Legal Experts Advisory Panel

Stockholm's Sunset:

New horizons for justice in Europe

March 2014

Over 120 leading criminal justice and human rights experts from across Europe are calling on the European Union to continue its crucial work to improve respect for the fundamental human right to a fair trial.

LEAP is coordinated by:

FAIR TRIALS INTERNATIONAL

Giving a voice to criminal justice experts from across Europe
www.legalexpertsnetwork.org

About the Legal Experts Advisory Panel

The Legal Experts Advisory Panel ("LEAP") provides a unique opportunity for strategic networking between criminal justice and human rights experts in Europe, currently bringing together 85 expert defence practitioners, 20 NGOs and 17 academics from 28 EU countries (see Annex 1 for full list of members). Members have in-depth knowledge of Europe's many criminal justice systems and a broad understanding of the many barriers to justice.

LEAP meets regularly to discuss criminal justice issues, identify common concerns, share examples of best practice and identify priorities for reform of law and practice. During 2012 and 2013, 12 LEAP meetings took place in 9 EU countries (Belgium, France, Greece, Hungary, Lithuania, Poland, the Netherlands, Spain and the UK) involving over 200 participants. In 2013, LEAP members also contributed to the development and delivery of four training workshops to 120 criminal lawyers on EU legislation on fair trial rights.

LEAP has identified clear priorities for future work by the EU to make fair trial rights a reality in Europe which form the basis of this report. Hearsay views expressed in this report are not the views of individual LEAP members but rather representative of the conclusions reached during LEAP meetings.

Coordinated by Fair Trials International

Fair Trials International ("Fair Trials") is a non-governmental organisation that works for fair trials according to internationally recognised standards of justice. Our vision is a world where every person's right to a fair trial is respected, whatever their nationality, wherever they are accused.

Fair Trials helps people to understand and defend their fair trial rights; addresses the root causes of injustice through its law reform work; and undertakes targeted training and networking activities to support lawyers and other human rights defenders in their work to protect fair trial rights.

Contact:

Libby McVeigh
Head of Law Reform
+44 (0)20 7822 2380
libby.mcveigh@fairtrials.net

Rebecca Shaeffer
Law Reform Officer
+44 (0)20 7822 2382
rebecca.shaeffer@fairtrials.net

Alex Tinsley
Law Reform Officer
+44 (0)20 7822 2385
alex.tinsley@fairtrials.net

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Executive Summary

1. As the sun sets on the Stockholm Programme, the significant achievements of the EU in relation to the protection of fair trial rights should be celebrated and the importance of continued work to make defence rights in Europe a reality should be emphasised. The past five years have witnessed a new approach to strengthening the area of justice, freedom and security, recognising the need to combine increased judicial cooperation in criminal matters with protection of the interests and needs of citizens whose lives have too frequently been destroyed by the injustices arising from the failure to respect the fundamental right to a fair trial.

2. Under the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (the "Roadmap"), agreed as part of the Stockholm Programme, three directives addressing key aspects of the right to a fair trial – interpretation and translation, the right to information and the right to access a lawyer (the "Roadmap Directives") – have been adopted, and three more are in the pipeline. The European Parliament (the "Parliament") has demonstrated the importance of its role as co-legislator on criminal justice instruments, advocating strongly in favour of a robust approach to fundamental rights protection, not only through the negotiations of new legislation but also in calling for action on pre-trial detention and in reviewing the flagship mutual recognition measure – the European Arrest Warrant (the "EAW"). We now look to a future when the European Commission (the "Commission"), the Court of Justice of the European Union ("CJEU") and the national courts have increased responsibility for overseeing the protection of fair trial rights, helping individuals to uphold their rights during the course of national criminal proceedings, shifting responsibility upstream from the European Court of Human Rights ("ECtHR").

3. During its numerous meetings and activities over the past year, the Legal Experts Advisory Panel ("LEAP") has identified the significant potential of the Roadmap Directives, as well as the challenges which remain in ensuring adequate protection of the right to a fair trial across the EU. This report brings together these key findings which can be summarised as follows:

   - Discussions with LEAP members from 23 Member States have shown that the rights covered by the three Roadmap Directives are frequently abused across Europe and these new measures could certainly be used to tackle injustice in individual cases and to challenge systemic causes of abuse but only if they are accurately transposed into national legislation and effectively implemented in practice.

   - Given the interdependent nature of the rights included in the Roadmap, each Roadmap Directive will not be fully realised without the adoption and implementation of other effective measures on legal aid, vulnerable suspects and the presumption of innocence, all of which have been identified through discussions with LEAP members as areas in which Member States would benefit from clear legislative guidance.

   - Meetings with LEAP members from 6 EU Member States (France, Greece, Hungary, Lithuania, Poland and Spain) have shown how frequently suspects are routinely detained for minor offences or without proper consideration of the specific facts of the case, often for long periods and without adequate access to robust review mechanisms. The action taken by the EU to date to address concerns surrounding pre-trial detention has not been sufficient, with the result that excessive and unjustified pre-trial detention continues to be a significant cause for concern among criminal justice and human rights experts.

- While it is vital that EU Member States work together to tackle crime, the EAW has resulted in avoidable cases of injustice and abuse to people surrendered by one EU country to another to face trial or serve a prison sentence. For many years, LEAP members have raised concerns about suspects being extradited to face trials for minor offences, to spend months in pre-trial detention or in cases when there is a real risk that their human rights will be breached, or being extradited to serve sentences imposed after trials involving serious violations of their fundamental rights. The EU institutions and individual Member States are now starting to recognise these concerns and the Parliament has now produced a report highlighting the key problems in the operation of the EAW and proposing legislative reforms to which the Commission must respond.

4. 2014 represents an important moment for EU criminal justice policy. Not only will the Council of the European Union (the "Council") agree the strategic guidelines for the next five years of justice and home affairs policy (the "Strategic Guidelines"), but a new Parliament and Commission will arrive to continue the important work started under the Stockholm Programme. To aid the EU institutions as they navigate this period of change, LEAP has identified the following six priorities for EU action over the next five years to continue raising standards of criminal justice in Europe:

   - **Learn from the achievements under the Stockholm Programme:** The EU should reflect on the achievements made in improving protection of fair trial rights over the past five years and allow these to inform decisions on priorities for the future which place individual rights at the heart of ever closer judicial cooperation.

   - **Effective implementation of the Roadmap Directives:** The EU must ensure that the Roadmap Directives are implemented and used effectively in Member States, and that the Commission takes enforcement proceedings against countries which fail to respect the crucial rights they protect.

   - **Completion of the Roadmap:** Given the interdependent nature of the rights set out in the Roadmap, the EU should continue its work on the remaining measures to which it has committed, and agree effective directives on legal aid, vulnerable suspects and the presumption of innocence.

   - **Minimum standards on pre-trial detention:** The EU must bring forward effective legal safeguards against the use of excessive and unjustified pre-trial detention in order to protect individuals and preserve the principle of mutual recognition based on mutual trust.

   - **Reform of the European Arrest Warrant:** The EU must deliver much-needed reforms to the EAW to ensure that extradition does not violate fundamental human rights and to ensure that its laws on defence rights provide a sound basis for mutual cooperation.

   - **Continued work on defence rights:** The need to improve respect for defence rights in practice, and to facilitate mutual trust and recognition between Member States, has grown no less urgent than it was when the Roadmap was first proposed in 2009. The EU must ensure that the protection of defence rights continues to be a key feature of the Strategic Guidelines for the next five years.

Introduction

5. Since 2009, Fair Trials has coordinated LEAP, which comprises over 120 members (representing NGOs, criminal defence law firms and academic institutions) from 28 Member States,[1] to better understand the root causes of the pervasive problems and to identify potential solutions. Over the past five years, LEAP members have highlighted time and again that, despite clear obligations of Member States to protect the right to a fair trial under the European Convention on Human Rights ("ECHR"), problems in both law and practice prevent accused persons from enjoying the full benefit of this fundamental right.

6. For over 20 years Fair Trials has provided assistance to people arrested in different EU member states and in 2013 alone we helped 190 EU citizens in this situation. These cases have given us a unique insight into the challenges to obtaining a fair trial within the EU. As our previous detailed reports have shown, fair trial rights are being violated in police stations, court rooms and prisons across the Europe.[2]

7. LEAP members and Fair Trials were delighted when, in 2009, the EU finally recognised the need to address the inadequacies of fair trial rights protection, evident in the repeated cases of injustice arising from the operation of mutual recognition measures such as the EAW, by adopting the Roadmap.[3] Through detailed briefings, joint letters to policy-makers and events in the Parliament, Fair Trials and LEAP have sought to inform EU legal developments and encourage law-makers to deliver effective and much-needed laws on fair trial rights.

> *"Over the past few years we have taken a number of small steps which together constitute a giant leap forward on the road towards a true European area of Justice."*
>
> ***Viviane Reding, Commissioner for Justice, 21 November 2013***

8. As the Stockholm Programme[4] reaches its conclusion, there is good cause for celebration. Not only have three robust measures on fair trial rights been adopted, but five more are on the table,[5] requiring members of the Council, Parliament and Commission to continue working to Stockholm's agenda beyond the official conclusion of the programme. Perhaps more importantly, however, the past five years have seen a growing realisation amongst the EU institutions that mutual recognition – the bedrock of EU criminal justice policy – depends upon a mutual trust which the existence of mutual obligations under the ECHR does not on its own guarantee. It has become clear that a mutual commitment to fair criminal justice systems in Europe can only be created through the adoption of EU directives with direct effect and robust enforcement mechanisms.

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[1] The list of LEAP members (at March 2013) is at Annex 1 and available at: http://www.fairtrials.org/wp-content/uploads/Fair-Trials-International-LEAP-membership-list1.pdf.

[2] See, for example, our major report 'Defence Rights in the EU', October 2012 http://www.fairtrials.org/wp-content/uploads/2012/10/ADR-Report_FINAL.pdf, and our interactive Defence Rights Map, http://www.fairtrials.org/justice-in-europe/.

[3] Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (2009/C 295/01), available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:295:0001:0003:en:PDF.

[4] The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens (2010/C 115/01), available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:en:PDF.

[5] Fair Trials International, *European Commission publishes new Procedural Rights package*, 29 November 2013, available at: http://www.fairtrials.org/press/european-commission-publishes-new-procedural-rights-package/.

"Thanks to our joint efforts, we have come a long way. And I think we should be proud of that. But of course there is more work to be done. We have laid the foundations of mutual trust, but we have to reinforce it."

Viviane Reding, Commissioner for Justice, 21 November 2013

9. Although the EU has made major progress in this area under the Stockholm Programme and the Roadmap, there is still much more work needed if fair trial rights are to be fully protected. Fair trial rights provide the basis for the European area of freedom, security and justice but without them, injustice will continue to undermine judicial cooperation measures, such as the EAW, which are needed to fight crime in an age of increased individual mobility. Whilst significant advances have been made in terms of new legislation, further work is needed to persuade Member States that the benefits of judicial cooperation cannot be enjoyed without implementing safeguards to protect the interests of people facing the increasingly sophisticated networks of judicial and law-enforcement authorities across the EU.

10. 2014 provides an opportunity for the EU to assess the achievements of the past five years while also establishing priorities for the future post-Stockholm period. Not only will the current Commission, Council and Parliament contribute to a new start, through the development of the Strategic Guidelines, but a new Parliament and Commission will no doubt bring a fresh approach. Finally, by the end of 2014, the Commission will have assumed its post-Lisbon powers in relation to all EU criminal justice measures by which it can bring Member States in line through the threat and initiation of enforcement proceedings. As the sun sets on the Stockholm Programme, we anticipate new horizons for justice in Europe which combine closer judicial cooperation with a strong commitment to recognising and protecting fair trial rights.

Part A: Achievements under the Stockholm Programme

11. The Stockholm Programme has resulted in numerous praise-worthy achievements in the area of EU criminal justice policy. As the attention of the EU institutions turns to what will follow the Stockholm Programme and the need to develop strategic priorities for justice policy over the next five years, we hope they will reflect on, and join us in celebrating, the following significant developments:

    i) **New fair trial rights directives:** The long-standing concerns of EU policy-makers, national governments, lawyers and civil society regarding the injustices arising from increasing judicial cooperation across the EU have begun to be addressed through the agreement of minimum standards on fair trial rights which clarify, codify and build upon the existing ECHR rules which have proven difficult for Member States to implement;

    ii) **Benefits of European Parliament involvement:** The Stockholm Programme has been implemented with the Parliament fully involved as a co-legislator, and the importance of its role, particularly from the perspective of improving fair trial rights protection, cannot be overstated; and

    iii) **New roles for the Commission and the Courts:** The laws passed during the past five years are enforceable in ways not seen previously in the area of EU criminal law, due to the new enforcement powers of the Commission and the important role of national courts, in conversation with the CJEU, in giving teeth to the new laws during the course of national criminal proceedings.

New EU laws on fair trial rights

12. Since 2009, we have seen the development of a new approach to fundamental rights protection within EU criminal justice policy which was, arguably, ten years too late. In 1999, the Amsterdam Treaty introduced a new era, placing an emphasis on increasing and improving judicial, police and prosecutorial cooperation between Member States. Borrowing the single market concept of 'mutual recognition', the idea of a judicial decision made in one Member State being automatically respected and applied by judicial authorities in other Member States quickly found favour, with Member States rushing to agree the flagship mutual recognition instrument – the EAW – in the aftermath of the 9/11 attacks.

13. Less attention, however, was given to the question of whether there was a sound basis for mutual trust between Member States, necessary for the functioning of mutual recognition. This question should

> ***Article 82, Treaty on the Functioning of the European Union***
>
> *(1) Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States (...)*
>
> *(2) To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern (...) the rights of individuals in criminal procedure (...).*

have been answered prior to the development of new instruments of judicial cooperation. The assumption was that the commitments assumed by all Member States under the ECHR were sufficient to create trust in each other's systems and no further action, legislative or otherwise, was required. This assumption was quickly shown to be naive, and the assumed trust, misplaced.

