

FAIR TRIALS INTERNATIONAL



COMMUNIQUÉ

issued after the meeting

‘ADVANCING DEFENCE RIGHTS IN THE EU’

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Introduction

1. On 10 May 2013, Fair Trials International (**'Fair Trials'**) brought together leading experts (a list of participants is provided in the Annex) in criminal justice from the Czech Republic, Estonia, Latvia, Lithuania and Poland (the **'Expert Group'**). The objective of the meeting was to learn about how the new Directives adopted under the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (the **'Roadmap'**) on (A) interpretation and translation; (B) the right to information; and (C) access to a lawyer in criminal proceedings (together, the **'Roadmap Directives'**) could help address fair trial issues in those countries.
2. We wanted to: (i) find out to what extent national law and practice already complies with the Roadmap Directives, where it needs improving and what is being done to implement them; (ii) think about ways to develop in-country training programmes to inform practitioners about the Roadmap Directives; (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 and the key targets, locations and timing for such training.
3. The Expert Group met for a full day in Vilnius, Lithuania. Prior to the meeting, participants were 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 litigation 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 (the **'CJEU'**) could provide greater clarity. These topics were then discussed at the meeting. The remainder of this communiqué outlines the key points raised in the meeting and the key conclusions reached.

Measure A – the right to interpretation and translation in criminal proceedings

4. The Directive on the right to interpretation and translation in criminal proceedings (the **'Right to Interpretation and Translation Directive'**),¹ which was adopted in October 2010, must be transposed into the national law of every Member State by October 2013. The Right to 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.²

Czech Republic

5. There is one central register for both interpreters and translators, and the police and courts are required to select from that register. In practice, police generally select the same few interpreters, which raises concerns about the independence of such interpreters who have a commercial interest in maintaining a positive working relationship with the police. Quality and accuracy was described as a major issue, with participants suggesting that a lack of basic

¹ [Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.](#)

² Further information about the content of the Right to Interpretation and Translation 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/>

knowledge of the legal system and processes is a key problem. A lack of consistency also occurs due to the frequent changes in interpreters throughout criminal proceedings. The ethical code by which interpreters and translators are bound is not effective. For interpretation between lawyers and suspects, the costs would have to be borne by the defence. Participants also expressed concern about delays in access to interpretation arising from the insufficient numbers of interpreters competent to interpret in certain languages.

6. Translations are provided of the charge, decisions ordering custody, and decisions as to guilt or innocence. According to participants, in practice, judges do not take a great interest in translations and the document often simply disappears in the bureaucracy. Participants also suggested that the quality of translations needs to be improved.

Estonia

7. There is no certification requirement for interpreters and translators. The courts, prosecutors, and police have a general obligation to guarantee interpretation, but there are virtually no statutory provisions on the quality of the service. Whilst sworn translators are regulated by the Sworn Translators Act, which sets out requirements relating to examinations, evaluations and ethical conduct, there is no requirement to use sworn translators in criminal proceedings. The number of languages covered by sworn translators is relatively small (presently, only English, Russian, Finnish, German, French, Spanish, and Italian language translators are available) with most languages being represented by only one or two individual translators/interpreters. In practice, therefore, it becomes necessary to use unregulated translators in many cases.
8. For unregulated translators and interpreters, the only quality control mechanism is the potential for being cautioned for incorrect interpretation and/or translation. They are also required to refuse to provide the service if they have insufficient command of the languages at hand. In pre-trial proceedings, for more common languages, the police have staff interpreters and translators whose impartiality is questionable. However, there have been no reported incidences of abuse in this regard.
9. As interviews are not audio-recorded during pre-trial phase, mistakes made by interpreters are difficult to verify after the event. Some defence lawyers have adopted a practice of using interpretation of only such language which the lawyer himself understands (even if that is not the first choice of the client), because this is the only way that the quality of interpretation can be verified on the spot.
10. For procedural steps taken by the police, prosecution, and court, the interpretation and translation is provided at the expense of the state. However, under the current rules, if the defendant is found guilty, s/he will be required to compensate these costs later – a practice out of line with the Interpretation and Translation Directive, which requires that costs be met by the state irrespective of the outcome in the case. For communication between lawyer and client, no state funded interpretation/translation is available. Amendments to the criminal procedure code are being prepared by way of implementation of the Right to Interpretation and Translation Directive, and are expected to be adopted later this year.

Latvia

11. There is no requirement for interpreters and translators to be certified, and no register of certified interpreters and translators from which the police and courts are required to select. For the most common languages, such as Russian, the police and courts have staff interpreters. For other languages, interpretation is outsourced to private companies.
12. A shortage of interpreters means that hearings are liable to be adjourned when interpreters cannot attend. Participants reported that their main concern is with quality: many of the interpreters are more versed in written translation and fail to perform adequately in oral interpretation, while many of the interpreters assigned for less common languages are simply native speakers with no specific training in interpretation. Whilst the cost of interpretation is covered, limits are set on the amount of time for which an interpreter can be used. A legislative amendment is currently being considered in order to implement the Right to Interpretation and Translation Directive and, specifically, to provide interpretation for lawyer and client consultations.
13. Under the Criminal Procedure Law, a translation is only required of the decision to refer the case to the trial court. However, as a matter of practice, translations are also provided of other appealable judicial decisions (such as indictments and judgments). Translation of other documents can be ordered at the discretion of the person in charge of the investigation. For case-file documents, at the point when the defendant has the opportunity to review the file, an interpreter is provided to explain the content of the documents.

