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

INSIDE POLICE CUSTODY 2

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Country Report for
Austria

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This report has been translated from German into English.

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List of abbreviations

Abs.	Absatz (Paragraph)
AIDP	Landesgruppe Österreich der Internationalen Strafrechtsgesellschaft (Austrian national committee of the International Association of Penal Law)
ARHG	Auslieferungs- und Rechtshilfegesetz BGBl 1979/529 (Law on extradition and mutual assistance)
Art	Artikel (Article)
AuvBZ	Akt unmittelbarer verwaltungsbehördlicher Befehls- und Zwangsgewalt (Exercise of active measures of direct administrative power and compulsion by the criminal police)
AVG	Allgemeines Verwaltungsverfahrensgesetz 1991 BGBl 1991/51 51 (General Administrative Procedure Act)
BFA	Bundesamt für Fremdenwesen und Asyl (Federal Office for Immigration and Asylum)
B-VG	Bundes-Verfassungsgesetz BGBl 1930/1
Directive Access to a lawyer	2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty
Directive Information	2012/13/EU on the right to information in criminal proceedings
Directive Legal Aid	2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings
Directive Presumption of Innocence	2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings
Directive Translation	2010/64/EU on the right to interpretation and translation in criminal proceedings
DSt	Disziplinarstatut für Rechtsanwälte und Rechtsanwaltsanwärter (Disciplinary Code)
EAW	European Arrest Warrant

ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU-JZG	BG über die justizielle Zusammenarbeit in Strafsachen mit den Mitgliedstaaten der Europäischen Union (Federal Law on Judicial Cooperation in Criminal Matters with the Member States of the European Union)
GRBG	Grundrechtsbeschwerde-Gesetz BGBl 1992/864 (Basic Rights Complaint Act)
ICCPR	International Covenant for Civil and Political Rights
JGG	Jugendgerichtsgesetz 1988 BGBl 1988/599 (Juvenile Court Act)
Lit	litera (Letter)
LPD	Landespolizeidirektion (Regional Provincial police directorate)
No.	Number
OGH	Oberster Gerichtshof (Supreme Court of Justice)
OLG	Oberlandesgericht (Higher Regional Court)
ÖRAK	Österreichischer Rechtsanwaltskammertag (Austrian Bar Association)
ÖVGD	Österreichischer Verband der allgemein beeideten und gerichtlich zertifizierten Dolmetscher (Austrian Association of Certified Court Interpreters)
PAD-NG	Protokollierungssystem der Polizei; kurz für Protokollieren, Anzeigen, Daten sowie New-Generation (Protocol system of the police, PAD-NG stands for ‘logging, display and data’ NG for ‘New Generation’)
PI	Polizeiinspektion (Police department)
RAK	Rechtsanwaltskammer (Bar Association)
RAO	Rechtsanwaltsordnung RGBl 1868/96 (Attorney’s act)
RLV	Richtlinien-Verordnung BGBl 1993/266 (Code of Conduct Regulation)
SDG	Sachverständigen- und Dolmetschergesetz BGBl 1975/137 (Court experts and Interpreters Act)
SPK	Stadtpolizeikommando (City police department)

StPO	Strafprozeßordnung 1975 BGBl 1975/631 (Code of Criminal Procedure)
StPRÄG	Strafprozessrechtsänderungsgesetz (Amendment of the Code of Criminal Procedure)
VfGH	Verfassungsgerichtshof (Austrian Constitutional Court)
VwG	Verwaltungsgericht (Administrative Court)

A. Introduction

Project Background: Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings

In 2009, the European Council adopted a Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings.[1] By establishing minimum standards, the aim was to encourage the harmonization and strengthening of procedural rights in the Member States of the European Union (EU).

These actions were prompted by far-reaching measures in the field of European criminal law, such as the Council Framework Decision on the European Arrest Warrant (EAW), as well as the necessity to ensure compliance with human rights when it comes to criminal proceedings in the respective Member States. The case law of the European Court of Human Rights (ECtHR) demonstrates that infringements of suspects' rights take place in all EU Member States. Furthermore, the EU is keen on enhancing mutual trust between the Member States in order to facilitate mutual recognition of judicial decisions – to which common minimum standards contribute.

The Roadmap for strengthening procedural rights of suspected and accused persons in criminal proceedings includes the following measures:

- The right to translation and interpretation services (Measure A)
- The right to information on rights and information about the charges (Measure B)
- The right to legal advice before and during criminal proceedings and legal aid (Measure C)
- The right of a detained person to communicate with relatives, employers and consular authorities (Measure D)
- Special safeguards and guarantees for suspected or accused persons in need of protection (Measure E)
- The Green Paper on pre-trial detention (Measure F)

In the aftermath of adopting the Roadmap, EU Directives were negotiated, which shall be transposed into the national legislation of the Member States. During the implementation period of the Roadmap, other Directives, that were initially not

1 Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings [2009] OJ C 295, 1-3.

included, were issued, such as the Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

The Directives apply to all stages of a criminal procedure, including both the pre-trial and trial stage of criminal proceedings, as well as appeal proceedings.[2] Exclusively administrative-penal proceedings are not subject to the Directives.[3]

Project scope and objectives

The research project, led by the Irish Council for Civil Liberties (ICCL), was carried out in nine countries: Austria, Bulgaria, Italy, Poland, Lithuania, Romania, Slovenia, Spain and Hungary. The Ludwig Boltzmann Institute of Human Rights (BIM) was responsible for conducting the research on Austria and issuing the Austrian report. In addition to this, a comparative report was prepared by ICCL.

This EU-funded project aims to assess the legal transposition and practical application of the Directives, including good practices, as well as related challenges. The intention is that the evaluation of "good practices," as well as the identification and discussion of those challenges, shall contribute to an increased effectiveness of procedural guarantees. Recommendations for legal and practical adjustments lay the groundwork and can be found at the end of this analysis. The project focusses on the investigative stage of the criminal proceedings, particularly the first 48 hours of an arrest, counting from the moment of arrest to the moment when the person is transferred to detention. However, this report also covers the cases in which the suspect is summoned to appear at a police interrogation due to an initial suspicion, regardless of a deprivation of liberty.

This present research project focusses, in particular, on the following EU Directives:[4]

- The right to translation and interpretation services (Measure A)
- The right to information on rights and information about the charges (Measure B)
- The right to legal advice before and during criminal proceedings and legal aid (Measure C)

2 See Article 1 para. 1, para. 2 of the Commission Directive 2010/64/EU (Directive Translation); Article 2 para. 1 of the Directive 2012/13/EU (Directive Right to Information); Article 2 para. 1 of the Directive 2013/48/EU (Directive Access to lawyer); Article 2 para. 1 Directive 2016/1919/EU (Directive Legal aid); Article 2 of the Directive 2016/343/EU (Directive Presumption of Innocence).

3 The Austrian Administrative Offences Act (VStG) is not part of the ordinary jurisdiction, but is rather classified as part of administrative law (Ewald Wiederin, 'Die Zukunft des Verwaltungsstrafrechts' [2006] 16 ÖJT vol III/1,7).

4 Concerning the Commission's recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, see the following research project conducted by the Ludwig Boltzmann Institute of Human Rights, including the final report and recommendations < http://bim.lbg.ac.at/de/projekt/laufende-projekte-projekte-menschenwuerde-projekte-eza-wirtschaft/eu-weite-staerkung-verfahrensrechte-strafrechtlich-verdaechtigen-beschuldigten-personen-intellektuellen-undoder-psychischen-beeintraechtigungen >.

- The presumption of innocence as an aspect of the Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

Although Directive (EU) 2016/343 on the presumption of innocence was, as mentioned earlier, not initially included in the Roadmap, the transposition and application of this Directive is still included in this report because the presumption of innocence is considered to be one of the most essential rights in criminal proceedings.

The scope of this report is so broad that it is not possible to provide a comprehensive analysis of all aspects. Therefore, there is a need for further research, for which the present report is intended to provide the basis for.

Methodology

The initial methodology for the project, which had been used in other projects,[5] included a legal analysis of the national legal system with regard to the respective EU Directives, as well as data collection through the conduct of observational research at police stations and through accompanying of defence lawyers who support clients at police interrogations. Moreover, interviews with police officers and defence lawyers were planned.

In addition to the planned interviews with police officers and defence counsels, seventeen interviews with former suspects were conducted in three prisons in Vienna and Graz. All persons interviewed were arrested after 1 January 2017, therefore after the respective Directives had entered into force, and were convicted. In addition, three interpreters from Vienna and Tyrol were consulted and additional information was gathered from the ministries in writing or by phone.

Eventually, at the beginning of 2018, the authorization to conduct observational research was granted for three districts in Vienna, and nine interrogations, including one case, in which the suspect was arrested, were subsequently observed.

The focus group discussions and interviews were transcribed, encoded and analysed with the help of a qualitative data analysis tool (Atlas.ti).

For quality assurance purposes, an advisory board consisting of representatives of the Federal Ministry of Justice, Federal Ministry of Interior, the Vienna Bar Association, independent researchers, and civil society was formed to discuss the recommendations of this report and receive general feedback.

5 See Jodie Blackstock, Ed Cape, Jacqueline Hodgson, Anna Ogorodova, Taru Sponken, Inside Police Custody: An Empirical Account of Suspects' Rights in Four Jurisdictions (Cambridge, Intersentia 2014).

Report structure

The report is divided into three main parts: The introduction (Part A) is followed by the largest chapter of this report, which incorporates an analysis of the legal and practical implementation of the right to translation and interpretation, the right to information, the right to access to a lawyer as well as the presumption of innocence and the right to remain silent (Part B). After a conclusion, the essential recommendations are summarised at the end of the report (Part C).

B. Procedural safeguards

1. The right to translation and interpretation services in criminal proceedings

1.1. Transportation and scope

Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings was adopted on 20 October 2010. Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with it by 27 October 2013. The Austrian legislator transposed the Directive by passing the amandement of the Code of Criminal Procedure (StPRÄG 2013) and amending in particular the Austrian Code of Criminal Procedure 1975 (CCP). The relevant provisions entered into force on 1 January 2014.

Since at least 50 percent of suspects, accused and detained persons in criminal proceedings (including deprivation of liberty for compulsory medical treatment ('Maßnahmenvollzug') do not speak or understand German, the effective allocation of interpretation services is indispensable in safeguarding the right to due process.[6]

In an impact assessment of StPRÄG 2013, the transposition of the Directive was discussed as causing considerable additional budgetary needs of 8.91 million EUR per year.[7] The aim to cut costs has also had a substantial influence on the revision of the law. Furthermore, the problem of the necessary availability of interpretation services was discussed: if all prospective translation services (written and oral) were administered via the interpreters/translators employed by the 'Justizbetreuungsagentur' (public agency centrally providing personnel services) that would require approximately 400 persons, as opposed to the current 20, and exceed the number of commercially-available interpreters/translators.

The rules pursuant to para. 48 CCP regulating the scope of the rights of the suspect and accused person conform to Article 1 para. 2 of the Directive.[8]

The national provision applies from the time of an initial suspicion, whereas the Directive applies to persons from the time that they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence. The law

6 The number 50% was mentioned during a justice and interpreter conference on 17th of April 2015, cf. < http://www.aidp-austria.at/wp-content/uploads/2015/12/AIDP-Symposium-2015-04-17-Justiz.pdf >, 3, accessed 2 February 2018; see also for the eastern part of Austria: Michaela Hessenberger, 'Österreichs Gerichten gehen die Dolmetscher aus' Salzburger Nachrichten (4 June 2018).

7 Legal drafting materials (Wirkungsfolgenanalyse), 532/ME 25. GP 8.

8 Furthermore, pursuant to Article 1 para. 3 of the Directive Translation, this Directive is also applicable to certain stages of administrative procedures.

incorporates the wording ‘suspected or accused persons’ established by the Directive. The provisions of the Directive apply until the conclusion of the proceedings, which is understood to mean the final determination of the question of whether they have committed the offence, including, where applicable, sentencing and the resolution of any appeal. para. 49 CCP regulates the essential rights of the suspect, including the right to interpretation (para. 49 item 12 CCP).

While the Directive regulates individual aspects of the right to interpretation (oral) and translation (written) separately in Article 2 and Article 3, the regulations in CCP partially apply to both services.[9] Para. 56 CCP, for instance, contains the provisions for written and oral translation services.

1.2. The right to interpretation

1.2.1. Provision of interpretation “without delay”

According to Article 2 para. 1 of the Directive, suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned shall be provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings.

The amended para. 164 sec. 1 CCP stipulates that prior to an interview, the potential need for interpretation shall be examined.[10] para. 171 sec. 4 CCP on the information about rights after an arrest was adapted to conform to the Directive. In its amended version it stipulates that suspects who do not understand the language of the criminal proceedings concerned shall be informed about their rights according to para. 49 CCP upon, or immediately after, their arrest in a language they understand. As a rule, the information shall be provided in writing. In exceptions it can be provided orally if the written letter of rights is not available in a language the suspect can understand. In such cases, an interpreter shall be assigned (para. 171 sec. 4 in combination with para. 56 sec. 2 CCP).

Para. 56 sec. 2 CCP was amended in the course of StPRÄG 2013 and now stipulates that translation services shall be provided orally and be guaranteed for collecting evidence from the suspect and, upon request, for meetings between the accused person and their defence counsel.[11] Before the transposition of the Directive,

9 This results, inter alia, from para. 13 of the Federal Law on court certified expert witnesses and interpreters (SDG), which states that the interpreter as laid down in the SDG, is also known as a translator; para. 13 SDG therefore subsumes two aspects of the term ‘interpreter’: on the one hand the interpreter as a language mediator, who translates spoken text from a source language to a target language, orally or through sign language, on the other hand as a language mediator, who translates a specified, usually written text from a source language to a target language, c.f. Bachner-Foregger, ‘Commentary on para. 56 CCP’ para. 3 in Fuchs/Ratz Wiener Kommentar zur StPO.

10 The old version of para. 164 sec. 1 CCP stated the necessity of legal instructions prior to interrogations. Since the competent authority was not obliged to consider the necessity of a potential translation assistance, a need for adaptation existed.

11 Cf. para. 56 sec. 2 first sentence CCP.

criticism had been voiced that the police interview is not mentioned in para. 56 sec. 2 CCP.[12] Because of the unclear wording regarding the collection of evidence from the suspect, it has been demanded that the national provisions, analogous to the Directive, explicitly mention that these include the police interview. In =practice, however, there seems to be no doubt that the police interview is covered by the regulation, which is also reflected in the information on rights in the protocol system of the police (PAD-NG).[13]

Interpretation must be provided within an appropriate time, if it is necessary. If this is not possible, the interpretation shall be provided using audio or video recording (para. 56 sec. 2 CCP). Apart from some police departments, there has however been almost no use of video interpretation so far (for details, see Chapter 1.2.3.).

The competence for assigning a translator/interpreter lies with the organ that heads the proceeding. At a police interview, the competence for assigning an interpreter lies with the police.[14] Expertise and respective qualification requirements are not regulated by law.

While the amendments in para. 56, 164 sec. 1 and in 171 sec. 4 CCP constitute necessary adjustments, certain points required further strengthening. One concerned the expansion of the scope of the regulation to encompass oral translation services during inspection of the case materials to ensure that the suspect can demand the written translation of further items in their file.[15] According to the Federal Ministry of Justice, the possibility to apply for the assignment of an interpreter to support the inspection of case materials is "in principle already included within the very generous interpretation of the right to interpretation by Austrian jurisprudence".[16]

» ***Initial clarification***

In focus group discussions, police officials emphasized the challenge resulting from the fact that during street policing, there is hardly ever an interpreter present – unless in cases of major interventions that were planned in advance and were assigned interpreters. Ad hoc interventions by the police involving many people can constitute challenging situations in and of themselves because of the difficulty associated with establishing an impression amid potentially different and contradictory statements. If language barriers exist, they make an initial clarification even

12 Klaus Schwaighofer and Andreas Venier, 'Stellungnahme zum Entwurf eines Strafprozessrechtsänderungsgesetzes 2013', 6/SN-532/ME 25. GP 2 (2013).

13 This includes, at the beginning of the protocol, the question on the necessity of a translation aid, subject to para. 49 CCP. See excerpt of the new PAD-NG. PAD-NG stands for 'logging, display and data' ('Protokollieren, Anzeigen, Daten'), NG for 'New Generation', because the new system was introduced with January 2018. The Federal Ministry of Justice refers in its statement to the present report and to the settled case law of the Austrian Supreme Court and the necessary interpretation compliant with fundamental rights (c.f. inter alia, 11 Os 139/12s, 11 Os 140/12s, 11 Os 141/12p, 11 Os 142/12k), as well as to the fact that everything that is suitable to deliver a proof according to logical rules and discover the truth, can be used as an evidence of proof, c.f. Christian Pilnacek, 'Commentary on para. 104' in Fuchs and Ratz, Wiener Kommentar zur StPO; Gabriele Eder-Rieder, 'Die amtswegige Wahrheitserforschung' [1984] ÖJZ 649, with further references. According to the Federal Ministry of Justice therefore the police interview of suspect is an evidence of proof at any case, which requires the mandatory presence of the suspect and thus definitely is included by para. 56 sec. 2 CCP.

14 Amendment in the course of the 2011 Budget Concomitant Law; See also para. 126 sec. 2 a CCP.

15 Alexander Tipold, 'Anmerkungen zum Entwurf des § 18 StPO', 14/SN-532/ME 25. GP 2 (2013).

16 Federal Ministry of Justice, Commentary to this present report.

more complicated. This is very important because the type and severity of the potential offence often serve as the basis for the decision on arrest. In some of these cases, English or another common language can be used – however, this does not always work. The focus group research revealed that in less complex cases, even Google Translate or similar technology was employed to clarify main points such as the potential offence. On the challenges surrounding the initial clarification, a police official was reminded of a – no longer existing - folder with standard questions in important languages that was available in every police car in the early 1990s.

For such cases in particular, it was emphasized that technological means of support could indeed be useful (see also 1.2.3. below). The possibility of video interpretation for common languages was deemed sensible for the purpose of the initial clarification within the focus group discussions with police officials. Since police officials are currently being equipped with smartphones and tablets, video interpretation could be implemented without major technical obstacles. Video interpretation could for example be provided using apps. The fact that there would be no financial costs for these calls was emphasized as an important step to lower any inhibition from side of the police to use this instrument (‘would constitute a regular call’).

» ***Timely assignment***

> *‘But if you start searching your favourite list and the first interpreter isn’t available and neither are the second and the third, it becomes a problem. We only have 48 hours and we cannot stretch them without good reason, we have to make sure that personal liberty is restored as soon as possible in cases of detention. It would be questionable to say, “I won’t call this interpreter because he/she is not good”.’*
> – Police official during focus group discussion 2

The police keep a list in which the competent police officials search for available interpreters. Searching for qualified interpreters to keep the police interview on schedule poses some challenges to police officials. In the regions of Lower Austria, Styria and Vienna, it was emphasized that the availability of interpreters depended strongly on the language: Russian, Bosnian, Croatian and Serbian were named as examples for languages with a sufficient supply of qualified persons. Chinese, Dari, Pashto, Arabic, Georgian, Somali and a number of less common languages, e.g. African or Indian languages, pose big challenges.[17] In the case of very rarely encountered languages, the police have to search for interpreters beyond the list – in some cases, even travel from Germany is required. The lack of interpreters also means that it can take several hours until the interpreter arrives if the police interview takes place outside of provincial capital cities.

The availability of qualified interpreters seems to depend not only on the language, but also on the type of offence: for serious offenses against life and limb, it was

17 E.g. there is one non-certified Georgian interpreter available for the federal state of Styria. Only two interpreters exist for Somali.

emphasized that the assigned interpreters are always the same. These areas of offenses are “interesting” and trust in the interpreters´ work is essential in these fields. There is therefore regular cooperation with the same individual interpreters. The availability is mostly good. For routine police work, however, no such continuous cooperation exists and the search for an interpreter can be difficult and time-consuming, in particular because no experience exists with respect to rare languages and a random choice often has to be made when choosing someone from the list. The police expressed a strong desire for sustainable cooperation with persons who reliably deliver high-quality services and are experienced with criminal law.

While the decreasing availability during weekends and nights due to lower pay was emphasized, in particular, by police in urban areas, in rural areas it was remarked that interpreting constituted a good source of income and availability. Some interpreters in Vienna who no longer work for the police stated that the tone towards suspects and, to some extent, also towards interpreters, as well as the low wages led to the termination of the work relationship.

The quality of interpretation services is directly affected by the problem of scarce resources because, due the lack of availability of interpreters from the list, inadequately qualified persons, i.e. lay interpreters, often called ‘in-house interpreters’, are used instead (see also 1.4 below).

> *‚We are tasked with keeping police custody as short as possible and in practice, that’s where we experience problems. We would obviously prefer to have steady interpreters we know we can call.’*
> – Police official during focus group discussion 2

Possible solutions that were discussed included a type of stand-by service for interpreters for common languages, or video remote interpretation for initial clarification in cases where it is possible and reasonable. The police in one of the regions reported a well-established practice that no longer exists: cooperation between the police and a translators’ office. The police could call and ask for a certain language, and a central contact took care of the search for a qualified interpreter. By introducing a similar system for administrative coordination, e.g. directly within the police, thereby centralising the coordination and assignment of qualified interpreters, fewer police resources would be spent.

1.2.2. Assessing the need for interpretation services

Pursuant to Article 2 para. 4 of the Directive on translation and interpretation, Member States shall ensure that a procedure or mechanism is in place to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings, and whether they need the assistance of an interpreter.

According to Article 2 para. 5 of the Directive, Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the

right to challenge a decision finding that there is no need for interpretation.

Assessing the need for interpretation services

para. 164 CCP regulates that the need for interpretation services (pursuant to para. 56 CCP) shall be examined before the beginning of the interview. The body in charge (court, public prosecutor or criminal police) is competent to examine this case by case. It shall be done appropriately and taking into account that for a fair trial, communication must be unimpeded.[18] The law does not stipulate a specific mechanism to establish whether the assistance of an interpreter is required.

In practice, no institutionalised mechanism exists to determine the need for interpretation services. Amongst the information on rights, the user interface used for the interview of the suspect (PAD-NG) contains additional information for the police official, instructing them to determine, when in doubt, whether the suspect understands the language with the help of everyday questions.[19] A protocol of questions and answers shall be made. Police officials reported that they ask suspects to read out short texts and inquire into the suspect's understanding in an attempt to safeguard that they do, in fact, understand.

> *‚Speaking is not the only problem- often that works - but reading the protocols and the information on rights… many people have trouble with those. In my opinion, if the law is in German, I go and look for an interpreter.'*
> – Police official in focus group discussion 1

Many police officials emphasized that when in doubt over the need for an interpreter, they always opt for assigning one, since suspects who were interviewed in German later stated in court that they could not understand the language at all.[20] The same applies to cases wherein the suspect or accused person states no need for interpretation services, as many do, because they wrongly assess their German skills. At the same time, some defence counsels argued that police officials also interview suspects or accused persons with very weak German skills without the presence of an interpreter, because it is in the interest of expedience - if an interpreter is assigned, the waiting period slows down the procedure.

Problems of understanding and the resulting errors in the protocol of the interview can hardly be changed in retrospect. They can thus be severely disadvantageous for the suspect, who often ends up being accused of trying to change their statement later. Audio-visual records of such interviews would protect both the police from the potential charge that an interpreter should have been assigned, and the suspect or accused person in actual need of an interpreter.

18 Decree of the Federal Ministry of Justice, GZ BMJ-S578.027/0006-IV 3/2013 (2013) 6.

19 Excerpt from the PAD-NG computer system of the Federal provincial police department.

20 Within the scope the observational research a police interview was postponed in order to assign an interpreter due to doubtful German skills. One interview was conducted nevertheless.

Interpreters also emphasized that even people who have lived in Austria for a long time, and can express themselves well in everyday situations, may be better served in their native language in matters relating to complex legal affairs. This can also be helpful throughout the process of collecting information, and with regards to their statement.

Appeals against the decision on the need for interpretation services

The suspect can demand the right to interpretation services pursuant to the actions of the authority according to para. 49 item 12 CCP (para. 56 CCP). If the claim is refused despite a given need for interpretation, the suspect can raise this during the main proceedings. If an interpreter is present during the main proceedings and the judge does not use the results of the police interview (in absence of the interpreter), this procedural error cannot be taken up again at a later stage. Under certain circumstances, in cases where a police interview without a necessary translator/ interpreter is read out and taken as evidence, despite objection, an appeal for a declaration of nullity can be made against the decision (para. 281 sec.1 item 2 CCP).

1.2.3. Video conference et al.: Ways to provide interpretation services

According to Article 2 para. 6 of the Directive, where appropriate, communication technology such as videoconferences, the telephone or the Internet may be used, unless the physical presence of the interpreter is required in order to safeguard the fairness of the proceedings.[21] These provisions were transposed by the amendments to para. 56 sec. 2 CCP. It stipulates the presence of an interpreter as a rule. The last sentence of para. 2 stipulates that technical equipment for video or audio conferences shall be used as a substitute in cases where no interpreter can be found within an appropriate period of time, unless this were contrary to the right to a fair trial.

Video remote interpretation in Austria is primarily used in medical departments of prisons where positive experiences have been reported.[22] After a few successfully-conducted pilot projects, beginning in 2018, video recording is used regularly in police detention centres (‘Polizeianhaltezentren’), primarily in medical departments. In some police offices, video remote interpretation has been taken up as the rule.[23] In these police offices, video recording is also used for police interviews. Accor-

21 See also recital 28 of the Directive RL 2010/64/EU: ‘When using videoconferencing for the purpose of remote interpretation, the competent authorities should be able to rely on the tools that are being developed in the context of European e-Justice (e.g. information on courts with videoconferencing equipment or manuals)’.

22 See also Federal Ministry of Justice, ‘Videodolmetsch in Ambulanz der Justizanstalt‘, <https://www.justiz.gv.at/web2013/home/presse/pressemitteilungen/aeltere_pressemitteilungen/pressemitteilungen_2014/videodolmetsch_in_ambulanz_der_justizanstalt~2c94848a48abf750014a4e8392f25c80.de.html > accessed: 5 May 2017; see Ombudsman Board, ‘Bericht an den Nationalrat und Bundesrat 2017, Präventive Menschenrechtskontrolle’ (2017) 139.

23 These police offices are SPK Schwechat, PI St. Pölten Bahnhof/PI St. Pölten, PI Wiener Neustadt and PAZ Wels support; No indication of the frequency of use could be given: information by Amtsdirektorin Petra Ruml via email and phone, Federal Ministry of the Interior.

ding to the Federal Ministry of Interior, the requirement to immediately provide a translator/interpreter is proving to be a positive experience.

During focus group discussions with police officials who were not experienced with video remote interpretation, doubts were raised regarding its practical applicability as well as its effects on the quality of the interview, as well as in respect of proposals to use them during criminal proceedings.

As mentioned before, no interpreter is present during initial interventions on site in cases where someone is taken into custody and a reason for arrest is given. Police officials emphasize that this can pose challenges because a common language cannot always be found. For initial clarification such as distinguishing between robbery and theft, the use of a system of video remote interpretation was suggested as useful (see also 1.2.1.1.).

