

Implementation of the Legal Aid Directive 2016/1919 in Austria



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RECHTSANWALTSBÜRO
SOYER KIER STUEFER

An Academic and Lawyer Perspective

In medias res

Status of Implementation

Austrian System of Legal Aid

Time Struggle

Stand-up Legal Counsel Service

Implementation Needs

STATUS OF IMPLEMENTATION

- Due to the current Austrian government crisis → Austria is **in default** in implementing the *legal aid* directive (since May 5, 2019)

- Ministry of Justice has already prepared **unofficial drafts** for implementing the
 - *legal aid* directive 2016/1919 and the
 - “*procedural safeguards for children*” directive 2016/800
(for both a “non-goldplating” implementation is planned)

- **Disadvantages** of non-implementation **are low** → the Austrian system of legal aid already largely complies with the content of the Directive

AUSTRIAN LEGAL AID and MANDATORY DEFENCE SYSTEM

National Criminal Proceedings (§ 61/1 CCP)

■ **Mandatory Defence**

- Enumerative list
 - Chosen lawyer or
 - Legal aid lawyer
- In general, only in **main trial** and
- (after) **imposed pre-trial detention**

but not at (and before) →
- decision on pre-trial detention**

Enforcement of an European Arrest Warrant (§ 29/4 ARHG)

■ **Mandatory Defence**

- European arrest warrant
 - detention awaiting extradition

National Criminal Proceedings (§ 61/2 CCP)

■ **Legal aid**

- Means and
- Merits test, especially
 - Mandatory defence
 - Difficult factual or legal case
- On application,
- In each stage of proceedings
 - guaranteed by the „stand-up legal counsel service“

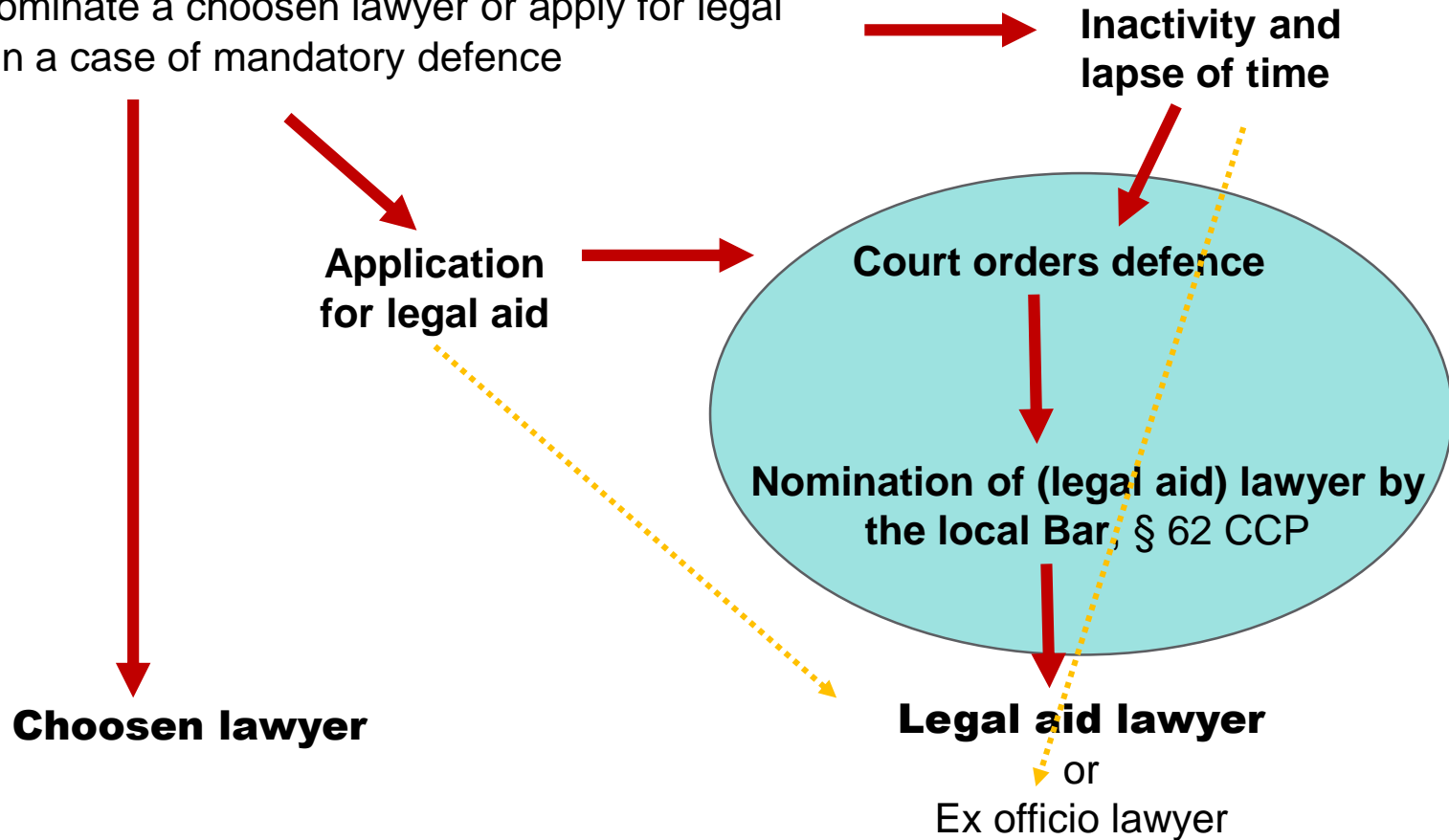
Enforcement of an European Arrest Warrant (§ 29/4 ARHG)

