

## (Effective) Remedies for a Violation of the Right to Counsel during Criminal Proceedings in the European Union: An Empirical Study

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### 1. Introduction

This article was written within the framework of the research project 'Towards Guaranteeing the Right to Effective Assistance of Defence Counsel in Member States in Trans-border Criminal Cases', conducted over a two-year period commencing on the 1<sup>st</sup> of January 2016. The overall aim of the research project is to explore how a violation of the right to counsel in criminal proceedings is remedied in all of the EU Member States, and to offer a basis to elaborate upon common remedies that could be applicable in all criminal proceedings conducted in the EU. For this purpose, a series of articles has already been published in the course of project activities. The first article summarised the state of the art concerning the right to a remedy when there has been a violation of the right to counsel in Europe (including EU law, Strasbourg case law), described the interconnection between rights and remedies, and proposed a theoretical foundation for effective remedies for a violation of the right to counsel in Europe.<sup>1</sup> Based on this elaborated theoretical foundation, the second article further explained the relationship between rights and remedies and proposed specific remedies that could be deemed 'effective' in cases where the right to counsel has been violated.<sup>2</sup> As the transposition date of Directive 2013/48/EU on the right of access to a lawyer was on the 27<sup>th</sup> of November 2016, the third article reported how transposition is progressing in the Member States based on the answers to a questionnaire distributed to the Ministries of Justice of the Member States.<sup>3</sup> This was the first part of the empirical research within the framework of this project.

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- 1 A. Soo, 'Article 12 of the Directive 2013/48/EU: A Starting Point for Discussion on a Common Understanding of the Criteria for Effective Remedies of Violation of the Right to Counsel', (2017) 25 *European Journal of Crime, Criminal Law and Criminal Justice*, no. 1, pp. 31-51.
- 2 A. Soo, 'Potential Remedies for Violation of the Right to Counsel in Criminal Proceedings: Article 12 of the Directive 2013/48/EU (22 October 2013) and its Output in National Legislation', (2016) 6 *European Criminal Law Review*, no. 3, pp. 284-307.
- 3 A. Soo, 'How Are the Member States Progressing on Transposition of Directive 2013/48/EU on the Right of Access to a Lawyer? An Inquiry Conducted among the Member States with the Special Focus on How Article 12 is Transposed', (2017) 8 *New Journal of European Criminal Law*, no. 1, pp. 64-76.

The results of the project, reported so far in the three above-mentioned articles, could be summarised as follows:

The right to counsel is one of the fundamental features of a fair trial, and therefore of the rule of law. The European Court of Human Rights (ECtHR) has repeatedly stressed not only that counsel should be present, but also that counsel must both fulfil and be allowed to fulfil his/her duties.<sup>4</sup> Therefore, the right to counsel has to be effective and practical, not theoretical and illusory.<sup>5</sup> In the context of open borders within the EU and an increasing number of transborder criminal cases, it is important that all EU Member States guarantee the right of counsel to suspects, accused persons, and requested persons in European Arrest Warrant (EAW) cases, at least on a minimum level. The Strasbourg system is not designed to achieve this goal owing to a number of reasons, including its retrospectivity and that the ECtHR makes decisions based on the specific circumstances of a case. For this reason, the EU has taken the initiative, via Directive 2013/48/EU,<sup>6</sup> which not only guarantees the right to counsel, but requires, as stated in Article 12(1), that in cases of a breach of this right, Member States have to '(...) ensure that suspects or accused persons in criminal proceedings, as well as requested persons in EAW proceedings, have an effective remedy under national law in the event of a breach of the rights under this Directive.' Compared to the initial proposal, which provided a stipulation that a remedy must have the effect of placing the suspect or the accused person in the same position as they would have found themselves had the breach not occurred, the right to an 'effective remedy' under the Directive in force is more general, i.e. its meaning is left to each Member State to interpret. However, this does not promote the right to counsel, as some Member States can provide remedies of a non-stringent nature.<sup>7</sup>

Yet, when it comes to the enhancement of the right, the strength of a remedy is one of the key issues. The remedy depends on the content of the right – *Ubi jus ibi remedium* – where there is a right, there is also a remedy. For example, if national law provides the right to have counsel present during questioning, but assigns no additional duties to counsel in terms of his/her obligations, i.e. counsel is passive during this stage, then no remedy can follow as there has been no violation of the right. If the very same counsel sits passively during questioning in a country that obliges counsel to actively advise the suspect during questioning, a remedy should follow, as there has been a violation of the right. However, the content of the right also depends on the remedy – *Ubi remedium ibi ius* – where there is no remedy, there is no right. This means that without a strong, effective remedy, the right loses its meaning not only in cases where it has been violated, but potentially in all cases, as the authorities are not motivated to respect it. Therefore, the remedy is only effective if it rectifies a definite violation, and prevents violations in the future.<sup>8</sup>

On the one hand, the wording of Article 12 of Directive 2013/48/EU is very general. On the other hand, remedies applied by the Member States have to be capable of guaranteeing the right to counsel, as the general goal of Directive 2013/48/EU is to enhance this right. This has led the author to suggest that any remedy for a violation of the right to counsel is only 'effective' within the meaning of Article 12(1) of the Directive if it aims at restoring the person's position back to that which it would have been had the violation not occurred.<sup>9</sup> The suggestion was made based on the initial wording of Article 12, and on the case law of the ECtHR and the wording of Directive 2013/48/EU itself, which both attribute a significant role to the right to counsel among fair trial rights. The author also analysed that the requirement that a person's pre-violation situation should be reinstated significantly reduces the list of applicable remedies as there are only a few that have such a potential. She proposed that the main remedies which are worth considering are the exclusionary rule, the doctrine of the 'fruit of the poisonous tree', and a retrial.<sup>10</sup>

4 ECtHR 10 October 2002, *Czekalla v. Portugal*, No. 38830/97; ECtHR 12 May 2005, *Öcalan v. Turkey*, No. 46221/99; ECtHR 2 November 2010, *Sakniovskiy v. Russia*, No. 21272/03.

5 ECtHR 13 May 1980, *Artico v. Italy*, No. 6694/74.

6 Directive 2013/48/EU 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, pp. 1-12.

7 Soo (2017), supra note 1, pp. 31-51.

8 Soo (2016), supra note 2, pp. 291-293.

9 Soo (2017), supra note 1, pp. 46-49.

10 Soo (2016), supra note 2, pp. 299-305.

The next step the author took was to investigate whether the transposition of Directive 2013/48/EU had resulted in any changes in the system of remedies in the Member States. The inquiry among the Ministries of Justice revealed that the majority of Member States had decided not to make amendments to their remedies system during the course of the transposition of Directive 2013/48/EU. Here the general wording of Article 12 becomes the focus of attention. Most Member States deemed that no amendments were necessary in order to comply with Article 12, and to justify this decision they described – in short – their existing system of remedies for a violation of the right to counsel. Based on these descriptions, it can be concluded that the remedies for such violations vary significantly, from the absolute exclusionary rule, to the court’s wide discretion to choose the remedy, and finally, to the prohibition of the exclusionary rule. Yet, it is up to Member States to leave their remedies as they are, so long as they can show that in their opinion these remedies are ‘effective’ as prescribed by Article 12(1) of the Directive.<sup>11</sup>

The answers of the Ministries of Justice of the Member States on the transposition of Directive 2013/48/EU reflected tremendous diversities in the applicable remedies, which the author further investigated. The second part of the empirical research conducted over the course of the project, which this article (as the fourth and final article to be written as part of the project) reports, was aimed at determining the law and case law of the Member States in terms of providing remedies for violations of the right to counsel. For that purpose the questionnaire was sent to the Ministries of Justice of the Member States. To verify the answers received from the Ministries, it was planned that they would be sent to local lawyers to be reviewed. However, due to the practical problems described in the second subsection (‘Methodology’) of this article, in a number of countries such lawyers were asked to answer the questionnaires instead of checking the answers provided by the Ministry. Although the initial plan was to confine the verification of the Ministries’ answers to lawyers, in some countries such answers were further checked by local scholars. These activities were crucial to determine per Member State how the law works in practice and whether it reflects the rules and procedures indicated in the written law of each Member State. The third subsection of this article (‘Results’) provides a summary of the gathered data, i.e. it provides an overview of the remedies that Member States’ national law and practice provide for suspects and accused persons in cases where the right to counsel has been violated. The fourth subsection (‘Discussion’) is a comment on how the EU should move forward based on these results.

The author hopes that her research project and articles, including this one, will contribute to a deeper knowledge and understanding of the proper remedies for violations of the right to counsel among European academics, and will be a source of inspiration for the Member States’ and the EU’s legislators. The deadline for the implementation of Directive 2013/48/EU fell within the project’s activities. Thus, the project not only monitored the legislation and practice of Member States prior to the deadline, but also subsequent to it, in order to ascertain whether each Member State’s legislation and practice meets the requirements of Directive 2013/48/EU, especially when it comes to Article 12. To date, EU institutions and EU legal researchers have mainly focused on the content of the right to counsel and less so on the remedies for its violation. This project was aimed at taking the next step by exploring proper (‘effective’) remedies for breaches of the right to counsel. In doing this, the final goal of this project was to contribute to the effective implementation of the right to counsel in all Member States of the EU. It must be emphasised that remedies never exist for their own sake, they are there to be applied only if the right itself has been violated. Stronger remedies lead to stronger rights. It is the sincere belief of the author that the right to counsel should be exercised in a manner that enables suspects and accused persons to benefit from all the safeguards and opportunities provided to them in the law, which is what led to the birth of the project, and to this article.

## 2. Methodology

The goal of the empirical research conducted within the framework of this project was to gather data from all Member States on how they have implemented or are planning to implement Directive 2013/48/EU,

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<sup>11</sup> Soo (2017), *supra* note 3, pp. 74-76.

and what remedies they provide or will provide in their legislation in cases of a violation of the principles related to the right to counsel laid down in the Directive. In addition, the aim was to determine whether the remedies provided in law actually work in practice. The plan was to send a questionnaire to representatives of the Ministries of Justice of all Member States making such an inquiry, and then to send the received answers to local lawyers to be verified. As Denmark, Ireland, and the UK had decided to opt out of Directive 2013/48/EU, they were only queried about national law and practice, not about the transposition of the Directive. However, this plan had to be altered during the project's activities as more than half of the Ministries of Justice agreed to answer only on the transposition of the Directive, and not the questions on law and practice regarding remedies for a violation of the right to counsel as a consequence of limited resources. Of the Ministries of Justice of the 25 Member States which are obliged to transpose Directive 2013/48/EU, 22 had answered the questions about transposition by the 4<sup>th</sup> of October 2016. The author could not establish any contact with the Ministries of Justice of Malta, the Republic of Cyprus, and France. A total of 13 Ministries of Justice confined their answers to transposition, and left questions regarding law and practice on remedies for a violation of the right to counsel unanswered. The Ministries of Justice of Denmark, Ireland, and the UK also refused to answer the questions on law and practice. As a result, complete questionnaires (answers to both the transposition and law and practice questions) were received from 9 Ministries of Justice. These complete questionnaires were sent to local lawyers to be verified. To gather information about law and practice regarding the remedies for violations of the right to counsel in the other 19 Member States, the questionnaire was sent to local lawyers. As a result, information about the remedies for violations of the right to counsel was gathered from all Member States. Answers from lawyers (not verifications) were sent either to local scholars or other lawyers to be verified. In this way, data from 14 of those 19 Member States was verified by the 31<sup>st</sup> of January 2017. Data received from lawyers of 5 Member States remained unchecked, as the author could not establish any contact with a scholar or a lawyer who was willing to perform the task. Table 1 below provides a specific overview of the questionnaires sent and received.

*Table 1 Distribution of the questionnaire, answers received, and verifications pertaining to all 28 Member States*

	Ministry of Justice		Local lawyer		Local scholar/lawyer
	Transposition	Law and practice	Verification	Answered the questionnaire	Verification
Austria	✓			✓	
Belgium	✓			✓	✓
Bulgaria	✓	✓	✓		
Croatia	✓			✓	✓
Republic of Cyprus				✓	
Czech Republic	✓			✓	
Denmark				✓	✓
Estonia	✓	✓	✓		
Finland	✓	✓	✓		
France				✓	
Germany	✓			✓	✓
Greece	✓			✓	✓
Hungary	✓	✓	✓		
Ireland				✓	✓
Italy	✓	✓	✓		
Latvia	✓	✓	✓		

	Ministry of Justice		Local lawyer		Local scholar/lawyer
	Transposition	Law and practice	Verification	Answered the questionnaire	Verification
Lithuania	✓			✓	✓
Luxembourg	✓			✓	
Malta				✓	✓
Netherlands	✓			✓	✓
Poland	✓	✓	✓		
Portugal	✓			✓	✓
Romania	✓			✓	✓
Slovakia	✓	✓	✓		
Slovenia	✓			✓	✓
Spain	✓	✓	✓		
Sweden	✓			✓	✓
United Kingdom				✓	✓

The questionnaires generated a large amount of data, which the author decided to report in two articles. First, an article on how the Member States are progressing in the transposition of Directive 2013/48/EU.<sup>12</sup> Second, the present article on the law and practice of the Member States regarding remedies for a violation of the right to counsel. The questionnaire used is attached as an annex to this article. Answers to questions 1–3 were reported in the first article, the rest are the subject of analysis in this article.

It must be emphasised that research of this kind has some limitations, which should be considered while reading this article. To some degree, answers to a questionnaire always reflect the personal views of the respondent. This view may or may not be accurate. This was why either lawyers or scholars were asked to verify all the answers received. Nevertheless, for some Member States the author could not find a reviewer. Even when such a review was performed, it still has to be kept in mind that the review itself reflects the personal opinion of the reviewer, which means that although a review increases the chance of gaining accurate answers about the justice system of a Member State, sometimes this may not have been the case. However, as the aim of this project was to gather data about remedies for a violation of the right to counsel from all EU Member States, the only practical research method was to send out a questionnaire to representatives of each Member State, and to rely on the accuracy of the answers received. For most of the Member States, the author had to confine her research to the answers to and the reviews of the questionnaire, as due to a number of constraints (for example, language), she had limited access to the law and case law of each Member State. Nonetheless, the value of the present research is reflected in the fact that the set goal was achieved, and therefore it provides an overview of the law and practice on remedies for a violation of the right to counsel in all EU Member States. If there is a need for a further analysis of such remedies in a certain Member State, this report could be used as a starting point.

### 3. Results

#### 3.1 Preventative measures to guarantee the right to counsel

The application of remedies should never be a goal in itself, as the main concern should be that rights are not violated in the first place. Therefore, the Member States' representatives were queried about the measures provided in their law and practice with the potential to prevent a violation of the right to counsel, both in terms of the activities of the authorities and of counsel. As these measures could vary depending on the stage of the proceedings, two questions were asked of the representative:

<sup>12</sup> Soo 2017, *supra* note 3, pp. 64-76.

1. Do judges or any other relevant authority (prosecutor, ministry etc.) in your country have competence to monitor whether the right to counsel is respected during the pre-trial stage of criminal proceedings?
2. Do judges or any other relevant authority (prosecutor, ministry etc.) in your country have competence to monitor whether the right to counsel is respected during the trial stage of criminal proceedings?

Several examples were offered to the representatives to facilitate their answers. To be more exact, they were queried as to whether the authority has competence to:

1. Order counsel to appear;
2. Order counsel to act;
3. Order investigative bodies/the Prosecutor's Office to terminate activities breaching the right to counsel or take action to respect the right to counsel;
4. Substitute counsel;
5. Guarantee the right to counsel by any other means.<sup>13</sup>

*Table 2 Preventative measures to guarantee the right to counsel in the pre-trial stage of criminal proceedings*

Bar = the Bar Association; CR = only in cases of compulsory representation; I = investigator; J = judge; LA = only in cases of legal aid; LAO = legal aid office; PO = the Prosecutor's Office.

