

# FAIR TRIALS INTERNATIONAL

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## **COMMUNIQUÉ**

**issued after the meeting**

**ADVANCING DEFENCE RIGHTS IN THE EU**

**20 February 2013**

**at the offices of the Open Society Institute, Budapest**

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**C L I F F O R D  
C H A N C E**

## Introduction

1. On 20 February 2013, Fair Trials International (**FTI**) brought together leading experts (a list of participants is provided in the Annex) in criminal justice from Austria, Bulgaria, Germany, Hungary and Romania to share information and develop practical strategies to improve respect for defence rights in the EU. 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 proceedings<sup>1</sup> (the **Roadmap**) on the right to interpretation and translation and on the right to information in criminal proceedings (together, **the Roadmap Directives**) will help address fair trial issues in those countries. We also wanted to hear about what problems the draft Directive on access to a lawyer and to communicate on arrest might alleviate. We wanted 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 and timing for the programmes.
2. The group met for a full day at the offices of the Open Society Institute in Budapest. 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. 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.

### A. Directive on the right to interpretation and translation in criminal proceedings

3. The Directive on the right to interpretation and translation in criminal proceedings (the **Interpretation Directive**), which was adopted in October 2010, must be transposed into the national law of every Member State by October 2013. The Interpretation Directive will help ensure that nobody is denied a fair trial because they do not understand the language in the country in which they are arrested.<sup>2</sup>
4. **Austria:** No formal qualification is required to act as an interpreter in criminal proceedings in Austria. The law does provide that qualified and certified interpreters should be used if possible, and in 2011 an agency administered by the Ministry of Justice was established to provide interpretation services in criminal proceedings in preparation for implementation of the Interpretation Directive. However, the law does not require interpreters registered with the agency to obtain a particular qualification.

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

<sup>2</sup> 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/>

5. There is a very limited right to written translations of key documents, including the indictment, the final court decision and any decision by an appellate court. If the indictment is interpreted orally, is considered to be easily understandable and the fairness of the trial is not affected then a written translation does not have to be provided. Defendants are only entitled to written translations of parts of the file if they are not represented by a lawyer and if they can establish a specific reason as to why it is necessary; if they have a lawyer, then he or she is expected to explain the documents with the assistance of an interpreter. While the translation itself is free of charge, copies of the documents must be paid for.
6. **Bulgaria:** Suspects are entitled to interpretation free of charge under Bulgarian law, but in practice it is not always provided. There is a lack of availability of interpreters, and in some cases it is not possible to cater for even common EU languages such as Italian. Participants reported that police are often unwilling to try to find interpreters if they are not readily available and will not wait for them to arrive before starting questioning. Interpreters are also unwilling to travel long distances because they are not paid for travel costs or time. There is a register of official interpreters and translators in Bulgaria, but there is very little quality control and no specific standards must be met in order to obtain a licence. Defendants are entitled to written translations of indictments, decisions on detention, the verdict and any decision by an appellate court. However, there is no right to request any additional documents. Further, there is no general right of appeal if suspects are denied interpretation or translation.
7. **Hungary:** In Hungary, the police usually appoint and pay interpreters and, due to this financial dependence, participants reported concerns that interpreters will sometimes try to influence suspects to confess or otherwise cooperate with the police. The interpreters in police stations are also often of a particularly low quality. As private interpreters are not permitted into police stations, lawyers and clients may not be able to speak openly to each other due to the lack of independence of the interpreter. This is especially the case for less common languages because, if a qualified interpreter of a language is not available, any other person with “sufficient knowledge” of the given language may be appointed.
8. Defendants have the right to written translations of indictments, charges and court decisions free of charge but must pay for translations of any other documents to which they have access. There was concern that this is not in compliance with the Interpretation Directive, which requires that defendants be provided with translations of all documents that are needed to enable them to exercise their right of defence.<sup>3</sup> In practice, oral rather than written translations are sometimes provided for decisions extending pre-trial detention. Challenges are occasionally brought about the quality of interpretation or translation, but they are almost never successful.
9. **Germany:** Germany has separate laws and budgets for interpretation and translation in police stations and at the court stage of proceedings. Interpreters at police stations are paid less and, as a result, the quality is often unsatisfactory. Participants reported that they will therefore sometimes advise clients to remain silent to avoid confusion caused by poor interpreting. Court interpreters are paid a higher rate set by statute and are of a much better standard.