Lithuania

14. There is no register of certified interpreters from which the police or the courts are required to select; the only requirement is for the person to be fluent in the relevant language. 'Pre-trial investigation institutions' (prosecution and police) and the courts each have 'in-house' interpreters.
15. In practice, pre-trial institutions check whether a person needs interpretation and ensure that one is present if requested, but there is often no way to check the quality of the interpretation actually provided. If the lawyer, or even the judge, happens to speak the language (for instance, Russian, which many Lithuanians understand, or English), they might be able to pick up mistakes, but in other cases the interpreter has to be trusted to interpret accurately. Whilst it was not deemed to be an issue in the courts, concerns were raised about the independence of interpreters in pre-trial institutions, with one example given of an interpreter being used who was also a witness in the case.
16. Translations are provided of those documents which, in accordance with the Code of Criminal Procedure, it is mandatory to serve on the defendant: the charge, the indictment and the court judgment. There is no requirement to provide translations of decisions relating to pre-trial detention. The witness statements attached to an indictment are usually translated, but other potentially crucial documents such as expert medical reports are not translated, though participants suggested that they ought to be. Further, the translation of documents is restricted to documents emanating from the pre-trial institutions; documents introduced to

the case-file by the defence are not translated. For other documents, the practice is for the lawyer to sit with the client and an interpreter during a short session and obtain oral explanations of the contents of the documents.

17. The Ministry of Justice is working on a draft bill with a view to implementing the Right to Interpretation and Translation Directive but participants suggested that this does not seem to be high on the legislative agenda.

Poland

18. There is a register of certified translators, for which the requirement for inclusion is having studied language philology at university. Interpretation at the police station is a cause for concern due to the fact that police officers tend to select from two or three habitual interpreters to whom they usually turn. According to the participants, these interpreters develop a “business” interest in maintaining a positive working relationship with the police, possibly to the detriment of their independence. In the absence of a lawyer – a common problem (see the section on the Access to a Lawyer Directive below) – the interpreter often acts as an adviser to the suspect, which can even extend to advising the suspect informally to ‘just plead guilty’, perhaps in the genuine belief that this will help the client to end the experience quickly.
19. Interpretation also poses a general problem (both at the police station and at court) where the suspect speaks a local dialect or minority variant of a language: if the defendant speaks Kazakh, for instance, s/he might be allocated a Russian-speaking interpreter and the differences between the languages can lead to inaccuracies; Columbian Spanish is, equally, very different to the Spanish spoken in Spain, giving rise to similar problems. Further, when the suspect is a member of a small expatriate community, interpreters will often also be members of that community and might be acquainted with the suspect. The example was given of a Vietnamese interpreter who altered the evidence given in court by a number of defendants, successfully avoiding their inculpation, which went undetected for some time.
20. The lack of audio recording of interpreted interrogations or in court is also crucial: the example was given of a large drug trafficking case with 15 defendants who spoke various languages, leading to a general murmur at the hearing which impacted upon the fairness of the trial. The lack of records of what was said in police interviews can also become problematic where the language becomes more specialised and incorrect translations can make statements made by the suspect seem more, or less, incriminatory: in a fraud case, for instance, it might be important to know whether a suspect had in fact said ‘income’ or ‘revenue’, but without an audio recording, only the term chosen by the interpreter at the time is preserved on record.
21. There is a code of conduct for interpreters and a corresponding disciplinary proceeding but participants had no knowledge of any such disciplinary proceedings ever having taken place.
22. Translations are provided of ‘essential documents’, which include the charges, the indictment and any appealable judgment. The decision finally convicting and sentencing the person will not be translated. An engaged lawyer will usually be able to insist upon a translation of

additional documents but in other cases, the defendant will simply be given an opportunity to look through the case materials before trial with an interpreter explaining relevant parts. If this process is carried out in consultation with a diligent lawyer, this can provide a real opportunity for the defendant to familiarise himself with the case, but in the case of *ex officio* lawyers, given the financial constraints they face, the defendant's rights of defence might be prejudiced by this process. Participants expressed concern that it is not always clear whether appeal deadlines are affected by the delivery of a translation of a judgment some days after its issue or not.

Common themes

The main problems that participants identified with interpretation and translation in criminal proceedings in their jurisdictions are:

- a. In Poland, Lithuania and the Czech Republic, there were doubts surrounding the independence of police station interpreters, arising from their commercial relationships with the police, and in Poland and the Czech Republic, the lack of enforcement of the code of ethics for interpreters;
- b. In Lithuania and Latvia, there was no central register of interpreters from which police and courts had to choose. This means that there is not even an initial competence hurdle to qualify as an interpreter.
- c. Participants from every jurisdiction reported that they had doubts about the quality of interpretation, particularly where the case concerned specialised areas or where the defendant or witness spoke a minority language or dialect; and
- d. The practice of providing oral explanations of documents in the presence of an interpreter – instead of a written translation – was liable to impact upon the rights of the defence.

