



ProRPC
STRENGTHENING PROCEDURAL RIGHTS IN POLICE CUSTODY

From law to practice:
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POLICE CUSTODY

Access to a lawyer

FACTSHEET



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Access to a lawyer



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Project description

Authors

The Factsheet was developed in the framework of the EU Project 'From law to practice: Strengthening procedural rights in police custody (ProRPC)' implemented by the LBI-GMR (Austria), in cooperation with APADOR-CH (Romania), Fair Trials Europe (Belgium), the Irish Council for Civil Liberties (Ireland), and Rights International Spain (Spain).

The Factsheet was written by Livia Popa and Georgiana Gheorghe of the Association for the Defence of Human Rights in Romania-the Helsinki Committee (APADOR-CH). The chapter on the regional challenges draws heavily on the work of Fair Trials Europe, who conducted in depth regional research in the framework of this Project.

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Information about the Project and Factsheet

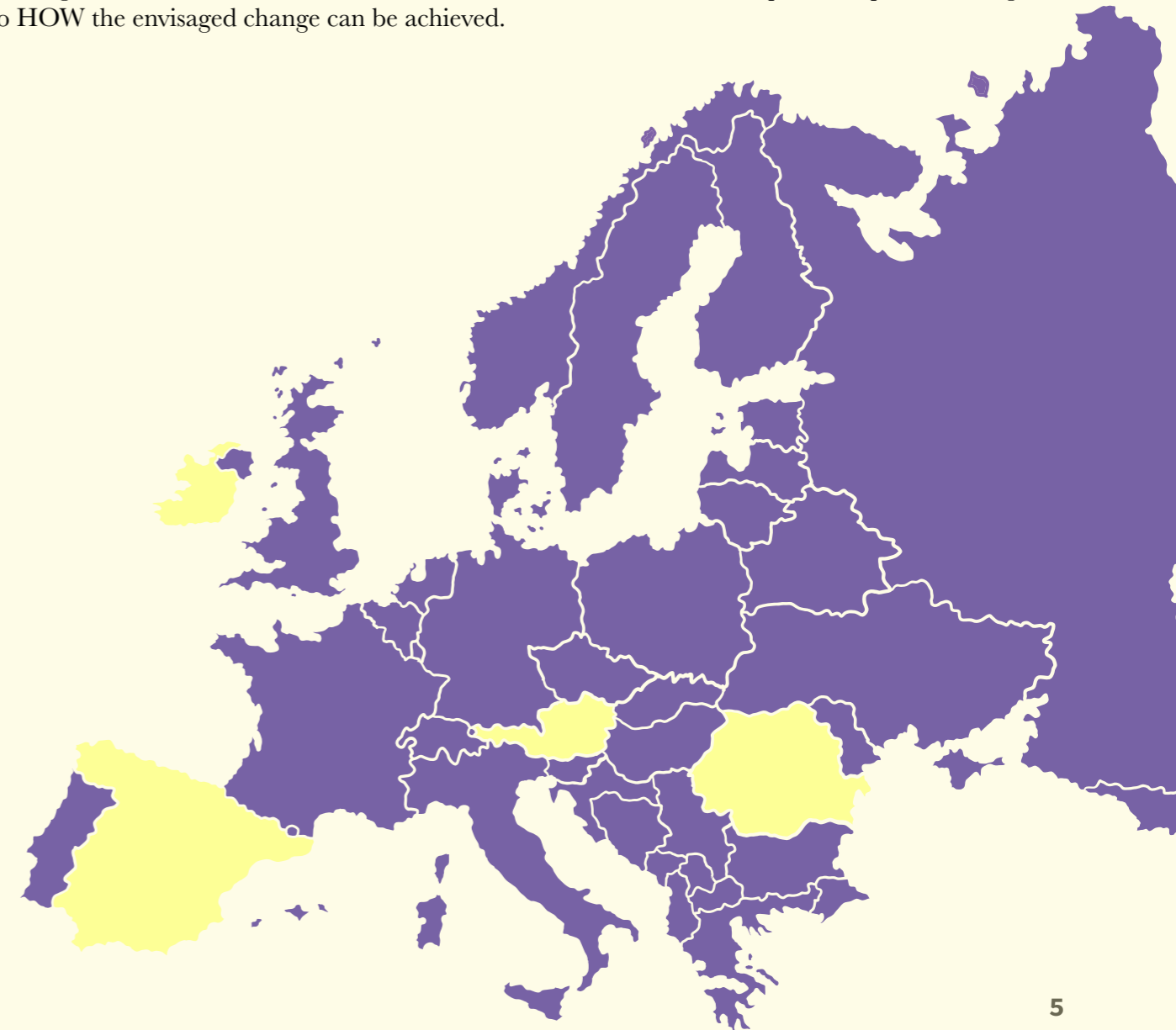
The Factsheet highlights the relevance of the right to access to a lawyer during the criminal investigation phase. It reflects on identified challenges and discusses promising practices. The goal is to respond to the question WHAT can be done to strengthen procedural rights. To this end, the Factsheet unpacks the key elements of the promising practices and attempts to identify lessons learnt. Thereby, the Factsheet not only describes the promising practices, but also investigates three main questions:

- What are the main benefits of the promising practices?
- How did the promising practices come about? (e.g. What triggered their implementation? What were the challenges faced beforehand?)
- What are the remaining challenges in the implementation of the promising practices?

The Factsheet is intended for all criminal justice actors and advocates who are interested in reforming their national system. The research on the promising practices focused especially on the practices of four EU Member States: Austria, Ireland, Spain, and Romania. Additional practices and examples from other EU Member States were gathered via regional consultations as well as the regional research conducted by Fair Trials Europe.

As each practice came about in a specific national context, in order to successfully replicate them, it will always be important to tailor them to the national contexts, dynamics and cultures. Yet we hope that disseminating information on the reform processes occurred in other countries can offer useful inspiration to strengthen procedural rights and overcome existing barriers.

Other factsheets of the series cover the areas of right to information, legal aid, and audio-visual recordings. The factsheets should be read in combination with the final report that provides insights into HOW the envisaged change can be achieved.