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<sup>3</sup> See Article 3(1) of the Interpretation Directive

10. Germany has published a draft law to implement the new Interpretation Directive. While it contains the right to interpretation free of charge, it makes no mention of quality.<sup>4</sup> The draft law does provide for translation of key documents, but it relies on the exception in Article 3(7) of the Interpretation Directive<sup>5</sup> to provide that these only need to be provided in writing if the defendant is not represented. It was agreed that this cost-saving decision has resulted in an unacceptably low standard of implementing legislation and that further work is needed to determine whether it is compliant with the Interpretation Directive.
11. **Romania:** While suspects do have the right to free interpretation under Romanian law, police often try to make suspects pay for private interpreters due to a lack of resources. When a rare language is needed, experts such as university professors may be used, but because police only have 24 hours to carry out initial questioning, there can be logistical difficulties if the person has to travel from Bucharest. As a result, suspects may be forced to accept interpretation in a widely spoken language such as English. In the courts, standards are higher and anyone who needs an interpreter is given one free of charge. There is a list of authorised court interpreters, but there is no organised professional body and, as a result, it is very difficult to complain about poor quality.
12. **The main problems that participants identified with interpretation and translation in criminal proceedings in their jurisdictions are:**
- The lack of independence of interpreters, who often rely on the police for work and payment, is a problem in Bulgaria and Hungary.
  - Participants from Austria, Bulgaria, Hungary and Romania reported concerns about the inadequate quality of interpreters and the fact that there is often no requirement for a formal qualification before registering as an interpreter or no requirement that certified interpreters be used in criminal proceedings. In Hungary there are additional concerns about the ability of the police to appoint anyone with 'sufficient knowledge' of a given language as an interpreter.
  - There are difficulties in catering for rare languages, especially in remote areas. While participants felt that video-conferencing could provide a solution for the logistical problems that rare languages can cause, it was agreed that facilities for this were some way off in many of the countries in question. The use of telephones was considered to be better than continuing with no interpretation, but it was clear that the presence of an interpreter in person was preferable.
  - The standards of interpretation at police stations are often lower than in courts. This is a particular problem in Germany and Romania where different systems are in place for police stations and court proceedings.
  - Austria, Bulgaria and Hungary only provide translations of a limited list of documents, and there is often no right to appeal this or to request additional documents. There is also a problem in Austria and Germany with oral, rather than written translations, being provided, especially when the defendant has a lawyer.

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<sup>4</sup> Article 8 of the Interpretation Directive states that interpretation must be of quality sufficient to safeguard the fairness of the proceedings.

<sup>5</sup> This allows for an oral translation or summary of a document where this does not prejudice the fairness of proceedings.

- Participants from Austria reported that, in order to get a file translated, defendants must pay for a copy of the file. This means that translations are not, in practice, provided free of charge.
- There are insufficient provisions to enable suspects and defendants to complain about the quality of interpretation or translation or to appeal where it has not been provided or is inadequate. Participants agreed that audio-recording of police interviews would help with this problem because it would provide an accurate record of the interpretation. Of the countries present, only Hungary currently has audio-recording available, but only on request and upon payment in advance by the suspect.

