

FAIR TRIALS INTERNATIONAL

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COMMUNIQUÉ

issued after the meeting

'ADVANCING DEFENCE RIGHTS IN THE EU'

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Legal Experts Advisory Panel

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Introduction

1. On 14 June 2013, Fair Trials International (**Fair Trials**) brought together leading experts (a list of participants is provided in the Annex) in criminal justice from Belgium, France, Italy, Luxembourg, Portugal and Spain (the **Expert Group**). The objective of the meeting was to learn about how the new Directives adopted under the Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings¹ (the **Roadmap**) on the right to interpretation and translation,² the right to information in criminal proceedings,³ and the right to access a lawyer and communicate with third parties upon arrest⁴ (together, **the Roadmap Directives**) will help address fair trial issues in those countries.
2. The meeting was designed to: (i) find out what is being done to implement the new laws; (ii) think about ways to develop in-country training programmes to inform practitioners about them; and (iii) look at opportunities to work with domestic bodies to ensure that the Roadmap Directives have maximum effect. In particular, we wanted to identify the key issues that training on the new laws should address, the key targets for the training and the best geographical location for the programmes.
3. The Expert Group met for a full day in Paris, France. Prior to the meeting, the group was provided with a detailed discussion pack and asked to reflect on the Roadmap Directives and how they could most effectively be implemented, as well as possible challenges drawing on the Roadmap Directives in the higher domestic courts and ways in which references for preliminary rulings from the Court of Justice of the European Union (**CJEU**) could provide greater clarity. The remainder of this communiqué outlines the key points raised in the meeting and the key conclusions reached.

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

4. The Directive on the right to interpretation and translation in criminal proceedings (**the Interpretation and Translation Directive**), which was adopted in October 2010, must be transposed into the national law of every Member State by October 2013. The Interpretation and Translation Directive seeks to ensure respect for the right to a fair trial by ensuring

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

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

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

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

adequate interpretation and translation when the person does not understand the language of the criminal proceedings.⁵

5. By the time of publication of this communiqué, all represented Member States had reported transposition of the Interpretation and Translation Directive.⁶

Belgium

The Right to Interpretation

6. Due to long-standing protective legislation for the Belgian national languages of Dutch, German and French, participants noted that there is generally no problem in Belgium with accessing interpretation in these languages. Further, there are effective sanctions in place to address failure to provide interpretation and translation for these three languages.
7. However, standards of interpretation for non-national languages vary widely, and interpretation of sufficient quality is not assured. This is partially attributable to the fact that there is no official register of interpreters in Belgium, and no minimum standards of qualification of interpreters. Anyone who holds him or herself out to be competent as an interpreter can act as one. This means that it is common for interpreters to be police staff, or someone with another professional job and no special training, resulting in many cases of sub-standard interpretation leading to serious misunderstandings. One participant referred to a case in which the interpreter did not actually speak the language of the defendant, but this was not discovered until the trial began.
8. Besides the lack of registry and quality control mechanisms, there is also no system in place for identifying the suspect's true mother tongue. Legislation is currently under consideration which would improve the system and bring the domestic legislation into compliance with the Interpretation and Translation Directive. This is not a priority, according to participants, due to the current political crisis in Belgium.
9. Furthermore, while there are interpreters at police stations to interpret police interrogations, these are not made available for meetings between lawyers and their clients.

Translation of essential documents

10. There is generally no translation available, not even of final judgments. It usually falls to the lawyers to explain everything to the client orally with the assistance of an interpreter. This area of law was at the time of the meeting being considered for reform.

France

The Right to Interpretation

11. At the time of the meeting, the Interpretation and Translation Directive had not been transposed in France, but it has since been transposed into national implementing legislation⁷ in

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

⁶ See 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.

August 2013. Participants reported that under the French legal aid system, interpreters should be provided for meetings between lawyers and their clients, but in practice this rarely occurs. This is particularly problematic for meetings which take place in jail, as interpreters are often not available.⁸ It is common for other detainees to act as interpreters for such meetings.

12. There is a register of official court interpreters, but according to participants there is not sufficient quality control of the interpreters who appear on the list. For example, there is no exam or other qualification necessary to prove competence; rather, interpreters are simply required to take an oath confirming that they are competent. Participants reported that interpreters frequently fail to interpret everything which the suspect says; instead, they simply provide a rough idea of the proceedings. Some interpreters tell defendants to sign documents without first translating or interpreting them, and others are fluent in their native tongue but not in French, particularly written French. This is a problem because, as in other Member States, no distinction is made between interpreters and translators, with interpreters frequently being called upon to act as translators as well.
13. Participants were concerned by problems with the independence of interpreters and lack of safeguards for the confidentiality of communications made with the aid of an interpreter. For example, police officers are often used as interpreters in the police station, and participants raised concerns relating to confidentiality and conflicts of interest when the same interpreter is used both in the police station and in court.