Project definitions

Lawyer

A person qualified and authorised according to national law to plead and act on behalf of his or her clients, to engage in the practice of law, to appear before the courts or advise and represent his or her clients in legal matters.

Legal advice

The provision of information by a legal aid provider on a person's legal rights and/or responsibilities and on the manner of and existing possibilities for solving a particular legal issue.

Legal assistance

Assistance by a legal aid provider, including, for example, assistance in drafting documents and court pleadings, support in mediation and help in navigating the rules and procedures.

Legal aid lawyer

Any person (legal or natural, and whether professionally qualified in law or not) involved in the delivery of State-funded legal aid.

Legal aid

The provision of legal advice, assistance and/or representation by a legal aid lawyer provider either at no cost or subject to a financial contribution.

Child

Any person below the age of 18 years, as provided by Art 1 of the UN Convention on the Rights of the Child. When referring to a child who is suspect or accused person, the term child may extend to persons older than 18 in certain cases as established by the EU Directive (EU) 2016/800 of 11 May 2016.

Interview

The questioning of a suspect or accused person by a law enforcement officer regarding their alleged involvement in a criminal offence or offence.

Persons in a situation of vulnerability

Any person who, because of his or her specific situation or circumstances, requires specific care, attention or assistance.

Introduction

The right of access to a lawyer in criminal proceedings represents a guarantee for all other procedural rights of suspects and accused persons. A lawyer can play a crucial role in advising and providing active defence, they can prevent miscarriages of justice, ensure equality of arms, protect the right to silence, and provide support for persons in a situation of vulnerability. Lawyers can inquire about and identify signs of victimisation, request medical examinations and file claims on behalf of their clients. In that sense, access to a lawyer as early as possible after arrest provides an opportunity to dissuade and limit instances of police violence during arrest.¹ Lawyers also verify the lawfulness of detention and challenge it where necessary.²

Lawyers' presence and legal assistance for suspect/accused children without undue delay is of crucial importance considering the stress of the initial arrest. Through proper communication and by building a rapport, the lawyer can help ease the child's confusion and facilitate access to their special rights and procedural adaptations. By encouraging communication based on trust and open communication, the presence of a lawyer can improve the outcome of the overall criminal process. Lawyers can also make sure that police officers act in the best interest of the child - a duty of all criminal justice actors which tends to be overlooked in favour of efficiency. The presence of a lawyer is vital in these cases because they can detect suggestibility and oppression and can ask for procedures to be adapted accordingly and to make sure that the judicial bodies take into account any special needs.

Persons in a situation of vulnerability face even more challenges in their access to justice. Research shows that people with intellectual disabilities are over-represented in the criminal justice system at the police custody stage.³ Data shows that there is a high rate of waivers of rights among persons with intellectual disabilities and false confessions. Persons with intellectual disabilities can feel "frightened and confused"-a lawyer can help them understand their rights and provide support.

The right of access to a lawyer is not only essential to ensure an appropriate defence and a fair trial, but is also one of the key safeguards against torture and ill-treatment. As maintained by the anti-torture bodies and especially the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), the right of access to a lawyer – together with the rights to information, access to a medical expert, and notification of the detention to a third party – plays a crucial role in preventing potential abuse during the early stages of custody, counting among the most effective safeguards to prevent torture.⁴

1. Extract from the 21st General Report of the CPT published in 2011, *Access to a lawyer as a means of preventing ill-treatment*, §18, available at: <https://rm.coe.int/16806ccd25>.

2. ECtHR, *Beuze v. Belgium*, App no 71409/10, 24 September 2009, § 136.

3. Gautam Gulati et al. *The collaborative development*, p.2.

4. E.g. Carver/Handley, 'Torture Prevention Works' (OUP, 2016); CPT (2002) 12th General Report, CPT/Inf (2002) 15, para 44.

Strengthening the right to access to a lawyer is a matter of urgency especially since police violence during arrest and following custody remains a systemic problem within Europe. Physical violence and verbal abuse from the part of the police,⁵ often towards minorities, non-nationals and racialized groups⁶ is frequently reported by the CPT. In many EU Member States, there are disproportionate stops and searches or racial profiling, police violence and incarceration of racialized groups.⁷ The number of people being held in prison while waiting for a trial has increased steadily over the past five years.⁸

5. CPT, Report on Greece, CPT/Inf (2020) 15, p.48, available at: <https://rm.coe.int/16809e2058>; CPT, Report on Romania, CPT/Inf (2019) 7, p.14, available at: <https://rm.coe.int/16809390a6>; CPT, Report on Portugal, CPT/Inf (2020) 33, p.10, available at: <https://rm.coe.int/1680a05953>.

6. Human Rights Watch, "They Talk to Us Like We're Dogs" – Abusive Police Stops in France, 2020, available at: <https://www.hrw.org/report/2020/06/18/they-talk-us-were-dogs/abusive-police-stops-france>; The EU Observer, Pandemic : Roma at the receiving end of racist policing, 04.05.2020, available at: <https://euobserver.com/coronavirus/148229> (accessed 13.03.2021); The Guardian, Systemic racism and police brutality are British problems too, 04.06.2020, available at: <https://www.theguardian.com/commentisfree/2020/jun/04/systemic-racism-police-brutality-british-problems-black-lives-matter> (accessed 13.03.2021).

7. ENAR, #Racialjustice, Policing racialised groups briefing – Disproportionated brutality, violence and racial profiling, 2020 p.1, available at: https://www.enar-eu.org/IMG/pdf/policing_racialised_groups_-_briefing_ojeaku_without_cover_10_revised_22062020.pdf; FRA, Being Black in the EU -Second European Union Minorities and Discrimination Survey, 2018, p.9, available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-being-black-in-the-eu_en.pdf.

8. Fair Trials, Pre-trial detention rates and the rule of law in Europe, 2021 (last updated: May 25, 2022), available at: <https://www.fairtrials.org/articles/publications/pre-trial-detention-rates-and-the-rule-of-law-in-europe/>.