	Order counsel to appear	Order counsel to act	Order authorities to terminate activities breaching the right to counsel or take action to respect the right to counsel	Substitute counsel
Austria	Yes (J-CR)	No	Yes (J, PO)	Yes (J-CR) <sup>i</sup>
Belgium	Yes (Bar-LA)	No	Yes (J, PO)	Yes (Bar-LA)
Bulgaria	Yes (PO)	No	Yes (PO)	No
Croatia	No	No	Yes (J)	Yes (J)
Republic of Cyprus	No	No	No	No
Czech Republic	No	No	Yes (PO)	Yes (J) <sup>ii</sup>
Denmark	Yes (J)	Yes (J)	Yes (J)	Yes (J)
Estonia	Yes (J, PO) <sup>iii</sup>	Yes (J, PO) <sup>iv</sup>	Yes (PO)	Yes (J)
Finland	Yes (J-CR; I, PO)	Yes (J)	Yes (PO, J)	Yes (J)
France	Yes (PO, J) <sup>v</sup>	No	Yes (PO, J)	Yes (I, PO, J) <sup>vi</sup>
Germany	Yes (J-CR)	No	Yes (PO)	Yes (J-CR)
Greece	Yes (J) <sup>vii</sup>	No	Yes (J)	No
Hungary	No	No	Yes (PO)	Yes (J <sup>viii</sup> ; I, J, PO-LA <sup>ix</sup> )
Ireland*	Yes (J)	Yes (J)	Yes (J)	Yes (J)
Italy	Yes (J, PO)	No	Yes (PO)	Yes (J) <sup>xi</sup>
Latvia	Yes (I, PO)	No	Yes (PO)	Yes (J, PO)
Lithuania	Yes (LAO-LA; I, J, PO)	Yes (LAO-LA)	Yes (J, PO)	Yes (LAO-LA; I, J, PO) <sup>xii</sup>
Luxembourg	Yes (I, J, PO)	No	Yes (I, J, PO)	No
Malta	No	No	No	No
Netherlands	Yes (J-LA)	No	Yes (J)	Yes (J-LA)
Poland	No	No	Yes (PO)	Yes (J-LA)
Portugal	Yes (J, PO)	No	Yes (J)	Yes (J-LA; PO)

<sup>13</sup> The representatives did not report any additional measures that could prevent a violation of the right to counsel in pending criminal proceedings.

	Order counsel to appear	Order counsel to act	Order authorities to terminate activities breaching the right to counsel or take action to respect the right to counsel	Substitute counsel
Romania	Yes (J, PO)	Yes (J, PO)	Yes (J, PO)	Yes (J, PO) <sup>xiii</sup>
Slovakia	Yes (J)	No	Yes (PO)	Yes (J)
Slovenia	No	No	Yes (I, J)	Yes (J-CR)
Spain	Yes (I, J, PO)	No	Yes (J)	No
Sweden	Yes (PO)	No	Yes (PO)	Yes (J)
United Kingdom	Yes (J)	Yes (J)	No	Yes (J)

- i The obligation to substitute a lawyer who fails to perform his/her tasks does not arise from national law, but from the case law of the ECtHR.
- ii This can only be done if the fully notified lawyer repeatedly fails to appear for criminal proceedings.
- iii Can be done via a notification sent to the Bar.
- iv See iii.
- v The prosecutor or investigating judge has no authority to order counsel to appear. They must notify the suspect of his/her right to have a lawyer appointed. If the accused wishes to have a lawyer, they transmit the request to the president of the Bar Association who will appoint a lawyer.
- vi The police officer, the prosecutor, or the investigative judge sends a request to the Bar to substitute counsel who cannot appear. In any other case counsel cannot be substituted.
- vii Counsel is only appointed if the suspect requests this.
- viii Counsel has to be excluded from the criminal proceedings, as his/her conduct was adverse to the interests of the defendant, or his/her interests are adverse to those of the defendant.
- ix A suspect has the right to put forth a justified request to replace his/her *ex officio* appointed lawyer if he/she is not satisfied with the lawyer's performance. In this case, it is the right of the police, prosecutor, or court (depending on the phase of the proceedings) to decide on this request, and to replace the lawyer if the request seems justified.
- x These answers apply to cases in which the suspect has been detained for more than 48 hours.
- xi Counsel can be substituted by the judge with a 'promptly available' lawyer when the court appointed or chosen lawyer does not attend. According to the reviewer this provision is often (mis)used after a dismissal of the request of an appointed lawyer to postpone hearings (for example, when the defence lawyer has other hearings to attend to) and can have a devastating impact on the effectiveness of the defence (a cross-examination cannot be effective if the 'promptly available' lawyer has no idea of prior statements by witnesses in the pre-trial file).
- xii The prosecutor may replace counsel permanently if counsel is using illegal means to defend the client, or temporarily if counsel cannot be present at a specific time; the pre-trial investigation officer and the pre-trial judge may replace counsel temporarily if counsel cannot be present at a specific time.
- xiii Retained counsel cannot be removed, but additional counsel can be appointed.

It can be concluded from Table 2 that preventative measures to guarantee the right to counsel in pre-trial proceedings vary significantly among the Member States. The main body responsible for guaranteeing the rights of suspects is the Prosecutor's Office, and in inquisitorial countries also the investigative judge. Nevertheless, sometimes the case finds its way to court, either via a complaint filed by the defence or via a procedural act performed in court (for example, a complaint filed by the defence owing to the activities of the investigative authorities, or a determination of the lawfulness of the arrest). Although the majority of countries reported that the state is responsible for counsel appearing during some evidence-gathering acts (for example, interrogation), this responsibility is sometimes limited to cases of mandatory representation or legal aid. In these countries, retained counsel's failure to appear is attributed to the suspect, as the evidence-gathering act can be performed without counsel being present. However, this approach does not seem to be in accordance with the case law of the ECtHR, as this court has on a number of occasions concluded that suspects should in all cases have an effective and practical right to counsel. Therefore, persons who actually have the means and desire to hire counsel should not be discriminated against. It should be emphasised here that the suspect has limited options to compel his/her counsel to appear, except by paying the counsel's fees and making an agreement with counsel to attend. If, despite this, counsel still does not appear, it should be the state's obligation to guarantee the right to counsel by at least postponing the evidence-gathering act and notifying the competent bodies (for example, the Bar) of counsel's failure to appear.

Unsurprisingly, 21 of the 28 Member States answered that the authorities do not have any means to influence counsel's actions, except maybe by ordering counsel to be present. Here the states are often wary of interfering with the independence of counsel. Indeed, the ECtHR has repeatedly stressed the need to find a balance between state authorities' obligation to interfere and the independence of the Bar.<sup>14</sup> Nevertheless, this should not be a principle behind which the state can hide its unwillingness to act. Such a balance is very difficult to achieve, but again it should be taken into account that according to the case law of the ECtHR, the right to counsel should be practical and effective, not theoretical and illusory. The obligation to guarantee such a right lies with the state, not with the suspect or counsel. Therefore, while respecting the independence of the profession, the state should act not only when counsel fails to appear, but also when counsel obviously fails to perform his/her duties. Otherwise, the standard of the right to counsel would be reduced to having a breathing lawyer present, i.e. the 'breathing lawyer' standard very much criticised in the US.<sup>15</sup>

Substitution of counsel is possible in most of the Member States, but the situations in which counsel can be substituted reflect the states' unwillingness to interfere in the activities of counsel. Therefore, substitution is sometimes limited to cases in which counsel has not appeared (for example, in France and Italy; here the Italian reviewer reported that this might have a devastating impact on the effectiveness of the defence as the new lawyer may not be prepared for the case), or to cases of legal aid. Nevertheless, in some countries not only legal aid lawyers, but also retained counsel can be substituted. In some countries (for example, Romania), ineffective retained counsel cannot be removed, but an *ex officio* lawyer can be appointed in addition.

*Table 3 Preventative measures to guarantee the right to counsel in the trial stage of criminal proceedings*

Bar = the Bar Association; C = the court; CR = only in cases of compulsory representation; LA = only in cases of legal aid; LAO = legal aid office.

	Order counsel to appear	Order counsel to act	Order authorities to terminate activities breaching the right to counsel or take action to respect the right to counsel	Substitute counsel
Austria	Yes (C-CR)	No	Yes (C)	Yes (C-CR) <sup>xiv</sup>
Belgium	Yes (Bar-LA)	No	No	Yes (Bar-LA)
Bulgaria	Yes (C)	No	Yes (C) <sup>xv</sup>	Yes (C-LA)
Croatia	Yes (C, BA)	Yes (C)	No	Yes (C)
Republic of Cyprus	No	No	No	No
Czech Republic	No	No	Yes (C) <sup>xvi</sup>	Yes (C) <sup>xvii</sup>
Denmark	Yes (C)	Yes (C)	Yes (C)	Yes (C)
Estonia	Yes (C)	Yes (C)	Yes (C)	Yes (C)
Finland	Yes (C)	Yes (C)	Yes (C)	Yes (C)
France	Yes (C-CR <sup>xviii</sup> )	No	Yes (C)	Yes (C)
Germany	Yes (C-CR)	No	Yes (C)	Yes (C-CR) <sup>xix</sup>
Greece	Yes (C-CR)	Yes (C-CR)	Yes (C)	Yes (C-CR)
Hungary	Yes (C)	No	Yes (C)	Yes (C)
Ireland	Yes (C)	Yes (C)	Yes (C)	Yes (C)

<sup>14</sup> ECtHR 19 December 1989, *Kamasinski v. Austria*, No. 9783/82; ECtHR 10 October 2010, *Czekalla v. Portugal*, No. 38830/97.

<sup>15</sup> A. Garcia, 'The Right to Counsel Under Siege: Requiem for an Endangered Right?', (1991) 29 *American Criminal Law Review*, no. 1, pp. 35-106; H. Zelnick, 'In Gideon's Shadow: The Loss of Defendant Autonomy and the Growing Scope of Attorney Discretion', (2003) 30 *American Journal of Criminal Law*, no. 3, pp. 363-399; G.J. O'Meara, 'You Can't Get There from Here: Ineffective Assistance Claims in Federal Circuit Courts After AEDPA', (2009) 93 *Marquette Law Review*, no. 2, pp. 545-590; S.F. Hanlon, 'State Constitutional Challenges to Indigent Defense Systems', (2010) 75 *Missouri Law Review*, no. 3, pp. 751-769.



	Order counsel to appear	Order counsel to act	Order authorities to terminate activities breaching the right to counsel or take action to respect the right to counsel	Substitute counsel
Italy	Yes (C)	No	No	Yes (C) <sup>xx</sup>
Latvia	Yes (C)	No	Yes (C)	Yes (C)
Lithuania	Yes (C)	Yes (LAO-LA)	Yes (C)	Yes (C)
Luxembourg	Yes (C)	No	Yes (C)	No
Malta	Yes (C)	No	Yes (C)	No
Netherlands	Yes (C-LA)	No	No	Yes (C-LA)
Poland	Yes (C-CR)	No	No	Yes (C-LA)
Portugal	Yes (C)	No	Yes (C)	Yes (C-LA)
Romania	Yes (C)	Yes (C)	Yes (C)	Yes (C) <sup>xxi</sup>
Slovakia	Yes (C)	No	Yes (C)	Yes (C)
Slovenia	Yes (C)	No	No	Yes (C) <sup>xxii</sup>
Spain	Yes (C)	No	No	Yes (C)
Sweden	Yes (C)	No	Yes (C)	Yes (C)
United Kingdom	Yes (C)	Yes (C)	Yes (C)	Yes (C)

xiv The obligation to substitute a lawyer who fails to perform his/her tasks does not arise from national law, but from the case law of the ECtHR.

xv The case may be returned to the prosecutor to remedy the violation.

xvi See xv.

xvii This can only be done if the fully notified lawyer repeatedly fails to appear during criminal proceedings.

xviii The court must provide counsel in cases where the participation of counsel is not mandatory, but the accused requests this.

xix Another counsel must be appointed if there is (a) a legal requirement to be assisted by counsel and (b) the previously appointed counsel was not present at trial, leaves trial without having been granted leave, or declines to defend the defendant.

xx Counsel can be substituted by the judge with a 'promptly available' lawyer when the court appointed or chosen lawyer does not attend. According to the reviewer, this provision is often (mis)used after a dismissal of the request of the appointed lawyer to postpone hearings (for example, when the defence lawyer has other hearings to attend to) and can have a devastating impact on the effectiveness of the defence (a cross-examination cannot be effective if the 'promptly available' lawyer has no idea of prior statements by witnesses in the pre-trial file).

xxi Retained counsel cannot be removed, but additional counsel can be appointed.

xxii See xxi.

The situation of preventative measures to guarantee the right to counsel at trial resembles the situation of such measures in pre-trial proceedings, i.e. the measures vary significantly among the Member States (Table 3). During trial, the main guarantor of people's rights is the court, not the investigative bodies. Again, the majority of Member States (19 of 28) reported that due to the independence of the profession, the state has no power to interfere with counsel's actions, even when counsel fails to perform his/her duties. Common law countries such as Ireland and the UK are an exception, as the court can make general suggestions and give general guidelines to the defence on how to proceed with the case.

Directive 2013/48/EU provides the right of access to a lawyer with an obligation to remedy any violation of the rights laid down in the Directive (Article 12). Unfortunately, the Directive does not address what measures could prevent a violation, and therefore also prevent the need to apply remedies. The Member States deal this issue very differently in their legal justice systems, as can be concluded on the basis of Tables 2 and 3. Not only do the preventative measures vary, but so does the reasoning and principles behind the measures. Some of the Member States take responsibility in guaranteeing the right to counsel in all cases, some limit it to legal aid or mandatory representation cases, and some do not deem themselves to be responsible for this at all. In addition, systems of preventative measures often still operate based on the 'breathing lawyer' standard, although both the case law of the ECtHR and Directive 2013/48/EU guide the Member States to guarantee effective and practical rights. Therefore, as the aim of the EU is to foster suspects' and accused persons' rights in criminal proceedings, controversial understandings of the role of

the state in guaranteeing the right to counsel should be addressed at the EU level. It is convenient for Member States to hide behind the argument of the independence of the profession, but this may lead to a legitimization of the proceedings in which legal aid counsel is present, but is not acting, or retained counsel is not even present, citing that it is the ultimate task of the suspect or accused to guarantee counsel's presence. However, this should not be the EU understanding of the right to counsel.

### 3.2 Definitive remedies for violations of the four aspects of the right to counsel

#### 3.2.1 Introduction

According to Directive 2013/48/EU, the right to counsel does not only comprise the presence of counsel, but also his/her effective participation, the suspect's right to consult with counsel privately, and the right to voluntarily and unequivocally waive the right to counsel.<sup>16</sup> Four cases were presented to the representatives of the Member States to determine how their country remedies, if at all, violations of various aspects of the right to counsel. It has to be emphasised that these cases cover only limited scenarios of a violation of the right to counsel. In order not to overburden the respondents with cases, the author decided to present only a few cases that involve the most fundamental aspects of the right to counsel: the presence of counsel (Case 1), the choice of counsel (Case 2), and the effectiveness of counsel's participation (Case 3 – during interrogation; Case 4 – in court).

More specifically, the first case focused on a violation of the right to have access to a lawyer, i.e. it was a case in which the detained person was interrogated in pre-trial proceedings without prior consultation with and the participation of counsel, although he had insisted upon it. The second case comprised the right to choose one's counsel, in cases where the chosen counsel was changed to a lawyer appointed by the authorities without the consent of the detained person. In both cases the detained person confessed and provided the police with information about where to find additional evidence, which was subsequently found as indicated. The statements, the evidence found as a result of the information given during interrogation, and some additional evidence gathered independently, were subsequently used to convict the detained person. When quizzing the representatives about what remedies could be applied to such violations according to national law, the author also asked if such remedies depend on whether the person interrogated was detained or not, and whether these remedies are granted *ex officio* by the judge or another authority, or only if the defence requests this.

The third and fourth cases were about the effectiveness of defence counsel. The third case focused on the right to effective assistance from counsel in pre-trial proceedings, in this case the suspect was interrogated by the police with unprepared legal aid counsel being present. In this case the suspect confessed and provided the police with information about where to find additional evidence, which was subsequently found as indicated. The statements, the evidence found as a result of the information given during interrogation, and some additional evidence gathered independently, were subsequently used to convict the suspect. In the fourth case, unprepared legal aid counsel represented the accused at trial without any prior discussion of the case with the accused. In this case the person was convicted based on his confession at trial and some evidence gathered by the police during pre-trial proceedings that indirectly indicated his guilt. In relation to both cases the author asked the representatives if the remedies depended on whether counsel was legal aid or retained, and whether remedies are granted *ex officio* by the judge or another authority, or only if the defence requests this.

For all cases, a list of potential remedies was presented to the representatives with an option to name additional ones if they exist in national law. Below, the answers of the representatives to the four case scenarios are discussed in detail.

<sup>16</sup> Soo (2016), *supra* note 2, pp. 286-291.