The right to translation of essential documents

14. Not all of the documents listed in the Interpretation and Translation Directive are translated as a matter of course, except in European Arrest Warrant (**EAW**) cases where more material is available translated. In French proceedings, only the final judgment is translated routinely, while the summons is never translated. It is possible for the defence to request further translations, but these, even where granted, are usually subject to delays. The legislation designed to transpose the Interpretation and Translation Directive does not remedy this situation.

Italy

The Right to Interpretation

15. In Italy, interpretation is provided for interviews with the police and for hearings before judicial authorities, but not for meetings between a lawyer and client.
16. There is no reliable or formal mechanism for identifying interpretation needs. Participants reported that police tend to simply ask suspects “do you understand Italian?” and proceed on that basis. An example given was the Amanda Knox case, in which one of the reasons for the initial reversal of her conviction was on the basis that her level of Italian was not sufficient, yet no interpreter was provided in her police interview.

⁷ Act of Parliament (Loi n° 2013-711 of 5 August 2013); Implementing decree (Décret d’application n° 2013-958 of 25 October 2013), see <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000028115175>; and a *Circulaire* of 31 October 2013, see http://www.textes.justice.gouv.fr/art_pix/JUSD1327250C.pdf

⁸ Implementing legislation now provides for interpretation to be provided for lawyer-client meetings when necessary to prepare for an interview, hearing, appeal or request for release, but only where the meeting takes place on institutional premises.

17. There is a registry of interpreters that is used by both the police and the courts, but the quality is not always assured. It is often difficult to find interpreters for uncommon languages, so defendants must sometimes use a pivot language like English or French.

The right to translation of essential documents

18. Only the initial accusation and final judgments, but not pre-trial detention orders, are routinely translated. It is possible for defence lawyers to request translation of further documents, but permission for this lies with the discretion of the judge. In a recent Court of Cassation case⁹, a pre-trial detention order was returned to the previous judge ordering for it to be translated and stating that the time for the defendant to appeal that order would start from when the translation was received. This is significant because delays in translation frequently affect the quality of appeals. Participants suggested that the requirement to have detention orders translated would make a significant difference to practice in Italy and would place foreign suspects on a more equal footing with their Italian-speaking counterparts.
19. Besides judgments and orders, participants reported that key evidence is frequently not translated. However, if a defendant can afford to hire a translator privately, evidence is translated; creating inequality between defendants with means and those on legal aid. One participant recently made a request for translation of wiretapping transcripts for the purpose of factual corroboration with the client, but this was refused by the court.

Luxembourg

The Right to Interpretation

20. Participants reported that 43% of criminal defendants are foreign nationals¹⁰, with a diverse range of languages represented. As in Belgium, the three major languages of French, German and Luxembourgish are available in court. Luxembourg maintains a list of interpreters and translators who are generally of a high quality. At the police station, police provide interpreters with the suspect having no input into the selection. Upon transfer to prison, a suspect may choose his or her own interpreter, provided they are on the official list.
21. The main challenge to transposition and implementation of the Interpretation and Translation Directive in Luxembourg identified by participants is the question of guaranteed independence of interpretation; there is a general lack of protection against bias and partiality in this system. For example, there is no right to recuse a translator or interpreter in court or a police station who has earlier been used in private communications between lawyer and client.

The right to translation of essential documents

22. As in France and Italy, most documents are not translated, even those on the list of essential documents contained in the Interpretation and Translation Directive. Instead authorities expect that lawyers and interpreters will summarise the content of materials for suspects and

⁹ Cass. pen., sect. I, 24.09.2012, n. 41099.

¹⁰ The Council of Europe Annual Penal Statistics for 2011 reports that 44.3% of all pre-trial detainees in Luxembourg were foreign nationals in 2009 (for more information, see http://www3.unil.ch/wpmu/space/files/2013/05/SPACE-1_2011_English.pdf.) The International Centre for Prison Studies reports that 72.2% of all prisoners in Luxembourg are foreign nationals as of 1.9.2013 (for more information, see: <http://www.prisonstudies.org/country/luxembourg>).

defendants. In particular, there is no translation of detention orders, despite the fact that pre-trial detention is routine in Luxembourg.