International standards

At the international level, the importance of the right to defence is enshrined in Art 14 of the International Covenant on Civil and Political Rights as well as Art 13 of the United Nations Convention on the Rights of People with Disabilities (UNCRPD). The importance of the right to access a lawyer has been also recognized by the UN when it adopted the Basic Principles on the Role of Lawyers.⁹ In its General Comment No. 24 on child justice, the UN Committee on the Rights of the Child (CRC) recommends that states provide legal representation for all children who are facing charges in juvenile courts.¹⁰

At the regional level, the European Court of Human Rights (ECtHR) jurisprudence emphasizes that for the right to a fair trial to remain “practical and effective”, access to a lawyer has to be provided from the first police questioning. The ECtHR noted that suspects and accused persons are in a situation of vulnerability during the initial investigative stage and the presence of a lawyer protects against self-incrimination and is a fundamental safeguard against ill-treatment. What someone says or does not say during their first interaction with law enforcement authorities may determine the direction of an investigation and the likelihood of pre-trial detention.¹¹

The right to legal assistance in criminal proceedings is also embedded in EU law. Since its entry into force in 2016, the European Union Directive 2013/48/EU on the right of access to a lawyer (“the Directive”) requires EU Member States to guarantee that suspects and accused persons have access to a lawyer before their first interview by law enforcement authorities or without undue delay after arrest.¹² The EU Directive on the right to access to a lawyer sets minimum standards mandatory for all EU member states and the EU Commission is set to assess periodically the practical implementation of this right at the national level.

Unlike other international standards, the Directive also regulates in greater detail and expands upon the right to access a lawyer. The right to legal assistance applies to the entire proceedings, from the police investigation to the conclusion of the appeal. Access to a lawyer in the early stages of the proceedings is particularly important.¹³ The Directive explicitly states that suspects and accused persons must have the right to: meet their lawyer in private prior to any questioning, have a lawyer present when questioned and for the lawyer to be able to participate effectively.¹⁴ In addition, the lawyer has to at least be present during the investigative or evidence-gathering acts (identity parades, confrontations, reconstructions).

9. UN Basic Principles on the Role of Lawyers, September 1990.

10. UN CRC General Comment No. 24 (2019) on children’s rights in the child justice system, §62.

11. Fair Trials, Why remote assistance breaches the EU Directive on the right of access to a lawyer Briefing paper – European Union (2021), p.5, available at: https://www.fairtrials.org/sites/default/files/publication_pdf/Briefing_remote_assistance_FORWEB.pdf.

12. Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294, 6.11.2013 (Directive on access to a lawyer), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0048&from=FR>.

13. *ibid*, Art 2 (1).

14. *ibid*, Art 3 (3).

EU Member States are obliged to ensure the assistance of a child by a lawyer. The lawyer should be trained in representing children. Children cannot waive being assisted by a lawyer. This conclusion appears also from Directive (EU) 2016/1919 on legal aid. Unfortunately, in some States, the possibility to waive assistance by a lawyer still exists.¹⁵

According to the Directive, the right to a lawyer may be waived. However, for a waiver to be valid the suspect or accused person must have been provided, orally or in writing, with clear and sufficient information in simple and understandable language about what the right to a lawyer entails and the possible consequences of waiving it. Any waiver must be given voluntarily and unequivocally.¹⁶

Both under EU legislation and the Council of Europe normative framework, the right on access a lawyer has been particularly important in relation to vulnerable suspects and accused persons such as persons with disabilities, migrants, and children.¹⁷ Pursuant to Directive 2016/800 on procedural safeguards for children in conflict with the law in criminal proceedings, children have the right to meet in private and communicate with a lawyer including prior to questioning by the police, and the right to be assisted by a lawyer during police questioning.¹⁸ It is important to note that regarding children the European Directives make a slight difference between access and assistance to a lawyer. The full set of Directives on fair trial rights needs to be read together. According to the frame introduced by Directive (EU) 2016/800, it is now an obligation of EU Member States to provide children with the assistance of a lawyer and, therefore, this obligation must be introduced in the Member States’ domestic laws. This means, that in any event, the child should always be assisted by a lawyer and this assistance should not be limited to guarantees of access to a lawyer or the mere presence of the lawyer during the juvenile justice proceedings. The lawyer should be allowed to have an active role and to participate during all steps of the proceedings.¹⁹ The European Commission has also issued a “Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings” which recommends that a suspect or accused person who cannot understand proceedings should not be able to waive their right to a lawyer.²⁰

15. DCI-Belgium, Manual for EU Member States “How to ensure the rights of children in conflict with the law?”, 2018, p. 60-61; DCI-Belgium, [Practical Guide for lawyers, How to defend a child in conflict with the law, 2018](#).

16. Directive on access to a lawyer, Art 9.

17. FRA, Child friendly justice – Perspectives and experiences of professionals on children’s participation in civil and criminal judicial proceedings in 10 EU Member States https://fra.europa.eu/sites/default/files/fra-2015-child-friendly-justice-professionals_en.pdf, 2015; FRA, Handbook on European law relating to the rights of the child, pp. 195-218, 2022, https://fra.europa.eu/sites/default/files/fra_uploads/fra-coe-2022-handbook-child-rights_en.pdf.

18. Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects and accused persons in criminal proceedings, OJ L 132, 21.5.2016 (Directive on the procedural safeguards for children), Art 6, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L0800&from=EN>.

19. DCI-Belgium, Manual for EU Member States “How to ensure the rights of children in conflict with the law?”, 2018, p. 60.

20. European Commission, Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:378:0008:0010:EN:PDF>.

Regional challenges

Although states appear to have transposed the Directive in their national legislation,²¹ the right of access to a lawyer remains to date widely under-implemented throughout the EU in practice, leaving the majority of suspect or accused persons, in particular those deprived of liberty, to face police questioning alone.²² In practice, a relatively small proportion of arrested and/or detained suspect or accused persons actually have a lawyer during their initial detention.²³

Few EU Member States have mandatory legal representation systems in place. Among those, most states apply mandatory representation only in specific cases, whereas only two states-Italy and Spain-apply mandatory representation for all suspects and accused persons.