### 3.2.2 Remedies for a violation of the right to have access to a lawyer

**Case 1.** *Ian, suspected of robbery, is detained and interrogated by the police during pre-trial proceedings without prior consultation with and the participation of counsel, although he has insisted upon one. As a result of the interrogation, he confesses and provides the police with information about where to find additional evidence. The evidence is found just as indicated. He is convicted based on his statements, the evidence found as a result of the information given during interrogation, and some additional evidence gathered independently.*

*Which of the following remedies for a violation of the right to communicate with counsel and to have counsel present during interrogation are applicable (multiple answers are possible)? Please indicate per each remedy the authority that grants the remedy and the legal basis of the remedy.*

**Additional question 1:** *Do the remedies depend on whether Ian was in detention during the interrogation?*

**Additional question 2:** *Are these remedies granted ex officio by the judge or another authority, or only if the defence requests it?*

**Table 4** *Applicable remedies for a violation of the right to have access to a lawyer in pre-trial proceedings*

	Excluding Ian's statements	Excluding evidence gathered based on information received from Ian	Inadmissibility of prosecution	Dismissal of charges or acquittal	Taking a decision implying the finding of guilt/criminal responsibility, but waiving the sanction	Reducing Ian's sentence	Annulment of the court's judgment with the possibility of a retrial	Any other remedy
Austria <sup>xxiii</sup>	No	No	No	No	No	No	No	No
Belgium	Yes <sup>xxiv</sup>	No	No	No	No	No	Yes	No
Bulgaria	Yes <sup>xxv</sup>	No	No	No	No	No	Yes	No
Croatia	Yes <sup>xxvi</sup>	Yes <sup>xxvii</sup>	No	No	No	No	Yes	No
Republic of Cyprus	No	No	No	No	No	No	No	No
Czech Republic	Yes	No	No	No	No	No	Yes	No
Denmark	No	No	No	No	No	No	Yes <sup>xxviii</sup>	No
Estonia	Yes	No	No	No	No	No	Yes	No
Finland	Yes	Yes	No	Yes <sup>xxix</sup>	No	No	Yes	Yes <sup>xxx</sup>
France	Yes	Yes	No	No	No	No	Yes <sup>xxxi</sup>	No
Germany	Yes	No	No	No	No	No	No	No
Greece <sup>xxxii</sup>	Yes	Yes	No	No	No	No	Yes	No
Hungary	Yes <sup>xxxiii</sup>	No	No	No	No	No	Yes	No
Ireland	Yes <sup>xxxiv</sup>	No	Yes <sup>xxxv</sup>	No	No	Yes <sup>xxxvi</sup>	Yes	No
Italy	Yes <sup>xxxvii</sup>	No	No	No	No	No	Yes	No
Latvia	Yes	No	No	No	No	No	Yes	No
Lithuania	Yes	No	No	No	No	No	Yes	No
Luxembourg	Yes	Yes	No	No	No	No	Yes	No
Malta	Yes	Yes	No	No	No	No	Yes	No
Netherlands	Yes	Yes	Yes	No	No	No	Yes	No
Poland	No	No	No	No	No	No	Yes	No
Portugal	Yes <sup>xxxviii</sup>	Yes	No	No	No	No	Yes	No
Romania	Yes <sup>xxxix</sup>	Yes	No	No	No	No	Yes <sup>xl</sup>	No

	Excluding Ian's statements	Excluding evidence gathered based on information received from Ian	Inadmissibility of prosecution	Dismissal of charges or acquittal	Taking a decision implying the finding of guilty/criminal responsibility, but waiving the sanction	Reducing Ian's sentence	Annulment of the court's judgment with the possibility of a retrial	Any other remedy
Slovakia	Yes	Yes	No	No	No	No	Yes	No
Slovenia	Yes <sup>xli</sup>	Yes <sup>xliii</sup>	No	No	No	No	Yes	No
Spain	Yes	Yes	No	No	No	No	Yes	No
Sweden	No	No	No	No	No	No	No	No
United Kingdom	Yes	No	No	No	No	No	Yes	No

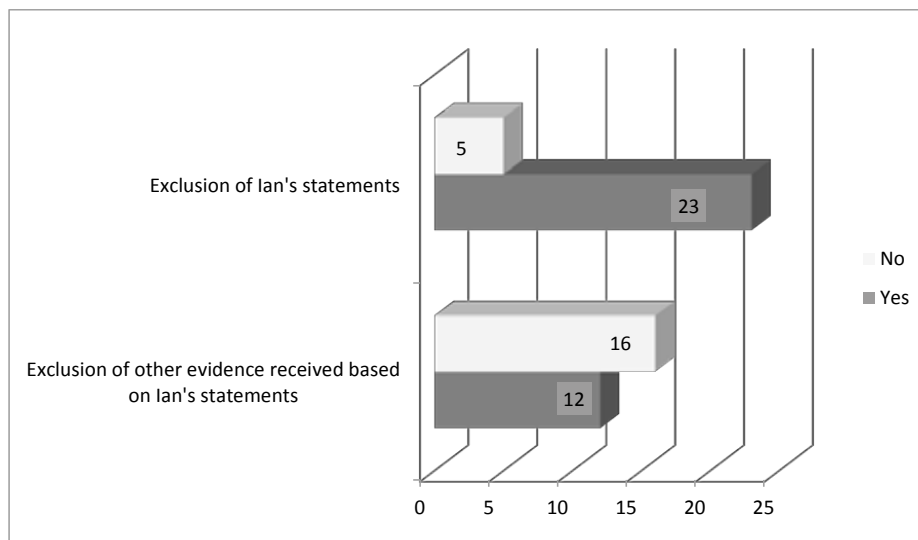
- xxiii It is required that the detained was instructed about the right to counsel. If there was no instruction, his interrogation would be void. If the right to counsel *per se* is violated, there are no applicable remedies.
- xxiv The right to counsel is provided by law during the first 24 hours of detention, and based on the case law also during further detention. This means that the police may allow a lawyer to be present during further interrogations, but there is no legal basis for this, which in the reviewer's view may affect the application of remedies.
- xxv Only applies if official charges are brought against the person. However, for 24 hours the police can detain a person with no official charge being brought against him/her. During this period, so-called 'informal conversations' between the detainee and the police often take place without the participation of a lawyer. In practice, recordings of such conversations are used as evidence in court.
- xxvi His statements will be excluded if he gave them during an official interview. If the interview was unofficial, his statements can never be used to convict him.
- xxvii However, evidence gathered based on Ian's statements made during an unofficial interview can be used to convict him, although his statements cannot.
- xxviii Here the defendant could withdraw his confession.
- xxix Under certain circumstances, infringing the requirements of a fair trial may lead to an acquittal even if the evidence was sufficient to prove guilt, and the court has to resolve this question in close conformity with current ECtHR case law.
- xxx If the case is closed, an extraordinary appeal may be brought to the Supreme Court.
- xxxi Here the accused is bound by his/her arguments raised before the first instance judge.
- xxxii The remedies apply only from the moment the case reaches the investigative judge.
- xxxiii However, the reviewer stressed that although this is the remedy provided in national law, it is not applied in practice. In addition, the law allows the interrogation to continue if notified counsel fails to appear. In this case, the statements made by the suspect will not be excluded.
- xxxiv According to recent developments in the case law, evidence obtained in knowing, reckless, or grossly negligent breach of a person's constitutional rights will be excluded, except in exceptional circumstances. Where evidence is obtained in breach of a person's constitutional rights, but such a breach is not 'deliberate and conscious', there is a rebuttable presumption in favour of exclusion. The presumption can be rebutted with evidence that the breach was inadvertent.
- xxxv This is more of a theoretical approach and has not been applied in practice.
- xxxvi See xxxv.
- xxxvii It must be mentioned that the general rule of the non-usability of statements that a defendant gave without a lawyer being present is valid only during trial: that means that it does not apply to other procedures that can lead to conviction. For example, statements made without a lawyer being present are used as full evidence in the 'plea bargaining proceeding' and 'short-track trial' (summary trial), where the evidence is limited to the materials in the investigation file, and the procedure turns from adversarial to inquisitorial.
- xxxviii This is an irreparable nullity.
- xxxix This is an irreparable nullity if the participation of counsel was mandatory.
- xl If the defendant was convicted based on statements given in the absence of a lawyer during the pre-trial phase, i.e. not directly heard by the court of first instance trying the case, this could lead to the annulment of the court's judgment. However, this outcome would not be a direct consequence of the violation of the right to counsel – this matter is settled during the preliminary chamber proceedings – but due to the principle of immediacy, which is also likely to give rise to a violation of the right to a fair trial.
- xli If such statements have been gathered during an informal interview, they cannot be used in court, but will remain in the case file. However, if the statements were gathered during a formal interview, they will be excluded from the file.
- xlii The evidence will be excluded only if Ian gave his statements during official interviewing.

In this case Ian's right of access to a lawyer during interrogation was completely deprived, including not having the opportunity to discuss the case with his lawyer before the interrogation took place. Based on the answers provided to the author by the representatives of the Member States (Table 4), it can be concluded that in 23 Member States Ian's statements could not be used to convict him. Nevertheless, this is a conclusion which is made with some reservations. The Belgian representative emphasised that Ian would not have the right to counsel after the first 24 hours of his detention, which means that statements made

during the latter period might not be excluded. A similar situation seems to occur in Bulgaria, except there Ian would not have the right to counsel during the first 24 hours after his arrest. In Greece, the statements given by Ian to the police could always be used to convict him, as the accused only has the right to counsel once the case has been given to the investigative judge. The Hungarian representative had doubts whether the exclusionary rule, although enacted by law, is applied in practice in such cases. In Ireland, recent case law has overruled the automatic exclusionary rule. In Italy, Ian's evidence could still be used to convict him if he waived his right to a full trial.

The question of whether evidence gathered based on information received from Ian without counsel being present would also be excluded was put to the representatives. This is the so-called 'fruit of the poisonous tree doctrine', mostly developed in the case law of the US. A total of 12 of 23 Member States reported that most probably that would be the case, although as in the US there are exceptions to this principle that have been developed by the case law of the Member States. Croatia and Slovenia reported that although the fruit of the poisonous tree doctrine is applied in their country, if the statements were made by Ian during an unofficial interview, information gathered based on his statements could still be used to convict him. In addition, the representative of Portugal described difficulties related to the application of the fruit of the poisonous tree doctrine: 'It is quite common that defendants are only confronted with the evidence several months (or years) after it was gathered. During this period of time, great amounts of secondary evidence may have been added to the file, and so on and so forth. This means that, even if the defendant manages to prove that the primary pieces of evidence were gathered in an unlawful manner – and that they must therefore be excluded – it is nearly impossible to escape the limit to the doctrine that "the chain of causation between the illegal action and the tainted evidence is too attenuated" for the secondary evidence to be excluded.' Therefore, the representative concluded, suspects should be confronted earlier with evidence gathered against them.

Figure 1 demonstrates Member States in which statements made by Ian without counsel being present and any other evidence gathered against him based on such statements would be excluded from the body of evidence.



*Figure 1 Will Ian's statements and information received based on these statements be excluded in Case 1?*

No exclusion of Ian's statements: AT, CY, DK, PL, SE.

Exclusion of Ian's statements: BE, BG, HR, CZ, EE, FI, FR, DE, EL, HU, IE, IT, LV, LT, LU, MT, NL, PT, RO, SK, SI, ES, UK.

No exclusion of any other evidence gathered based on information from Ian: AT, BE, BG, CY, CZ, DK, EE, DE, HU, IE, IT, LV, LT, PL, SE, UK.

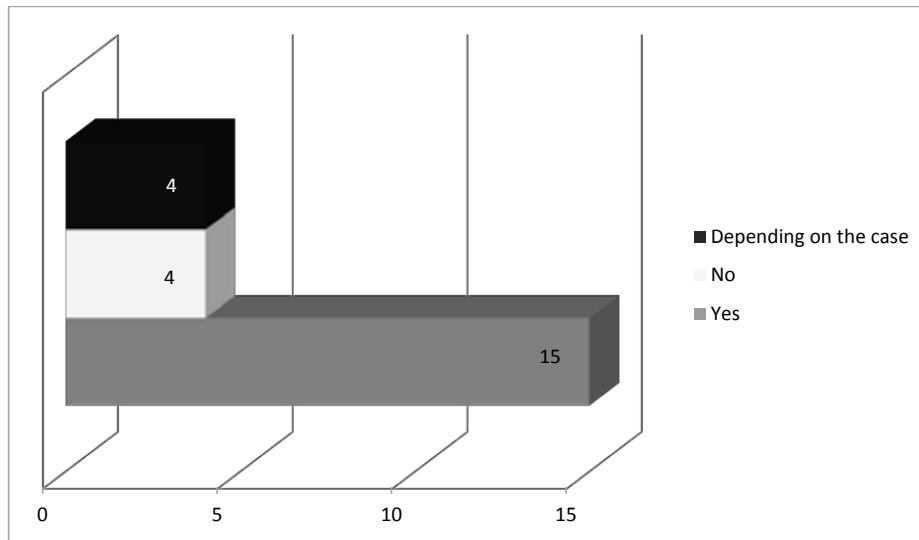
Exclusion of any other evidence gathered based on information from Ian: HR, FI, FR, EL, LU, MT, NL, PT, RO, SK, SI, ES.

The Member States were also queried as to other remedies which may be applicable to Ian in the pending proceedings. Three countries – Austria, the Republic of Cyprus, and Sweden – reported that Ian would not have any remedies in the described case. 22 of 23 Member States (except Germany) that reported the application of the exclusionary rule also noted that if it is not applied at the first instance court, it could be a basis to annul the judgment of higher courts. Denmark and Poland also mentioned that the annulment of the court's judgment might be an option, despite it not being possible to exclude Ian's statements. Ireland and the Netherlands reported that the inadmissibility of prosecution might be the remedy for the most serious infringements. In Finland, such infringements might lead to a dismissal of the charges or an acquittal, even if there was enough evidence to prove Ian's guilt. In Ireland a reduction in the sentence of a person due to his/her rights being violated in pre-trial proceedings is at least a theoretical option. In Finland, a violation of the right to counsel might form a basis to reopen an already closed case.

As previously stated, 23 Member States reported that in the case that Ian was unlawfully deprived of his right to have access to a lawyer during interrogation, his statements made during this interrogation will most likely be excluded from the body of evidence. These countries were also asked about whether such evidence is still brought to the attention of the court. Only four countries – Croatia, Italy, Slovenia, and the UK – reported that the court deciding the case does not see such evidence, as the decision on lawfulness is made beforehand. In France, this is the case with most serious crimes, and in Ireland with jury trials. In Belgium and Malta, the practice varies, as sometimes unlawful evidence is still brought to the court's attention. In Slovenia, statements made during a formal interview are excluded if a person's right to counsel has been violated, but information received from him/her during an unofficial interview is retained in the case file.

In the remainder of the countries, the lawfulness of the evidence is either decided by the same court as that trying the accused (Bulgaria, Estonia, Finland, France (in less serious cases), Germany, Ireland (trial before a panel of judges), Lithuania, Slovakia), or formally unlawful evidence is retained in the case file (the Czech Republic, Greece, Hungary, Latvia, Luxembourg, the Netherlands, Portugal, Romania, Spain; the same also occasionally happens in Belgium and Malta). Figure 2 shows how the exclusionary rule operates in the Member States when the right to counsel has been violated. Austria, the Republic of Cyprus, Denmark, Poland, and Sweden have been omitted as, according to the answers of their representatives, the exclusionary rule is not applied in such cases.

Based on the answers provided by the representatives, it can be concluded that in most Member States unlawful evidence is only formally excluded when the court deciding the case views it. As the representative of Portugal argued: 'This means that, while that particular piece of evidence can never be used to establish the facts or determine the degree of guilt, it is never materially excluded from the case file. Therefore, any of the judges may have access to it, willingly or not. Even if a judge tries to avert it, this has an obvious impact. After all, "what has been seen cannot be unseen". This problem should be addressed immediately. A simple change to the law stating clearly that the decision to exclude any piece of evidence must entail its immediate removal from the case file, would suffice. Or a change in the law instituting proceedings by which the decision to exclude the evidence would be made before trial by a judge who is different than the trial judge.'



*Figure 2 If the exclusionary rule is applied, will Ian's statements still be brought before the court deciding the case?*

Depending on the case: BE (occasionally), FR (most serious charges = no, less serious charges = yes), IE (jury trial = no, trial before a panel of judges = yes), MT (occasionally).

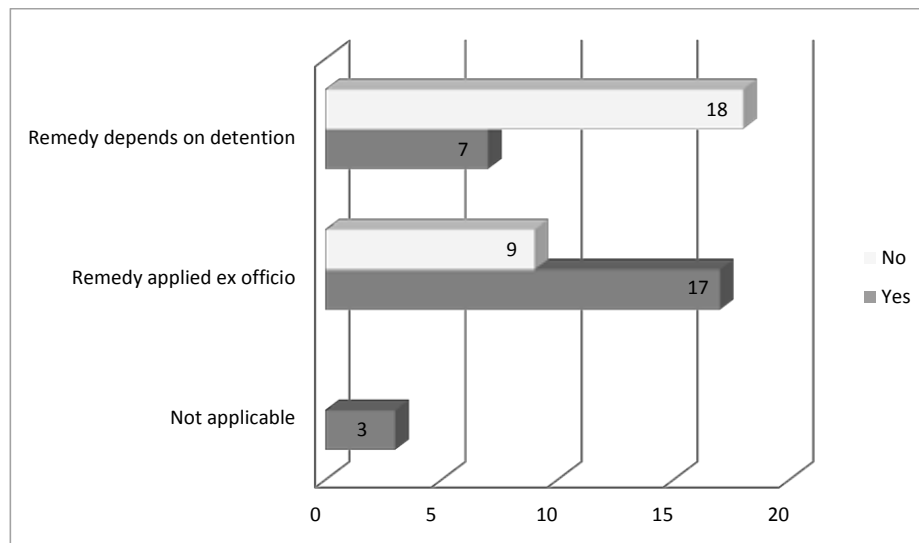
No: HR, IT, SI (official statements), UK.