Percentage of 2013 ECtHR violations relating to the right to liberty and/or the right to a fair trial in criminal cases:

Cyprus – 100%

Estonia – 80%

Spain – 71.1%

Germany – 66.6%

Poland – 64.3%

Malta – 60%

ECtHR Annual Report 2013 (Provisional)

14. Fair Trials' 2012 report – *Defence Rights in Europe* – set out compelling evidence as to the inadequacy of the ECHR as an instrument which establishes mutual trust. And today, the evidence is equally, if not more, convincing. Between 2009 and 2013, Member States were found to be in violation of the rights to liberty and a fair trial in 640 criminal cases.[6] Some Member States' records at the ECtHR raise particular concerns about their ability to protect effectively fair trial rights. In 2013 alone, Bulgaria, Greece and Poland were found in breach of Articles 5 and 6 in over 50 criminal cases, making up more than 45% of the total Articles 5 and 6 violations in criminal cases for that year.[7] For several Member States, violations of Articles 5 and 6 in criminal cases made up the majority of the violations found by the ECtHR against them, demonstrating that protection of these crucial rights falls some way behind the other ECHR rights. The record of sustained non-compliance with the ECHR provides compelling justification for further steps to be taken urgently to improve respect for these rights, especially within a system of increasing judicial cooperation.

15. The failure of Member States to protect the rights set out in Articles 5 and 6 demonstrates not only that there is a lack of consensus on what protection should actually involve, but also that the ever-growing body of ECtHR case-law on these rights does not provide sufficiently clear and accessible guidance for their practical protection. Countless cases of injustice demonstrate this insufficiency, particularly those resulting from the operation of the EAW. The cases of Andrew Symeou, Gary Mann, Robert Horchner and Natalia Gorczowska[8] – to name only a handful – are familiar to Council members, Parliamentarians and Commission representatives alike.

16. The Stockholm Programme was not, however, the first attempt by policy-makers in Brussels to address such concerns. In 2003, the EU attempted to address the need for action to raise fair trial rights standards with the publication of a Commission Green Paper on procedural defence rights which highlighted the need for minimum safeguards for suspects and defendants to be guaranteed in every Member State.[9] The Green Paper was followed by a proposal for legislation in the form of a draft Framework Decision laying down common minimum standards in criminal

[6] Source: European Court of Human Rights statistics, 2009-2013.
[7] Ibid.
[8] Further detail on these cases can be found on the Fair Trials website at: http://www.fairtrials.org/cases/.
[9] Green Paper from the Commission, Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, COM(2003) 75 final, available at: http://eur-lex.europa.eu/LexUriServ/site/en/com/2003/com2003_0075en01.pdf.

proceedings in the EU.[10] This initial ambitious effort to build a sound basis for mutual trust was unsuccessful, perhaps due to the broad range of issues it sought to cover in a single legislative proposal.

17. The Lisbon Treaty, adopted in 2007, recognised the need for a fair trial rights to be addressed as a prerequisite for the success of mutual recognition in the area of criminal justice policy. Article 82(2) of the Lisbon Treaty enabled laws establishing minimum rules for the rights of individuals in criminal proceedings to be made where these are necessary to facilitate police and judicial cooperation in cross-border criminal matters. This development set the stage for the Roadmap, which applied the lessons learnt in 2003, adopting in 2009 a step-by-step approach to establishing fair trial rights standards which was more palatable to Member States than the more ambitious approach proposed by the Commission previously. It was recognised that this would also allow greater focussed attention on the detail of the measures which addressed, in turn, key elements of the right to a fair trial.

18. When all of the measures promised under the Roadmap have been adopted, it will be clear that this approach has worked. It has already resulted in three robust directives on fair trial rights – covering the right to interpretation and translation, the right to information and the right to access a lawyer – which are far more extensive than could have been envisaged a decade ago.

19. The process has clearly not been smooth, with certain measures - notably the Directive on the right of access to a lawyer in criminal proceedings (the "Access to a Lawyer Directive") which was adopted over two years after the initial proposal was published - taking much longer to be agreed than anticipated, but the potential impact of these achievements for the fairness of justice systems across the EU is enormous (as described more fully in Part B below and in the communiqués set out in Annex 2). The Commission has also published three further proposed directives and two related recommendations – on procedural safeguards for children,[11] legal aid[12] and the presumption of innocence[13] – in order to fulfil their commitment under the Roadmap.

> *Important progress has been made to improve protections for criminal suspects in the past three years. The measures that have already been achieved promise to provide a lasting legacy, to improve the operation of important judicial cooperation measures, and to bolster respect for one of the key principles on which the European Union is founded: respect for human rights and the rule of law.*
>
> ***Joint NGO letter to Viviane Reding, July 2013***

[10] Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM(2004) 328 final, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0328:FIN:EN:PDF.

[11] Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings, COM(2013) 822/2, available at: http://ec.europa.eu/justice/criminal/files/com_2013_822_en.pdf; and Commission Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal Proceedings, C(2013) 8178/2, available at: http://ec.europa.eu/justice/criminal/files/c_2013_8178_en.pdf.

[12] Proposal for a Directive of the European Parliament and of the Council on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings, COM(2013) 824, available at: http://ec.europa.eu/justice/criminal/files/com_2013_824_en.pdf; and Commission Recommendation on the right to legal aid for suspects or accused persons in criminal proceedings, C(2013) 8179/2, available at: http://ec.europa.eu/justice/criminal/files/c_2013_8179_en.pdf.

[13] Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, COM(2013) 821/2, available at: http://ec.europa.eu/justice/criminal/files/com_2013_821_en.pdf.

20. The Roadmap Directives provide clarification and codification of the ECHR standards which Member States have previously failed to respect. Not only do they establish a framework through which such standards should be transposed into national law, but it is hoped that the (in some cases) protracted process of agreeing these directives may itself have developed a common understanding of the international human rights norms which underpin the right to a fair trial.

The role of the European Parliament

21. The achievements under the Stockholm Programme have also highlighted the importance of the new role for the Parliament, granted under the Lisbon Treaty, as co-legislator on criminal justice instruments. The General Approach of the Council[14] on the proposed directive on the right to access a lawyer was concerning for members of LEAP and the wider human rights community, not least due to the inclusion of wide-ranging derogations from the right to access a lawyer and limitations on the confidentiality of lawyer-client consultations. Informed of the risks by Fair Trials, other civil society organisations and the LEAP network,[15] the co-decision procedure resulted in the Council recognising the need for more robust protection of this central aspect of the right to a fair trial.

22. Members of the Parliament have also defended fair trial rights during negotiations on other key instruments agreed during the term of the Stockholm Programme, including most notably the European Investigation Order – the latest mutual recognition instrument to be added to the acquis. Members of the LIBE Committee ensured that several of the flaws noted through the operation of the EAW, a measure developed without Parliament co-decision, have been addressed in the agreed text of the European Investigation Order which requires a proportionality assessment by both the issuing and the executing state (Article 5a) and the mandatory refusal of any EIO which would result in the violation of fundamental rights (Article 10).[16]

Enforcement mechanisms

23. The Stockholm Programme has seen the development of a new era of EU criminal justice policy, with concretisation of fair trial rights under EU law through not only the adoption of three important directives but also the new roles given to the Commission, civil society and national courts in enforcing those rights. The Roadmap Directives bring with them the potential for monitoring and enforcement by the Commission which has not been seen previously in the area of crime and policing laws due to the pre-Lisbon use of "framework decisions" to legislate on such matters. After the Lisbon Treaty, crime and policing laws are made in the form of "directives" which are binding on all EU countries and failure to comply with their terms and

[14] General Approach of the Council on the Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, 2011/0154 (COD), available at: http://register.consilium.europa.eu/doc/srv?l=XX&t=PDF&gc=true&sc=false&f=ST+10908+2012+INIT.

[15] Joint NGO briefing on Directive on the Right of Access to a Lawyer, April 2013, available at: http://www.fairtrials.org/wp-content/uploads/Joint-NGO-briefing-on-Directive-on-the-right-of-access-to-a-lawyer-_15-April-2013-FINAL.pdf.

[16] Draft European Parliament Legislative Resolution on the draft directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters, 20 December 2013, 2010/0817(COD), available at: http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A7-2013-0477&language=EN.

give full effect to them in national law can give rise to infringement proceedings, brought by the Commission against a Member State; an option not available to the Commission with the pre-Lisbon Treaty framework decisions.

24. While the Commission does not obtain its Lisbon powers in relation to most EU crime and policing laws passed before the Lisbon Treaty was adopted, including the EAW, until December 2014, its enhanced Lisbon powers take effect from the transposition deadline of each of the Roadmap Directives, the first of which was in October 2013 and the second of which is in June 2014. The question of implementation of the Roadmap Directives is discussed further below, but the potential for the Commission to assess compliance and hold Member States to account for failure to implement gives these products of the Stockholm Programme, at least for the time-being, a unique quality.

25. The key driver of compliance with the Roadmap Directives will, however, be the national courts, where necessary in conversation with the CJEU. National courts are required to interpret national law in conformity with the purpose of the Roadmap Directives and, where a provision of a directive for which the transposition deadline has passed is sufficiently clear and precise, unconditional and capable of producing rights for individuals, to set aside provisions of national law which would lead to a result contrary to the directive. National courts in all Member States will also have the option of referring questions regarding interpretation of the Roadmap Directives to the CJEU for a preliminary ruling.

26. The combination, therefore, of the content of the Roadmap Directives, the role of national courts in conversation with the Court of Justice and the impact of the Charter, will help individual suspects and defendants to uphold their fair trial rights during national criminal proceedings, rather than having to wait some years after their conclusion in order to get a ruling from the ECtHR. The Stockholm Programme has not only, therefore, seen the development of EU-wide minimum standards but also the introduction of new legal tools for key actors involved in Europe's criminal justice systems which themselves can help to ensure that these new standards improve the situation of suspects and defendants in a timely manner.

Recommendations

27. As consideration is given to the future of EU criminal justice policy, particularly in the months leading to the discussion of the Strategic Guidelines for the next five years of Justice and Home Affairs policy, we urge the Commission, Council and Parliament to reflect on the achievements in improving the protection of fair trial rights over the past five years. This should inform their decisions on priorities for the future so as to ensure that further development of judicial cooperation mechanisms continues to be accompanied by corresponding safeguards for suspects and defendants.

28. We call upon Member States to recognise that developments towards ever-closer judicial cooperation cannot continue without corresponding steps being taken to ensure the protection of fair trial rights, not least so as to protect their citizens from being unjustly treated at the hands of another Member State.

29. We urge the judiciary of every Member State to recognise the new role with which it has been vested as enforcer of EU law in domestic systems but also as having responsibility for seeking clarifications and consistency regarding the interpretation of EU law and its interaction with domestic law through active involvement in the important role of judicial conversation with the CJEU.

The Roadmap's progress so far

Defence right	Action so far	Still to come?
Interpretation and translation for those who do not speak or understand the language of the criminal proceedings.	**October 2010:** Directive adopted. **October 2013:** Deadline for Member States to implement into national law.	Ongoing monitoring by the Commission to ensure full transposition and implementation by Member States.
Clear, prompt **information** on rights, charges and the case against suspected or accused persons.	**April 2012:** Directive adopted.	**June 2014:** Deadline for Member States countries to implement into national law.
Legal advice must be available from the point of arrest or questioning by police, right through to the trial and any appeal.	**October 2013:** Directive adopted.	**November 2016**: Deadline for Member States to implement into national law.
Arrested persons must have the right to **notify someone of their arrest,** and the **right to communicate with consular officials** must be available for those arrested overseas.	**October 2013:** Directive adopted.	**November 2016**: Deadline for Member States to implement into national law.
Legal aid for people accused of a crime who cannot afford to pay a lawyer.	**November 2013:** Commission proposed a Directive on provisional legal aid for suspects deprived of their liberty and those subject to EAW proceedings; also proposed a Recommendation on legal aid in criminal cases more generally.	Negotiations to commence.
Vulnerable suspects like children or those with disabilities need additional support to get a fair trial.	**November 2013:** Commission proposed (i) a Directive on procedural safeguards for children accused in criminal proceedings and (ii) a Recommendation on vulnerable adults accused or suspected in criminal proceedings.	Negotiations to commence.

The presumption of innocence and the right to be present at one's trial must be respected until a judicial determination of guilt or innocence is made.	**November 2013:** Commission proposed a Directive on strengthening certain aspects of the presumption of innocence and the right to be present at trial.	Negotiations to commence.
Pre-trial detention. In November 2011, Fair Trials reported on the widespread misuse of pre-trial detention across Europe, calling for: • EU laws regulating the use of pre-trial detention; • Better use of alternatives to pre-trial detention; and • Deferred extradition under EAWs, until the case is ready for trial.	**June 2011:** Commission published Green Paper on Detention. **December 2011:** Informed by LEAP, Fair Trials leads calls for effective EU action and the Parliament calls on the Commission to propose a new law, backing many of our recommendations. **2012-13**: LEAP meetings in 6 EU Member States to discuss the state of pre-trial detention. **July 2013:** Fair Trials, together with 4 other international NGOs, writes to Vice-President of the Commission Viviane Reading to call for progress on Roadmap and its successor programme, with a focus on pre-trial detention. **September 2013:** Fair Trials, together with 22 other international NGOs, writes to Viviane Reading calling for progress on minimum standards and data collection on pre-trial detention. **November 2013**: Informed by LEAP, Fair Trials makes submission to the Commission's "Assises de la Justice" consultation, calling again for progress to be made on pre-trial detention in the EU. **January 2014:** The Commission publishes report criticising member states for not implementing common rules on detention, including the European Supervision Order, which could help to reduce over-reliance on pre-trial detention.	Development of the case for EU action on pre-trial detention continues.

Part B: Effective implementation of the Roadmap Directives

LEAP meetings on fair trial rights in Europe 2012 – 2013

5 meetings
58 participants
25 Member States

Hungary: *20 February 2013, 15 participants from Austria, Bulgaria, Germany, Hungary and Romania.*

Lithuania: *10 May 2013, 10 participants from the Czech Republic, Estonia, Latvia, Lithuania and Poland.*

Paris: *14 June 2013, 15 participants from Belgium, France, Italy, Luxembourg, Portugal and Spain.*

London: *26 July 2013, 9 participants from Cyprus, England and Wales, Greece, Ireland, Malta and Scotland.*

Amsterdam: *20 September 2013, 9 participants from the Netherlands, Sweden, Finland and Denmark.*

30. As the EU institutions consider what more could and should be achieved by the EU in strengthening the protection of fair trial rights, they should be cognisant that Member States are currently responsible for implementing more EU crime and policing laws than ever before, with the transposition deadlines of dozens of measures having passed in the last five years. As praiseworthy as the Roadmap Directives may be, they are nothing but pieces of paper if not accurately transposed into national legislation and implemented effectively in practice.