Another example reported from police practice relates to young women without identification documents that cannot express themselves in German: cases in which it is unclear whether they are a victim of theft, potentially a sex worker or a victim of human trafficking. According to the police, it takes approximately one hour to wait for the interpreter, to whom she tells her story. If a concrete suspicion of human trafficking arises, the case is given to the regional criminal investigation office where she is interviewed once more by an interpreter trained specifically for cases of sexual exploitation. In cases like this, an initial clarification via video remote interpretation could save time and money and allow the police to focus on the needs of the person, such as her health needs or in respect of filing a complaint.

The first apps that translate essential questions have been developed in pilot projects, e.g. in the area of trafficking of human beings. In order for such an app to function in cases involving illiterate persons, an oral translation must be included. During focus group discussions, police officials emphasized the technical feasibility of such an app but also the need for a special project to develop the tools needed in different areas.

It was also emphasized by police officials during focus group discussions that while such technical support for initial clarifications would certainly not always be possible, in low level matters, in particular, it would make many things easier for all the parties involved.[24]

Tablets have been provided in some areas, but police officials lamented technical hurdles during handling, i.e. the lack of necessary software. The speed of technical development poses another challenge: currently, the received videos can, to some extent, not be played because of newer formats that cannot be read by the equipment.

24 A police official during a focus group discussion 2.

1.2.4. Interpretation services for contact with the defence counsel

For communication between suspected or accused persons and their legal counsel, Article 2 para. 2 of the Directive stipulates that Member States shall ensure that, where necessary for the purpose of safeguarding the fairness of the proceedings, interpretation is available. This shall serve to ensure that suspected or accused persons can state their own version of events to their legal counsel and include potential exculpatory information. This shall safeguard a fair trial.[25]

This was considered in the provisions of para. 56 sec. 2 CCP. Pursuant to it, interpretation services shall be provided, upon request, for communication between the suspect and their legal defence in direct connection with the taking of evidence. A decree on StPRÄG 2013 by the Federal Ministry of Justice suggests that the right to interpretation services shall be provided according to the complexity of the proceedings[26], but in general for a certain time period before and after the interview or proceedings respectively.[27] To avoid undue use of this regulation by suspects and their defence[28], the need for interpretation services shall be examined in individual case pursuant to Article 6 ECHR.[29]

The amendments to para. 56 sec. 2 CCP also repeal the distinction between the (free) assignment of interpretation services in cases with a legal aid lawyer, cases where the suspect chooses a lawyer at his/her own discretion, and court-appointed counselling since the costs of interpretation between suspect and their lawyer are now always met by the State. The scope as well as the possible restrictions (within the bounds of Article 6 ECHR) conform to the Directive. One condition is that the assignment must be conducted in consultation with the public prosecutor. These changes have been reported as significant by defence counsels during focus group discussions.

If the suspected or accused person requires an interpreter, an interpreter is assigned. The interpreter clarifies whether the suspect or accused person desires legal representation – if that is the case, their arrival is awaited. For the private and confidential conversation between the suspect and their legal defence prior to the interview, the same interpreter is assigned as in the following interview.

25 Recital 19 of the Directive '(…) Suspected or accused persons should be able, inter alia, to explain their version of the events to their legal counsel, point out any statements with which they disagree and make their legal counsel aware of any facts that should be put forward in their defence.'; See also Recital 20 of the Directive 'For the purposes of the preparation of the defence, communication between suspected or accused persons and their legal counsel in direct connection with any questioning or hearing during the proceedings, or with the lodging of an appeal or other procedural applications, such as an application for bail, should be interpreted where necessary in order to safeguard the fairness of the proceedings'.

26 Decree of the Federal Ministry of Justice, GZ BMJ-S578.027/0006-IV 3/2013 (2013) 5.

27 Decree of the Federal Ministry of Justice, GZ BMJ-S578.027/0006-IV 3/2013 (2013) 5.

28 Ibid.

29 Ibid, 8.

1.2.5. Persons with hearing or speech disabilities

Persons with hearing or speech disabilities are entitled to appropriate assistance by an interpreter (Article 2 para. 3 of the Directive). In the course of StPRÄG 2013, para. 56 sec. 7 CCP introduced interpretation services for persons with hearing or speech disabilities pursuant to the provisions in the Directive. Currently, nine out of 16 precincts have sworn and judicially certified sign language interpreters, which shows that immediate assignment seems difficult to attain, particularly in rural areas.[30]

An interpellation by parliament on the topic of the low quality of interpretation services suggested an amendment to the provisions of para. 126 sec. 2a.[31] [32]Since persons with hearing disabilities face the significant issue that no word-by-word, but only protocols reflecting the meaning of the interview can be made, the quality of interpretation services for such cases shall be ensured using video and audio recording. Because the interviewed person is the only person able to judge the professional competence of their interpreter, the current legislation contains a high risk of legal uncertainty. This risk can be avoided by using video recordings of interpretation services.

Police officials who participated in the focus group discussions emphasized the challenging interpretation of foreign languages in cases of persons with hearing and speaking disabilities.

1.2.6. Record keeping

Article 7 of the Directive stipulates that the investigative or judicial authority has to document when an interpreter is assigned to the interview of the suspected or accused person. para. 96 sec. 1 item 1 CCP requires that the taking of evidence is documented. Records are kept on the persons participating in the interview (item 1), e.g. when the legal defence counsel or an interpreter is present.[33]

In practice, the assignment of an interpreter is normally documented. The new computer-based system PAD NG, introduced in 2018, contains several options for

30 Helene Jarmer, 'Änderungsantrag „Bundesgesetz, mit dem die Strafprozessordnung 1975, zuletzt geändert durch BGBl. I. Nr. 34/2015, geändert wird', 1212/A, 25.GP, (2015)
< https://www.parlament.gv.at/PAKT/VHG/XXV/A/A_01212/imfname_424093.pdf > accessed 2 February 2018; cf. list of court translators/interpreters <http://www.sdgliste.justiz.gv.at/edikte/sv/svliste.nsf/Suche?OpenForm&subf=dlfg&vL2obDF=Gebae&NAV=Gebae&L1=Geb%E4rdensprache > accessed 9 May 2017.

31 para. 126 para. 2 a should be amended with the following sentence: 'If an interpreter for sign language is consulted, audio and video recordings ought to be prepared, otherwise the evidence cannot be utilised.'

32 Helene Jarmer, 'Änderungsantrag „Bundesgesetz, mit dem die Strafprozessordnung 1975, zuletzt geändert durch BGBl. I. Nr. 34/2015, geändert wird', 1212/A, 25.GP 2, (2015)
< https://www.parlament.gv.at/PAKT/VHG/XXV/A/A_01212/imfname_424093.pdf > accessed 2 February 2018.

33 For the content of the written record, see para. 96 para.1 no. 1 - no. 6 CCP.

this.[34] Challenges were mentioned rather in respect of the accurate documentation of protocols: an interpreter mentioned that a police official, who was conducting the interview with a suspect, initially refused to make the changes to the protocol suggested by the interpreter, and only complied when the interpreter refused to sign at the end. Lawyers confirmed that there were challenges in handling inaccurate protocols, in particular in combination with insufficiently qualified or biased interpreters.

1.3. The right to written translation services

1.3.1. Assessing the need for translation

Pursuant to Article 3 para. 1 of the Directive, the Member States shall ensure that a written translation of all documents which are essential to ensure that the suspects are able to exercise their right of defence is provided to suspected persons. In certain circumstances, an oral translation or oral summary of essential documents may be provided instead of a written translation on the condition that such an oral translation or oral summary does not prejudice the fairness of the proceedings (Article 3 para. 7 of the Directive).

Pursuant to Article 3 para. 2 of the Directive, essential documents shall include any decision depriving a person of their liberty, any charge or indictment, and any judgment. According to Article 3 para. 3, the competent authorities shall, in any given case, decide whether any other document is essential. There shall be no requirement to translate passages of essential documents which are not relevant for the purpose of enabling suspected or accused persons to have knowledge of the case against them (Article 3 para. 4 of the Directive). Subject to Article 3 para. 5 of the Directive, the Member States have to also ensure that suspected or accused persons have the right to complain, if individual documents or passages, which were necessary for a fair trial, were not translated.

Para. 56 sec. 1 CCP was amended by StPRÄG 2013. According to the second sentence, the suspect is entitled to a written translation of the essential documents within an appropriate period of time to the extent that this is required in the interest of exercising their right of defence and to a fair trial.[35] In addition, further files can be subject to translation upon request of the accused person if this is in the interest of safeguarding the right to a fair trial. At the same time, the translation of individual parts of essential materials to the case can be restricted, as long as the accused person knows what they are accused of (para. 56 sec. 4 CCP).

34 'I confirm the oral translation and explicitly waive my right to a written translation aid: I apply for the interpreter service in the following language ...; I am deaf/mute and apply for the consultation of an interpreter for sign language; I am able to sufficiently communicate in German and explicitly waive my right to a translation aid.' Lastly, there is also an open section for comments, c.f. PAD-NG excerpt from the Federal regional police department (Landespolizeidirektion).

35 See also Austrian Supreme Court of Justice Cases, RS0128399 [2012]. The amendments further include the view expressed by the Supreme Court of Justice (OGH) in a precedent ruling on the legal interpretation of para. 56 CCP.

Furthermore, the written translation can be replaced with an oral translation, or in cases wherein the accused person is represented by a defence counsel, with an oral summary, as long as the right to a fair trial is not jeopardized (para. 56 sec. 5 CCP).

Para. 56 sec. 3 CCP lays down that 'essential' materials to the case, such as the order for and judicial authorization of the arrest, and in cases of ex officio arrest by the police the written justification by the criminal police, the decision on detention pending trial or its extension, the indictment and the ruling prior to appeals, have to be in principle translated. Within the scope of an independent arrest by the police without an order, the translation is arranged by the criminal police, otherwise by the court or the public prosecutor. Regarding which documents are to be considered 'essential', the amendments in para. 56 sec. 4 CCP were criticized by scholars as Article 3 para. 2 of the Directive stipulates that 'essential documents shall include any decision depriving a person of their liberty, any charge or indictment, and any judgment' and are thus more extensive than national regulations.[36]

The amendment of para. 56 sec. 1 CCP, which makes a written translation of whole files the exception, has been called an unfair restriction of essential documents.[37] It is doubtful, according to scholars, whether an assessment of the essential nature of individual documents is in compliance with the prohibition of anticipatory assessment of evidence ('Verbot der vorgreifenden Beweiswürdigung'). If the suspect requests the translation of files pursuant to para. 56 sec. 4 CCP during the investigation proceedings, deliberations on the essential nature of these documents would precede the court trial. Reaching decisions on the essential nature of individual items based on deliberations that precede the trial constitutes an insufficient amount of respect for the prohibition of anticipatory assessment of evidence.[38]

The Federal Ministry of Justice, on the other hand, takes the view that the possibility of restricting the right to written translation of essential documents is anyway only possible if the right to a fair trial is not infringed. The protection of defence rights and the right to a fair trial always ought to be guaranteed by the respective official competent for the act, within the scope of his margin of discretion. The Federal Ministry of Justice adds moreover that, if a suspect is not satisfied with the scope of the written translation, the possibility to lodge an objection subject to para. 106 CCP during the investigation proceedings is also ensured at all times.[39]

Para. 56 sec. 1 CCP stipulates the enforcement of the right to translation and the right to interpretation services according to the provisions on access to case materials (para. 53 CCP). Hence, it is possible that in case of refusal of a written

36 Klaus Schwaighofer and Andreas Venier, 'Stellungnahme zum Entwurf eines Strafprozessrechtsänderungsgesetzes 2013', 6/SN-532/ME 25. GP 2 (2013).

37 Christoph Herbst and Norbert Wess, 'Faires Verfahren ohne umfassende Kenntnis des Akteninhalts? Zum Anspruch des Beschuldigten auf schriftliche Übersetzungshilfe gemäß para. 56 StPO' (2016) iZWF 5/2016, 197 < http://herbstkinsky.at/wp-content/uploads/2016/09/Faires-Verfahren-ohne-umfassende-Kenntnis-des-Akteninhhalts_2016-_HE.pdf > accessed 17 March 2017.

38 Ibid.

39 The Federal Ministry of Justice, statement on the present report.

translation by the police, a request to the prosecutor is possible. In the case of a refusal of written translation by the prosecutor, the suspected or accused person can lodge an appeal subject to para. 106 CCP.

1.3.2. The procedure for assigning translators

The regulation of para. 56 sec. 1 CCP is also relevant for the assignment of translators. The competence to decide about the granting of the right to translation services belongs to the respective body in charge.[40] This means that the criminal police must arrange the necessary translations concerning their conducted investigations because the criminal police is obliged to provide access to the case materials until the final report is given to the prosecutor.

The 'reasonable time period' for the provision of translation services, defined in the Directive, para. 56 sec. 1 CCP, was discussed within the evaluation procedure and concerns were raised regarding its efficient implementation: problems are to be expected when written translations (e.g. of orders for arrest and their authorization orders or of detention orders) are required to be produced 'within a reasonable time period' pursuant to para. 56 sec. 1 CCP., This is particularly the case if the translation were to be accomplished prior to the time limits set for appeals, which would be reasonable but will likely often not be possible due to the lack of interpreters.[41] These timely translations are essential for effective legal protection, but since the time period for appeals does not apply to translations, but rather to the drafting of an appeal, a conflict arises.

In relation to written translations, both the police and defence counsels reported few problems. The quality standards appear to be correct, although during investigation proceedings, the police make little use of translation services aside from cases of economic crimes (the letter of rights itself is available in different languages).

1.3.3. Waiver of the right to receive written translation

para. 56 sec. 6 CCP has been added in the course of StPRÄG 2013 to transpose Article 3 para. 8 of the Directive.[42] In a statement by experts, the following aspect was pointed out: it was pointed out that on the one hand, para. 56 sec. 6 CCP does not regulate that translation services shall be provided for the information about rights and the waiver, but on the other hand, how would the suspected or accused person have obtained full knowledge of the consequences of such a waiver? 'The draft and

40 Explanatory remark to the government bill no. 532 25. GP, 6 et seq.

41 Gerlinde Hellebrand, 'Stellungnahme zum Entwurf betreffend ein Bundesgesetz, mit dem die Strafprozessordnung 1975 sowie das Strafregistergesetz 1968 geändert werden (Strafprozessrechtsänderungsgesetz 2013)', 1/SN-532/ME 25. GP. (2013).

42 Article 3 para. 8 of the Directive states the following: 'Any waiver of the right to translation of documents referred to in this Article shall be subject to the requirements that suspected or accused persons have received prior legal advice or have otherwise obtained full knowledge of the consequences of such a waiver, and that the waiver was unequivocal and given voluntarily'.

the deliberations give no indication.'[43] The regulation also leaves open whether a waiver can be revoked: 'Does the option of revoking the waiver exist and if so: does the suspect have to be informed?'[44] The Federal Ministry of Justice points out though that para. 50 sec. 2 CCP includes information on rights in a language, which is comprehensible for the accused person and furthermore also applies to the consequences of a waiver on written translations of essential documents of the case, which shall be necessarily quoted prior to such a waiver subject to para. 56 sec. 6 CCP.[45] The Ministry further emphasizes that in the case of a waiver of written translations, it is possible to request such a written translation at a later stage of the proceedings.

According to para. 56 sec. 6 CCP, a waiver of the right to written translation is only allowed if the suspect has been informed about their rights and the consequences of such a waiver. Although the final version of para. 56 sec. 6 CCP stipulates that the provisions on the waiver of legal remedies (para. 57 sec. 2 CCP) apply to arrested persons, in other cases prior consultation with a defence counsel is not compulsory. The statement points out a loophole in relief, as this would allow an evasion of the right to translation of essential documents according to Article 3 of the Directive by letting suspects who do not understand German sign a blanket waiver on the translation of essential documents after an 'information of some sorts'.[46] Since an effective waiver can only be made after legal advice has been received, or after the suspect has otherwise obtained full knowledge of the consequences of such a waiver, the provisions of para. 56 sec. 6 CCP fall below the requirements of the Directive. This is because by only providing information by the police, without an assigned interpreter and without the control exercised by the defence counsel, does not ensure that the waiver is 'unequivocal and given voluntarily' and that 'full knowledge of the consequences of such a waiver' has been obtained.[47]

1.3.4. Record-keeping

Article 7 of the Directive stipulates that the investigative or judicial authority shall note when a person has waived the right to translation. As mentioned above, a waiver of written translations is only allowed if the person has been informed about their rights and the consequences of such a waiver (para. 56 sec. 6 CCP). Written records shall be kept of the information about rights and the waiver (paras. 95 and 96). The decree on StPRÄG 2013 by the Federal Ministry of Justice explains that the reference in para. 56 sec. 6 CCP to paras. 95, 96 CCP ensures that the information about rights and the waiver qualify as essential procedures during the actions of the authority. [48]

43 Klaus Schwaighofer and Andreas Venier, 'Stellungnahme zum Entwurf eines Strafprozessrechtsänderungsgesetzes 2013', 6/SN-532/ME 25. GP 2 (2013) 2 et.seq.

44 Ibid, 3.

45 Federal Ministry of Justice, opinion on the present report.

46 Klaus Schwaighofer and Andreas Venier, 'Stellungnahme zum Entwurf eines Strafprozessrechtsänderungsgesetzes 2013', 6/SN-532/ME 25. GP 2 (2013).

47 Ibid.

48 Decree of the Federal Ministry of Justice, GZ BMJ-S578.027/0006-IV 3/2013, (2013) 6.

1.4. Quality assurance for interpretation and translation services

According to Article 5 para. 1 of the Directive, Member States shall take concrete measures to ensure that the interpretation and translation provided meets the quality required to ensure a fair trial. For the purpose of quality assurance, Article 5 para. 2 of the Directive stipulates that Member States 'shall endeavour to establish a register or registers of independent translators and interpreters who are appropriately qualified'.

Article 2 para. 5 of the Directive requires Member States to create an opportunity for suspected or accused persons to review whether the interpretation services they have received meet the conditions for a fair trial. Article 3 para. 5 of the Directive stipulates the analogous regulation for translation services.

1.4.1. Establishment of a register of interpreters and translators

Lists of sworn interpreters (and experts) were first introduced with the Court Experts and Interpreters Act 1975 (SDG).[49] To guarantee that the persons in the list are sufficiently and ethically qualified, the SDG regulates the conditions and the procedure for registering in the public index (para. 3b para. 1 SDG, 'Gerichtsdolmetscherliste') kept by the Federal Ministry of Justice.[50]

Currently this list includes 783 persons.[51] Translation services are provided in 52 languages. The assessment of the respective Regional Court district shows that rural areas, in particular, have only a limited amount of available languages and personnel resources.[52]

The police used to rely on their own lists, kept by the police directorate of the respective province. In the course of the focus group discussions, it was revealed that two distinct lists used to exist: one for the Federal Office for Immigration and Asylum (BFA) and another one for the provincial police directorate (LPD). Some interpreters could be found on both lists, many only on one, leading to confusion and problemssfor police officials who did not use the list(s) regularly. Another effect of keeping two lists was that in cases where, for reasons of insufficient quality,

49 para. 1 SDG of 19 Febuary 1975, Austrian Federal Law Gazette, BGBl. Nr. 137/1975.

50 List of Court Experts and Interpreters < http://www.sdgliste.justiz.gv.at/ > accessed 29 May 2017; See the requirements: Austrian Association of court-certified Interpreters (ÖGVGD) < http://www.gerichtsdolmetscher.at/index.php/de/wie-wird-man-gerichtsdolmetscher > accessed 10 May 2017; For the introduction of certification also see: Austrian national committee of the International Association of Penal Law (AIDP) and Austrian Association of Lawyers, 'Justiz und Dolmetscher, Symposium am 17 April 2015' (2015) 42.

51 List of Court Experts and Interpreters < http://www.sdgliste.justiz.gv.at/ > accessed 3 July 2018.

52 E.g. in the district of the Regional Court Leoben, only 10 languages are available, List of Court Experts and Interpreters, < http://www.sdgliste.justiz.gv.at/edikte/sv/svliste.nsf/Suche?OpenForm&subf=dls&vL2obDG=609&NAV=609&L1=LG%20Leoben > accessed 9 May 2017; for the district Steyr only 7 different languages are listed.

an interpreter's name was to be removed from the list, the decision lay with either the provincial police directorate (LPD) or federal office for asylum (Bundesamt für Fremdenwesen und Asyl).

The police lists contained sworn as well as unsworn interpreters, whereas in at least one province police officials reported that only very few are sworn in by a court. Persons who do not sufficiently master German or the language to be interpreted were also on the list – this was confirmed by the police as well as by former suspects. The list further gave no indication of an interpreters' experience. They also contained fellow police officials who spoke foreign languages and indicated the principal availability of these persons on weekends and national holidays.

The Federal Ministry of Interior told us that a process has been started to establish one register of interpreters, which will be centrally managed by the Federal Ministry of Interior.[53] First, persons are transferred from the existing list to a new register and the Federal Ministry of Interior, regarding new admissions, has defined certain quality standards. Currently there is, however, no further information on these standards available. There are plans to simplify the accounting of interpreters via this new register. To enable portable access to this register, possibilities of access with the help of an App were created for police officials.

The previous practice of contacting interpreters also stays the same with the new register. Based on the existing list, it is the responsibility of the police official in charge to find an interpreter. Often this means 'going through the list' and making lots of phone calls, thereby causing a considerable strain on police resources that could be reduced by establishing an administrative position in charge of this process (see also 1.2.1.).

> *,This used to be a mere phone call. Now you have to go through the list. I start with the first, if I don't reach them, I take the second, then the third, until the fifth eventually comes. Then the three other ones call back and want to know why I called. It used to take significantly less work to do this.'*
> – Police official during focus group discussion 1

The police have emphasized that quality as well as availability of interpreters depends strongly on the language. For languages with only limited availability of interpreters, it often follows that less qualified persons are recruited, with = consequences for the quality of the interpretation. The lack of available and qualified interpreters for example leads to Iranians being recruited for Dari language, or a person speaking Romani being interviewed in Italian, or a Somali national in ArabiB.[54] While this may work in individual cases, it is often not a satisfactory solution. It often leads to difficulties in comprehension, which is then reflected in the transcript. A court-certified interpreter from Tyrol affirmed her availability, but

53 Meeting with a representative of the Federal Ministry of Interior on 16 October 2018.
54 Interviews with a former accused person.

criticised the consultation of non-certified colleagues by the police.

Although ideally the police cooperates with known interpreters, this is not always possible due to lack of availability. Police officials confirm that for low level crimes, interpretation even by family members is accepted, as well as during initial clarification. According to the police, this is often in the interest of the suspect who want to keep the matter within their 'inner circle' of people they trust. For severe crimes, however, the police underlined that this is not an option.

Situations may arise wherein pre-assigned interpreters are not available and send a substitute without consulting the police. These might even be persons who are not on the office list and unknown to the police officials in charge. Police officials regarded this as problematic due to the need for trust in the interview as well as on the impact on quality.

Most of the police officials consulted confirmed that no or few fellow police officials who speak foreign languages have been contacted lately. There are several reasons for this: not only are the most urgently required languages not spoken among them, but this creates problems for the relationship of trust between the suspect and interpreter once it is established that the interpreter is in fact also a police official.

The question of quality has been the subject of repeated public discussion.[55] Dr. Rupert Wolff, President of ÖRAK, expressed concern about the use of ‚in-house interpreters' (‚HausdolmetscherInnen') within budget restraints.[56] He also suggested that the lack of available sworn interpreters was caused, among other factors, by insufficient remuneration. He deemed the use of insufficiently qualified interpreters and translators as particularly problematic when there are insufficient interpretation services at the first interview. Due to a lack of video or audio recording, no retrospective relief can be attained in such cases. Mr. Forsthuber, President of the Regional Court (Landesgericht) in Vienna, said, therefore, that interviews using uncertified interpreters should be recorded on video in order to enable the quality of the interpretation to be examined.[57] The Association of Austrian Defence Counsels has been demanding for a while that the use of audio and video recording during interviews be compulsory, in particular during the first interview as

55 With reference to 'fatal errors', caused by insufficient interpretation services from amateur interpreters, as well as other deficiencies (i.e. 'faulty protocols, unnecessary costs and time lags during investigations'), a parliamentary question was raised to the Federal Ministry of the Interior. The response states that due to a lack of statistical coverage, an evaluation of the amount of non-certified interpreters participating at investigations in 2014 was impossible, see Nikolaus Scherak, 'Parliamentary query: Einsatz von Laiendolmetscher/innen bei Ermittlungsverfahren', 3774/J 25. GP. BM.I (2015); Parliamentary query response (2015) 3613/AB 25.GP, 1 et.seq.; See also Maria Sterkl, 'Dolmetschermangel mit fatalen Folgen' Der Standard (Vienna, 24 July 2016) < http://derstandard.at/2000041637774/Dolmetschermangel-mit-fatalen-Folgen > accessed 29 May 2017; Ricardo Peyerl, 'Falsch übersetzt, Urteil nichtig' Kurier (Vienna, 2 March 2015) < https://kurier.at/chronik/oesterreich/falsch-uebersetzt-urteil-nichtig/116.946.706 > accessed 10 May 2017.

56 Ibid; Contrary to ad hoc certified interpreters at the court (‚in-house interpreters'), who receive the same fee as certified interpreters at the court, those at the police provide interpretation services in their work hours, so that the cost saving is not limited to the travel costs. Therefore, the incentive to use 'in-house interpreters' is bigger within the police than the judiciary system.

57 Austrian national committee of the International Association of Penal Law (AIDP) and Austrian Association of Lawyers, 'Justiz und Dolmetscher, Symposium am 17. April 2015' (2015) 21.

it sets the course for further proceedings.[58] A waiver should only be allowed to be made by a suspect with legal representation, otherwise the waiver should be invalid.

In response to the lack of available interpreters for asylum procedures, the postgraduate study program 'Translating for courts and authorities' was established at the University of Vienna. Its graduates can also be recruited for criminal trials.[59]

In response to the lack of available interpreters for asylum procedures, the postgraduate study program 'Translating for courts and authorities' was established at the University of Vienna. Its graduates can also be recruited for criminal trials. The program focuses on the languages Arabic, Dari/Farsi and Turkish and should also serve as preparation for judicial authorization. This exam, which has also been criticized as being overly onerous, is currently being evaluated by the Austrian Association of Certified Court Interpreters (ÖVGD) with regard to potential changes.[60]

For very rare languages, police officials suggested the creation of a European 'pool', and also raised the matter of accounting. An EU-wide pool has already been created within the scope of an EU-project, but questions regarding practical use would have to be examined.

1.4.2. Quality assessment and mechanisms to discontinue work with unqualified interpreters

Art 2 (5) of the Directive also obliges the Member States to establish possibilities to check whether the interpretation services are adequate to ensure a fair trial. Art 3 para 5 of the Directive regulates the same, mutatis mutandis, for translation services.

Austrian law stipulates that the quality of translation and interpretation services shall be assessed on a case-by-case basis. An interpreter shall be relieved of their duty ex officio when partiality, pursuant to para. 47 sec. 1 CCP, is proved or doubts regarding their expertise are raised (para. 126 sec. 4 CCP). Para. 126 CCP (in combination with para. 47 sec. 1 CCP) thus stipulate the grounds for an ex officio release of the translator. A criminal defence lawyer said that is very difficult to prove doubts on eligibility or bias. Moreover, the suspect can complain that the quality of the interpretation is not sufficient or that their translator is biased.