Portugal

The right to interpretation

23. According to participants, the Ministry of Justice has stated that there is no need to change anything in Portugal in order to ensure compliance with the Interpretation and Translation Directive, with the exception that a register of interpreters and translators must be created in order to comply with Article 5. At present there is no such registry of interpreters, nor are there any minimum requirements for qualification as an interpreter. The lists that do exist are haphazard and consist of people known to the court. No distinction is made between interpreters and translators, with the result that many interpreters and/or translators are of poor quality.
24. There is no code of ethics to regulate interpreters and translators, and no formal mechanism to evaluate their competency. It is usually the same interpreter who is used both at the police station and in court, although the parties have a right to request a second one for conversations with the defence lawyer. One participant recounted an incident in which a request for a new interpreter on this basis was refused by the court. Some interpreters and translators are on the police payroll and essentially become an arm of the police. The defence may not be informed of this, with lawyers only being able to discover this information by carrying out their own research on the interpreter or translator. The participants described interpreters on the police payroll as tending to “adjust” their interpretation to fit the police narrative.
25. The Portuguese law, as currently drafted, does not provide sufficient guidance as to what documents are essential and therefore must be translated. Charges are supposed to be translated, but this principle is derived from the constitutional law principles, not from legislation. Participants report that requests for translated judgments are sometimes rejected by the court even in situations where they concern questions of fact which only the defendant himself can answer. On a more positive note, however, some courts have decided that the timeframe within which an appeal must be lodged does not begin until a judgment is translated, though there is no unanimous opinion on this.
26. Portugal now records all interrogations (with some exceptions for venues that lack technological provision to do so). In most places, recording is limited to audio rather than video. Complaints about the quality of interpretation can usually be raised in the act, but practically it can be difficult unless the lawyer understands the language of the suspect, or if the suspect understands enough of the local language to be able to dispute misinterpretations. Videotaping would provide a mechanism by which the quality of the interpretation can be reviewed for the purposes of appeal.

Spain

The right to interpretation

27. According to participants, the political perception is that due to Spain’s economic crisis, the criminal justice system cannot afford to provide interpreters. Participants explained that lawyers have been told by court staff to bring their own interpreters. There is an accreditation system in place, with lists maintained of official court interpreters, and in theory, lawyers must

choose interpreters from these lists. In order to be placed on the official court list, interpreters must pass an exam administered through the Foreign Ministry. The Minister of Justice has a contract with two companies to provide interpretation services, however, in practice, each court operates differently. Despite the exam and accreditation process, many interpreters are sub-standard, which creates delays when lawyers must ask judges for interpreters of insufficient quality to be replaced. Interpreters are provided only for court proceedings, but not for meetings between lawyers and their clients.

The right to translation of essential documents

28. No documents are routinely translated except for the letter of rights. Other documents are usually explained by the lawyer, if they happen to speak the language, or by an interpreter, if one is available. However, finding an available interpreter to summarise documents can create delays that suspects are often keen to avoid, and this option is frequently waived as a result. If clients pay privately, they are able to get documents translated, but this service is not available as part of the legal aid provision.

Common themes

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

- a. In Portugal and Belgium, there is no register of qualified interpreters and translators. In Spain, Italy, Luxembourg and France, registers exist but do not contain sufficient requirements so as to ensure that interpreters listed there are of the required standard of quality.
- b. In Belgium and Italy, there was not an effective mechanism for identifying the need for interpretation, resulting in suspects struggling to understand and effectively participate in the proceedings.
- c. There were concerns about a lack of safeguards for the independence of interpreters in France, Luxembourg and Italy. This was due to the practice of police or police staff being used as interpreters, and/or the use of the same interpreters for confidential communications and for interrogations and courtroom testimony.
- d. In Belgium, France and Italy, interpretation was not provided for meetings between lawyer and client.
- e. In Belgium, France, Luxembourg, Italy and Spain, essential documents are rarely translated. At best, these documents are summarized orally by an interpreter.
- f. As an example of good practice, in Portugal interrogations are now routinely videotaped to provide a mechanism by which the quality of interpretation can be reviewed for the purposes of appeal or other challenge.

Measure B – the right to information in criminal proceedings

29. 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.

Belgium

Notification of Rights

30. Notification of some rights is provided on the first document provided to a suspect upon arrest, including the right to a lawyer, to remain silent and not to incriminate oneself, but the document does not include all of the rights listed in the Right to Information Directive, such as the right to interpretation and translation. The document also contains notification of further rights not listed in the Right to Information Directive, such as the right to obtain a full transcript or a summary of the interrogation. Further information, such as guidance on legal aid, is provided orally. Participants raised concerns that police officers did not always ensure that suspects fully understood the nature of their rights and the consequences of waiving them.