■ **Legal aid**

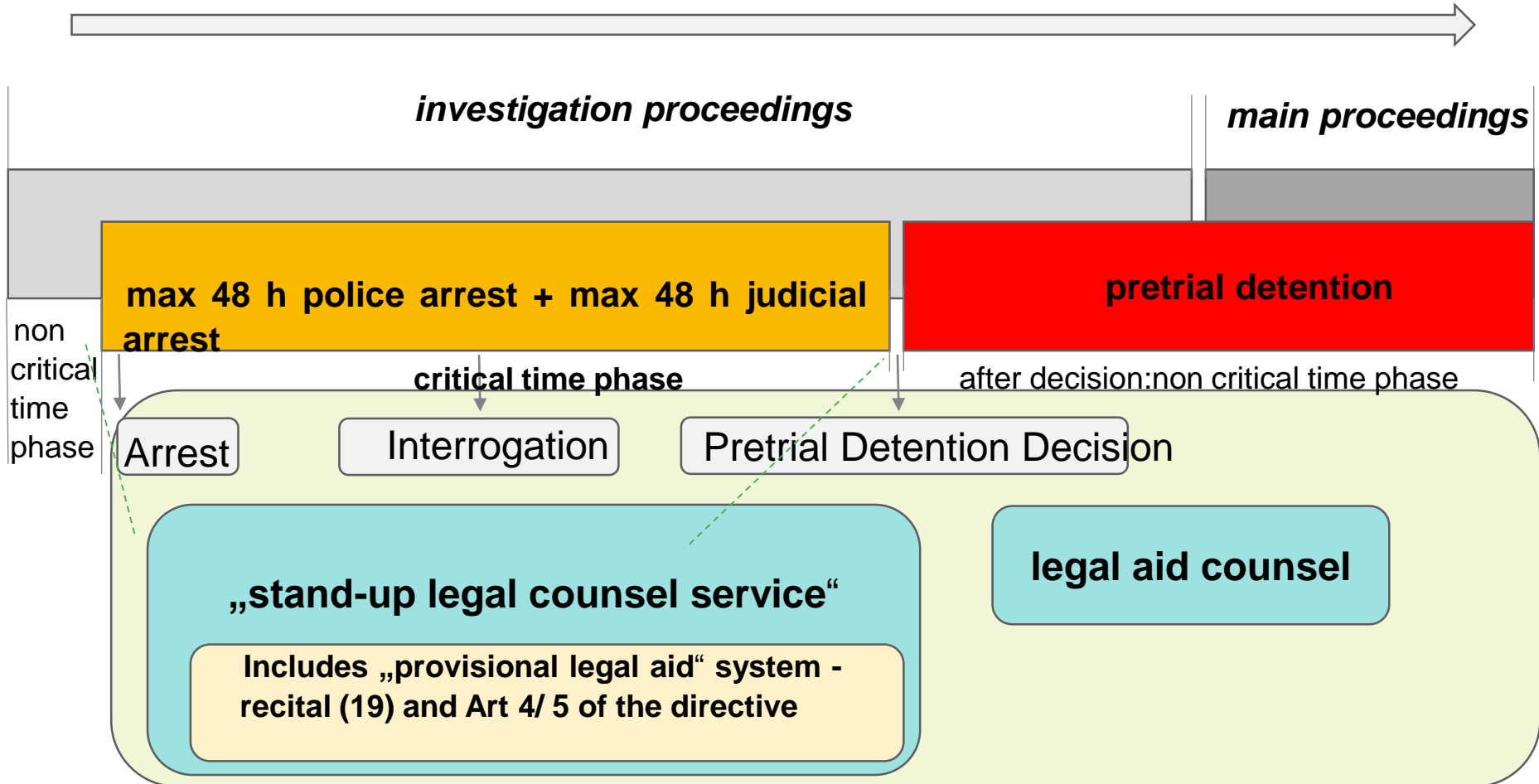
- European arrest warrant
 - **No right for legal aid**
but→
 - optional: using the „stand-up legal counsel service“

