

# FAIR TRIALS INTERNATIONAL

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COMMUNIQUÉ

issued after the meeting

'ADVANCING DEFENCE RIGHTS IN THE EU'

26 June 2013, London UK

## Legal Experts Advisory Panel

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## Introduction

1. On 26 June 2013, Fair Trials International (FTI) brought together leading experts (a list of participants is provided in the Annex) in criminal justice from Cyprus, England and Wales, Greece, Ireland, and Scotland with additional contributions from participants from Malta (**the Expert Group**). The objective of the meeting was to learn about how the new Directives adopted under the Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings<sup>1</sup> (the **Roadmap**) on the right to interpretation and translation,<sup>2</sup> the right to information in criminal proceedings,<sup>3</sup> and the right to access a lawyer and communicate with third parties upon arrest<sup>4</sup> (together, **the Roadmap Directives**) will help address fair trial issues in those countries.
2. The meeting was designed to: (i) find out what is being done to implement the new laws; (ii) think about ways to develop in-country training programmes to inform practitioners about them; and (iii) look at opportunities to work with domestic bodies to ensure that the Roadmap Directives have maximum effect. In particular, we wanted to identify the key issues that training on the new laws should address, the key targets for the training and the best geographical location for the programmes.
3. The group met for a full day at the Clifford Chance Offices in London. Prior to the meeting, the group was provided with a detailed discussion pack and asked to reflect on the Roadmap Directives and how they could most effectively be implemented, as well as possible challenges drawing on the Roadmap Directives in the higher domestic courts and ways in which references for preliminary rulings from the Court of Justice of the European Union (**CJEU**) could provide greater clarity. The remainder of this communiqué outlines the key points raised in the meeting and the key conclusions reached.

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

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

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

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

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

transposed into the national law of every Member State by October 2013.<sup>5</sup> The Interpretation and Translation Directive seeks to ensure respect for the right to a fair trial by ensuring adequate interpretation and translation when the person does not understand the language of the criminal proceedings.<sup>6</sup>

5. By the time of publication of this communiqué, all represented member states had reported transposition of the Interpretation and Translation Directive.<sup>7</sup>

## Cyprus

### *Right to Interpretation*

6. Interpretation is available at both the police station and the court and is provided at state expense. The state does not, however, provide for interpretation between lawyers and suspects. Where used, the cost of these services must be borne by the defendant.
7. Cypriot law imposes a duty on a police officer who does not speak a language understood by an arrested person to ensure that interpretation is provided.<sup>8</sup> This mechanism for identifying the need for interpretation is not sufficient, for several reasons: a) it tends to encourage police to struggle to communicate in a language understood by the suspect, often English, even if either party is not fully fluent in that language, b) it does not specify the level of fluency necessary for either police officer or suspect, and c) it does not require an assessment of the mother tongue of the suspect.
8. Participants noted that there is a shortage of interpreters of sufficient quality in languages other than English. In many cases, in order to meet the needs of suspects and defendants who do not speak either Greek or English, interpretation will take place first from the third language into English, then from English into Greek (and the reverse), creating serious misunderstandings in courts and police stations.

### *Right to translation of essential documents*

9. A very limited number of documents is translated for the suspect in Cyprus, participants reported, not including many of those listed as essential in the Interpretation and Translation Directive. However once an indictment has been filed, some further documents, usually evidential, are provided to defence lawyers.

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<sup>5</sup> NB: at the time of the meeting in June 2013, the transposition date had not yet passed.

<sup>6</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/>

<sup>7</sup> See [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:72010L0064:EN:NOT#FIELD\\_MT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:72010L0064:EN:NOT#FIELD_MT) for details of the transposing legislation in each member state.

<sup>8</sup> Article 7 (1) and (2) of the *Rights of Person who are Arrested and Detained Law of 2005 (163(I)/2005)*. See also Article 12(5)(e) of the Constitution of the Republic of Cyprus, which provides that every person has the right to have the free assistance of an interpreter if he cannot understand or speak the language used in the Court.