31. The Commission has recently published a damning implementation report[17] on three framework decisions – on (i) prisoner transfers; (ii) probation and alternative sanctions; and (iii) the European Supervision Order.[18] Despite the fact that Member States unanimously agreed these measures, the approach to their implementation has been far less convincing with less than half of all 28 Member States having implemented all three measures, despite the fact that the deadlines for doing so have long-passed. The implications for the reduction of excessive and unjustified pre-trial detention will be discussed more fully in Part D below, but broader conclusions can be drawn from the lack of commitment on the part of Member States to ensuring not only effective transposition into domestic legislation of EU laws which could benefit suspects and defendants, but also their effective implementation during day-to-day criminal cases.

32. During 2013, Fair Trials coordinated five meetings[19] (in France, Hungary, Lithuania, the Netherlands and the UK) for LEAP members from 23 Member States to discuss how the Roadmap Directives will be used and the impact they are likely to have on the day-to-day experience of suspects and defendants in their Member States. These discussions reiterated how frequently these rights are abused across Europe and, crucially, how the Roadmap Directives could be used to tackle injustice in individual cases and to challenge some of the systemic causes of abuse, provided that they are effectively implemented, in both law and practice. The published communiqués are set out in Annex 2. A summary of the key findings of these meetings is provided below.

[17] Fair Trials International, *Failure of EU Member States to implement common rules on detention*, 6 February 2014, available at: http://www.fairtrials.org/press/failure-of-eu-member-states-to-implement-common-rules-on-detention/.

[18] Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:294:0020:0040:EN:PDF.

[19] See published communiqués from the meetings in Hungary and Lithuania at Annex 2 and at: http://www.fairtrials.org/wp-content/uploads/Hungary-ADR-Communiqu%C3%A9_Final.pdf and http://www.fairtrials.org/wp-content/uploads/Fair-Trials-International-Lithuania-ADR-communique.pdf. Communiqués from the meetings in France, UK and Netherlands will be published in 2014.

Interpretation and Translation Directive

33. The Directive on the right to interpretation and translation in criminal proceedings (the "Interpretation and Translation Directive"),[20] which was adopted in October 2010, should have been transposed into the national law of every Member State by October 2013. The Interpretation and Translation Directive seeks to ensure respect for the right to a fair trial by ensuring adequate interpretation and translation when the person does not understand the language of the criminal proceedings.

> **1 in 5**
>
> *of the people who contacted Fair Trials International from EU countries in 2011-2013 reported being denied access to an interpreter or to translations of key documents*

34. **Assessment of interpretation needs:** LEAP members from several Member States (including Belgium, Cyprus, England & Wales, Italy, the Netherlands and Sweden) suggested that the process by which the interpretation needs of a suspect or defendant is established is inadequate, and often driven by the subjective assessment of police officers.

35. **Independence of interpreters:** LEAP members from many Member States (including Bulgaria, Czech Republic, Denmark, France, Hungary, Ireland, Lithuania, Luxembourg, Poland, Portugal and Sweden) expressed concern about the independence of interpreters, particularly those who are employed by the police to interpret during interviews with suspects and defendants and therefore have a commercial relationship to sustain.

36. **Quality of interpretation:** LEAP members from almost all Member States gave accounts of poor quality of interpretation, often arising from the inadequate qualification requirements and from an inadequate supply of interpreters working in less common languages and in remote areas. It was also noted that in some Member States, the standard of interpretation in police stations is lower than in the courts.

37. **Interpretation for lawyer-client meetings:** LEAP members from several Member States (including Belgium, Cyprus, France, Italy and Spain) complained that interpreters were not provided as a matter of course for meetings between lawyers and their clients.

> ***Case study from Greece***
>
> *In Greece, a Nigerian citizen accused of fraud failed to attend his own trial due to the fact and date of the postponement not being interpreted for him. He was convicted and sentenced to a ten year prison sentence in his absence.*

38. **Translation of essential documents:** LEAP members from Austria, Belgium, Bulgaria, England and Wales, Finland, France, Hungary, Italy, Luxembourg, Portugal, Spain and Sweden reported difficulties in obtaining written translations of essential documents and an over-reliance on oral translation, especially when the individual has a lawyer. LEAP members from many Member States noted the frequent provision of oral translation in lieu of written translation which significantly reduces the benefit for the defendant.

[20] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:280:0001:0007:EN:PDF.

39. **No avenues of redress:** LEAP members from several Member States (including Austria, Bulgaria, Germany, Hungary and Romania) expressed concerns about the insufficient provision of mechanisms through which suspects and defendants may complain about the quality of interpretation and translation and agreed that audio-recording of police interviews is a pre-requisite to an effective mechanism for challenging quality. Participants from Sweden, however, gave examples of how the existence of audio-recordings of police interviews enabled the defence to challenge effectively the quality of interpretation and protect the fairness of the proceedings.

Right to Information Directive

40. The Directive on the right to information in criminal proceedings (the "Right to Information Directive"),[21] 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.

1 in 10

of the people who contacted Fair Trials International from EU countries in 2011-2013 reported being denied information about their rights or the reason for their arrest

41. **Inadequate provision of information about rights:** LEAP members from many Member States (including Belgium, Bulgaria, Denmark, Finland, France, Italy, the Netherlands, Portugal, Romania, Spain and Sweden) expressed concerns that suspects and defendants were provided with inadequate information about their rights upon arrest. Participants from some Member States (including Ireland, Luxembourg and the United Kingdom) raised concerns that inadequate time is given for suspects and defendants to read the letter of rights and that care is not taken to ensure that the information has been fully understood, with the result that waivers of rights may not be exercised with full knowledge of the consequences.

42. **Information about rights not clear and accessible:** LEAP members from many Member States (including Austria, Bulgaria, Czech Republic, Germany, Estonia, Hungary, Latvia, Lithuania, Poland, Portugal and Romania) reported that defence rights are often not explained clearly to suspects and defendants and, in several of these Member States, the information about rights was not written in simple and accessible language.

43. **Limited access to case-file:** LEAP members from many Member States (including Austria, Bulgaria, the Czech Republic, Estonia, Finland, Hungary, Lithuania, Luxembourg, Poland, Portugal, Spain, Sweden and the United Kingdom) complained of inadequate access to the case-file, and in some cases excessive use by the prosecution of exceptions to the right of access to the case-file, particularly during the pre-trial phase when the prosecution asserts that access could have an adverse impact on the investigation.

[21] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:142:0001:0010:en:PDF.

44. **Making copies of the case-file:** LEAP members from some Member States, such as Estonia and Romania, noted that the defence is prohibited from making copies of the case-file. In others (including Austria, Belgium, Greece, Italy and Poland) the cost of making copies of the case-file is very high and must be borne by the defence.

45. **No remedies:** LEAP members from several Member States (including the Czech Republic, Estonia, Latvia, Lithuania and Poland) reported that the failure of the authorities effectively to notify suspects and defendants of their rights was not taken into account for the purposes of assessing the probative value and/or the exclusion of evidence obtained.

Article 7(1) of the Right to Information Directive – making waves in Europe

In 2013, the Paris Bar circulated submissions inviting its members to rely on Article 7(1) of the Right to Information Directive to seek the annulment of police custody records because of the failure to provide access to the case-file prior to interrogation. By the end of 2013, courts were beginning to respond.

In Poland – where the Helsinki Foundation for Human Rights reported widespread denial of case-file access – a law was adopted modifying the procedural code to require disclosure of documents mentioned in a detention motion and preventing the court basing a detention decision on material unseen by the defence.

Access to a Lawyer Directive

46. The Access to a Lawyer Directive,[22] which was adopted in October 2013, must be transposed into the national law of every Member State by October 2016. The Access to a Lawyer Directive seeks to ensure respect for the right to a fair trial by ensuring effective access to a lawyer at all stages of the criminal proceedings and by guaranteeing the right to communicate with consular officials and third parties following arrest.

47. **Police-appointed lawyers:** LEAP members from some Member States (including Bulgaria and Hungary) expressed concern about the quality and independence of lawyers obtained for suspects and defendants by the police.

13%

of the people who contacted Fair Trials International from EU countries in 2011-2013 reported being denied access to a lawyer following their arrest

48. **Timeliness of access to a lawyer:** LEAP members from some Member States (including the Czech Republic, France, Hungary, Latvia and Poland) reported that police either give lawyers insufficient notice to enable them to get to the police station and/or do not wait a sufficient amount of time for the lawyer to arrive before starting initial questioning.

[22] 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, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:294:0001:0012:EN:PDF.

49. **Ineffective participation:** LEAP members from several Member States (including Belgium, Denmark, Greece, Ireland, Italy, Luxembourg, Malta, the Netherlands, Spain and Sweden) reported concerns regarding the ability of lawyers to effectively participate in police interviews with suspects and defendants.

50. **Confidentiality of lawyer-client meetings:** LEAP members from several Member States (including Estonia, Finland, Greece, Hungary, Ireland, Poland, Romania and the United Kingdom) reported that police regularly carry out surveillance of lawyer-client conversations.

51. **Waivers of right to access a lawyer:** LEAP members from the Czech Republic, Estonia, Latvia, Luxembourg, Poland, Portugal and Sweden reported that suspects and defendants frequently waive their right to seek legal advice due to inadequate provision of information regarding the right to a lawyer and to legal aid and the consequences of exercising such a waiver.

52. **Legal aid:** LEAP members from many Member States (including Austria, Bulgaria, the Czech Republic, Denmark, Germany, Greece, Hungary, Romania, Spain and Sweden) expressed concerns about the inadequacies of the legal aid system in their country, highlighting what they considered to be inadequate resources and poor quality of representation as key factors.

Why the Access to a Lawyer Directive is needed:
Martin v. Estonia (ECtHR, 2013)

A young man was arrested and initially represented by a family-appointed lawyer. Unexpectedly, he 'waived' his right to this lawyer and appointed a different lawyer suggested by the police. He then made confessions, which he retracted later, saying he had been threatened with pre-trial detention among violent detainees and pressured into changing lawyers and confessing. The trial court relied on all the statements, convicting him. The appeal court took the view that his defence rights had been breached and excluded the evidence given in interrogation, but relied on 'general knowledge' procured as a result of his confessions. The ECtHR found that this failed to 'undo' the breach of defence rights and meant the conviction violated Article 6 ECHR. By this time, the applicant had spent three years in prison.

53. **Remedies:** LEAP members from several Member States (including Denmark, Estonia, Latvia, Poland and Sweden) reported that there was no adequate system ensuring that breaches of the right to a lawyer are effectively remedied in the assessment of evidence.

Implementation concerns

54. The Roadmap Directives will only serve to remedy the concerns which LEAP members have raised regarding fair trial rights protection in their respective Member States if they are transposed and implemented effectively. Neither transposition nor effective implementation can, however, be taken for granted. The recent report of the Commission on the implementation of three Framework Decisions on detention measures demonstrates that even where Member States have agreed to the adoption of EU law, they may nevertheless fail to give it effect in national law.[23]

55. By February 2014, ten Member States had yet to notify the Commission of the details of transposition legislation for the Interpretation and Translation Directive, despite the deadline

[23] See note 17 above.

having passed in October 2013.[24] Of those who have provided notification of transposition, many have submitted that national legislation already complies with the provisions of the Interpretation and Translation Directive, requiring no legislative change. LEAP members gave the example of the Portuguese Ministry of Justice concluding that no new legislation was required to give effect to the Interpretation and Translation Directive despite the poor quality and lack of independence of interpreters and the frequent denial of written translations in Portugal referred to above. During the meetings in 2012 and 2013, LEAP members raised specific concerns regarding the following provisions of the Roadmap Directives which they fear may not be fully implemented in their own Member States.

56. **Quality of interpretation:** Given the lack of any obligation for Member States to ensure that police interviews are audio-recorded, LEAP members expressed concern as to how the quality of interpretation can be ensured (in compliance with Article 5 of the Interpretation and Translation Directive) and how effective any mechanism for complaining about the quality of interpretation (in accordance with Article 2(5) of the Interpretation and Translation Directive) could be.

> ***Case study from Ireland***
>
> *Having arrested a Polish man for drink-driving in Ireland, the police had difficulty finding a Polish interpreter so used a Slovak interpreter who claimed he could speak Polish. The suspect complained that the Slovak interpreter could not speak Polish and refused to cooperate further. He was subsequently charged with failure to provide a breath specimen as a result of his non-cooperation, an offence which attracts a custodial sentence of a maximum of 6 months in Ireland.*

57. **Overuse of oral interpretation in place of translation:** LEAP members suggested that the existence of the exception in Article 3(7) of the Interpretation and Translation Directive, which allows for an oral translation to be provided instead of a written translation, will become the rule rather than the exception.

58. **Failure to ensure letter of rights is fully understood:** LEAP members expressed concern that responsibility is given to police officers to ensure not only that the letter of rights has been provided in accordance with Article 4(1) of the Right to Information Directive, but also that its content has been sufficiently understood so as to guarantee the validity of any subsequent waiver of rights, particularly the right to a lawyer and the right to remain silent.

59. **Interpretation of "essential" in Article 7(1) of the Right to Information Directive:** Many LEAP members acknowledged that Article 7(1) has the potential to improve radically the protection of defence rights in the pre-trial phase, particularly in cases where the suspect or defendant is detained. They noted, however, that the impact of this provision will largely depend on the interpretation given to "essential to challenging effectively (...) the lawfulness of arrest and detention" and the difficulty which the defence will face in (a) ascertaining whether or not there are any documents which they have not seen and (b) demonstrating that they are "essential" for this purpose.

60. **Broad use of the derogations set out in Article 7(4) of the Right to Information Directive:** LEAP members are concerned that the value of Article 7(2) in establishing a right of access to "all material evidence" could be too easily undermined by the potentially broad use of the derogations set out in Article 7(4), particularly that which allows access to be refused where

[24] Information published by the European Commission on National Execution Measures as at February 2013, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:72010L0064:EN:NOT.

"strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an ongoing investigation".

61. **Broad use of derogations in the Access to a Lawyer Directive:** LEAP members expressed concern that the derogations to the right of access to a lawyer set out in Article 3(6) of the Access to a Lawyer Directive could be broadly interpreted and relied upon to undermine the essential right protected by this directive. There are significant concerns that the authorities will over-use reference to the need for "immediate action by the investigating authorities" in order "to prevent substantial jeopardy to criminal proceedings" in order to proceed with interviewing suspects and defendants without legal representation.

Training of 120 defence lawyers in 2013

Recognising the importance of training for defence lawyers as a way to ensure the effective implementation of the Roadmap Directives, Fair Trials and LEAP members delivered four 2-day residential training programmes in Hungary, Poland, France and the UK in 2013.