Access to Case Materials

31. Lawyers have some access to case materials at various points in the pre-trial period, but the form of access provided is very restrictive. There is no access to case materials during the first contact in the police station. Some information on charges is available from the first hearing where pre-trial detention or release is decided; this information includes the type of offence, but not the specific elements of the crime alleged. After five days of detention, another hearing is held before a separate judge; prior to this hearing, the defendant's lawyer has 24 hours of access to the case-file. Participants reported that the strict time limits within which access to the file is granted presents serious challenges to mounting an effective defence. A defendant has the right to request copies of the case-file, and the right to appeal against a decision to refuse copies of the file, but in practice getting copies is difficult due to varying policies between courts and the often prohibitive cost of copies.
32. Besides the restrictions on time and mode of access, lawyers can generally access the full case-file. An exception to this is cases involving special investigation techniques (such as use of undercover policing or wiretapping), which are most often used in cases involving terrorism allegations. In these cases, a confidential file is produced, which contains technical information to confirm that the investigation was conducted lawfully. This file is only accessible by the defence at the close of the investigation.

France

Notification of Rights

33. There is no letter of rights provided to suspects upon arrest. Rather, information about rights, which generally covers all of the rights listed in the Right to Information Directive except for the right of access to the case materials, is provided orally. In the case of non-French speaking defendants, information is provided by the interpreter, sometimes by phone if the arrest occurs at night. Participants suggested that a "letter of rights" system would be a notable improvement in France.

Access to Case Materials

34. The defence has complete access to the case-file without reservation in France; however this access is not granted until the first hearing before an examining magistrate. After this appearance, the defendant may request a copy of the case-file and should subsequently receive a copy within 15 days of the request; participants anticipated that copies of the case-file would soon be sent by email.

Italy

Notification of Rights

35. Upon arrest, the suspect is notified orally of the right to remain silent, the right to legal advice and the right to access a lawyer. A letter of rights is provided to suspects when interrogation with a lawyer present takes place, which sets out the rights expressed in Article 3 of the Right to Information Directive, but omits those listed in Article 4. Participants were not aware of any legislative reforms taking place in anticipation of the implementation date of the Right to Information Directive. Participants expressed the view that a letter of rights for detained people would be helpful, and that it should include the right to be present at trial, since under Italian law the defendant must ask to be brought out of detention to attend trial.

Access to Case Materials

36. Access to case materials relating to the reasons for detention is usually provided within five days after a suspect is arrested.¹¹ The lawyer is authorised to make copies but participants note that this is often prohibitively expensive. It is only at the end of the investigative period, which can sometimes take up to six months, that the lawyer is entitled to see the complete case-file. Participants raised concerns that, even at this point, some exculpatory information may be excluded from the file without the defence being aware.

Luxembourg

Notification of Rights

37. A list of rights is provided in the form of a waiver document, which includes a number of questions relating to access to a lawyer, medical care and a phone call, but not the full list of rights indicated in the Right to Information Directive. Participants raised concern that the mere signing of a letter without the presence of a lawyer should not be taken as a free and informed waiver. The rights are too easy to waive and such a waiver is too difficult to revoke. Further, the letter is given to the suspect only when they are before an investigating magistrate, rather than at first arrest as proposed by the Right to Information Directive. No formal letter of the rights is provided to suspects at the police station, but participants are hopeful that this will be addressed by forthcoming reforms.

Access to Case Materials

¹¹ Supreme Court, Criminal Sections; judgment, 30-09-2010, n. 36212 states that: "The lawyer of the arrested or stopped has the right to examine and obtain copies of documents on which the request for validation of the detention or arrest and application of the precautionary measure are grounded; the rejection of that request causes a general intermediate nullity of the interrogation and validation of the measure, which is remedied in accordance with art. 182, paragraph 2, Code of Criminal Procedure, if it is not objected during the validation hearing."

38. In Luxembourg, access to the case-file during the pre-trial period is very limited. The suspect's lawyer has no access at all to case materials until after the first interrogation has been carried out.¹² Full access to the case-file is only provided one month before trial. Given the widespread and routine use of pre-trial detention, this lack of access to the case-file makes challenging detention decisions very difficult.

Portugal

Notification of Rights

39. There is no letter of rights *per se*, but there is a document written in several languages that is provided once a person is declared to be a defendant. It does not, however, include all the rights mentioned in the Right to Information Directive; for example, the right to interpretation and translation, the right to access to the case files, the right to inform family and consular officials of the fact of detention, the right to medical assistance and the maximum length of detention are missing. The main problem, however, is that the language used in the document is complex and legalistic and therefore not easily accessible to most suspects.