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**'),³ 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.⁴

³ [Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.](#)

⁴ Further information about the content of the Right to Information Directive is available in English, French, German, Italian and Spanish here: <http://www.fairtrials.net/publications/defence-rights-in-europe-the-right-to-information-in-criminal-proceedings/>

Czech Republic

Notification of rights

24. Suspects are provided with a document entitled 'Advice to charged person' which is essentially a transcription of the Criminal Procedure Code and therefore not easily understood by those who have not had legal training. Its primary function is to confirm to the court that information was given rather than to ensure that the suspect or defendant has understood their rights. The suspect is obliged to sign the letter and the police inappropriately give the impression that it is unimportant and advise the suspect that 'you just need to tell the truth'. The letter is provided in Czech, with only an oral but no written translation provided. It covers all the elements included in the Right to Information Directive, but, due to the language, is difficult to understand without the assistance of a lawyer. The letter is provided before interrogation.

Access to the case-file

25. During the investigative phase, while matters are with the police, the law requires that the defence be granted access to the file. It is possible for access to be withheld where there are 'important reasons', and the view was expressed that this exception is susceptible to abuse (the concept of 'important reasons' being broad and undefined). Participants had experienced differing levels of access to the case file during criminal proceedings, with some usually being granted access prior to police interrogation and others usually having to wait until after the interrogation, resulting in suspects remaining silent during questioning. All participants confirmed that full access to the file is provided once the investigation is concluded.

Estonia

Notification of rights

26. There is no letter of rights as such in Estonia. Rights are notified orally and appear as a 'cut-and-paste' of the legal texts in fine print at the bottom of the interview transcript. Technically, this information covers all of the rights listed in the Right to Information Directive except the right to translation (although this is to be amended) and the right to consular access, even though these rights are constitutionally-guaranteed. Although the law clearly states that prosecutors and investigators are required to explain the list of rights, in practice suspects are being asked simply to read and sign the list. Participants considered this to be unsatisfactory given the pressure inherent in police station situations.

27. The right to silence is turned upside down: investigators explain that the person has the right to 'refuse to give testimony', which is somewhat different from the right 'to remain silent'. Participants explained that this formulation of the right is liable to make a big difference as the suspect may understand their choice to exercise the right to silence as a refusal to cooperate.

Access to case materials

28. Lack of access to the case-file at the pre-trial stage is a serious problem in Estonia. The Code of Criminal Procedure states that access to the case-file must not be granted until the case is submitted for trial. In practice, when the Prosecutor applies for the court's approval of pre-trial detention, the Prosecutor submits all manner of documentation to the court and asserts that the suspect is dangerous. The defence, having no sight of these documents, finds it difficult to challenge this. This situation is all the more concerning given that pre-trial investigations can last for up to five or six years. There is a law pending which will provide for access to the case-file for 'important' factual matters and those relevant to pre-trial detention.
29. When the case is sent for trial, access to the file is granted but the manner of access poses problems. Materials are provided on a CD or DVD as pdf copies of a paper file, often containing overwhelming amounts of information running to thousands of pages, from among which the Prosecution may rely on only very narrow sections. The Prosecutor is able to prohibit the production of paper printouts and/or further digital copies. If the client is detained, the use of electronic files can be a serious problem: a laptop cannot be brought into prison so the lawyer must go through the materials with the client using a slow, outdated computer within the prison.

Latvia

Notification of rights

30. A person arrested in Latvia is provided with a letter of rights which, technically, covers all the elements listed in the Right to Information Directive. However, the letter, which is often not read to the individual concerned, essentially reproduces the text of the Code of Criminal Procedure and is therefore not in accessible language. It is provided at the police station at the point at which the person becomes 'institutionalised', but before then, informal conversations may occur with the police and there is a risk of pressure being brought to bear upon the suspect before he or she is made aware of the relevant rights. Further, the letter is often only produced in Latvian.
31. It was emphasised that, currently, the probative value of evidence obtained in interrogations was the same regardless of whether there had been a failure to notify the person of their rights effectively. It was emphasised that, when the person does not know their rights and the person does not have diligent representation at the police station, there is a need for the failure to notify rights effectively to result in the exclusion of evidence.

Access to the case file

32. Almost no access to the documents in the case-file is granted to the defence during the investigation stage, when the materials are referred to as 'the secret of the investigation'. The investigator, at his discretion, may show some specific documents to the suspect if he/she thinks this will facilitate the process. There are a few exceptions to this approach, for example in cases brought against minors. During the investigation process, suspects may familiarise themselves with the Criminal Proceedings Register (a list of officials who have taken part in

the investigation), the detention protocol, a copy of the resolution recognising them to be a suspect, information relating to expert examinations and, where it is the suspect who has requested the expert examination, they are also entitled to review the subsequent report.

33. Access to the case-file is provided when the case is referred for trial and the defendant and defence practitioner have the opportunity to familiarise themselves with the content of the file, if necessary with the assistance of an interpreter. It was reported that investigators sometimes add evidence to the file only at the stage when the trial phase starts, placing the defence at a disadvantage in preparing for trial.
34. Once the investigation is complete, the suspect also has the right to request materials of special investigation actions which are not included in the case file by submitting an application to the investigation judge.