***120 lawyers** from **23 Member States** attended the training.*

8 expert co-trainers from 8 Member States were drawn from the LEAP network.

62. **Effective participation of lawyers:** Our meetings have highlighted the wide range of approaches that Member States have adopted to the rules governing the participation of a lawyer, particularly during police interviews. Some LEAP members expressed doubt as to the impact which the reference to "practically and effectively" in Article 3(1) of the Access to a Lawyer Directive will have on their ability to participate effectively to protect the interests of their clients.

63. **Effectiveness of waivers:** Given concerns about the extent to which police officers are committed to ensuring that suspects and defendants have understood their right to access a lawyer, LEAP members are also concerned that attempts by Member States to ensure that adequate information regarding the consequences of a waiver is provided, in accordance with Article 9(1) of the Access to a Lawyer Directive, may not be effective in day-to-day practice.

64. **Remedies for failure to protect right of access to a lawyer:** Given concerns about the lack of a clear approach by the courts in many Member States to the treatment of evidence collected in violation of the right to access a lawyer, LEAP members have expressed disappointment in the prioritisation of "national rules and systems on the admissibility of evidence" in Article 12 of the Access to a Lawyer Directive and the resulting lack of clear guidance on this crucial point.

65. **Interconnection of Roadmap Directives:** LEAP members repeatedly highlighted the interconnectedness between each of the Roadmap Directives, pointing to the fact that the success of each depends on the full implementation of them all. Examples given included:

    i) the relationship between the provision of information about the right to interpretation (under Article 3 of the Right to Information Directive) and the ability of a suspect or defendant to insist upon quality interpretation for any police questioning (under Article 2 of the Interpretation and Translation Directive);

    ii) the relationship between the ability of a lawyer to participate effectively in the criminal proceedings (under Article 3 of the Access to a Lawyer Directive) and access to the case-file (under Article 7 of the Right to Information Directive); and

iii) the relationship between the provision of written notification of the right of access to a lawyer (under Article 4 of the Right to Information Directive) and the ability of the suspect or defendant to assert the right of access to a lawyer (granted by Article 3 of the Access to a Lawyer Directive) without inadvertently or ill-advisedly exercising the right to waiver (under Article 9 of the Access to a Lawyer Directive).

Recommendations

66. We urge the Commission, Council and Parliament to recognise the significant achievements which have been made in reaching agreement on the Roadmap Directives and the potential for them to make a real improvement to the operation of mutual recognition measures, and the treatment of suspects and defendants more broadly, provided that they are implemented effectively.

67. We call upon the Commission to ensure that the Roadmap Directives are implemented effectively, in both law and practice, by working with Member States as they transpose them at a domestic level; monitoring, with the input of civil society organisations where necessary, the effectiveness of implementation in practice (encouraging best practice and challenging poor practice); encouraging effective training programmes for government officials, interpreters and translators, judges, police, prosecutors and lawyers; and taking enforcement action against Member States where necessary.

68. We hope that Member States will prioritise not only timely but also accurate transposition and effective implementation of the Roadmap Directives, acknowledging where changes to national law and practice are required in order to comply with these new measures.

69. While recognising the important role of civil society organisations in mainstreaming training on the Roadmap Directives and developing a training curriculum which can be replicated widely, we urge national bar associations in Member States to support this work by informing criminal defence lawyers of the existence, content and applicability of the Roadmap Directives so that they can use the measures to benefit their day-to-day practice.

Part C: Completion of the Roadmap

70. Under the Roadmap, the EU has committed itself to passing a series of laws, each protecting a key aspect of the right to a fair trial, but the work is not yet complete. Given the interdependent nature of these rights, the protections sought by the existing Roadmap Directives cannot be fully realised without the adoption and implementation of the other measures envisaged. The EU itself has, for example, recognised that the right to legal aid is essential to ensure that the right to a lawyer is effective in practice.[25] Similarly, without protections for vulnerable suspects, large numbers of suspects caught up in Europe's criminal justice systems will not be able to exercise their rights and participate in their trial.

71. We were therefore delighted when, on 27 November 2013, the Commission published a package of five new measures to establish minimum fair trial standards across the EU, including three draft directives (on legal aid, children and the presumption of innocence) and two recommendations (on legal aid and vulnerable suspects).[26] We look forward to working with our LEAP network to identify key advocacy priorities prior to the commencement of negotiations on the new measures later in 2014. Prior to the publication of the measures, however, we had taken several opportunities to collate general expert comment from LEAP members on these remaining issues.

72. In July 2012, based on an EU-wide survey of defence lawyers aimed at identifying the most common types of fair trial abuse encountered in their daily practice (conducted in partnership with the Dutch charity EuroMoS), Fair Trials published a report[27] on legal aid in the EU which identified areas of concern regarding the availability of publicly-funded legal advice to suspects and defendants in many Member States. In November 2012, we convened a meeting of LEAP members to discuss the protection of the right to a fair trial of vulnerable suspects in the EU and published a communiqué setting out the views shared during the discussion.[28] In October 2013, at the annual LEAP meeting, LEAP members further explored the issues of legal aid and vulnerable suspects and initiated a conversation with our network members on the issue of the presumption of innocence. Through our research and discussions with LEAP members, we have demonstrated the importance of legislation in relation to legal aid, vulnerable suspects and the presumption of innocence as key to the continued improved protection of procedural rights in the EU. An overview of some of the common themes emerging from these discussions with experts from across the EU is set out below.

Legal Aid

73. Our July 2012 report – *The practical operation of legal aid in the EU* – identified that in many Member States, there is no adequate legal aid provision for suspects and defendants who are unable to afford a lawyer. Without the right to free legal advice for those who cannot afford it, the basis for mutual trust is lacking. Furthermore, as recognised in the UN Principles and

[25] See Executive Summary of the Impact Assessment accompanying the document Directive of the European Parliament and of the Council on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings, p.2, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2013:0477:FIN:EN:PDF.
[26] See notes 5 and 11-13 above.
[27] Fair Trials International, *The practical operation of legal aid in the EU*, July 2012, available at: http://www.fairtrials.org/wp-content/uploads/2012/09/Legal_Aid_Report.pdf
[28] Fair Trials International, *Vulnerable suspects in the European Union,* November 2012, available at: http://www.fairtrials.org/wp-content/uploads/Vulnerable-Suspects-Communique.pdf.

Guidelines on Access to Legal Aid in Criminal Justice Systems,[29] justice systems that do not guarantee proper, timely access to legal advice and representation, funded where necessary by the state, frequently suffer unnecessary waste and expense because of appeals, quashed convictions and infringement litigation resulting from the inadequate safeguarding of defence rights during the investigation or trial.

74. Our survey of defence lawyers confirmed that a vast majority of Member States have some form of emergency duty lawyer scheme to ensure that people in custody have access to legal advice even when they cannot afford it. However, defence practitioner members of LEAP have reported numerous problems with these schemes in practice. Recurring problems include:

    i. duty lawyers are considered to be poorly paid or have to wait a long time for payment to be processed;

    ii. in some Member States legal aid lawyers are provided with a flat rate regardless of the amount of work done or the complexity of the case;

    iii. the quality of duty lawyers in many Member States is considered to be low, meaning that the actual access to effective legal advice, in reality, is limited;

    iv. in a number of Member States, legal aid cannot be granted until suspects are brought before a judge, up to 48 hours after arrest, meaning that they may be without legal representation during the crucial time of initial police questioning;

    v. in some Member States, while legal aid is available during criminal proceedings, defendants are required to repay their legal costs if found guilty (this can pressure suspects into waiving their right to a lawyer for fear of being unable to pay later);

    vi. in a vast majority of Member States, suspects are not allowed to choose their legal aid lawyer and must accept whoever is appointed;

    vii. in a few Member States, legal aid practitioners are appointed and funded by the police, leading to concerns that their advice may be prejudiced as they are unlikely to be instructed again if they challenge the investigation;

> ***United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems***
>
> *Legal aid is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law. Legal aid is a foundation for the enjoyment of other rights, including the right to a fair trial, as defined in article 11, paragraph 1, of the Universal Declaration of Human Rights, a precondition to exercising such rights and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process.*
>
> *A functioning legal aid system, as part of a functioning criminal justice system, may reduce the length of time suspects are held in police stations and detention centres, in addition to reducing the prison population, wrongful convictions, prison overcrowding and congestion in the courts, and reducing reoffending and revictimization. It may also protect and safeguard the rights of victims and witnesses in the criminal justice process. Legal aid can be utilized to contribute to the prevention of crime by increasing awareness of the law.*

[29] United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, 2012, available at: http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V12/528/23/PDF/V1252823.pdf?OpenElement.

viii. in a number of Member States, practitioners reported that police will pressurise suspects into waiving their right to access a lawyer, including by failing to explain the right to legal aid; and

ix. the extent to which the relevant competent authority helps suspects apply for legal aid if they are unable to pay for a lawyer varies considerably (in some Member States the application process is very bureaucratic, which is particularly problematic for non-nationals who may not understand the documentation required).

Proposed measures on legal aid

Proposed Directive covers:

i) Provisional legal aid for suspects or accused persons deprived of liberty; and

ii) Legal aid in both the executing and issuing state in European Arrest Warrant proceedings.

Proposed Recommendation covers:

i) Guidance on means and merits test to assess need for legal aid;

ii) The need to ensure quality of legal aid representation;

iii) Requirement for Member States to collect data and inform Commission of measures taken to give effect to the Recommendation; and

iv) Commission will make an assessment after 48 months as to whether further legislation is necessary.

75. The availability and effectiveness of legal aid varies considerably across Europe. Where it is offered, defence practitioners indicate that limited funding for legal aid means that the advice provided is often of insufficient quality to protect the best interests of the suspect. Legal aid is also often not provided until well after the point of arrest and initial questioning, meaning that suspects are unrepresented during one of the most crucial stages of the process. Despite the fact that the right to free legal advice for those who cannot afford it is enshrined in the ECHR, this is not respected in all EU countries.

76. Whilst it is clear that resources are limited due to the current economic crisis, proper safeguards for basic fair trial rights are not an optional extra in a fair justice system. On the contrary, defence rights must be better protected throughout the EU, if we are to build the mutual trust between Member States that is necessary for countries to cooperate effectively to tackle serious crime. Access to adequate legal aid at the earliest stages of criminal proceedings is essential to ensure that suspects both know about, and are fully able to exercise, their legal rights. In many cases, effective legal advice at the earliest stage of proceedings will make the legal process more efficient by, for example: helping defendants to make an informed decision about whether to plead guilty; encouraging charges to be dropped or changed at an early stage where appropriate; and precluding legal challenges before trial and appeals afterwards. If people are denied access to effective legal advice due to their financial circumstances, this can lead to a serious inequality of arms, undermining fair trial rights and the rule of law. It also exacerbates inequalities and the marginalisation of poorer EU citizens.

77. At our LEAP Annual Meeting in October 2013, LEAP members confirmed the findings of the Fair Trials report on legal aid and their support of the need for EU minimum standards to govern the provision of legal aid within Member States and to complement the rights set out in the Access to a Lawyer Directive. In doing so, they highlighted two main concerns:

i. LEAP members emphasised that all suspects and defendants should be provided with free legal aid at the police station. In many countries, suspects and defendants are simply not guaranteed that a lawyer will be provided and paid to attend his/her preliminary interrogation at the police station. In some countries, suspects and defendants are simply not entitled to free legal aid at this stage, and in others, entitlement depends on a means test with the possibility of the suspect and defendant having to pay retrospectively for legal assistance provided at this stage. This prevents many suspects from calling a lawyer at this stage of proceedings, despite the impact on the fairness of the proceedings and the ability of the suspect or defendant to pursue an effective defence at a later stage.

ii. LEAP members expressed concerns that remuneration of legal aid lawyers was inadequate, and that this results in a poor quality of representation and a resulting negative impact on the adequacy of the defence. Legal aid lawyers are often paid an hourly fee which is much lower than they would expect to charge fee-paying clients or a flat rate which does not take into account the complexity of the case. Legal aid lawyer lists in some Member States, were therefore considered to consist of lawyers who are inexperienced and dependant on getting these cases because they could not secure fee-paying work. The quality of their work and thus the defence was considered by LEAP members to suffer as a result.

78. Given the first of the two key concerns raised by our LEAP members in October 2013, it is significant that the proposed directive on legal aid establishes legal standards in relation to provisional legal aid for suspects or accused persons deprived of liberty, including while detained in the police station (as well as the provision of legal aid in both issuing and executing states during EAW proceedings). Key concerns - including on the means and merits tests to be applied when assessing the need of a particular suspect for legal aid and the quality of legal aid representation - have, however, been omitted from the proposed directive and included in a corresponding recommendation. It is reassuring, however, that Recital 17 of the Recommendation obliges the Commission to reconsider the need for legislative action on the non-legislative measures 48 months after the adoption of the Recommendation. Further, Section 4 of the Recommendation sets out requirements for data collection and monitoring to inform the future decision about whether to legislate.

Vulnerable Suspects

79. Our 2012 research[30] into the protection of fair trial rights across the EU suggested that, in many Member States, there are inadequate safeguards in place to ensure that children, suspects with mental or physical conditions, or those who are otherwise vulnerable, understand the proceedings in which they are involved and are treated fairly. If suspects cannot understand what is happening then they cannot exercise their rights effectively and cannot receive a fair trial.

80. The meeting of LEAP members and other experts convened in November 2012 sought to identify the main areas of consensus among participants as to the key problems with the treatment of vulnerable suspects and defendants in the EU and what should be covered by the draft legislation. Participants agreed that action is needed at EU level to address the treatment of vulnerable suspects in criminal proceedings. As with other defence rights, any additional costs of special measures for vulnerable suspects, would be offset by cost savings in the long term as they can avoid mistrials and appeals. They will also address the widespread concern that many vulnerable suspects and defendants in the EU today are unable to receive a fair trial.

[30] Fair Trials International, *Defence Rights in the EU*, October 2012, available at: http://www.fairtrials.org/wp-content/uploads/2012/10/ADR-Report_FINAL.pdf.