## **England and Wales**

### *Right to Interpretation*

10. The right to interpretation exists for the accused in the police station and in court, where the defendant benefits from an interpreter who sits beside him. At the start of the trial, interpreters are required to take an oath.
11. In recent years, the government has introduced a new interpretation scheme based on a private contract, the majority of services being provided by one company. The performance of the company has come under much criticism, as many trials have been delayed and remand periods extended as administrative mistakes meant that interpreters did not always appear when necessary. Many professional interpreters refused to work for the company as they significantly lowered salaries for interpreters. Consequently, participants noted that the quality of interpretation has diminished, and interpreters are not specialised in the context of specific dialects, which can sometimes result in an inaccurate translation of crucial testimony of the accused. The defendants are unaware of the mistranslation, and even if they are, participants reported a widespread fear of raising these complaints. One suggestion was that the barrister should assume responsibility for arranging for an independent person (for example, a member of the defendants' family) to appear in court to verify the quality of interpretation.

### *Right to translation of essential documents*

12. In England and Wales, the documents identified as "always essential" by Article 3 of the Interpretation and Translation Directive are usually translated. However, lawyers may need to ensure that bundles of evidence are being translated in a timely fashion. Furthermore, problems are evident in relation to translation of 'unused materials'. In a situation where the judge and the prosecution do not agree on certain documents being passed on to the defence, there is no provision for translation. This results in the defence being responsible for translating original copies of materials that they consider to be relevant, if those are not considered to be so by the prosecution.

## **Greece**

### *Right to Interpretation*

13. Since Greece has one of the most international classes of defendants, due to high levels of tourism and migration, interpretation services are crucial. However, participants noted that the quality of interpretation is low and basically unregulated. Interpreters for example may purport to speak ten languages, yet they only have a basic grasp of each of them. In one case, three interpreters were dismissed from court after it came to light that they lacked legal and medical vocabulary. Even though there are certain provisions for interpreters, such as lists at each court, there is no monitoring mechanism that can verify the qualifications provided. One of the main reasons why the quality of interpretation is problematic stems from the lack of financial motivation – for each trial an interpreter may earn as little as €15 in total.

14. At police stations, interrogations are not taped and interpreters are not usually provided, resulting in the burden being placed on the accused to obtain one. In certain cases, it is the police officers who act as interpreters, raising problems of quality, confidentiality and impartiality. Therefore, so far, the only way of controlling the system is through *post facto* complaints.

#### *Right to translation of essential documents*

15. In Greece, participants confirmed that all the documents specified in Article 3 of the Interpretation and Translation Directive are translated in a timely manner.

### **Ireland**

#### *Right to Interpretation*

16. There is no single mechanism for identifying whether a suspect is in need of interpretation; the court or the solicitor must raise the issue. Interpretation services exist at the police station and in court. Legal aid also provides for interpretation between lawyers and clients. However, participants reported that the quality of interpretation is often poor, with quality interpretation frequently constrained to the most commonly spoken languages amongst defendants. It is often difficult to locate interpreters in languages that are rarer. Furthermore, there is no single mechanism to assess whether someone is in need of an interpreter; it is either the court or the solicitor that is in charge of raising the issue.

17. Participants suggested that ethical training should be provided for all interpreters, as confidentiality is a key problem. Participants also pointed to persistent anecdotal evidence suggesting that a practice of 'referral fees' exists, that is, money being provided to a particular interpreter in exchange for recommendation of a particular lawyer to the accused. Due to such concerns, participants suggested that Ireland would benefit from a standard contract provided to the interpreter that would be accompanied by a confidentiality clause.

#### *Right to translation of essential documents*

18. In Ireland, participants did not feel that the availability and quality of translation was usually an issue. The case-file, or "book of evidence" in Irish criminal procedure, is translated in a timely manner; however the indictment is not.

### **Malta**

#### *Right to Interpretation*

19. An interpreter is provided throughout the criminal proceedings including during police questioning if the accused does not understand Maltese or English, the official languages of

Malta. An interpreter is also provided for communication between the accused and their lawyers. However, there is no formal mechanism for identifying language needs of suspects.

20. Interpretation in court proceedings is provided free of charge as well as for any meetings between suspect and lawyer beforehand. However, if the accused is convicted the Court may apply Article 533(1) of the Criminal Code which allows the court to order that the convicted person be responsible for the costs associated with interpretation.
21. There are no formal requirements or qualifications required of courtroom or police station interpreters, which allows for variable and at times insufficient quality of interpretation.

#### *Right to translation of essential documents*

22. Translation of documents into English is always available; translations of the charges and the bill of indictment are also always translated. Translation of further materials in the case file can be requested by the suspect and will be granted at the discretion of the court.