## **B. Directive on the right to information in criminal proceedings**

13. The Directive on the right to information in criminal proceedings (the **Right to Information Directive**), the second law under the Roadmap, was adopted in May 2012. It must be implemented in the domestic law of every EU Member State by June 2014. The Right to Information Directive will help ensure that people arrested in the EU are provided with key information about basic legal rights and the charges against them.<sup>6</sup>
14. **Austria:** In Austria, suspects are given oral information about their rights before police questioning and are then given a written letter of rights following arrest or detention. The written information is very long and complex and there were concerns that it is difficult for suspects to understand.
15. Both defendants and their lawyers have the right to access the case file. This right is absolute in relation to accessing information necessary to challenge the lawfulness of detention, although in other cases it can be derogated from if there are concerns that it will interfere with the investigation.<sup>7</sup> It is possible to challenge a refusal to disclose the case file. However, in practice, there are some difficulties in gaining effective access because defendants must pay for copies of the file before inspecting it. This can be very expensive (up to 60 cents per page). Participants told us that some court officials will allow defendants or their lawyers to take pictures of the file without charge.
16. **Bulgaria:** In the first 24 hours after arrest at the police station there is only a limited legal obligation on the police to provide information about rights. In practice, however, (although not required by law) the police usually provide a booklet which lists basic rights in several European languages that has been published by the Open Society Justice Initiative. Once criminal charges are brought, the system is more regulated and a letter of rights is provided.
17. Limited access to the case file is granted during the early stages of criminal proceedings. This right is absolute in relation to information necessary to challenge the lawfulness of detention,

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<sup>6</sup> Further information about the content of the Right to Information Directive is available in English, French, German, Italian and Spanish at <http://www.fairtrials.net/publications/defence-rights-in-europe-the-right-to-information-in-criminal-proceedings/>

<sup>7</sup> Article 7(1), which is non-derogable, guarantees the right to documents which are essential to challenging the lawfulness of arrest and detention. Access to other documents can be denied in certain limited circumstances, provided it does not prejudice the right to a fair trial, under Article 7(4).

although in other cases it can be derogated from if there are concerns that access will interfere with the investigation. Once the police investigation is complete, both suspects and lawyers are granted full access to the case file (without derogation), although the file can only be inspected in the premises of the investigating authorities or the court building. Copies are only permitted at the trial stage, but the defendant must pay for these.

18. **Germany:** Germany has published draft implementing legislation for the Right to Information Directive which participants considered to be of a good standard. The new legislation will improve the information suspects are given about their rights in criminal proceedings in Germany. Information about the right to access the case file has been included in the draft letter of rights. However, even under the new law, due to concerns about protecting the original documents, access to the entire written case file is only granted if defendants have a lawyer. Unrepresented suspects are only informed about their right to request oral information about the case file and copies of certain documents. FTI agreed to circulate the draft legislation to other countries and to see if an English translation could be produced.
19. **Hungary:** In Hungary, suspects are informed orally about their basic procedural rights (mainly the right to silence) before police questioning. No letter of rights is provided, and the only written information about rights is in the official minutes of the police interview, which are not provided until later in the proceedings and only on request.
20. There is a limited right to access the case file during the investigative phase. There is an absolute right to access experts' opinions and minutes of questioning of the suspect and defence witnesses, but for all other information there is an exception where access would impact on the interests of the investigation. This derogation is widely invoked and applies to all information, including information necessary to challenge pre-trial detention. This can mean that suspects' pre-trial detention is extended with no right for the defence to see the information that justified the extension, and with only very general reasons provided by the court. It was widely agreed that legislative reform will be needed to ensure compliance with the Right to Information Directive.<sup>8</sup>
21. **Romania:** Participants estimated that suspects are only given information about their rights in about twenty percent of cases in Romania. There is no standard letter of rights and only very basic information is provided. It is very difficult to challenge a failure to provide information about rights.
22. There is a right to access the prosecution file, but no copies can be made meaning that lawyers may have a very limited amount of time to read a long and detailed file. Copies of the court file can be made, but this only contains the information that is heard during the court proceedings and will often not include evidence that could help the defendant. Legislative changes will be needed to ensure compliance with the Right to Information Directive.