The refusal to grant or the failure to deliver adequate interpretation services during a police interview, and the potential procedural errors following from it, (in particular the insufficient quality of the interpretation services) are hard or impossible to

58 See also the resolutions of the 15th Austrian meeting of criminal lawyers on 18 March 2017, the 13th Austrian meeting of criminal lawyers 2015 and the 11th Austrian meeting of criminal lawyer 2013.

59 Postgraduate Center University of Vienna, 'Akademische Behördendolmetscherin / Akademischer Behördendolmetscher' < https://www.postgraduatecenter.at/weiterbildungsprogramme/kommunikation-medien/dolmetschen-fuer-gerichte-und-behoerden/ > and < https://www.postgraduatecenter.at/fileadmin/user_upload/pgc/1_Weiterbildungsprogramme/Behoerden_und_Gerichtsdolmetschen/Downloads/ZTW-Kadric-support_letter.pdf > accessed 28 November 2018.

60 Interview with translator 1.

prove without video or audio recordings. [61] The initial lack of quality usually leads to inaccurate transcripts of the interview – and raising doubts over these has not resulted in changes for suspects. The Supreme Court of Justice (OGH) has ruled that the refusal to assign a judicially authorized sworn translator to the police hearing does not constitute grounds for the exclusion of the transcript as evidence during the main hearing. In the case at hand, the mother of the suspect was interpreting.[62]

» ***Quality assessment***

In focus groups, police officials said that responsibility for assuring the quality of proceedings lies with them - the 'ordinary official'. The wish for an examination of interpreters prior to being added to the list was expressed so that police officials could trust the quality of work – both for sworn and unsworn interpreters.

Sworn interpreters said that unqualified persons were often assigned police interpretation work. At the same time, interpreters said it would be sensible to raise basic awareness among police officials about how to quickly examine interpreters ahead of the interview. A 'vademecum' has been drafted for judges in cooperation with Federal Ministry of Justice, which lays down the most important points to be respected in the cooperation between interpreters and judges. No such document exists for the police yet, but could be developed as an aid.[63] The surveyed police officials currently use different methods to ensure the quality of translators: they ask for a self-assessment and relevant experience on the first phone call, e.g. for experience in the area of criminal law or around the type of offence committed.[64]

One police official reported that they always assessed the quality of interpreters at the beginning of the interview. The interpretation of complex information about rights at the beginning was reported as a good indicator for assessing the quality of the interpreter. Sometimes, small errors are added to the transcript to see if the interpreter reacts. In cases of doubt, they are asked to repeat what they told the suspected person. In general, it was reported that there were no common standards in police training or practice with respect to reliably assessing of inadequate interpretation services.

‚Personally, I do that during the call. I simply ask for what I need and whether they have done that before. I just ask, even if it might not be polite. I tell them, I need this and that, can you do that. Sometimes they'll immediately say that they have never done it. […] Same for written documents or other types of files [...] ‚Do you feel capable of doing that?' The answer will tell you where the journey goes. During

61 See also the public discussion, e.g. Petra Tempfer, 'Fehler bei Justiz und Polizei durch Hausdolmetscher' Wiener Zeitung (Vienna, 5 May 2015) < http://www.wienerzeitung.at/nachrichten/oesterreich/chronik/750331_Fehler-bei-Justiz-und-Polizei-durch-Hausdolmetscher.html > accessed 29 May 2017.

62 See Austrian Supreme Court of Justice(OGH) Case 12 Os 37/12a [2012].

63 Austrian national committee of the International Association of Penal Law (AIDP) and Austrian Association of Lawyers, 'Justiz und Dolmetscher, Symposium am 17. April 2015' (2015) 50; Interview with a translator.

64 Focus group discussion with police officials.

the interview itself, I ask the suspect whether they understand their interpreter, if it works, and then I write that down. I can't do more than that.'
– Police official during focus group discussion 1

Assessing the quality of interpreters poses some challenges for the police. One official responded when asked how this is done: 'We can't assess that, because we cannot understand them – they could be telling us anything.' The suspect's reaction or a signal by them were named as options to estimate the quality of the interpreter. There have also been reported cases where the interpreter was not able to translate back to German. One police official reported raising doubts about the quality of interpretation during a monitored phone conversation – when asked, the interpreter revealed they were not translating word-by-word but interpreting the best possible meaning. Certified interpreters emphasized the importance of a cultural expertise combined with a professional understanding of roles, which means an expertise in knowing when a word-by-word statement could possibly be interpreted in a certain way.

Another aspect of examining the quality of interpreters relates to their impartiality and role during the interview. Certain interpreters would exhibit an aversion towards 'a certain type of person', placing the ensuing conversation onto a weak foundation and leading to, in the worst cases, the exchange of animosities – police officials have noted that while they can attempt to reconstruct what is being said by asking for clarification, they are unable to resolve a potential dispute.[65] It has also been suggested that interpreters can sympathize too strongly with the suspect or the police, or begin to draft their own questions. Police officials have reported that such cases of interpreters overstepping their role require intervention from the beginning. Although suspects can state that they do not understand the interpreter, it is mostly impossible to assess whether the interpreter service was conducted accurately or not, because German skills would be necessary for this.

Interpreters and defence counsels have reported that the distribution of roles in the interview is often unclear for the suspect. One interpreter reported that the suspect thought she was the police official. The situation at the interview, where the police official sits behind a desk and transcribes at a computer, and the interpreter sits opposite to the suspect, could contribute to this uncertainty. A sentence at the beginning of the interview, explaining the roles of the parties, could help alleviate this problem. These procedures also constitute a good example for the content a 'vademecum' on the cooperation between the police and interpreters should entail in order to be useful to police officials and suspects alike.

It has been pointed out several times by police officials that it helps if the interpreter and the police know and trust each other, because this suggests that the procedures and vocabulary are known to the interpreter. In addition, police officials

65 Ibid.

should be able to trust that the lists of interpreters contain only qualified persons.

Beyond the development of a ‘vademecum‘, trainings and further education or shared ‘round tables’ between the different professional groups could constitute an important basis for good, professional and mutually-appreciative cooperation.[66]

» ***Mechanisms to discontinue work with unqualified interpreters***

Currently, there seem to be no institutionalised and clearly regulated procedures in place to discontinue work with unqualified interpreters. When problems arise, there is the option of sending an informal notification to the authority. It has been reported that interpreters have been removed from the list after such criticism. However, it was also reported that interpreters sometimes got removed from only one of the two lists, leading to a lack of transparency. Some police officials add personal remarks to the list or exchange information about the quality of interpreters with colleagues.

> *‚In my experience, we waited for five minutes to be sure that there was no point in continuing with the interpreter. I released him, told him that it was not going to work and that he could pack his things and go. Afterwards I wrote an email to the department in charge and got a reply the next day that the person would be removed from the list. I can’t say whether what I wrote was examined further or not.’*
> – Police official during focus group discussion 1

During focus group discussions with the police, the option of rating interpreters was suggested.[67] A focus on their abilities and a justification for this rating would be important. It was further suggested that such feedback should not be anonymous. There was no agreement on this in the ensuing discussion, because another person who also translates professionally emphasized the importance of the interpersonal relationship. Whether a person gets along well with an interpreter is also a question of personal preference – while some get along well with a certain type of interpreter, others do not get along at all. Although professional ability should constitute the substance of a rating, different aspects are included, some of which are subjective. A further distinction is required regarding types of offences: a person might have no problem carrying out an interview relating to a drug offence, but they might not be able to interpret 8 hours on a fraud offence in the same way. Keeping these rating references off the list but removing a person after 3-4 similar references was suggested as a possible solution to this problem.

Some police officials expressed that they felt dependent on interpreters of rare languages. Reportedly, no appropriate actions can be taken with regard to, e.g. interpreters who regularly arrive late.

66 Similar documents are in place in other countries, e.g. the Police in Cambridgeshire, Great Britain, ‘Communicating via an interpreter – how to get the best results’.

67 If there was any space in the lists of interpreters, where one could actually add serious misconducts’.

1.5. Confidentiality

According to Article 5 para. 3 of the Directive, ‘member states shall ensure that interpreters and translators be required to observe confidentiality regarding interpretation and translation provided under this Directive.‘

The regulations on fees for interpreters and court experts (para. 127 sec. 1 CCP) stipulate that they are required to observe confidentiality. para. 127 sec. 1 CCP regulates the legal situation in Austria regarding the confidentiality of interpretation services. However, these apply only to cases where oral or written translation services have been ordered by the public prosecutor or the court (para. 126 sec. 2a last sentence CCP).

The confidentiality requirement for interpretation services during investigation proceedings, and its practicalities, were hardly discussed. However, police officials did mention that suspected or accused persons often prefer not to have a translator assigned, because of a preference for keeping the matter within the ‘inner circle of the family’. For such cases in particular, video recording could assure that professional and competent interpreters are assigned who do not live in the same community as the suspect or accused person.

1.6. Costs of interpretation and translation services

According to the Directive, Member States shall meet the costs of interpretation and translation resulting from the application of the Directive, irrespective of the outcome of the proceedings (Article 4 of the Directive). Recital 15 of the Directive lays down that this should also apply to the execution of the European arrest warrant. In these cases, the executing Member States should provide and bear the costs of interpretation and translation.

If the criminal police assign the interpreter pursuant to para. 126 sec. 2a CCP, para. 53b of the General Administrative Procedure Act (AVG) regulates the entitlement for a fee. In cases wherein, the interpreter is assigned by the public prosecutor or the court, the Fees Entitlement Act regulates the fee (para. 127 sec.1 CCP).

Prior to the transposition of the Directive, para. 381 and para. 393 CCP in its previous version regulated where costs for translation services should be met. para. 381 sec. 6 CCP envisaged that the costs of an assigned interpreter should be borne. The new and current version refers to translation aid (within the meaning of para. 56 CCP), thereby clarifying that both oral and written translation are encompassed by the regulation.

para. 381 sec. 6 CCP stipulates that the costs for translation aid do not form part of the costs the indicted person ought to replace; this applies also to translation services in conversations between the suspect and their court-appointed or

defence counsel (para. 56 sec. 2 CCP) that are directly related to the interview or the taking of evidence.[68] Beyond that, a legal aid lawyer assigned pursuant to para. 61 sec. 2 CCP can enforce their fee even when interpretation services are not in direct relation to an interview or the taking of evidence (beyond the scope of para. 56 sec. 2 CCP), if the interpretation service was necessary.

Regarding the increasing demand for interpretation services and the additional burden on the administrative authority, an interpellation[69] on the financial burden of individual police offices and statistical data on interpretation services, was countered with the reply that it is impossible to provide information because it would require a disproportionate administrative effort.[70] Therefore, a collection of the data on interpretation services delivered in the course of executive administrative actions in Austria does not exist, and no conclusions as to the costs thereby created can be drawn. The reply to the interpellation shows only a table of total costs for interpretation services within law enforcement ('Sicherheitsexekutive').[71]

Financial Year	**Total costs in EURO**
2011	15.360.103,10
2012	17.144.296,28
2013	17.290.871,18

The total costs for interpretation services in 2013 were €21.501.187,47[72] for the Federal Ministry of Justice, the majority of the € 17.290.871,18[73] was spent on interpretation services for law enforcement.

For the following years, the costs for translation services by BMI were: € 19.849.266,98[74] (2014), € 22.544.276,44[75] (2015) and € 24.604.244,98[76] (2016). It follows from this that the costs for interpretation services rose again in 2015 and 2016 after a drop in 2014. It can be assumed that the majority of costs applied to law

68 Rechtsanwaltskammertag (ÖRAK), 26/SN-532/ME 25. GP (2013).

69 Rupert Doppler, parliamentary inquiry 'Dolmetschkosten der Exekutive', 277/J 25. GP 1.

70 Federal Ministry of the Interior, 'Query response' 253/AB 25.GP 1.

71 Federal Ministry of the Interior, 'Query response' 253/AB 25.GP 2.
< https://www.parlament.gv.at/PAKT/VHG/XXV/AB/AB_00253/imfname_339950.pdf > accessed 28 November 2018.

72 Federal Ministry of the Interior, 'Query response' 240/AB,
< https://www.parlament.gv.at/PAKT/VHG/XXV/AB/AB_00240/imfname_339930.pdf > accessed 28 November 2018.

73 Federal Ministry of the Interior, 'Query response' 253/AB,
< https://www.parlament.gv.at/PAKT/VHG/XXV/AB/AB_00253/imfname_339950.pdf > accessed 28 November 2018.

74 Federal Ministry of the Interior, 'Query response' 3890/AB,
< https://www.parlament.gv.at/PAKT/VHG/XXV/AB/AB_03890/imfname_408059.pdf > accessed 28 November 2018.

75 Federal Ministry of the Interior, 'Query response' 7509/AB,
< https://www.parlament.gv.at/PAKT/VHG/XXV/AB/AB_07509/imfname_520151.pdf > accessed 28 November 2018.

76 Federal Ministry of the Interior, 'Query response' 11186/AB,
< https://www.parlament.gv.at/PAKT/VHG/XXV/AB/AB_11186/imfname_626315.pdf > accessed 28 November 2018.

enforcement as well.

To the question of who carries the burden of costs for interpretation services delivered during police actions of authority, it was replied that these are borne by the respective police directorate of the province.[77] Nevertheless, police officials stated that this aspect is not relevant with regard to the consultation of interpreters.

A major change was made regarding the lump sum for the interpretation of a protocol at the end of the interview: previously, EUR 10,20 per page were paid; now it is a lump sum amount of EUR 20, which applies whether the transcript runs to one or 20 pages. Interpreters also complained that the fees have not been adjusted in years and that remuneration for interpreting the transcripts has been reduced. It was also emphasized that remuneration was one reason why interpreting in this area was unattractive.[78]

Police officers reported, at least in urban areas, that since the reduction in pay in 2013, it has become more difficult to find interpreters willing to work for example, at night or in the evenings, whereas previously they would all have had come.

> *‚It happens that on weekends or holidays or after ten o'clock, they'll say, ‚no […] I won't come there now for twenty or twenty-five Euros and that is certainly a financial problem.'*
> – Police official during focus group discussion 2

Defence counsels also emphasized that cutting costs for interpreters probably contributed to errors and thus to additional costs – as well as to frustration among police officials. The development of audio-visual interpretation services, based on conducted evaluations of recent experiences, as well as 'lessons learnt' from other countries, could be a reasonable solution cost-wise and would guarantee that eligible interpreters could be consulted immediately.

1.7. Translation and interpretation services in proceedings for the execution of an European Arrest Warrant

Article 2 para. 7 of the Directive guarantees that in proceedings for the execution of a European Arrest Warrant, persons subject to such proceedings who do not speak or understand the language of the proceedings shall be provided with interpretation. In addition, it is stipulated that the competent authorities of the member states executing the European Arrest Warrant provide a written translation of it.

para. 16a EU-JZG guarantees that in cases where a person has been arrested on

77 Federal Ministry of the Interior, 'Query response', 253/AB 25.GP 1.
78 Interviews with interpreters.

the basis of a European Arrest Warrant, they have to be instructed on their legal rights in writing in a language they can understand without delay. In practice, the info sheet for detained persons is handed out – no separate info sheets are available - but the Federal Ministry of Justice states that such info-sheets are in the process of being developed.

In general, the provisions of CCP apply in analogy.

1.8. Conclusions and recommendations: The right to interpretation and translation

Providing interpretation for the benefit of the suspected or accused persons without delay currently poses challenges to police officials, in particular with regards to rare languages and languages in high demand. The challenges of partially different lists with different interpreters have already been countered by the Federal Ministry of Justice through the development of one individual list, managed by the Ministry. Currently, too many police resources are spent in finding an interpreter by 'calling through' the whole list. Furthermore, too many interpreters are on this list who do not meet the quality standards for a fair trial. This means that police officials cannot always rely on the eligibility of those on the lists. Additionally, police officials are forced to carry the burden of evaluating the eligibility of an interpreter at the beginning of the interview or even at the first phone call. This means they have to evaluate whether the interpreter is in full command of German or the language in question. Interpreters, on the other hand, complain about the low wages and about the fact that mostly non-certified interpreters are consulted by the police.

In Austria there are some positive experiences with the use of video recording systems.

Based on these findings, we make, inter alia, the following recommendations:

Necessity to evaluate

- On the basis of the findings it is important to evaluate existing procedures and approaches with the support of experts, e.g. the Austrian Association of Sworn and Court-Certified Interpreters (ÖVGD). The goal should be, keeping the needs of everyone in mind, to guarantee high-quality interpretation services during the investigation proceedings. In particular, the possible use of cell phone apps or modern technologies should be taken into consideration. Additionally, 'good practices' from other countries should be considered.

Development of concrete implementing steps together with relevant experts

- Experts should be involved in the current reform efforts of the Federal Ministry of Interior in order to ensure that only those interpreters who meet the transparent quality standards are included in the Ministry register, (with regard to linguistic, cultural and professional eligibility). The

newly-developed criteria by the Federal Ministry of Interior should be disclosed, tested with consulted experts and if necessary adjusted and evaluated.

- Due to the fact that it seems unrealistic for some languages that all interpreters are court sworn/certified, possibilities for guaranteeing quality standards should be developed together with experts.
- The option to comment on bigger issues or give feedback to individual interpreters should be available not only to the police, but also to the suspect and to defence counsels. Ideally, such a system would be developed in collaboration with experts.
- Based on experiences in Austria and 'lessons learned' in other countries, the application of video interpretation services should be extended. This includes for initial enquiries in order to quickly ascertain the facts. Furthermore, video interpretation should be used when qualified interpreters are not capable of immediately appearing in person. 'Standard operating procedures' could be created in collaboration with experts. Video interpretation does not aim to replace the personal interview, but should be applied whenever a qualified interpreter is not available.
- Audio-visual recordings of interviews can provide essential support for all parties in order that the quality of interpretations can be reviewed later, for instance, to prove allegations, and to provide a safeguard for police officials and the suspect. In many countries, these have formed part of established police procedures for many years, or are recommended by international organisations such as the UN, CPT and CAT.[79] In cases of legal representation only, it should be possible to waive the use of such audio-visual recordings, otherwise excluding the obtained information as evidence. This is because the lawyer is able to explain the waiver and the resulting consequences to his client.
- Expenses that might be saved through i.e. the use of modern technology could be reallocated to cover indexation or adjustment of fees for translators and thereby to have a sustainable middle- and long-term supply of translators for the investigation procedure.

Concrete implementation steps

- Through the establishment of an administrative focal point, the finding of available interpreters could be conducted centrally and therefore refocus the resources of police officials back to investigational activities.
- The awareness of high-quality interpretation services, helping to avoid (costly) mistakes as well as reduce the duration of the proceeding, should be strongly supported. Besides the development of a vademecum

79 See UN-Special Rapporteur on Torture, 'Report to the General Assembly of the UN and to the Commission on Human Rights', E/CN.4/2004/56, (2003) para. 34; UN, "Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment", A/71.298 (2016) < http://undocs.org/A/71/298 >; CPT, 'Police custody, 2. General Report of the CPT', CPT/Inf(92)3 (1992) para. 39 and 40 < https://rm.coe.int/16806cea2f >; CPT, '12th General Report on the CPT's activities', CPT/Inf(2002)15 (2002) < https://rm.coe.int/1680696a76 > ; The following report provides a good overview on this topic: Fair Trials International, 'Pro-Cam International desk report: Audiovisual recordings during interrogations', to be released soon.

on the cooperation between police and translators, trainings and further education as well as ‘round tables’ between the different professions could constitute an important basis for good, professional and mutually-appreciative cooperation.[80]

80 Similar documents are in place in other countries, e.g. the Police in Cambridgeshire, Great Britain, ‘Communicating via an interpreter – how to get the best results’.

2. The right to information

2.1. Transposition and scope of the Directive

On 22 May 2012 the Directive on the right to information in criminal proceedings (2012/13/EU, Directive information) was adopted and had to be transposed until 2 June 2014. Contrary to the Directive on the right to interpretation and translation in criminal proceedings (measure A), which was cause for significant discussion due to the substantial additional costs for translation and interpretation work, the transposition of the Directive on the right to information in criminal proceedings (measure B) was the subject of significantly less (public) debate.[81] In comparison to measure A, fewer changes were necessary for the transposition of measure B.[82] From the point of view of the Federal Ministry of Justice, the changes were often primarily clarifications of existing regulations in the Austrian Code of Criminal Procedure and its practice.[83] Experts shared this view.

The legislature made amendments to transpose measure B that entered into force at the latest on 1.1.2014, and thus within the period allowed for implementation. The Directive was transposed into national law with the entering into force of the Reform of the Code of Criminal Procedure 2013 (BGBl. I No. 195/2013, in force since 1.1.2014), the revision of the Federal Law on Judicial Cooperation in Criminal Matters with the Member States of the European Union (BGBl I No. 175/2013, in force since 7.8.2013) and the amendment of the Fiscal Offences Act (BGBl I No. 155/2013, in force since 1.8.2013).

The Directive stipulates that accused or suspected persons shall be informed about their rights and about the accusation that they are suspected or accused of having committed (Article 1 of the Directive). Beyond that, the Directive also governs the right of access to the materials of a case (Article 7 of the Directive).

81 Regarding the discussions on measure A, see for example: APA, 'Österreichs Strafverteidiger fordern Übersetzung in Strafverfahren' Der Standard (Wien, 18 September 2009) < http://derstandard.at/1252771669200/EU-Forderung-Oesterreichs-Strafverteidiger-fordern-Uebersetzung-in-Strafverfahren > accessed 15 December 2015.

82 See government bill no. 2402 BlgNR 25. GP 4.

83 See e.g. Federal Ministry of Justice, legislative drafting materials (Dokument 2402 der Beilagen XXIV. GP - Regierungsvorlage - WFA und Vorblatt, 8 betreffend die schriftliche Belehrung von Beschuldigten anlässlich der Festnahme) and Federal Ministry of Justice, Decree no. BMJ-S578.027/0006-IV, 3/2013, 3-4 with regard to the written documentation requirement of the information about rights. See also Susanne Reindl-Krauskopf, 'Alles beim Alten' (2015), 1 < http://ales.univie.ac.at/fileadmin/user_upload/i_strafrecht_kriminologie/Reindl-Krauskopf/MP/RL_Rechtsbelehrung.pdf > accessed 15 December 2015.

2.2. The right to information about rights

2.2.1. Timing of the information about rights

According to the Directive, every suspect shall be informed about the investigate proceedings conducted against them and the offence of which they have been suspected 'as soon as possible' (Article 2 para. 1 of the Directive). According to para. 49 CCP, the suspect has to be informed as soon as possible (para. 50 sec. 1 CCP). Further indications about when about a suspect must be informed of their rights can be found in the regulations on arrest in para. 171 sec. 4, which stipulate that the suspect shall be informed about their rights 'upon or immediately after arrest'; and in para. 164 sec. 1 CCP which regulates that the information about rights has to occur at the latest before the hearing of the suspect.[84]

In particular, the information about rights should not be circumvented in a way that the person is interviewed/interrogated within a simple inquiry without being informed about rights. However, the use of a statement, which is taken without first informing a suspect of their rights regarding the respective rights of suspects subject to paras. 49, 50 CCP, is not explicitly null and void.[85] This is the case even though knowledge of one's rights is indispensable during the proceedings. If the information about rights is inadequate, the suspect must produce evidence that this had a detrimental impact on the will of the individual (para. 166 sec. 1 no. 2 CCP). If the information about rights does not include essential components, in para. 164 sec. 1 CCP listed rights, e.g. the right to refuse to give evidence, the right to legal assistance, this is not considered e an interview/interrogation of a suspect, but is rather classified as a simple inquiry.[86] Regulations on the information about rights of suspect cannot be circumvented via inquiries, risking nullity of the proceedings (para. 152 CCP). Thus, the given statements without information about rights loses its usability.[87]

Pursuant to para. 96 sec. 1 item 4 CCP, the fact that a suspected or accused person has been informed about their rights is essential during an action of an administrative authority and must be documented in the protocol. At the same time, due to the lack of available audio or video recordings, whether the information on rights was adequately provided cannot be assessed in retrospect – once the protocol has been signed by the suspect, it is difficult to amend statements or point out that certain statements were different or have not been made at all.

The information on legal rights regarding communication has to be provided

84 Soyer and Schumann, 'Commentary on para. 59 CCP' para. 26 in Fuchs and Ratz, Wiener Kommentar zur StPO. Both think that, given an interpretation in conformity with EU Law, an obligation to information also exists during the transfer to the interrogation and not only at the interrogation itself, in particular to avoid informal/informational preliminary discussions, unaware of the legal situation or a possibly long travel time to the interrogation.

85 Stefan Seiler, Strafprozessrecht (Manz Verlag Wien 2017) 120.

86 See para. 151 CCP.

87 Stefan Seiler, Strafprozessrecht (Manz Verlag Wien 2017) 120 with reference to EvBl 2015/16.

upon or immediately after arrest, at the latest after transfer to the police office.[88] In practice, the detained person is asked during the filling out of the protocol for detention whether they would like to contact one person (e.g. a relative), a defence counsel, or consular authorities. The information is provided via the letter of rights for detained persons as well as the info sheet for the stand-by legal counselling service.[89] Besides German, the info sheet for detained persons is available in 47 other languages.[90] The info sheet of the legal counselling service is available in 23 languages in total.[91] If the info sheet is not available in a language the detained person can understand, the information has to be given orally by a police official, an uninvolved person or an interpreter during the hearing.[92] It is worth noting that these information sheets are issued, at least in Vienna, at the place of detention, i.e. by police officials who are not necessarily experienced in interviews with suspects, and respond to questions, e.g. with regard to the cost bearing, might give inadequate information. Every suspect, whether detained or not, has to be informed about their rights prior to questioning. A revised computer system (PAD-NG) for police questioning, introduced at the beginning of 2018, requires the information to be provided before details on versions of events can be entered. However, both defence counsels and suspects have reported the occurrence of informal preliminary talks without prior information on rights or documentation of such talks. One suspect reported an uncomfortable conversation during transport from Vienna to Graz during which he was questioned on what had transpired and was prompted to admit what had happened.[93]

2.2.2. Content of the information about rights

According to Article 3 para. 1 of the Directive on the right to information in criminal proceedings, suspected and accused persons shall be provided with information concerning at least the right of access to a lawyer, any entitlement to free legal advice and the conditions for obtaining such advice, the right to be informed of the accusation, the right to interpretation and translation and the right to remain silent.

Article 4 para. 2 of the Directive on the right to information in criminal proceedings stipulates that in addition to the rights governed by Article 3 of said Directive, the

88 Instruction on arrests, initial measures, communication and documentation: 'Anhaltewesen; Erstmaßnahmen, Verständigungen und Dokumentation' (2014).

89 The instruction 'Anhaltewesen; Erstmaßnahmen, Verständigungen und Dokumentation' from 2014 states:
Every arrested person must be handed over the relevant letter of rights for detained persons without delay after the transfer to the department where he or she is to be in custody before the first interrogation. Accused persons also have to receive the 'Information sheet on the stand-by legal counselling service'.