HOW IT WORKS WITHOUT (!) TIME STRUGGLE IN CASE OF MANDATORY DEFENCE AND LEGAL AID IN AUSTRIA

Court ordering the suspect to nominate a chosen lawyer or apply for legal aid in a case of mandatory defence



HOW IT WORKS WITH (!) TIME STRUGGLE



„STAND-UP LEGAL COUNSEL SERVICE“

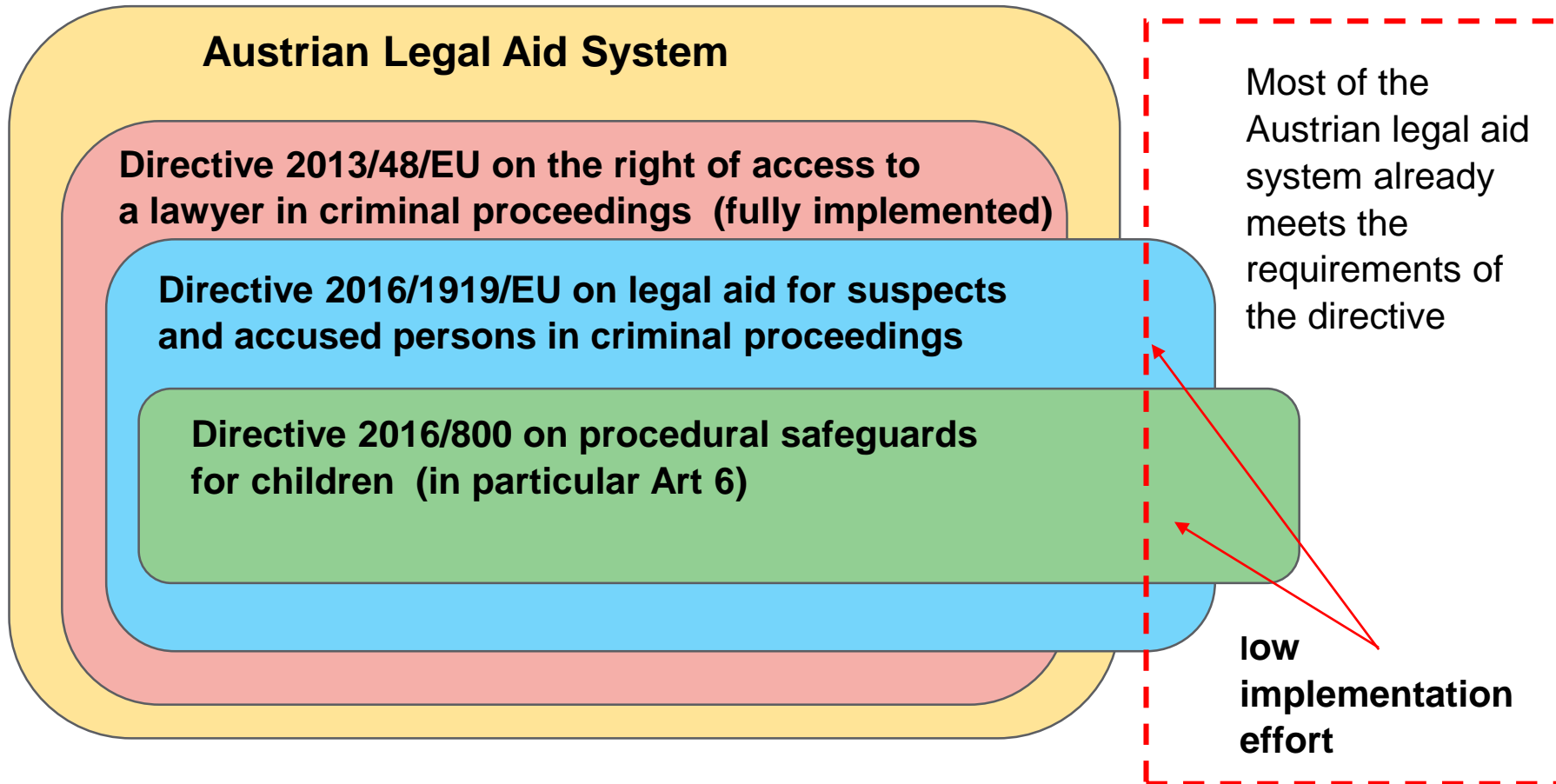
■ *How it works*

- about forty (40) stand-up lawyers are available around the clock (after directive implementation)*
- high and fast availability*
- first call for free*

■ *Integration of “provisional legal aid”*

- all stand-up lawyer services are for free in case of “provisional legal aid”*
 - *means & merits*
 - *basically given at the critical time phase*
 - *service ends automatically with pretrial detention decision*
 - *in contrast to legal aid (according to § 61 Abs 2) “provisional legal aid” will be remunerated directly by the state*

INITIAL SITUATION FOR IMPLEMENTATION



IMPLEMENTATION NEEDS

■ Art 4 Abs 4 lit a (Interest of justice)

- „Interest of justice“ for decision on pre-trial detention (§ 61 Abs 2)

■ Art 4 Abs 5 combined with recital (19) (immediate legal aid decision)

- Immediate decision on the granting of legal aid
- Integration of “*provisional legal aid*” by the „*stand-up legal counsel service*“

■ Art 5 Abs 1 and 2 (European Arrest Warrant)

- Guaranteed legal aid in case of executing member state (Abs 1)
- Guaranteed legal aid in case of issuing state (Abs 2)