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<sup>8</sup> The right to documents which are essential to challenging the lawfulness of arrest or detention is absolute pursuant to Article 7(1) of the Right to Information Directive.

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

- In Bulgaria and Romania, suspects are only provided with limited information about their rights on arrest and before the initial police questioning. In particular, this is rarely given in writing.
- Rights are often not explained clearly and information on written rights can be very long and complex making it difficult for suspects to understand what they mean in practice. This is a particular problem in Austria.
- Access to the case file may only be granted in the court building. In Romania no copies of the files can be made which means that access in practice is very limited.
- In Austria copies of the case file must be made before access is granted - these are expensive and must be paid for by the defendant.
- There are significant exceptions to the right to access the case file, in particular where the prosecution considers that it could have an adverse impact on the investigation, which are very widely used. This is a particular problem in Austria, Bulgaria and Hungary.
- In Hungary this derogation extends to all parts of proceedings in the investigative stages, including information necessary to challenge the lawfulness of detention, which is clearly not compliant with the Right to Information Directive.
- The stage at which access to the case file is granted varies; in some states it is only available once the investigation is complete which may be too late to prepare an effective defence.

**C. Draft directive on the right to access a lawyer and to communicate on arrest**

24. The draft directive on the right to access a lawyer and to communicate on arrest was published by the European Commission in June 2011 and is currently under negotiation between the European Council, the European Parliament and the Commission.<sup>9</sup>

25. **Austria:** There are problems with the protection of lawyer/client confidentiality in Austria, as the law permits the authorities to supervise meetings between lawyers and suspects in certain circumstances.

26. **Bulgaria:** The laws in Bulgaria provide for effective access to a lawyer but in practice there are numerous problems. The police are reluctant to help suspects find a lawyer, and where they do, they will often recommend someone with whom they work closely, in some cases former policemen. There is no right to appeal against a refusal of access to a lawyer.

27. **Germany:** In Germany lawyers are reluctant to take legal aid cases because they may not be paid for attending the police station. Legal aid payments are dealt with during the first court appearance, meaning that if suspects change their lawyer or waive their right to a lawyer then there may be no payment for the initial work.

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<sup>9</sup> More information about the content of the draft directive is available in English, French, German, Italian and Spanish at <http://www.fairtrials.net/publications/defence-rights-in-europe-towards-a-law-guaranteeing-the-right-to-a-lawyer-and-to-communicate-with-consular-staff-and-others-on-arrest/>

28. **Hungary:** Access to a lawyer is provided on arrest in Hungary, although participants told us that if a suspect cannot afford to pay for representation then the lawyer is appointed by the police who tend to favour those who are more likely to advise their client to cooperate. A number of lawyers are former policemen, and others are financially dependent on work from police, leading to concerns that their independence may be compromised. Police-appointed lawyers are often of low quality and sometimes fail to attend hearings. For juvenile suspects and those suspected of serious crimes, legal representation at the police station is mandatory. Police are supposed to give lawyers sufficient notice to prepare for police questioning, but will often try to circumvent this by sending a fax during the night or phoning when they know the lawyer will be unavailable. The Constitutional Court has recently held that police must give lawyers sufficient notice to enable them to attend the police station, which will hopefully remedy this problem.<sup>10</sup>
29. Confidentiality between lawyers and their clients is protected under Hungarian law, but in practice surveillance is widespread. Participants said that they do not usually speak to their clients, but write questions down and ask them to respond in writing. One of the biggest problems with access to a lawyer in Hungary is the lack of resources available for legal aid. Lawyers are paid as little as EUR10 per hour for attending a police station.
30. **Romania:** The lack of resources available for legal aid in Romania means that only inexperienced or low quality lawyers with limited other work will take on the cases. Participants suggested that after a certain number of years of practice, lawyers should have to take on a minimum number of legal aid cases per year to try and raise standards. Confidentiality between lawyers and their clients is protected under Romanian law and can only be derogated from in line with very limited exceptions on grounds of national security. In reality, however, participants told us that surveillance is standard practice and they assume that their conversations with their clients are recorded.
31. **The main problems that participants identified with access to a lawyer in their jurisdictions are:**
- Participants from Bulgaria and Hungary reported that where suspects do not have their own lawyer, police will often contact lawyers who they know well and who are likely to advise their client to cooperate. These lawyers are sometimes former policemen.
  - In Hungary, police often do not give lawyers sufficient notice to enable them to get to the police station in time for initial questioning, although this problem may be addressed by a recent Constitutional Court ruling.
  - Despite relatively strong laws protecting confidentiality between lawyers and their clients in all the countries, it was reported that in Hungary and Romania the police regularly carry out surveillance of conversations.
  - There is a lack of resources available for legal aid in all the countries represented at the meeting, and the standard of advice given in these cases can be very low.