The effectiveness of the right to access a lawyer for people in police custody almost entirely relies on the police. However, it may be a false assumption that the police in all cases will effectively inform suspects or accused persons of their rights and will take adequate measures to enforce them. Bringing lawyers to the room may be perceived, consciously or not, as conflicting with their primary objective which is to resolve cases as swiftly as possible. Enforcing the right to a lawyer can also cause extra hurdles and delays for the police which have to look for a lawyer, wait for them to arrive, wait for them to consult with their clients before starting the questioning. Consequently, the following systematic practices still lead suspects or accused persons to waive their right of access to lawyer:

- The police fail to inform or inadequately inform suspects or accused persons of their rights.²⁴
- The police discourage suspects or accused persons from exercising their right to a lawyer, for example, by telling them “that the case is simple and that there is no need for the presence of a lawyer; or that proceedings are just beginning, and lawyers are not needed at the initial stage”²⁵ or that asking for a lawyer will be costly²⁶ or will prolong their detention.²⁷ Lack of clarity about entitlement to legal aid, coupled with concern about cost, is clearly an instrumental factor.²⁸
- The police “informally” question suspects or accused persons without/before informing them of their rights.²⁹
- The police fail to call lawyers even when suspects or accused persons asked to be assisted.³⁰
- The police do not provide access to phones where suspects or accused persons are required to initiate contact with lawyers.³¹

21. European Commission, Report from the Commission to the European Parliament and the Council on the implementation of Directive 2013/48/ EU, COM(2019) 560 final, p.3, available at: https://ec.europa.eu/info/sites/default/files/implementation_report_on_the_eu_directive_on_access_to_a_lawyer.pdf.

22. FRA, Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings, 2019, p.12-13, <https://fra.europa.eu/en/publication/2019/rights-practice-access-lawyer-and-procedural-rights-criminal-and-european-arrest>.

23. Ed Lloyd Cape, Inside Police Custody 2, Comparative Report 2018, p.47, available at <https://www.fairtrials.org/articles/publications/inside-police-custody-2/>.

24. FRA, Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings, 2019, p. 27-28, 42.

25. *ibid*, p.37.

26. *ibid*, p.47.

27. *ibid*, p.53.

28. Ed Lloyd Cape, Inside Police Custody 2, Comparative Report 2018, p.47.

29. FRA, Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings, 2019, p. 12,23,29,31.

30. *Ibid*, p.46.

31. Fair Trials, Where’s my lawyer - making legal assistance in pre-trial detention effective, 2019, p.18, available at: https://www.fairtrials.org/sites/default/files/publication_pdf/Wheres-my-lawyer-making-legal-assistance-in-pre-trial-detention-effective.pdf.

The European Commission has also identified gaps regarding children’s rights, and in particular the requirement to notify an appropriate adult where it would be contrary to the best interest of the child to inform the person who holds parental responsibility.³² It also identified failures regarding the possible derogations from the right of access to a lawyer³³ and shortcomings with regard to the conditions under which the right of access to a lawyer can be waived.³⁴

Significant other implementation challenges when it comes to the right to access to a lawyer remain:

Challenges in finding a lawyer and inefficient appointment procedures: the Directive places responsibility on states to ensure that suspects and accused persons deprived of their liberty are in a position to effectively exercise the right of access to a lawyer.³⁵ It does not impose the manner in which it should be done and does not explicitly require the competent authorities to make contact with lawyers for the suspect or accused person. In many countries, suspects or accused persons are provided with a list of lawyers. Such lists provide no guarantee that an appropriately qualified and experienced lawyer will be available at the time and in the location that they are required. In certain countries, it was reported that it is extremely challenging to find a lawyer willing to act outside of office hours.³⁶ The use of such system can also result in abuses, when lawyers are in practice chosen by the investigating authorities based on their willingness to cooperate with the prosecution.³⁷

Some countries have addressed this issue by developing duty lawyer schemes, with a single point of contact and conditions for inclusion and staying in the scheme.

Lack of data. Another issue is the lack of data collected on the state of implementation of the rights guaranteed by the Directive. In some states, the relevant authorities do not allow researchers to be based in police stations or to observe questionings. As a result, data must be collected by alternative means, such as interviews with police officers, lawyers, and former suspects or accused persons.³⁸ While technological tools can be used to ensure suspects or accused persons to find a competent lawyer, it can also serve as a tool to obtain clear statistics on the exercise of the right of access to a lawyer in Member States, and to keep track of all the steps taken by the authorities from moment of arrest to allow suspects or accused persons to effectively use their rights.

In reality, only some countries have mandatory legal representation and effective duty lawyer schemes. Finding a lawyer often represents a challenge and the extent to which lawyers can participate in police interviews varies from state to state. Privacy of the lawyer-client consultation is also not ensured.³⁹

32. European Commission, July infringements package: key decisions, 15 July 2021, available at: https://ec.europa.eu/commission/presscorner/detail/en/inf_21_3440.

33. European Commission, September infringements package: key decisions, 24 September 2021, available at: https://ec.europa.eu/commission/presscorner/detail/en/inf_21_4681.

34. European Commission, October infringements package: key decisions, 24 September 2021, available at: https://ec.europa.eu/commission/presscorner/detail/en/inf_21_5342.

35. Directive on access to a lawyer, Art 4(4).

36. *ibid*.

37. Fair Trials, Where’s my lawyer - making legal assistance in pre-trial detention effective, 2019, p.18, available at: https://www.fairtrials.org/sites/default/files/publication_pdf/Wheres-my-lawyer-making-legal-assistance-in-pre-trial-detention-effective.pdf

38. Ed Lloyd Cape, Inside Police Custody 2, Comparative Report 2018, p.50.

39. *ibid*.

Promising practices on the right of access to a lawyer



Promising practice from Romania

The mandatory legal representation system

Romania is one of the European countries in which legal representation is mandatory for some categories of suspect and accused persons.

Mandatory legal assistance was first mentioned in the 1936 Criminal Procedure Code (CPC) which granted the right to all children in conflict with the law. With the adoption of the 1969 CPC, this right was extended to other categories of suspects or accused persons.

According to the CPC, legal representation of suspects or accused persons is mandatory in four specific situations: a) when a suspect or accused person is a child b) whenever the suspect or accused person is deprived of liberty c) when a judicial body believes that a suspect or accused person cannot prepare their defence on their own d) during the course of the trial, in cases where the law mandates detention for life or imprisonment exceeding 5 years for the committed offence.⁴⁰ The right to legal assistance is also provided in the laws regulating the lawyer's profession and the Statute of lawyers.⁴¹ The Statute stipulates that national bars are responsible for organizing legal assistance in all criminal cases detailed in the Criminal Procedure Code.⁴² The legal assistance can be provided in all phases of criminal trial proceedings, from the beginning of the criminal investigation until the end of the trial.