81. Common views expressed by LEAP members regarding the matters that need to be addressed by EU legislation include:

i. Recognition of vulnerabilities is key and more training and practical information is needed to ensure that they are identified early in proceedings. Checklists should be introduced in police stations to help lawyers and police identify vulnerable suspects. It is important, however, to ensure that checklists are not solely relied upon; police should have access to relevant professionals who can assist with assessment of the suspect if necessary.

ii. A system of accreditation for lawyers and other professionals working with vulnerable suspects and defendants should be considered.

iii. Effective participation is at the heart of any work on special safeguards for vulnerable suspects and this should be reflected in the scope of any directive. It is essential to ensure that vulnerable suspects have effective access to justice and a fair trial.

iv. In conjunction with effective participation, a definition of what constitutes a vulnerable suspect may be helpful to ensure awareness and prevent Member States avoiding applying measures, but it must not be too prescriptive and must be clearly stated to be non-exhaustive.

Case study from Lithuania

In April 2013 two Afghani boys crossed the Lithuanian boarder from Belarus and were apprehended by the State border guard. Both boys claimed to be underage and sought asylum. Despite a specific clause in the Criminal Code which prevents prosecution of asylum-seekers, and this being a clear-cut example of such a case, the boys were charged with illegal border-crossing and placed in pre-trial detention.

As non-Lithuanian speakers the boys were classified as a mandatory defence case and received a state funded legal representative. However, the case demonstrates the ineffectiveness of the legal assistance they secured.

The state-appointed lawyer did not appeal the boys' placement in pre-trial detention at any point (the detention was twice extended). The boys were also encouraged not to challenge the charges, resulting in their conviction under summary proceedings.

Fortunately at this stage the case was taken over by the Lithuanian Red Cross Organisation who appealed the court decision. The boys were acquitted at the end of September.

Both boys spent over 100 days in pre-trial detention in an adult remand prison which is known for having the worst conditions of all remand centres in Lithuania, as the test, which is known to be unreliable, indicated their age at 20-24 years.

v. Vulnerable suspects should only be able to waive their right to a lawyer when adequate safeguards are in place to ensure that the suspect can give, and has given, informed consent. This decision should be revocable at any point in proceedings.

vi. Audio and video recordings of police interviews with vulnerable suspects should be introduced to monitor and assess the level of understanding in proceedings.

82. These findings were reiterated by participants at our LEAP Annual Meeting in October 2013. In support of the need for the EU to develop minimum standards, participants suggested that there is a wide-range of suspects and defendants who are vulnerable to the extent that their personal characteristics or situation renders them unable to participate in the criminal procedure on an equal basis with others. Such individuals include children and juveniles, foreigners, persons with disabilities or health conditions and persons with addictions. Participants recognised that, whilst there are different potential approaches to defining vulnerability for the purposes of assessing the additional needs of particular suspects and defendants, it is crucial that the EU establishes a suitable approach to this and, more importantly, imposes an obligation on Member States to establish their own systems for identifying vulnerable suspects and defendants and clear protocols defining the action to be taken upon identification. Some participants also suggested that the requirement of mandatory legal representation for some categories of vulnerable suspects and defendants (such as children) could also be an effective way to ensure that their rights are adequately protected and not waived inappropriately.

83. Given the challenges which LEAP members identified in producing a clear definition of vulnerability, for the purposes of developing a consistent approach to necessary safeguards in an EU directive, it is perhaps unsurprising that the Commission published a proposed directive which only addressed the needs of children and not other groups of vulnerable suspects. We hope that this will be the first in a series of targeted measures dealing with other vulnerable groups.

84. The proposed directive on procedural safeguards for children is intended to address the particular vulnerabilities of children within the criminal justice system. It covers: (i) the right to be provided with specific information, (ii) the involvement of parents and other appropriate adults, (iii) mandatory legal representation, (iv) individual assessments of protection, education, training and social integration needs, (v) medical examinations, (vi) audio-visual recording of questioning, (vii) specific treatment in relation to detention, (viii) special diligence in investigations, (ix) protection of privacy, (x) personal attendance at trial, and (xi) legal aid.

Proposed measures on vulnerable suspects

Proposed Directive on safeguards for children covers:

i) the right to be provided with specific information;
ii) the involvement of parents and other appropriate adults;
iii) mandatory legal representation;
iv) individual assessments of protection, education, training and social integration needs;
v) medical examinations;
vi) audio-visual recording of questioning;
vii) specific treatment in relation to detention;
viii) special diligence in investigations;
ix) protection of privacy;
x) personal attendance at trial; and
xi) legal aid.

Proposed Recommendation on vulnerable suspects covers:

i) the need for prompt identification of vulnerable suspects;
ii) the presumption of vulnerability in certain cases;
iii) the rights to information, legal assistance and medical assistance;
iv) the audio-visual recording of questioning; and
v) the need for certain steps to be taken in relation to the deprivation of liberty of vulnerable persons.

85. The corresponding recommendation sets out guidance for Member States on the need for prompt identification of vulnerable suspects, the presumption of vulnerability in certain cases, the rights to information, legal assistance and medical assistance, the audio-visual recording of questioning and the need for certain steps to be taken in relation to the deprivation of liberty of vulnerable persons.

Presumption of Innocence

86. While the Roadmap did not propose a measure on the presumption of innocence, the issue is referred to in the Stockholm Programme, where the Council invites the Commission to consider whether it needs to be addressed in order to facilitate better cooperation in the area of criminal justice. The Commission published a Green Paper on the presumption of innocence in 2006 in response to which 11 Member States provided their views which were largely in favour of an EU legislative initiative on this issue.[31]

87. During 2013, the Commission continued the consultation process through meetings with key stakeholders and an on-line survey.[32] The result of this process was the publication of a proposed directive on the presumption of innocence in November 2013 which sets out guarantees that: (i) guilt cannot be inferred by any official decisions or statements before final conviction, (ii) the burden of proof is placed on the prosecution, any doubt benefits the accused and the standard of proof is "beyond reasonable doubt", (iii) the right not to incriminate oneself and to remain silent is guaranteed and no negative inferences may be drawn when it is exercised, and (iv) the accused has the right to be present at the trial.

Presumption of innocence and the media in the UK

When 25 year old Joanna Yeates was murdered in December 2010, police initially suspected and arrested her landlord, Chris Jeffries. He was held in police custody for 36 hours in police custody and then released on police bail until the investigation against him was closed in March 2011.

During this period of police bail, his arrest was covered heavily by national media, together with descriptions of him as "strange," "creepy," and "a loner" by unnamed sources. The coverage was so prejudicial as to prompt the Attorney General to publically reprimand editors with a reminder that the Contempt of Court Act forbids the publication of material related to an arrested person that was likely to prejudice a future jury against them.

Eventually another man was convicted for the murder. Jeffries was awarded compensation from 8 different media outlets for libel related to their coverage of his arrest. Two newspapers were convicted of contempt of court for publishing information that could prejudice a trial.

Mr Jefferies later gave evidence at the UK's Leveson Enquiry into the culture, practice and ethics of the British Press, where he testified that he was unable to live at his home for 3 months following his arrest due to the strength of public hostility against him due to the negative media coverage, and that he and his family suffered ongoing trauma due to his pubic character assassination.

[31] European Commission, Green Paper on Presumption of Innocence, COM(2006) 174 final, available at: http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0174en01.pdf.

[32] Impact Assessment accompanying the document Proposal for measures on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, SWD(2013) 478 final, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2013:0478:FIN:EN:PDF.

88. Members of our LEAP network highlighted the need for clarification and codification of minimum standards on the presumption of innocence during discussions at the LEAP Annual Meeting in October 2013. The key themes emerging from the discussions were as follows:

i. LEAP members suggested that in some Member States, certain forms of coercive plea-bargaining could be deemed to be an infringement of the presumption of innocence and the right not to incriminate oneself.

ii. LEAP members discussed the following issues concerning the burden of proof, which should rest upon the prosecution:
    a. A key concern related to what forms of evidence should be permitted, particularly with regard to the reliance by the prosecution on anonymous witnesses and the ability of the defence to call independent experts and to challenge the conclusions of government expert witnesses.
    b. Further, LEAP members were concerned that summary proceedings, which are growing increasingly popular in many Member States, do not always respect the imposition of the burden of proof upon the prosecution.

iii. The role of the media in creating a presumption of guilt was also discussed, as well as the problem of public comments made by judges.

Proposed directive on presumption of innocence

The proposed directive would require that:

i) guilt cannot be inferred by any official decisions or statements before final conviction;
ii) the burden of proof is placed on the prosecution, any doubt benefits the accused and the standard of proof is "beyond reasonable doubt";
iii) the right not to incriminate oneself and to remain silent is guaranteed and no negative inferences may be drawn when it is exercised; and
iv) the accused has the right to be present at the trial.

89. The broad approach adopted in the proposed directive on the presumption of innocence, which addresses many of the key concerns raised previously by LEAP members, is welcome and we look forward to contributing to the negotiation process over the coming year.

Recommendations

90. We were pleased to learn that the Commission has published a new package of proposals on procedural rights by way of completion of the Roadmap. Fair Trials has repeatedly called for the continuation of action to establish effective minimum standards on fair trial rights in the EU, including recently in a joint letter to Vice-President Reding in July 2013 (Annex 4). LEAP members and Fair Trials look forward to working with the EU Institutions and other civil society organisations during negotiations on the new laws, to ensure they provide the human rights protections needed to establish an area of freedom, security and justice within Europe.

91. We call upon the Commission, Council and Parliament to ensure that the completion of the Roadmap remains a priority and that work on the new procedural rights proposals continues during the mandates of the new Commission and Parliament.

92. We urge Member States to recognise that work on the remaining proposals is an important continuation of the process which started with the first three Roadmap Directives and which requires the agreement of these further measures to prevent the initial achievements from being undermined.

Part D: Minimum standards on pre-trial detention

93. In October 2011, Fair Trials published a major report – *Detained without Trial*[33] – in which it called for EU-wide standards on pre-trial detention in response to the Commission's Green Paper on Detention. Making reference to the charity's own casework, ECHR standards and comparative research, the report set out a detailed case for EU legislation to establish minimum standards clearly establishing the following key elements:

i. **Substance of pre-trial detention decisions:** There is a right to pre-trial release unless there is proper evidence of a real risk that the suspect will: a) fail to appear at trial; b) interfere with evidence or witnesses in the case; c) commit an offence; or d) be at risk of suffering physical harm, either inflicted by himself or others.

ii. **Procedure for pre-trial detention decisions:** The decision-making process leading to orders of pre-trial detention must comply fully with all aspects of the right to a fair trial including an oral hearing during which the equality of arms is respected. Reasoned decisions to support an order for detention must be provided and the right to challenge such decisions with the effective assistance of a lawyer must be available to the suspect.

iii. **Alternatives to detention:** Where the presumption of release is rebutted, full consideration should be given to the proportionality of detention and the availability of alternatives such as house arrest and electronic monitoring. The individual's means should be taken into account when fixing financial surety.

Prison overcrowding in the EU

Hungary – 145.1%

Cyprus – 137.5%

Greece – 136.5%

Malta – 133.6%

Italy – 128.8%

Croatia – 125.7%

Belgium – 124.4%

International Centre for Prison Studies statistics, 2011-2014

iv. **Review of pre-trial detention:** All individuals in pre-trial detention should be entitled to a regular review, by a body of "judicial character", of the necessity and proportionality of their continued detention.[34] The court must give reasons for its decision regarding the detention and must not use identical or "stereotyped" forms of words.

v. **Special diligence:** Investigations being carried out in relation to an individual who is held in pre-trial detention must be conducted with 'special diligence'; the case must be given priority and conducted with particular expedition.

vi. **Detention conditions:** Every effort must be made to ensure that the person's pre-trial detention, and particularly the conditions in which he is detained, does not impair his/her ability to prepare for trial.

[33] Fair Trials International, *Detained without trial*, October 2011, available at: http://www.fairtrials.org/justice-in-europe/pre-trial-detention/ .

[34] Article 5(4), European Convention on Human Rights; *De Wilde, Ooms and Versyp v Belgium* [1971] ECHR 1, Para 76; *Neumeister v Austria* [1968] ECHR 1, Para 24.

LEAP Meetings on Pre-Trial Detention 2012-13

77 participants in 6 Member States

Spain: *18 October 2012, 12 participants including academics, defence lawyers and NGO representatives.*

Poland: *4 December 2012, 20 participants including academics, defence lawyers, prosecutors and NGO representatives.*

Hungary: *21 February 2013, 13 participants including academics, defence lawyers, judges, prosecutors, Ministry of Justice officials and NGO representatives.*

Greece: *27 April 2013, 13 participants including academics, defence lawyers and NGO representatives.*

Lithuania: *9 May 2013, 11 participants including academics, defence lawyers, former prosecutors, and judges (including a Supreme Court judge).*

France: *13 June 2013, 8 participants, including academics, defence lawyers, judges and administrators of pre-trial services.*

vii. **Remedies and compensation:** Any individual who has been placed in pre-trial detention must have an effective remedy and an enforceable right to compensation where he has been detained in contravention of the minimum standards relating to pre-trial detention.

94. In the past year, Fair Trials has coordinated meetings of its LEAP network in 6 EU countries – France, Greece, Hungary, Lithuania, Poland and Spain – to discuss the way pre-trial detention is used in different EU countries and to identify opportunities for reform. These meetings have supported the need for minimum standards which Fair Trials called for in 2011. The communiqués setting out the detail of the discussions held and conclusions reached at each meeting[35] are included in Annex 3, and an overview is provided below.

Substance of decisions

95. Many LEAP members commented that judges frequently give inadequate consideration to the specific features of the case when decided whether or not to order pre-trial detention.

96. Another issue identified is that the length of the potential sentence and the severity of the alleged crime is treated as the key determinant of whether pre-trial detention should be ordered. LEAP members from Lithuania and Hungary reported that pre-trial detention decisions are often based on an assessment of the evidence demonstrating whether or not an individual committed the offence in question. According to LEAP members from Greece, Poland and Lithuania, judges are said to be influenced by media pressure and public opinion when deciding on pre-trial detention.

97. LEAP members noted the particular challenges facing foreign nationals, who are usually deemed to present a flight risk without considering whether they have ties to the country where they have been arrested. LEAP representatives from Hungary and Poland highlighted

[35] The communiqués published following the LEAP meetings on pre-trial detention are included in Annex 3, but also are available as follows: Spain (available at: http://www.fairtrials.org/wp-content/uploads/Spain-PTD-communique.pdf), Poland (available at: http://www.fairtrials.org/wp-content/uploads/Poland-PTD-communique.pdf), Hungary (available at: http://www.fairtrials.org/wp-content/uploads/Hungary-PTD-communique.pdf), Greece (available at: http://www.fairtrials.org/wp-content/uploads/Greek-communique-EN.pdf), Lithuania (available at: http://www.fairtrials.org/wp-content/uploads/130910_Lithuania-PTD_Final_EN.pdf) and France (available at: http://www.fairtrials.org/wp-content/uploads/Fair_Trials_International_France_PTD_Communiqu%C3%A9_EN.pdf).

that where a case involves multiple defendants, the court usually imposes the same detention order on all defendants without taking into account their personal circumstances. In all of the six countries surveyed, it seems that pre-trial detention is not used as the exceptional measure which it is intended to be.