■ Art 9 (Vulnerable persons)

- Will be a case of Mandatory Defence

Two Remaining / Main Problems

**Quality of Legal Aid
Representation Rate**

1.A. QUALITY OF LEGAL AID SERVICES AND TRAINING

Status quo in Austria

- **Legal Aid service in Austria is granted by Lawyers which are generalists**
 - Special qualifications requested by defendants in general are not granted

- **No approved Specialist-Lawyer-System in Austria**
 - e.g. “Fachanwalt für Strafrecht“ in Germany
 - Austria as a „small country“ with rural regions and small cities except of Vienna

- **No specific training obligations for legal aid**
 - Every lawyer has the duty to up-date his knowledge and skills, but no directives and control exist

Lack of Art 7

- In the absence of a training obligation to achieve a minimum level of qualification beyond the qualification of a lawyer, Article 7 does not seem appropriate to increase the quality of the procedural assistance system in Austria →

- Therefore, the implementation of the directive **will not increase significantly** the quality of legal aid in Austria

1.B. TRAINING OF LEGAL AID SERVICES

Suggested solution to increase the quality of legal aid

- Subject-specific legal aid related **compulsory** trainings for all **lawyers**, judges and prosecutors (strong model)

or, alternatively,

- Legal aid related **compulsory** trainings **only for the “stand-up legal counsel service”** (soft model)