Yes: BG, CZ, EE, FI, DE, EL, HU, LV, LT, LU, NL, PT, SK, RO, ES.

Directive 2013/48/EU applies from the time suspects or accused persons are made aware by competent authorities of a Member State, via an official notification or otherwise, that they are suspected or accused of having committed a criminal offence, irrespective of whether they are deprived of their liberty (Article 2(1)). As the right of access to a lawyer should not depend on the deprivation of liberty, so should not the application of remedies. However, 7 Member States – Belgium, Croatia, Germany, Ireland, the Netherlands, Poland,<sup>17</sup> and Romania – reported that this is not the case (Figure 3).

It was also asked whether the application of remedies has to be requested by the defence, or if the court should apply the remedies *ex officio* (Figure 3). 7 countries that reported the applicability of the exclusionary rule stated that it is only applied if the defence requests this. These were France, Germany, Ireland, Luxembourg, Portugal, Romania (in cases where representation is not mandatory), and the UK. In the rest of the countries that reported the application of the exclusionary rule (and Romania in compulsory representation cases), the court should exclude Ian's evidence on its own initiative. Of course, filing an appeal against the judgment of the first instance court in these countries is the responsibility of the defence if counsel finds that unlawful evidence is being used to try his/her client.

<sup>17</sup> As previously reported, in Poland a retrial would be the only applicable remedy, as the exclusionary rule is not recognised in this country.



*Figure 3 Remedies for a violation of the right to have access to a lawyer in pre-trial proceedings: in Case 1, do they depend on the detention of a person, or are they applied ex officio?*

Remedies do not depend on detention: BG, CZ, DK, EE, FI, FR, EL, HU, IT, LV, LT, LU, MT, PT, SK, SI, ES, UK.

Remedies depend on detention: BE, HR, DE, IE, NL, PL, RO.

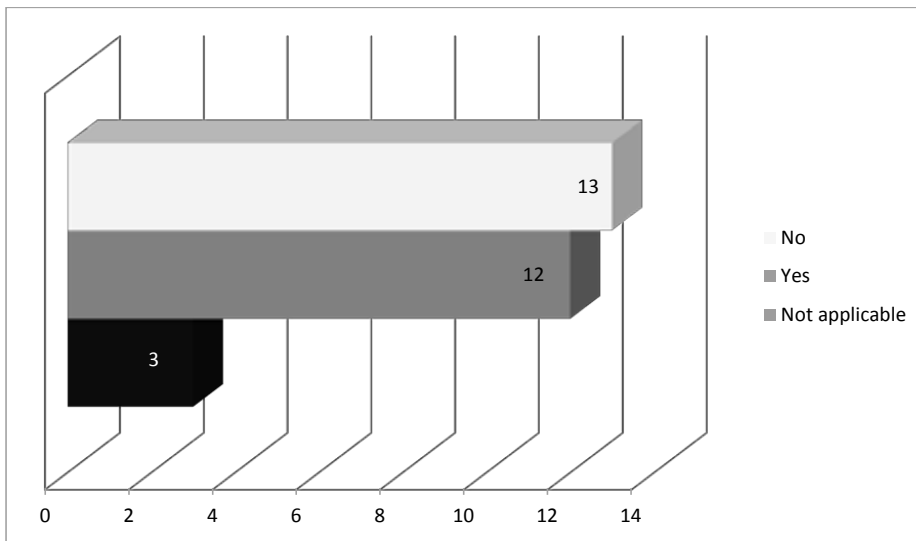
Remedies are applied based on a request from the defence: DK (appeal), FR, DE, IE, LU, PL (appeal), PT, RO (in cases where representation is not mandatory), UK.

Remedies are applied ex officio: BE, BG, HR, CZ, EE, FI, EL, HU, IT, LV, LT, MT, NL, RO (in cases of mandatory representation), SK, SI, ES.

These questions cannot be answered as there are no remedies: AT, CY, SE.

The author also asked the representatives if applicable remedies depended on whether the violation of the right to counsel derived from government agencies or from counsel themselves (for example, if counsel does not appear during the interrogation, despite being notified beforehand). As reported before, 25 Member States have the remedies of excluding evidence and/or the annulment of the judgment of lower courts when counsel fails to attend. 13 Member States stated that the application of a remedy would not depend on the source of the violation and 12 answered that it would (Figure 4). In the latter Member States, counsel's failures would be remedied more reluctantly or not at all.





*Figure 4 Do remedies depend on whether the violation of the right to counsel derived from government agencies or from counsel?*

Remedies depend on the source of violation: CZ, FR, DE, EL, HU, IE, IT, LT, LU, MT, SK, UK.

Remedies do not depend on the source of violation: BE, BG, HR, DK, EE, FI, LV, NL, PL, PT, RO, SI, ES.

Not applicable: AT, CY, SE.

### 3.2.3 Remedies for a violation of the right to choose one's counsel

**Case 2.** *Ian, suspected of robbery, has retained counsel. He is detained, but has not confessed. During pre-trial proceedings, at some point the authorities change his counsel to an appointed one, explaining to him that his counsel no longer has time for him. Simultaneously, counsel is falsely notified that Ian has refused his further services. As a result of the newly appointed counsel's advice, Ian confesses and provides the police with information about where to find additional evidence. The evidence is found just as indicated. He is convicted based on his statements, the evidence found as a result of the information given during interrogation, and some additional evidence gathered independently.*

*Which of the following remedies for a violation of the right to choose one's counsel are applicable (multiple answers are possible)? Please indicate per each remedy the authority granting the remedy and the legal basis of the remedy.*

**Additional question 1:** *Do the remedies depend on whether Ian was in detention during the interrogation?*

**Additional question 2:** *Are these remedies granted ex officio by the judge or another authority, or only if the defence requests this?*

Table 5 Applicable remedies for a violation of the right to choose one's counsel in pre-trial proceedings

	Excluding Ian's statements	Excluding evidence gathered based on information received from Ian	Inadmissibility of prosecution	Dismissal of charges or acquittal	Taking a decision implying the finding of guilt/criminal responsibility, but waiving the sanction	Reducing his sentence	Annulment of the court's judgment with the possibility of a retrial	Any other remedy
Austria	No	No	No	No	No	No	No	No
Belgium <sup>xliii</sup>	No	No	No	No	No	No	No	No
Bulgaria <sup>xliv</sup>	No	No	No	No	No	No	Yes	No
Croatia	Yes <sup>xlv</sup>	Yes <sup>xlvi</sup>	No	No	No	No	Yes	No
Republic of Cyprus	No	No	No	No	No	No	No	No
Czech Republic <sup>xlvii</sup>	Yes	No	No	No	No	No	Yes	No
Denmark	No	No	No	No	No	No	Yes <sup>xlviii</sup>	No
Estonia <sup>xlix</sup>	Yes	No	No	No	No	No	Yes	No
Finland	Yes <sup>l</sup>	Yes	No	Yes <sup>li</sup>	No	No	Yes	Yes <sup>lii</sup>
France	Yes	Yes	No	No	No	No	Yes	No
Germany	Yes	No	No	No	No	No	No	No
Greece	Yes	Yes	No	No	No	No	Yes	No
Hungary	Yes	No	No	No	No	No	Yes	No
Ireland	Yes <sup>liii</sup>	No	Yes <sup>liv</sup>	No	No	Yes <sup>lv</sup>	Yes	No
Italy	Yes	No	No	No	No	No	Yes	No
Latvia	Yes	No	No	No	No	No	Yes	No
Lithuania <sup>lvi</sup>	Yes	No	No	No	No	No	No	No
Luxembourg <sup>lvii</sup>	Yes	Yes	No	No	No	No	Yes	No
Malta <sup>lviii</sup>	Yes	Yes	No	No	No	No	Yes	No
Netherlands <sup>lix</sup>	Yes	Yes	Yes	No	No	No	Yes	No
Poland <sup>lx</sup>	No	No	No	No	No	No	Yes	No
Portugal	Yes	Yes	No	No	No	No	Yes	Yes <sup>lxi</sup>
Romania	Yes	Yes	No	No	No	No	Yes	No
Slovakia	Yes	Yes	No	No	No	No	Yes	No
Slovenia	Yes	Yes	No	No	No	No	Yes	No
Spain	Yes	Yes	No	No	No	No	Yes	No
Sweden	No	No	No	No	No	No	No	No
United Kingdom	-	-	-	-	-	-	-	-

xliii The representatives emphasised that this is a situation which is highly unlikely to occur in Belgium.

xliv The representative emphasised that this is a situation which is highly unlikely to occur in Bulgaria, as the Bar is responsible for appointing counsel.

xlv His statements will be excluded if he gave them during an official interview. If the interview was unofficial, his statements can never be used to convict him.

xlvi However, evidence gathered based on Ian's statements made during an unofficial interview can be used to convict him, although his statements cannot.

xlvii The representative emphasised that such a situation seems very unlikely, as the lawyer should not comply with a notice from a police authority regarding his/her client refusing his/her further services.

xlviii Here the defendant can withdraw his confession.

xlix Although *Martin v. Estonia* (ECTHR 30 May 2013, *Martin v. Estonia*, No. 35985/09) might not give this impression, now this situation is most unlikely to occur in Estonia as the authorities can no longer appoint counsel, only the Bar is authorised to do this.

l If new counsel has studied the case properly and the suspect is aware of his right to remain silent, the statements might not be excluded. In this case, the evidential value of the statements could still be reduced.

- li Under certain circumstances infringing the requirements of a fair trial may lead to an acquittal, even if the evidence were sufficient to prove guilt, and the court has to resolve this question in close conformity with current ECtHR case law.
- lii If the case is closed, an extraordinary appeal may be brought to the Supreme Court.
- liii According to the recent developments in the case law, evidence obtained in knowing, reckless, or grossly negligent breach of constitutional rights will be excluded, except in exceptional circumstances. Where evidence is obtained in breach of constitutional rights but such a breach is not 'deliberate and conscious', there is a rebuttable presumption in favour of exclusion. The presumption can be rebutted with evidence that the breach was inadvertent.
- liv This is more of a theoretical approach and has not applied in practice.
- lv See liv.
- lvi There is no court practice on this matter.
- lvii The representative emphasised that this situation is highly unlikely to occur in Luxembourg, as the Bar is responsible for appointing counsel.
- lviii See lvi.
- lix See lvi.
- lx However, the representatives emphasised that this situation would be impossible, as counsel needs to receive notification that he/she has been relieved of his/her duties from the suspect him/herself, not the police.
- lxi An extraordinary reopening of the proceedings is also possible, if these facts are revealed after the case is closed.

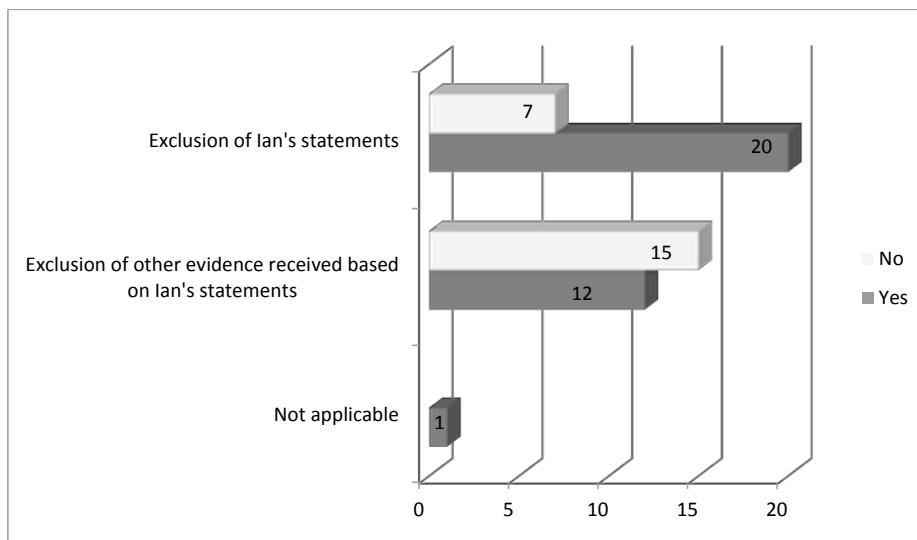
This is a case that covers the person's right to choose counsel. If the chosen lawyer is changed to an appointed lawyer without good reason, this right has been violated according to the case law of the ECtHR.<sup>18</sup> Based on the conditions that suspects and accused persons have the right to have access to a lawyer in a manner that allows them to 'exercise their rights of defence practically and effectively' (Article 3(1)), and that the waiver of the right to counsel is only valid if it is informed, voluntary, and unequivocal (Article 9(1) a) and b), it could be concluded that Directive 2013/48/EU also provides suspects and accused persons the right to choose their lawyer.<sup>19</sup> 20 of 27 Member States (the UK representative could not answer the question as there is no distinction between the types – either as counsel of choice or on the duty list – of lawyer) concluded that the exclusionary rule would apply (Table 5). In Austria, the Republic of Cyprus, Denmark, Poland, and Sweden the exclusion of evidence would not be remedied even in Case 1. In Belgium and Bulgaria Ian's statements would also not be excluded. However, the representatives of both countries emphasised that the Case 2 scenario is highly unlikely to occur in their country. The representatives of the Czech Republic, Estonia, and Poland also claimed that the Case 2 scenario is very unlikely to occur in their country. Finland reported that the exclusion of Ian's statements would depend on the effectiveness of the newly appointed lawyer; if he/she does his/her job properly, Ian's statements might not be excluded, but the evidential value of the statements might still be reduced. All 12 Member States that reported the application of the fruit of the poisonous tree doctrine in Case 1, also did so in Case 2.

The other remedies – next to the exclusion of evidence – that could be applicable in the pending proceedings against Ian were similar to Case 1. Four countries – Austria, Belgium, the Republic of Cyprus, and Sweden – reported that Ian would not have any remedies in the described case. 18 of 20 Member States (except Germany and Lithuania) that reported the application of the exclusionary rule also noted that if it is not applied at the first instance court, it could become the basis to annul the judgment by higher courts. Bulgaria, Denmark, and Poland also mentioned that the annulment of the court's judgment might be an option. Ireland and the Netherlands reported that the inadmissibility of prosecution might be the remedy for the most serious infringements. In Finland, such infringements might lead to the dismissal of charges or an acquittal, even if there was enough evidence to prove the person's guilt. In Ireland, reducing the sentence of a person due to his/her rights being violated during pre-trial proceedings is at least a theoretical option. In Finland and Portugal, a violation of the right to choose counsel might form the basis to reopen a closed case.

Figure 5 shows in which Member States Ian's statements and any other evidence received based on his statements will be excluded when a change of lawyer was imposed upon him.

18 ECtHR 30 May 2013, *Martin v. Estonia*, No. 35985/09; ECtHR 20 October 2015, *Dvorski v. Croatia*, No. 25703/11.

19 Soo (2016), *supra* note 2, p. 297.



*Figure 5 Will Ian's statements and information gathered based on these statements be excluded in Case 2?*

No exclusion of Ian's statements: AT, BE, BG, CY, DK, PL, SE.

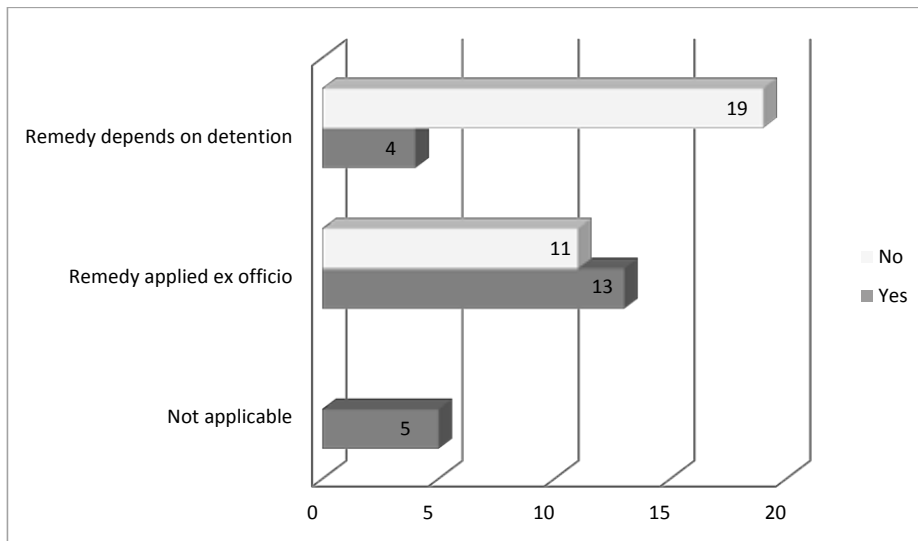
Exclusion of Ian's statements: HR, CZ, EE, FI, FR, DE, EL, HU, IE, IT, LV, LT, LU, MT, NL, PT, RO, SK, SI, ES.

