

FAIR TRIALS INTERNATIONAL



COMMUNIQUÉ

issued after the meeting

'ADVANCING DEFENCE RIGHTS IN THE EU'

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Legal Experts Advisory Panel



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Introduction

1. On 20 September 2013, Fair Trials International (**Fair Trials**) brought together leading experts (a list of participants is provided in the Annex) in criminal justice from Finland, the Netherlands, Sweden and Denmark (the **Expert Group**). The objective of the meeting was to learn about how the new Directives adopted under the Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings¹ (the **Roadmap**) on the right to interpretation and translation,² the right to information in criminal proceedings,³ and the right to access a lawyer and communicate with third parties upon arrest⁴ (together, **the Roadmap Directives**) will help address fair trial issues in those countries.
2. The meeting was designed to: (i) find out what is being done to implement the new laws; (ii) think about ways to develop in-country training programmes to inform practitioners about them; and (iii) look at opportunities to work with domestic bodies to ensure that the Roadmap Directives have maximum effect. In particular, we wanted to identify the key issues that training on the new laws should address, the key targets for the training and the best geographical location for the programmes.
3. The Expert Group met for a full day in Amsterdam, the Netherlands. Prior to the meeting, the group was provided with a detailed discussion pack and asked to reflect on the Roadmap Directives and how they could most effectively be implemented, as well as possible challenges drawing on the Roadmap Directives in the higher domestic courts and ways in which references for preliminary rulings from the Court of Justice of the European Union (**CJEU**) could provide greater clarity. The remainder of this communiqué outlines the key points raised in the meeting and the key conclusions reached.

Measure A - Directive on the right to interpretation and translation in criminal proceedings

4. The Directive on the right to interpretation and translation in criminal proceedings (**the Interpretation and Translation Directive**), which was adopted in October 2010, must be

¹ Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, (2009/C 295/01), 30 November 2009

² Directive 2010/64/EU of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings. Further information about the content of the Interpretation Directive is available in English, French, German, Italian and Spanish at <http://www.fairtrials.net/publications/defence-rights-in-europe-the-right-to-interpretation-and-translation-in-criminal-proceedings/>

³ Directive 2012/13/EU of the European Parliament and of the Council on the right to information in criminal proceedings. Further information about the content of the Interpretation Directive is available in English, French, German, Italian and Spanish at <http://www.fairtrials.org/publications/defence-rights-in-europe-the-right-to-information-in-criminal-proceedings/>

⁴ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty. Further information about the content of the Directive on the Right to Access a Lawyer can be found at: <http://www.fairtrials.org/wp-content/uploads/2012/10/Measure-C-Update-Summary-English.pdf>

transposed into the national law of every Member State by October 2013. The Interpretation and Translation Directive seeks to ensure respect for the right to a fair trial by ensuring adequate interpretation and translation when the person does not understand the language of the criminal proceedings.⁵

5. All countries represented at the meeting have the right to interpretation and translation explicitly protected in national law for criminal defendants and suspects, although Denmark has opted out of the Interpretation and Translation Directive (as well as all of the other Roadmap Directives). Furthermore since the meeting was held, the Netherlands, Sweden and Finland have all reported transposition of the Interpretation and Translation Directive into national legislation.⁶

Denmark

6. In Denmark, the right to interpretation and translation in criminal proceedings is relatively robustly protected by the Danish Code of Criminal Procedure. However, there is a legislative gap in protection of the right to interpretation and translation in the case of extradition cases, which are not controlled by the Code of Criminal Procedure. While practically speaking, there is usually an interpreter present for court proceedings in extradition matters, in such cases written materials are not translated, and interpreters are not provided for discussions between lawyer and client. This is the case even where suspects are detained in extradition cases.
7. In general for criminal cases, however, participants note that interpretation is available and of sufficient quality. Interpreters are duly trained, qualified and registered, and courts and police are obliged to use these official interpreters at no cost to defendants.
8. There is some concern by participants about independence of interpreters, for example where the same interpreter at court also interprets for a confidential lawyer-client conference. This particularly arises in extradition cases, where usually court interpreters are the only option available for suspects (as described above). This results in lawyers using the court interpreters for lawyer/client meetings, since interpretation is not otherwise available.

Finland:

9. Participants reported that while suspects and defendants are entitled, by law, to interpretation and translation, there is a lack of interpreters for many languages, such as Romanian, meaning that many do not have effective access to such services. Furthermore, the confidentiality of the interpreted negotiations between the lawyer and client is not adequately guaranteed in particular at the pre-trial phase due to insufficient independence of interpreters. For example, the interpreter in a police interview may be a member of the police personnel.