Lithuania

Notification of rights

35. A person arrested in Lithuania is provided with a 'notification of allegation' – a letter summarising the accusation against them – which includes, at the bottom of the page, a list of their procedural rights. These include: the right to be assisted by a lawyer; the right to consult the case materials before trial; the right to access documents at the pre-trial stage; and the right to challenge decisions of the investigative authorities. It does not, however, cover: the right to translation and interpretation; the right to remain silent; and the right to contact consular officials. According to the participants, the Ministry of Justice has, however, taken the view that no reforms were needed as the national law complies with the Right to Information Directive.
36. There is no explanation of how these rights are to be exercised. The document itself contains dry factual assertions. Investigators are required, in law, to provide oral explanations but this is done in a very formulaic manner (the officer will essentially read the rights aloud); usually, suspects are simply told that their lawyer will explain the contents of the document to them. Timing of the notification of rights is also an issue. According to the Code of Criminal Procedure,⁵ a person arrested must be questioned as a suspect within 24 hours. The notification of allegation, with the information about rights, must be provided before questioning,⁶ but in practice there will be very little time between the two. This places a great burden upon the lawyer who will have to ensure that the rights are understood prior to questioning.
37. While the right to remain silent is provided by the Code of Criminal Procedure, it is phrased defensively – as the right to refuse to testify – which makes its exercise less attractive as it implies non-cooperation. Equally, although no adverse inferences can be drawn from silence in the context of determination of the defendant's guilt or innocence, choosing to remain silent at police interview may affect the attitudes of prosecutors and judges and make pre-trial detention more likely, which would in turn create pressure on the suspect to cooperate.

⁵ Article 141(6).

⁶ Article 187.

Access to case materials

38. Under the Code of Criminal Procedure, a Prosecutor can refuse access to case materials at the pre-trial stage if disclosure would adversely affect prospects of the investigation reaching a successful outcome. The current provisions came into force in 2003. In 2004, the Supreme Court Senate ruled that if a Prosecutor sought pre-trial detention, the evidence on which that motion was based would have to be disclosed to the defence.⁷ However, in 2006, the Constitutional Court ruled⁸ that Supreme Court Senate decisions did not constitute a source of law binding on the lower courts, which retained their independence.

Poland

Notification of rights

39. The letter of rights covers the rights included in the Right to Information Directive. While it is available in some languages, including English, French, German and Russian, it is often not available in less common languages. It uses the legal terminology of the Code of Criminal Procedure which is not “simple and accessible” as required by the Right to Information Directive. Participants suggested that in order to understand fully the rights and make effective use of them, the presence of a lawyer is required but unfortunately is not often guaranteed (see the section on the Access to a Lawyer Directive below). The manner in which the information relating to rights is delivered is often brusque and formulaic: the suspect is informed that on a certain date, they are alleged to have committed certain actions, and is then informed of their rights and duties. There is a space of time allowed in which to consider the rights, but the suspect is pressed to sign the piece of paper which includes the alleged facts and the list of rights. This happens immediately before the interrogation. Although some conscientious police officers make efforts to ensure that the suspect has understood the rights, many do not. Ultimately, most suspects simply ignore the letter. Participants consider there to be a need for civic education to enhance citizens’ awareness and understanding of their constitutional rights.

40. The same information is given to those arrested under a European Arrest Warrant and they are also advised on additional rights arising from their position as the subject of an EAW, including, inter alia, the possibility of consenting to surrender.

41. The participants explained that the main problem with the enforcement of procedural rights in Poland was that, when the matter is raised in court, it is rarely understood as a substantial infringement of the rights of defence. The importance of procedural rights to the exercise of defence rights should be enshrined by obligations upon courts to take account of procedural violations in the assessment of guilt or innocence or by imposing sanctions, extending to the dismissal of the case.

Notification of accusations

⁷ Decision No. 50 of 30 December 2004 of the Supreme Court of Lithuania Senate, paragraph 4.

⁸ Constitutional Court Ruling of 28 March 2006, available in English - <http://www.lrkt.lt/dokumentai/2006/r060328.htm>

42. In Poland, the person is notified orally of what they are accused of, and can obtain a written explanation upon request. The explanation is, however, somewhat unhelpful: typically, the notification will include a statement of the charges and will state that ‘the evidence leads to the conclusion that the above charges are substantiated’. The requirement for ‘detail’ in the Right to Information Directive is not currently met. It is only when the suspect is sent for trial that the charges are described in more detail and substantiated. However, these substantiations have no bearing on proceedings: A judgement may be passed convicting the defendant on different grounds and with a different description of facts and reasoning than presented in the indictment. In simplified criminal proceedings, no substantiation of an act of indictment is required. If the police were required to substantiate their allegations in the act of indictment, it is possible that fewer indictments would be issued.⁹

Access to case materials

43. During the investigative stage, sufficient access to the case-file is not provided. An amendment to the Code of Criminal Procedure inserted a new Article 156(5a) which provides that, if the Prosecutor applies for pre-trial detention, the evidence on which that motion is based must be made available to the defence, bringing an end to the previous practice of providing no disclosure during the pre-trial stage. However, in ‘exceptional circumstances’, ‘where this would cause extreme problems for the investigation’, disclosure can be withheld. For a short time, this new system worked well, but very soon the exception became the rule and there is no effective sanction against this. The Codification Committee has now released draft legislation which will have the effect of removing this exception.

44. Once the case is referred for trial, access is provided to the case-file. If the documents need to be translated, this may be an issue, as explained in the section on the Right to Interpretation and Translation Directive above. The defence is able to take copies of the file but must do so at its own expense; the cost is one zloty per copy, amounting to approximately 250€ per 1000 pages. In recent years, judges have increasingly begun allowing the use of digital cameras and handheld scanners, though this practice depends significantly on the personality of the judge and may not be followed in some parts of the country.