No exclusion of any other evidence received based on information from Ian: AT, BE, BG, CY, CZ, DK, EE, DE, HU, IE, IT, LV, LT, PL, SE.

Exclusion of any other evidence gathered based on information from Ian: HR, FI, FR, EL, LU, MT, NL, PT, RO, SK, SI, ES.

Not applicable: UK.

Four Member States – Germany, Ireland, the Netherlands, and Romania – reported that the application of a remedy would only be an option if Ian was detained (Figure 6). This left 19 Member States in which the remedy does not depend on detention. 8 countries that reported the applicability of the exclusionary rule stated that it is only applied if the defence requests this. These were Croatia, France, Greece, Germany, Ireland, Luxembourg, Portugal, and Romania (in cases where representation was not mandatory). In the other Member States (and Romania in compulsory representation cases), the court should exclude Ian's evidence of its own initiative if the defence has not requested this. Nonetheless, filing an appeal against the judgment of the first instance court in these countries is a responsibility of the defence, if they find that unlawful evidence has been used to convict their client.



*Figure 6 Remedies for a violation of the right to choose one's counsel in pre-trial proceedings: do they depend on the detention of a person and are they applied ex officio?*

Remedies do not depend on detention: BG, HR, CZ, DK, EE, FI, FR, EL, HU, IT, LV, LT, LU, MT, PL, PT, SK, SI, ES.

Remedies depend on detention: DE, IE, NL, RO.

Remedies are applied based on a request from the defence: BG (appeal), HR, DK (appeal), FR, DE, EL, IE, LU, PL (appeal), PT, RO (in cases where representation was not mandatory).

Remedies are applied ex officio: CZ, EE, FI, HU, IT, LV, LT, MT, NL, RO (in cases of mandatory representation), SK, SI, ES.

These questions cannot be answered as there are no remedies or the question does not apply to the justice system of the Member State: AT, BE, CY, SE, UK

### 3.2.4 Remedies for a violation of the right to the effective assistance of a lawyer during pre-trial proceedings

**Case 3.** *Ian, suspected of robbery, is interrogated by the police in the presence of his legal aid counsel. His counsel, not having studied the facts and the relevant law, advises him to confess, although the circumstances of the case show that without his confession his chances of conviction are virtually non-existent. As a result of interrogation, he confesses and provides the police with information about where to find additional evidence. The evidence is found just as indicated. He is convicted based on his statements, the evidence found as a result of the information given during interrogation, and some additional evidence gathered independently.*

*Which of the following remedies for a violation of the right to have effective assistance from counsel during interrogation are applicable (multiple answers are possible)? Please indicate per each remedy the authority granting the remedy and the legal basis of the remedy.*

**Additional question 1:** *Would your answers to Ian's case be any different if he had retained counsel?*

**Additional question 2:** *Are these remedies granted ex officio by the judge or another authority, or only if the defence requests this?*

Table 6 Applicable remedies for a violation of the right to effective assistance from counsel in pre-trial proceedings

	Excluding Ian's statements	Excluding evidence gathered based on information received from Ian	Inadmissibility of prosecution	Dismissal of charges or acquittal	Taking a decision implying the finding of guilt/criminal responsibility, but waiving the sanction	Reducing his sentence	Annulment of the court's judgment with the possibility of a retrial	Any other remedy
Austria <sup>lxii</sup>	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Belgium	No	No	No	No	No	No	No	No
Bulgaria	No	No	No	No	No	No	No	No
Croatia	No	No	No	No	No	No	No	No
Republic of Cyprus	No	No	No	No	No	No	No	No
Czech Republic	No	No	No	No	No	No	No	No
Denmark	No	No	No	No	No	No	Yes <sup>lxiii</sup>	No
Estonia <sup>lxiv</sup>	Yes	No	No	No	No	No	Yes	No
Finland	Yes	Yes	No	Yes <sup>lxv</sup>	No	No	Yes	Yes <sup>lxvi</sup>
France	No	No	No	No	No	No	No	No
Germany	No	No	No	No	No	No	No	No
Greece	No	No	No	No	No	No	No	No
Hungary	No	No	No	No	No	No	No	No
Ireland <sup>lxvii</sup>	Yes <sup>lxviii</sup>	No	Yes <sup>lxix</sup>	No	No	Yes <sup>lxx</sup>	Yes	No
Italy	No	No	No	No	No	No	No	No
Latvia	No	No	No	No	No	No	No	No
Lithuania	No	No	No	No	No	No	No	No
Luxembourg	No	No	No	No	No	No	No	No
Malta	No	No	No	No	No	No	No	No
Netherlands	No	No	No	No	No	No	No	No
Poland	No	No	No	No	No	No	Yes	No
Portugal	No	No	No	No	No	No	No	Yes <sup>lxxi</sup>
Romania	No	No	No	No	No	No	No	No
Slovakia	No	No	No	No	No	No	No	No
Slovenia	Yes	Yes	No	No	No	No	Yes	No
Spain	No	No	No	No	No	No	No	Yes <sup>lxxii</sup>
Sweden	No	No	No	No	No	No	No	No
United Kingdom	No	No	No	No	No	No	No	No

lxii Austrian law does not grant the right for counsel to effectively participate during interrogations.

lxiii Here the defendant can withdraw his confession.

lxiv The reviewer emphasised that this is a theoretical approach as there is no case law on this issue.

lxv Under certain circumstances, infringing the requirements of a fair trial may lead to an acquittal, even if the evidence were sufficient to prove guilt, and the court has to resolve this question in close conformity with current ECtHR case law.

lxvi If the case is closed an extraordinary appeal may be brought to the Supreme Court. In addition, if Ian files a complaint to the Bar, and the Bar concludes that there has been a violation, this could enhance the chances of success of Ian's extraordinary appeal to the Supreme Court to reopen the case, or affect the evaluation of the admissibility of Ian's pre-trial statements within the pending appeal process.

lxvii There is no case law on this matter in Ireland, so the approach of the courts is unknown.

lxviii According to recent developments in the case law, evidence obtained in knowing, reckless, or grossly negligent breach of constitutional rights will be excluded, except in exceptional circumstances. Where evidence is obtained in breach of constitutional rights, but such a breach is not 'deliberate and conscious', there is a rebuttable presumption in favour of exclusion. The presumption can be rebutted with evidence that the breach was inadvertent.

- lxix This is more of a theoretical approach and has not been applied in practice.  
 lxx See lxix.  
 lxxi According to the procedural rules of Portugal, statements made by the suspect at the police interview could be used at trial only if he consents to this. This is the only possible remedy.  
 lxxii Ian has an opportunity to withdraw his statements at trial.

The central issue in this case was the lack of effective defence counsel. By presenting this case to the representatives, the author aimed to determine whether the Member States, by the application of remedies, honour the right to effective assistance from counsel in their criminal proceedings. Directive 2013/48/EU puts a strong emphasis on the effective participation of counsel in criminal proceedings (for example, preamble §§ 25, 42, Article 3 of the Directive). Also, as stated in the introduction of this article, according to the guidelines of the ECtHR, the right to counsel has to be effective and practical, not theoretical and illusory. In Ian's case, the latter occurred as the lawyer participating in the interrogation was totally unprepared and, as a result thereof, misadvised Ian.

As a result of the answers provided by the representatives, it was revealed that compared to the previous two case scenarios, a violation of Ian's right to effective assistance from counsel would be left completely unremedied in most of the Member States (Table 6). The Austrian representative could not answer the question on applicable remedies at all, as in Austria lawyers' participation in interrogations is limited to their presence. Only 4 Member States (Estonia, Finland, Ireland, and Slovenia) reported that Ian's statement might be excluded (Figure 7), with Estonia and Ireland emphasising that this is a theoretical possibility as there is no case law on the matter. The fruit of the poisonous tree doctrine would be applied only in Finland and Slovenia. Ireland also mentioned the inadmissibility of prosecution, or a reduction of the sentence as a possible (although mainly theoretical) remedy. In Finland, such infringements might lead to the dismissal of charges or an acquittal, even if there was enough evidence to prove a person's guilt. In addition to countries that referred to the exclusion of evidence as a remedy, Denmark and Poland also stated that an appeal was an option. The representative of Finland explained that Ian could simultaneously file a complaint to the Bar, which if successful would raise his chances of the exclusion of evidence, an appeal, and if necessary the case being reopened. In Portugal and Spain, Ian has the option not to give his consent to the statements being used at trial, which is the only possible remedy.

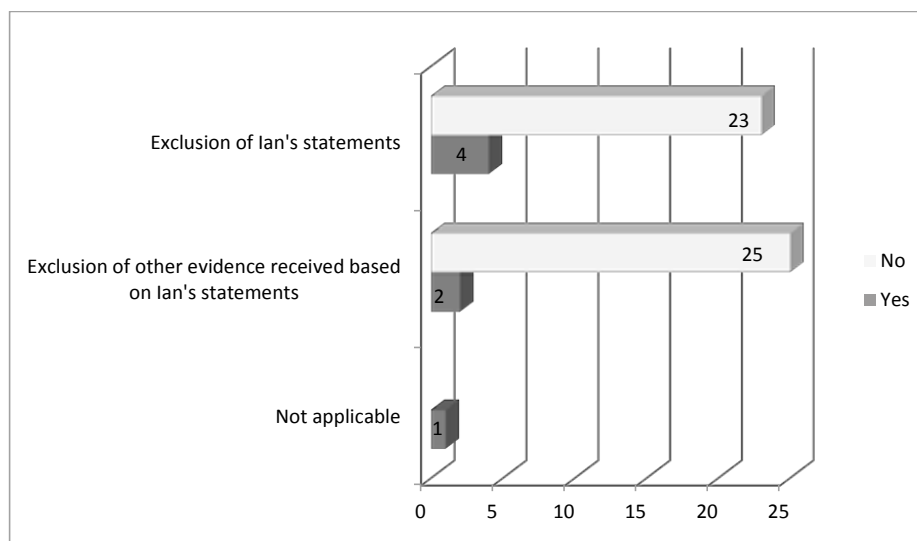


Figure 7 Will Ian's statements and information received based on these statements be excluded in Case 3?

No exclusion: BE, BG, HR, CY, CZ, DK, FR, DE, EL, HU, IT, LV, LT, LU, MT, NL, PL, PT, RO, SK, ES, SE, UK.

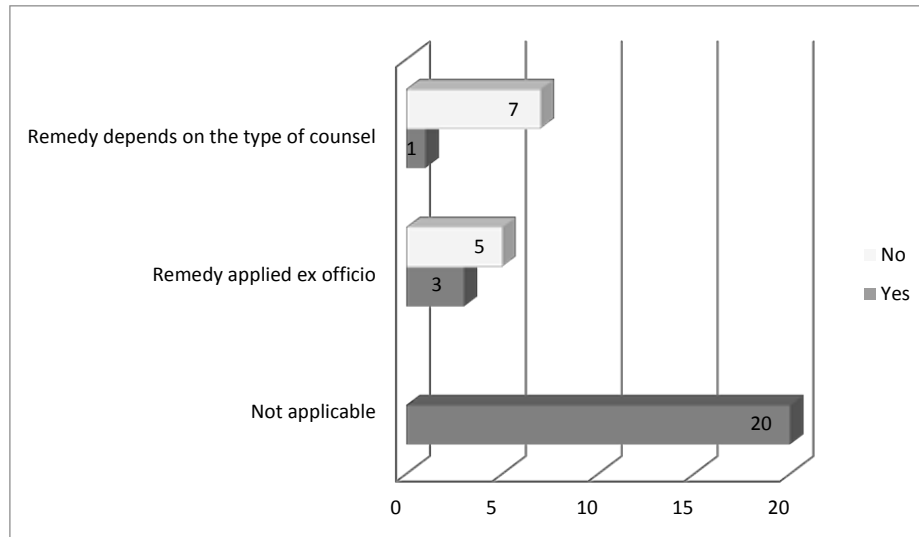
Exclusion of Ian's statements: EE, FI, IE, SI.

No exclusion of any other evidence gathered based on information from Ian: BE, BG, HR, CY, CZ, DK, EE, FR, DE, EL, HU, IE, IT, LV, LT, LU, MT, NL, PL, PT, RO, SK, ES, SE, UK.

Exclusion of any other evidence gathered based on information from Ian: FI, SI.

Not applicable: AT.

In Slovenia remedies could be applied only if counsel was appointed to Ian. In all other countries where remedies could be applied, it would not depend on whether counsel was retained or appointed. In Estonia, Finland, and Slovenia, the remedies would be applied *ex officio* by the judge; in Denmark, Ireland, Poland, Portugal and Spain the defence is expected to file a request.



*Figure 8 Remedies for a violation of the right to effective assistance from counsel in pre-trial proceedings: do they depend on whether counsel was legal aid or retained, and are remedies applied ex officio?*

Remedies do not depend on whether counsel was legal aid or appointed: DK, EE, FI, IE, PL, PT, ES.

Remedies depend on whether counsel was legal aid or counsel: SI.

Remedies are applied based on a request from the defence: DK, IE, PL, PT, ES.

Remedies are applied ex officio: EE, FI, SI.

These questions cannot be answered as there are no remedies or the question does not apply to the justice system of the Member State: AT, BE, BG, HR, CY, CZ, FR, DE, EL, HU, IT, LV, LT, LU, MT, NL, RO, SK, SE, UK.

### 3.2.5 Remedies for a violation of the right to effective assistance from a lawyer at trial

**Case 4.** *Imagine that Ian's case was as follows. Legal aid counsel appears at trial obviously unprepared. Ian notifies the judge that he has never seen this counsel before and has therefore never discussed the case with him/her. Nevertheless, the trial continues and counsel advises Ian to confess. Ian is convicted based on his confession at trial and some evidence gathered by the police in pre-trial proceedings that indirectly indicates his guilt.*

*Which of the following remedies for a violation of the right to effective assistance from counsel during trial are applicable (multiple answers are possible)? Please indicate per remedy the authority granting the remedy and the legal basis of the remedy.*

**Additional question 1:** *Would your answers to Ian's case be any different if he had retained counsel?*

**Additional question 2:** *Are these remedies granted ex officio by the judge or another authority, or only if the defence requests this?*



Table 7 Applicable remedies for a violation of the right to effective assistance from counsel at trial

	Excluding lan's statements	Dismissal of charges or acquittal	Taking a decision implying the finding of guilt/criminal responsibility, but waiving the sanction	Reducing his sentence	Annulment of the court's judgment with the possibility of a retrial	Any other remedy
Austria	No	No	No	No	No	Yes <sup>lxxiii</sup>
Belgium	No	No	No	No	No	No
Bulgaria <sup>lxxiv</sup>	No	No	No	No	Yes	No
Croatia	No	No	No	No	Yes	No
Republic of Cyprus	No	Yes <sup>lxxv</sup>	No	No	Yes	No
Czech Republic	Yes	No	No	No	Yes	No
Denmark	No	No	No	No	Yes <sup>lxxvi</sup>	No
Estonia <sup>lxxvii</sup>	Yes	Yes	No	No	Yes	No
Finland	Yes	Yes <sup>lxxviii</sup>	No	No	Yes	No
France <sup>lxxix</sup>	No	No	No	No	No	No
Germany	Yes	No	No	No	Yes	No
Greece	No	No	No	No	Yes	No
Hungary <sup>lxxx</sup>	No	No	No	No	No	No
Ireland	No	No	No	No	Yes	No
Italy	No	No	No	No	No	No
Latvia	No	No	No	No	Yes	No
Lithuania	No	No	No	No	No	No
Luxembourg	No	No	No	No	Yes	No
Malta	No	No	No	No	Yes	No
Netherlands	No	No	No	No	No	No
Poland	No	No	No	No	Yes	No
Portugal	No	No	No	No	No	No
Romania	No	No	No	No	Yes	No
Slovakia	No	No	No	No	No	No
Slovenia	Yes	No	No	No	Yes	No
Spain	No	No	No	No	No	No
Sweden	No	No	No	No	Yes	No
United Kingdom	No	No	No	No	Yes	No

lxxiii The state has an obligation to intervene if legal aid counsel obviously fail to fulfil their duty based on the case law of the ECtHR. If the state does not intervene, it would be regarded as an infringement of Article 6 of the ECHR, which, however, does not lead to the nullity of the verdict itself.

lxxiv The representative emphasised that this is highly unlikely to occur in Bulgaria. If a defendant notifies a judge that he has never seen counsel before and has therefore never discussed the case with him/her, the judge will either grant counsel the opportunity to become acquainted with the case file within a sufficient period of time, an opportunity for the defendant and his/her counsel to discuss the case, or an opportunity for the defendant to have his/her counsel substituted upon the defendant's request (in any case, hearings may be postponed).

lxxv This could be done at appeal proceedings.

lxxvi Here the defendant can withdraw his/her confession.

lxxvii The reviewer emphasised that this is a theoretical approach as there is no case law on the issue.

lxxviii Under certain circumstances infringing the requirements of a fair trial may lead to an acquittal, even if the evidence were sufficient to prove guilt, and the court has to resolve this question in close conformity with current ECtHR case law.

lxxix The representative emphasised that the accused should always request preventative measures (for example, the postponement of the court session).

lxxx Here preventative measures can be applied (postponement, substitution of counsel).