### **Scotland**

#### *Right to Interpretation*

23. The Cadder decision<sup>9</sup> changed the certain provisions of the Criminal Justice (Scotland) Act 1980. As a result, suspects are now entitled to interpretation, and the police have a duty to assess their needs during the early stages of the criminal process.
24. However, participants noted that the quality of interpretation is problematic and there is little quality control. In certain cases, for example involving Farsi speakers, interpreters and the accused speak different dialects from each other. Participants reported that defendants are usually hesitant to raise issues of interpretation during trials. In one case reported by participants, it was another interpreter who highlighted the discrepancies in interpretation of the second interpreter. It was therefore suggested that there ought to be a more robust system of accountability and remedies. Participants also agreed that interpreters should receive training, specifically related to criminal procedure.

#### *Right to translation of essential documents*

25. Similarly to Ireland, not all essential documents are translated, including the indictment.

### **Common Themes**

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<sup>9</sup> *Cadder v HM Advocate* [2010] UKSC 43 (26 October 2010), interpreting the ECtHR case *Salduz v Turkey*, (Application no. 36391/02) 27 November 2008, found that Article 6(1) (ECHR) had been breached when the accused was denied access to a solicitor before he was interviewed by police. The judgment had the effect of changing Scottish practice so that police can no longer question suspects without offering the suspect a private consultation with a lawyer, not only before an interview but also at any time during the interview at the suspect's request.

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

- a. In Cyprus, England and Wales, Greece, Ireland, and Malta, there is no reliable mechanism for assessing whether defendants need interpretation.
- b. In Cyprus, Greece, Ireland, Malta and Scotland, there are not sufficient monitoring procedures in place to assess the level of skill of the interpreter and the resulting quality of interpretation.
- c. In Cyprus, Ireland, and Scotland, there are difficulties in catering for rarer languages and dialects and defendants are often disinclined to raise that issue in court.
- d. In Cyprus, Greece and Ireland, there were concerns about the lack of enforceable ethical safeguards, with particular concerns raised about lack of independence and confidentiality observed by interpreters.

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

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

**Cyprus**

*Provision of information about rights*

27. Police are obliged to provide an arrested suspect with information on his rights,<sup>10</sup> and on the reason for his arrest.<sup>11</sup> However, no formal letter of rights is provided, according to participants.

*Access to case materials*

28. Participants report that lawyers are not permitted access to any case materials during the investigatory period prior to when an indictment is submitted to the Court. Once the investigation is finalised and submitted to court, authorities are obliged to provide the defence with a copy of all statements and materials in their possession.<sup>12</sup>

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<sup>10</sup> Rights of Persons under Arrest and Detention Law (N. 163(I)/2005).

<sup>11</sup> Article 21 of the Criminal Procedure Law Cap 155.

<sup>12</sup> Article 7 of the Criminal Procedure Law, Cap. 155.

## **England and Wales**

### *Provision of information about rights*

29. The letter of rights, known in England and Wales as the 'note of entitlement'<sup>13</sup>, is codified in Code C 3(1) of the Code of Practice and includes specific privileges such as visiting hours and procedures and right to translation. There are also provisions requiring that the notice be made available in audio form and in translation. A similar letter of rights is provided in EAW cases, which explains the extradition process in various languages.
30. In addition, police are required to inform suspects in their custody of the reason for detention, plus a further explanation of rights including the right to a lawyer (and to legal aid), the right to communicate with a third party, the right to medical care, and the right to see a written copy of the police codes of practice. Following this, police are instructed to ask a set of detailed questions to ensure the rights have been understood by suspects.

### *Access to case materials*

31. In England and Wales, there is a duty on prosecutors to disclose to the defence any material that might reasonably be considered capable of undermining the prosecution case or assisting the case for the accused. However according to participants, this positive obligation on prosecutors does not operate during the period in which a decision is taken to either detain or release a suspect pre-trial. Because disclosure has not yet happened at this stage, it is difficult for the defence to rebut prosecutorial arguments that a suspect should be detained based on the overall strength of the evidence. There have also been recent changes to the practice on disclosure in certain trials involving allegations of terrorism or other sensitive issues relating to national security.

## **Greece**

### *Provision of Information about Rights*

32. There is no uniform letter of rights in Greece. Since pre-trial detention periods are often long and the conditions in prison poor, participants suggested that a letter of rights for detained people would not substantially improve rights protection in practice. Participants suggested that a general right of access to a lawyer would be more efficient than a formal box-ticking exercise that may allow states to comply with formal requirements to inform suspects of their rights without ensuring that those rights are meaningful in practice.