90 The info sheet is available in the following 47 languages: Albanian, Arabic, Armenian, Bengali, Bosnian, Bulgarian, Chinese, Danish, English, Finnish, French, Georgian, Greek, Hindi, Igbo, Italian, Croatian, Central Kurdish (Sorani), Northern Kurdish (Kurmanji), Lithuanian, Macedonian, Mongolian, Nepali, Dutch, Norwegian, Panjabi, Pashto, Persian-Dari, Persian-Farsi, Polish, Portuguese, Romanian, Russian, Swedish, Serbian, Slovakian, Slovenian, Spanish, Tamil, Czech, Chechen, Turkish, Ukrainian, Hungarian, Urdu, Vietnamese, and Yoruba.

91 See 'stand-by legal counselling service' for an overview on the info sheets. Those are, besides German, available in following languages: Albanian, Bosnian, Bulgarian, Danish, English, French, Italian, Croatian, Macedonian, Norwegian, Polish, Portuguese, Romanian, Russian, Swedish, Serbian, Slovakian, Spanish, Czech, Turkish, and Hungarian, c.f.
< https://www.rechtsanwaelte.at/buergerservice/servicecorner/verteidigernotruf/ >.

92 See instruction on arrests 'Anhaltewesen'.

93 Interview with a former suspect.

Letter of Rights shall also contain information about the following: the right of access to the materials of the case, the right to have consular authorities and one person informed, the right of access to urgent medical assistance and the maximum number of hours or days suspects or accused persons may be deprived of liberty before being brought before a judicial authority.

The information on the rights for suspects governed by Article 3 are stipulated in the Austrian Criminal Code: the right to contact a defence counsel and to grant them powers of attorney (paras. 58, 59 sec. 1 and 164 sec. 1 CCP), to be informed about the suspicion against them (paras. 49 item 1, 50, 164 sec. 1 CCP), to obtain translation/interpretation assistance (paras. 49 item 12, 56 CCP) and the right to remain silent (paras. 49 item 4, 164 sec. 1 CCP).

A written Letter of Rights is only designated in cases of detention. The Letter of Rights must contain the rights of the suspect in line with paras. 50 in combination with para. 49 CCP (para. 171 sec. 4 CCP) and inform the detained person about the following:

- that they may contact (or allow the contacting of) a relative or another person and a defence counsel without delay before detention,
- that they may complain against the judicial authorization of the arrest and request their release,
- that consular authorities may be contacted (where applicable) and
- that they must be transferred to prison and presented before a judge without undue delay, but at the latest after 48 hours (paras. 172 sec. 4 item 1 CCP in combination with para. 174 sec. 1).

The suspect also has to be informed in writing about the right to complain about the judicial authorization and the right to object against the arrest by criminal police, and request to be released (para. 171 sec. 4 item 2 lit. b CCP).

In practice, the PAD-NG's protocol of the interview encompasses the rights listed in the Directive and in CCP (the right of access to a lawyer, the right to be informed about the accusation, the right to interpretation and translation, the right to remain silent).

Contrary to the provisions in Article 4 para. 2a of the Directive, the right of access to the materials of the case is not mentioned. Information about the right of access is provided by informing the suspect of their rights before the interview – the Directive demands, however, that member states shall ensure that suspects or accused persons who are arrested or detained are provided promptly with a written Letter of Rights containing the right of access to the materials of the case.

egarding information on any entitlement to free legal advice and the conditions for obtaining such advice pursuant to the Directive, the info sheet mentions the option of an initial conversation with a defence counsel from the stand-by legal counselling

service free of charge, and points out that more information can be obtained from the official in charge of taking the person into police custody. It also contains a reference to the right to request a legal aid lawyer, but points out that until the decision to grant legal aid has been reached by the court, the costs of the defence must be borne by the suspect or accused person. Regarding the provision in Article 3 para. 1 lit. b of the Directive to be informed about any entitlement to free legal advice and the conditions for obtaining such advice, reference can be made to the info sheet for the stand-by legal counselling service that the arrested person receives together with the info sheet for detained persons, but this also mentions that 'detailed information on the nature, range and potential costs of services available' will be provided during the first consultation with the counsel.[94]

Regarding the possibility of free intervention by a lawyer, the information given was different: The Federal Ministry of Justice emphasized that there is no such right to free intervention of a lawyer within the stand-by legal counselling service (see B.3.4.). The Bar Association though, described it as an opportunity in case the suspect is not capable to bear the costs and is later granted legal aid.[95]

This lack of clarity is also reflected in the information sheets in which the payment of costs is not clearly explained. Numerous police officials said that they assumed that a personal intervention by the lawyer must be paid for by the suspect and so had informed the suspect accordingly. This means that many suspects assume that they must bear the costs for a lawyer and thus refrain from contacting one. This impression was confirmed in interviews with former suspects (see also B.3.2.-3.4.). Other police officers also argued that the free intervention of lawyers is possible at this stage.

It appears necessary to provide clearer and more understandable information on any entitlement to free legal advice and the conditions for obtaining such advice, as well as to raise awareness among police officials and inform them accordingly. The recommendation to extend the scope of legal aid in the preliminary investigation will be discussed in detail in B.3.

2.2.3. Information about rights " in easy and accessible language"

Article 3 para. 2 stipulates that this information shall be given orally or in writing, in simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons.

Article 4 of the Directive stipulates that suspects or accused persons who are arres-

94 Info sheet Stand-by Legal Counseling Service ('arrest hotline').

95 The Federal Ministry of Justice emphasizes that possible implementation requirements in transposition of the Directive legal aid are currently being checked. The deadline for transposition ends on the 5 May 2019.

ted or detained are provided promptly with a written Letter of Rights. They shall be given an opportunity to read the Letter of Rights and shall be allowed to keep it in their possession throughout the time that they are deprived of liberty. Article 4 para. 4 of the Directive regulates that the Letter of Rights shall be drafted in simple and accessible language. Article 4 para. 5 ensures that suspects or accused persons receive the Letter of Rights written in a language that they understand. Where a Letter of Rights is not available in the appropriate language, suspects or accused persons shall be informed of their rights orally in a language they can understand. A Letter of Rights in a language they can understand shall then be given to them without undue delay.

While para. 50 CCP does not regulate whether the information about rights has to be given orally or in writing, para. 171 sec. 4 CCP stipulates that the suspect is to be informed about their rights pursuant to para. 50 CCP in writing during or immediately following their arrest. If the written Letter of Rights is not available in a language the suspect can understand, the information has to be given first orally and a written form shall be provided 'without undue delay' (para. 171 sec. 4 CCP). A written record of the fact that the information has been provided shall be made pursuant to para. 50 sec. 3. No adjustments were made for the hearing of the suspect (para. 164 CCP). The information on rights at the hearing of the suspect can be provided in written or oral form.

Through StPRÄG 2013, para. 2 was added to para. 50 CCP to transpose the Directive. It stipulates that the information about rights has to be provided in a comprehensible manner according to the 'special personal needs' of the suspect. The CCP does not describe the term 'special personal needs', except regarding translation aids for individuals who do not understand the language of the proceedings (para. 56 CCP), or persons who are deaf or mute (para. 56 sec. 7 CCP). Furthermore, the CCP does not clarify how this term 'special personal needs' is to be considered in practice.

Suspects have to receive a written Letter of Rights, subject to para. 171 sec. 4 CCP upon or immediately after arrest in a comprehensible manner and a language they can understand. The required amendment to para. 171 CCP to comply with Article 4 of the Directive was made with the Reform of the Austrian Code of Criminal Procedure (StPRÄG).[96] para. 171 sec. 4 CCP now stipulates that a letter of rights has to be handed out to accused and suspected persons who have been arrested.

CCP contains no exact provisions that state that the suspect shall be given an opportunity to read the Letter of Rights. Since the corresponding instruction regulates that persons in custody are to receive the letter of rights without delay after transfer to the police office, it can be assumed that usually there will be time for the suspect to read the letter of rights.

96 Federal Ministry of Justice, document no. 2402 of the attachments XXIV. GP, 8.

As mentioned before, during criminal proceedings in Austria, information about rights (such as the right to legal advice) is provided via the protocol for arrest; the information about rights via the letter of rights for detained persons and lastly within the information about rights during the police interrogation. Suspects who are not detained are informed about their essential procedural rights via the summons. Police officials, defence counsels, experts, and some of the suspects agreed that the provision of information about rights was complex. Both officials as well as defence counsels argued that information about rights in its current form does not serve the suspects in actually gaining an understanding of their rights. They did note, however, that there had been an improvement as a result of the new PAD NG, resulting in simplified information. Defence counsels further criticized the manner in which the information about rights is provided in practice.

Both police officials and defence counsels reported that suspects, for the most part, do not know their rights, except for those who have been in contact with criminal proceedings many times before. It should also be emphasised that arrest leads to abnormal levels of stress. Moreover, many of those summoned to an interview cannot state whether they have been summoned to the police station as witnesses or suspects.

A linguist consulted for the project further pointed out that the number of persons who cannot read and understand the content of simple texts is large and underestimated – the number of (native) functional illiterates in Austria is estimated to be as high as 1 million people.[97]

» ***Information about rights prior to the interview and after the introduction of PAD NG - hearing of suspects***

There are no ready-made forms for questioning by the police, but prepared paragraphs of text that the PAD NG system for protocols and documentation generates during questioning. These text blocks contain an information on rights (‘PAD’, since January 2018 ‘PAD NG’).[98] The Federal Ministry of Justice consented to the text for the information about rights. For suspects who speak foreign languages, the text is translated by an interpreter.

Prior to the introduction of PAD NG, the information about rights was printed out before the interview and given to the suspect to read and sign. Police officials have reported that in view of this practice, the most important rights were then summarized orally. The offer was also made to read out individual rights where necessary. This was reported as reasonable because questions would otherwise arise during police questioning. There were, however, also reports that the Letter of

97 See Christa Zöchling, ‘Analphabetismus: Eine Million kann kaum lesen und schreiben.’ Profil (2013) < https://www.profil.at/home/analphabetismus-eine-million-368220 > accessed 28 November 2018; Büchereiverband Österreich, ‘Analphabetismus in Österreich‘ < https://www.wirlesen.org/artikel/lesen-gesellschaft/lesen-sprache/leseschwaechen/analphabetismus-in-oesterreich > accessed 28 November 2018.

98 Conversation and correspondence with Mag. Huber-Lintner, Department III/10 of Human Rights at the Federal Ministry of the Interior, 7th and 13th of January 2016; Conversation during focus groups with police officials.

Rights was signed without information on individual rights, and reports of instances where the information was read very quickly.

> *'You don't read all the rights. The police does it. The police official quickly reads through them, says that it says this and that, sign here. You don't really know what you signed.'*
> – Former suspect interviewed for this project

The procedure has been changed by the introduction of the new PAD NG: printing and signing the document prior to the interview is still possible, but the document can also be signed at the end of the interview. This means that depending on the police official's handling of the situation, the suspect may only receive the information about rights orally before the interview when it is read from a monitor.[99] The information about rights in simple and accessible language is read out loud: the text blocks in the new PAD NG consist of the relevant legal text with a corresponding explanation in simple and accessible language below – a fact that was strongly welcomed by the police officials interviewed. Not the legal text, but the corresponding text in simple and accessible language shall be read out loud.

Some police officials voiced frustration about the complexity and length of the information about rights– these complaints did, however, relate to the information about rights prior to the introduction of the new PAD NG.[100] Police officials and defence counsels agreed that the main concern lies with a correctly-executed information about rights that is signed by the suspect.

Police officials have also reported that native German-speaking Austrians are often challenged by the information about rights and have difficulty understanding it. Some police officials pointed out that persons from different legal backgrounds require much more basic legal information about rights which also explains the role of judges, attorneys, lawyers, and police during proceedings. They emphasized that such an explanation was not feasible for the police and was 'not part of their duties'.[101]

Defence counsels also demanded that the police do not rush when explaining 'the information about rights before giving it to the suspect to sign –good quality information about rights requires an adequate amount of time to explain. The new system was criticized on the grounds that the information about rights is sometimes executed very quickly and is partially incomplete. While the information about rights may be executed in a manner that is formally correct, accuracy seems to be the main

99 The practice seems to differ though, because it has been reported that in Tyrol, the instructions are held as prior to the introduction of the new PAD-NG, therefore through the issuing of printouts and submission to signature, see the interview with the interpreters.

100 A police officer during a focus group discussion: 'I have to say, I do not accept that I have to explain half of the CCP in this interrogation. And then I'd still have to explain. (...) Because we did not study it again'.

101 Focus group discussion with police officials. See also the observational research, in which the interpreter translated the rights directly off the monitor, without the police official reading them out again. C.f. Soyer and Schumann, 'Commentary on para. 58 CCP' para. 12 in Fuchs and Ratz, Wiener Kommentar zur StPO regarding the monitoring of results of the information about rights and the possibility to comprehend as an obligation of the one informing.

concern, rather than whether the person in question has actually understood the information about rights.[102] This is probably due to the fact that the police's main – and understandable – concern lies with a quick testimony that in turn leads to a formal criminal complaint/ sentence.

The requirement to produce a protocol parallel to questioning has made it difficult for police officials to focus on the conversation and can even inhibit the conversation because of the police official's seating position behind the computer.

When a defence counsel is present during the interview, they have reported that no information about rights is supplied because it is assumed that it has already been provided. One defence counsel reported that she requests the information about rights to be given even when she is present. One police official, by contrast, reported that when information about rights is given, defence counsels will usually ask to skip it.

To summarize, the information about rights is almost consistently provided, but whether the suspect has actually understood it is not the main concern for many police officials. There was also agreement among defence counsels and police officials that suspects experience difficulties in understanding the information about rights. Gaining an understanding about rights is, however, a crucial condition for exercising them. The new PAD NG and the more accessible wordings are an essential step – but the extent to which suspects actually understand their rights should be evaluated and measures should be taken to enhance awareness of their importance, in particular among police officials.

Raising awareness among police officials so that suspects understand their rights does not just follow from the jurisdiction of ECtHR[103], but also from an understanding of the role of the police as custodians of procedural rights and the right to due process. To an extent, such an understanding already exists, for instance in Styria where defence counsels attest that the information about rights provided is significantly better in Graz than in rural areas.

» ***Letter of Rights for detained persons***

Detained persons receive the letter of rights upon arrival at the police office. One of the linguists consulted said that the text in the letter of rights was difficult to understand since it was 'very technical and pertains to the vocabulary of an educated person. Besides the intensive use of legal terminology, this is exemplified in the pronounced use of so-called 'nominalisation'. This (usually) serves to compress a text and enhance the density of information therein. Usually subordinate clauses are shortened by applying different forms of nominalisation.'[104]

102 Observational research during several interviews.

103 Padalov v. Bulgaria, no. 54784/00, ECHR (judgment on 10 August 2006); see Talat Tunc v. Turkey, no. 32432/96, ECHR (judgement on 27 March 2007); Panovits v. Cyprus, no. 4268/04, para. 72, ECHR (judgement on 11 December 2008).

104 Angelika Wagner, linguist and DAF-trainer ('German as a foreign language'), via email.

The following example serves to demonstrate this point: ‘You have been taken into custody by an organ of the criminal police for the suspicion of the commission of an act punishable by court. To paraphrase this sentence ‘verbally‘ (as opposed to the nominal style) would yield the following wording: ‘You have been taken into custody by an official from the criminal police because you are suspected of having committed something that is punishable by a court.’

According to the linguist consulted, the letter of rights for detained persons furthermore contains complex adjectives (as well as vocabulary)[105], technical vocabulary (including combinations of nouns and verbs) such as ‘suspicion of an offence’ (‘Tatverdacht’), ‘custody’ (‘Anhaltung’) as well as ‘remove the reasons for detention’ instead of ‘prove that you have been detained though innocent, ‘connect with’ instead of ‘call’, etB. Some sentences are particularly complex.[106]

The technical wordings are not just very complex but, according to expert opinion, ‘can hardly be decoded by persons unfamiliar with technical language(s), in other words for persons with low levels of education, because the ‘unpacking’ of these constructions and thus understanding their substance requires a heightened linguistic-cognitive ability of abstraction and prior awareness.[107]

This expert view confirms that of police officials and defence counsels that many suspects have difficulty understanding the text, because it can be assumed that persons with a low(er) level of education or without profound knowledge of the German language cannot read and understand it without the help of legal assistance.

The Austrian Ombudsman Board agreed that comprehension is the main challenge in respect of information about rights during criminal proceedings. Changes have been suggested, however no ‘easy and accessible’ version of the information about rights exists yet.[108]

In other EU-wide projects, work on recommendations for ‘easy and accessible’ information about rights has already been done.[109] Undertaking such an effort for Austria would require few resources if relevant experts are included.

105 Complex adjectives are e.g. ‘a, in a housing community with you living, relative’ instead of ‘a relative living with you’.

106 An example for a particularly complex sentence: ‘In some cases though, an official can carry out the communication via telephone, who is able to put the communication on hold for a few hours, if this would appear necessary in order to complete the immediate investigations concerning your arrest (e.g. the arrest of an accomplice)’ instead of ‘The official is able to postpone the telephone call, if other important matters have to be completed beforehand (e.g. the arrest of accomplices)’.

107 Ibid.

108 Interview with Mag. Cerny, Section C of the public ombudsman board within the scope of an earlier project.

109 A series of relevant EU projects already provided recommendations for the preparation of instructions in plain language, see inter alia Hungarian Helsinki Committee, ‘Accessible Letters of Rights in Europe – Comparative study’ (2017) < http://www.helsinki.hu/wp-content/uploads/Comparative-Report_FINAL_ENG.pdf >; see also Project of the Ludwig Boltzmann Institute of Human Rights, ‘Handbook Dignity at Trial’ (2018) 90.

2.2.4. Taking into account the particular needs of suspects or accused persons in vulnerable situations

As mentioned earlier, Article 3 para. 2 of the Directive stipulates that the information about rights is provided in writing or verbally in an easy and comprehensible language, taking the particular needs of vulnerable suspects and accused persons into account. Recital 26 of the Directive determines that people are in vulnerable situations if they, 'cannot understand the content or meaning of the information, for example because of their youth or their mental or physical condition.[110]

Para. 50 sec. 2 CCP stipulates, since the amendments of the StPRÄG 2013, that '(…) the legal instruction shall be given in a language which the suspect understands and in a comprehensible manner, taking into account special personal needs'. A reference to vulnerability or a legal definition concerning certain groups in vulnerable situations cannot be found in the CCP. Guidelines on how particular needs are to be handled in practice only exist in respect of translation aids for persons who do not understand the language of the proceedings, and for young people.

In the PAD-NG interview there are special instructions for victims who are particularly worthy of protection, but the most vulnerable, for example suspects with psychosocial disabilities, are not specifically mentioned. For adolescents, additional information is provided which specifies that a person of trust can be called in. Alternative formats for the special needs of suspects (e.g. Braille or large print) are currently not available.

The fact that the term of protection of suspects in vulnerable situations was not transposed into CCP is mirrored in practice: to an extent, questions posed to police officials in focus groups regarding their understanding and handling of the protection of suspects in vulnerable situations could not be answered, or elicited answers on persons in witness protection programmes rather than underage suspects or those affected by a mental or physical condition. Measures to increase awareness in this regard would seem reasonable, in particular to detect mental or physical conditions as well as to be able to adequately take into account the particular needs of children and young adults.[111]

Regarding a decision by the Austrian Supreme Court of Justice that a confession based on information about rights that was executed but not properly comprehended may still be used, a defence counsel regretted that it is possible for a person to go through criminal proceedings without adequately understanding why they end up in prison. This, in turn, constitutes an inadequate basis for resocialization.

110 Recital 26 of the Directive on the right to information in criminal proceedings.
111 See Ludwig Boltzmann Institute of Human Rights, 'Handbook Dignity at Trial' (2018) 62.

Of further relevance in this context is the fact that summonses to police interviews for suspects who are out of prison and represented by a legal guardian are distributed solely to the suspects and not to the guardian – via phone or in written form. For juvenile suspects, the summonses are distributed to the juveniles, but not to their parents or another person assigned with their legal representation.

Although the young person is able to call a person of trust to the interrogation and also needs to be informed about this opportunity - a respective obligation to inform during preliminary proceedings does not exist according to the Juvenile Court Act (JGG).[112] However, such an obligation to inform is required both under the EU-'Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings'[113] and the Child Friendly Justice Guidelines „of the Council of Europe.[114]

Para. 58 sec. 4 CCP stipulates that in the case of a minor or a person for whom a legal custodian has been appointed, the legal representative may grant powers of attorney to a defence counsel even if it goes against the will of these persons. Summonses that are received in writing contain the most important rights of the suspect.

If, however, the legal representatives are unaware of the upcoming police interview, they are prevented from participating. It thus seems important to send summonses to police interviews to legal representatives as well. Exceptions should apply where the child's welfare is endangered.[115] Although summonses have to be made in writing and this must convey the position of the summoned during the proceedings as well as their essential rights, in practice, summonses are often made via phone.[116] Some police officials later send written summonses via email that inform about rights. In order to be able to comprehend one's rights, adequately prepare for the interview und possibly consult legal advice prior to the interview, summonses should always be issued in writing. This applies all the more when the suspect is a minor, a vulnerable person or when a custodian has been appointed for them.

112 C.f. para. 37 JGG.

113 Directive (EU) 2016/800 of the European parliament and of the Council of 11 May 2016. The Directive stipulates in Recital 22: 'Member States should inform the holder of parental responsibility about applicable procedural rights, in writing, orally, or both. The information should be provided as soon as possible and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the child.' (Highlighted by the author); Recital 23 states: 'In certain circumstances, which can also relate to only one of the persons holding parental responsibility, the information should be provided to another appropriate adult nominated by the child and accepted as such by the competent authority.' Providing the information to a holder of parental responsibility is also explicitly stated in Article 5 para. 1 of the Directive and should be conducted 'as soon as possible.' Exceptions only apply in case this would be contrary to the child's best interests, c.f. Article 5 para. 2 of the Directive.

114 See 'Guidelines of the Committee of Ministers of the Council of Europe on Child Friendly Justice' (2010), para. IV.A.1.1.: "From their first involvement with the justice system or other competent authorities (such as the police, immigration, educational, social or healthcare services) and throughout that process, children and their parents should be promptly and adequately informed of, inter alia: a. their rights […], b. the system and procedures involved […], c. the existing support mechanisms for the child […], e. where applicable, the charges…' No. 3 of the Directive explicitly emphasizes: 'As a rule, both the child and parents or legal representatives should directly receive the information' < https://rm.coe.int/16804b2cf3 > accessed 28 November 2018.

115 The Federal Ministry of Justice stresses in this regard that the implementation deadline of the RL 2016/800 will run until 11.06.2019.

116 See Stefan Seiler, Strafprozessrecht (Manz Verlag Wien 2017) 104; Interviews with police officials, defence counsels and former accused persons.

2.2.5. Letter of Rights in European Arrest Warrant proceedings

Article 5 of the Directive stipulates the right to information about rights for persons arrested for the purpose of the execution of a European Arrest Warrant. Member States shall ensure that persons who are arrested for the purpose of the execution of a European arrest warrant are provided promptly with an appropriate Letter of Rights containing information on their rights according to the law implementing Framework Decision 2002/584/JHA in the executing Member State.

The right to information about rights after arrest for the purpose of executing a European arrest warrant is regulated in para. 16a EU-JZG. The suspect shall be 'instructed on his/her legal rights […] without delay', corresponding to the regulation on arrest in CCP (para. 171 sec. 4 CCP). The law stipulates that persons arrested for the purpose of executing a European arrest warrant receive a written Letter of Rights without delay. The written Letter of Rights has to be provided in a language they can understand, according to the law (para.16a para. 1 EU-JZG). The instruction in any case has to include the right to receive a written translation of the European arrest warrant (para. 16a sec. 1 item 1 and 2 EU-JZG). The suspect further has the right to involve a defence lawyer in cases of arrest (paras. 61 and 62 CCP also apply in analogy; para. 29 sec. 4 Extradition and Mutual Assistance Act) and the possibility to (dis)agree to the surrender after conferring with a defence lawyer also on the consequences of such a declaration (para. 16a para. 1 item 3 and 4 EU-JZG). The detailed provisions on the conditions and the procedure of receiving (necessary) defence or the right to receive a written translation are not laid out separately for procedures to execute a European arrest warrant. The general provisions of the Code of Criminal Procedure apply, above all paras.49 and 50 CCP.

The law further safeguards that the arrested person can exercise their right to legal aid in the issuing state (para. 16a para. 1 item 5 and para. 2 EU-JZG). The suspect has to be instructed on the right to be represented by a defence lawyer, also in the issuing state of the European arrest warrant, without delay (para. 16a para. 1 item 5). A standard form (available in German and common foreign languages, para. 16a item 1 to 4 EU-JGZ) is provided to notify the sentenced person.

Pursuant to para. 16a para. 2 EU-JZG, the public prosecutor shall inform the issuing judicial authority without delay if the person concerned intends to make use of the right to be represented by a defence lawyer in the issuing state, but is not represented by a defence lawyer, so that the judicial authority can take the necessary measures to select a defence counsel.

The required legal framework for adequate notification of rights in procedures to execute a European arrest warrant is provided, mostly with reference to regulations in the CCP.

2.3. The right to information about the accusation and the reasons for arrest

2.3.1. Information about the accusation

Article 6 para. 1 of the Directive stipulates that suspects or accused persons are provided with information about the criminal act they are suspected or accused of having committed promptly, and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence. It further shall be insured that suspects or accused persons are informed promptly of any changes in the information given in accordance with this Article where this is necessary to safeguard the fairness of the proceedings (Article 6 para. 4).

The exact scope and content of the duty to inform about the accusation such as the legal offence and the facts of the offence are not laid down in more detail, with regard to the investigation phase. After stating that 'the information provided to suspects or accused persons about the criminal act they are suspected or accused of having committed should be given promptly, and at the latest before their first official interview by the police or another competent authority', Recital 28 of the Directive stipulates that 'a description of the facts, including, where known, time and place, relating to the criminal act that the persons are suspected or accused of having committed and the possible legal classification of the alleged offence should be given in sufficient detail, taking into account the stage of the criminal proceedings when such a description is given, to safeguard the fairness of the proceedings (…)'. Article 6 para. 3 of the Directive includes that 'at the latest on submission of the merits of the accusation to a court, detailed information is provided on the accusation, including the nature and legal classification of the criminal offence, as well as the nature of participation by the accused person.' According to para. 50 CCP, accused persons have the right to be informed about the criminal act they are suspected or accused of having committed by the public prosecutor or the criminal police (para. 49 item 1 CCP). The information about the accusation has to be provided 'without delay', unless this were to endanger the investigation (e.g. electronic monitoring of telephone communications; para. 50 sec. 1). In such a case, the notification can be suspended for as long as the purpose of the investigation requires it until, at the latest, the interview of the accused person (para. 164 sec. 1 CCP).