Access to Case Materials

40. Historically in Portugal, the entire investigation was conducted in secret, and suspects and defendants had no legal access to the case-file during the pre-trial period. Reforms to the Code of Criminal Procedure introduced in 2007 reverse that practice and render the entire file public, with exceptions for the cases in which the public prosecutor declares the case secret. The decision to impose secrecy must be confirmed by an instructing judge. Secrecy is generally imposed in complex cases involving allegations of drugs trafficking, corruption, fraud, etc. Under current law in an ordinary case, which is not declared secret, the defence generally has access both to the case file and to a list of evidence. In certain situations the prosecutor may request for certain items to remain secret from the defence, for example for reasons of witness protection or in covert operations.

Spain

Notification of Rights

41. According to law, a letter of rights should be provided to suspects and defendants in which a list of rights, encompassing all of those mentioned in the Right to Information Directive, is set out in clear language. Participants reported that in some cases, police fail to provide the letter or simply give it to suspects to sign without providing adequate time for them to read it or making sure that they have understood the content. Such violations are possible because there is no obligation for a lawyer to be present when the information is provided. However, a lawyer is appointed immediately afterwards, and can check whether the suspect has been informed of and understood his rights.

Access to case materials

42. Normally, the lawyer has access to the whole case-file, with access made available from the first appearance before a judge. No access to case materials is provided prior to this hearing, for example at the police station. Participants also reported that in complex cases, there is

¹² Article 85, Code of Criminal Instruction

insufficient access not only to the case-file but also to information on the charges at the stage of first interrogation.

43. As an exception to the general rule of access to the case-file, under Article 302 of the Code of Criminal Procedure, part or all of the case-file, including evidence and details of the accusation, can be declared secret where the prosecutor asserts that access could jeopardize the investigation. In such cases, neither the defendant nor the defence lawyer has access to the case-file. The period of secrecy is reviewed monthly; however reviews can be summary and in practice can last up to 10 days before the close of the investigation. At that time, access to the evidence is given, but participants noted that, in general, cases are won or lost during the pre-trial phase and access during the pre-trial period is key.

Common themes

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

- a. In Belgium, Luxembourg, Italy, Spain and Portugal, some form of a letter of rights exists, but none was as comprehensive as is required by the Right to Information Directive. Participants raised concern that written notification was provided too late in the process, or without proper safeguards to ensure that the information was indeed provided and that the rights described were fully understood by suspects. France currently provides no written information on rights to suspects.
- b. Access to the case-file is withheld until the first court hearing in Belgium, France, and Spain, and is delayed for 5 days in Italy and until after the first interrogation in Luxembourg, making it difficult for lawyers to effectively argue against pre-trial detention.
- c. Access to the full case-file is not provided until the close of the investigation or shortly before trial in Luxembourg and Italy, after which time, participants reported, it is often too late to make useful interventions that may have impacted the direction of the investigation.
- d. Even in systems that provide for full access to the case-file throughout the investigative period, such as those in Portugal and Spain, restrictions on access to case materials are still imposed for certain types of offences or in cases where the prosecution asserts that access may impede the progress of the investigation.
- e. In Belgium and Italy, though access to the case-file is technically permitted, it is subject to practical limitations in time and form of access that in practice impeded the defence.

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

44. The text of the third measure under the Roadmap, which grants suspects the right to access a lawyer and the right to communicate with third parties upon arrest, was adopted on 7 October 2013. At the time of the meeting, the text had been agreed but it had not been finally adopted. We refer to this law as the **Access to a Lawyer Directive**.

Belgium

Right of Access

45. In Belgium, suspects have the right to access a lawyer immediately after they have been arrested, for a brief consultation prior to police interrogation. This consultation usually lasts no more than 30 minutes, which participants felt was an inadequate period of time to consult the case-file and discuss the case with the client. Following that first interrogation, the lawyer is not allowed to see his client again until he is brought before the judge (within 24 hours following arrest). Participants expressed that there was a need for the suspect to have access to a lawyer between the first police interrogation and the judicial hearing.

Participation and remedy

46. Historically, Belgian lawyers have not been able to participate during the police interrogation. On 14 February 2013, this law was challenged before the Constitutional Court, but the Court merely declared that the lawyer should have an “active role,” without fully defining what this means. According to the current interpretation, in practice “active participation” of the lawyer in the interrogation means that there is a right to for the lawyer to interrupt the interrogation once.