⁵ Further information about the content of the Interpretation Directive is available in English, French, German, Italian and Spanish at <http://www.fairtrials.net/publications/defence-rights-in-europe-the-right-to-interpretation-and-translation-in-criminal-proceedings/>

⁶ References for national legal provisions implementing the Interpretation Directive can be found here: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:72010L0064:EN:NOT#FIELD_IE

10. At the time of the meeting, there was no register of interpreters, and it was unclear whether the Finnish authorities were planning to create one in order to implement the Interpretation and Translation Directive. There is a new examination (under the auspices of the Ministry of Education) for interpreters that was related in August 2013, but passing this is not necessary in order for interpreters to act in court or legal settings and participants did not think it would be made a prerequisite for membership of a register. This lack of consistency between the requirements for qualification of interpreters and quality control of interpreters used in court settings is due to the fact that qualification of interpreters is managed by the Ministry of Education rather than the Ministry of Justice. Practically speaking, participants identified serious problems with the quality of interpretation.
11. Participants raised the example of a well-known case⁷ in which the police attempted to conduct an interrogation in English. The interrogation was not taped or recorded, a lawyer was not present, and minutes were taken in Finnish. These minutes, untranslated, were then signed by the suspect. Eventually the case was overturned by the Supreme Court, but only after a long court challenge.
12. Translations of essential documents are rare. Usually interpreters summarise the content of documents orally. There is new legislation implementing the Interpretation and Translation Directive, which clarifies that defendants have the right to translation if necessary to protect procedural rights, but at this point it is still unclear how this will be enforced in practice.

Netherlands:

13. In the Netherlands, there is a national centre responsible for interpretation services in criminal proceedings throughout the country, coordinated by telephone. The centre will respond within an hour and send an interpreter to a police cell, prison, or to interpret by telephone where personal attendance is not possible in a timely manner. There is always a secured line, so participants did not consider there to be any concerns about confidentiality. This is a free service, paid for by the Ministry of Justice, covering all languages and dialects to a high quality. Interpreters are quality checked and sworn in, and participants noted experiences in which interpreters showed evidence of ethical training, for example by refusing to interpret for one suspect if they had previously interpreted for a co-defendant.
14. Despite the relative strength of the professional interpretation service, problems still occurred in the identification of the need for interpretation and safeguards around waiver of the right to interpretation, with police sometimes attempting to proceed without interpreters where they are needed or acting as interpreters themselves. One participant relayed an example in which a Polish suspect accused of attempted homicide was interrogated by police in English, which he claimed to speak to some degree, despite the fact that a Polish interpreter was available by telephone. Police noted that the suspect spoke poor English, but dismissed the interpreter nonetheless.

⁷ Case number KKO 2012:45

15. Regarding translation of essential documents, only indictments are regularly translated. There is a new law designed to implement the Interpretation and Translation Directive which will enter into force on 1 October 2014, which creates some changes to existing law in terms of translation. Under the new law, suspects can request to have documents of the file translated as long as they are deemed necessary for the defence. The request must be made to the prosecutor at the investigative stage, or to the court at trial stage. It also provides for the charges, indictment, and final decision of the case to be translated as a matter of course without the suspect requesting it.

Sweden

16. In Sweden, the right to interpretation is provided by law and is generally available whenever required. However, independence of interpretation is sometimes compromised, particularly in small minority ethnic communities where the interpreter may know the suspect. In these instances, telephonic interpretation is available, but was less preferable to lawyers as it was seen as more distracting and less accurate than in-person interpretation.
17. Furthermore, legal aid defendants are liable to repay the costs of their representation if they are found guilty. In legal aid cases, usually lawyers pay the costs of interpretation and later ask the court for reimbursement. However in non-legal aid cases, the defendants usually pay the costs of interpretation themselves and are never reimbursed by the court. Since the meeting, a new law implementing the Interpretation and Translation Directive has been adopted which should amend this situation by providing that the translation shall be paid by the Court in all cases.⁸
18. There is scope for improvement on the mechanism by which the need for interpretation is identified. The new draft law includes stronger language with regard to the duty of the court to appoint an interpreter where necessary, but does not otherwise clarify the mechanism for identification of the need for interpretation. Even where the need for an interpreter is correctly identified in the police station, defendants often waive their right to an interpreter rather than wait for one to arrive. Participants report that police are often too willing to struggle in a pivot language, like English, in which neither police nor suspect are truly fluent.
19. Quality is sometimes a problem, particularly in relation to minority languages. For commonly spoken languages, such as English, interpreters are professional, competent and well-trained, and they generally observe ethical norms such as confidentiality. However, for rarer languages, because there is a smaller pool of interpreters, it is not possible to insist on such high standards. Interpreters for these languages tend to speak in a familiar way to suspects, to offer advice, and sometimes do not interpret strictly what was said. The new law⁹ implementing the

⁸ Code of Judicial Procedure: Chapter 33, section 9, (in force from 1 October 2013, updated 1 January 2014) provides a general right for the defendant to have important documents translated, where the translation shall be paid by the court Chapter 31, sections 1 and 2 provides a right for compensation for “reasonable” expenses for interpretation regardless of legal aid. Available at: <http://rkrattsdb.gov.se/SFSdoc/13/130663.PDF>

⁹ Code of Judicial Procedure: Chapter 5, section 6, para 2.