These provisions shall ensure a balance of interests on both sides – a respect for the rights of the suspect or accused persons and the efficiency of necessary measures by the criminal police.[117] In transposing this Directive, the information about rights in terms of para. 50 sec. 1 CCP has been expanded to stipulate that as soon as the information provided no longer corresponds to the current status of investigations,

117 Josef Haissl, 'Commentary on para. 50' para. 10, in Gabriele Schmölzer and Thomas Mühlbacher, StPO Strafprozessordnung - Kommentar Band 1: Ermittlungsverfahren (LexisNexis 2013).

i.e. through new circumstances, suspicion of another offence or changes in the legal assessment, the accused has to be informed of the changes.[118]

The Supreme Court's case law states that the scope of the duty to inform depends on the status of the procedure. While it deems comprehensive information on the accusation and the legal qualification as important elements to a fair trial, it also regards them as 'barely possible' during the investigation procedure.[119] In normal cases, final and detailed information can be provided at the indictment, which complies with para. 50 CCP as well as with Article 6 para. 3 of ECHR.[120] Defence counsels criticized this legal interpretation in 2013 as gravely disadvantageous for the rights of the accused persons.[121]

While police officials refer to the summonses for information about the accusation and the rights of suspected and accused persons, defence counsels, as well as former suspects, argue that in a large number of cases, summonses are handed out via telephone and not in writing. They do not include the reason for the summons or in which function (accused person, witness) a person is called to the police office. Both defence counsels and suspects have reported the suspicion that in some cases, persons were summoned as witnesses when they were suspects (see also B.4.2.).

It was repeatedly claimed that, in practice, information on the accusation is very rudimentary or vague, and that changes to the accusation are not communicated despite existing legal regulations. This was addressed in a recommendation by ÖRAK several years ago which suggested listing all the offences that are investigated in the protocol as part of the information about rights[122] - this is allowed for in the new PAD NG with the explicit reference that the information must not be constrained to the articles of the Austrian Criminal Code ('StGB').[123]

One defence counsel reported undercover investigation proceedings, of more than 2 years, against a client, which he learned of by chance during another investigation. The defence counsel said that usually, suspects are informed about the accusation when they are summoned to the interview or upon arrest, but that does not comply with Article 6 ECHR.[124] Even when access to records is restricted in such cases due to reasons pertaining to the investigation, the information about the accusation has to be provided earlier.

Regarding the wording of Article 6, para 1. of the Directive that stipulates that infor-

118 para. 50 para. 1 sentence 2 CCP.

119 Austrian Supreme Court of Justice, Case No. 14 Os 108/10d [2010] = EvBl 2010/159, 6.

120 Art 6 para. 3 ECHR states: 'Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him (…)'.

121 Association of Austrian defence counsels, Resolution no. 11, meeting of the Austrian defence counsels on 16th of March 2013.

122 The Austrian Bar Association (ÖRAK), 'Wahrnehmungsbericht zur Österreichischen Rechtspflege und Verwaltung für das Jahr 2011/2012' (2012) 42.

123 The component in the interrogation protocol is: 'You are being informed about the fact, that an investigation is conducted against you as an accused person, because of a suspicion (criminal offence).' It further adds: 'The consisting suspicion (indications on the crime scene, the time of the crime and the crime act) shall be disclosed. (Shall not be limited to para.para. descriptions)'.

124 See Art 6 para. 3a ECHR.

mation about the accusation be 'provided promptly and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence', it can be assumed that EU law would require information about the accusation to be provided at a much earlier date than at the hearing of the suspect.[125]

2.3.2. Information about the reasons for arrest or detention

According to Article 6 para. 2 of the Directive, suspected or accused persons who are arrested or detained shall be informed of the reasons for their arrest or detention, including the criminal act they are suspected or accused of having committed.

para. 171 sec. 1 CCP stipulates that suspects shall be informed about the reasons for their arrest or detention upon arrest or immediately after (pursuant to para. 50 sec. 1 CCP). The instruction on arrest ('Dienstanordnung zum Anhaltewesen') regulates that every arrested person shall be informed of the reason for the deprivation of liberty upon or immediately after arrest.[126] The same instruction regulates that in cases where the information cannot be provided immediately, the reasons for this ('e.g. strong intoxication, high agitation, language difficulties'[127]) must be documented and the information about rights must be provided as soon as possible. In cases with language difficulties, the interpreter can provide information at first, for instance during the initial consultation via phone.

One police official reported that in practice, information about the accusation is provided upon arrest and details are already contained in the written order of arrest given to the suspect, otherwise information about the accusation is given orally. The letter of rights for arrested persons reads: 'You have already been informed about the reason for your arrest and the criminal act you are suspected or accused of having committed; You will receive either the written judicial permission of arrest or a written justification by the criminal police regarding the suspicion of an offence and reasons for your arrest within 24 hours.'

However, defence counsels said that the suspicion of an offence is sometimes kept very vague; in multiple cases, former suspects reported that they were not initially informed about the precise accusation.

125 The Federal Ministry of Justice emphasizes that it was deliberately avoided to provide an exact definition of the time of instruction in the CCP, in order to serve two diametrically opposed objectives (On the one hand, the respect for fundamental rights, on the other hand, the protection of efficiency from a criminal policy perspective) and to prevent strategies of circumvention. According to the Ministry, an obligation to provide information only at the first interrogation, would be too late from an efficiency of defence perspective. On the other hand, an interrogation in cases of a minimal offender-related suspicion, would be too early in many cases, keeping a tactical approach in mind. With regard to explanatory remarks to the government bill, the Ministry also thinks that a general instruction subject to para. 50 would only be too late in case of the first interrogation/interview, because therefore the exception would become the rule, Soyer and Stuefer, 'Commentary on para. 50 CCP' para. 7 in Fuchs and Ratz, Wiener Kommentar zur StPO, as well as a statement by the Federal Ministry of Justice on this present report.

126 Instruction on arrest, 3.

127 Ibid.

2.4. The Right of access to the materials of the case and visual inspection

2.4.1. The right of access to the materials of the case

Article 7 of the Directive stipulates that where a person is arrested and detained at any stage of the criminal proceedings, Member States shall ensure that documents relating to the specific case, in accordance with national law and in respect of the lawfulness of the arrest or detention, must be made available to arrested persons or to their lawyers. Pursuant to Article 7 para 5 of the Directive, access shall be provided free of charge.

Pursuant to Article 7 para. 4, exceptions can be made and, provided that this does not impair the right to a fair trial, access to certain materials may be refused if such access may lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest. Example cases are listed in which access could impair an ongoing investigation or seriously harm the national security of the Member State in which the criminal proceedings are instituted. A decision to refuse access to certain materials must be taken by a judicial authority or must at least subject to judicial review.

The right of access to the materials of the case is stipulated in CCP as one of the basic rights of the accused pursuant to para. 49 CCP and can be enforced from the onset of the investigation procedure (para. 53 sec. 1 CCP). During the investigation proceedings, access to the materials of the case can take place at the office of the public prosecutor or, until the final protocol has been communicated, also at the police station. According to CCP, access to the materials of the cases can only be refused in special cases if such access may lead to a serious threat to the life or the fundamental rights of another person (paras. 51 sec. 2 in combination with 162 CCP), in cases where access could impair an ongoing investigation (para. 51 sec. 2 CCP), if such refusal is strictly necessary to safeguard an important public interest as well as to prevent harm to national security (para. 77 CCP).

According to the case law of the Austrian Supreme Court of Justice, access to the materials of the case may not be refused via blanket reference to an ongoing investigation that could be impaired if the information were disclosed. The circumstances must be specified in order to substantiate the claim that access could impair an ongoing investigation. des Ermittlungsverfahrens (§ 51 Abs 2 StPO).[128]

128 The Austrian Supreme Court specifically stated: 'The court shall, in case of confirmation of a refusal to grant access to documents from the public prosecutor, as a consequence of a raised objection subject to para. 106 CCP, cite the special circumstances, which justify the assumption of a serious threat according to para. 162 CCP or an endangerment of the purpose of the investigations according to para. 51 para. 2 second case CCP, in the court's belief. [„Das Gericht hat, wenn es infolge eines Einspruchs wegen Rechtsverletzung die Rechtmäßigkeit der von der Staatsanwaltschaft angeordneten Verweigerung der Akteneinsicht bestätigt, die besonderen Umstände anzuführen, die die Annahme ernster Gefahr im Sinn des para. 162 StPO oder eine Gefährdung des Zwecks der Ermittlungen im Sinn des para. 51 Abs 2 zweiter Fall StPO nach seiner Überzeugung rechtfertigen"], see Austrian Supreme Court, Case 14 Os 43/13z [2013].

The restriction of access to the materials of the case may be upheld for as long as the purpose of the investigation proceedings requires, at the latest until the end of the investigation proceedings (para. 51 sec. 2 CCP).[129]

In addition, specific files pertaining to the investigation proceedings can be categorized as classified information.[130] The regulation refers primarily to files pertaining to the investigation proceedings where confidential treatment constitutes a particular interest, in particular information on transmitted data (para. 135 sec. 2), monitoring of messages (para.135 para. 3), and acoustic monitoring of persons (‘Lauschangriffe‘) (para. 136 sec. 1 item 2 and 3 CCP). The restrictions in para. 51 sec. 2 CCP apply (paras. 1, 2 ‘Verschlusssachenverordnung‘).

If access to the materials of the case has been unlawfully refused or restricted, an objection for violation of rights can be made in court prior to the termination of the investigation procedure (para. 106 item 1 CCP). A complaint against judicial decisions and authorizations can be filed pursuant to para. 87 CCP.

While access to the materials of the case is free of charge, EUR 0,34 are charged per copy if the defence counsel makes their own copies and EUR 0,66 if the office of court administration makes them.[131]

If the suspect has received legal aid, they are not required to bear the costs. In cases in which the suspect bears the costs of their defence, they also have to bear the costs for copies (for detained persons, this excludes the files up until the first hearing on the detention). If the suspect selected a defence counsel at their own discretion, costs for copies constitute cash expenses that the suspect has to bear because even if the proceedings end with an acquittal, the contribution to the costs for the defence usually only covers a fraction of these costs.[132]

Defence counsels emphasize the right of access of the materials of the case as a substantial right in order to be able to understand the accusation –when information is provided orally, this is not always possible.

If a lawyer is present, an inspection of the files is usually done prior to the interview and works well and smoothly in almost all cases. Postponing an interview in order to be able to inspect the files in time beforehand usually poses no problems. This constitutes a big improvement in comparison to several years ago, when requests for access to case materials before the interview were often met with blanket refusal.

129 Special regulations are provided in the event of imposition of pretrial detention: The inspection of records can only be limited in this respect, that documents, which are essential for the evaluation of the suspicion and the reasons of arrest, cannot be included from the limitation, cf. para. 51 para.2 CCP.

130 Verschlusssachenverordnung, BGBl. II Nr. 3/2015.

131 Court Fees Act (GGG), TP 15, remark no. 6, 37.

132 If the suspect is acquitted or the criminal proceeding is discontinued, due to withdrawal from the accusation by the public prosecutor, the Federal Government contributes to the cost of defence, upon request. This cost contribution includes the cash expenses rendered by the suspect, as well as a lump-sum contribution to the costs of defence. This lump-sum contribution to the cost of defence is set on a case-by-case basis. Stefan Seiler, Strafprozessrecht (Manz Verlag Wien 2015) 329.

A problem reported from practice was the absence of the police official responsible for the files. In such cases, the concerned persons were asked to return the next day.

Defence counsels said that the police, unlike the public prosecutor's office, do not keep serial numbers or an overview system for files, and that it is therefore impossible to assess whether the files are complete or whether, for instance, new files have been added. It was also mentioned that the police keeps so-called 'hand files', leading to differences between 'official' files by the police and the public prosecutor's office, or to potential files in the 'hand file' that do not form part of the official file.

It appears to be different in cases when suspects or accused persons make a motion to inspect the files themselves. Cases were reported in which this was not granted or refused under the pretext that a 'written motion' was required beforehand. Of the former suspects consulted for this project, some reported never to have seen the materials of their case during proceedings - some also never asked to see them. Persons who had access to their materials emphasized that it enabled them to prepare properly for the proceedings. Two former suspects wanted to gain access to their case materials but were refused and told that the files were with their lawyer. One person reported they were unable to reach their assigned council, another reported that their assigned council refused them access to the files.[133] At the same time, police officials reported that after switching to the new PAD NG system at the beginning of 2018, the motions for access to the case materials were increasing because the information about rights contains explicit mention of the right to inspect one's files.

While the access is granted unproblematically most of the time, several practical and bureaucratic hurdles were reported. At the police station it is envisaged that police officials themselves make copies of files – this requires police resources. One defence counsel criticized the circumstances around the inspection of files at the public prosecutor's chamber in Wiener Neustadt – apart from weekly changes of the person in charge, the staff required the defence counsels to sit 'in the hallway in front of the public prosecutors' offices and chambers and placed a guardian next to them.'[134] In addition, working with large files required constant efforts to attain access to newly-added files. Only the public prosecutor is informed of new results in the investigation procedure; the defence is not alerted to such information.

High costs for copies were also reported as important constraints: 0,66 EUR per page quickly adds up to thousands of Euros for large files. However, persons receiving legal aid receive copies free of charge. One defence counsel suggested partially granting legal aid regarding such costs, including during the main criminal proceedings.

Some defence counsels reported that they take photographs of smaller files to keep

133 Interview with former suspect, who responded to the question, what he did thereupon: 'You can write. But what can you do about it?'.
134 Interview with a defense counsel.

the costs low for the suspect. While this is a conceivable solution for smaller files, it is not possible for large files. The option of taking photographs is handled differently by the police: one police official took the view that while he had no experience with it, this was not allowed; another emphasized that he took it upon himself to suggest that relevant case material in smaller files be photographed.

A proposal for improvement, for all parties involved and to save paper and personnel resources, would be to extend the use of electronic case files to the police: copying large files is very expensive and electronic data transfers are already being executed in some places. The use of electronic case files would not only make access to case materials cheaper but would contribute to simpler handling and the saving of resources.[135] The Central Public Prosecutor's Office for Combating Economic Crimes and Corruption (WKStA) and the Federal Bureau of Anti-Corruption (BAK) in Vienna both use electronic case files. Defence counsels reported that access to case materials at these offices always functions relatively smoothly. It was also reported that electronic access to files at courts and public prosecutor offices in Vienna is increasing because it saves resources. In principle, the police have access to electronic case files; at the same time, it was reported that electronic access to files was not practiced at the police in Vienna although this was technically possible. Police officials have reported that in Graz, electronic access to files is possible and that defence counsels can purchase USB drives.

Regarding access to case materials in cases with large amounts of electronic data, police officials have reported that access to files can be difficult for them because only a small number of desks equipped with computers is available, and police resources are affected whenever a defence counsel is inspecting files. For this reason, they welcomed a decision by the Higher Regional Court (OLG) allowing access to files to be restricted.[136] In cases of electronic data transfer, however, access to case materials should not pose a problem, even with large amounts of data.

2.4.2. Visual inspection

In recital 31 of the Directive, it is elaborated that access to the material evidence, whether for or against the suspect or accused person, which is in the possession of the competent authorities in relation to the specific criminal case, should include access to materials such as documents, and where appropriate photographs and audio and video recordings.

The visual inspection of evidence (para. 51 sec. 1 CCP) is included in provisions on the access to the materials of the case regarding the results of the investigation

135 The Association of Austrian defence counsels also demands the comprehensive use of electronic case files, as well as an electronic access to files, see the resolutions of the 16th meeting of the Austrian defence counsels Association on the 17th of March 2018 in Graz.

136 Austrian Supreme Court Case No. 17 Bs 42/16z: 'The procedure of the investigating authorities to ensure the documents and data in order to examine these or copies of the electronic data subsequently for the subject of preliminary investigation, in order to then include files relevant to the proceedings and thus decide on the granting of access to the file ‚is not to complain about'.

proceedings (para. 49 item 3 CCP). There is no catalogue of evidence in Austrian Criminal Law so that everything that can serve as evidence is encompassed in this category.[137] The only exception is evidence that falls under the exclusionary rule. The right to visual inspection of evidence is safeguarded by law from the beginning of the investigation proceedings. Potential restrictions and their limits are clearly regulated by law. The provisions are in accordance with the right of access to case materials.

The law now also encompasses access to video and audio files[138] after the Constitutional Court (Austrian Constitutional Court) repealed the regulation on its restriction[139] in an effort to safeguard the equality of arms principle (principle of procedural equality).[140]

As disclosed by the surveyed police officials and also by defence counsels, problems sometimes occur around the visual inspection of video or audio files that cannot be played due to a lack of the necessary technical equipment, or that cannot be transferred because of special formatting. Police officials reported the partial lack of technical equipment needed to play new data formats.

2.5. Conclusions and recommendations: The right to information

The information about rights provided in the new PAD NG system for the hearing of the suspect already contains simpler and shorter sentences than the previous version. The fact that the letter of rights for arrested persons has been issued in 47 languages is positive; the letter of rights of the stand-by legal counselling service has been issued in no less than 23 languages.

Article 3 para. 2 of the Directive determines that any particular needs of suspects or accused persons in vulnerable situations shall be taken into account when providing information about rights. Although para. 50 sec. 2 CCP states that 'special personal needs' are to be considered within information about rights, however a possible vulnerability is not explicitly mentioned and this might be an additional reason for the lack of understanding or awareness among the police officials.

The letter of rights for arrested persons, as well as the info sheet for the stand-by legal counselling service, both contain complex wording which suspects may find difficult to understand, particularly when under stress after having been arrested and placed into custody. Regarding the right of access to case materials, it is noticeable that it is not mentioned in the letter of rights for arrested persons. It further contains no clear wording on the possibility of free legal advice and representation during

137 Stefan Seiler, Strafprozessrecht (Manz Verlag Wien 2015) 97.
138 Cf. para. 52 para. 1 CCP in the version of 2009 and 2013, Austrian Federal Law Gazette, BGBl I 2009/52 and BGBl I 2013/27.
139 Cf. para. 52 para.1 CCP in the version of 2009, Austrian Federal Law Gazette, BGBl I 52/2009.
140 Austrian Constitutional Court (VfGH), Case G 137/11 [2011].

investigation proceedings beyond the first phone call.

Despite simpler information and an easier and more accessible language in the verbal communication, the information about rights is often provided in a way that does not lead to an understanding of the most important rights or even undermines them, while all formal requirements are nonetheless fulfilled, i.e. the information on rights is signed by the suspect.

This leads to the following recommendations:

Necessity to evaluate

- It would appear important to evaluate the information provided about rights in order to assess whether it is actually understood. For suspects, understanding this information is a precondition to resorting to legal remedies against their arrest. In cooperation with experts on accessible language, simpler texts that are better understood should be produced, i.e. for the letter of rights for arrested persons and the stand-by legal counselling service. Good practices from other countries should also be considered.

Development of concrete implementing steps together with relevant experts

- In cooperation with experts and based on existing practices in other countries, it should be considered if the most important rights could be explained to arrested persons with videos in the most relevant languages in addition to letter of rights. These should be understood as aids, taking into consideration that many people have difficulty reading, and should not replace the oral and written information about rights.

Concrete implementation steps

- Written letter of rights should mention the right of access to case materials. In addition, clearer wording regarding the possibility of free legal advice during the investigation proceedings should be provided.
- Awareness among police officials should be raised through trainings and during daily work to indicate that information about rights must not only be formally correct but, above all, be understood. This should ensure that suspects can exercise their rights effectively and therefore strengthen the fairness of proceedings under the rule of law.
- Using and facilitating access to electronic case files would save resources for all the parties involved (less personnel needs for e.g. the police, public prosecutor, defence counsels) and would also mean lower costs for suspects when accessing their case materials.
- Currently no option exists to review whether the information about rights was provided adequately. Audio-visual recordings of the interrogations could contribute to legal certainty and therefore serve the interest of everyone involved. Lastly, legal certainty would strengthen the results of police investigations.

3. The right of access to a lawyer

3.1. Transposition and scope of the Directive

On the 22nd of October 2013 a Directive was adopted that implements the EU-wide application of minimum standards regarding **the right of access to a lawyer in criminal proceedings as well as the right to have a third party informed upon deprivation of liberty** (Directive 2013/48/EU). This Directive transposed parts of measure C regarding access to a lawyer and parts of measure D regarding communication with family, employers and consular authorities. The national legal situation required an adaptation to Union law by 27 November 2016. Unlike initially planned in the roadmap, legal aid is not regulated by the same Directive but by the other Directive on legal aid for suspects and accused persons in criminal proceedings[141], because it proved to be particularly controversial. Since legal aid is essential in the safeguarding of the right of access to a lawyer, these Directives must be considered together.

The Directive on the right of access to a lawyer was transposed via the Amandement of the Austrian Code of Criminal Procedure I 2016 (StPRÄG I 2016) as well as the Amandement of the Austrian Code of Criminal Procedure II 2016 (StPRÄG II).

The right of access to a lawyer shall be respected throughout investigation proceedings, main proceedings and the resolution of any appeal. Pursuant to para. 7 CCP, the suspect has the right to legal defence at all stages of the proceedings.[142] The European Arrest Warrant is regulated through the Extradition and Mutual Assistance Act (ARHG) and in the Federal Law on Judicial Cooperation in Criminal Matters with the Member States of the European Union (EU-JZG) – the provisions on the right of access to defence during proceedings for the execution of a European arrest warrant can also be found there.[143]

3.2. Information on the right of access to a lawyer

The right of access to a lawyer is safeguarded by the duty to inform the suspect who has been deprived of their liberty that such a right exists: according to para. 171 sec. 4 item 2 lit. a, every suspect deprived of their liberty shall be informed of their right to inform a lawyer immediately (further clarification according to StPRÄG 2016 I BGBl I 2016/26) after their arrest. For the suspect who is brought before the competent authority, the general provision in paras. 50 sec. 1, 164 sec. 1 sentence 3 CCP

141 Directive 2016/1919/EU (Directive Legal Aid) on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings. The Member States shall transpose this Directive into national law until 25 May 2019.

142 para. 7 CCP.

143 Stefan Seiler, Strafprozessrecht (Manz Verlag Wien 2015); Christian Bertel and Andreas Venier, Strafprozessrecht (Manz Verlag Wien 2016).

applies. The information about rights has to be provided without delay, i.e. immediately after the person is taken into custody to be brought before the competent authority. Waiting until the interview to provide the information about rights is not allowed.[144]

The amendment in para. 59 sec. 4 CCP lays down that suspects who have been arrested or brought before the competent authority for an immediate interview (para. 153 sec. 3 CCP) without a lawyer have the right, if they do not choose their own lawyer (para. 58 sec. 2 CCP), to contact a 'stand-by defence counsel'. To this end, the so-called 'stand-by legal counselling service' ('Rechtsanwaltlicher Bereitschaftsdienst', 'Verteidigernotruf') is at their disposal (see also chapter B.2.3).

In practice, arrested persons are asked during the filling out of the protocol for detention whether they wish to be represented by a lawyer. It is not a requirement that the form is filled out by the police official together with suspect – but the number of options and the not necessarily clear distinctions are noticeable:

- *Do you want us to contact a **defence counsel** or legal representative?*
- *Do you want to use the arrest hotline of the stand-by legal in service?*
- *Do you want a **defence counsel** to visit you (subject to fees)?*
- *Do you want the hotline of the stand-by legal counselling service to send a lawyer?*
- *Do you want to be visited by a lawyer of your own choice?*[145]

The instruction on custody, first measures, contact and documentation[146] further stipulates that the suspect shall be informed about the stand-by legal counselling service and handed the letter of rights for arrested persons and the info sheet on stand-by legal counselling service without delay, at the latest before the first interview. The letter of rights for arrested persons mentions the right of access to a lawyer as well as the option of contacting the stand-by legal counselling service for the purpose of an initial conversation free of charge.[147] The info sheet on the stand-by legal counselling service is 'available daily from 0.00 to 24.00 hours where, if required, a counsel entitled to represent clients in criminal proceedings can be contacted immediately'. The info sheet informs that the stand-by service encompasses

144 Soyer and Schumann, 'Commentary on para. 59 CCP' para. 24 et.seq. in Fuchs and Ratz, Wiener Kommentar zur StPO.

145 See the form 'Protocol for detention' (Anhalteprotokoll).

146 Instructions, subject: Custody, first measures post arrest, notification rights and duties, documentation of the custody, AZ P4/47319/2014 from 19 February 2014, 12-13.

147 Page 1 of the info sheet from 1 January 2014: „You have the right to contact a person of your choice [...] and a defense attorney about your arrest. If the person is reachable by phone, you may also make the communication yourself. The connection is made on the basis of your information by an official and then handed over the telephone receiver to you. During the conversation, an official will be present. Your phone conversation must be limited to what is most needed, namely, that you have been arrested, where you are being held, and what the allegation against you is. If you want to speak to a lawyer, but do not know any specific one, you can ask the person of trust to put you in touch. You can also have a free initial consultation with a lawyer through the Lawyer's Journal Service. For more information, please contact the officials responsible for your detention'.

an initial conversation over the phone, and, on request, a personal consultation with a lawyer and where required legal representation during an interview.[148] Regarding fees, the info sheet mentions that initial contact over the phone is free of charge and that 'during this first consultation the counsel will provide you with detailed information on the nature, range and potential costs of services available within the scope of the legal counselling service'.[149] As mentioned earlier, these info sheets are, at least in Vienna, handed out in the detention area by police officers who do not conduct interrogations themselves and therefore might not be familiar with the details, e.g. the payment of costs.

Finally, the right of access to a lawyer is pointed out before the interview: 'You can contact a defence counsel and grant them powers of attorney. Should you not contact a lawyer of your own choice, you can also contact a stand-by defence counsel.' In the additional information for the police officials conducting the interview it is pointed out that only the arrested suspect or the accused person brought before a competent authority have the right to a first consultation with a lawyer free of charge (the stand-by legal counselling service).

Police official 1: It often leads to us sitting there, reading it out to the person in front of us who then looks at it and then at you and asks, 'Listen, do I need a lawyer or not?'
Police official 2: That is the main question.
Police official 1: Well then he asks me and I say, 'Listen, I can't say yes or no to that, if I say no, that would almost constitute abuse of office. And then he says, 'Well, if I just tell you what happened, does that suffice, do I need a lawyer for that or not?'
– Police officials in focus group discussion 2

At the same time, many suspects are under the impression - from watching TV - that the lawyer will 'do the interview for them'. One police official explained that he counters with another question, encouraging the suspect to think for themselves about how a lawyer could benefit the current situation, or by referencing the right to remain silent. There was no agreement among police officials on whether it was permitted to point out that the lawyer was not allowed to intervene during the interview, but many police officials said that they provide the accused person with that information.

On the one hand, defence counsels reported an increased awareness among police officials regarding the rights of the accused and the right of access to a lawyer already prior to the Directives. On the other hand, they said that despite this increased awareness and the formal correctness of the information on their rights, they often undermine it themselves. This, caused by pointing out that a lawyer will cost but

148 See Info sheet 'Stand-by Legal Counselling Service („Arrest Hotline')' < https://www.rechtsanwaelte.at/index.php?eID=tx_securedownloads&u=0&g=0&t=1533665283&hash=41f567c3bbb568199c7247783ca7b06e5121ba53&file=uploads/tx_templavoila/info_englisch_04.pdf >.

149 Ibid.

‘have no effect’, because all they can do is sit in the corner. Another reasoning was that calling a lawyer will require the suspect to wait for them, or that the suspect ‘had nothing to hide’. [150]

Regarding the possible role of the lawyer, some police officials did in fact express the view that in many cases, their presence ‚accomplishes nothing‘.[151] This impression relates to, in particular, the restricted role of the defence counsel during the interview stipulated in para. 164 CCP, which - while mostly exercised differently in practice (see 3.5.) - appears to be mentioned often when the information about rights is provided.