In case 4, Ian's counsel demonstrated complete ineffectiveness at trial. Not only did he/she fail to consult Ian before trial, but he/she also did not study the facts of the case beforehand. Despite counsel's ineffectiveness, the trial continued, and a guilty verdict was reached. 18 Member States stated that the annulment of the judgment of the first instance court would be a remedy for Ian (Figure 9). The Austrian representative mentioned that counsel's ineffectiveness would provide grounds to conclude that Ian's right to a fair trial as stipulated in Article 6 of the ECHR had been violated, but it would not by itself be a sufficient reason to annul the judgment. In five countries – the Czech Republic, Estonia, Finland, Germany, and Slovenia – Ian's statements given in such circumstances would be excluded from the body of evidence.

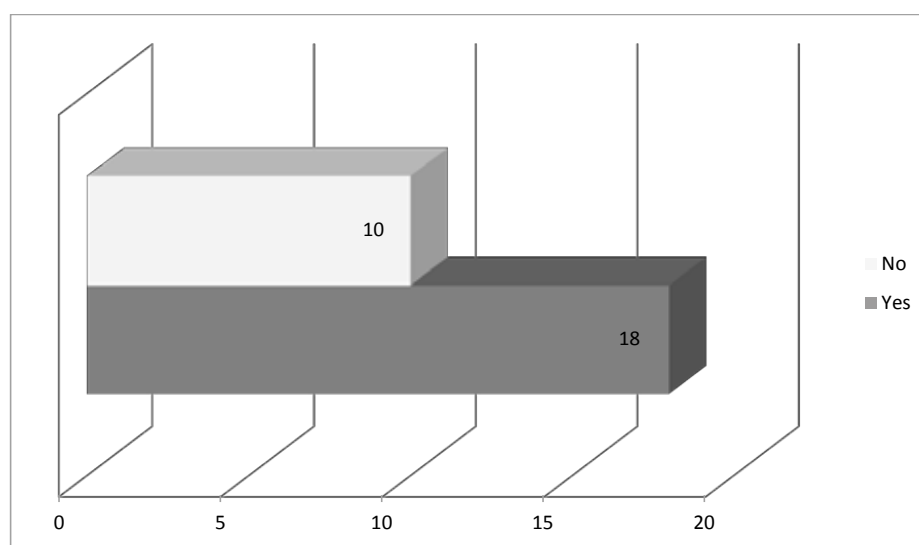
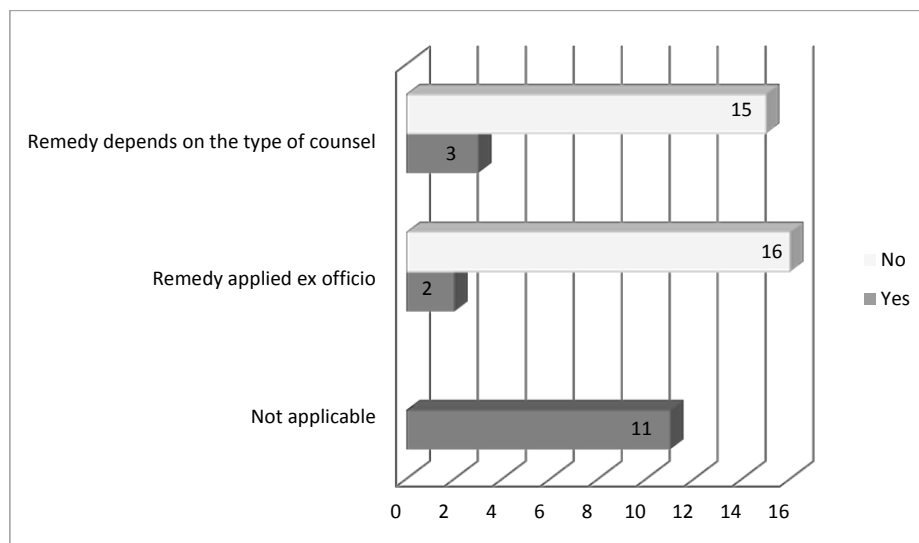


Figure 9 Does counsel's ineffectiveness provide grounds to annul the judgment of the first instance court in Case 4?

Counsel's ineffectiveness does not provide grounds to annul the first court's judgment: AT, BE, FR, HU, IT, LT, NL, PT, SK, ES.  
Counsel's ineffectiveness does provide grounds to annul the first court's judgment: BG, HR, CY, CZ, DK, EE, FI, DE, EL, IE, LV, LU, MT, PL, RO, SI, SE, UK.

In the Czech Republic, Romania, and Slovenia the remedies would be applied only if counsel was appointed or was legal aid counsel (Figure 10). The rest of the 15 Member States reported that this fact would be irrelevant when it comes to the application of remedies. In Estonia and Slovenia the judge could exclude Ian's statements *ex officio*.



*Figure 10 Remedies for a violation of the right to effective assistance from counsel at trial: do they depend on whether counsel was legal aid (appointed) or retained, and are they applied ex officio?*

Remedies do not depend on whether counsel was legal aid (appointed) or retained: BG, HR, CY, DK, EE, FI, DE, EL, IE, LV, LU, MT, PL, SE, UK.

Remedies depend on whether counsel was legal aid (appointed) or retained: CZ, RO, SI.

Remedies are applied based on a request from the defence: BG, HR, CY, CZ, DK, FI, DE, EL, IE, LV, LU, MT, PL, RO, SE, UK.

Remedies are applied ex officio: EE, SI.

These questions cannot be answered as there are no remedies: AT, BE, FR, HU, IT, LT, NL, PT, SK, ES.

### 3.3 A further exploration of remedies: remedies in plea bargaining and in EAW proceedings; the speediness of remedies

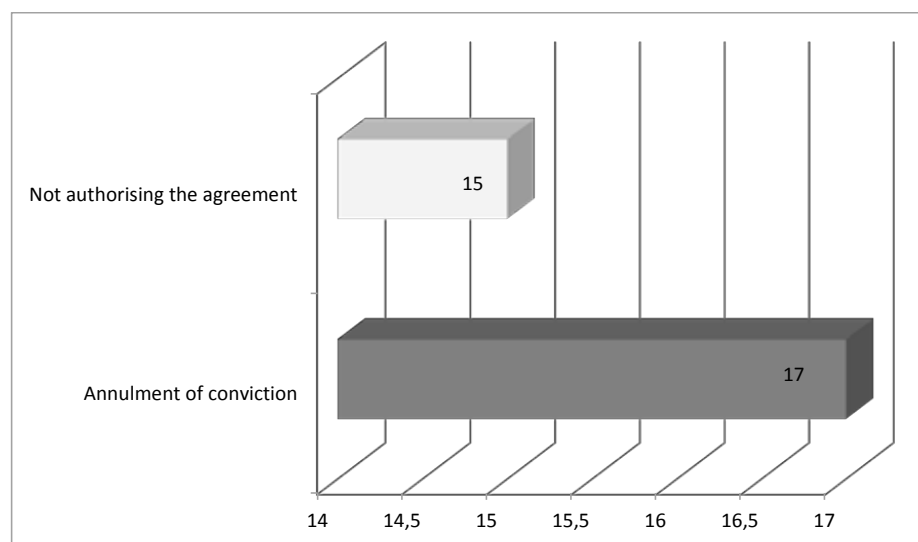
#### 3.3.1 Remedies for a violation of the right to counsel in plea bargaining proceedings

As plea bargaining or similar procedures have become more popular in Europe, the author asked the representatives of the Member States about remedies which are applicable if the right to counsel has been violated during such procedures. It should be noted that in Austria, Lithuania, the Netherlands, Portugal, and Sweden plea bargaining or similar proceedings are not available. This leaves 23 Member States in which such an agreement between the parties is possible, regardless of whether the accused has to admit guilt or not in the course of these proceedings. In Belgium and Luxembourg, plea bargaining is a relatively recent institution, which means that the representatives of these countries admitted that their answers are more of a guess than being based on case law. In relation to remedies regarding plea bargaining, two questions were asked:

1. Are there any remedies for the accused due to his/her counsel's absence or defective advice when he/she has agreed to plea bargaining?
2. Are there any remedies for the accused due to his/her counsel's defective advice to decline plea bargaining?

The first is a typical situation in which the accused waives his/her right to trial due to a lack of or defective advice from counsel. The Member States mentioned two remedies for a violation of the accused's right to counsel in this situation. 15 Member States stated that in this case the court would not authorise the plea, which is more or less a preventative measure, as the conviction has not yet entered into force. 17 Member States explained that an appeal followed by the annulment of the plea would also be a possibility. However, attention should be paid to the fact that sometimes the application of a remedy depends on

whether the participation of counsel was mandatory during the negotiation, or whether counsel was retained or appointed. In some states, a violation of the right to counsel only leads to a remedy if counsel was completely absent. For further information, see Figure 11.



*Figure 11 What are the remedies if the accused's right to counsel was violated during plea negotiations and the accused has agreed to the plea bargain?*

Not authorising the agreement: BE, BG, HR (if counsel was absent), CZ, EE, FI, FR (if the presence of counsel is mandatory), EL (if counsel was absent), LV, LU, MT, RO (if the presence of counsel is mandatory), SK, SI, UK.  
Annulment of conviction: BG, CY, CZ, DK, EE (if counsel was absent), FI, FR (if the presence of counsel is mandatory), DE, HU, IE, IT, LU, PL, RO, SI (in cases where counsel was appointed), ES, UK.

The second question was asked on a rather contradictory subject. In this case the accused refuses a plea which is favourable to him/her due to his/her counsel's defective advice. In the US, this might actually lead to an annulment of the judgment delivered by the court.<sup>20</sup> Nevertheless, none of the representatives said that this was the case in their Member State. All 23 concluded that in such cases there are no remedies available. The reasoning behind this was comprehensively explained by the Estonian representative: 'This is not considered to be a violation, as plea bargaining is not a right that a defendant could apply, it is the decision of the prosecutor to offer it to the defendant.'

### 3.3.2 Remedies for a violation of the right to counsel in EAW cases

According to Article 10(1) of Directive 2013/48/EU, Member States shall ensure that a requested person has the right to have access to a lawyer in the executing Member State upon arrest, pursuant to the EAW. In addition, the fourth paragraph of the same Article provides that the competent authority in the executing Member State shall, without undue delay after the deprivation of liberty, inform the requested person that he/she has the right to appoint a lawyer in the issuing Member State. The role of that lawyer in the issuing Member State is to assist the lawyer in the executing Member State by providing that lawyer with information and advice with a view to the effective exercise of the rights of requested persons under Framework Decision 2002/584/JHA.<sup>21</sup> In the light of these provisions the author asked the representatives

20 G.M. Dery & A. Soo, 'Turning the Sixth Amendment Upon Itself: The Supreme Court in *Lafler v. Cooper* Diminished the Right to Jury Trial with the Right to Counsel', (2012) 12 *Connecticut Public Interest Law Journal*, no. 1, pp. 101-126.

21 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision, OJ L 190, 18.7.2002, pp. 1-18.

of the Member States if in their country there are special remedies for situations in which the right to have a lawyer both from the executing and issuing Member States has been breached.

Most of the countries reported that as an executing state no specific remedies apply, which means that in these situations general remedies are available (for example, an appeal against the decision to execute). In Bulgaria and the Czech Republic, remedies are subject to legislative action. Slovenia had amended its legislation according to which the court may no longer rely on statements made by requested persons if the investigative judge failed to inform the requested person of his/her rights, including the right of access to a lawyer, or if the requested person issued a statement in the absence of counsel. The representative of Ireland emphasised that as Ireland has decided to opt out of Directive 2013/48/EU, the Irish courts in practice do not concern themselves with whether or not representation is available in the issuing state to the person whose surrender is sought. Conversely, the UK representative stated that if the assistance of an issuing state lawyer is requested in the UK, the court will adjourn the case to enable one to be contacted in order to prepare his/her advice or representation.

### 3.3.3 Speediness of applicable remedies

According to the case law of the ECtHR, 'Particular attention should be paid to the speediness of the remedial action itself, since it is not inconceivable that the adequate nature of the remedy can be undermined by its excessive duration[.]'<sup>22</sup> Therefore, the author asked the representatives if special provisions exist in their country's legislation regarding the speediness of remedies. Most of them reported that their courts are bound only by general deadlines, and by the case law of the ECtHR in relation to the criteria that the case should be resolved within a reasonable period of time. In addition, some of the Member States mentioned that if there are time limits, these more or less constrain the defence (for instance, the deadline for filing a request to exclude evidence) and are therefore not particularly helpful to the suspect or accused. Therefore, it might happen that if the defence has failed to raise the issue of a pre-trial violation of the right to counsel within the deadline provided by the law, it cannot be subsequently raised before the court (such is the case, for example, in France, Greece, Romania, and Slovenia).

### 3.4 Additional remedies

The author also queried the representatives about whether there were any additional remedies – i.e. not in the questionnaire – for a violation of the right to counsel. Mainly a complaint to the ombudsman was mentioned, which is not, however, a remedy that could affect the person's situation in the pending criminal proceedings. Some also mentioned extraordinary appeals, but doubts were often raised as to whether a violation of the right to counsel would suffice to invoke this procedure (however, a strong argument to reopen the case might be the remedy concluded by the ECtHR). In the Netherlands, when the Code of Criminal Procedure does not provide a remedy and the accused believes that the state (or one of its representatives) has acted unlawfully, it is possible to start civil injunction proceedings (*kort geding*) against the state. Such injunction proceedings could technically also include, for example, a demand that the court orders the state to release the suspect or accused, restore contact with counsel, or appoint (new) counsel. In Slovakia, the accused has the right to request his/her release from custody at any time (but only after every 30 days).

## 4. Discussion

As explained in the introduction of this article, over the course of the project the author published two theoretical articles about the understanding on effective remedies for a violation of the right to counsel that could be common to all EU Member States.<sup>23</sup> These articles were written before the empirical research was conducted.

<sup>22</sup> ECtHR 13 December 2012, *De Souza Ribeiro v. France*, No. 22689/07, § 81.

<sup>23</sup> Soo (2017), *supra* note 1, pp. 31-51; Soo (2016), *supra* note 2, pp. 284-307.

In the first article the author proposed that in order for the remedy to be effective, accused persons should be put, as far as possible, back in the position in which they would have been if a violation of the right to counsel had not occurred.<sup>24</sup> In the second article it was argued that this understanding of an effective remedy should not be applied only to the right to have counsel present during the proceedings, but also to other important aspects of the right to counsel (e.g., the right to choose one's counsel, the right to effective assistance from counsel).<sup>25</sup> In addition, the remedy should not depend on whether the right to counsel was violated due to the authorities' or counsel's own action: as the accused lacks knowledge and the means to influence his/her counsel's activities, he/she should not suffer if his/her counsel fails to act effectively.<sup>26</sup> The author also concluded in the second article that there are only a small number of remedies that meet the requirement that a person should be put, as far as possible, back in the position where he/she would have been if a violation had not occurred: mainly the application of the exclusionary rule, the fruit of the poisonous tree doctrine, and, if necessary, a retrial.<sup>27</sup> Finally, it was emphasised that the Member States should not only look for remedies, but also preventative measures to avoid a violation of the right to counsel in the first place, as there are many situations in which it is impossible to restore the pre-violation situation.<sup>28</sup> To be more specific, the author proposed that the remedies that the Member States should strive for are the following.