The importance of mandatory legal assistance is underlined by the sanction for the violation of this right: any evidence obtained is rendered invalid and is automatically excluded. It also constitutes a reason for appeal or for annulment of any measure taken in absence of this procedural safeguard.

Children represent a particularly vulnerable category of suspects and accused persons. Due to their age, there is a higher risk of undue influence by police during the criminal proceedings. Minors also tend to be more prone to compliance and suggestibility. In addition, children experience difficulties in correctly assessing the implications of their statements and the complex dynamics of proceedings. The Romanian legislator presumes that persons under the age of 18 do not have full cognitive and emotional development capacity to defend themselves. Therefore, legal assistance should be mandatory in cases when they are deprived of liberty.

The information on rights and all communication with children must be communicated in an accessible

40. CPC, Art 90.

41. Law no. 51/1995 on the lawyers' profession, Statute of Lawyers <https://www.unbr.ro/statutul-profesiei-de-avocat/>.

42. Statute of Lawyers, Art 150.

language. Even though this is an obligation, police officers do not seem willing to, or knowledgeable on how to properly notify them of their rights.⁴³ In this context, the presence of a lawyer guarantees not only that their special rights are respected, but also that the information on rights and procedure is carried out in simplified language, adapted to the child's mental and psychological development as well as taking into consideration other potential vulnerabilities.

A child has the right to an individual assessment in the form of an evaluation report and the court cannot proceed to rule in its absence.⁴⁴ At the trial phase, an evaluation report of the child is mandatory (not before). The evaluation report's aim is to offer information about the child's behaviour, special needs and psychosocial development in order for the judicial bodies to adapt the conditions of the criminal proceedings and detention accordingly. It is the role of the lawyer to request such an evaluation as early as possible, in order that potential vulnerabilities be detected and the criminal proceedings adapted accordingly.

The assistance of a lawyer is also mandatory in all cases when suspects or accused persons are deprived of liberty (during police arrest,⁴⁵ pre-trial detention, or detained in a detention centre or in an educational centre or when the safety measure of medical hospitalisation has been ordered). Persons who are deprived of liberty have limited access to resources of any kind and the presence of a lawyer represents a safeguards to a fair investigation and all procedural rights. For example, the right to silence and the right not to self-incriminate have a great impact on the investigation and can influence its outcome.⁴⁶ Having a lawyer in police custody reduces the risk of ill-treatment and torture before or even during the interview as well as later during the criminal proceedings. Effective defence ensures proper information on rights and as well as the procedure and reduces the risk of agreeing to uninformed guilty pleas.⁴⁷

43. Ed Lloyd Cape, Inside Police Custody 2, Comparative Report 2018.

44. CPC, Art 506.

45. Police arrest is a deprivation of liberty preventive measure regulated by the CPC. The duration of the initial arrest cannot exceed 24 hours. The arrest takes effect as soon as the detention order is issued. The detention order can only be issued after hearing the suspects or accused persons, who has the right to be assisted by a lawyer (chosen or legal aid).

46. ECtHR, *Beuze v. Belgium*, op.cit., § 128; See also the EmprRiSe Project ('Empirical and Legal Research on the Right to Silence during Police Investigations'), a collaboration between Maastricht, Dublin City, Antwerp and KU Leuven Universities aimed at studying the right to silence in pre-trial investigations across the Netherlands, Ireland, Belgium and Italy (about this topic: see A. Beazley & A. Pivati, "The right to silence in pre-trial investigation", in *New Journal of European Criminal Law*, May 2021, available at: <https://journals.sagepub.com/doi/pdf/10.1177/20322844211028320>).

47. APADOR-CH, Study concerning the respect for procedural rights of suspects and defendants- from their perspective, 2022, p. 50, available at https://apador.org/wp-content/uploads/2022/09/Raport-detinuti_En_online_2-pag.pdf. In a study carried out by APADOR-CH on 1000 detainees during 2021 and 2022, 77% of the detainees stated that their criminal investigation ended with a guilty plea. Only in two cases out of ten did the criminal investigation end with a judgment delivered by a court of appeal. The majority of those surveyed were dissatisfied with the sentence they received following the conclusion of the guilty plea, as they felt that the punishment they received was more severe than what was promised when they agreed to the guilty plea.

Even if the Romanian legislation has enshrined the right of access to a lawyer for a wide category of suspects and defendants, the system is far from perfect. Significant problems remain when it comes to the effectiveness of the defence. There are no clear and detailed rules about the role of the lawyer at the investigative stage and no regular monitoring and evaluation of the appointment system. There is also no specialization of lawyers (for example in representing children or persons in a situation of vulnerability and no course/training on legal assistance during the criminal investigation for lawyers who provide legal aid.⁴⁸ When it comes to access to a lawyer for persons in a situation of vulnerability, the legislation is vague. National legislation stipulates that whenever the criminal investigation authorities assess that a person cannot defend himself/herself, a legal aid lawyer will be appointed. The impossibility of self-defence is not defined by Romanian law, but according to jurisprudence, it includes situations when the complexity of the case requires qualified legal knowledge or if the suspects or accused person is an elderly person, foreign citizen or stateless person or the persons is not aware of the procedural provisions of Romanian law. Also, if the person is deaf/mute or has mental/physical disabilities that could in any way affect their preparation for defence. In practice, it is not clear how the assessment of persons in a situation of vulnerability is carried out in practice.

Effective Appointment Procedures: The Bucharest's Bar electronic system for random appointment of legal aid lawyers

In Romania, a person cannot waive their right to a lawyer if they are deprived of liberty and a police interview cannot take place in the absence of a lawyer.