Police officials, as well as defence counsels, emphasized a largely mutual and, in principle, positive attitude towards each other as well as well-established practices in their common dealings.[152] Some officials emphasized that it is in their interest to have a defence counsel present at the interview, as it serves as a guarantee that procedural safeguards are respected, thereby increasing the likelihood that the interview will ‘hold up’ in the main proceedings. However, an official from the provincial CID pointed out that police officials from the regional police department had a lot of experience of defence counsels, and it was her impression that officials who might have less experience with conducting interviews and therefore defence counsels exhibited greater inhibition and potentially also greater concerns regarding the consultation of a lawyer.

However, some police officials also expressed the view that the increasing presence of lawyers during the interview interferes negatively with the results of the interview as it leads to less willingness on the part of the suspect to provide answers. It increases, according to police officials, the use of the right to remain silent.[153] In this respect, defence counsels lamented that while the majority of police officials performed their work correctly, some still adhered to a view of the defence counsel as the suspect’s ‘accomplice’ and therefore as someone who will instruct them to make false statements – as opposed to a view of the defence counsel as a safeguard of procedural rights. On the one hand, understanding was expressed for the police’s aim to achieve results, on the other hand, it was pointed out that the resulting imbalance during the proceedings could only be corrected by having a lawyer present. It was emphasized, in particular, that their presence often leads to better statements because interviews have to be prepared constructively, and that a lawyer’s presence by no means has to lead to the use of the right to remain silent.

Defence counsels also lamented that suspects think they appear guilty when asking

150 One defence counsel during a focus group discussion: ‘Whenever I ask the detainees, whether they have been informed about their rights or not, they always say that the official said they could not afford it. Once the lawyer is in the room, you‘ll owe them 1000 Euros. Then they sit there and think, well I don’t have 1000 Euros, so I won’t take a lawyer. In practice, that’s how it goes’.

151 Police official during a focus group discussion: ‘,It makes me think: ‚Why does this person take a lawyer?‘ It will only cost money but accomplish nothing. It cannot accomplish anything‘.

152 Police official during a focus group discussion: ‘,Most of the lawyers, with very few exceptions that are known by name, but most lawyers support our work, in my experience’.

153 Focus group discussion.

for a lawyer, or that even the police assumes that if an accused person were not guilty, they would not require a lawyer. In the case of accused persons that are not detained, it has therefore been suggested that written summonses be distributed to interviewees as opposed to issuing summonses over the phone, to include, alongside the information about the accusation, the information that no disadvantage will result from consulting a lawyer.

The conversations revealed essential differences regarding knowledge on the topic of the allocation of costs for defence lawyers: In the case of persons in custody, police officials emphasized multiple times that meeting the costs for the defence lawyer at this stage of the proceeding was not due immediately, but that the fee was paid only at a later stage of the proceedings.[154] The Federal Ministry of Justice shares the same opinion. At the same time, defence counsels pointed out that in cases where legal aid was claimed and granted later, the fees for the stand-by legal counsel present at the interview were also covered.

Some police officials in the focus group discussions addressed a possible lack of space during interviews. Since most of the interrogations are conducted directly in the office, it might become cramped if a defence counsel and an interpreter are present in addition to two officers and the suspect.

3.3. Timing of the access to a lawyer

Access to a lawyer must be provided in such time and in such manner, that allows the persons concerned to exercise their rights of defence practically and effectively (Article 3 para. 1 of the Directive).

With regard to the investigation proceedings, such a timely access to a lawyer means that suspected or accused persons must be granted the right of access to a lawyer 'without undue delay'. In any event, suspects or accused persons shall have access to a lawyer from whichever of the following points in time is the earliest:

» ***Before they are questioned by the police or by another law enforcement or judicial authority (lit. a)***

The right of access to a lawyer before questioning by a law enforcement or judicial authority was transposed via StPRÄG 2016 I and II.[155] para. 59 sec. 1 CCP, StPRÄG 2016 II transposed the accused persons access to a defence counsel at any time during the proceedings.[156] While para. 59 sec. 1 CCP emphasizes that right for the undefended arrested person or the arrested person who has not been brought befo-

154 E.g. police official during an interview: 'It happens frequently that the accused persons believe if it's a right, then that means that it is also paid for. And that's not the case. Because in our case it doesn't get paid. The defence counsel in court – yes. But not for the police. And we say that in advance. We also tell them very clearly ‚We can call one'. We don't wait forever. But we would wait about an hour. [...] Then many say ‚No then let's do the first one like this. Afterwards will be sufficient'.

155 Explanatory remarks to the government bill no 1058 BlgNR 25. GP 19; Explanatory remarks to the government bill no 1300 BlgNR 25 GP 5.

156 Soyer and Schumann, 'Commentary on para. 59 CCP' para. 4, 7, 16 in Fuchs and Ratz, Wiener Kommentar zur StPO.

re a competent authority, the regulation must be read in the context of para. 58 sec. 1 CCP – this means that access to a lawyer at any time for all suspects is guaranteed, including, of course, suspects who already have legal representation. The revised version of para. 59 sec. 1 CCP constitutes a considerable further safeguard of the right of access to a defence counsel.

» ***Upon the carrying out of an investigative or other evidence-gathering act in accordance with point c (lit. b)***

The access to a lawyer according to Article 3 para. 3 lit. b of the Directive regarding the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act is further specified by Article 3 para. 3 lit. c: it stipulates that suspects or accused persons shall have, as a minimum, the right for their lawyer to attend the following investigative or evidence-gathering acts as well as reconstructions of the scene of a crime where those acts are provided for under national law and if the suspect or accused person is required or permitted to attend the act concerned.[157]

For reconstructions of the scene of a crime, the right of the defence counsel to attend was already transposed in para. 150 sec. 1 CCP. The right of the lawyer to attend is safeguarded by para. 150 sec. 2 CCP. It stipulates that the involvement of the defence counsel – as opposed to the right of the suspect, the victim or a private party to attend – may not be restricted under any circumstances.[158]

Regarding confrontation following from diverging statements according to para. 163 sec. 3 CCP, the provisions for the interview apply in analogy. It follows from this that the defence counsel has the right to attend the confrontation and the law conforms to the Directive.[159] With the introduction of para. 163 sec. 4 CCP, further transposition of Article 3 para. 3 lit. c of the Directive is ensured by stipulating the right of the defence counsel to attend all those confrontations to which the suspect is a party. If the suspect is not a party to the confrontation, the defence counsel does not have the right to attend.[160]

» ***Without undue delay after deprivation of liberty (lit. c)***

The amended para. 59 sec. 1 CCP now emphasizes that the right to contact, consult and grant powers of attorney to a defence counsel also applies to suspected or accused persons who have been deprived of their personal liberty through arrest or by being brought before a competent authority.[161] The right of access to a lawyer pursuant to para. 59 sec. 4 CCP is now guaranteed from immediately after the beginning of deprivation of liberty until a decision on detention pending trial has been

157 Article 3 para. 3 lit c Directive 2013/48/EU.
158 para. 150 para. 2 CCP.
159 Explanatory remarks to the government bill no. 1058 BlgNR 25. GP 18.
160 Explanatory remarks to the government bill no 1058 BlgNR 25. GP 18.
161 Austrian Federal Law Gazette, BGBl I Nr. 121/2016.

reached.[162] This serves to ensure a national regulation on the right to a lawyer's presence (in time) and efficient participation in the interview of the suspect in conformity with Union law.

While para. 59 sec. 1 CCP regulates access prior to the interview, this does not change the fact that every accused person who has been deprived of their personal liberty shall be provided with access to a lawyer without undue delay and regardless of the upcoming interview. Although the wording of para. 59 sec. 1 sentence 1 CCP is too narrow in this respect, the right to contact a lawyer at any time (pursuant to para. 58 sec. 1 CCP) applies. The regulations thus require to be interpreted in conformity with Article 3 para. 2 lit. c of the Directive 2013/48/EU, which stipulates the right of immediate access to a lawyer for suspected or accused persons who have been deprived of their liberty.[163]

The suspect or the person brought before a competent authority (para. 153 sec. 3 CCP) thus has the right to contact and grant powers of attorney to a lawyer already at the first interview by the police (para. 59 sec. 1, para. 164 sec. 2 CCP). If a lawyer is consulted, the interview shall be suspended until the arrival of the defence counsel, unless this disproportionally prolongs custody. A disproportional prolongation of custody can be assumed if the interview cannot take place within the time limit of 48 hours due to the requirement to wait for the defence counsel.[164] Federal Ministry of Justice and ÖRAK have additionally agreed on the principle that the maximum waiting period for the arrival of a defence counsel is 3 hours.[165] In metropolitan areas, a shorter amount of time may be acceptable.

Regarding the practical implementation of the timely access to a lawyer, focus group discussions focused, above all, on the course of actions after a defence counsel has been contacted in cases of arrests (lit. B.) and prior to police interviews (lit. a.).

> *'But as mentioned before, this is an interpersonal thing. If he says ‚Excuse me, I'm currently in Linz and will be there in 1,5 hours', then it won't be a problem, then we'll wait the 1,5 hours. I don't care whether it's half an hour earlier or later, that's not a problem. But once you realize that the lawyer doesn't want to come or simply attempts to delay, then you have to start at some point. But that only rarely happens…'*
>
> – Police official in focus group discussion1

Some police officials emphasized that waiting for the lawyer was not an issue, since an early presence is also in the lawyer's interest, and other work could be carried out in the meantime. Others, however, seemed to consider it an annoyance to first have to wait for an interpreter and then again for a defence lawyer. Several police officials

162 Soyer and Schumann, 'Commentary on para. 59 CCP' para. 11 in Fuchs and Ratz, Wiener Kommentar zur StPO.
163 Ibid, para. 18.
164 Decree of the Federal Ministry of Justice, BMJ-S578.029/0015-IV 3/2016 (2016) 10.
165 Ibid.

also reported that, at times, the defence counsel does not arrive – either because it would take too long or because reference is made to the statement to be made later in prison (see B.3.4. regarding stand-by legal counselling service). If the suspects remain silent, records of this have to be made and the interview is over. One police official said that in cases where waiting for the defence counsel exceeds 3-4 hours, the interview has to be started without a lawyer, since this could be a tactical approach – this is, however, only possible if the suspect is willing to make a statement without the presence of their lawyer.

Defence counsels reported that police officials will usually make arrested persons 'sit and wait', which means that it is usually possible to arrive in time for the interview. However, once the defence counsel announces their visit, they said that there is a greater urgency on behalf of the police to begin the interview.

3.4. Modalities of the access to a lawyer

Article 3 of the Directive stipulates that suspects and accused persons shall have the right of access to a lawyer in such time and in such a manner that allows the persons concerned to exercise their rights of defence practically and effectively. According to para. 3 lit. a, this encompasses the right to meet in private and communicate with the lawyer representing them (see B.3.4.1.), and the lawyer's attendance during, as well as their effective participation in interviews (see B.3.4.2.).

In the case of an arrest, the person can contact a legal counsel chosen at their own discretion and bear the fees for their service. If the person cannot afford a lawyer, a first consultation with the stand-by legal counselling service can be made free of charge.

Stand-by legal counselling service

On the 1st of January 2017 the stand-by legal counselling service, which previously was not regulated by law, was established in para. 59 sec. 4 CCP and extended in its temporal area of competence: The stand-by legal counselling service enables the suspect, who is not represented by a defence counsel, to get help immediately following the beginning of detention until the decision on the imposition of custody.[166]

It was a necessary response to earlier criticism of the system of legal aid, where it was argued that legal aid would unlikely be granted prior to the first interview for practical reasons alone. The judicial interrogation with regard to the decision on the imposition of custody often took place without legal aid. This was required with regards to the Directive on legal aid for suspects and accused persons in criminal

166 Soyer and Schumann, 'Commentary on para. 59 CCP' para. 4 in Fuchs and Ratz, Wiener Kommentar zur StPO. See also Decree of the Federal Ministry of Justice, BMJ-S578.029/0015-IV 3/2016; Criminal procedure amendment law II 2016 < https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2016_I_121/BGBLA_2016_I_121.pdf >.

proceedings, which required transposition before May 2019.[167]

The stand-by legal counselling service is available 24/7 under an Austrian-wide telephone number, which is operated by the ÖRAK via a call centre. The call centre enables direct communication between the stand-by lawyer and the caller. There are two stand-by lawyers per province. The bar associations maintain lists with stand by lawyers, who volunteer to take on the stand by legal counselling service and make sure that these are available.

The detained person is informed about the possibility of contacting a lawyer via the letter of rights for detained persons as well as the info sheet on the stand-by legal counselling service.[168] Furthermore, prior to every interrogation the suspect is informed about the right to contact a stand-by legal counsel.

The initial consultation by phone is free of charge. Moreover, the suspect is able to demand an appearance in person of the stand by legal counsel (paras. 164 or 174 sec. 1 CCP). If the suspect demands an appearance in person, the interrogation has to be paused until the defence counsel arrives. For a personal defence counsel a hourly rate of € 120,- (plus VAT) is charged to appear in person.[169]

In practice though, lawyers often refrain from charging the fee if the court subsequently grants legal aid.[170] The suspect can apply for legal aid after the transfer to prison. The Federal Ministry of Justice covers the costs of the ongoing operation, including the legal services, which were not or could not be paid by the accused person.[171]

In 2016 the stand-by legal counselling service was consulted 409 times.[172] Following regulation by law in 2017, the stand by legal counselling service was consulted 1.422 times in total in 2017, in the first half year period (January 2018 – June 2018) 601 times in total.[173] In comparison to the time period prior to the legal change, the number of calls almost quadrupled.[174]

167 Article 4 para. 5 of the Directive on Legal Aid 2016/1919, which shall be transposed until 25 May 2019 schedules that legal aid should be granted immediately and prior to the interrogation at the latest. Referring to the transposition of the Legal Aid Directive, see inter alia Barbara Kraml, 'Directive 2016/1919 on legal aid for Suspected and accused persons in criminal proceedings as well as sought persons in European arrest warrant proceedings'
< https://ales.univie.ac.at/fileadmin/user_upload/p_ales/Gesetzesvorhaben/RL_Prozesskostenhilfe_Kraml_ALES_HP.pdf > accessed 27 November 2018.

168 See info sheet for detained persons, accessed 1 January 2014.

169 ÖRAK, Info sheet for lawyers on the stand-by legal counseling service, as of 1 January 2017, available:
< https://www.rakwien.at/userfiles/file/Formulare/Verteidigernotruf/Verteidigernotruf_Informationsblatt_Oerak.pdf > accessed 29 January 2017.

170 Soyer and Schumann, 'Commentary on para. 59 CCP' para. 12 in Fuchs and Ratz, Wiener Kommentar zur StPO.

171 Decree of the Federal Ministry of Justice, BMJ-S578.029/0015-IV 3/2016.

172 Manfred Seeh, 'Schweigen bis der Anwalt kommt' Die Presse (Vienna, 16 November 2017)
< https://diepresse.com/home/panorama/oesterreich/5321274/Schweigen-bis-der-Anwalt-kommt > accessed 8 February 2017.

173 Ibid; Information for the present project given upon request by ÖRAK.

174 However, the number of arrests in Austria could not be found out upon request at the Federal Ministry of the Interior and the Federal Criminal Police Office (BM.I and BKA).

Defence counsels emphasize the importance of the stand-by legal counselling service as a step towards real equality of arms in criminal proceedings but criticize its practical implementation. They said that some police offices reach out to the service regularly while others never do so. Defence counsels who are personally involved in the stand-by legal counselling service report that it is often the case that no or only very few calls are received, and that the police consider them an annoyance. Problems with regard to the allocation of costs have already been discussed (see B.3.2.)

> *'I've spoken to suspects time and again who told me, they weren't really made aware of this [stand-by legal counselling service]. They didn't catch that. Sometimes, the information about rights is delivered in a way that puts emphasis on the part where it says that it has to be paid out of their own pocket. And less emphasis is put on 'only if you can afford it' – but that would have to be added.'*
> – Interview with defence counsel 1

It must be said that in the information about rights in the PAD-NG, the role of the stand-by legal counselling service is not defined ('Unless you contact a legal counsel chosen at their own discretion, you can also contact a 'stand-by counsel''), but at this stage the person should already be informed by way of the letter of rights for arrested persons, which mentions the possibility of an initial consultation free of charge. Moreover, the separate info sheet on the stand-by legal counselling service is handed out to arrested persons. The information about rights prior to the interview becomes relevant if the suspect does not speak German and the info sheets are not available in their language, or in cases where they are available, if the suspect cannot understand their meaning.

Several of the former suspects consulted for this project reported that they were not informed about the option of the stand-by legal counselling service. It could not be determined whether this was the result of a failure to understand the provided information or a failure to provide the information about rights. One person reported that they were told that the stand-by legal counselling service could not be reached on weekends.

It is further noticeable that different explanations exist with respect to the allocation of costs:
Defence counsels said that consulting a lawyer, also available through the stand-by legal counselling service, is often portrayed as expensive.[175] From focus group discussions with police officials it became clear that police officials often assume that the suspect must bear the fees for a lawyer's attendance in person at the police station. In part, this is based on personal experiences whereby the lawyers did not

175 One defence counsel reports: 'He did say: You have the right to stand-by legal counselling service, sign here, but I will tell you that that is VERY expensive and how will you pay for it. I'd say you just sign here'.

want to come because payment was not certain.[176]

Besides the uncertainty regarding the allocation of costs, when the suspect is not capable of paying the fee, it was claimed that a lawyer is always available in principle via phone, still only very rarely is the lawyer present at the interrogation. A lively discussion ensued among police officials in the focus group regarding their different experiences with personal interventions by lawyers and in respect of whether the defence counsel is obliged to appear in person or not.

> *'The problem is that you want a lawyer, you organise one via the hotline or let the person call them, but then the lawyer says ,I can come, but I will charge something', 'Fees? Why? How can I get one for free?' So, I'll say 'During the criminal trial, but not now.' […] Often times you have already resolved that issue and know that the suspect wants to remain silent, but he still wants to talk to the lawyer and the lawyer tells him 'I'll come, but only if my fees are paid'. Then he doesn't want that. Often, we tell them that, but maybe they don't believe us or want to hear it from a lawyer, because they don't trust us.*
> – Police official during focus group discussion 1

A decree of the Federal Ministry of Justice mentions that consultation and legal representation exceeding the initial consultation is to be paid for by the suspect. The Federal Ministry of Justice however covers the operating costs of the stand-by legal counselling service, including those legal defence counselling services that suspects have failed to pay.[177] A representative of the Austrian Bar Association emphasized that in cases where the fees are not paid they are nevertheless covered, thus enabling legal representation free of charge during investigation proceedings.[178]

Besides uncertainty regarding the allocation of costs and its effects on information about rights, defence counsels who work in the stand-by legal counselling service reported that accounting for the fees is cumbersome and bureaucratic, which makes the work unattractive at least from a financial point of view.

If the defence counsel has to appear in person, the power of attorney and agreement on fees forms are taken along, because in principle, the suspect has to pay for the legal service provided that it is affordable. If the lawyer is in fact mandated, but the suspect is not immediately granted legal aid, no longer in detention or chooses a legal counsel at their own discretion, they have to pay the fees for the lawyer's service. In practice, this requires the defence counsel to 'chase' the person if they want to be paid. In cases of consultations by phone or if the appearance in person for the first interrogation is covered by legal aid, the ÖRAK manages the accounting. In cases of legal aid, the index of costs must be provided to the Bar Association in Vienna.

176 One police official reported: 'It has happened to me twice that a lawyer asked the accused person via the interpreter whether they had money. He said no and then the lawyer said, he wouldn't come.' See focus group discussion 2.

177 Decree of the Ministry of Justice, BMJ-S578.029/0015-IV 3/2016 (2016) 8.

178 Interview with a defence counsel.

Personal presence of a lawyer during interviews

In Austria, the presence of the lawyer is not mandatory during the investigation proceedings, except in cases of preventive detention where the suspect is in a specialised institution (para. 429 Abs 2, para. 430 sec. 3, paras. 436, 439 sec. 1 CCP), seem likely (para. 61 sec. 1 no- 2 CCP). The identification of such preventive detention is often difficult, thus psychologically impaired persons are frequently not legally represented during the investigation proceedings.

Other cases of mandatory defences mentioned in the CCP all refer to the main proceedings, which follow the investigation proceedings.[179] Even for juveniles there is no mandatory defence during the investigation proceedings, but only in the main proceedings of Regional Courts and main proceedings of District Courts, when this appears to be in the interest of administrative justice, especially when it seems necessary and appropriate to safeguard the rights of juveniles.

Defence counsels claimed that in the great majority of cases, no legal representative is present during the first interview. They emphasized the difference between cases wherein the suspect was detained and cases in which they were free and summoned to an interview. The latter cases provide more time to gain knowledge of the proceedings and find a lawyer. In the majority of cases, however, the summons is either made via phone, leaving little time before the interview, and the information about rights (e.g. the right of access to a lawyer) is provided right before the interview.

Both police officials and defence counsels emphasized that whether a lawyer is present also strongly depends on the offence. During larger proceedings, lawyers are always present according to the police officials consulted, e.g. in proceedings on fraud and economic crimes. Single perpetrators, apart from previously convicted persons, are usually not legally represented. For drug offences, reports from one province indicated that legal representatives are never present and also not requested, because according to the police ‘the facts are usually clear and a lawyer’s presence would accomplish nothing’, but also because the persons are not very familiar with the procedure. Defence counsels further pointed out that the likelihood of contacting a lawyer decreases for persons who do not speak German.

The fact that a very high number of criminal trials with mandatory legal representation, pending at the Regional Court for Criminal Matters in Vienna, are cases involving legal aid is also a key explanation for why the majority of persons are not represented by a lawyer during the first interview.[180]

179 para. 61 para. 1 no. 1 CCP lists the cases of mandatory defence in criminal proceedings exhaustively. It stipulates mandatory defence inter alia for the proceedings, when and as long the accused person is held in pre-trial detention or arrested subject to para. 173 StPO 4 StPO , for the main proceedings Regional Court as a jury, in the main proceedings for accommodation in an institution referred to in Sections 22 and 23 of the Criminal Code or for the main trial before the Regional Court as a single judge, if the offense is punishable by imprisonment exceeding three years, c.f. Achammer ‘Commentary on para. 61 CCP’ para. 2 in Fuchs and Ratz, Wiener Kommentar zur Strafprozessordnung.

180 For the pending criminal proceedings at the Regional Court on Criminal Matters in Vienna, 85% were so called cases of legal aid, see inter alia in Julia Kolda, ‘Verfahrenshilfe mehr Roulette als Garantie’ Die Presse (2017).

It was emphasized by defence counsels several times that the legal representative in cases involving legal aid usually joins the proceedings after the first interview or after the termination of the investigation proceedings once the accusation is clear, but that by then 'the train has left the station' [181], because the protocol for the first interrogation constitutes an essential basis for the following proceedings. Potential faults in the protocol or statements canrarely be revised afterwards. While the stand-by legal counselling service was introduced as a bridge during this first period, it is not yet effectively and broadly utilized.

One defence counsel emphasized the interest on the part of the police in getting a statement, but it was also highlighted that, to be able to adequately counter this interest, the presence of a lawyer is required. The criminal lawyers regretted the fact that police officials, as well as accused persons, often underestimate the importance of the first interrogation and the lack of knowledge about the specific difference made when a lawyer is present, e.g. the safeguarding of a correct recording of the conversation.

However, defence counsels, as well as some police officials, emphasized the advantages of having a lawyer present at the interview: police officials emphasized the procedural safety in cases in which a lawyer is present, and defence counsels pointed out the higher quality of the statements as well as potential additional information (see B.3.2. above).

> *‚We are not unhappy about the presence of a lawyer, to the contrary, it's even better when he's there, because it ensures that our interview will 'hold up' later. Then the defence counsel can't say during the main proceedings that the suspect was pressured, because the defence counsel was there and it is his job to make sure that the interview is conducted lawfully.'*
> – Police official during a focus group discussion 1

Many of the former suspects interviewed indicated that they waived the option of a lawyer (see also B.3.5.) in an effort to be able to quickly exit the situation and because they thought they could not afford one.

In addition to the presence of a lawyer during the interrogation, police officials, as well as criminal defence lawyers, pointed out that the specialisation of lawyers in criminal law is highly relevant when it comes to adequate legal representation.[182] Police officials exemplified this by the consulted private defence counsels, however this corresponds with the often stated criticism on the allocation system regarding legal aid, which does not consider the different thematic specialisations.

181 Focus group discussion with criminal lawyers.

182 Network on Criminal policy (Netzwerk Kriminalpolitk),',Zehn Gebote guter Kriminalpolitik', JSt (2017) no. 4, 311–315, and 312; Julia Kolda, 'Verfahrenshilfe mehr Roulette als Garantie' Die Presse (2017) < https://diepresse.com/home/recht/rechtallgemein/5150756/Verfahrenshilfe_Mehr-Roulette-als-Garantie > accessed 29 January 2017.

3.5. Right to communicate in private with the lawyer

Article 3 para. 3 lit. a of the Directive on the right of access to a lawyer in criminal proceedings stipulates the right to communicate with the lawyer in private: 'The member states shall ensure that suspects or accused persons have the right to meet in private and communicate with the lawyer representing them, including prior to questioning by the police or by another law enforcement or judicial authority.'

In addition to this, Article 4 of the Directive on the right of access to a lawyer in criminal proceedings states the confidentiality of communication between the accused person and the legal aid lawyer, which includes the meeting, the written correspondence, telephone calls and all other authorised forms of communication.

Even prior to the Directive, para. 58 sec. 1 CCP granted suspects the right to discuss matters with a defence counsel if the suspect has asked for a lawyer. The use of the verb ('besprechen') in para. 58 sec. 1 CCP indicates that this goes beyond mere contact but encompasses the right to explain the situation and the possible courses of action available to the suspect.[183] In order for this right stipulated in para. 58 sec. 1 CCP to be exercised in practice, the interview of a suspect shall not begin before the arrival of the lawyer. During the Reform of the Austrian Code of Criminal Procedure (StPRÄG II 2016), this principle was included in para. 164 sec. 2 sentence 2 CCP, which now regulates that an interview shall be suspended until the arrival of the lawyer, unless this would involve an inappropriate prolongation of custody (see also B.3.3.). If the suspect does not choose a legal counsel at their own discretion, contact with the stand-by legal counselling service shall be enabled.

For interviews of suspects who were not arrested and where appropriate time for preparation was given and the information about rights was provided, it is not deemed necessary to wait for the lawyer. However, the accused person may decide to contact a lawyer at the beginning of the interview. Whether these cases require waiting for the lawyer, setting a new date for an interview or postponing the interview is at the discretion of the competent authority.[184]

In any case, the suspect shall be granted the opportunity to consult with their lawyer before the interview and after the arrival of said lawyer (para. 164 sec. 1 sentence 2 CCP). Based on a Ministerial decree, the length of these consultations should not exceed 30 minutes, but this depends on the circumstances.[185]

Prior to the extensive changes made in the course of the 2nd amendment of the Criminal Procedure Code in 2016 (StPRÄG II), the right to confidential communi-

183 Soyer and Schumann, 'Commentary on para. 57 CCP' para. 58, in Fuchs and Ratz, Wiener Kommentar zur StPO.

184 Explanatory remarks to government bill no. 1058 BlgNR 25. GP 19.

185 Decree of the Ministry of Justice on the transposition of the amendments of the CCP, the law on extradition and mutual assistance (ARHG) and the law on judicial cooperation in criminal matters with the Member States of the EU (EU-JZG), serving the Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings, BMJ-S578-029/0015-IV 3/2016 (2016) 10.

cation was not ensured. Therefore para. 59 sec. 1 and para. 2 CCP in its previous version, enabled the monitoring of the communication, under certain conditions and cases, between the accused person or suspect and its defence counsel.