### *Access to case materials*

33. In Greece, the defence lawyer has full access to all documents, even prior to the police interview. However, the accused is responsible for the financial cost of making copies of documents. In practice, it is the secretary of court who is in charge of providing the defence with

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<sup>13</sup> A copy of the note of entitlement in a number of languages can be found here: <https://www.gov.uk/government/publications/notice-of-rights-and-entitlements-english>



all the relevant documents. Both parties can continue to disclose and introduce new material throughout the proceedings. In relation to legal aid cases, case materials are often only provided to the lawyer no more than an hour before trial commences, leaving the defence with an extremely brief period to prepare.

## **Ireland**

### *Provision of information about rights*

34. The letter of rights in Ireland is known as Form C 72S. Clarity is not an issue, since the Standard English version is presented in straight-forward and accessible language. However, according to participants, the provision of information about rights becomes problematic in remote police stations. The problem stems from the inadequate reading time being granted to the accused. One participant described a recent case in which the detaining officer claimed on the police station record that it took the defendant one and a half minutes to read a two page document. As a result of the rush, certain forms state that the defendant 'refused to sign' and there is no reference to whether the document was explained and understood.

### *Access to case materials*

35. Participants note that the right to information in the case-file generally is not a problem. Increasingly, a copy of the charges is provided to suspects routinely. If the prosecution fails to disclose all necessary materials, proceedings can be halted until they do. Moreover, if all necessary documents are not disclosed, the trial will not continue. However, European Arrest Warrant (EAW) cases cause problems. Even though translation is freely available, there is no access to case-files from the issuing country.

## **Malta**

### *Provision of Information about rights*

36. According to Article 355AC of the Criminal Code, a suspect must be informed that he is under arrest in a language that he understands. Police must also inform people held in custody of their rights "as early as practical." Upon detention, a written notice of rights is available in eight languages.

### *Access to case materials*

37. The law on access to documentation is regulated by Article 518 of Chapter 9 of the Criminal Code. This states that the criminal case file shall not be open to inspection by the parties involved without the special permission of the court. Any act which is pronounced in open court is open to inspection by any person and copies may be produced on payment of a fee.

## **Scotland**

### *Provision of Information about rights*

38. At the time of the meeting, the letter of rights had not been used in practice in Scotland. However, in July 2013, a letter of rights was introduced<sup>14</sup> which contains notification of the rights to know the reason for arrest, the offence suspected, the length of police detention, the right to a lawyer, the right to have a third party notified of the arrest, the right to remain silent, the right to have a guardian present for minors, the right to interpretation, to access relevant case files and to have consular authorities notified where appropriate, as well as practical advice on exercising the right to a lawyer, in simple and accessible language. Nevertheless, participants report there is rarely an interpreter present when the individual is given the letter of rights which can create problems when defendants waive their rights without fully understanding them. The letter is available in a number of languages.

#### *Access to case materials*

39. In Scotland, the level of disclosure available to the defence can depend on the case and the expense to the state. There is no effective right of access at the police station, which means documents are usually available at the trial stage. There are two stages of disclosure, pre-bail and post-bail. At the former, only the nature and summary of evidence is available – varying from one to ninety pages. After the bail hearing, full disclosure is granted. However, witness statements cannot be provided to the accused, due to confidentiality issues. This directly contravenes the Right to Information Directive which requires all documents to be available to the defendant.

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

- a. In Cyprus, England and Wales, Ireland, and Scotland, a letter of rights is now provided in a variety of languages. In Greece and Malta, notification of rights still upon arrest is still mainly provided orally by police and it can be difficult to verify what information was provided and if the suspect understood it. Access to information on rights may still be a problem in more remote areas and for more rare languages.
- b. Participants across jurisdictions felt that it was not only the content and provision of the letter but adequate time and assistance to read and understand it that are key to ensuring that suspects are meaningfully informed of their rights. It was felt that requiring an interactive process of questions and answers is a more effective mechanism to establish that the defendant has understood his rights.
- c. The legal framework in place in all the represented jurisdictions was more or less sufficient to safeguard the right of the defence to access case materials. However, various phenomena sometimes impeded the right in practice: in Scotland, concerns about costs; in Greece, the practical access afforded to legal aid lawyers with little time to examine the case; in England and Wales, the impact of secret trials for cases involving national security. Lawyers were also concerned about the lack of access to relevant cross-border case materials in EAW cases.