France

Right of access

47. In France, though there is technically legal recognition of the right to access a lawyer, in practice this right is not always respected. A suspect may choose his own lawyer or select one from an official list. Once a lawyer is selected, police will wait for two hours for the lawyer to arrive; if the lawyer does not arrive within that time period, police will begin questioning the suspect without the presence of a lawyer.
48. Furthermore, some derogations from timely access to a lawyer are possible in cases involving allegations of serious offences (carrying possible sentences of at least five years), for limited periods of time up to 24 hours, upon the motion of a prosecutor and the approval of a judge.¹³

Participation and remedy

49. During police questioning, the lawyer is not allowed to interrupt, but may ask questions at the end of the interrogation. Although participation during police questioning is not permitted in law, in practice there is some latitude, depending on the attitudes of the police and their relationship with the lawyer.

Italy

Right of Access

50. Duty lawyers are generally present in Italian police stations and suspects generally have a right to access them immediately upon arrest. An initial hearing is held no more than 96 hours following arrest, with a defence lawyer present, where the suspect is questioned by the judge for the preliminary investigation, who determines whether the arrest has been conducted lawfully and whether the suspect should be detained or released with conditions. In many

¹³ Code of Criminal Procedure, Article 63-4-2, Created by ACT No. 2011-392 of 14 April 2011 - Art . 8.

cases, according to participants, no interrogation happens before a suspect comes before that hearing.

51. Derogation from the right of immediate access to a lawyer is possible in exceptional cases upon the motion of a prosecutor and the approval of a judge for a period of no more than five days.

Participation and remedy

52. Italian lawyers are entitled to advise their clients to stay silent during police questioning but they are not allowed to intervene in the interrogation. There are some limits on the confidentiality of communications between lawyers and defendants in organized crime cases, such as the imposition of a glass divider between lawyer and client.
53. Any admission made without the presence of a lawyer cannot be used as evidence of guilt, but it can nevertheless serve to justify detention. The fact of detention can then impact the rest of the case, so the defendant can be prejudiced by these limited admissions. Furthermore, the evidence collected, even if it is not admissible against the defendant, may be admissible against another suspect, such as a co-defendant.

Luxembourg

Right of Access

54. Lawyers have a right to be present during police questioning, including upon arrest pursuant to an EAW. However, they are usually allowed only a short period – often no more than 30 minutes - to discuss the case with suspects prior to interrogation, which participants felt was insufficient to effectively defend a suspect in the subsequent interrogation.
55. According to the participants, the most significant barrier to the right of access to a lawyer is the lack of effective safeguards for suspects waiving their right to a lawyer. Participants reported that many suspects waived their right to access a lawyer without fully understanding the consequences of waiver, and that police took advantage of suspects' lack of understanding to obtain evidence they may not have had a lawyer been present. It is very difficult subsequently to argue effectively that the waiver was unwilling and to secure effective remedies in relation to the evidence obtained in the absence of a lawyer. Participants suggested that suspects should have access to a lawyer, if only by telephone, in order to discuss the consequences of waiver before taking the decision.

Participation and remedy

56. Despite the general availability of lawyers at the police station, they are not allowed to participate actively or effectively during police interrogation. The General Public Prosecutor has issued a directive to reform this, but as of yet there have been no meaningful reforms.

Portugal

Right of Access

57. In Portugal, access to a lawyer generally conforms to the demands of the Access to a Lawyer Directive, including at the earliest stages of the process. The main problem, however, relates to

the frequent waiver of the right by defendants, particularly in relation to investigatory acts such as reconstructions and lineups.

Participation and remedy

58. Lawyers in Portugal have a right to participate in the interrogation, both at the end of the interrogation with further questions or comments, and by intervening to object when a question is inappropriate. If no lawyer is present during the interrogations, statements cannot be used in trial, unless the defendant requests it.
59. The confidentiality of lawyer-client conversations is strictly protected. Correspondence may not be intercepted and remote conversations may not be recorded, unless the lawyer is a suspect himself. Violation of professional secrecy rules renders evidence inadmissible.
60. Portugal has a system of mandatory legal assistance, which grants that everyone has a lawyer at certain procedural acts (e.g. if detained, if a foreigner, if under 21, during trial stage, etc.). The defendant will have to pay for the respective costs if he is convicted and has not requested legal aid. Legal aid may be requested at any stage of the proceedings. In order to benefit from full legal aid, the family income has to be under around 15.000€/year. If benefitting from legal aid, the defendant is not able to choose his own lawyer.