#### **D. Key recommendations**

##### **32. Implementation:**

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<sup>10</sup> Decision no 8/2013 (III.1.) of the Hungarian Constitutional Court.

- 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 result is that technically implementation has taken place, but courts, judges, lawyers and suspects are unaware of the new laws and do 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.
- Work is needed to establish exactly what the Interpretation Directive requires in terms of the quality of interpretation and translation. In particular, if the disparity in standards of interpretation between courts and police stations remains once the Interpretation Directive has come into force, then a referral to the CJEU in relation to whether this is compatible with the Directive could be valuable.
- Implementing legislation for the Interpretation Directive must ensure the independence of interpreters. Participants agreed that independent regulated bodies of interpreters should be set up to monitor standards and process complaints, and that suspects should be able to select from a list of qualified interpreters.
- Clarification is needed as to what information must be provided to suspects about their rights and the level of access to the case file required by the Right to Information Directive. In particular, work is needed to establish exactly how wide the exceptions can be under the Roadmap Directives (for example when oral rather than written translations can be provided) and this in an area in which references to the CJEU may be valuable.
- Once the German implementing legislation for the Roadmap Directives is finalised, translations should be prepared and circulated.
- Once the Roadmap Directives are in force, FTI would be keen to work with people on preliminary references to the CJEU and to identify areas in which the Commission might bring infringement proceedings. Participants agreed to support FTI in these efforts.

### **33. Domestic awareness and training:**

- Articles should be written in domestic publications that defence lawyers routinely receive to raise awareness of the Roadmap Directives. FTI can assist with drafting these articles.
- Participants agreed that, in order to attract high quality candidates, training about implementation must be timely and relevant to the participants. It was felt that the best time to conduct the training courses would be around the implementation date of the Interpretation Directive. This would enable people to apply the knowledge gained in their practice immediately and also to be well prepared for the implementation of the Right to Information Directive several months later.
- Training is usually focussed on judges and prosecutors. Defence lawyers are unable to attend due to the cost and because they cannot spend time away from their practice during the week.
- Participants agreed that summer or weekend courses would be a good way to train defence practitioners, ideally with some form of accreditation enabling it to count towards the professional development requirements for the year.
- Participants felt that training courses would be most effective if they focus on the practical use of the new laws and use real examples. FTI is intending to produce a number of worked examples and sample submissions, which participants agreed would be very useful.

- Local bar associations should be engaged to ensure that training happens throughout the Member States and not just in the main cities.

**Advancing Defence Rights (Austria, Bulgaria, Hungary, Germany, Romania)  
May 2013**

**ANNEX**  
**PARTICIPANTS**  
**(alphabetical order)**

**Attendees**

**Natalija Bitiukova** is an intern at the Open Society Justice Initiative in Budapest.

**Danut-loan Bugnariu** is the founding partner of Bugnariu Avocati, Romania. He specialises in business and economic criminal law. He has worked on cases involving money laundering, fraud, tax related crimes, obstruction of justice, and corruption involving government officials.

**Cristinel Buzatu** works at the Hungarian Helsinki Committee in Budapest. He was previously a research fellow at the Open Society Justice Initiative and a consultant for the United Nations Development Program. He has an LLM in Human Rights with a specialisation in EU law and legal clinical work from the Central European University.