Interpretation and Translation Directive requires authorities to use properly qualified and authorised interpreters where it is possible to find them, but this will not help the situation with rare languages. There is another new law on confidentiality, allowing for interpreters to be prosecuted where confidentiality is violated.¹⁰ Previously, the rule of confidentiality was only expressed in a code of ethics and did not carry criminal sanctions.

20. Quality of interpretation is partially assured in Sweden due to the fact that all testimony of the accused, victims and witnesses in court is recorded, including with video recording. It is often, but not always, recorded in police stations as well but this varies from station to station. Lawyers also have the right to record interrogations and often bring tape recorders to the police station for this purpose. As a result, it is possible to determine for the purposes of appeal whether interpretation has been of sufficient quality to safeguard the proceedings. As an example, participants highlighted the example of an overturned conviction on the basis that, upon later viewing of the videotaped, interpreted testimony at court, it was determined that 90% of the (Arabic to Swedish) interpretation was inaccurate. However, if this had not been videotaped, it would have been impossible to prove this as there was no other Arabic speaker in the courtroom apart from the witness and the interpreter.
21. Despite the generally high quality of interpretation, however, no documents are provided in translation at all. The official view, according to participants, is that it is enough to have interpreters summarise documents orally. This attitude is reflected in the legislation passed to bring Sweden into compliance with the Interpretation and Translation Directive, which contains no mention of translation, depending on Article 3(7), which allows for oral translation or summary of essential documents as an exception to the general rule requiring translation, as long as an oral summary does not prejudice the fairness of the proceedings. Lawyers will sometimes record the interpreter's oral summary to give to the defendant as a protective measure, or making a demand that the interpretation be recorded by either the interpreter or the investigators. However, there are occasions in which the participants felt that the fairness of the proceedings is jeopardised by the lack of translated documents; for example, where much of the evidence is comprised of written documents (for example in economic crime cases). There are also special considerations where a defendant is in pre-trial detention. One participant relayed an example in which the lawyer requested the evidence to be translated; the prosecutor agreed to the translation but required that the client stay in detention for two extra weeks to allow time for the translation.

Common Themes

22. **The main problems that participants identified with interpretation and translation in criminal proceedings in their jurisdictions are:**
 - a. In all jurisdictions, there was a lack of quality interpreters in less common languages.

¹⁰ Penal Code Chapter 20, section 3.

- b. In Sweden, Denmark and the Netherlands, few if any essential documents are regularly translated. However, new implementing legislation in each of these member states may improve access to translation.
- c. There are not sufficient safeguards relating to the identification of the need for interpretation or around waiver of that right, resulting in police officers sometimes inappropriately carrying out interrogations in languages not fully understood.
- d. Concerns exist in Denmark and Sweden about the independence of interpreters, particularly in small ethnic communities where interpreters are likely to know suspects personally.
- e. In Finland, Denmark and Sweden, some defendants end up bearing the costs of interpretation and translation through legal provisions that require defendants found guilty at trial to reimburse the costs of legal aid.
- f. There are some examples of good practice among the represented jurisdictions, including the routine use of video and audio recording of interpreted testimony in Sweden, and the availability of interpretation in rare languages through the comprehensive national telephonic interpretation service in the Netherlands.

Measure B – the right to information in criminal proceedings

23. The Directive on the right to information in criminal proceedings (**the Right to Information Directive**), which was adopted in May 2012, must be transposed into the national law of every Member State by June 2014. The Right to Information Directive seeks to ensure respect for the right to a fair trial by ensuring that suspects are made aware of their rights upon arrest so that they are able to exercise them. It also requires access to the case-file at the investigative phase and prior to trial.

Denmark:

Provision of Information on rights

24. The letter of rights required by the Right to Information Directive is only provided to defendants in detention in Denmark. There is no letter of rights provided at the police station. Rather, police are required to provide information orally to suspects. However, this oral provision of information is not as comprehensive as the letter of rights, and it is difficult to determine later whether the suspect understood the nature of the rights explained to him at the police station.

Access to case materials

25. In general, participants did not raise concerns about the disclosure of evidence to the defence. In some serious cases raising national security issues, case-files are disclosed with certain material subject to confidentiality provisions. In these cases, confidential material is still disclosed to the defendants' lawyer, but it is printed on a different colour to the other pages so as to indicate that the material should not be shared with the defendant or suspect himself.

Finland:

Provision of information on rights

26. There is no letter of rights system in place in Finland. The new Investigation Act, which came into effect in January 2014, proposes a letter of rights but it is limited, only mentioning the right to a lawyer, and not the other rights listed in the Right to Information Directive. Preliminary interrogations often take place without suspects having adequate knowledge of their rights. Foreigners in particular may have problems in understanding why they are detained and what rights they have. New legislation implementing the Directive is, however, in preparation.