The Bucharest Bar is the only Bar Association in Romania that currently manages an electronic system for appointing legal aid lawyers.⁴⁹ It was set up in September 2020 and ensures prompt legal assistance for persons deprived of liberty as well as an efficient and transparent appointment procedure. The electronic system was created at the initiative of the Bucharest Bar Association in order to solve an existing problem, namely the unfair distribution of legal aid cases among lawyers. Some lawyers of the Bucharest Bar were complaining that they were rarely appointed as legal aid lawyers, while others were assigned to cases often. Thus, the electronic system for random appointment of legal aid lawyers was created in order to deal with this dissatisfaction and ensure fair distribution of cases and equal legal aid fees opportunities.

Lawyers need to voluntarily register online on the Register of Legal Aid Assistance. Once a request for legal assistance is submitted by the judicial bodies to the Bar, the electronic system will randomly choose a lawyer and notify them by SMS.⁵⁰ The lawyer has 10 minutes to accept an urgent case and 1 hour to consider other cases. If they confirm in time, the programme issues an electronic delegation and communicates a code and a number to the lawyer via SMS. The lawyer can thus access the case, see its nature and the parties involved. In order to speed up the procedure even more, after the system picks a lawyer, they are immediately contacted by phone by the responsible person from the Bar's Legal Aid Service. Since 2021, there is also a mobile phone application that lawyers can down-

48. APADOR-CH, Inside Police Custody 2, 2018, available at <https://www.apador.org/wp-content/uploads/2017/03/IPC-eng.pdf>.

49. Romanian lawyers are organized as a liberal profession and have their own organization - the National Union of the Romanian Bar Associations - as well as 42 local bars at the level of each county. Every local Bar association in the country has a list of legal aid lawyers where the lawyers voluntarily sign up for. According to the updated Regulation framework for the organization, functioning and the attributions of the legal aid services of the bars, the legal aid assistance is provided by lawyers who request to sign in the Register of Legal Aid Assistance.

50. Bucharest Bar, SAJ, Information concerning the electronic distribution of cases through the electronic system https://www.baroul-bucuresti.ro/upload_res/Ghid%20program%20informativ%20SAJ.pdf.

load from Google Store.⁵¹ The application sends notifications providing information about the cases and runs until it finds an available legal aid lawyer who accepts the case.

A lawyer can be requested a maximum of 3 times a day and the system takes into consideration the cases he/she has opted for as well as their refusals. In 2021, due to the high number of refusals, the Bucharest Bar adopted a decision stipulating that lawyers who register more than 30 refusals in 3 months for no reason will be suspended for one year from the Register of Legal Aid Assistance.⁵² In addition, it also adopted a decision providing specific rules for ensuring a "permanent" function of the Legal Aid Service.⁵³ Namely, the Bar created a permanent list of lawyers always available for urgent cases, by day and by night, during weekends and legal holidays. A lawyer on this list is contacted in cases where there is less than 30 minutes before a police hearing is due to start and none of the lawyers selected by the electronic system have confirmed the appointment. This way, the system guarantees prompt legal assistance during police interviews in all circumstances. A lawyer can choose to remain briefed in one particular case for its entire duration, with the consent of the client and the dean of the Bar. The electronic system transparently publishes information about the number of assigned cases and the money paid to lawyers for the last 6 months.

The new system has a positive impact on the attitude of the legal aid lawyers because it comes with safeguards of transparency, fairness of the distribution of cases and predictability. It respects fundamental principles of distribution, ensuring equal opportunities for lawyers to achieve the same income and number of cases. The electronic system ended suspicions regarding the case distribution process because it removed the human factor from the procedure. Bucharest Bar representatives can no longer choose and appoint from a list of legal aid lawyers.⁵⁴ Before the system was introduced, lawyers would also lose unnecessary time if they were appointed in advance and cases were then rescheduled. Currently, a lawyer is appointed taking into consideration their actual availability and interest which increases the quality of legal aid.

The speed and efficiency of the system of appointing a legal aid lawyer has a positive effect on other actors as well, leading to a greater fairness of the overall process. Police officers can no longer evade the appointment system while at the same time they benefit from an efficient criminal investigation.⁵⁵

This new system for random appointment of legal aid lawyers is a tool that is constantly improving from a technical point of view. The cooperation as well as the training of legal aid lawyers is crucial in this regard and given the necessary commitment, resources and technical expertise, this model could be replicated in other Bar associations across the country as well as in other European countries with a sufficient number of legal aid lawyers. Ultimately, this transparent, fair and speedy system

51. Users' manual, Bucharest Bar application, <https://www.baroul-bucuresti.ro/stire/lansarea-aplicatiei-baroul-bucuresti>.

52. Decision no. 01/19.01.2021 of the Council of Bucharest Bar, available at: <https://www.baroul-bucuresti.ro/hotari-ale-consiliului-bb-12>.

53. Decision no. 12/27.10.2020 of the Council of Bucharest Bar, available at: <https://www.baroul-bucuresti.ro/hotari-ale-consiliului-bb-11>.

54. The general rule for appointing legal aid lawyers-applicable to all other Romanian Bar Associations except the Bucharest Bar association-is the following: the distribution of cases is made according to their complexity in relation to specialization, experience, seniority and availability of the lawyer. If a suspects or accused persons needs a lawyer during criminal proceedings, the police officer or the prosecutor must make a written request to that bar. The Legal Aid Service of the respective Bar will appoint legal aid lawyers by phone contacting those who have expressed their options for the cases in the order determined by the monthly distribution. Each Bar association in the country has a list of legal aid lawyers that is also available on their websites.

55. The Inside Police Custody study (2018) emphasized that in some cases police officers would call a lawyer they already knew in order to speed up the procedure, which in practice led to a formal legal assistance because the lawyer would come and sign the papers.

of appointing legal aid lawyers benefits people who are deprived of liberty the most. According to representatives of the Legal Aid Service, the lawyers arrive at the police station in a maximum of 2 hours in all cases when persons are arrested by the police.

In terms of challenges, this promising practice for random and speedy appointment of legal aid lawyers remains an exception rather than the rule applicable at the level of all Bar Associations in Romania. A systemic change could happen if lawyers advocate for the benefits of such a system at the local level and if sufficient financial resources are allocated by Bars associations to set it up and maintain it.