**Cliff Gatzweiler** is a German lawyer specializing in criminal defence and extradition in Aachen. He also works as Co-Counsel at the International Criminal Court and the Special Tribunal for Lebanon.

**Marion Isobel** is an associate legal officer at the Open Society Justice Initiative in Budapest. She is a qualified lawyer in the Australian state of Victoria and has been active as both a law professor and legal officer for the Extraordinary Chambers in the Courts of Cambodia. She specialises in international and criminal law.

**Dinko Kanchev** is a criminal lawyer and a member of the Sofia Bar Association and of the Bulgarian Lawyers for Human Rights Foundation. He has extensive experience in cross-border and fundamental rights work.

**Gabor Magyar** is a partner at Magyar György és Társai, a law firm based in Budapest, Hungary. He has appeared at the European Court of Human Rights, the European Court of Justice and the European Commission. He has experience with human rights law, the European Arrest Warrant, data protection, criminal procedure and tort law.

**Zaza Namoradze** is a Director of the Budapest office of the Open Society Justice Initiative who oversees programmes on legal aid reform, access to justice and effective defence rights.

**Nóra Novoszádek** is a legal officer at the Hungarian Helsinki Committee's Law Enforcement and Human Rights Program. She is involved in projects regarding defence rights, detention and rule of law issues.

**Mihai Popescu** is the Founder and President of the Romanian Association for Human Rights Protection Group (GRADO). He has been involved in a large number of human rights and penal reform projects with a focus on vulnerable groups.

**Stefan Schumann** is a researcher and a lecturer at the University of Linz, Austria. He is qualified as a lawyer in Germany and has worked as an expert for the European Union in the field of criminal procedural law. His research focuses on transnational criminal justice, criminal law and European law. His recent studies focused on suspects' rights and on the transfer of prisoners..

**Apologies**

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**Diana-Olivia Hatneanu** is a Romanian lawyer at the Association for the Defence of Human Rights in Romania – the Helsinki Committee (APADOR). She has extensive experience working on cross-border criminal defence cases involving fundamental rights issues.

**Krassimir Kanev** is the Chair of the Board of the Bulgarian Helsinki Committee. He has worked on a number of aspects of criminal defence rights including access to legal aid for indigent defendants. He also teaches human rights at Sofia State University, as well as on online human rights courses for human rights professionals organized by the US-based charity HREA.

**Asya Mandjukova** is a partner at Georgieva, Petrov, Nenkov, Georgiev Law Firm in Sofia, Bulgaria. She has worked on a number of cross-border criminal defence cases which involved fundamental rights issues.

**Oliver Wallasch** is a practising attorney at Wallasch & Koch in Frankfurt, Germany. His practice encompasses criminal defence work, extradition proceedings and international criminal law. He is a patron of Fair Trials International.

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#### FAIR TRIALS INTERNATIONAL STAFF

**Jago Russell** has been the Chief Executive of Fair Trials International (Fair Trials) since September 2008. Before joining Fair Trials, he worked as a policy specialist at the UK human rights charity Liberty, and worked as a Legal Specialist in the UK Parliament. Jago is a qualified solicitor and has published and lectured widely on a range of criminal justice and human rights issues.

**Emily Smith** is a Law Reform Officer at Fair Trials, where she works on the organisation's campaigning, lobbying and law reform work with a focus on EU criminal justice and extradition. Before joining Fair Trials, Emily worked as a solicitor at the international law firm Linklaters LLP and at the human rights organisation JUSTICE. Emily obtained an LLM in Human Rights Law in 2011.

**Alex Tinsley** is a Law Reform Officer at Fair Trials. Alex produced the 2012 Guide to the European Supervision Order. Before joining Fair Trials, Alex worked at the Legal Service of the European Commission and the Court of Justice of the European Union, and volunteered at the immigration detention charity BID.