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<sup>14</sup> A copy of the letter of rights is available at: <http://www.scotland.gov.uk/Resource/0042/00426560.pdf>

- d. The right to information interacts with the rights covered by the other Roadmap Directives – the right to interpretation and the right to access a lawyer, such that without access to materials in the defendant’s language and with the advice of a lawyer given due time to consider the evidence, the right to information is not practical and effective.

### **Directive on the right to access a lawyer**

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

### **Cyprus**

#### *Right of Access to a Lawyer*

42. A suspect person can ask to see his lawyer before giving a statement to the police and before other investigatory acts such as an identification parade. Any evidence taken in contravention of this right should be excluded from evidence. However, the lawyer does not generally have an ability to be present or to participate effectively in the interrogation.
43. The right to access a lawyer is strengthened by police procedural training. If an officer fails to safeguard that right, disciplinary proceedings can be brought against him.

#### *Confidentiality*

44. Participants report that confidentiality in lawyer-client communications is safeguarded.

### **England and Wales**

#### *Right of Access to a Lawyer*

45. Since access to a lawyer is a constitutional right based on the Code of Practice, England and Wales believe they are up to standard and therefore did not opt in to the Access to a Lawyer Directive. 24-hour attendance by a duty solicitor at the police station is the normal practice. Currently in England and Wales, the biggest concern stems from terrorism cases, where it is possible in some circumstances to question a suspect without a lawyer present.

#### *Confidentiality*

46. In England and Wales, participants reported, the issue of confidentiality is a serious cause for concern. There are currently no appropriate safeguards in place. Since phone conversations in prison are recorded, they infringe on the right of confidential access to a lawyer. Participants reported that the police have also at times attempted to videotape lawyer-client interviews.

## **Greece**

### *Right of Access to a Lawyer*

47. The laws in Greece provide for effective access to a lawyer, but the solicitor does not have an active role during police station questioning. Solicitors do not advise the clients directly during this period but rather are present in order to safeguard the defendants' rights.

### *Confidentiality*

48. In Greece, there are rules provided for confidentiality, however participants report that in practice, there are inadequate safeguards.

## **Ireland**

### *Right of Access to a Lawyer*

49. Since 1990, there has been a constitutional right of access to a solicitor; however it is not an absolute right but a right of "reasonable" access. At the time of the meeting, there were two appeals pending before the Supreme Court that sought to clarify the term "reasonable". Both related to scenarios where a request for a lawyer has been made, yet the questioning by the police commenced before the solicitor arrived.

50. In March 2014, the Supreme Court ruled on the two cases, *DPP v Gormley* and *DPP v White*,<sup>15</sup> resulting in a judgment in *DPP v Gormley* that quashed a conviction based on evidence collected before the suspect had access to a lawyer. The judgment also indicated that current Irish caselaw<sup>16</sup> establishing the right to "reasonable" access will inevitably be overturned in favour of a more robust interpretation of the right to access a lawyer in line with European standards.

51. Notwithstanding these recent developments, Ireland has still not indicated a willingness to opt-in to the Access to a Lawyer Directive.

### *Confidentiality*

52. The lack of protection of confidentiality of lawyer/client communications in Ireland is a major issue, according to participants, who reported that some advocates are uncomfortable with giving advice at police stations since there is deemed to be a possibility of police tampering. The participants shared a recent case that involved a phone conversation between the defendant and a family member, which the police tried to voice match with incriminating evidence.

## **Malta**

### *Right of Access to a Lawyer*

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<sup>15</sup> Judgments available at:

<http://www.courts.ie/Judgments.nsf/09859e7a3f34669680256ef3004a27de/146243a82fed833780257c930048b8b0?OpenDocument>

<sup>16</sup> Deaglan v. Lavery, available at <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ie/cases/IESC/1999/29.html&query=lavery&method=boolean>