Promising practices from other EU Member States

Mandatory legal assistance: The Spanish example⁵⁶

Free legal assistance is a public service funded by the State and is provided by private lawyers who apply to be included in the Bars' lists for legal assistance services on a voluntary basis.⁵⁷ The Spanish legal aid system is not limited to criminal proceedings, but does also include other areas, such as civil, labour and administrative proceedings. As far as criminal proceedings are concerned, the Constitution provides the compulsory assistance of a lawyer from the moment of police detention⁵⁸. This right to prompt access to a lawyer in police custody can only be waived in cases of road safety offences.⁵⁹ In practice, this results in access to legal aid being granted to any person in police custody.

Every suspect or accused person can request a lawyer from the duty scheme. However, the legal assistance provided will not automatically be free of charge. For the service to be free, the applicant must meet the means requirements.⁶⁰

Yet, irrespective of the final results of the means test, all detainees who request legal aid will be assisted by a duty lawyer during their stay in the police station,⁶¹ given that access to legal counselling in detention is mandatory.

56. This good practice example is taken from the Legal Aid factsheet and was written by Rights International Spain.

57. Enrolment in the duty scheme is voluntary since 1996.

58. Spanish Constitution, art 17.3.

59. See art 520.8 Criminal Procedure Code. Also, only in the event of a child who has not been detained but is summoned to declare by the police or Juvenile Prosecutor's Office for a minor offence (falta) while the file has not been opened, is then possible to waive the right to a lawyer (assisted by his/her legal representatives). Waiving this right is not possible if he/she is accused of a crime (delito) even if it is a road safety crime (which is the general exception of art. 520.5 Criminal Procedure Code of Spain). In addition, lawyer's assistance is imperative once the proceedings have been initiated (even if it is a minor offence). Consulta 4/2005 Fiscalía General del Estado.

60. The threshold to assess the economic means is the "Indicador Público de Renta a Efectos Múltiples" (IPREM) or public income index (in 2020, based on 12 pays: 6.454,03€, on the basis of 14= 7.519,59€). To be entitled to free legal aid that amount will be multiplied by 1, 2 or 3 depending on the number of members of the family unit (also in the case of a child, the income of the family unit of the applicant will be considered).

61. A large majority of assistances are carried out by duty scheme lawyers, not by privately appointed lawyers (even in the case of children).

In addition, regardless of their financial resources, the following people will always be granted legal aid: victims of gender violence, terrorism, human trafficking, as well as children and persons with mental disabilities who are the victims of abuse or mistreatment.

The duty system for criminal affairs is organized based on a rota scheme, with a number of lawyers being on call for periods of twenty-four hours, every day of the year. The number of lawyers on call varies from one geographical area to another and is determined by each Bar Association.

For suspects or accused in police custody, the police calls the local Bar Association who designates a state-appointed lawyer from the duty scheme, among those who are on call at that moment. The appointed lawyer must arrive at the police station as soon as possible, always within a maximum period of three hours since receiving the assignment⁶². When called, duty lawyers cannot refuse to attend the police station, nor can they refuse to defend a specific client, unless a conflict of interest exists.

In the interest of consistency, the same lawyer who assisted the suspect or accused person at the police station should, in principle, follow the entire judicial proceedings. However, the person suspected or accused can request the Bar Association for the appointed lawyer to be replaced. The request will be decided by the Bar within 20 days and can be appealed by the beneficiary.

Among the benefits of this system, the availability of lawyers on call, 24/7 every day of the year, to give in-person legal assistance to suspects in police custody⁶³ is noteworthy. According to several experts, the majority of detainees are grateful for the lawyers' assistance, not only because of the technical assistance, legal information and counselling they provide, but also for their role in offering reassurance, as detainees see lawyers as people they can trust and with whom they will be engaging in a constant dialogue.

In terms of remaining challenges, the current minimum requirements to join the duty scheme guarantee that lawyers who enrol in the system have experience and knowledge. However, introducing methods such as those applied in The Netherlands (peer review, supervision by mentors, etc.) would help ensure homogeneity in the quality of the service provided by legal aid lawyers. Some Spanish Bar associations already request, in order to remain in the duty scheme, that lawyers attend ongoing training. This requirement should be made compulsory for every Bar association.

Greater funding and public investment would be necessary to ensure the sustainability of the system. Lawyer's remuneration is also insufficient, the average compensation of lawyers from the duty scheme for each criminal proceeding dealt with is 147,87 €⁶⁴ - clearly insufficient.

Effective Appointment Procedures: The Belgian Salduzweb platform

In Belgium, where a duty lawyer scheme is in place, an online platform is used to connect lawyers and suspects or accused persons before their first interview by the police and/or the investigative judge. This system shows true potential to provide effective access to a lawyer in police custody, both as a contact tool and as a data collection tool.

62. Criminal Procedure Code, Art 520.5.

63. According to the XIV Report of the Free Justice Observatory (2020), 38.367 lawyers are ascribed to the rota scheme for assistance in police custody and 34% of issues dealt with by lawyers from the duty scheme correspond to legal assistance to detainees (more than 658.000).

64. XVI Informe del Observatorio de la Justicia Gratuita, 2022.

The creation of the platform was a consequence of the 2016 changes in the Belgian Judicial Code which entrusts Bar Associations with the task of organising a system “to contact a lawyer in the fastest way possible, making use of modern means of communication”.⁶⁵ Thus, the “Salduzweb” application was created- an online platform aimed at streamlining the search for a lawyer in police custody.⁶⁶

In practice, the application is used by the police and investigative judges to find lawyers (both private and legal aid)⁶⁷ for suspects or accused persons who are deprived of liberty. Lawyers who wish to appear on the application must register on the website and choose the time that they will be on duty by selecting one or more 4-hour time slots, preferred areas of law and practice, and the police zones they want to be assigned to.⁶⁸

If the person asks to be assisted by a lawyer and does not know one, the police file a request via the web application. Instantly, a text is randomly sent to a duty lawyer with the assistance request and the location of the police station. The system is randomized, and the police have no power to decide which lawyer will be called.

If the lawyer accepts the mission, they become unavailable in the system. If the first proposed lawyer is not available, the system automatically sends a text to next one in line. If no lawyer can be found through the application, an emergency number at the legal aid office level can always be called.⁶⁹

If the person waives the right to be assisted by a lawyer, the waiver is recorded in writing and signed. In principle, the waiver is also recorded on the application. Children however cannot waive their right to assistance.