Access to case materials

27. Access to case materials may be refused or essentially limited before the end of the pre-trial investigation. There may be no access to the case-file before the first court hearing, which can sometimes be up to 96 hours after the suspect is first deprived of his liberty. This results in there being very little, if any, chance to meaningfully challenge detention decisions. The provisions in Article 7(1) of the Right to Information Directive relating to access to case materials to challenge pre-trial detention have the potential to substantially improve practice in Finland. Unfortunately, participants report that Article 7(1) is unlikely to be comprehensively implemented at this time.
28. Furthermore, decisions about whether to provide access to the case-file during the investigative period lie in the hands of the police in Finland, as the court plays no role in managing the investigation. The absence of efficient judicial, or even prosecutorial, oversight of decisions to deny the defence access to the case-file has caused substantial problems in practice. New legislation¹¹ entering into force in January 2014, presents a possibility for the prosecutor to step in, but the judicial oversight during the investigative period continues to be possible only in the administrative courts where the proceedings are very slow and often found fruitless.
29. In order to detain a defendant pre-trial in Finland, the law requires some finding of probability of the defendant's guilt. In practice, the court has not required the police or other investigative authorities to submit any evidence in support for this finding. Participants report that there are many cases in which the court orders detention based on police assertions of the suspect's guilt, without any reference to objective evidence. Without access to the case-file, and without critical oversight of police assertions of the likelihood of the suspect's guilt, it is very difficult for the defence to argue against detention. The new law entering into force at the beginning of January 2014 requires evidence on the prerequisites for the remand to be presented in the remand hearing, but it remains to be seen how it will affect the practice.
30. Finland has a Justice Ombudsman and a Chancellor of Justice, who write reasoned opinions on police practices in Finland. Participants noted that even they sometimes face problems with accessing relevant materials.

¹¹ Comprising the Investigation Act, Coercive Measures Act, and Police Act.

Netherlands:

Provision of information on rights

31. There is no letter of rights provided to suspects and defendants at the police station in the Netherlands. When a suspect is first arrested, they are orally informed of the right to remain silent. Following the *Salduz v Turkey* decision of the European Court of Human Rights (ECtHR)¹², suspects are also now informed that they may consult with a lawyer before the interrogation and that they can also waive that right. If the police and the prosecutor decide to detain the suspect up to a further 3 days after the first 6 hours of police detention, the suspect receives the court document ordering further detention, which contains no mention of rights.

Access to case materials

32. During the investigative stages, suspects may request access to certain documents. However, generally nothing is presented at the stage of the initial police interrogation. There is a new procedure in the Dutch criminal code which allows for a request for materials to be made in writing to the prosecutor. The prosecutor can refuse, but such refusal can be challenged before the investigating judge. However in practice, participants report, there is not widespread knowledge of this procedure and it is very difficult to execute it. When faced with a request for evidence, police and prosecutors commonly refuse access.
33. As it stands, there is only a practical right to full disclosure of the case-file after indictment. When the suspect comes before the judge on the question of pre-trial detention, the defence obtains a file with enough evidence to confirm whether the procedure has been carried out correctly, in terms of whether there is sufficient suspicion and/or any other reason to detain the suspect. Participants reported however that none of this information is presented with enough time to develop meaningful evidence and arguments for the defence.

Sweden:

Provision of information

34. The police in Sweden are not required to provide written information to suspects on their rights, and participants identified a real problem with police interrogating suspects without first explaining their rights. Police are required to explain that suspects do not have to answer questions without a lawyer present, but according to participants they do not generally explain what the right to silence entails and what the implications of its exercise would be. For example, many suspects complain that they were never told that they could refuse to be interrogated without a lawyer present.

¹² *Salduz v Turkey* 36391/02 [2008] ECHR 1542.

35. A letter of rights is distributed to defendants in pre-trial detention, but this comes much too late for them to be able to exercise meaningfully the most important rights. Participants agreed that a letter of rights, duly explained to and signed by suspects at the police station pre-interrogation, would improve practice in Sweden.

Access to case materials

36. In general, participants reported that prosecutors do not provide the defence with any case materials until shortly before the indictment, at which time the whole case-file must be made available. The letter of the law is actually quite strong, requiring that the defence have access to evidence as soon as prosecutors have it. However, there is an exception where that access would harm the investigation. Participants report that many prosecutors exploit this exception to withhold most evidence until the last possible moment pre-indictment.
37. With regard to access to case materials related to pre-trial detention, the prosecutor must make a decision as to whether to keep the suspect in custody once he has been detained for 6 hours, with the possibility of an extension for 6 more hours in exceptional circumstances. After a further 3 days, the prosecutor must apply to court to request remand into custody for a longer period. At that stage, the defence is provided with:
- i. A form explaining the accusation; and
 - ii. The reasons for remanding the suspect or defendant into custody (which must be limited to either the possibility of the destruction of evidence, the likelihood of the suspect committing further crimes or risk of flight).