Common themes

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

- a. In all jurisdictions, whilst information about procedural rights was provided in writing, the language used was dry and legalistic, using the nomenclature or even reproducing the wording of the relevant legal texts or constitution.
- b. In Estonia, Poland and Lithuania the right to remain silence was phrased as a right to refuse to answer questions, such that, by exercising it, the suspect would feel s/he was refusing to cooperate. This, combined with the prospect of pre-trial detention, might combine to pressure the suspect into waiving the right.

⁹ Similar concerns were raised by participants from Estonia, the Czech Republic and Latvia with regard to their own jurisdictions.

- c. In all jurisdictions, there were problems with access to the case-file at the pre-trial stage. In the case of Estonia, access is withheld altogether, while in Poland, Lithuania and the Czech Republic exceptions allowing access to be withheld were commonly abused.
- d. Access to the case-file once investigations were complete posed problems in terms of the modalities of access: in Poland, the costs of obtaining copies were excessive or prohibitive, while in Estonia, it was difficult to consult with detained clients on the basis of digital files.
- e. In all of the jurisdictions represented, the failure effectively to notify rights was not taken into account for the purposes of assessing the probative value and/or the exclusion of evidence obtained.

Measure C – Access to a lawyer in criminal proceedings¹⁰

46. 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, which was finally adopted on 7 October 2013.¹¹ We refer to this as the ‘**Right of Access to a Lawyer Directive**’.

Czech Republic

Right of access to a lawyer / legal aid

47. The right to have a lawyer present applies throughout criminal proceedings, from the point of arrest through to trial and appeal. When the person is still a suspect in police custody, there are lists of lawyers available and the police will give the suspect time to consult the list and make enquiries. However, there is no entitlement to *ex-officio* legal assistance at this stage, so exercising the right may become impossible. The lawyer who attends the police station can, however, seek their costs back from the state after the event.
48. After the initial arrest phase, the suspect can seek legal aid representation for the case going forward. The court will appoint a lawyer if the defendant requests one, or if it is a case of mandatory defence (which applies if the person is detained pre-trial). The process of court-appointment of the lawyer was described as somewhat bureaucratic. The person must prove that they are impecunious, for instance by supplying proof of entitlement to unemployment benefits. The court will, with his information, appoint a lawyer relatively promptly but it may take up to 14 days for the deed of authorisation to reach the appointed lawyer. Once the lawyer is appointed, they will then usually defend the person throughout the case.

Participation of the lawyer in police interrogations

49. During the interrogation administered by the police, the accused usually sits beside their defence counsel. The lawyer is not allowed to advise his client regarding specific questions. The lawyer can intervene in the discussion with the interrogator only by objecting about the

¹⁰ Participants were also asked about the right to notify and be visited by consular officials where the defendant is a foreign national. No issues were raised in this regard so the topic is not explored separately here.

¹¹ See http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/jha/138913.pdf. The final text is available at: <http://register.consilium.europa.eu/pdf/en/13/st10/st10190.en13.pdf>. The measure itself will be published in the Official Journal by the time this document is published online.

formulation of the question. The lawyer can, however, ask their client questions of their own, provided these are not leading questions. The participation of lawyers in interrogations is regulated by the Criminal Procedure Code and by unwritten conventions. There are no official guidelines regulating this.

Waiver

50. The right to counsel can be waived. This is problematic because no prior advice is given about the consequences of a waiver. This applies even in 'mandatory defence' cases involving serious offences, where the suspect must be provided with a lawyer even if they do not request one.

European Arrest Warrant cases

51. European Arrest Warrant cases where the Czech Republic is the executing state qualify for mandatory defence. However, lawyers have a very minimal role to play because of the way the principle of mutual trust is applied in the Czech Republic. The right to consult with a lawyer in the issuing state is not recognised.

Confidentiality

52. Confidentiality of client-lawyer consultations is protected and participants did not report any concerns about the application of the principle in practice. The law on custody clearly protects the confidentiality of lawyer-client correspondence. Though it was suggested that some correspondence is occasionally opened by prison staff, the situation is generally adequate. Detained suspects are able to communicate from detention and prison services provide stamps to impecunious detainees in order to facilitate this.

Remedies

53. There is no formal process of exclusion of evidence obtained in violation of the right of access to a lawyer from the file. Instead, the law provides that it is not permissible for the court to rely on evidence obtained in breach of the right of access to a lawyer. The evidence is therefore part of the file but the judge, aware of it, has to disregard it.

Estonia

The right of access to a lawyer

54. The system of legal advice works reasonably in Estonia. The law prohibits a person being held without a lawyer being made available, and there is a right to consultation prior to questioning. Every suspect is entitled to legal aid. The problem area is the issue of 'waivers'. Suspects regularly 'waive' their rights because they are persuaded to do so by investigators, or because they do not understand the consequences of waiving their right to have a lawyer present. This results from the absence of prior advice about the exercise of the waiver.

Participation of the lawyer in police interrogations

55. The participation of the lawyer during police interrogations is not regulated in detail. In practice, the lawyer can sit next to the client and advise the client during the interrogation.

During an interrogation, the lawyer can ask for questioning to be suspended in order to enable a private consultation between the lawyer and the client. The police do not have a statutory requirement to comply with such request, but in most cases they will allow it. The lawyer is also entitled to make remarks and have them recorded in the interview record.