First, evidence gathered as a result of a violation of the right to counsel should never be used to convict, irrespective of whether it was gathered in pre-trial proceedings or during trial. If such evidence has been gathered in pre-trial proceedings, the exclusionary rule should be accompanied by the application of the fruit of the poisonous tree doctrine, which means that not only should the evidence itself be excluded, but also all additional evidence gathered based thereon. If the right to counsel has been violated during trial as a result of which a piece of evidence has been gathered (for example, a witness has testified during trial), the remedy to restore the pre-violation position would be application of the exclusionary rule and, if it is possible, a repetition of the evidence-gathering act. In addition, attention should be paid to the fact that unlawful evidence gathered during pre-trial proceedings should not be brought to the view of the court. In his concurring opinion in *Dvorski v. Croatia*, Judge Zupančič pointed out that if the exclusionary rule is applied in a way that the evidence is still viewed by the court, it might actually not be a proper remedy, because even if the judge cannot rely on such evidence, he/she will still be affected by it on a subconscious level.<sup>29</sup> The same opinion was also strongly expressed by the Portuguese representative during this project (see Subsection 3.2.2 of this article). Therefore, the Member States should build a system in which unlawful evidence is excluded from the dossier so that the sitting court never sees it.<sup>30</sup>

The exclusion of evidence gathered in violation of the right to counsel has a number of justifications. First, there are certain types of evidence that are intrinsically unreliable and therefore unsuitable for the discovery of the truth.<sup>31</sup> The statements of a suspect given as a result of a violation of the right of access to a lawyer could be mentioned as an example here: the accused, without counsel monitoring the interrogation, is in a very vulnerable position, and is therefore potentially subject to coercion and abuse. Second, the exclusionary rule also disciplines the authorities, encouraging them to refrain from violating people's rights. In addition, if they know that unlawful evidence will most likely not be used to convict, they avoid collecting evidence in such a way in the first place. However, these two arguments seem to apply only to a limited extent. To be more exact, the reliability of evidence could be questioned when there is reason to believe that evidence was not only gathered in violation of the right to counsel, but in violation of the accused's other rights, mainly his/her right to, for example, personal integrity, or life. The second argument

24 Soo (2017), supra note 1, pp. 46-49.

25 Soo (2016), supra note 2, pp. 297-298.

26 Ibid., pp. 298-299.

27 Ibid., p. 307.

28 Ibid., pp. 305-306.

29 'The German rule to the effect that the judge cannot rely on such evidence in his or her reasoning out, motivation of the judgment is, to say the least, naïve to the extent that this presupposes the ability of the judges to ignore the contaminated or otherwise inadmissible evidence.' ECtHR 20 October 2015, *Dvorski v. Croatia*, No. 25703/11, a concurring opinion of Judge Zupančič, § 12.

30 Soo (2016), supra note 2, pp. 299-300.

31 S. Zappalà, *Human Rights in International Criminal Proceedings* (2003), pp. 149-150.

is applicable if the violation had its roots in the actions of the authorities. However, it does not concern cases in which the violation of the right to counsel was purely counsel's 'fault' (e.g., counsel failed to appear at the interrogation).

In the opinion of the author, the main justification to exclude evidence in cases where the right to counsel has been violated can be found in the 'rights theory' and the 'theory of integrity'. According to the rights theory, the state sets the boundaries of lawful access to evidence via fundamental rights. These boundaries should not be breached and if they are, then persons, as well as the state, should be placed back to the position they would have been if the violation had not occurred.<sup>32</sup> As a result of criminal proceedings, the state makes a declaration about someone's guilt or innocence. In order to do this, clearly defined procedural rules should be followed.<sup>33</sup> The theory of integrity (or legitimacy) suggests that the use of unlawfully obtained evidence undermines the authority of a verdict.<sup>34</sup> As the goal of the criminal procedure is not only to discover the truth, but to call citizens to answer charges against them, the verdict could only be called just if it was reached in the course of a fair trial.<sup>35</sup> The right to counsel is one of the ground rules of a fair trial in Europe. Therefore, if it is violated the 'game' departs from the set rules, and its result can never be called just, and the person against whom the charges have been filed cannot be called to answer. A football match resulting in a 10:0 score with 11 players on one side, and 5 or even all 11 removed against the rules from the other side, simply does not count as a fair result.

Second, if unlawful evidence has been used to convict the accused, a retrial should be ordered. This is a remedy that has been repeatedly suggested by the ECtHR.<sup>36</sup> In addition, a retrial could also be a proper remedy for a number of cases in which the exclusionary rule is not applicable, as the violation did not itself result in the gathering of evidence, yet it tainted the fairness of the trial as the defendant's rights could not be exercised practically and effectively (for example, counsel did not prepare for trial).<sup>37</sup>

Nevertheless, there are a number of limitations to the remedies listed above. First, the exclusionary rule and the fruit of the poisonous tree doctrine often contradict society's interest in finding the truth: it is difficult to accept that the evidence that is already there should be set aside and that the court should simply pretend that it does not exist. Second, if unlawful evidence finds its way into the dossier seen by the court, no matter if it is just retained in the case file, or the court deciding the case makes a decision on the lawfulness of the evidence, it potentially – at least subconsciously – influences the judge's decision. This is also the case when the evidence is gathered during trial in violation of the accused's right to counsel. Third, a retrial is limited by the principle of finality, as the annulment of a judgment and a retrial always results in the extra expenditure of resources. Fourth, violations that did not produce any actual evidence at all are very hard to detect and remedy as they are often not reflected in documentation, and/or it is difficult to argue what the pre-violation position of the person whose rights have been violated was. For the above-mentioned reasons, the author also called the EU legislator to launch a discussion on preventative measures, for example, more extensive monitoring by judges.<sup>38</sup>

As can be seen from the analysis in the previous subsection, the diversity of remedies for a violation of the right to counsel (as well as in preventative measures) are considerable among the Member States. This did not change after the implementation date of Directive 2013/48/EU, as most of the Ministries of Justice of the Member States reported that according to their self-analysis, no changes to their national law with respect to Article 12 were necessary. Against the theoretical approach to effective remedies for a violation of the right to counsel summarised above, it can be argued, based on these empirical findings, that the Member States often do not remedy the violation of the right to counsel in pre-trial proceedings in an appropriate manner. The central criterion for a remedy to be effective, as previously discussed, is its ability to restore the pre-violation

32 J.D. Jackson & S.J. Summers, *The Internationalisation of Criminal Evidence. Beyond the Common Law and Civil Law Traditions* (2012), p. 155.

33 A. Duff et al. (eds.), *The Trial on Trial Volume 3. Towards a Normative Theory of the Criminal Trial* (2007), p. 238.

34 Jackson & Summers, *supra* note 32, p. 156.

35 Duff et al., *supra* note 33, p. 110.

36 ECtHR 27 November 2008, *Salduz v. Turkey*, § 72; ECtHR 30 May 2013, *Martin v. Estonia*, No. 35985/09, § 107; ECtHR 10 November 2016, *Sitnevskiy and Chaykovskiy v. Ukraine*, Nos. 48016/06 and 7817/07, § 142.

37 Soo (2016), *supra* note 2, p. 303.

38 Soo (2016), *supra* note 2, pp. 305-306.

position of the person whose right to counsel has been violated. The Member States that actually apply this approach keep it more or less limited to cases in which the right to have counsel present at proceedings has been violated. In addition to requiring counsel's presence during the interrogation, and remedying a violation of such a condition by the application of the exclusionary rule, these Member States tend to have an approach that chosen counsel cannot be substituted against a person's wishes without a valid reason. If it is done, the remedy tends to be the same as that for a violation of the right to have counsel present at proceedings. Yet, as can be seen from Table 8, a number of Member States do not even remedy the violation of the right to have counsel present at pre-trial proceedings, not to mention the violation of the right to choose one's counsel. What is more, most of the Member States refuse to consider the quality of counsel's performance when ineffective assistance by counsel has been argued by a suspect or an accused.

Even if Member States apply the exclusionary rule to violations of certain aspects of the right to counsel, it might be limited to cases in which the suspect had been in detention, in which the violation was the state's fault, or in which counsel had been appointed by the state. In addition, sometimes it is the defence who has to seek the application of remedies, and this has to be done even in cases where the right to have counsel present has been violated. Last but not least, in most Member States the harm done to a suspect or an accused owing to a violation of the right to counsel is never completely undone, as unlawful evidence gathered as a result of the violation is retained in the case file, and is therefore still viewed by the court. Table 8 summarises the most important findings of the present article on the exclusionary rule (described in detail in Subsections 3.2.2–3.2.4 of this article).

*Table 8 Exclusion of evidence received in violation of the right to counsel in the Member States  
(Subsections 3.2.2–3.2.4 of this article)*

	Violation of the right of access to a lawyer (Case 1)	Violation of the right to choose one's lawyer (Case 2)	Violation of the right to effective assistance from counsel during pre-trial proceedings (Case 3)
Austria	No	No	n/a
Belgium	Yes*	No	No
Bulgaria	Yes	No	No
Croatia	<b>Yes*</b>	<b>Yes‡</b>	No
Republic of Cyprus	No	No	No
Czech Republic	Yes†	Yes	No
Denmark	No	No	No
Estonia	Yes	Yes	Yes
Finland	Yes	Yes	Yes
France	Yes†‡	Yes‡	No
Germany	Yes*†‡	Yes*‡	No
Greece	Yes†	Yes‡	No
Hungary	Yes†	Yes	No
Ireland	Yes*†‡	Yes*‡	Yes†‡
Italy	<b>Yes†</b>	<b>Yes</b>	No
Latvia	Yes	Yes	No
Lithuania	Yes†	Yes	No
Luxembourg	Yes†‡	Yes‡	No
Malta	Yes†	Yes	No
Netherlands	Yes*	Yes*	No
Poland	No	No	No
Portugal	Yes‡	Yes‡	No
Romania	Yes*‡ (if counsel not mandatory)	Yes*‡ (if counsel not mandatory)	No



	Violation of the right of access to a lawyer (Case 1)	Violation of the right to choose one's lawyer (Case 2)	Violation of the right to effective assistance from counsel during pre-trial proceedings (Case 3)
Slovakia	Yes†	Yes	No
Slovenia	<b>Yes</b>	<b>Yes</b>	<b>Yes</b> <sup>§</sup>
Spain	Yes	Yes	No
Sweden	No	No	No
United Kingdom	<b>Yes</b> †‡	-	No

Bold type = the court deciding the case will not see unlawful evidence.

\* = only remedied if the suspect was detained.

† = only remedied when the violation derived from the state.

‡ = remedy applied only at the request of the defence.

§ = only remedied when counsel was legal aid (appointed) counsel.

Many of the Member States that actually apply the exclusionary rule when the right to counsel has been violated do not recognise the fruit of the poisonous tree doctrine, as shown in Table 9. Therefore, any information received based on unlawful evidence gathering can still be used to convict a person. However, this results in a situation where the harm caused to the defendant can never be completely undone, as the state still profits from the violation.

*Table 9 Application of the fruit of the poisonous tree doctrine in cases where the right to counsel has been violated (Subsections 3.2.2–3.2.4 of this article)*

	Violation of the right of access to a lawyer (Case 1)	Violation of the right to choose one's lawyer (Case 2)	Violation of the right to effective assistance from counsel during pre-trial proceedings (Case 3)
Austria	No	No	n/a
Belgium	No	No	No
Bulgaria	No	No	No
Croatia	Yes	Yes	No
Republic of Cyprus	No	No	No
Czech Republic	No	No	No
Denmark	No	No	No
Estonia	No	No	No
Finland	Yes	Yes	Yes
France	Yes	Yes	No
Germany	No	No	No
Greece	Yes	Yes	No
Hungary	No	No	No
Ireland	No	No	No
Italy	No	No	No
Latvia	No	No	No
Lithuania	No	No	No
Luxembourg	Yes	Yes	No
Malta	Yes	Yes	No
Netherlands	Yes	Yes	No
Poland	No	No	No
Portugal	Yes	Yes	No
Romania	Yes	Yes	No

	Violation of the right of access to a lawyer (Case 1)	Violation of the right to choose one's lawyer (Case 2)	Violation of the right to effective assistance from counsel during pre-trial proceedings (Case 3)
Slovakia	Yes	Yes	No
Slovenia	Yes	Yes	Yes
Spain	Yes	Yes	No
Sweden	No	No	No
United Kingdom	No	-	No

In most of the Member States, the right to have counsel present at trial is monitored by the court, as reported in Subsection 3.1 of this article, which means that violations of this right are rare. However, when it comes to the right to have counsel effectively participating at trial, the situation radically changes (Table 10). Here not only are the courts reluctant to monitor such a violation, but the violation of the right to effective assistance by counsel is often not remedied in pending criminal proceedings.

*Table 10 Retrial as a remedy in cases where the right to the effective participation of counsel at trial has been violated (Subsection 3.2.5 of this article)*

	Annulment of the court's judgment with the possibility of a retrial
Austria	No
Belgium	No
Bulgaria	Yes
Croatia	Yes
Republic of Cyprus	Yes
Czech Republic	Yes <sup>§</sup>
Denmark	Yes
Estonia	Yes
Finland	Yes
France	No
Germany	Yes
Greece	Yes
Hungary	No
Ireland	Yes
Italy	No
Latvia	Yes
Lithuania	No
Luxembourg	Yes
Malta	Yes
Netherlands	No
Poland	Yes
Portugal	No
Romania	Yes <sup>§</sup>
Slovakia	No
Slovenia	Yes <sup>§</sup>
Spain	No
Sweden	Yes
United Kingdom	Yes

§ = only remedied when counsel was legal aid (appointed) counsel.

Based on the results of the present study and taking into account the theoretical approach on effective remedies for a violation of the right to counsel summarised above, the author makes the following observations and proposals regarding future developments in relation to remedies for a violation of the right to counsel in the EU, which both the Member States and the EU institutions could consider.

1. By adopting Directive 2013/48/EU, the EU took action with the aim to guarantee that every suspect, accused, and person subjected to an EAW within the EU has the right to counsel in criminal proceedings. Yet, the current wording of Article 12 may turn out to be a serious obstacle to achieving this goal. As the understanding of an 'effective remedy' varies among Member States, it leads to a situation in which the right to counsel itself is exercised at different levels in Member States. For instance, in a number of Member States the exclusionary rule is applied to statements made by suspects during interrogation in which the authorities unlawfully prohibited counsel from attending, and in other Member States it is not. Thus, how can it be argued that in all of the Member States the right to counsel is exercised in the same manner? In the Member States belonging to the latter group, the authorities could prohibit counsel from attending every interrogation without any consequences. In these countries the right to counsel during interrogation does not exist in practice at all, although it might be prescribed by law, and is definitely prescribed by Directive 2013/48/EU. Therefore, in order to promote the application of the right to counsel on the level provided by Directive 2013/48/EU, it is important that a common understanding of 'effective remedies' for a violation of this right is achieved.
2. While searching for effective remedies for violations of the right to counsel provided in Article 12 of Directive 2013/48/EU, the initial standpoint that such remedies should aim to put persons whose rights have been violated back in the position where they would have been if the violation had not occurred, should not be discarded. This approach honours the right to counsel as being central to a fair trial.
3. Violations of the right to have counsel present during evidence-gathering acts (for instance, the interrogation of a suspect) in pre-trial proceedings should be remedied in a uniform manner throughout the Member States. The right to counsel during pre-trial proceedings serves not only as a guarantee against self-incrimination, but also contributes to the equality of arms. Therefore, all evidence gathered in violation of the right to have counsel present provided by Directive 2013/48 EU should be excluded from the body of evidence. The exclusion of evidence that has been received in violation of the right to have counsel present during evidence-gathering acts should not depend on whether the suspect was in detention or not, as Directive 2013/48/EU does not bind the application of the right to counsel to being detained.
4. Attention should be paid to the fact that in Member States the right to counsel in pre-trial proceedings is not reduced to the right to have counsel present, or, in the best case scenario, the right to have a chosen lawyer present. Directive 2013/48/EU requires effective rights. Therefore, a violation of the right to effective assistance from counsel in pre-trial proceedings should result in the application of the exclusionary rule regarding evidence received in such a way.
5. The court deciding on the conviction of a person should never see evidence gathered in violation of the right to have counsel present at pre-trial proceedings, as such evidence still affects judges, at least at a subconscious level. In this case the exclusion of evidence does not fully restore the pre-violation position of the person whose right to counsel has been violated.
6. As the right to counsel is an essential feature of a fair trial, the application of a remedy should not depend on a request from the defence, i.e. it should be done *ex officio* by the body responsible for verifying the lawfulness of evidence (for instance, the court).
7. The application of the exclusionary rule should not depend on whether the suspect has appointed or retained counsel, or whether the violation derived from counsel or the state. The right to counsel should be guaranteed for all suspects and accused persons, regardless of whether they have the means to pay for the services of a lawyer or not. In addition, it has to be taken into account that suspects and accused persons have limited knowledge of the law and thus limited possibilities to instruct their counsel. Counsel is an independent party to the proceedings, who should act in the best interest of the

person defended by him/her, but if he/she does not do so, the defendant might not even recognise this, or if he/she does, he/she might only become aware of this afterwards.<sup>39</sup>

8. The exclusionary rule should not only cover evidence received in direct violation of the right to counsel, but all evidence gathered on the basis of information received during an unlawful evidence-gathering act. Therefore, the approach to the applicability of remedies for a violation of the right to counsel should also comprise the fruit of the poisonous tree doctrine in Europe. Unlike the exclusionary rule, the fruit of the poisonous tree might be subject to certain limitations. Nevertheless, these exceptions should still honour the idea that effective remedies for a violation of the right to counsel should aim at placing the person back in the position where he/she would have been in if the violation had not occurred.
9. Attention should be paid to the fact that the right to be represented by a lawyer at trial also covers effective representation. If a lawyer's performance does not meet such a criterion, the court should intervene, and if the court fails to do so, the remedy subsequently applied should aim at placing the accused back in the position where he/she would have been in if the violation had not occurred (most probably, the annulment of the judgment and a re-trial). For the above-mentioned reasons, the application of the remedy should not depend on whether counsel failed to perform his/her duties due to the state or due to his/her own failure, or whether counsel was retained or appointed. A similar approach should be taken in cases in which the conviction is a result of simplified proceedings (for instance, plea bargaining). In such cases a violation of the right to counsel should also lead to the annulment of a conviction, or if possible a refusal to authorise the agreement, as a number of Member States have reported (see Subsection 3.3.1 of this article).
10. Much more emphasis should be put on preventative measures that guarantee the right to counsel in criminal proceedings, as in many cases the position that the person would have been in if the violation had not occurred is extremely difficult to restore. The EU has not addressed this issue in Directive 2013/48/EU. The approach of the Member States to preventative measures varies significantly, as discussed in Subsection 3.1 of this article. In cases where the violation has been significant, but restoring the pre-violation position is impossible, the obligation to avoid prosecution or to acquit might arise. As this is a subject which is almost completely unexplored in Europe (only Finland, Ireland, and the Netherlands reported that under certain conditions remedies of this kind could be applied), further research should be carried out regarding how these countries approach this issue.
11. Special attention should be paid to the fact that the right to have counsel is guaranteed to persons subject to an EAW, both in the issuing and executing states. Most of the Member States do not provide for specific remedies for a violation of the right to counsel in such cases (as discussed in Subsection 3.3.2 of this article).
12. Currently, there are no specific rules regarding the speediness of remedies for a violation of the right to counsel in the Member States (reported in Subsection 3.3.3 of this article). The deadlines for requesting and applying such remedies seem to restrict the defence rather than promoting the right to counsel.