There is usually some material evidence provided along with the form, for example the notes from the initial interrogation, a witness statement, or police statement regarding surveillance evidence. However the quality of the material provided at this stage is inconsistent – sometimes all relevant material is included, and sometimes nothing at all. For example, one participant’s client, accused of attempted murder, was given nothing more than a report from the police which described gang warfare and a related shoot-out, with no specific reference to the client.

38. A draft law¹³ intending to implement the Right to Information Directive has been proposed, which suggests, among other changes, an amendment to the current law which would require authorities to provide defendants with information about the circumstances giving rise to their arrest or detention.
39. Once the right to access material is given, the defence is able to examine all of the material, including evidence which has been deemed irrelevant or discarded by the prosecution. Furthermore, defence counsel acting on behalf of a detained suspect has the right to ask the prosecutor to order that certain investigative acts be carried out. A prosecutor’s refusal to do so can then be appealed to court.¹⁴

¹³ Draft law (2013/14:157) of 11 March 14 suggesting amendments to chapter 24 (section. 9 a), suggested to come into force 1 June 2014.

¹⁴ Code of Judicial Procedure, Chapter 23, sections 18 and 19

Common themes

40. The main problems that participants identified with the right to information in criminal proceedings in their jurisdictions are:

- A. None of the represented jurisdictions currently provide a letter of rights to suspects in the police station. Rather, all rely on police providing information to suspects orally. The information on rights provided by police is not as comprehensive as the list contained in the Right to Information Directive in any of the jurisdictions. In Sweden, Denmark, and the Netherlands, a letter of rights is provided to defendants once they are remanded into detention, but this is often too late to exercise key rights. Furthermore, they are often written in technical and inaccessible language.
- B. In Sweden, the Netherlands, and Finland, access to the case-file is not routinely granted until just before or after indictment, limiting the defence's ability to argue against detention and other decisions taken at an early stage in the investigation. Access to the case-file at the police station is rarely provided in any jurisdiction represented here.
- C. In Denmark, there is good practice with regard to providing access to case materials subject to limitations on disclosure due to national security concerns. Sensitive material that is not deemed safe to be disclosed to the defendant is still made available to the defence lawyer, with pages marked in a different color paper to signal that it should not be shared with the defendant himself.

Measure C – the right of access to a lawyer in criminal proceedings and the right to communicate upon detention

41. The text of the third measure under the Roadmap, which grants suspects the rights to access a lawyer and to communicate with a third party on arrest, was adopted on 22 October 2013. At the time of the meeting, the final text had been adopted but the Directive had not yet been published in the Official Journal of the EU. For convenience, we refer to the **Access to a Lawyer Directive**.

Denmark:

Access to a Lawyer

- 42. In Denmark, there is no access to a lawyer during the investigation prior to a formal charge being brought against a suspect.
- 43. The primary problem identified by participants in securing access to a lawyer once a charge has been laid is a lack of safeguards around defendants' waiver of the right to a lawyer. Participants described the procedures around waiver as a summary box-ticking exercise that did

not meaningfully explore whether the defendant has actually understood the right to a lawyer and the consequences of waiver.

44. The remedies available when evidence has been obtained in violation of the right to access a lawyer are not always straightforward. As decisions are usually very short, only two to three paragraphs long, it is often impossible, according to participants, to know exactly what weight was given to disputed evidence. The decision will state the arguments made by the defence, but not the consequence of that argument on the court's decision.

Communication

45. Whether a defendant has the ability to communicate with outside parties upon arrest depends largely on the police officer in charge; the right is not always guaranteed.

Finland:

Access to a Lawyer

46. Participants confirmed that Finland's laws more or less conform to the demands of the Directive on Access to a Lawyer, but are not always observed in practice. The time period before a suspect is brought to court for the first time was identified by participants as a perilous period for suspects without lawyers, in which interrogators may push for a confession.
47. In general the police are eager to have lawyers present at the first interrogation to ensure that the evidence collected there will be useable in any eventual trial. However, police are still generally not willing to allow lawyers to participate, preferring them to sit quietly and sign the minutes afterwards. Practice in this regard varies substantially between police units, and may be partially addressed by the new Investigation Act which came into force in January 2014.
48. During the past year, the system has changed somewhat with regard to treatment of waivers of the right to a lawyer, following the decision in *Salduz* and a Finnish Supreme Court decision¹⁵. That case featured a foreign suspect who was interrogated in English by police, with no interpreter present. The suspect was noted to have waived his right to a lawyer in police notes of the interrogation, which were written in Finnish. The conviction, which carried a 9 years prison sentence, was ruled to be unsafe on the basis that the waiver could not be shown to be willing and knowing, given that he clearly could not understand the language of the notes attesting to his supposed waiver, and given that he had not met his lawyer before the interview, and the lawyer was not present in the interview. It was also unclear whether he was aware of all the charges, and if he understood the importance of his right to remain silent. Unfortunately, subsequent case law has not applied the exclusionary rule as strictly in the context of waivers. The current approach of the Court is that it will not automatically ban the use of evidence collected without the presence of a lawyer where a waiver was granted, unless there is good reason to believe that the waiver was uninformed.