Spain

Right of Access

61. In Spain the legal framework acknowledges the right of suspects to access lawyers from the point of arrest. As a practical matter, there are always public defenders on duty in police stations, meaning that there is generally no delay in access to a lawyer at the point of first interrogation. Participants expressed the view that the main barrier to effective access to a lawyer is the extremely low rate of compensation for legal aid lawyers, which was reported to be 360 euro per case regardless of its length or complexity. According to participants, since the time of the meeting, the rate of legal aid reimbursement has been cut 20%.

Participation and remedy

62. Despite generally good access to lawyers at the police station, the ability of these lawyers to participate effectively in the proceedings is limited. The lawyer is given no time to confer with the suspect before interrogation. In practice this leads to lawyers routinely advising that suspects remain silent, rather than risk prejudicing their case without the effective participation of the lawyer. Once a client has agreed to speak during police questioning, the lawyer is not permitted to interrupt the procedure, and is no longer allowed to advise his client after this point.

Common themes

The main problems that participants identified with access to a lawyer in criminal proceedings in their jurisdictions are:

- a. In France, police proceed with interrogations in the absence of a lawyer when the lawyer does not arrive within two hours after being called.

- b. In Belgium, France, Luxembourg, and Italy lawyers' ability to participate effectively during police questioning is very limited, often consisting only of the ability to ask questions at the conclusion of the interrogation.
- c. In Belgium, Luxembourg, and Spain, participants felt that there was insufficient time to advise suspects prior to police interrogation. This resulted in lawyers advising clients to remain silent.
- d. In France, Italy and Belgium, there were possible derogations from the right of access to a lawyer immediately following arrest, and a lack of continuous access of suspects to lawyers prior to the first court hearing.
- e. In all jurisdictions, participants expressed concern about the lack of effective safeguards to ensure that waivers of the right to a lawyer are meaningful, knowing and willing. There was particular concern over the perception that police sometimes use coercion and manipulation of facts to induce waivers.
- f. In Italy, Portugal and Spain, participants were concerned that the low rates of legal aid limited the effectiveness of legal assistance in some cases.

D. Key Recommendations

Implementation

- a. Participants had varied views on the seriousness with which their governments would approach implementation of the Roadmap Directives. In some Member States, such as Belgium and Luxembourg, significant changes had already been made to national criminal procedural codes and practice in response to the adoption of the Roadmap Directives. In others, like Portugal and Italy, no changes seemed to be anticipated at all, despite some deficiencies in current law and practice there.
- b. Though awareness of the Roadmap Directives was higher in some Member States, such as Belgium and Luxembourg, in general and particularly in Italy, Spain, and Portugal, awareness among practitioners was low and the Roadmap Directives are therefore unlikely to be used robustly in practice. Training and awareness-raising were considered to be key in all Member States represented.
- c. With regard to the Interpretation and Translation Directive, participants did not expect to see any changes in their national laws, despite the noted insufficiencies in a number of Member States, in particular lack of quality control mechanisms and lack of and failure to identify the need for interpretation and translation.
- d. Implementation of the Right to Information Directive was likely to require substantial changes to practice in many Member States, including Belgium, France and Luxembourg, to ensure that suspects and their lawyers have access to relevant aspects of the case-file in time to challenge pre-trial detention conditions.
- e. There were also likely to be challenges to full implementation of the Right to Information Directive in cases where access to the evidence was limited on grounds ostensibly covered by one of the available derogations (i.e. to prevent tampering with the evidence). Targeted

litigation and lobbying were seen to be necessary to ensure that available derogations do not prevent meaningful implementation of the right to access to the materials of the case as provided for by Article 7 of the Right to Information Directive.

- f. In terms of the letter of rights, in almost all of the Member States, reform was needed to ensure that letters were comprehensive of all the rights listed in the Right to Information Directive and that they were presented in clear and accessible language.
- g. Many of the Member States represented at the meeting, including Belgium and Luxembourg, had already enacted changes to their legal frameworks to facilitate suspects' access to a lawyer, and lawyers' ability to participate in police interrogations, following decisions on those subjects by the European Court of Human Rights (ECtHR). Further enhancement of lawyers' ability to participate, and safeguards against interrogations that take place without the presence of a lawyer (as in France) were seen to be necessary in order to fully implement the Access to a Lawyer Directive.
- h. 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 is also keen to identify opportunities for references to the CJEU for preliminary rulings. Participants agreed to support Fair Trials in these efforts.