The newly inserted para. 59 sec. 3 CCP now stipulates that any monitoring and thus interferences with the confidentiality of the communication between the (arrested) suspect and their lawyer is not allowed.[186] Pursuant to Article 4 of the Directive, this also encompasses correspondence, which was generally allowed before StPRÄG.[187] An instruction by the Federal Ministry of Justice stipulates that the amendments to para. 59 CCP have ensured that monitoring the communication between the arrested suspect and their defence counsel is now absolutely prohibited.[188] Confidentiality may only be restricted within the narrow bounds stipulated by recital 33 of the Directive.[189]

One police official emphasized that a good atmosphere during the interview was in the interest of the police and that it was therefore not smart to restrict the communication between the lawyer and their client. The police officials surveyed also reported that confidential consultations are very common and work ‘very smoothly’.

The defence counsels surveyed reported that the confidential conversation needed to be enforced by them – but whenever it is asked for, the police mostly allow it. Regarding phone conversations with the stand-by legal counselling service, different experiences were shared: sometimes a confidential conversation is possible, sometimes a police official is present and at other times, suspects do not know whether their conversation is in fact confidential because it takes place in the offices of the police. In such cases, a defence counsel said questions could be asked that only had a ‘yes’ and ‘no’ answer. At the same time, in focus group discussions with the police it was emphasized that suspects have the right to confidential conversations and that this could not be refused.

3.6. ‘Effective’ participation of the lawyer during questioning

Article 3 para. 3b of the Directive stipulates that suspected and accused persons ‘have the right for their lawyer to be present and participate effectively when questioned.’

The passive role of the lawyer during the interview, envisioned in prior versions of para. 49 item 5 and para. 164 sec. 2 CCP, made amendments of the law necessa-

186 bid, paras. 42-43.
187 Soyer and Schumann, ‘Commentary on para. 59 CCP’ para. 43 in Fuchs and Ratz, Wiener Kommentar zur StPO.
188 Decree of the Ministry of Justice, BMJ-S578.029/0015-IV 3/2016 (2016) 6.
189 Ibid.

ry. To conform to the provisions in the Directive, regulations had to be created that enable the lawyer to ask questions, request clarification and make statements during the interview.[190]

However, the current version of para. 164 sec. 2 CCP stipulates that the defence counsel shall not consult with the suspect on the answer to individual questions nor take part in the interview 'in any way'. The wording alone raises doubts regarding the conformity of this provision with the Directive.

Consultation with the lawyer is allowed in intervals after thematically connected parts; the aim is that the course of the interview is undisturbed.[191] After the interview or thematically connected parts have concluded, additional questions may be posed.[192] This means that extensive interviews should be structured, for instance, around different themes pertaining to the accusation.[193] The lawyer has the right to be present. The main task of the defence counsel during this stage is thus to control the lawfulness of the proceedings, such as upholding of the right to remain silent.[194] In matters concerning procedure, the defence counsel can make statements.[195] In addition, the defence counsel may interfere if leading questions, trick questions or ambiguous questions are being asked (para. 164 sec. 4 CCP).[196] After the interview, the defence counsel can inspect the protocol in lieu of the accused person (para. 52 sec. 2 CCP i.B.w. para. 57 sec. 2 CCP) and demand additions and corrections (para. 96 sec. 4 CCP).

The original wording intended for para. 164 sec. 2 CCP stipulated more rights for the lawyer to ask questions during the interrogation. Due to criticism during the legislative procedure, the wording was adapted and now stipulates that the active participation of the lawyer encompasses asking the suspects questions and making statements after the conclusion of the interview or of thematically connected parts thereof.[197] On the part of the public prosecutor's office, concerns were expressed regarding a potential prolongation of the length of proceedings as a result of the provisions.[198] Even before the Directive, the suspect was allowed to refuse answers and consult with a defence lawyer first or to remain silent altogether. Moreover, the interview of the suspect would lose its value as evidence as it would no longer contain statements of the suspect, but rather answers prepared by the defence counsel in response to the charges.[199]
The Austrian Bar Association lamented that this restriction was applied to the final

190 See recital 25 of the Directive 2013/48/EU. See also Birgit Julia Wirth, Nina Marlene Schallmoser and Hubert Hinterhofer, Recht auf Zugang zu einem Rechtsbeistand (Jahrbuch Europarecht 2014) 363.
191 para. 164 para. 2 CCP.
192 Roland Kier and Norbert Wess, Handbuch der Strafverteidigung (Manz Verlag Wien 2017) 153.
193 Decree of the Ministry of Justice, BMJ-S578.029/0015-IV 3/2016 (2016).
194 Roland Kier and Norbert Wess, Handbuch der Strafverteidigung (Manz Verlag Wien 2017) 49 and 153.
195 Decree of the Ministry of Justice, BMJ-S578.029/0015-IV 3/2016 (2016).
196 Christian Bertel and Andreas Venier, Strafprozessrecht (Manz Verlag Wien 2017) 432.
197 Austrian Bar Association (ÖRAK) 'Wahrnehmungsbericht'.
198 Association of Austrian Prosecutors) (Vereinigung österreichischer Staatsanwältinnen und Staatsanwälte), 37/SN-171/ME 25. GP 2.
199 Ibid, 37/SN-171/ME 25. GP 3.

provision because a more active role for the defence would not have led to an unnecessary prolongation of the proceedings but, on the contrary, would have expediated the resolution of the case.[200] In a report by ÖRAK, the restriction was classified as an essential limitation of the right of the defence to consultation and questioning.[201] The Association of Austrian Defence Counsels did equally not agree with the criticism by the public prosecutor's office regarding the active role of the defence, because the suspect was already granted the right to remain silent and give a written statement instead, even before the planned amendment.[202] With reference to the jurisdiction of the ECtHR, the suspect's right to a lawyer must not be restricted because of efforts to improve the efficiency of the procedure.[203]

Regarding the legal interpretation of the current provision, highly distinct views were found among the defence counsels surveyed on whether the current wording of para. 164 sec. 2 CCP guarantees 'effective' participation.[204] While some were of the opinion that the current provision is in violation of EU law, others argued that the provision is sufficient for effective participation in the interview. Others referred to the current practice which largely enables 'effective participation' but pointed out that, based on the current wording, effective participation could not be assumed.[205]

Regarding the practical implementation of the role of the defence counsel, the defence counsels and police officials reported different approaches: most reported that they get along well, which often also leads to greater participation of the lawyer than envisaged in the law.
The survey also revealed differences based on personal approaches, but also

'Often we'll agree with the lawyer that he joins the conversation, because it makes no sense to say that he can't say anything now if I then have to repeat the whole interview. If it doesn't disturb the flow of the conversation and he doesn't permanently stop the client from making a statement, then I'll let the lawyer talk.' – Police official during a focus group discussion 2	*'Some allow the lawyer to talk big in there. I don't allow any of it. Not for personal reasons, but because I have a system for my interviews. And I don't need someone who'll constantly…Because I know what they want. Throw a smokescreen, blab, whatever. I have the worst job. I have to ask the questions that aid me – if it's a complex story, I'll write them down before. Otherwise you can't keep up with the writing. [..] I can't accomplish quality in my protocol otherwise.'* – Police official 1 in focus group discussion

200 Austrian Bar Association (ÖRAK), 'Tätigkeitsbericht 2016', 10.
201 Austrian Bar Association (ÖRAK) 'Wahrnehmungsbericht' 2015/2016, 13.
202 Richard Soyer,'Newsletter der Vereinigung österreichischer StrafverteidigerInnen', 36 JSt 2.
203 Soyer and Schumann, 'Commentary on para. 58 CCP' para. 39, in Fuchs and Ratz, Wiener Kommentar zur StPO; Relevant jurisdiction by the ECHR is, inter alia: Salduz v Turkey App no 36391/02 (ECtHR, 27 November 2008), Sejdovic v. Italy App no 56581/00 (ECtHR, 1 March 2006), Sharkunov and Mezentsev v Russia App no 75330/01 (ECtHR, 2 July 2009).
204 Focus group discussions and interviews with defence counsels.
205 Interview with defence counsel: 'If one is reduced to being quiet then that is not effective participation'.

depending on the offence: a police official who works with economic crimes reported that he will usually not allow interventions during the interview because he would otherwise not be able to guarantee the quality of the protocol. This argument is linked with the requirement that the police officials have to record the interview on their own – Audio-visual recordings could possibly be a remedy. In very few cases, it was also reported that the lawyer had to sit behind the accused person because, it was argued, there is no regulation governing that the suspect and their lawyer are allowed to sit next to each other.

Despite the fact that, in practice, police officials handled the effective participation of the lawyer differently, the current provision was considered to be good and clear, e.g. for cases with defence lawyers who intervene too strongly during the interview.

Although in practice, para. 164 sec. 2 CCP is handled less strictly than the regulation stipulates – which probably explains why most defence counsels do not consider it a significant problem – the current provision has another effect: when information about rights and the right of access to a lawyer are provided, the lawyer is not technically allowed to speak during the interview. It can be assumed that this understanding of the role of the lawyer during the information about rights will have an effect on the number of times a lawyer is consulted, and that more suspected or accused persons will waive the option of access to a lawyer.

The wording of para. 164 sec. 2 CCP should be amended in a way that leaves no doubt regarding its conformity with the Directive and parallels its interpretation in practice.

3.7. Waiving the right to a lawyer

The right of access to a lawyer can be waived according to Article 9 para. 1 of the Directive if the suspected or accused person has been provided, orally or in writing, with clear and sufficient information in simple and understandable language about the content of the right concerned and the possible consequences of waiving it (Article 9 para. 1 lit. a) and the waiver is given voluntarily and unequivocally (Article 9 para. 1 lit. b). According to Article 9 para. 2 of the Directive, the waiver shall be noted and may subsequently be revoked at any point during the criminal proceedings (para. 3). It shall be ensured that suspected or accused persons are informed about that possibility. In the recitals of the Directive, it is pointed out that when a juvenile waives their right of access to a lawyer, their specific conditions should be taken into account.[206]

206 See Rectials 39 and 55 of the Directive on right of access to a lawyer in criminal proceedings.

In Austria, legal representation is not mandatory for all cases of interrogations during the investigative proceedings (see B.3.4. above).[207] Therefore, the right of access to a lawyer may be lawfully waived.[208] An exception exists in relation to proceedings in which a preventive detention could be ruled, e.g. preventive detention ('Anstalt für geistig abnorme Rechtsbrecher').[209] In these cases, a defence lawyer must be supplied during the entire proceedings (even against the will of the suspect).[210] The defence counsel can even file requests for the benefit of the suspect against their will.[211] Regarding the practical implementation of these rights, a problem arises because although legal representation is required throughout the proceedings, the absence of a defence counsel is only null and void when it comes to the main proceeding (para. 430 sec. 3 CCP).

Legal representation for juveniles is not required for investigative proceedings. Although for juveniles and also for persons, whom a guardian is ordered, the legal representative (e.g., guardian) is allowed to authorize a lawyer, even against their will (para. 58 sec. 4 CCP). With regard to the need for protection of juveniles, it should be required that they are not interviewed without a defence lawyer – this would also be consistent with the Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings.[212]

The elaborations on StPRÄG I 2016 mention that the information for the suspect on the waiver, and the condition that it be given voluntarily, have been regulated in national law to conform to the Directive. paras. 7, 49 no. 2, 58 et seq., 164 sec. 4 CCP guarantee the right to revoke a waiver and stipulate that an indefinite commitment to the waiver is not allowed. para. 59 sec. 1 sentence 2 CCP clarifies that the arrested person and the suspect who is brought before a competent authority must be informed that a waiver can subsequently be revoked at any point during the criminal proceeding. In addition, police officials reported that it often appears to be unclear to suspects whether a waiver is permanent or not. The information about rights for suspects within the PAD-NG enables different answer options, which represent the different options.[213]

207 Explanatory remarks to the government bill no. 25 BlgNR 22. GP 86; c.f.Soyer and Schumann, 'Commentary on para. 61 CCP' para. 44 in Fuchs and Ratz, Wiener Kommentar zur StPO.

208 para. 59 para. 1 and 50 para. 3 CCP.

209 para.para. 21, 61 para. 1 no. 2 CCP.

210 para. 61 para. 3 CCP.

211 para.para. 429 para. 2 no. 1, 436 CCP. Soyer and Schumann, 'Commentary on para. 61 CCP' para. 19 in Fuchs and Ratz, Wiener Kommentar zur StPO.

212 See Article 6 para. 3 as well as Recital 55 of the Directive, which stipulates the assistance by a lawyer without undue delay, if children and juveniles are made aware that they are suspects or accused persons. In any event, children shall be assisted by a lawyer before they are questioned by the police or by another law enforcement or judicial authority. The Federal Ministry of Justice refers in this context to the transposition deadline of the Directive, which expires on 11 June 2019.

213 The PAD-NG contains following answer options:
•"I expressly declare to waive the right to a lawyer for the period of criminal police custody or the length of the interview, respectively. I am aware of the fact that I can revoke this waiver at any point.
•"I want to contact the following lawyer prior to my interview: .....
•..... [blank space for a different answer]".

The waiver shall be noted in writing, may subsequently be revoked at any point during the criminal proceedings and is at first restricted to the period of police custody (para. 50 sec. 3 in combination with para. 59 sec. 1 CCP).[214]

All of the parties surveyed – police officials, defence counsels and former suspects – reported frequent waivers of the right to a lawyer by suspects. According to police officials, the right to a lawyer is often waived because all the facts are on the table. Many police officials expressed the view that in many cases, bringing in a lawyer does not 'accomplish anything', e.g. in cases of shoplifting (also see B.3.2. and B.3.5.). Another reason reported by police officials relates to the prolongation of the waiting time until the interview because it can take a couple of hours for the lawyer to arrive.[215] According to the police, when given the option, many suspects prefer to leave as quickly as possible.

> *Q: Did you then call a lawyer?*
> *A: No, I didn't. As I said, at first he [the police official] was relatively nice and that's why I thought I won't need one. Only in retrospect did I think differently about that.*
> – Former suspect during an interview

The desire to get the experience over and done with was reported in interviews with former suspects, during which many said they had waived their right to a lawyer. This constituted a problem in one case, for instance, where a person was arrested for a drug offence – the person, who in the meantime has been convicted, reported they were in such a dire mental and physical state and merely wanted to get the interview, which took place outside a provincial capital on a Friday night, over and done with in order to go and see a doctor.[216] According to the individual, the facts were on the table although he also reported that during the interview, the police attempted to frame him for other crimes he did not commit. Another reason for a waiver that was mentioned was being unable to afford a lawyer. The defence counsels expressly criticized the information about the right to a lawyer (see also B.3.2.) which, they said, clearly reflects the view of the police officials, adding to the reasons why suspects waive their right to a lawyer. One defence counsel emphasized that if the information about rights were delivered adequately, nobody would waive the right to, at least, the consultation with a lawyer via phone.[217]

One demand expressed by defence counsels was to allow the waiver only after the accused person has at least spoken to a stand-by legal defence counsel on the

214 *Soyer and Schumann, 'Commentary on para. 59 CCP' para. 15, in Fuchs and Ratz, Wiener Kommentar zur StPO.*

215 A police official: 'You have to be aware of the fact that someone is confined or arrested for shoplifting or maybe a theft by robbery or coercing or theft. His time significantly prolonged in custody, because he is waiting for his lawyer. He [Anm. The lawyer] passes by two or three hours later and these 3 hours, he has to wait and most of the time they only want to sign quickly, I would say, and then leave. They do not want to stay.' [„Man muss sich da ja vor Augen führen, dass jemand, der wegen einem Ladendiebstahl oder vielleicht wegen einem räuberischen Diebstahl oder Nötigung und Diebstahl eingesperrt worden ist oder verhaftet worden ist. Seine Zeit maßgeblich verlängert in der Anhaltung, weil er auf einen Anwalt wartet. Der kommt nach zwei oder drei Stunden und die drei Stunden muss er da sitzen und sehr häufig wollen sie einfach schnell unterschreiben, sag' ich einmal und wieder gehen. Die wollen ja nicht da bleiben."].

216 Interview with a former accused person.

217 'Who would waive after a correct information about rights? […] I mean, from a rational perspective, nobody would voluntarily waive such rights or such an opportunity.'- Defence counsel 1 in an interview.

phone. However, this request was already declined when the stand-by legal counselling service was first introduced – probably due to concerns about costs.

3.8. Restrictions of the right of access to a lawyer

According to Article 3 para. 6 of the Directive 2013/48/EU, 'in exceptional circumstances and only at the pre-trial stage', temporary derogations from the application of the right of access to a lawyer may be allowed to the extent justified in light of the particular circumstances of the case, on the basis of one of the following compelling reasons: a) 'where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person', or b) where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings'. Those exceptions are supposed to be stipulated clearly in national legislation, and are to be used in a restrictive manner.[218]

Lit. a of the Directive was not transposed into national law as there exists 'no need for such an exception'.[219] Regarding lit. b, the deliberations on StPRÄG I 2016 explained that the exceptions provided for in para. 164 sec. 2 CCP had to be adapted to the more stringent provisions in the Directive.[220]

The conditions for a derogation of the right of access to a lawyer whilst detained by the police are now regulated in para. 59 sec. 2 CCP. para. 59 sec. 2 first sentence CCP requires the right of contact between the suspect and the defence counsel prior to the suspect's transfer to prison to be derogated in as much as is necessary for powers of attorney and general legal consultation to still be possible, insofar as an immediate interview or other immediate investigations appear absolutely necessary in order to prevent significant interference with the investigation or with evidence. If the right of access to a lawyer is derogated, the provisions in para. 59 sec. 2 second sentence CCP must be respected: in such a case, the accused person shall be given a written justification for the derogation by the criminal police immediately or within 24 hours. In respect of these regulations on derogation in para. 59 sec. 2 CCP, experts said that they allow a far-reaching limitation for the arrested accused person during investigation proceedings.[221]

Regarding the derogation of the lawyer's participation during interviews, para. 164 sec. 2 CCP stipulates that this may only occur if, due to special circumstances, it appears absolutely necessary to avert substantial jeopardy to criminal proceedings or interference with evidence through an immediate interview or other immediate investigative proceedings. In such a case, the suspect shall be provided with

218 Recital 38 of the Directive on legal aid.

219 Explanatory remarks to the government bill no. 1058 BlgNR 25. GP 2 < https://www.parlament.gv.at/PAKT/VHG/XXV/I/I_01058/fname_517378 >.

220 Since the changes made to para. 59 para. 1 CCP via StPRÄG I 2016 were revised via StPRÄG II 2016 (and are hence no longer in force), they will not be discussed in further detail.

221 Soyer and Schumann, 'Commentary on para. 59 CCP' para. 8, in Fuchs and Ratz, Wiener Kommentar zur StPO.

an order by the public prosecutor or a written justification by the criminal police. If possible, an audio or video recording pursuant to para. 97 CCP shall be made.[222]

The wording used in para. 59 sec. 2 CCP as well as within para. 164 sec. 2 CCP (significant interference with investigation proceedings) was criticized with respect to the wording in Article 3 para. 6 lit. b of the Directive: according to recital 32, the purpose of Article 3 para. 6 lit. b is to prevent the destruction or alteration of essential evidence or the interference with witnesses – the Directive obviously had no other deficiency of criminal proceedings in mind. Furthermore, it does not constitute 'significant interference with investigation proceedings' for the defence lawyer to enable the suspect to better withstand the pressure of the police interview.[223] The Federal Ministry of Justice does not understand this criticism and refers to the wording used during the transposition of the Directive, which solely differentiates between evidences that already have been captured and that which is still to be captured, thus complying with the goals set out in the Directive 2013/48/EU.[224]

3.9. The right to have a third party and consular authorities informed upon deprivation of liberty

3.9.1. The right to have a third party informed and to communicate while deprived of liberty

According to Article 5 of the Directive, it shall be ensured that suspects or accused persons who are deprived of liberty have the right to have a third person informed of their deprivation of liberty without undue delay if they so wish. A derogation from this right shall only be made on the basis of compelling and clearly stated reasons.

Article 6 of the Directive grants suspects or accused persons who are deprived of liberty the right to communicate without undue delay with at least one third person, such as a relative, nominated by them. Article 6 para. 2 allows the exercise of this right to be limited or deferred in view of imperative requirements or proportionate operational requirements.

In the deliberations on StPRÄG I 2016 it has been noted that national law conforms to EU law to a large extent and therefore adaptation is not required: para. 171 sec. 4 item 2 lit. a CCP and Article 4 para. 7 BVG on the protection of personal freedom already guaranteed the right to communication with third persons immediately upon

222 Article 3 para. 5 of the Directive stipulates that derogations from the right of access to a lawyer without undue delay after deprivation of liberty (Article 3 para. 2 lit. c) is only allowed in exceptional circumstances and only at the pre-trial stage, where the geographical remoteness of a suspect or accused person makes it impossible to ensure the right of access to a lawyer without undue delay after deprivation of liberty. Austria made no use of this exception in the CCP amendment act I and II (StPRÄG I and II).

223 Christian Bertel and Andreas Venier, 'Kommentar zur StPO' (Jan Sramek Verlag 2012) para. 59 no. 3; Andreas Venier, 41/SN-171/ME 25. GP 1f.

224 Statement of the Federal Ministry of Justice regarding this report.

deprivation of liberty; Article 4 para. 7 BVG on the protection of personal freedom guarantees this right without undue delay.[225]

In the interviews with former suspects, most participants confirmed that they were allowed to call a third person. Some reported that this was refused to them or that the call was delayed.

3.9.2. The right to have a third party informed and to communicate in cases of children and juveniles[226]

If the suspect or accused person is a child, it must be ensured that the holder of parental responsibility of the child is informed as soon as possible of the deprivation of liberty and of the reasons pertaining thereto. This information shall not be provided if it is contrary to the best interest of the child. For the purposes of Article 5 para. 2 of the Directive, a person below the age of 18 years shall be considered a child.

The right to communicate with the holder of parental responsibility as well as other potential persons/institutions is regulated in para. 35 sec. 4 JGG. Accordingly, a person with parental authority (or a relative living with the juvenile) as well as youth court assistance ('Jugendgerichtshilfe'), a potential probation officer and the administration of youth welfare shall be notified of the deprivation of liberty without undue delay, unless the juveniles is immediately released. An exception only applies if the juvenile objects for a compelling reason. The national regulations conform to EU law, and there was no need for adjustments.

3.9.3. The right to have consular authorities informed and to communicate with those authorities during the deprivation of liberty

Article 7 of the Directive stipulates that suspects or accused persons who are non-nationals and who are deprived of their liberty have the right to have the consular authorities of their state of nationality informed of the deprivation of liberty without undue delay, and to communicate with those authorities if they so wish. This right shall be granted without undue delay. Where suspects or accused persons have two or more nationalities, they may choose which consular authorities, if any, are to be informed of the deprivation of liberty and with whom they wish to communicate.

Article 7 para. 2 of the Directive grants suspects or accused persons the right to be visited by their consular authorities and the right to converse and correspond with them. They further have the right to have legal representation arranged for by their

225 Explanatory remarks to the government bill no. 1058 BlgNR 25. GP 20.
226 See also Directive 2016/800/EU.

consular authorities, subject to the agreement of those authorities and the wishes of the suspects or accused persons concerned. The exercise of the rights laid down in this Article may be regulated by national law or procedures, provided that such laws or procedures enable full effect to be given to the purposes for which these rights are intended (Article 7 para. 3).

Para. 171 sec. 4 item 2 lit. c CCP and Article 36 Vienna Convention on Consular Relations (BGBl. No. 318/1969) grant the right to communication with consular authorities. It encompasses the right to be visited, to communicate and correspond as well as the right for consular authorities to arrange for legal representation (Article 36 para. 1 lit. b and c Vienna Convention on Consular Relations).[227] To ensure that these rights according to Article 7 of the Directive are granted 'without undue delay', this was clarified in the course of StPRÄG I 2016 in para. 171 sec. 4 item 2 lit. a and c CCP.[228]

Although the protocol for detention asks whether consular authorities shall be informed, and the info sheet for detained persons informs about the right to inform consular authorities, police officials unanimously reported from their experience that this right has never been exercised, or that a more frequent request is that consular authorities shall *not* be informed.

3.10. European Arrest Warrant

The Directive on the right of access to a lawyer also applies to European Arrest Warrant proceedings 'from the time of their arrest in the executing Member State in accordance with Article 10'. The national legislature transposed the relevant provisions by amendments via StPRÄG II 2016 and new regulations, in particular in EU-JZG.

For persons who were arrested on the basis of a European arrest warrant issued by an Austrian judicial authority, para. 30a EU-JZG grants the right to authorise a defence lawyer. This right is engaged from the moment of custody in another Member State. According to para. 29 sec. 3 ARHG (which refers to para. 18 sec. 2 EU-JZG), the person sought shall be informed of the right to contact a defence attorney in cases where Austria is the executing state.[229] If the person was arrested and does not yet have a defence counsel, the procedure in para. 59 CCP must be followed.

para. 16a para. 1 item 5 and para. 2 EU-JZG ensure the arrested person's right to be represented by a defence lawyer in the issuing state of the European arrest warrant. The suspect has to be instructed on their legal rights without delay. This instruction is provided via a form (para. 16a item 1-4 EU-JZG). Beyond that, the public prose-

227 Explanatory remarks to the government bill no. 1058 BlgNR 25. GP 20.
228 Ibid.
229 Austria is the executing state, if a person is stopped in Austria due to an European arrest warrant issued by another Member State.

cutor must inform the issuing judicial authority without delay if the person concerned intends to make use of the right mentioned in para. 16a para. 1 item 5 and is not yet represented by a defence lawyer in the issuing state. This gives the authority of the issuing state the means to take the necessary measures to arrange for the choice of a defence counsel.[230]

A report by ÖRAK welcomed the fact that persons arrested for the purpose of enforcing a European arrest warrant shall now be given the opportunity to legal counselling in the executing state and the issuing state. The EU regulations were criticized in respect of the provisions regarding the right of the lawyer to review the conditions in prison; proposals were weakened to the extent that the lawyer now only has the option of questioning the competent authorities about these conditions. A negative assessment was also given regarding the fact that no general prohibition of unlawfully obtained evidence was included. Member States are required to ensure that in criminal proceedings, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their right to a lawyer or in cases where a derogation of this right is authorized, the rights of the defence and the fairness of the proceedings are respected.[231]

3.11. Conclusions and recommendations: The right of access to a lawyer

The right of access to a lawyer is mostly in line with the Directive but, in practice, most suspects are not defended during investigation proceedings, in part due to the significant number of legal aid cases. Currently, legal aid is designed in a way that most of the suspects receive legal representation only after completion of the investigation proceedings, thus already after one or more interrogations have been conducted. This is the case even though` the investigation proceedings lay the groundwork for further proceedings and the statements made in the protocols cannot be revised once made.