53. Following recent amendments to the Code of Criminal Procedure, Maltese law now allows suspects to have access to a lawyer before interrogation by the police. However, defence counsel is still not permitted to be present during the interrogation itself.
54. The Maltese Code of Criminal Procedure provides for the right of access to a lawyer “as soon as practicable [...] for a period not exceeding one hour. However, delays in access to a lawyer are permissible with the authorisation of a police officer “not below the rank of supervisor.”<sup>17</sup> Delay can be justified by an officer’s reasonable concerns about interference with the evidence or the investigation including asset confiscations, and harm to third persons. In these cases, police are authorised to proceed with interrogation in the absence of a lawyer. These possible derogations may be interpreted to be wider than those permitted by the Access to a Lawyer Directive, which only allows for interrogation without a lawyer in the case of “an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person” or “where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings.”<sup>18</sup> However, the delay under Maltese law cannot last longer than 36 hours from the time of arrest.
55. There are legal protections against corruption in the selection of defence lawyers, specifically criminal prosecution of any police officer who tries to persuade a suspect to engage a particular lawyer.<sup>19</sup>
56. Despite legal provisions providing access, there are practical barriers to an effective right to a lawyer due to extremely low rates of remuneration for legal aid lawyers.

## **Scotland**

### *Right of Access to a Lawyer*

57. Access to a lawyer in the police station has undergone major changes in the last few years as a result of the Cadder decision referred to above. Currently, police station representation is arranged through a 24/7 hotline. There are seldom situations where a solicitor cannot be reached using the phone method. However, participants raised concerns about the lack of human contact – it is hard to assess whether the individual understood the advice provided. It is still more common for lawyers to provide advice over the telephone than to attend the police station in person. This is partially due to the corroboration doctrine in effect in Scottish law of evidence, which requires that any fact used to find a verdict of guilt beyond a reasonable doubt must be supported by two independent sources. This rule means that it is rarely in the interests of suspects to provide evidence to police officers, and defence counsel therefore routinely advise silence in the police station. However participants noted that it was sometimes difficult for suspects to maintain silence even when so advised in the absence of a lawyer in person. The Scottish government has recently proposed to abolish the corroboration doctrine; if this happens, lawyers may have to take a more active role during police interrogation.

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<sup>17</sup> Malta Code of Criminal Procedure, Art. 355AT(3).

<sup>18</sup> Art. 3.6(a)) of the Directive on the Right to Access a Lawyer.

<sup>19</sup> Malta Code of Criminal Procedure, Art. 355AT(8).

**58. The main problems that participants identified with access to a lawyer in their jurisdictions are:**

- a. Access to a lawyer is not always fully ensured in all jurisdictions represented at the meeting. In Malta and Cyprus, suspects have access to a lawyer for consultation pre-interrogation, but lawyers are not permitted to be present during the interrogation. In Scotland, though recent law changes have improved access to a lawyer at the police station, in practice most suspects receive advice to remain silent over the telephone and do not benefit from the presence of a lawyer during the interrogation. In Ireland, suspects are allowed only “reasonable access” to a lawyer, which means that there are some cases in which interrogation without a lawyer still takes place.
- b. In Greece, although access to a lawyer at the police station is ensured, there is no right for lawyers to participate effectively in interrogations.
- c. In Greece and Malta, the low rates of legal aid present practical barriers to lawyers’ attendance in police stations and throughout the pre-trial period.
- e. In England and Wales, Greece and Ireland, confidentiality between lawyers and clients is not comprehensively safeguarded.

**D. Key Recommendations**

**Implementation**

- a. Participants believe that little is being done to implement the Roadmap Directives in any of their Member States. Many judicial and legislative authorities, as well as lawyers themselves, are resistant to the idea of European law in the area of criminal justice, and knowledge of relevant EU law provisions is not good.
- b. In particular, neither the UK nor Ireland have opted into the Access to a Lawyer Directive, despite the fact that inadequacies remain in those jurisdictions with regard to ensuring access to a lawyer from the point of arrest and safeguarding the confidentiality of communications between lawyers and suspects.
- c. 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.
- d. 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 case materials prior to trial provides a real, adequate opportunity prepare for trial; and (iii) that suspects are advised of their rights in a clear, accessible manner upon arrest.
- e. Once the deadline for implementation of the Roadmap Directives has passed, Fair Trials will be keen to obtain information from local experts on the practical implementation of the Roadmap

Directives, to assist the European Commission in its monitoring and to highlight possible areas for infringement actions. Fair Trials will also be keen to identify opportunities, where they exist, for references to the CJEU for preliminary rulings concerning the Roadmap Directives. Participants agreed to support Fair Trials in these efforts.