¹⁵ KKO 2012:45

49. Problems arise around the ability of suspects to obtain assistance with the lawyer of their choice. For example, suspects who request particular lawyers may be told by police that their preferred lawyer is unavailable, even if that is not the case. This can result in coerced waivers of access to a lawyer or to reliance on lawyers recommended by police.
50. An emergency legal aid system in the police station has been discussed but has not proceeded due to a lack of sufficient lawyers willing to participate. There are state legal aid offices with knowledge and know-how, but their services are not directed to people in police custody. So far, lacking consensus and resources, as well as the lack of a system of provisional legal aid for people in police custody have prevented practical police station attendance schemes from being developed.
51. Participants reported serious concerns regarding the protection of confidentiality during lawyer and client meetings. There are practical barriers in place, such as a lack of facilities in which lawyers are able to communicate with clients in places of detention or in police station cells. This results in lawyer-client meetings sometimes taking place in the presence, and within earshot of, prison guards and other third parties. Video (but not audio) surveillance of the meetings in prisons is also common.

Netherlands:

Access to a Lawyer

52. Since the *Salduz* judgment, participants reported that there have been some improvements in the Netherlands regarding access to a lawyer at the police station. Suspects can now access a lawyer and receive advice for 30 minutes prior to questioning (unless this right is waived). A well-organised police station rota scheme ensures that lawyers are available to provide this service upon request by the suspect or defendant.
53. Effective participation of lawyers in the interrogation is still limited, however, and in most cases, lawyers are not present during interrogations. In those cases where they are permitted to attend, for example in juvenile cases, their ability to intervene is restricted to asking questions at the conclusion of the interview. Furthermore, there is no involvement of defence lawyers during evidence-gathering acts. Many Dutch defence lawyers respond to this by advising their clients to remain silent if their requests to have a lawyer present in the interview are not granted. Participants predicted that the implementation of the Access to a Lawyer Directive will face substantial resistance in the Netherlands, particularly from prosecutors.
54. Under the current duty solicitor system, police must wait for two hours for the suspect's chosen lawyer to arrive. If the lawyer does not arrive within two hours, a duty lawyer is assigned to the suspect. Extra training is required in order for lawyers to join the duty rota, and in practice they usually have two duty shifts every six months, so it does not present a major workload issue for most.

55. Participants reported general compliance with the demands of the Access to a Lawyer Directive with regard to confidentiality, and confirmed that interrogations are sometimes, but not always, videotaped .
56. With regard to remedies, if a statement is taken without prior consultation with a lawyer to which a suspect or defendant is entitled, the Supreme Court has ruled that it must be excluded from consideration by the court.
57. An emerging problem with regard to access to a lawyer is the summary justice process, which prosecutors are aiming to use to deal with 75% of all crimes. Though characterised as “minor”, such crimes can carry sentences of up to 180 hours of community service. As a rule, there is no access to a lawyer for this class of prosecutions. The procedure is that the defendant receives a letter detailing the accusations, in Dutch; if the defendant does not respond to this letter within 14 days, he is automatically convicted. Under new legislation which was scheduled to come into force in October 2013, this letter will have to be translated, but the lack of procedural safeguards and widespread nature of summary proceedings is still troubling.

Sweden:

Access to a Lawyer

58. Lawyers are allowed to attend police interviews, and any evidence-gathering act at which the suspect or defendant is present. However, access can be a problem when it comes to minor offences, which are often dealt with summarily without real process. Furthermore, due to frequent waivers of the right to a lawyer, it is common for suspects to go without access to a lawyer until indictment, when the investigation is closed. This means that at the same point a lawyer is appointed, a trial date is scheduled, sometimes within only two weeks. By this time many investigative acts have taken place that cannot then be undone, and the lawyer has a relatively small amount of time in which to determine what should have been done during the investigation had a defence lawyer been involved. There are not sufficient safeguards around suspects’ waivers. Participants noted that police will sometimes make suggestions that lead to a waiver, such as, “you don’t need a lawyer just for the investigation do you? Only if it goes to court?” An affirmative reply to these questions on the part of the suspect is taken as a waiver of the right to a lawyer. Ideally, participants noted, suspects would get legal advice before a waiver could be considered legitimate.
59. In those cases where a lawyer is appointed, his participation during interrogation is often restricted, depending on the approach of the individual interrogator. Questions from the defence are usually permitted only at the end of the interview; though practice in this regard varies on the length of interview, and the experience of the defence lawyer in addition to the personality of the individual police officer. Often, interventions by the lawyer will be dismissed by police officers as a “waste of time.” However the lawyer can pause the interview in order to speak with the client in private at any time, and can also stop the interview and request a new

investigator if there is good cause to do so. Participants were generally comfortable that confidentiality between lawyer and client was protected.