Awareness and Training

- a. Participants agreed criminal lawyers and judges are not accustomed to referring to European law as a reference point. To ensure effective implementation, Bar Associations from each respective jurisdiction should provide training and information on the Roadmap Directives (and corresponding jurisprudence from the ECtHR and the Charter of Fundamental Rights) and their practical use. The exception to this was Portugal, where challenges to systemic dissemination of information exist because ongoing legal education is not required for lawyers. However, through ad hoc lawyers associations, Portuguese participants agreed that some relevant information could be distributed.
- b. It was agreed that training on the Roadmap Directives would also be useful for judges and prosecutors, though these groups were harder to target.
- c. In some Member States, such as Belgium and France, participants felt that there was a role for strategic litigation to force implementation of some of the aspects of the Roadmap Directives more likely to face political challenges, such as access to the case-file at the police station.
- d. The obligations under the Roadmap Directives 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.

ANNEX – PARTICIPANT BIOGRAPHIES

(Alphabetical Order)

Mary Cobb is an American-trained lawyer. She received her undergraduate degree from Stanford University in California, and her law degree from University of California Hastings College of Law. She has worked for the past five years as a state criminal prosecutor, specially assigned to the prosecution of sexually violent offenses. She also clerked for a United States federal judge wherein she assisted on a federal death-penalty case. Presently, Mary lives in Rome, Italy, where she is completing a stage at the International Law Firm of Avvocato Paolo Iorio. She is also a current member of Avvocati Senza Frontiere/Lawyers Without Borders.

Henry Feltenstein is a criminal lawyer at the law firm Corporate Defense in Madrid. He specialises in white-collar crime, and his practice includes international and cross-border work including extradition defence. He was formerly a member of the public defender's office, where he regularly assisted people in detention.

Antonio Manca Graziadei is the founding member of Studio Legale Manca Graziadei, in Rome Italy and Edinburgh, Scotland, and has lectured on EU and Italian law at Hangzhou Zhejiang University Law School and Ningbo University in China. He is currently the President of Avvocati Senza Frontiere/Lawyers Without Borders in Italy, and a member of the Criminal Chamber of Rome.

Fulvia Guardascione is a criminal lawyer at Studio Legale Vetrano in Naples, Italy, dealing with cases involving alleged organized crime and serious offences such as armed robbery, fraud, drug-dealing and extortion. She has a particular interest in human rights law and detention issues.

Christophe Marchand is a specialised criminal law attorney based in Brussels, Belgium. He deals with complex and international cases including money laundering, murder, human trafficking, drug trafficking, terrorism, international humanitarian law and extradition. He has expertise in human rights and terrorism issues, especially in North Africa. Christophe qualified as an attorney in 1996 and is a partner at the law firm Jus Cogens in Brussels. He completed his legal training with a Masters in International Law at the University of Brussels (2006). He has written several articles on issues related to criminal law, international criminal law, human rights and terrorism.

Christian Mesia is a founder of the law firm Lesseps Legal, based in Madrid, specialising in international criminal and white collar crime, and possesses a PhD in economic crime and corporate governance. He is a professor at ESCP Europe Business School, and a member of ACFE Association of Certified Fraud Examiners.

Sofia Monge is a founding member of Lisbon and Porto-based law firm Abreu and Associado, where she specializes in criminal law.

Christine Mussche is a partner with the law firm Van Steenbrugge, Van Acker and Mussche, in Ghent, Belgium, where she specialises in criminal law.

João Barroso Neto is a lawyer with Germano Marques da Silva e Associados in Lisbon, where he specialises in criminal law.

Vânia Costa Ramos is a criminal lawyer at the law firm Carlos Pinto de Abreu e Associados in Lisbon, Portugal. She specialises in international and European criminal law and is responsible for mutual cooperation cases. Vania lectures on criminal law at the University of Lisbon, and is completing her

PhD thesis on evidence exchange in the EU. She is currently a member of the European Criminal Bar Association Advisory Board.

Olivier Rangeon is a lawyer based in France. He has particular interest in cross-border criminal justice and human rights.

Maria Chiara Ruzza is a lawyer at Studio Legale Manca Graziadei in Rome (Italy).

Roby Schons is a partner in Étude Noel & Schons, where he specializes in criminal, labour, family and refugee law, and has acted in a number of successful claims before the European Court of Human Rights.

Dominique Tricaud is a lawyer at the Paris Bar, working at the chambers at Tricaud Traynard et associés and specialising in criminal law. He is a Patron of Fair Trials International and a member of the Legal Expert Advisory Panel. He is also a former member of the Conseil de l'Ordre of the Paris Bar and works regularly on extradition cases.

Phillipe Vouland is a lawyer at the Marseille Bar, at Vouland & Grazzini avocats, specialising in criminal law. He is co-founder of the Institut de défense pénale, which provides training to criminal defence lawyers in response to the changing landscape of criminal justice.