### **Awareness and training**

- a. By and large, criminal lawyers tended to rely on domestic criminal and procedural codes rather than to EU law, which was not generally understood to raise the standards available in the represented jurisdictions. To ensure effective implementation, domestic lawyers should be trained to see EU law, the Charter and case-law of the European Court of Human Rights as part of their tools.
- b. Because of the general reluctance of judges to make referrals to the CJEU, outreach to judicial authorities about the role and utility of the CJEU's jurisdiction, as well as the practicalities of making referrals, should be undertaken.
- c. Information regarding international standards on the Roadmap Directives and related international standards should be translated and circulated within the professions and civil society in the countries represented in the Expert Group, to enhance awareness, particularly amongst young lawyers.
- d. Bar Associations may also play a role to ensure that criminal defence practitioners are aware of and comfortable using the Roadmap Directives (and the EU Charter), and in ensuring that defence perspectives are heard in the development of implementing legislation.
- e. State authorities should be encouraged to ensure that all internal rules and guidelines, codes of practice and/or staff manuals pay proper attention to procedural rights, and that violations of these rights are being duly investigated in disciplinary and other proceedings.
- f. In both Ireland and England and Wales, practitioners' training is a common practice. Since these schemes are compulsory, it may be possible to integrate training on the Roadmap Directives to a wide audience. European law, in particular the new Roadmap Directives that apply to the UK should therefore be incorporated into the training.
- g. There was a consensus among the participants suggesting that judges would benefit particularly from training in this area. However it was felt that the judiciary was very protective of their independence and may be resistant to outside training.
- h. Creation of an online platform that would send out regular updates on cross-jurisdiction cases and reforms would be beneficial to keep practitioners updated on developments in EU criminal law.
- i. Training should be also aimed at interpreters, with a focus on confidentiality, procedure and ethics.

## **Litigation and referrals to CJEU**

- a. In order to motivate the judges to refer questions to the CJEU, there is a need to improve knowledge of the current fast track procedures available. Currently, the perception is that the process takes too long to be of practical assistance. Moreover, to get beneficial results, it is necessary to choose the right test case. However, there is still reluctance in the eyes of the judges since participants felt they were too often nationalistic and insular and hence, view themselves as 'defenders against European intrusion'.

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**ANNEX – PARTICIPANT BIOGRAPHIES**  
**(Alphabetical Order)**

**Theodora Christu** has worked at the AIRE Centre as a consultant in human rights and EU law. She has also been a Research Fellow at the British Institute of International and Comparative Law (2001-2007) and is an Executive Member of the Bar Human Rights Committee of England and Wales (2009).

**Anand Doobay** is a UK solicitor and partner at the London firm of Peters & Peters, [www.petersandpeters.com](http://www.petersandpeters.com), who works on a range of criminal and fraud matters including cases using mutual legal assistance and European Arrest Warrants. He is author of a leading text book on the law of mutual legal assistance.

**Jonathan Mitchell** is a barrister at 25 Bedford Row in London. His practice encompasses criminal and civil cases. He is a member of the European Criminal Bar Assn.

**Grace Mulvey** is Research and Policy Officer at the Irish Council for Civil Liberties, where she coordinates the ICCL's Justicia project on defence rights in the EU. She is also a qualified Attorney at Law at the New York Bar.

**George Pyromallis** is the head of the George Pyromallis Law office, Athens. From 1994 until 2006 he worked as an associate in the criminal litigation department at Anagnostopoulos Bazinas & Fifis Law Offices. George works on a range of defence matters including extradition.

**Gary McAteer** is a partner in Beltrami and Company in Glasgow. He has 27 years of experience in criminal law both as Solicitor and Solicitor Advocate.

**David McKie** is a partner in Levy and McRae Solicitors in Glasgow. His practice spans both criminal and civil law and he frequently runs trainings and professional development workshops.

**Dara Robinson** is an Irish solicitor at Sheehan & Partners. He specialises in criminal work and has substantial cross-border experience.

**Dr Nadine Sant (non attending; participated remotely)** is a qualified advocate in Malta and a barrister in the UK. She has practiced at the Attorney General's office in Malta as a prosecutor and legal advisor. She has acted as Malta's representative at the European Council, the Commission and Eurojust in legal negotiations requiring the amendments of national legislation. She is also a visiting lecturer at the University of Malta, and a tenant at Great James Street Chambers in London.

**Brian Storan** is a Criminal Defence Barrister practicing at the Criminal Courts of Justice in Dublin.

**Elias Stephanu (non attending; participated remotely)** is a partner at KSCP Juris in Nicosia, Cyprus. He is an expert representative in criminal matters to the Committee of the European Union and the Council of Europe. He has published a number of articles on the European Arrest Warrant.