Decision-making procedure

98. LEAP members from all 6 countries noted that judges frequently follow the recommendations of the prosecutor to order pre-trial detention, without carefully reviewing the arguments of both parties and without being seen to exercise judicial independence. LEAP members also suggested that it is very difficult for the defence to prepare an effective case against pre-trial detention as they do not have access to the entire case-file or only receive access at a later stage of the pre-trial phase.

99. LEAP members from Lithuania noted that pre-trial judges are often new judges without extensive experience. Their competence and the quality of their decision-making will only be reviewed after five years, and, aside from appeal, there is no oversight of their decisions on pre-trial detention.

Percentage of prison population in pre-trial detention, 2012-2014

Spain – 13.9%

Poland – 8.3%

Hungary – 26.9%

Greece – 34.1%

Lithuania – 12.1%

France – 25.4%

International Centre for Prison Studies statistics, 2012-2014

100. LEAP members from Spain noted that there is the possibility of appeal to a higher court or, if this proved unsuccessful, a constitutional protection petition before the Constitutional Court. However, exercising these rights can exacerbate delays so lawyers reported that they sometimes feel it is better not to do so. LEAP members from Lithuania explained that appeals against first-instance determinations would often take a long time to be heard, during which time the person would also be detained.

101. LEAP members from Greece described the detention hearings as lacking basic features of procedural fairness. The hearings are not public and are not adversarial, and adjudication is usually in favour of pre-trial detention. Another problem reported by the Greek LEAP members was the low quality of interpretation for non-Greek speaking defendants, leaving the accused with only a vague sense of the proceeding and an inability to intervene when needed.

102. LEAP members from France argued that pre-trial decisions are often made in a more informal manner, during off-the-record conversations with investigating judges, to which the defence lawyers are often not privy.

Alternatives to detention

103. LEAP members at all 6 meetings confirmed that there are several alternatives to pre-trial detention established by law in their Member States which should be considered before resorting to the exceptional measure of pre-trial detention. However, they all noted that pre-trial detention is far more frequently ordered than the alternatives.

104. According to LEAP members from Lithuania, judges are not at liberty to refuse to order detention and apply a less restrictive measure in its place. In order for an alternative to be used, the prosecutor must either have requested it or have consented to a defence request. It is therefore at the discretion of the Prosecutor whether or not alternatives to detention are used.

105. Electronic tagging is in general not used in the six countries surveyed, although LEAP members agreed that it would be a useful alternative to pre-trial detention in many cases. The European Supervision Order is implemented in some countries, but not in all, and LEAP members were not able to provide any examples of its use. The main concern of LEAP members was that the procedure for issuing a European Supervision Order is too complicated which will make judges reluctant to use it even when it is implemented.

Advocacy on Pre-Trial Detention in Hungary: Partnership with the Hungarian Helsinki Committee

Following the publication of the communiqué of the LEAP pre-trial detention meeting in Hungary, the Hungarian Helsinki Committee (HHC) (an NGO member of LEAP) and Fair Trials have engaged in an ongoing correspondence with the office of the Hungarian Deputy Public Prosecutor on issues raised in the meeting. This engagement has come at a critical moment for advocacy around reforms of pre-trial detention in Hungary, where ***new laws passed in November 2013 remove the upper statutory limit of pre-trial detention*** *(formerly 4 years).*

In the absence of binding minimum standards in EU law, this deterioration in safeguards for the imposition of pre-trial detention can only be combated on the national level. HHC, in conjunction with another Hungarian NGO, is currently challenging the constitutionality of the new limitless pre-trial detention regime through the office of the Ombudsman in Hungary.

106. LEAP members from France confirmed that judges generally do comply with the 'last resort' approach and consider whether one of the 17 alternatives listed in French law are available before ordering detention. The result, however, is that many suspects are placed under judicial supervision, which is sometimes ordered too readily and many suspects remain under judicial supervision for many years as investigations are not conducted with the "special diligence" required in detention cases.

Review of pre-trial detention

107. LEAP members from both Hungary and Poland expressed concerns about the inadequate review of pre-trial detention.

108. LEAP members from Hungary acknowledged that whilst there is a regular review of pre-trial detention, both before and after the indictment is filed, it is very rare that an initial decision to detain is reversed. There is no legal obligation to make continuing pre-trial detention conditional on the investigation progressing or for a judge to raise concerns about the length of time that an investigation is taking.

109. According to LEAP members from Poland, some judges are increasingly willing to extend pre-

trial detention on the condition that progress is made in identified areas.

Special Diligence

110. At most of the 6 meetings, LEAP members referred to significant problems relating to the length of pre-trial detention:

i. In Lithuania, LEAP members suggested this is a particular cause for concern where organised crime is involved. Individuals can be held in pre-trial detention for up to 12 months in total, and in very complex or particularly voluminous cases up to 18 months. The defence has no adequate access to the case-file, which makes it impossible to monitor the progress of the investigation and challenge the decision to keep someone in detention. Lack of competence of investigators was raised as a reason for lengthy pre-trial detention, as well as the fact that charges are presented at a very preliminary stage in the investigation, when sufficient evidence has yet to be compiled. LEAP members from Lithuania also raised concerns about the length of pre-trial detention after the case has been referred to the trial court but prior to the first-instance determination as to guilt or innocence as there is no statutory limit on detention during this period.

ii. LEAP members from Greece noted that there is a tendency on the part of prosecutors and judges to make felonies out of relatively small cases in order to allow judges to impose pre-trial detention more easily. According to the law there is a strict 18 month limit on pre-trial detention, but in practice it is possible to get around this limit through the fragmentation of cases.

iii. LEAP members from Poland and France raised concerns that prosecutors habitually file for extensions without good reasons and courts often rubber-stamp their requests.

Strategic Litigation on Secreto de Sumario

In January 2014, Fair Trials International submitted a third party intervention to the European Court of Human Rights in the case of ***Gonzalez Martin v Spain.*** *The case challenges Spain's use of the* secreto de sumario *regime, which allows all or part of the information regarding the criminal charges and investigation to be kept confidential from the defendant and his lawyer, and raises the question of when such secrecy powers violate fair trial rights protected by the European Convention on Human Rights.* ***Fair Trials used knowledge of the secrecy regime gained during the LEAP meeting on pre-trial detention in Spain, together with our history of work on such cases, to inform our intervention.***

The use of secrecy powers restricts the ability of a suspect to develop an effective defence during the investigation stage, by preventing the suspect from (i) making informed decisions on whether to exercise the right to silence, (ii) contributing to the collection of exculpatory evidence, and (iii) challenging the lawfulness of the investigation. This case provided the first opportunity for Fair Trials to use the Right to Information Directive to inform the Court's jurisprudence. Fair Trials suggested that the right to be informed begins much earlier than the beginning of the trial, and should be enforceable irrespective of whether the trial has been completed and the impact on the overall fairness of the proceedings can be assessed. Fair Trials also outlined the factors – including the extent of independent judicial oversight of the secret investigation – which should be considered in order to determine whether the use of secrecy powers violates the right to a fair trial or not.

iv. According to LEAP members from Spain, the general rule is that investigations are secret as far as third parties are concerned. However, the *secreto de sumario*, which is an exceptional power, can also be employed to deprive the defence of access to the case-file. The use of *secreto* contributes to delays in the investigation phase, since it protects the prosecution from close scrutiny of the investigation. There is a lack of any robust accountability mechanism to challenge these issues.

v. LEAP members from Hungary acknowledged that prosecutors sometimes extend investigations for as long as is necessary to find evidence sufficient to obtain a conviction, with defendants remaining in pre-trial detention in the meantime. This is particularly concerning in light of the recent amendment to the Hungarian criminal procedure code which has removed the limitations on the period of pre-trial detention for murder suspects facing prison sentences of 15 years or more if found guilty.[36]

Use of pre-trial detention as a prosecution tactic

111. LEAP members from Spain underlined that pre-trial detention (together with delays in preparing for trial and *secreto de sumario*) is sometimes used as a tactic to achieve convictions because suspects were less able to defend themselves and more likely to lose resistance and cooperate or give evidence against co-accused.

112. LEAP members from France expressed a general concern regarding the impact of pre-trial detention on final sentencing by the trial court. For example, if a defendant has been detained for eight months pre-trial, the judge will often order 16 months imprisonment in a case where eight months would normally be considered sufficient punishment in relation to the facts.

113. LEAP members from Hungary and Greece participants expressed concerns that the police regularly put pressure on suspects in order to make them cooperate to avoid pre-trial detention. Suspects are promised that they will be released if they confess to the crime or sometimes they are told that they will be put in pre-trial detention or the detention will be prolonged if they do not confess.

Pre-trial detention in the United Kingdom

In 2000, HM Inspectorate of Prisons published a thematic review [...] examining the treatment and conditions for unsentenced prisoners in England and Wales. This review identified [...] that ***unconvicted and convicted unsentenced prisoners received notably poorer provision than sentenced offenders****. This was despite the additional entitlements that should be afforded to remand prisoners due to their status [...] remand prisoners commonly described receiving fewer facilities and privileges than sentenced prisoners on the enhanced level or holding certain jobs. Results from our survey also supported this, with remand prisoners revealing a poorer perception of their conditions than sentenced prisoners.*

Her Majesty's Inspectorate of Prisons, August 2012

114. LEAP members from Greece also explained that some judges seem to be using pre-trial detention as punishment for the alleged crime itself, in order to make up for the perceived inevitability of trial delays and lack of convictions.

[36] Fair Trials International, *Guest post: Pre-trial detention in Hungary*, available at: http://www.fairtrials.org/press/guest-post-pre-trial-detention-in-hungary/.

Detention conditions

115. LEAP members from Hungary complained that the poor conditions and lack of basic facilities available in pre-trial detention facilities can also put psychological pressure on suspects to cooperate. LEAP members from Greece also highlighted the inhuman conditions in Greek prisons, where pre-trial detainees are usually kept in the same overcrowded facilities as convicted persons. Defence lawyers' practice has changed to include more visits to prison because so many of their clients are held there.

Call for legislation on pre-trial detention

116. In September 2013, Fair Trials coordinated a letter from 22 non-governmental organisations to Vice-President Reding (Annex 5) to request that the Commission continue its work to tackle the problem of excessive and unjustified pre-trial detention under the next legislative agenda, including by developing a timeframe for tabling a legislative proposal setting common minimum standards for the use of pre-trial detention in the EU.[37]

117. We are pleased by the growing recognition that effective standards on pre-trial detention are key to judicial cooperation in Europe, and that setting minimum standards by law is within the EU's competence.[38] Reaffirming the call for action to address detention conditions in its resolution of December 2011, the Parliament has recently revisited the issue as part of its review of the EAW, discussed more fully below, in which it recognised that "the absence of minimum standards on such detention including regular review, its use as a last resort and consideration of alternatives, coupled with the lack of proper assessment of whether the case is trial-ready, can lead to unjustified and excessive periods of suspects and accused persons in pre-trial detention".

> *"The conclusion is that while pre-trial detention and the promotion of alternatives to pre-trial detention were identified as important issues both by Member States and civil society, proper and timely implementation of existing EU legislation is clearly the priority, before drafting new legal measures in that area. We have therefore decided to focus on the sound implementation of the Framework Decisions on Transfer of Prisoners, on Probation and Alternative sanctions and on the European Supervision Order."*
>
> ***Viviane Reding, Response to Joint Letter from 22 NGOs, 14 October 2013***

118. We are, however, disappointed by the Commission's current limited focus on the implementation of three Framework decisions – on transfer of prisoners, on probation and alternative sanctions and on the European Supervision Order – which was confirmed by Viviane Reding in her response to the joint letter referred to above. Only one of these measures – the European Supervision Order – has the potential to impact on the use of pre-trial detention (with respect to only a small number of pre-trial detainees). Further, in the Commission's implementation

[37] Joint letter on the need for further action on pre-trial detention, submitted by Fair Trials and 21 other NGOs in September 2013 (available at Annex 5 and at: http://www.fairtrials.org/wp-content/uploads/Letter-to-Viviane-Reding-on-PTD.pdf).

[38] As evidenced in 'Pre-trial Detention: the case for Urgent EU action', May 2012 http://www.fairtrials.org/documents/PTD_Update_Report_May_2012.pdf.

report published in February 2014,[39] a clear indication was given as to the lack of commitment on the part of Member States to implementing these important measures, with less than half of all Member States having implemented the Framework Decisions despite the transposition deadlines having long-passed in 2011 and 2012. Finally, LEAP members have suggested that even if the European Supervision Order was implemented by Member States, it would not provide a solution. The fact that there has been a reticence demonstrated by Member States towards implementation and that there have been concerns raised regarding the workability of the European Supervision Order emphasise the benefits of a more holistic legislative response, with the more effective scrutiny that accompanies the co-decision procedure.

Recommendations

119. We urge Member States to recognise the role of excessive and unjustified pre-trial detention in undermining efforts to create an effective system of mutual recognition of judicial decisions in the area of criminal justice. Further, we highlight the impact which the unnecessary detention of suspects and defendants prior to trial has not only on the lives of those concerned but also on the conditions in detention facilities, particularly as a result of over-crowding, and recommend that a reduction in the number of pre-trial detainees will ease the financial burden allowing for resources to be redirected to improving detention conditions.

120. We call on the Commission to respond to our call for urgent action to be taken to establish minimum legislative standards on pre-trial detention so as to reduce the excessive and unjustified use of pre-trial detention across the EU.

121. We call on the Council to include in the Strategic Guidelines a commitment to take further EU action to establish minimum and enforceable EU standards on pre-trial detention and, if further evidence of the need for legislation is required, to propose the collection of statistics on pre-trial detention to assess the use of alternatives to, and length of, pre-trial detention in Member States and the numbers of cases in which non-nationals are permitted to return home pending trial.

122. We urge lawyers to use Article 7(1) of the Right to Information Directive as a basis for requesting access to all materials relevant to the question of whether pre-trial detention is necessary in a particular case and to challenge the use of pre-trial detention where the relevant criteria are not demonstrated to have been met.

[39] See note 17 above.