60. In the absence of a strict exclusionary rule for evidence obtained without a lawyer present, defence lawyers are left to argue that the evidence is less reliable and should be ignored by the Court on that basis. If this argument is accepted, the judge should write in the decision that the evidence is unreliable. However in practice there are systemic problems with a lack of fully reasoned decisions, such that it is difficult to know exactly how much weight was assigned to various pieces of evidence, some of which may have been tainted by unlawful collection methods. This also forecloses the possibility of appealing on this basis. There is currently a programme initiated by the court administration trying to improve this, but so far not much progress has been made. .
61. In Sweden, as in many countries in the region and those represented at the meeting, defendants on legal aid are responsible for paying back the costs of their legal defence in the event they are found guilty. In practice, this is rarely collected due to the fact that most defendants have few resources by that time.

Communication

62. Police routinely refuse to allow suspects and defendants to communicate with third parties. The lawyer in attendance at the police station is obliged to ask the police or prosecutor for permission for the client to contact a third party, and this request is commonly refused. The lawyer himself must receive permission from the authorities to contact a third party on behalf of the client. Where the prosecution believes there is any risk that information may leak, they will refuse this request. Refusal is more often the rule than the exception in cases of serious crime, resulting in long periods of incommunicado detention for a large swath of defendants in Sweden. This creates a real issue with appointing a lawyer, since the family is unable to do research and appoint a lawyer on the suspect's behalf, and the suspect has no ability to conduct this research himself. Participants expressed particular concern with regard to minor suspects, and suggested that the derogations from the right to communicate with third parties, such as that found in Article 6(2), would allow Sweden to continue with this practice regardless of the implementation of the Access to a Lawyer Directive.

Common themes

63. **The main problems that participants identified with access to a lawyer in criminal proceedings in their jurisdictions are:**
- a. In Sweden and Finland, there were not always practical schemes in place to ensure that suspects had access to lawyers at the police station, and in Sweden, Finland and the Netherlands, barriers existed to suspects' ability to access the lawyer of their choosing.

- b. There was a serious problem of lack of lawyer participation during police questioning in the Netherlands. Other jurisdictions, including Sweden and Finland, permitted lawyers to attend interrogations but their ability to intervene was quite limited.
- c. There was a lack of access to a lawyer in summary proceedings, which comprise a substantial proportion of prosecutions, in Sweden and the Netherlands.
- d. Remedies for evidence collected in violation of the right to access a lawyer were difficult to enforce, particularly in Sweden and Denmark but to a lesser degree in all represented jurisdictions, due to a lack of fully reasoned decisions from judges. Where it was not clear what weight was granted to the evidence in question and on what grounds that weight was given, appealing decisions on the basis of inadequately remedied violations of the right to access a lawyer was very difficult.
- e. All jurisdictions identified a lack of safeguards around waivers of the right to access a lawyer, with police employing coercive tactics to induce waiver or treating the provision of waiver as a box-ticking exercise without ensuring that suspects fully understood the nature and consequence of waiving the right.
- f. There were insufficient protections of the right to communicate with third parties upon arrest in Denmark and Finland, and widespread incommunicado detention in Sweden.

D – Key recommendations

Implementation

- a. Participants from all jurisdictions felt that in general, the Roadmap Directives were unlikely to make a major impact on practice in their jurisdictions due to their Member States' possible reliance on derogations available in the text of the Roadmap Directives, especially with regard to the Right to Information Directive the Access to a Lawyer Directive . That being said, legislation had already been adopted in Finland, the Netherlands and Sweden to help those Member States implement some aspects of the Roadmap Directives, including enhanced protections of the right to interpretation and translation.
- b. Implementation of the Interpretation and Translation Directive must ensure that there are adequate quality control mechanisms capable of ensuring that the fairness of the proceedings is not prejudiced by reason of poor interpretation at the police station. There must, in particular, be a focus on ensuring the independence and adequate qualification of police station interpreters, including interpreters for rarer languages. The use of routine videotaping of interrogations in some jurisdictions represented at the meeting is an example of best practice that should be considered for adoption elsewhere.
- c. The provision of a letter of rights at the police station, which should accompany implementation of the Right to Information Directive, was identified by all participants as an innovation that could substantially improve both suspects' knowledge and exercise of their rights at the interrogation stage.