European Arrest Warrant cases

56. When Estonia is the executing state in an EAW case, the participation of a lawyer is mandatory and access is granted. If Estonia is the issuing state, no guarantee of representation is provided under the law. This has, in the past, been unsuccessfully raised as a potential violation of the Constitution.

Confidentiality

57. The confidentiality of consultations between lawyer and client is protected without exception. However, other forms of communication, such as emails and telephone calls, can be intercepted and are 'protected' only by virtue of the rule that they cannot be used as evidence. The inability to use such evidence is not a sufficient remedy as the lawyer's job has still been rendered ineffective by virtue of the fact that it has not been kept private. Calls for enhanced confidentiality by preventing wire-tapping and the imposition of an obligation to delete any information which is accidentally acquired have as yet had no success.

Remedies

58. Estonian law does not address the admissibility of evidence. In an extreme case, where evidence had been obtained by torture, it would not be taken into account at all. However, in the main, judges will acknowledge a violation of defence rights through the failure to provide access to a lawyer but will usually reach the view that it does not affect the probative value of the evidence, and can therefore be considered. At best, the court may decide not to take account of the evidence, but the reasoning set out in the subsequent judgment often indicates that the court's thinking was, implicitly, influenced by the disregarded evidence.¹²

Latvia

Right of access to a lawyer

59. The suspect has a right to access a lawyer from the point where the person becomes a suspect. In some cases, for instance where the person is a minor, representation is mandatory. There are lists of duty lawyers for every region who can be called to attend the police station. The person must pay for the lawyer themselves unless they are impecunious in which case they will be exempted from payment. Unfortunately many suspects are not aware of their rights and often waive the right to legal assistance as they become convinced that there is no need. In addition, they know that the costs of legal representation they will bear may be very high.

¹² In this regard, see the recent case of *Martin v. Estonia* App. No 35985/09 (Judgment of 30 May 2013).

60. The process of appointment of a lawyer for the defence of the whole case can result in delays. This results in a problem with 'waivers': suspects are advised that, if they waive the right, they may be able to leave within a few hours, whereas procuring a legal aid lawyer will complicate proceedings. Despite having access to a lawyer during the pre-trial stage, the lawyer's inability to review the case materials at this stage prevents the provision of comprehensive legal assistance. Further, although the right of access to a lawyer is guaranteed at each procedural stage, there is no guarantee of continuity, particularly because the case may change administrative territory as it passes from investigation to trial stage and a new lawyer will have to be designated (in state-funded cases). As a result, the trial stage lawyer may have no prior knowledge of the case, which impacts upon the quality of service delivered.

Participation of the lawyer in police interrogations

61. There are no official guidelines regulating the participation of the lawyer in police interrogations. In practice, much depends on the lawyer and the authority which they carry vis-à-vis the relevant police officials. Effective participation in police interrogations is possible, but depends on the lawyer's skills and knowledge and the police are generally not in favour of the lawyer being present.

Remedies

62. Latvian law provides for the inadmissibility of evidence obtained in breach of fundamental rules of criminal procedure, and allows the restricted admissibility of evidence obtained in breach of procedural rights provided these are not essential and that the violations have not influenced the veracity of the evidence acquired. However, practitioners report that there is currently no consequence for procedural violations and the criminal courts routinely dismiss arguments about these, noting that they are a matter for the administrative courts. In any case, the issue of the treatment accorded to evidence obtained in breach of procedural rights is made somewhat irrelevant by the frequent use of waivers.

Lithuania

The right of access to a lawyer

63. The legal framework relating to access to a lawyer does not, itself, pose any great problems in Lithuania, though participants reported that problems are encountered in practice. When a person is arrested, the right to a lawyer arises when a lawyer's presence becomes necessary to the procedure (usually at police questioning). With a few exceptions, lawyers are generally present in police interrogations. The police and investigators are required to explain to the suspect that they are entitled to a lawyer, but this does not always happen in practice. State-funded legal aid is provided in some cases (for example, where the offence is a serious one) even if the person has money. The problem with state-funded defence is quality: *ex officio* lawyers are overburdened and underpaid, which adversely affects quality.

Participation of the lawyer in police interrogations

64. The Code of Criminal Procedure states¹³ that the lawyer is allowed to ‘participate’ in the suspect’s questioning. There are no official rules or best practice guidelines. The precise boundaries of the lawyer’s role will, as a result, vary from case to case according to how tolerant the questioning officer is: while some officers allow the lawyer to advise their clients regarding specific questions asked and tolerate interventions in the discussion, others demand a completely tacit participation of the lawyer. In such situations, lawyers will simply advise their client to remain silent.
65. Under the Code of Criminal Procedure, the lawyer is able to ask questions of the client at the end of the interrogation and may insert notifications into the record. Similarly the lawyer and suspect are able to ask for the revision of the record where the manner in which responses have been recorded is not deemed to be accurate. Participants reported that in some cases, however, officers do not permit any such interventions to happen. Where this is the case, the lawyer may simply add handwritten notes before signing the record.

Confidentiality

66. Broadly speaking, confidentiality is satisfactorily protected. The suspect has a right to a face-to-face meeting with no third party present. There is no confidentiality clause applicable to interpreters, but according to participants, this is not a major concern. The ‘Criminal Intelligence’ service conducts surveillance activities which may monitor lawyer-client communications; these are not admissible, but they are used operationally.

