects and accused persons effective access to legal aid, with clear pathways and conditions from the time they are suspected of having committed a criminal offence, including preliminary police proceedings. The national legal aid scheme only applies to judicial proceedings. Although the police may appoint a lawyer free of charge to a suspect if he does not have the means to retain a lawyer if this is in the interest of justice, this provision is almost never used in practice.
- To ensure quality legal aid services and effective defence, the fees of legal aid lawyers should be increased and the expenses that are necessary to provide legal counselling and representation reimbursed. Remuneration legal aid lawyers receive for the counselling and representation performed within the national legal aid scheme is only half of the amount they would be paid under the Attorney Tariff. Furthermore, the authorities are limiting the types of eligible costs and, forcing the lawyers to be less active; providing only the appearance rather than effective defence.

## **Bulgaria**

- Bulgaria should immediately proceed with bringing into force the laws, regulations and administrative provisions necessary to fully comply with Directive 2013/48/EU on the right to access to a lawyer, as the deadline for transposition has already expired in November 2016.
- Persons who are not formally charged with a criminal offence but who are detained on suspicion of having committed a crime by the police or other law-enforcement authorities (under Customs' Act, Military Police Act, Anti-Terrorism Act, National Agency "State Security") as well as those whose situation is substantially affected by actions taken by these authorities as a result of a suspicion against them should be granted the formal status of "suspects" in criminal proceedings.
- Suspects should be guaranteed level of protection, equal to the one guaranteed to accused persons, including the right to remain silent and not to self-incriminate and the right to absolutely mandatory representation by a lawyer in the cases, enumerated in the Criminal Procedure Code.
- Police, law-enforcement and investigative authorities should facilitate effective assistance by a lawyer to suspects and accused persons, who are detained, by virtue of providing lists of available legal and non-legal aid lawyers from which they could choose.
- National authorities, especially the police, should guarantee immediate access of lawyers to their clients, held in police custody in any case, including when lawyers are retained by relatives and do not yet possess a valid power-of-attorney, signed by the detainee.
- To facilitate effective assistance by a lawyer, domestic law should expressly provide for the right of suspects and accused persons in detention to consult with a lawyer via telephone prior to any interrogation, if the lawyer could not attend the interrogation.
- The National Legal Aid Bureau and local Bar associations should establish a transparent and accountable mechanism for distribution of cases among legal aid lawyers.

The practice of having authorities, in charge of the proceedings, selecting legal aid lawyers, should be prohibited.

- Domestic legislation should adopt special rules and procedures to ensure that waivers of the right to access to a lawyer is given voluntarily and unequivocally, and that information about the content of the right concerned and the possible consequences of waiving that right is provided in an accessible manner.
- Courts should conduct careful assessment of all circumstances under which confessions are obtained from suspects in police custody, to eliminate any chance of admitting coerced statements as evidence in the case. Such assessment must necessarily include consideration of the position of detainees to exercise their rights of defence practically and effectively, free from any form ill-treatment or torture.

***Sofia, 2018***