## 5. Final observations

Based on the results of this project, the author makes three concluding remarks.

First, the right to counsel is not guaranteed by the application of effective remedies in the EU. The analysis of the applicable remedies for violations of different aspects of the right to counsel has revealed that in the best case scenario, counsel has to be present, but no more than this. Therefore, most of the Member States have adopted the 'breathing lawyer' standard for the performance of counsel during proceedings. Preventative measures taken to guarantee the application of the right to counsel in criminal proceedings also fail to address this problem, as most Member States refrain from assessing counsels' activities based on the argument that the profession is independent. For the Member States, this argument acquires even more

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<sup>39</sup> For instance, the suspect has instructed counsel to appear at the interrogation, but counsel fails to do so and does not notify the suspect beforehand. In such cases the suspect learns about the fact that the lawyer has not appeared at the same time as the police, i.e. at the beginning of an interrogation.

strength when counsel has been retained by the suspect or accused person. Yet, the ECtHR has emphasised that the duty of a lawyer should never be limited to the presence of counsel:

Indeed, the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention.<sup>40</sup>

Second, although the Member States often prefer to claim that their criminal justice system is so unique that evidentiary rules cannot be prescribed at the EU level, this approach should be neglected if the goal of the EU is to guarantee effective rights to all suspects, accused persons, and persons subject to an EAW in the EU. Unless the Member States remedy the same violation of the right to counsel in the same manner, the right will never be practised uniformly in the Member States.

Finally, there are indications that the Member States have not transposed the right of access to a lawyer provided in Directive 2013/48/EU in a correct manner. In some Member States, the right still seems to depend on whether the person is in detention. In addition, in some Member States unofficial interviews are allowed without the right to counsel guaranteed to arrested persons, and without the exclusion of statements received in such way, or evidence gathered as a result of such statements. ■

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40 ECtHR 13 October 2009, *Dayanan v. Turkey*, No. 4377/03, § 32.

## Annex: Questionnaire

### Background of transposition

1. Will/Did the transposition of the Directive require changes in the existing rules about the right to counsel in your legal system?

Yes No

If the answer to this question is YES, please name the changes and provide relevant legal sources.

If the answer to this question is NO, please explain why no changes need to be done and provide relevant legal sources.

2. Will/Did the transposition of the Directive include either inserting rules about the remedies for a violation of the right to counsel into your legal system or making changes to the existing rules about the remedies for a violation of the right to counsel in your legal system?

Yes No

If the answer to this question is YES, please name the added rules/changes and provide relevant legal sources. If answer to this question is NO, please explain why no rules need to be added/changed and provide relevant legal sources.

3. Article 12(2) of the Directive stipulates an obligation 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 from this right was authorised in accordance with Article 3(6) of the Directive, the rights of the defence and the fairness of the proceedings are respected. Taking this into account, which of the following statements are true in your country?

- a. In meeting the requirement mentioned above, my country is planning to provide/there are already provided specific mechanisms in legislation.

True False

- b. In meeting the requirement mentioned above, there are legal provisions that regulate the consequences of violations of/derogations from defence rights so there is no need for specific mechanisms.

True False

- c. In meeting the requirement mentioned above, specific mechanisms are left open for the case law to determine.

True False

In case your answer to one or more of these statements is YES, please give a further description of the relevant mechanism.

In case your answer to all statements is NO, please give a further explanation of how your country meets/is planning to meet the requirements of Article 12(2) of the Directive.

### Preventative measures to guarantee the right to counsel

For questions 4-11, please attach any legislation/case law/empirical findings (if available in English) with a reference to the relevant legal provision/paragraph of the court judgment.

4. Do judges or any other relevant authority (prosecutor, ministry etc.) in your country have competence to monitor whether the right to counsel is respected during criminal proceedings in the following ways:

- a. The authority is competent to monitor that the right to counsel is respected during the pre-trial phase of proceedings (please indicate the competent authority):

i. By ordering counsel to appear; Yes No

Please indicate the competent authority:

- ii. By ordering counsel to act (for example, prepare, file a motion etc.); Yes No  
Please indicate the competent authority:
- iii. By ordering investigative bodies/the Prosecutor's Office to terminate activities breaching the right to counsel or take an action in order to respect the right to counsel; Yes No  
Please indicate the competent authority:
- iv. By the substitution of counsel; Yes No  
Please indicate the competent authority:
- v. In any other way (please explain).
- b. The authority is competent to monitor that the right to counsel is respected during trial (please indicate the competent authority):
- i. By ordering counsel to appear; Yes No  
Please indicate the competent authority:
- ii. By ordering counsel to act (for example, prepare, file a motion etc.); Yes No  
Please indicate the competent authority:
- iii. By ordering the Prosecutor's Office to terminate activities that breach the right to counsel or take an action in order to respect the right to counsel; Yes No  
Please indicate the competent authority:
- iv. By the substitution of counsel; Yes No  
Please indicate the competent authority:
- v. In any other way (please explain).

### Specific remedies for a violation of the right to counsel

For questions 4-11, please attach any legislation/case law/empirical findings (if available in English) with a reference to the relevant legal provision/paragraph of the court judgment.

5. Four cases are described below. Please explain, by referring to relevant national law and case law, how these cases are likely to be solved. Please illustrate the application or non-application of each remedy concisely, keeping in mind that you are most welcome to refer to any legislation/case law/empirical findings (if available in English) as long as you indicate the relevant legal provision/paragraph of the court judgment.
- a. Ian, suspected of robbery, is detained and interrogated by the police during pre-trial proceedings without prior consultation and participation of counsel although he has insisted upon one. As a result of interrogation, he confesses and also provides the police with information about where to find additional evidence. The evidence is found just as indicated. He is convicted based on his statements, the evidence found as a result of the information given during interrogation, and some additional evidence gathered independently.  
Which of the following remedies for a violation of the right to communicate to counsel and to have counsel present during an interrogation are applied (multiple answers possible)? Please indicate for each remedy the authority granting the remedy and the legal basis for the remedy.
- i. Excluding Ian's statements; Yes No  
The authority and the legal basis:
- ii. Excluding evidence gathered based on information received from Ian; Yes No  
The authority and the legal basis:
- iii. Inadmissibility of prosecution; Yes No  
The authority and the legal basis:
- iv. Dismissal of the charges or an acquittal; Yes No  
The authority and the legal basis:

v. Taking a decision implying the finding of guilt/criminal responsibility, but waiving the sanction;  
Yes No

The authority and the legal basis:

vi. Reducing his sentence; Yes No

The authority and the legal basis:

vii. Annulment of the court judgment with the possibility of a retrial; Yes No

The authority and the legal basis:

viii. Providing Ian with any other remedy (please describe).

Additional question 1: Do the remedies depend on whether Ian was in detention during the interrogation or not?

Yes No

If the answer is YES, please explain in which way.

Additional question 2: Are these remedies granted ex officio by the judge or another authority, or only if the defence requests this?

Ex officio By request

b. Ian, suspected of robbery, has retained counsel. He is detained, but has not confessed. During pre-trial proceedings at some point the authorities change his counsel to the appointed one, explaining to him that his counsel no longer has time for him. Simultaneously, counsel is notified (falsely) that Ian has refused his further services. As a result of newly appointed counsel's advice, Ian confesses and also provides the police with information about where to find additional evidence. The evidence is found just as indicated. He is convicted based on his statements, the evidence found as a result of the information given during interrogation, and some additional evidence gathered independently. Which of the following remedies for a violation of the right to choose one's counsel are applied (multiple answers possible)? Please indicate for each remedy the authority granting the remedy and the legal basis for the remedy.

i. Excluding Ian's statements; Yes No

The authority and the legal basis:

ii. Excluding evidence gathered based on information received from Ian; Yes No

The authority and the legal basis:

iii. Inadmissibility of prosecution; Yes No

The authority and the legal basis:

iv. Dismissal of the charges or an acquittal; Yes No

The authority and the legal basis:

v. Taking a decision implying the finding of guilt/criminal responsibility, but waiving the sanction;  
Yes No

The authority and the legal basis:

vi. Reducing his sentence; Yes No

The authority and the legal basis:

vii. Annulment of the court judgment with the possibility of a retrial; Yes No

The authority and the legal basis:

viii. Providing Ian with any other remedy (please describe).

Additional question 1: Do the remedies depend on whether Ian was in detention during the interrogation or not?

Yes No

If the answer is YES, please explain in which way.

Additional question 2: Are these remedies granted ex officio by the judge or another authority, or only if the defence requests this?

Ex officio By request



- c. Ian, suspected of robbery, is interrogated by the police in the presence of his legal aid counsel. His counsel, not having studied the facts and the relevant law, advises him to confess, although the circumstances of the case show that without his confession the chances of his conviction are virtually non-existent. As a result of interrogation, he confesses and also provides the police with information about where to find additional evidence. The evidence is found just as indicated. He is convicted based on his statements, the evidence found as a result of the information given during interrogation, and some extra evidence gathered independently.

Which of the following remedies for a violation of the right to have the effective assistance of counsel during interrogation are applied (multiple answers possible)? Please indicate for each remedy the authority granting the remedy and the legal basis for the remedy.

- i. Excluding Ian's statements; Yes No

The authority and the legal basis:

- ii. Excluding evidence gathered based on information received from Ian; Yes No

The authority and the legal basis:

- iii. Inadmissibility of prosecution; Yes No

The authority and the legal basis:

- iv. Dismissal of the charges or an acquittal; Yes No

The authority and the legal basis:

- v. Taking a decision implying the finding of guilt/criminal responsibility, but waiving the sanction;

Yes No

The authority and the legal basis:

- vi. Reducing his sentence; Yes No

The authority and the legal basis:

- vii. Annulment of the court judgment with the possibility of a retrial; Yes No

The authority and the legal basis:

- viii. Providing Ian with any other remedy (please describe).

Additional question 1: Would your answers to Ian's case be any different if he had had retained counsel?

Yes No

If your answer to this question is YES, please explain in which way.

Additional question 2: Are these remedies granted ex officio by the judge or another authority, or only if the defence requests this?

Ex officio By request

- d. Imagine that the case of Ian would have been as follows. At trial legal aid counsel obviously appears to be unprepared. Ian notifies the judge that he has never seen his counsel before and that counsel has therefore never discussed the case with him. Nevertheless, the trial continues and counsel advises Ian to confess. Ian is convicted based on his confession at trial and some evidence gathered by the police in pre-trial proceedings indirectly indicating his guilt.

Which of the following remedies for a violation of the right to have the effective assistance of counsel during trial are applied (multiple answers possible)? Please indicate for each remedy the authority granting the remedy and the legal basis for the remedy.

- i. Excluding Ian's statements; Yes No

The authority and the legal basis:

- ii. Dismissal of the charges or an acquittal; Yes No

The authority and the legal basis:

- iii. Taking a decision implying the finding of guilt/criminal responsibility, but waiving the sanction;

Yes No

The authority and the legal basis:

iv. Reducing his sentence; Yes No

The authority and the legal basis:

v. Annulment of the court judgment with the possibility of a retrial; Yes No

The authority and the legal basis:

vi. Providing Ian with any other remedy (please describe).

Additional question 1: Would your answers to Ian's case be any different, if he had had retained counsel?

Yes No

If your answer to this question is YES, please explain in which way.

Additional question 2: Are these remedies granted ex officio by the judge or another authority, or only if the defence requests this?

Ex officio By request

6. If the exclusionary rule is one of the possible remedies for a violation of the right to counsel in your country, does it mean that:
- The evidence gathered in breach of a right is excluded in preliminary proceedings and the court deciding the case does not see it at all,
  - The evidence gathered in breach of a right is formally admissible at trial and the court decides on the admissibility thereof based on the principle of the free assessment of evidence, or,
  - The evidence gathered in breach of a right is formally inadmissible but it is still brought to the view of the court, because it is retained in the case file?
7. In principle, a breach of the right to counsel could occur because of two reasons: it could derive from government agencies (for example, they impede counsel from acting) or from the lawyer (for example, he/she does not appear or act). Does the choice of remedy depend on the reason for the violation in these cases?
- Yes No
- If your answer to this question is YES, please explain in which way.

### **Specific remedies for a violation of the right to counsel in plea bargaining**

For questions 4-11, please attach any legislation/case law/empirical findings (if available in English) with a reference to the relevant legal provision/paragraph of the court judgment.

8. Is plea bargaining or a proceeding of a similar nature a possibility in your country?
- Yes No
- If your answer to this question is YES:
- What are the remedies for a violation of the right to counsel during plea bargaining (for example, the annulment of the plea or a refusal to authorise the plea)?
  - What are the remedies if an accused has declined the plea bargain due to counsel's defective advice (for example, the annulment of the later judgment and the restoration of the plea)?

### **Specific remedies for a violation of the right to counsel in European arrest warrant cases**

9. Article 10 of the Directive provides specific regulations concerning the right to counsel in European arrest warrant proceedings – a person has a right to have a lawyer both in the executing and the issuing Member State. Does your country provide special remedies for situations in which this right has been breached?
- Yes No

If your answer to this question is YES, please explain the nature of these remedies. If your answer to this question is NO, please elaborate.

### Speediness of remedies

- 10.** According to the case law of the European Court of Human Rights, ‘particular attention should be paid to the speediness of the remedial action itself, since it is not inconceivable that the adequate nature of the remedy can be undermined by its excessive duration[.]’ (*De Souza Ribeiro v. France*, No. 22689/07, 13 December 2012, § 81). In light of this finding, are there any specific deadlines for the application of a remedy for a violation of the right to counsel in your country’s legislation or case law?

Yes    No

If your answer to this question is YES, please explain the nature of these deadlines. If your answer to this question is NO, please elaborate.

### Additional remedies that should be mentioned here

- 11.** Are there any other remedies in criminal proceedings provided in national legislation or case law that did not come up in this questionnaire (for example, releasing the person from detention, filing a complaint to the ombudsman etc.)?

Yes    No

If your answer to this question is YES, please explain the nature of these remedies.

In general please disregard any remedy outside the specific proceedings (for example, a malpractice suit, disciplinary action, a collateral attack). If, however, this remedy directly affects the position of a suspect or accused person in specific proceedings, please include it in your answer and provide information on how the remedy affects the suspect’s or accused person’s position.

- 12.** If you have any additional remarks about the remedies for a violation of the right to counsel in your country, please write them here. ■