Part E: Reform of the European Arrest Warrant

123. The EAW has made fundamental changes to the way extradition works within the EU. While it is vital that Member States work together to tackle crime, the EAW has resulted in avoidable cases of injustice and abuse of people surrendered by one EU country to another to face trial or serve a prison sentence.

124. Members of LEAP have worked together on extradition cases to ensure that suspects' rights are upheld in both the issuing and executing states. For many years, LEAP members have raised concerns about suspects being extradited to face trials for minor offences, to spend months in pre-trial detention or in cases when there is a real risk that their human rights will be breached, or being extradited to serve sentences imposed after trials involving serious violations of their fundamental rights.[40]

> *"These remarkable instruments of cooperation – the bridges between our different legal orders - are something that the EU should take pride in. But like any feat of engineering, the proper legal safeguards have to be built in, to make sure that the bridge is structurally sound. We have to have the safeguards, to build the trust."*
>
> **Viviane Reding, Commissioner for Justice, 21 November 2013**

125. In its 2011 report - *The European Arrest Warrant seven years on – the case for reform*[41] – Fair Trials drew on the work of the LEAP network, which first discussed the EAW in May 2009,[42] and concluded that:

    i. EAWs are being issued for minor offences and without proper consideration of whether extradition is proportionate, notwithstanding the severe human and financial costs involved;

    ii. The judicial decision not to execute an EAW is not always respected by the issuing State, resulting in repeated arrests and hearings in other countries;

    iii. EAWs are being executed despite serious and well-founded human rights concerns; and

    iv. People sought under EAWs are not being provided with legal representation in the issuing state as well as the executing state.

126. We greatly welcome the introduction of the right of a requested person to dual representation, in the issuing as well as the executing state, under Article 10 of the Access to a Lawyer Directive. We also recognise that, if effectively implemented and enforced, the Roadmap Directives will start to provide a much-needed foundation for the trust in EU countries' justice systems needed for the fair operation of the EAW scheme and other mutual recognition measures. Further work to establish the necessary minimum standards, however, is needed through completion of the remaining Roadmap measures which should provide effective human rights protections in the areas of legal aid, special protections for vulnerable suspects and the presumption of innocence (discussed above), as well as further work to prevent excessive and unjustified pre-trial detention.

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[40] Joint Letter on the Euroepan Arrest Warrant, submitted by Fair Trials International and LEAP members in October 2010, available at: http://www.fairtrials.org/documents/Letter_to_Viviane_Reding_re_EAW.pdf.

[41] Fair Trials International, *The European Arrest Warrant seven years on – the case for reform*, May 2011, available at: http://www.fairtrials.org/documents/FTI_Report_EAW_May_2011.pdf.

[42] Communiqué published after the Fair Trials International Legal Experts Advisory Panel Meeting (15 May 2009, London), The European Arrest Warrant, available at: http://www.fairtrials.org/documents/COMMUNIQUE_May_09.pdf.

Continuing disproportionate use of the EAW

Mr. A is a Polish national and a permanent resident of Finland, where he lives with his family. He was sought under an EAW from Poland to serve a 1 year prison sentence for a minor offence for which he was tried and sentenced in his absence while he was living in Finland.

Finland has refused to surrender him to Poland because he would prefer to serve the sentence in Finland, close to his family and his home, and Finland is willing to honour his wishes. However, Poland has refused to provide the necessary documents required before the judgment can be enforced in Finland. Both Finland and Poland have implemented the Prisoner Transfer Framework Decision, but Poland is unwilling to initiate the relevant proceedings. The Polish judgment will become time-barred in 2019. Until then, Mr. A cannot leave Finland without risking arrest.

127. Even if the EU is successful in creating the context of a Europe where minimum standards exist and are enforced, there will still remain a need for safeguards against misuse and overuse of mutual recognition measures, including:

    i. a requirement not to use the EAW where it is not proportionate because of the minor nature of the alleged crime, the human impact on the subject of the EAW or the availability of more proportionate alternatives;

    ii. a ground for refusal in the executing state where an EAW has been issued as part of an investigation which is not yet trial-ready, to prevent people spending months or years in prison in the requesting state before trial;

    iii. an express requirement not to surrender people under an EAW where there are well-founded human rights concerns relating to the conviction being enforced or the risk of human rights violations following surrender; and

    iv. a requirement upon issuing states to withdraw EAWs where a Member State has chosen not to execute an EAW.

128. We are delighted that the Parliament, under the stewardship of Baroness Sarah Ludford MEP, has carried out a thorough review of the operation of the EAW Framework Decision as part of an own-initiative legislative report. The report, agreed in February 2014, calls on the Commission to carry out many of the reforms outlined above to ensure that the EAW operates in compliance with the founding EU principles of proportionality and human rights.[43]

129. The report sets out clear guidance as to the legislative proposals which the Commission is required to consider, relating to:

    i. an explicit ground for refusal of a mutual recognition decision on human rights grounds;

    ii. the requirement to carry out a proportionality check before issuing a mutual recognition decision;

[43] Committee on Civil Liberties, Justice and Home Affairs, Report with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)), available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2014-0039+0+DOC+PDF+V0//EN.

iii. mutual recognition decisions being issued only by judicial authorities or with judicial oversight; and

iv. a clear requirement for remedies against decisions taken in mutual recognition procedures.

130. The first two of these legislative proposals derive from the achievements made by the Parliament during negotiations on the European Investigation Order Directive, establishing a rather different approach to mutual recognition than that adopted over a decade before when the EAW was created without the Parliament's involvement.

> *"The Euro-warrant will remain a crucial crime-fighting tool, delivering swift justice compared to previous long and cumbersome extradition procedures, ensuring that criminals cannot escape the long arm of the law by crossing into another European country. With the reforms I and my MEP colleagues are calling for – and we expect the Commission to act on – all our citizens will be able to have full confidence in its fairness as well as its effectiveness."*
>
> ***Baroness Sarah Ludford MEP, January 2014***

131. While not included in the list of legislative proposals, the report also calls on the Commission to collect from Member States comprehensive data relating to the operation of the EAW mechanism to assess what further steps are required. Further, it suggests that a regular review of non-executed EAWs should be carried out to ensure that they are withdrawn, along with the deletion of the corresponding SIS II and INTERPOL alerts, to prevent people from being left unable to move freely within the EU without the risk of future arrest and surrender. It also proposes that networks of judges, prosecutors and criminal defence lawyers should be strengthened so as to facilitate the effective functioning of the EAW regime and that training on the EAW and all related mutual recognition instruments should be provided to all parties involved in the process. Finally, and perhaps most notably given our concerns regarding the excessive and unjustified use of pre-trial detention, the Parliament calls upon the Commission to "explore the legal and financial means available at Union level to improve standards of detention including legislative proposals on the conditions of pre-trial detention".[44]

132. The involvement of the Parliament in the negotiation of new mutual recognition instruments and the review of the flagship EAW measure has resulted in a fairer approach to mutual recognition under the Stockholm Programme. We hope that the newly elected Parliament will continue to play this balancing role when its mandate commences in late 2014.

Recommendations

133. We call upon the Commission to take action upon the proposals made by the Parliament – the democratically-elected arm of the EU - to deliver much-needed reforms to the EAW to ensure that:

i. extradition does not violate fundamental human rights;

ii. its laws on defence rights provide a sound base for mutual cooperation; and

[44] Ibid, Para 17.

iii. the flaws in the operation of the EAW are addressed so it can be an instrument which the EU can be proud of.

134. Given that the Lisbon Treaty has acknowledged that the success of mutual recognition requires attention to be given to the protection of individual rights, we urge Member States to recognise that the benefits of judicial cooperation cannot continue to be enjoyed without the long overdue overhaul of a measure which was agreed in response to a specific crisis and in relation to which inadequate consideration was given to the protection of the individual and the prevention of injustice.

Part F: Continued work on fair trial rights

135. The need to improve respect for defence rights in practice, and to facilitate mutual trust and recognition between Member States, has grown no less urgent than it was when the Roadmap was first proposed in 2009.

136. Legislative action to address excessive and unjustified pre-trial detention must be a priority for the EU institutions. As explained in detail in Part D above, little progress has been made on this important issue since the Commission's Green Paper on Detention was published for consultation. The existence and application of appropriate safeguards relating to the use of pre-trial detention are key factors in the fair operation of, and public trust in, existing mutual recognition measures and legislation should therefore be seen as falling squarely within the remit of Article 82(2) of the Treaty of the Functioning of the European Union.

137. While the new package of proposals on fair trial rights published by the Commission in November 2013 is welcomed, the proposed directives do not cover all aspects of the concerns relating to the provision of legal aid and the protection of vulnerable suspects other than children. It is therefore hoped that the need for further proposals to address these issues is addressed in the Strategic Guidelines and that the requirement set out in Recital 17 of the proposed recommendation on legal aid for the Commission to assess after 48 months whether further action, including legislative measures is needed to ensure the objectives of the Recommendation are met remains within the adopted text and is complied with at the relevant time.

> *"The European council's guidelines will be decided in a Europe where Eurosceptics make their voices heard loudly and where nationalism and xenophobia are on the rise. Let us hope that the heads of states and government will demonstrate political courage and give a clear signal that Europe will not compromise on its core values. The European Union is an area of freedom, security and justice where democracy, the rule of law and respect for human rights are upheld. We should look to safeguard these principles as we develop our policies for the coming years."*
>
> ***Cecilia Malmström, Commissioner for Home Affairs, February 2014***

138. In addition to the priorities listed above, we envisage that the process of implementation of the Roadmap Directives and new mutual recognition instruments such as the European Investigation Order will make clear where gaps in protection lie and highlight the need for further work to be carried out in order to bolster the protection of fundamental rights across the EU which will be a necessary precondition of the mutual trust which underpins the success of judicial cooperation in criminal matters.

139. We envisage, for example, that it will become necessary for the EU to legislate to require the audio-recording of all police interviews so as to ensure that other rights – such as the right to interpretation and translation and the right to information – are adequately protected. Audio-recording offers an efficient, cost-effective method of ensuring that fundamental rights are protected in police stations and that accurate records of interviews are available (particularly where interpreters are used). An EU-wide system introducing this practice would significantly improve the protection of other fair trial rights which the EU recognises must be guaranteed.

Recommendation

140. We urge the Commission, Council and Parliament to ensure that the protection of fair trial rights continues to be a key feature of the Strategic Guidelines for the future of Justice and

Home Affairs Policy, and that evidence gathered during the process of monitoring the implementation of the Roadmap Directives will be used to inform decisions on where new legislation is needed to fill in any gaps in fair trial rights protection.

Part G: Concluding Recommendations

141. While significant achievements have been made under the Stockholm Programme, the EU's work to improve protection of fair trial rights within the area of freedom, security and justice is not complete. Efforts to increase and improve judicial cooperation between Member States continue, with the adoption of a new mutual recognition Directive on the European Investigation Order imminent. Further, a major proposal which envisages the establishment of an EU-wide prosecution mechanism – the European Public Prosecutor's Office - is under consideration, taking cooperation in relation to criminal justice to a level unseen within the realms of mutual recognition. A continued focus on the centrality of the citizen and individual rights to all EU law-making must be a key theme for the next five years of justice policy and we propose six ways in which this can be achieved.

Recommendation 1: Learn from the achievements under the Stockholm Programme

142. As consideration is given to the future of EU criminal justice policy, particularly in the months leading to the discussion of the Strategic Guidelines for the next five years of Justice and Home Affairs policy, we urge the Commission, Council and Parliament to reflect on the achievements in improving the protection of fair trial rights over the past five years. This should inform their decisions on priorities for the future so as to ensure that further development of judicial cooperation mechanisms continues to be accompanied by corresponding safeguards for suspects and defendants.

143. We call upon Member States to recognise that developments towards ever-closer judicial cooperation cannot continue without corresponding steps being taken to ensure the protection of fair trial rights, not least so as to protect their citizens from being unjustly treated at the hands of another Member State.

144. We urge the judiciary of every Member State to recognise the new role with which it has been vested as enforcer of EU law in domestic systems but also as having responsibility for seeking clarifications and consistency regarding the interpretation of EU law and its interaction with domestic law through active involvement in the important role of judicial conversation with the CJEU.

Recommendation 2: Make existing laws work in practice

145. We urge the Commission, Council and Parliament to recognise the significant achievements which have been made in reaching agreement on the Roadmap Directives and the potential for them to make a real improvement to the operation of mutual recognition measures, and the treatment of suspects and defendants more broadly, provided that they are implemented effectively.

146. We call upon the Commission to ensure that the Roadmap Directives are implemented effectively, in both law and practice, by working with Member States as they transpose them at a domestic level; monitoring, with the input of civil society organisations where necessary, the effectiveness of implementation in practice (encouraging best practice and challenging poor practice); encouraging effective training programmes for government officials, interpreters and translators, judges, police, prosecutors and lawyers; and taking enforcement action against Member States where necessary.

147. We hope that Member States will prioritise not only timely but also accurate transposition and effective implementation of the Roadmap Directives, acknowledging where changes to national law and practice are required in order to comply with these new measures.

148. While recognising the important role of civil society organisations in mainstreaming training on the Roadmap Directives and developing a training curriculum which can be replicated widely, we urge national bar associations in Member States to support this work by informing criminal defence lawyers of the existence, content and applicability of the Roadmap Directives so that they can use the measures to benefit their day-to-day practice.

Recommendation 3: Agree and adopt new directives on fair trial rights

149. We were pleased to learn that the Commission has published a new package of proposals on procedural rights by way of completion of the Roadmap. Fair Trials has repeatedly called for the continuation of action to establish effective minimum standards on fair trial rights in the EU, including recently in a joint letter to Vice-President Reding in July 2013. LEAP members and Fair Trials look forward to working with the EU Institutions and other civil society organisations during negotiations on the new laws, to ensure they provide the human rights protections needed to establish an area of freedom, security and justice within Europe.

150. We call upon the Commission, Council and Parliament to ensure that the completion of the Roadmap remains a priority and that work on the new procedural rights proposals continues during the mandates of the new Commission and Parliament.

151. We urge Member States to recognise that work on the remaining proposals is an important continuation of the process which started with the first three Roadmap Directives and which requires the agreement of these further measures to prevent the initial achievements from being undermined.

Recommendation 4: Take legislative action to address excessive and unjustified pre-trial detention

152. We urge Member States to recognise the role of excessive and unjustified pre-trial detention in undermining efforts to create an effective system of mutual recognition of judicial decisions in the area of criminal justice. Further, we highlight the impact which the unnecessary detention of suspects and defendants prior to trial has not only on the lives of those concerned but also on the conditions in detention facilities, particularly as a result of over-crowding, and recommend that a reduction in the number of pre-trial detainees will ease the financial burden allowing for resources to be redirected to improving detention conditions.