1.C. QUALITY OF LEGAL AID SERVICES

Lack of Quality Assurance

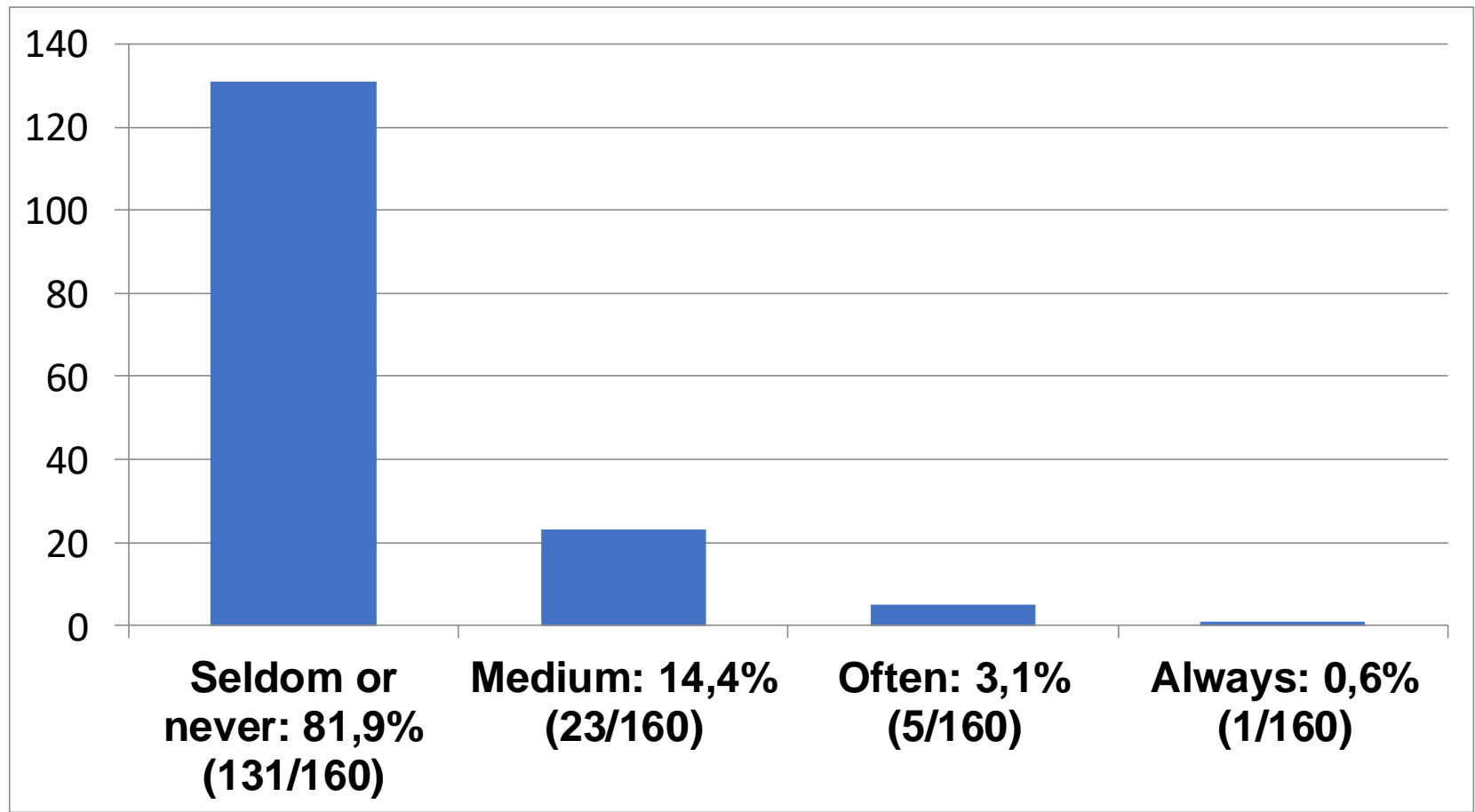
- No measures are taken to ensure the quality of legal aid in advance or afterwards

Suggested solution to increase the quality of legal aid

- Establish preliminary legal aid data evaluations
- Implement a “Peer-Review-System” as other states already do