Legal representation is mandatory investigation proceedings in cases regarding the deprivation of liberty for preventive detention (for medical reasons); however, the absence of a defence counsel in instance cannot render the proceedings null and void.

The introduction of the stand-by legal counselling service constitutes a positive step towards more effective legal representation during investigation proceedings. Although calls to the stand-by legal counselling service are increasing, hurdles exist with respect to its use throughout the country, such as inadequate information about rights and uncertainty regarding the allocation of costs for the service. To become personally active during this stage of the proceedings is also not very

230 Decree of the Federal Ministry of Justice, BMJ-S578.029/0015-IV 3/2016 (2016) 13; Explanatory remarks to the government bill no. 1058 BlgNR 25. GP 19.

231 Austrian Bar Association (ÖRAK), 'Wahrnehmungsbericht 2013' (2013).

attractive for defence counsels because of how the payment for their fees is handled. Many suspects waive their right to consult a lawyer, be it through calling the stand-by legal counselling service or requesting the appearance of a lawyer in person, because inter alia suspects are primarily interested in leaving this situation behind; they cannot afford legal representation; in some cases, the belief prevails that a defence counsel will make them already look 'guilty'. In addition to this, there is a belief that a defence counsel is not required anyway because of the lawyers 'limited role'.

Para. 164 sec. 2 CCP stipulates that the lawyer may not participate in the interview in any way, except after completion of the interrogation or through questions addressed to the suspect with regard to thematically-connected sections as well as the submission of statements. The aspect that the lawyer is not allowed to actively participate in the interview, is particularly communicated by the police officials, which promotes the misunderstanding that the consultation of a defence counsel does not have any 'effect', in many cases. In practice, the role of the defence counsel is often broader than the law envisages.

The results obtained during the research process lead to the following recommendations:

Development of concrete implementing steps together with relevant experts

- Para. 164 sec. 2 CCP should be adapted in order to guarantee conformity with EU-law and comply with existing practice.
- In principle, the transposition of the Directive on legal aid should be used in a way that ensures more effective access to a lawyer during the investigation proceedings, and also for those suspects who are not capable of affording legal representation. This should also include the personal presence of a professionally competent defence counsel during the interrogation.

Concrete implementation steps

- Juveniles and persons with intellectual/psychosocial disabilities should always be represented by a defence counsel during investigation proceedings, due to their special need for support. Therefore para. 61 CCP should be amended in a way that ensures the mandatory legal representation of juveniles during investigation proceedings at all times.
- The legal representation of particularly vulnerable suspects during investigation proceedings should be ensured in an effective way, in particular through amendments of the grounds fornullity. This is due to the ineffective practice of mandatory legal representation of persons with intellectual/psychosocial disabilities. Currently, the interrogation of persons during investigation proceedings with psychosocial/intellectual disabilities, who have no defence counsel, can be criticised during the main proceedings but does not lead to nullity.
- The summonses should include wording regarding the right of access to a lawyer, emphasising that the consultation of a defence counsel will not have any disadvantages.

- The role of the counsel should not be trivialised within the provision of information about the right of access to a lawyer. Raising awareness among police officials on the role of the defence counsel, or rather the promotion of the attendance of a lawyer to strengthen the proceeding and legal certainty, would be an important step in this direction.
- Regarding information about the right of access to a lawyer, all parties involved require more certainty as to the allocation of costs for the stand-by legal counselling service.
- All suspects should only be able to legally waive the right of access to a lawyer, after they have spoken to the stand-by legal counselling service.
- Confidential communication between the defence counsel and the suspect prior to the interview should be ensured at all times. Therefore, the spatial conditions should be designed in a way that allows this kind of communication.
- Audio-visual recordings for cases where a lawyer is not present could increase legal certainty for all parties involved. Waiving this option should only be possible in the presence of a lawyer. Apart from that, the respective recordings should always be made; otherwise, the obtained evidence should be excluded from being used in the proceedings.

4. Presumption of innocence and the right to remain silent

4.1. Transposition and scope of the Directive

Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings was adopted on 9 March 2016.[232] The Directive required transposition by 1 April 2018.

The Directive was not initially part of the measures planned in the roadmap to strengthen procedural rights, although it follows from item 2 of the roadmap that addi-

232 Recitals no. 14, 27, 41, 45, 48 of the Directive 2016/343/EU. Similar guarantees, as mentioned in the Directive on the presumption of innocence, can be particularly found in Article 47 and 48 of the Charter of Fundamental Rights of the European Union, in Article 14 of the International Covenant on Civil and Political Rights (ICCPR), in Article 11 of the Universal Declaration of Human Rights and in Article 6 of the European Convention of Human Rights. Therefore, the Directive on the presumption of innocence also includes explicit references to legal sources of EU Law as well as international law. In this Directive, the special importance of the ECtHR jurisdiction is highlighted.

tional measures can be adopted.[233] To strengthen the rights of suspects and accused persons in criminal proceedings and establish common European minimum standards, the provisions in the Directive complement the essential procedural rights for suspects and accused persons stipulated in the Directive on the right to translation and interpretation, the Directive on the right to information and the Directive on the right of access to a lawyer. The Directive contains minimum standards for certain aspects of the presumption of innocence and of the right to be present at trial (Article 1 of the Directive). This report will only address the presumption of innocence.

The Directive ensures that suspects and accused persons have the right to remain silent and the right not to incriminate themselves (Article 7 of the Directive). The right to remain silent serves to preserve the procedural principle of the presumption of innocence (Article 3) and should serve as protection from self-incrimination.[234] The right to remain silent and the right not to incriminate oneself should apply to questions relating to the criminal offence that a person is suspected or accused of having committed and not, for example, to questions relating to the identification of a suspect or accused person.[235] The right to remain silent and the right not to incriminate oneself imply that competent authorities should not compel suspects or accused persons to provide information if those persons do not wish to do so. In order to determine whether the right to remain silent or the right not to incriminate oneself has been violated, the interpretation by the European Court of Human Rights of the right to a fair trial under the ECHR (in particular regarding Article 6 ECHR), as well as the interpretation by the Court of Justice of the European Union, should be taken into account.[236]

In Austria, the amendment of the Austrian Code of Criminal Procedure 2017 enabled the transposition of Directive 2017/343/EU, among others.[237] According to the legislature and prevailing scholarly opinion, the transposition did not cause major changes to current practice because the Directive essentially constitutes a codification of the jurisdiction of the ECtHR on Article 6 ECHR.[238] Since the ECHR has constitutional status in Austria, rights in criminal proceedings already had to meet the standards of the ECHR. The jurisdiction of the Austrian Supreme Court of Justice regarding the rights and principles in criminal proceedings is closely

233 See Council Resolution of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings [2009] OJ C 295/1 < https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:295:0001:0003:en:PDF > as well as Stijn Lamberigts, 'The Presumption of Innocence (and the Right to be Present at Trial)' (European Law Blog, 3 May 2016) < https://europeanlawblog.eu/2016/05/03/the-presumption-of-innocence-and-the-right-to-be-present-at-trial-directive/ > accessed 28 November 2018.

234 Recital 24 of the Directive 2016/343/EU.

235 Recital 26 of the Directive 2016/343/EU.

236 Recital 27 of the Directive 2016/343/EU.

237 https://parlament.gv.at/PAKT/VHG/XXV/ME/ME_00325/index.shtml (05.02.2018).

238 https://parlament.gv.at/PAKT/VHG/XXV/SNME/SNME_29444/imfname_666606.pdf (05.02.2018). Auch die Lehre sah „kein[en] erkennbare[n] innerstaatliche[n] Umsetzungsbedarf in Österreich", Cf. Barbara Kraml and Fritz Zeder, 'Die vierte Richtlinie über Beschuldigtenrechte' [2016] 4 JSt 357 et.seq.; Barbara Kraml, 'Richtlinie 2016/343 über die Stärkung bestimmter Aspekte der Unschuldsvermutung und des Rechts aus Anwesenheit in der Verhandlung in Strafverfahren' < http://ales.univie.ac.at/fileadmin/user_upload/p_ales/Gesetzesvorhaben/RL_Unschuldsvermutung_Zusammenfassung_ALES.pdf > accessed 5 February 2018.

oriented towards the ECtHR's interpretation of Article 6 ECHR (para. 2).[239]

4.2. Information about the right to remain silent

In accordance with Article 3 of the Directive on the information about rights, the Directive on the presumption of innocence stipulates that suspects or accused persons are also provided with information concerning the right not to incriminate themselves.[240] The same applies to the Letter of Rights pursuant to Article 4 of the Directive on the information about rights. [241]

The essential procedural rights for accused persons stipulated in CCP (para. 49) were already mentioned in relation to the analysis of the Directive on the information about rights.[242] The right to information about rights stipulated in para. 49 item 1 in combination with para. 50 CCP also encompasses the right to remain silent. Pursuant to this regulation, the suspect has to be informed about their right to remain silent on the accusation (para. 49 item 4 CCP). According to para. 164 CCP, the suspect shall also be made aware that their statement serves as their defence but can also be used as evidence against them. The law does not specify a duty to inform about the potential consequences of the exercise of the right to remain silent.

In the case of an arrest, the suspect is informed about the right to remain silent in the letter of rights for arrested persons: *'You have the right to remain silent. You should nonetheless consider that your statement can serve your defence and you could rob yourself of the opportunity to explain your version of events and resolve potential errors or false accusations, thereby contributing to a shortening of your detention. If your statement serves to establish the truth, this constitutes a mitigating cause during trial.'*[243]
While this wording conforms to the legal requirements stipulated in the Directive as well as in CCP – it can also be concluded that it strongly urges suspects to make a statement. Although there is no legal requirement that information about the potential consequences of the exercise of the right to remain silent be provided, discussion of the regulation would be welcome: both defence counsels as well as former suspects suggested emphasising that there are no negative consequences to exercising the right to remain silent in the information about rights.[244]

All suspects or accused persons have to be informed about their right to remain silent prior to the interview. The wording of the standardized information about rights pursuant to para. 49 CCP is as follows: '*You can make a statement or remain silent.*

239 Austrian Supreme Court (OGH) Case 14 Os 109/01 [2001], EvBl 2002/80 S 314 - EvBl 2002,314 = Jus-Extra OGH-St 3177.
240 Recital 30 of the Directive 2016/343/EU.
241 Recital 31 of the Directive 2016/343/EU.
242 Recital 31 and 32 of the Directive on the presumption of innocence refer to the right to information, which is rooted in the Directive on the right to information in criminal proceedings and equally applies to the right not to incriminate oneself.
243 Translation of the German version of the Letter of rights for arrested persons, 1 January 2014.
244 Focus group discussion with defence counsels; interviews with a formerly accused person.

[…] In addition, this serves to inform you that your statement serves your defence but can also be used as evidence against you.'[245]

Finally, the protocol of the interview of the suspect contains a note on 'willingness to make a statement' following the personal information about the accused person: *'I have been informed of the fact that I can make a statement or remain silent, and that I can consult with a defence lawyer prior, unless this contact had to be restricted.'*

Regarding the question of practical implementation of the information about the right to remain silent, some accused persons reported that they were told they had to make a statement and that various promises were made to them (see 4.3.).[246] In other cases, the right to remain silent was mentioned in accordance with the obligatory information about rights, but immediately undermined: 'I assume you want to make a statement.'[247] Raising awareness among police officials regarding the fact that such statements exert influence on the accused person towards making a statement would appear reasonable.

On the one hand, defence counsels emphasized that most suspects want to make a statement and it only rarely happens that someone exercises the right to remain silent, i.e. without prior consultation with a lawyer, even though that 'should be the norm'.[248] In particular, previously convicted persons who know the procedure tend to remain silent. Furthermore, suspects often underestimate the importance of the first interview.

Defence counsels further said that, in recent years, there have been cases in which persons were summoned via phone as opposed to in writing, leading to ignorance on their part as to the capacity in which they were summoned; there were also cases in which summoned persons were told that they were summoned as witnesses and required to make a statement. After that statement, the person was then told that they were leaving the police office as a suspect. In such cases, defence counsels explained that they filed a disciplinary complaint against the police official.

4.3. The exercise of unlawful compulsion during the interview

The right to remain silent and the right not to incriminate oneself imply that competent authorities should not compel suspects or accused persons to provide information if those persons do not wish to do so. The suspected or accused person

245 Own translation of excerpts from PAD-NG.

246 Excerpts from interviews: 1.) Interviewer: ‚And did the police official tell you to tell your story or did they tell you that you can remain silent?' Interviewee: 'They said that I have to speak.' 2.) Interviewer: 'Did they tell you that you have the right to say nothing or that you have the right to remain silent? Do you remember?' Interviewee: 'No. They just asked me just to answer any question that they asked me'.

247 Participant observation.

248 Focus group discussion with defence counsels.

must be given the opportunity to freely decide to remain silent, and not to incriminate themselves (Recital 27 and Article 7 para. 3 of the Directive).

The prohibition of forced self-incrimination is incorporated on the constitutional level in Austria pursuant to Article 6 para. 2 ECHR. An almost identical provision can be found in para. 7 sec. 2 CCP. In addition, the Constitutional Court concludes in Article 90 para. 2 B-VG -'in criminal proceedings the procedure is by indictment'- that suspects or accused persons may not be pressured to incriminate themselves using threats or legal sanctions.[249]

Para. 164 sec. 4 CCP stipulates that neither promises nor false claims are allowed for the purposes of obtaining a statement or a confession (prohibited method of evidence-gathering). Furthermore, the exercise of a person's free will may not be influenced by measures or interferences directed against the physical integrity of the person. Accordingly, para. 166 CCP constitutes an explicit prohibition against erroneously-obtained statements of an accused person.[250] Para. 166 sec. 1 item 1 CCP regulates that from a violation of the prohibition of torture (see also Article 3 ECHR) follows the absolute prohibition of the evidence thereby obtained.

The Austrian legal framework thus guarantees the rights stipulated in Article 7 of the Directive both at constitutional level (ECHR, Article 90 para. 2 B-VG) and in the CCP.

Interviewer: 'And were you told that you can remain silent?
Former suspect: 'Yes, he told me that. But it would obviously be worse for me if I don't say anything.
Interviewer: 'And did he [police official] say what would be worse?
Former suspect: 'No, he didn't. If he calls the public prosecutor, obviously. That's probably what he meant.
– Interview of a former suspect

Regarding practical application defence counsels emphasized that in cases in which a lawyer is present, the right to remain silent constitutes no problem. On the other hand, lawyers and former suspects confirmed that different means are employed to obtain a statement – via promises that the police officials would utilize the statement to urge the public prosecutor to give a lenient sentence, that the accused person would not be sentenced to detention pending trial, that they could go home earlier, or via threats ('In that case you will definitely not be going home.'[251]) Some former suspects reported that pressure was exerted in order to obtain a statement. One person stated that the police's handling of suspects had greatly changed for the better over the course of the past 10-15 years, that a 'certain pressure gets built up', [...]

249 Compilation of the most important rulings of the Austrian Constitutional Court, VfSlg 12.454/1997, 5235/1966, 5295/1966, 9950/1984, 10.291/1984, 10.394/1985 , VfGH 29. September 1988, G72 ua./88.

250 Michel-Kwapinski 'Commentary on para. 166' para. 3 in Fuchs and Ratz, Wiener Kommentar zur StPO; C.f. Article 10 Directive on the presumption of innocence.

251 Focus group discussion with defence counsels.

but it is not as physical as it used to be, not as violent.'[252]

Some police officials emphasized that they make an oral reference to the right to remain silent prior to the interview, although that was ‚not beneficial for us'. This refers to the understandable interest among the investigating officials to obtain a statement. The views of police officials regarding this topic diverged, because some police officials also emphasized that the exercise of the right to remain silent posed no problem.

One police official said that the exercise of the right to remain silent should not be taken personally. In this context, the interview of the suspect was referred to as 'purely a matter of duty', whereas the collection of other essential evidence was deemed more important, and an essential focus should, according to them, be placed on the interviews of the remaining persons involved in the case.

‚It's a problem when people [police officials] still think they'll get someone to make a confession during an interview. It requires me to look at two issues: One is interview practice and the other one is the Code of Criminal Procedure. The Code of Criminal Procedure doesn't allow it. Full stop. That might be good for a crime movie, but the Code of Criminal Procedure doesn't want it to occur. That you tell them [suspects] only half the story, that's a classic of interrogation practice. […] And that's why it ends where […] the other evidence counts, the indications. That's why I have to investigate and in the end [..]. the interviews with the witnesses and the victims are relevant to me. […] The interview of the suspect is just a duty I perform. Because I assume that those who really have a skeleton in their closet are not going to admit it in there, that would be stupid.'
– Police official 1 during one of the interviews

One defence counsel emphasized that a conflict of interest between the parties to the interview was due to their different roles and would always remain. It is a conflict of interest in that the police have an understandable interest in the quick attainment of an indictment and are at the same time required to guarantee the rights of the accused, which – while not countering this effort - can cause additional efforts or delays, such as in cases without a confession. The only option to guarantee a fair trial, according to the defence counsel, is the presence of a lawyer to ensure the equality of arms principle (procedural equality). Some police officials, however, said that this development makes the investigation proceedings more difficult.

‚Then the lawyer says ‚We won't say anything'. […] Then there's nothing you can do. That used to be different. We would have been able to talk to him [the accused person] and then we got something. It was a quicker way to the finish line or to the accomplice. But if the lawyer says 'We won't say anything', then what are you supposed to do? That is just counterproductive, I have to say. Because often it is

252 Interview with formerly accused persons.

noticeable that the accused persons would actually like to talk.'
– Police official during a focus group discussion

4.4. Written records of interviews

Recitals 31 and 32 of the Directive refer to the provisions on written and oral information about rights. To this end, Article 8 para. 1 of the Directive on information about rights stipulates that when oral (Article 3) and written (Article 4) information about rights is provided to suspects or accused persons, this shall be noted using a recording procedure.

The written protocol serves as a record of the interview. The information about rights contains, as mentioned before, a reference to the right to remain silent. The protocol is not an identical transcript of the statement but its content should be reflected accordingly.

In principle, suspects and, if present, their lawyers, always retain the option of reading the protocol at the end of the interview, as well as making notes or changes should parts of it not be correct. Finally, the suspect must sign the protocol. The difficulties in the practical exercise of this right have already been discussed in chapter B.1.2.6.

Defence counsels said that in cases in which no lawyer is present, the protocol is often not handed out to the accused persons.

4.5. No negative consequences of the right to remain silent

The exercise by suspects and accused persons of the right to remain silent or of the right not to incriminate oneself shall not be used against the person and shall not be considered to be evidence that they have committed the criminal offence concerned (Article 7 para. 5 of the Directive) – otherwise, the right to remain silent would be rendered meaningless.

With regard to evidence that was obtained without prior information about rights in breach of the right to remain silent or the right not to incriminate oneself, the defence rights and, in particular, the right to a fair trial must be considered (Article 4 para. 2 in combination with Article 10 para. 2 of the Directive).[253]

The competent authorities assess whether they deem facts as proven pursu-

253 'Without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of the right to remain silent or the right not to incriminate oneself, the rights of the defence and the fairness of the proceedings are respected.' (Article 10 para. 2 of Directive 2016/343).

ant to para. 14 CCP. When in doubt, the principle of in dubio pro reo prevails. The burden of proof lies with the authorities, therefore negative conclusions drawn from the exercise of the right to remain silent are only allowed under very restricted circumstances.[254]

Furthermore, evidence may not be used if it has been obtained via unlawful influence on the freedom of will of the person. The same applies to methods of interrogation that are in breach of fundamental principles of the proceedings, e.g. to evade the right to remain silent (para. 166 sec. 1 item 2 CCP). Item 2 protects these fundamental principles during criminal prosecution and defence[255] and ties them to the prohibition of evidence if the exclusion of said evidence is indispensable for the reparation of the error.[256] Therefore, evidence obtained via a breach of a prohibition of evidence-gathering (during the investigation procedure) pursuant to item 2 is not automatically prohibited from being presented during the main hearing.[257]

During the main hearing, no negative conclusions can be drawn from the suspect's exercise of the right to remain silent. However, according to the jurisdiction of the Austrian Supreme Court of Justice (OGH)[258] as well as the ECtHR, consideration of the silence cannot be ruled out under all circumstances.[259] The OGH has incorporated these parameters for a case by case assessment into its jurisdiction.[260] In concreto, the silence of the suspect may be used as evidence if the evidence obtained during the hearing constitutes grounds for the suspicion that the only possible conclusion a reasonable person can draw from it is that the suspect is silent because they do not have an answer to the evidence presented against them.[261] A breach of Article 6 para. 2 ECHR was found when, despite the lack of prima facie evidence against the suspect, the courts prompted the appellant to make a statement, thereby transferring the burden of proof from the plaintiff to the defence.[262]

If the court rules on the use of evidence obtained via a breach of the right to remain silent and/or the right not to incriminate oneself, the accused person's rights to a fair trial as well as their defence rights must be respected.[263] If, during the main hearing, statements or evidence obtained via a breach of the right to remain silent are admitted, the court or the judge shall respect the principle of a fair trial.[264] Recital 45 of the Directive refers to the ECtHR's jurisdiction on Article 3 ECHR and points out the relevance of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

254 Stefan Seiler, Strafprozessrecht (Manz Verlag Wien 2017) 35.
255 Michel-Kwapinski 'Commentary on para. 166' para. 16 in Fuchs and Ratz, Wiener Kommentar zur StPO.
256 para. 166 para. 1 no. 2 CCP.
257 See also ruling of the Austrian Supreme Court (OGH), RS0125172 [2009].
258 C.f. Austrian Supreme Court Case no. 15 Os 18/06w (2006).
259 Kurt Kirchbacher, 'Commentary on para.para. 245 para. 46 et. seq. in Fuchs and Ratz, Wiener Kommentar zur StPO.
260 Austrian Supreme Court (OGH) Case no. 14 Os 109/01 [2001], EvBl 2002/80 S 314 - EvBl 2002,314 = Jus-Extra OGH-St 3177.
261 Ibid.
262 Ibid.
263 Recital 45 of Directive 2016/343/EU.
264 Ibid.

4.6. Conclusions and recommendations: The right to remain silent and the presumption of innocence

The right to remain silent is included in the letter of rights for arrested persons as well as in the instructional part of the new PAD-NG computer system, whereas the letter of rights gives the impression that it works towards confession, while the instruction in the PAD-NG is phrased more neutrally. No indications are made that an exercise of the right will not have negative consequences. During providing information on the right to remain silent, it is often the case that it is undermined by simple statements such as: 'I assume you want to make a statement' or at worst even pressure is used to work into this direction.

Based on the findings, we make the following recommendations:

Concrete implementation steps

- Summonses should be distributed exclusively in writing in order to provide adequate information about essential rights prior to the interview, and clarify whether a person is being summoned as a witness or a suspect.
- Professional training for police officials should be used to raise awareness regarding the legitimate exercise of the right to remain silent and the manner in which information about this right is provided in order to prevent information about rights from being undermined.
- The police, as well as representatives of the judiciary, should be sensitized to the principle that even partial exercise of the right to remain silent should not be used to the detriment of the suspect.
- In the daily work of the police, it should be ensured that suspects, including those without a legal representative, automatically receive a protocol of the interview.
- Audio-visual records of the interview could establish legal certainty in cases in which no lawyer is present, to the benefit of all parties involved. A waiver should only be allowed in the presence of a lawyer.

C. Conclusion and recommendations

Police officials, lawyers as well as former suspects confirmed the positive developments in recent years regarding the rights of suspects and accused during criminal proceedings. The transposition of the Directives enabled further progress.

The transposition of the Directives required amendments, but many of the guarantees were already enshrined in the Austrian Code of Criminal Procedure (CCP). Among the police officials consulted, procedural safeguards were also regarded as positive because they safeguarded their own work, particularly with respect to the interest that the results of investigation proceedings 'hold up' in court. Despite such positive developments, there are, however, several challenges in the application of certain aspects of the different Directives.

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

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

Access to materials of the case (case files) has improved in recent years and rarely poses a problem for lawyers, although there are problems with costs. Access to case materials for persons receiving legal aid works well. However, the way access to case files is currently managed at police level, and this constitutes a strain on police resources as well as those of lawyers.

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

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

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

This leads us to make the following recommendations:[265]

1. The existing process of assigning interpreters in the investigative stage should, in consultation with experts, be further evaluated to ensure that all persons listed in the new register of the Federal Ministry of the Interior meet quality standards (regarding linguistic, cultural and professional competence). Even in cases where uncertified interpreters are consulted,

265 The final recommendations listed here are a summary of each chapter and are supplemented by cross-chapter recommendations.

quality standards should be guaranteed. Moreover, reform efforts should encompass the evaluation of interpreters, the enhancement of video interpretation services on the basis of 'lessons learned', the development of 'vademecums' on cooperation between the police and interpreters, as well as an ongoing dialogue between these professional groups, for instance through inter-disciplinary roundtables.

2. The way police currently provide information on procedural rights should urgently be evaluated with regards to accessibility, since the understanding of rights is necessary for their active use. Furthermore, more accessible texts could be drafted for the existing information sheets, with the help of experts on easy and accessible language. Uncertainties regarding the allocation of costs of legal representation during the investigation proceedings should be eradicated. Police officers should be further sensitised to the need to inform about rights and obligations in an understandable, not just formally correct, manner. Above all, the right of access to a lawyer during the investigation proceedings should not be 'minimised' – in light of current practice, it seems important to sensitise police officers accordingly.
3. Summonses for questioning of persons who are not arrested should always be sent in writing, and in cases of juveniles and persons with guardians summonses should always be sent to the legal representative as well, to ensure the effective exercise of rights. It should be explicitly noted in the summons that the consultation of a lawyer is not only a right, but that the exercise of this right does not lead to disadvantages for the accused person.
4. The introduction of electronic files and the comprehensive granting of access to the electronic case files would save resources for all parties involved in the proceedings and should, therefore, be applied at the investigative stage.
5. The right of access to a lawyer during the investigation proceedings, in particular for persons who are later granted legal aid or who are particularly vulnerable (e.g. juveniles) should be strengthened and structured more effectively in the context of the Directive on legal aid for suspects and accused persons in criminal proceedings and the Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings. While, in cases of arrested persons, a lawyer should generally always be present during the interview, it would be important to introduce a a right to legal assistance during investigation proceedings at least for juveniles. To waive the right of access to a lawyer should only be possible after consultation with the stand-by legal counselling service.
6. In the framework of police training and continuing education, as well as in the everyday work of police officers, awareness should be increased about the legitimacy of the right to remain silent and about the importance of providing adequate information about this right. This awareness-raising should also lead to the recognition that even the partial use of the right to remain silent is not used against a suspected person.

7. Audiovisual recordings of interviews, already used in many other countries, should also be introduced in Austria. Audiovisual recordings that can only be waived in cases where legal representation is present would constitute an optimal approach to documenting the interview and achieving the highest possible value for it as evidence in later proceedings. In addition, it could considerably unburden police officials from having to write minutes and enable them to focus exclusively on the interview of the accused person.
8. Remedies for tackling violations of the rights of suspects and accused persons during investigation proceedings should be strengthened for them to become more effective.
9. Cooperation of relevant stakeholders (ministries, police, bar association) with science and independent experts should be fostered for the development of evidence-based measures. Additionally, a view from the 'outside' can often provide a positive take on existing organisational structures.

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