The appointed lawyer has two hours to arrive at the police station and carry out the confidential consultation. The person may also ask for the private consultation to be held over the phone. After the phone or in person consultation, suspects or accused persons may still decide to waive their right to a lawyer during the questioning. If a lawyer does not come after two hours, adult suspects or accused persons are put in contact with the duty-scheme staff for a free consultation, and only after that the police can start interviewing them without the assistance of a lawyer.

The Salduzweb platform was evaluated by the Belgian Ministry of Justice as an innovative and successful system for finding a lawyer.⁷⁰ One year after the system was put in place, a lawyer was found immediately in 93% of cases in Flanders and in 65% in French and German speaking Belgium.⁷¹ Today, as a result of the extensive use of the platform, combined with the existence of the emergency number, a lawyer is found in almost all cases.

The application’s managers are continually trying to improve it by adding or modifying functionalities, meaning that a number of problems reported are gradually being resolved. A working group of criminal justice actors using the platform yearly meet with the platform operators and collaborate to improve its functioning and design.

65. Belgian Judicial Code, Art 495 (3).

66. Belgian Ministry of Justice, Salduz+ law evaluation report, 2017-2018, p.40, available in French at: http://www.dsb-spc.be/doc/pdf/Rapport-Salduz-qualitatif_FR.pdf.

67. Legal aid lawyers however must go through a specific training before they can assist persons in police custody.

68. O. Nederlandt, D. Vandermeersch, Deux ans après la loi ‘Salduz’, op.cit, p.28.

69. Belgian Ministry of Justice, Salduz law evaluation report, 2013, p.9.

70. ibid

71. Answer to a parliamentary question directed to the Minister of Justice, CRABV 54 COM 127 25 March 2015. The wide disparity between these two numbers has not been explained and is likely due to different analysis of the data in the north and south of the country, and not to such a massive variation in practice.

In addition, the platform could be an effective tool for data collection.⁷² It enables the steps taken by the police to find a lawyer to be tracked. Before starting a questioning, the police must fill out some information: date, police zone, age, gender, nationality and language of the person, if the person wants to be assisted by a lawyer for the confidential consultation and/or during the questioning, and if an interpreter was called. Although it was reported that it is not always the case in practice,⁷³ the application must be used even when the person waives the right to a lawyer. Data can thus be extracted for the proportion of cases where persons requested to be assisted by a lawyer or waived their right. It could also show the geographical areas where the assistance rate is lower and evaluate the assistance rates with regard to gender, age, nationality and language. All this information could be cross-referenced and analysed, making the system a tool to evaluate the implementation of the right of access to a lawyer.⁷⁴

Both the police and lawyers can also report incidents that happened during the questioning through the system. This has the potential to ensure oversight both of police work and on the quality of legal assistance, as the information collected in the system can be reported to Bar Associations.

By randomly selecting and automatically contacting a lawyer, the application removes the burden from the police to serve as the contact provider. It avoids differential treatment of suspects or accused persons and ensures that only those lawyers who are competent in criminal law and who are willing to provide assistance will be called. It also allows for data collection on access to a lawyer. The web application, which has many advantages, could be easily replicated in other jurisdictions where suspects or accused persons experience difficulties to find a lawyer when in custody, and especially when arrested for the first time.

Despite the challenges and risks that go with the implementation of the Salduzweb system - for example inconsistent use by the police and sometimes inefficient legal assistance - it allows every suspect or accused person who wishes to be assisted to be put in contact with a lawyer.

72. Belgian Ministry of Justice, Salduz law evaluation report, op.cit., p.9.

73. Belgian Ministry of Justice, Salduz law evaluation report, op.cit., p.126.

74. Belgian Ministry of Justice, Salduz law evaluation report, op.cit., p.9.



Key takeaways

Access to a lawyer for all suspects and accused persons in police custody is a matter of urgency

Very few countries in Europe have a system of mandatory legal representation in police custody for all suspects and accused persons. Making the right to access to a lawyer a reality in countries across the European Union is urgent given the mounting evidence of police custody violence and breaches of procedural rights in the initial stages of the criminal proceedings.⁷⁵

The right of access to a lawyer can only become part of a legal culture if there is political and legislative will (case of Spain) as well as a change in police culture (Belgium).

Both strategic litigation and advocacy are needed in order to change legal and political cultures. But the use of these tools implies cooperation between various stakeholders rather than working in silos. Bar Associations are primary actors of change- they should be the main stakeholders advocating for the importance of the right to access to a lawyer in police custody (including within the judicial system, before judges). Strategic litigation can be initiated by both lawyers and human rights NGOs', followed by communication and awareness raising campaigns in partnership with the media.

The cooperation between Bar associations and police officers could also be beneficial. This could take the form of joint trainings for police officers in order to convince them the benefits of having a lawyer present during interviews (including by analysing failed prosecutions). Before setting up a mandatory legal aid system, countries could first implement duty lawyer schemes in police custody pilot projects (case of Belgium).

A sufficient number of legal aid lawyers is also required as well as effective trainings and an engaged community for legal aid lawyers-such as the one offered by the SUPRALAT training programme. In order for the right to access to a lawyer be effective, legal aid lawyers need specific training and quality oversight.

For the right of access to a lawyer to become effective there is a need for rapid appointment systems of legal aid lawyers

Electronic systems for rapid appointment of a legal aid lawyers make the right of access to a lawyer effective in practice. Setting them up requires a long-term collaborative effort between various stakeholders at the national level. The commitment of Bar Associations and Police is crucial in terms of being drivers for change and raising awareness on the advantages of effective appointment systems for all stakeholders.

Collaboration and trust always bring positive change and can overcome obstacles, including those of a cultural nature. In order to create the proper ground and overcome challenges the following solutions have to be considered: education of the general public on the importance of having a lawyer in police station, cost efficacy analysis/evidence-based research on the costs of setting up such system, evidence-based research on waiver rates and concrete impacts on suspects and accused persons and society in general, good practice exchange with other member states and even the creation of a EU appointment platform.

⁷⁵ Fair Trials, Equality Data in Criminal Justice, 2022, available at <https://www.fairtrials.org/articles/publications/equality-data-in-criminal-justice/>.