2.A. LOW REPRESENTATION RATE IN THE PRELIMINARY INVESTIGATION

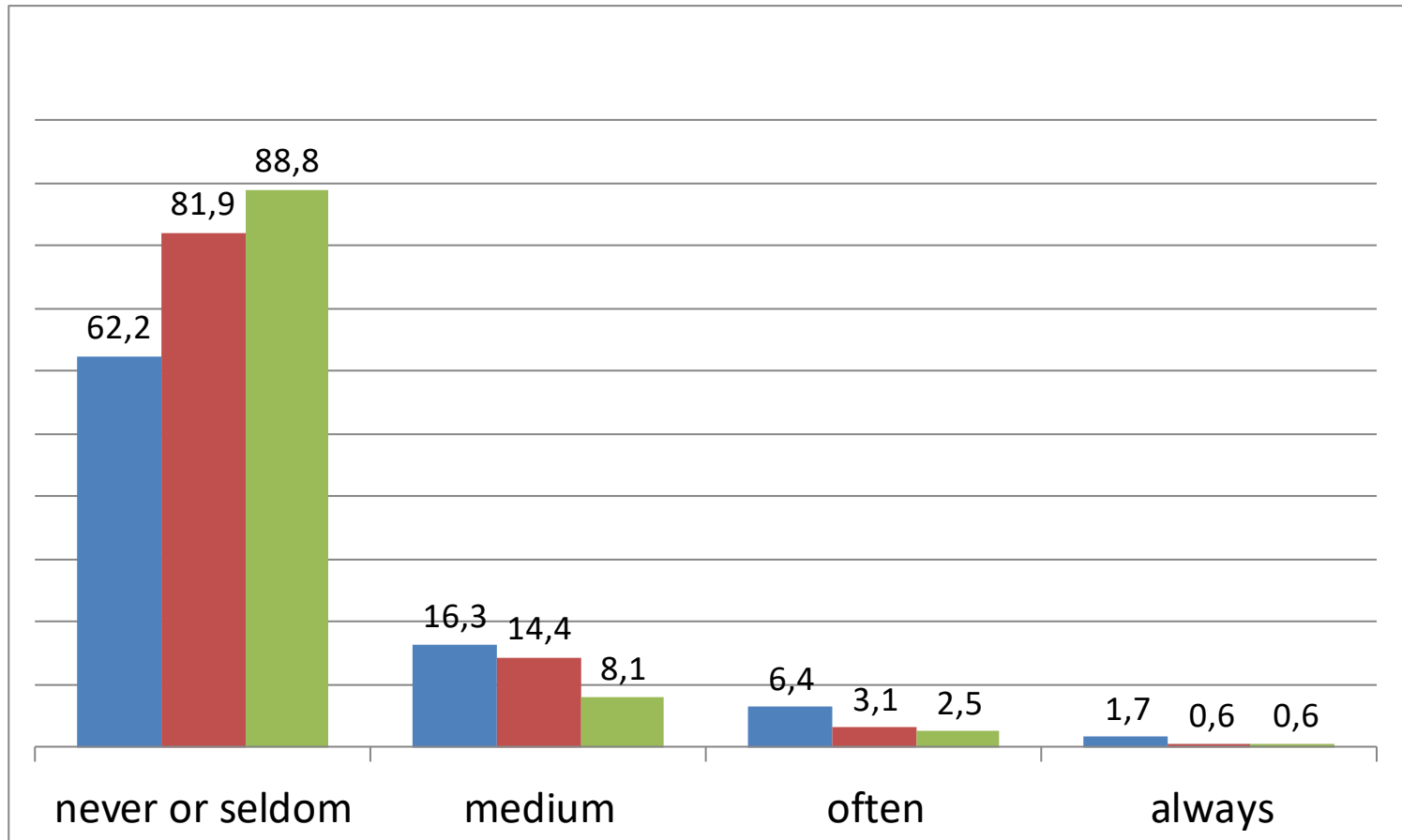
LAWYER CONSULTATION (PED 2010/12) before pre-trial interrogation in Austria



2.B. LOW REPRESENTATION RATE IN THE PRELIMINARY INVESTIGATION

LAWYER CONSULTATION (PED 2010/12) IN AUSTRIA (%)

on arrest / before interrogation / before informal questioning



2.C. LOW REPRESENTATION RATE IN PRE-TRIAL STAGE

- **The directive does not promote the increase in the representation rate in pre-trial stage→**
 - Therefore, it can not fully realize its true benefits from an Austrian perspective

- **Suggested solution**
 - Extension of **mandatory defense** regarding pre-trial stage (strong model)

 - or alternative**

 - **Compulsory telephone contact** with a lawyer immediately after arrest (soft model)

THANK YOU FOR YOUR ATTENTION!

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