- d. The widespread use of incommunicado detention by Sweden and the lack of effective participation of lawyers in police interrogations in the Netherlands were major challenges to implementation to the Access to a Lawyer Directive that participants felt would face serious political resistance. Participants were also doubtful about the impact of possible litigation on these issues at the CJEU in Luxembourg due to the unwillingness of national courts to make referrals. Strategic litigation on the national level to ensure that derogations are applied narrowly was identified as an important implementation tool.
- e. Once the deadline for implementation of the Roadmap Directives has passed, Fair Trials will be keen to obtain information from local experts on the practical implementation of the Roadmap Directives, to assist the European Commission in its monitoring and to highlight possible areas for infringement actions. Fair Trials will also be keen to identify opportunities, where they exist, for references to the CJEU for preliminary rulings concerning the Roadmap Directives. Participants agreed to support Fair Trials in these efforts.

Awareness and training

- a. By and large, criminal lawyers tended to rely on domestic criminal and procedural codes rather than to EU law, which was not generally understood to raise the standards available in the represented jurisdictions. To ensure effective implementation, domestic lawyers should be trained to see EU law, the Charter and case-law of the European Court of Human Rights as part of their tools.
- b. Because of the general reluctance of judges to make referrals to the CJEU, outreach to judicial authorities about the role and utility of the CJEU's jurisdiction, as well as the practicalities of making referrals, should be undertaken.
- c. Information regarding international standards on the Roadmap Directives and related international standards should be translated and circulated within the professions and civil society in the countries represented in the Expert Group, to enhance awareness, particularly amongst young lawyers.
- d. Bar Associations may also play a role to ensure that criminal defence practitioners are aware of and comfortable using the Roadmap Directives (and the EU Charter), and in ensuring that defence perspectives are heard in the development of implementing legislation.
- e. State authorities should be encouraged to ensure that all internal rules and guidelines, codes of practice and/or staff manuals pay proper attention to procedural rights, and that violations of these rights are being duly investigated in disciplinary and other proceedings.

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ANNEX – PARTICIPANT BIOGRAPHIES

(Alphabetical Order)

Myrddin Bouwman is a lawyer and specialist in the field of criminal law and procedure at Van Appia and Van der Lee Law Firm in Amsterdam, where she is a partner. She has also lectured at the University of Utrecht on criminal law and procedure. She is a member of the Dutch Association of Criminal Defence Specialists (NVSA), the European Criminal Bar Association (ECBA), the Legal Experts Advisory Panel (LEAP, Fair Trials International), and is a board member of the Dutch NGO Euromos, a human rights foundation aimed at monitoring human rights in situations of extradition or surrender of suspects and suspected persons.

Mikala Hallund is a lawyer with Tyge Trier, <http://ttrier.com/>, in Denmark. She specialises in criminal law with a particular interest in human rights. She formerly worked as a Senior Legal Officer for the International Federation of the Red Cross.

Kenneth Lewis is a lawyer and partner at Lewis and Partners, <http://www.lewislaw.se/>, in Stockholm, Sweden. He specialises in Criminal law and has represented clients in cases before the European Court of Human Rights as well as proceedings before the Human Rights Committee.

Sakari Melander is a post-doctoral researcher at the Faculty of Law, Helsinki (<http://www.helsinki.fi/university/>). He has written extensively on European Criminal and Comparative Law and has acted as an expert in constitutional law before the Finnish parliament.

Jozef Rammelt is a partner at Keizer Advocaten in Amsterdam, www.keizeradvocaten.nl, and specialises in international criminal law, extradition and repatriation cases. Jozef is a co-founder of the EuroMoS foundation, <http://euromos.org> a Dutch NGO dedicated to monitoring the treatment of suspects and defendants in EU Member States. Jozef is a long-time supporter of FTI and is a Patron.

Daniel Roos is a lawyer and partner at Advokatfirman Acta in Helsingborg, www.advokatacta.se. He specializes in criminal law and has a particular interest in human rights law and cross-border criminal justice issues.

Jan Södergren is an associate at Lewis and Partners, <http://www.lewislaw.se/>, in Stockholm, Sweden. He specialises in labour law and constitutional law including freedom of speech, rights of association and property rights. Jan has represented a number of claimants at the European Court of Human Rights including the indigenous Sami people in the case of Handölsdalen Sami Village and Others v. Sweden. He is the author of numerous legal articles related to constitutional and human rights cases.

Satu Wartiovaara works at Turku & Wartiovaara, <http://www.lakiturku.fi/>, in Helsinki. She is a criminal lawyer with extensive experience in human rights and a certificate from the Strasbourg International Institute of Human Rights.

Just Wiarda (observer) is chairman of EuroMos, a non-governmental foundation working to ensure that extradited people have their fundamental human rights safeguarded, <http://euromos.org/>, and was formerly legal advisor to the Ministry of Justice. As chairman of EuroMos he has overseen the launch of a joint project with Fair Trials to map the fairness of EU criminal justice systems.