Remedies

67. Lithuanian law provides no clear regulation as to what evidence is admissible. The relevant provision of the Code of Criminal Procedure¹⁴ states that only information collected through legal means can be considered as evidence.

Poland

The right of access to a lawyer

68. Participants identified many problems faced by suspects in gaining the access to a lawyer which is, in theory, protected by Polish law. These problems primarily related to:
- a. The lack of assistance provided by the police and other pre-trial institutions to enable the suspect to make contact with a lawyer;
 - b. The delays inherent within the process of appointing a legal aid lawyer; and
 - c. The frequent pressure imposed on suspects by police to waive the right of access to a lawyer in order to avoid delays.

¹³ Article 48(1)(2).

¹⁴ Article 20(4).

Legal aid

69. At the pre-trial stage, eligibility for legal aid is subject to a means test. At the trial stage, the ongoing reform project being elaborated by the Codification Committee envisages a procedure whereby, if the person wants a legal aid lawyer, they will get one, but may risk having to pay the fees if they are convicted. Certain exemptions are foreseen and it is likely that judges will use these. Participants expressed concerns that the risk of costs exposure may create pressure upon the defendant to waive their right of access to a lawyer.
70. The current system of legal aid does not cater for lawyers' specialisations. The court may appoint a lawyer who, while an expert in maritime law, has never attended a police station. This problem arises because all lawyers, with the exception of members of the Council, are required to do legal aid cases. Within the bigger cities, such as Warsaw, the profession has sought to address this issue by sending a questionnaire to lawyers to establish what sort of legal aid cases they wish to receive. While that system essentially works, it is not country-wide. The court may also appoint a lawyer it trusts, which may not be in the client's interests.

Participation of the lawyer in police interrogations

71. In general, the lawyer is allowed to sit next to the client during interrogations and advise regarding specific questions. However, if the lawyer has reservations about how and what is being recorded, the most they can do is demand that the record of the interview reflect these reservations.

Confidentiality

72. Whilst consultations between lawyer and client should, according to the law, be confidential, this is sometimes not the case due to the power of the prosecutor to order that police be present in the lawyer's consultation with the client. The Constitutional Court has recently laid down broad criteria limiting this practice and, though they are broad and easily avoided, they nevertheless establish a framework. The confidentiality of the consultation is, in any case, ensured by the fact that evidence obtained in this context cannot be relied upon. Secret surveillance of communications with lawyer and client is, however, an issue, as although the material obtained cannot be used in evidence it can be used to further investigations. Phone logs might, for instance, be used to demonstrate when a person was in contact with their lawyer.

European Arrest Warrant cases

73. Individuals facing an EAW in relation to which Poland is the executing state no longer have the right to an obligatory defence: the law guaranteeing this was repealed as a result of lawyers being dissatisfied with the lack of refusal grounds available to them. There is no legal mechanism available – as things stand – to ensure communication between the lawyer in the executing state and a lawyer in the issuing state. Some legal aid is available but it will often not cover dual representation.

Remedies

74. There are not sufficient remedies in respect of breach of the right to a lawyer in Poland. Evidence obtained in breach of the right to a lawyer can be relied upon to indict the suspect and obtain a conviction: there is no exclusion of such evidence in accordance with the jurisprudence of the European Court of Human Rights. The lawyer can attempt to argue that the conviction is invalid because of the reliance on such evidence but that is the only remedy. Disciplinary action can be sought but it will not benefit the defendant. Some of the more responsible courts may approach the question of the probative value of evidence in police interrogation in the absence of a lawyer more carefully, but there is no exclusionary rule.

Common themes

75. **The main problems that people identified in relation to the right of access to a lawyer in criminal proceedings in their jurisdictions were:**
- a. There were problems reported in Poland, Latvia, Estonia and the Czech Republic in relation to ‘waivers’: the failure to provide prior legal advice about the legal consequences of the waiver meant that suspects might refrain from seeking legal advice at the expense of their defence.
 - b. Confidentiality of communications between lawyer and client was not always observed: in Poland and Estonia – while the evidence obtained could not be used in court – the information obtained in this way would be used operationally and the lawyer, knowing of the risk of surveillance, would be inhibited in delivering advice to the client.
 - c. In Latvia, Estonia and Poland, it was reported that there was no reliable system providing for the exclusion of evidence obtained in breach of the right of access to a lawyer (though the relevance of the issue was reduced by the fact that the right to a lawyer was often waived).
 - d. The systems of appointment of *ex officio* lawyers in Poland (at the national level), Latvia and the Czech Republic were bureaucratic and liable to delays during which the person, though they might not be interrogated, would be likely to be detained (which, in turn, contributed to the problem of ‘waivers’).

D – Key recommendations

Implementation

- a. Participants expressed concern that Governments may implement the wording of the Roadmap Directives without giving adequate consideration to any steps that must be taken in practice to make them work in conjunction with existing national laws and ensure effective implementation. The concern is that whilst technically implementation will take place, courts, judges, lawyers and suspects may remain unaware of the new laws and will not know how to use or implement them. It was therefore agreed that proper training and lobbying of national governments to ensure careful implementation is essential.
- b. Implementation of the Directive on Access to a Lawyer will be essential as access to a lawyer at the early stages provides a means of guaranteeing other rights – such as the right to silence – are properly understood and not waived inappropriately.

- c. Implementation of the Right to Information Directive must ensure (i) that suspects have sufficient access to the case file to challenge detention effectively; (ii) that disclosure of the case file prior to trial provides a real, adequate opportunity prepare for trial; and (iii) that rights suspects are advised of their rights in a clear, accessible manner upon arrest.
- d. 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.
- e. Once the deadline for implementation of the Roadmap Directives has passed, Fair Trials will be keen to obtain information from local experts on their practical implementation, 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 for references to the CJEU for preliminary rulings. Participants agreed to support Fair Trials in these efforts.

Awareness and training

- f. By and large, criminal lawyers working on an *ex-officio* basis and without experience in cross-border cases, look to the domestic criminal and procedural codes as the reference point. 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.
- g. 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.
- h. Citizens themselves should be taught about their rights under the Roadmap Directives to help ensure those arrested are in a position to understand the importance of the rights and are prepared to demand their enforcement. Newspaper articles have a role to play in this regard.
- i. The Bar Associations should ensure training of criminal defence practitioners to ensure that they are aware of and comfortable using the Directives (and the EU Charter). Such training should be targeted at all criminal lawyers, and not only the relatively few of them who are actively involved in Bar meetings, cross-border cases and/or international projects.
- j. The obligations under the Directive are incumbent on the Member States and 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.

Fair Trials International
6 October 2013

ANNEX – PARTICIPANT BIOGRAPHIES (Alphabetical Order)

Inga Abramaviciute is a practising attorney at the Law Office Adversus. Additionally, she serves as both Presiding Member of the Coordination Council of Legal Aid at the Ministry of Justice and as Deputy of Presiding Members at the Lithuanian Commission of Journalists and Publishers. Ms. Abramaviciute sits as Chairman of the Council for the Lithuanian Centre for Human Rights, and lends her services as a consultant to the Human Rights Monitoring Institute. Ms. Abramaviciute earned her bachelor's degree in law from the Law University of Lithuania and an L.L.M. in public international law from Mykolo Romerio Universitetas.

Aldis Alliks is a Senior Associate at the Law Firm VARUL in Riga, Latvia (a part of VARUL, a Pan-Baltic association of law firms). He is a member of the European Criminal Bar Association and a Board member of the Latvian Criminal Bar Association. He specialises in white-collar crime cases, EU criminal law and criminal procedure law. He has represented and advised applicants before the European Court of Human Rights.

Jana Havigerová graduated in Law from the Palacky University in Olomouc in Czech Republic. She is owner of a law firm and as attorney at law she specializes (among others) in criminal law and representation defendants in criminal court proceedings. She is a member of the presidium of the Czech Helsinki Committee.

Karolis Liutkevičius is a Legal Officer at the Human Rights Monitoring Institute in Lithuania. Karolis holds a Master of Laws degree from Vilnius University Faculty of Law. His main areas of expertise include human rights protection in the criminal justice system, with a focus on pre-trial arrest and detention, and the legal regime of right to privacy.

Ondřej Múka is a lawyer at the firm of Krutina & Co in the Czech Republic. He specialises in criminal defence, cross border cases, extradition, human rights and data protection. He is a member of the Czech Bar Association, the European Criminal Bar Association, and the Czech National Group of the International Association of Penal Law.

Mikolaj Pietrzak is a Warsaw based advocate specializing in criminal law and human rights. A partner in the Pietrzak & Sidor Law Office in Warsaw, he is a council member of the Warsaw Bar Association and the Chairman of the Human Rights Committee of the National Bar Council of Poland. He is a member of the European Criminal Bar Association and an international member of the Perren Buildings Chambers in London. He has appeared before the Supreme Court of Poland and the Constitutional Tribunal of Poland and represented applicants before the European Court of Human Rights. He is currently the representative of Guantanamo detainee Abd al-Rahim Al-Nashiri in the criminal investigation conducted by the Appellate Prosecutor in Warsaw concerning the operation of the CIA secret prison in Poland, the detainment and torture therein of Al-Nashiri and other CIA prisoners, and the related abuse of power by public officials in Poland.

Ilvija Pūce is the current Latvian delegate for the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), term ending 2015. A licensed lawyer, Ms. Pūce serves as the Senior Legal Advisor to the Latvian Centre for Human Rights. Her

specialties include anti-discrimination and closed institutions, and Ms. Pūce has published several articles on the detention and legal rights of detainees in Latvia.

Nicola Švandová is a lawyer in the Czech Helsinki Committee. She graduated from the Charles University of Prague, Faculty of Law. Presently she continues her doctoral studies at the Charles University of Prague, in criminal law, criminology and criminalistics. Her work at the Czech Helsinki Committee relates to the criminal justice and prison system.

Jaanus Tehver is partner and attorney-at-law at the Law Office of Tehver & Partners and also maintains active membership in several professional organizations. Mr. Tehver serves as Member of the Board at Estonian Bar Association, Chairman of the Board at Transparency International Estonia, Member of the Advisory Board at ECBA, and Member of the Criminal Law Committee at CCBE. Possessing a law degree from Tartu Ülikool and a postgraduate diploma in European Community law from King's College, Mr. Tehver specialises in criminal defense, international criminal law, litigation, and EU law.

Zuzanna Warso is a lawyer with the Polish Helsinki Foundation for Human Rights. She is responsible for monitoring activities of bodies and institutions of the Council of Europe, with particular attention to the reform of the ECtHR, as well as following the developments of EU policy in the area of freedom, security and justice.