153. We call on the Commission to respond to our call for urgent action to be taken to establish minimum legislative standards on pre-trial detention so as to reduce the excessive and unjustified use of pre-trial detention across the EU.

154. We call on the Council to include in the Strategic Guidelines a commitment to take further EU action to establish minimum and enforceable EU standards on pre-trial detention and, if further evidence of the need for legislation is required, to propose the collection of statistics on pre-trial detention to assess the use of alternatives to, and length of, pre-trial detention in Member States and the numbers of cases in which non-nationals are permitted to return home pending trial.

155. We urge lawyers to use Article 7(1) of the Right to Information Directive as a basis for requesting access to all materials relevant to the question of whether pre-trial detention is necessary in a particular case and to challenge the use of pre-trial detention where the relevant criteria are not demonstrated to have been met.

Recommendation 5: Reform the European Arrest Warrant

156. We call upon the Commission to take action upon the proposals made by the Parliament – the democratically-elected arm of the EU - to deliver much-needed reforms to the EAW to ensure that:

    i) extradition does not violate fundamental human rights;

    ii) its laws on defence rights provide a sound base for mutual cooperation; and

    iii) the flaws in the operation of the EAW are addressed so it can be an instrument which the EU can be proud of.

157. Given that the Lisbon Treaty has acknowledged that the success of mutual recognition requires attention to be given to the protection of individual rights, we urge Member States to recognise that the benefits of judicial cooperation cannot continue to be enjoyed without the long overdue overhaul of a measure which was agreed in response to a specific crisis and in relation to which inadequate consideration was given to the protection of the individual and the prevention of injustice.

Recommendation 6: Continue to identify the need for EU work to improve protection of fair trial rights

158. We urge the Commission, Council and Parliament to ensure that the protection of fair trial rights continues to be a key feature of the Strategic Guidelines for the future of Justice and Home Affairs Policy, and that evidence gathered during the process of monitoring the implementation of the Roadmap Directives will be used to inform decisions on where new legislation is needed to fill in any gaps in fair trial rights protection.

ANNEX 1: MEMBERS OF THE LEGAL EXPERTS ADVISORY PANEL

NO.	NAME	COUNTRY	CATEGORY	INSTITUTION
1.	Aldis Alliks	Latvia	Legal Practitioner	VARUL
2.	Catharine Almond	Ireland	Legal Practitioner	Sheehan & Partners
3.	Liesbeth Baetens	The Netherlands	Legal Practitioner	Faber Inter
4.	Wouter van Ballegooij	The Netherlands	Academic	European Parliament
5.	João Barroso Neto	Portugal	Legal Practitioner	Carlos Pinto de Abreu e Associados
6.	Rodrigo Barbosa Souto	Portugal	Legal Practitioner	N/A
7.	Rachel Barnes	UK	Legal Practitioner	Three Raymond Buildings
8.	Mátyás Bencze	Hungary	Academic	University of Debrecen
9.	Jodie Blackstock	UK	Legal Practitioner	JUSTICE
10.	Ines Bojić	Croatia	Legal Practitioner	Law Office Ines Bojić
11.	Myrddin Bouwman	The Netherlands	Legal Practitioner	Van Appia & Van der Lee
12.	Inga Botyriene	Lithuania	Legal Practitioner	I. Botyrienės ir R.A. Kučinskaitės Vilniaus advokatų kontora
13.	James Brannan	UK/France	Interpreter	European Court of Human Rights
14.	Danut-Ioan Bugnariu	Romania	Legal Practitioner	Bugnariu Avocati

NO.	NAME	COUNTRY	CATEGORY	INSTITUTION
15.	Cristinel Buzatu	Romania	NGO Representative	APADOR
16.	Jaime Campagner Muñoz	Spain	Legal Practitioner/Academic	Bufete, Valdivia & Campagner/University of the Balearic Islands
17.	Theodora Christou	UK	Academic/NGO Representative	Various
18.	Ben Cooper	UK	Legal Practitioner	Doughty Street Chambers
19.	Vania Costa Ramos	Portugal	Legal Practitioner	Carlos Pinto de Abreu e Associados
20.	Scott Crosby	Belgium	Legal Practitioner	Kemmler Rapp Böhlke & Crosby
21.	Sarah De Mas	UK	NGO Representative	N/A
22.	Anand Doobay	UK	Legal Practitioner	Peters & Peters Solicitors LLP
23.	Deirdre Duffy	Ireland	NGO Representative	Irish Council For Civil Liberties
24.	Robert Eagar	Ireland	Legal Practitioner	Sheehan & Partners
25.	Andrejs Elksnins	Latvia	Legal Practitioner	S. Varpins and A. Elksnins Law Office Latvia
26.	Joanna Evans	UK	Legal Practitioner	25 Bedford Row
27.	Mike Evans	UK	Legal Practitioner	Kaim Todner Solicitors Ltd
28.	Henry Feltenstein	Spain	Legal Practitioner	Corporate Defense
29.	Hans Gaasbeek	The Netherlands	Legal Practitioner	Lawyers Without Borders

NO.	NAME	COUNTRY	CATEGORY	INSTITUTION
30.	Cliff Gatzweiler	Germany	Legal Practitioner	N/A
31.	Markku Fredman	Finland	Legal Practitioner	Fredman & Mansson
32.	George Gebbie	UK	Legal Practitioner	Black Chambers
33.	Orestis Georgiadis	Greece	Legal Practitioner	Goulielmos D. & Partners
34.	Carlos Gómez-Jara	Spain	Legal Practitioner	Corporate Defense
35.	Edward Grange	UK	Legal Practitioner	Hodge Jones and Allen
36.	Antonio Graziadei	Italy	NGO Representative	Avocats Sans Frontières Italy
37.	Alexandru Grosu	Romania	Legal Practitioner	Grosu & Asociaţii Advocats
38.	Fulvia Guardascione	Italy	Legal Practitioner	Studio Legale Vetrano
39.	Arturas Gutauskas	Lithuania	Legal Practitioner	VARUL
40.	Aurelijus Gutauskas	Lithuania	Academic/Legal Practitioner	Mylokolas Romeris University; Justice of the Supreme Court of Lithuania
41.	Marie Guiraud	France	Legal Practitioner	N/A
42.	Diana-Olivia Hatneanu	Romania	Legal Practitioner	Hatneanu Diana-Olivia Law Office
43.	Sanna Herlin	Sweden	Legal Practitioner	Tre Advokater

NO.	NAME	COUNTRY	CATEGORY	INSTITUTION
44.	Liam Herrick	Ireland	NGO Representative	Irish Penal Reform Trust
45.	Jacqueline Hodgson	UK	Academic	University of Warwick
46.	Lidija Horvat	Croatia	Legal Practitioner	N/A
47.	Paolo Iorio	Italy	Legal Practitioner	Avocats Sans Frontières Italy
48.	Marion Isobel	Hungary/Australia	NGO Representative	Open Society Justice Initiative
49.	Erika Jamborne	Hungary	Academic	University of Miskolc
50.	Mar Jimeno-Bulnes	Spain	Academic	Universidad de Burgos
51.	John Jones Q.C.	UK	Legal Practitioner	Doughty Street Chambers
52.	Andras Kadar	Hungary	NGO representative	Hungarian Helsinki Committee
53.	Dinko Kanchev	Bulgaria	Legal Practitioner	Bulgarian Lawyers for Human Rights Foundation
54.	Liese Katschinka	Netherlands	NGO Representative	EULITA
55.	Natacha Kazatchkine	Belgium	NGO Representative	Amnesty International
56.	Hans Kjellund	Denmark	Legal Practitioner	Advokaterne Sankt Knuds Torv P/S
57.	Marije Knapen	Netherlands	Academic	Avans Centre for Public Safety and Criminal Justice, University of Tilburg
58.	Titia Korff	Netherlands	Legal Practitioner	Pijnenburg Advocaten

NO.	NAME	COUNTRY	CATEGORY	INSTITUTION
59.	Maciej Kuśmierczyk	Poland	Academic/ Legal Practitioner	University of Warsaw; Kuśmierczyk
60.	Ondrej Laciak	Slovakia	Legal Practitioner	Laciak Law Office
61.	Bas Leeuw	Netherlands	Academic	University of Leiden
62.	Karolis Liutkevičius	Lithuania	NGO Representative	Lithuania Human Rights Monitoring Institute
63.	Christiaan Luyckx	Belgium	Legal Practitioner	Van Alsenoy & Partners
64.	Gabor Magyar	Hungary	Legal Practitioner	Magyar György és Társai
65.	Asya Mandjukova	Bulgaria	Legal Practitioner	Georgieva, Petrov, Nenkov, Georgiev Law Firm
66.	Katerina Mantouvalou	UK	Academic	European Social Policy Group , ICF GHK's
67.	Christophe Marchand	Belgium	Legal Practitioner	JusCogens avocats-advocaten
68.	Panayota Massouridou	Greece	Legal Practitioner	N/A
69.	Gary McAteer	Scotland	Legal Practitioner	Beltrami and Company
70.	David McKie	Scotland	Legal Practitioner	Levy & McRae Solicitors
71.	Hugh Mercer Q.C.	UK	Legal Practitioner	Essex Court Chambers
72.	Christian Mesia	Spain	Legal Practitioner	RCD Legal & Tax Advisors

NO.	NAME	COUNTRY	CATEGORY	INSTITUTION
73.	Jonathan Mitchell	UK	Legal Practitioner	25 Bedford Row
74.	Ellen Ruth Moerman	Netherlands	Academic/ Interpreter	N/A
75.	Nuala Mole	UK	NGO Representative	AIRE Centre
76.	Sofia Monge	Portugal	Legal Practitioner	Carlos Pinto de Abreu e Associados
77.	Grace Mulvey	Ireland	NGO Representative	Irish Council For Civil Liberties
78.	Ondřej Múka	Czech Republic	Legal Practitioner	Advokatni Kancelar
79.	Patrick Musters	UK	Legal Practitioner	Andrew Keenan and Co
80.	Karla Nahtigal	Slovenia	Legal Practitioner	Nahtigal Ltd
81.	Zaza Namoradze	Hungary	NGO Representative	Open Society Justice Initiative
82.	Anders Németh	Denmark	Legal Practitioner	Advokatselskabet Anders K Németh
83.	Fernando Niembro	Spain	Legal Practitioner	Estudio Juridico
84.	Ali Norouzi	Germany	Legal Practitioner	Widmaier Norouzi Rechtsanwälte
85.	Anna Ogorodova	Netherlands	Academic	University of Maastricht
86.	Raphaele Parizot	France	Academic	L'Université Paris 1 Panthéon – Sorbonne

NO.	NAME	COUNTRY	CATEGORY	INSTITUTION
87.	Neil Paterson	UK/Belgium	NGO Representative	Steunpunt Algemeen Welzijnswerk
88.	Roumen Petrov	Bulgaria	Legal Practitioner	Georgieva, Petrov, Nenkov, Georgiev Law Firm
89.	Nicholas Philpot	UK	Legal Practitioner	N/A
90.	Mikolaj Pietrzak	UK	Legal Practitioner	Pietrzak & Sidor
91.	Matthew Pinches	UK	NGO Representative	Prisoners Abroad
92.	Renata Pinter	UK	Legal Practitioner	Tuckers Solicitors
93.	Ilvija Puce	Latvia	Legal Practitioner	Latvian delegate for the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
94.	Georgios Pyromallis	Greece	Legal Practitioner	George Pyromallis Law office
95.	Jozef Rammelt	Netherlands	Legal Practitioner	Keizer Advocaten
96.	Olivier Rangeon	France	Legal Practitioner	N/A
97.	Tunde Marika Renner	Romania	Legal Practitioner	N/A
98.	Dara Robinson	Ireland	Legal Practitioner	Sheehan & Partners
99.	Federico Romoli	Italy	Legal Practitioner	Studio Legale Romoli

NO.	NAME	COUNTRY	CATEGORY	INSTITUTION
100.	Daniel Roos	Sweden	Legal Practitioner	Advokatfirman Sederholm
101.	Erika Roth	Hungary	Academic	N/A
102.	Zuzanna Rudzińska	Poland	Legal Practitioner	Wardyński & Partners
103.	Maria Chiara Ruzza	Italy	NGO Representative	Avocats Sans Frontiers Italy
104.	Nadine Sant	Malta	Legal Practitioner	Great James Street Chambers
105.	Roby Schons	Luxembourg	Legal Practitioner	Barreau du Luxembourg
106.	Stefan Schumann	Austria	Academic	Johannes Kepler University
107.	Jeroen Soeteman	Netherlands	Legal Practitioner	Jebbink Soetetman
108.	Demetra Sorvatzioti	Cyprus	Academic	University of Nicosia
109.	Elias Stephanou	Cyprus	Legal Practitioner	KSCP Juris
110.	Dominika Stępińska-Duch	Poland	Legal Practitioner	Wardyński & Partners
111.	Brian Storan	UK	Legal Practitioner	N/A
112.	Jakub Tamborski	Poland	Legal Practitioner	Jakub Tamborski Law Firm
113.	Martynas Tamošaitis	Lithuania	Legal Practitioner	APB Meidus ir Juzukonis
114.	Jaanus Tehver	Estonia	Legal Practitioner	Tehver & Partners

NO.	NAME	COUNTRY	CATEGORY	INSTITUTION
115.	Rolandas Tilindis	Lithuania	Legal Practitioner	Baltic Legal Solutions Lithuania
116.	Karen Todner	UK	Legal Practitioner	Kaim Todner
117.	Janusz Tomczak	Poland	Legal Practitioner	Wardyński & Partners
118.	Balázs Tóth	Hungary	NGO Representative	Independent expert on prison conditions
119.	Dominique Tricaud	France	Legal Practitioner	Tricaud-Traynard Avocats Associés
120.	Alexandros Tsagkalidis	Greece	Legal Practitioner	Anagnostopoulos Law Firm
121.	Han Vallenduuk	Netherlands	Legal Practitioner	Vallenduuk Advocaten
122.	Jørn Vestergaard	Denmark	Academic	University of Copenhagen
123.	Marianne Wade	UK	Academic	University of Birmingham
124.	Wafa Shah	UK	Legal Practitioner	Doughty Street Chambers
125.	Oliver Wallasch	Germany	Legal Practitioner	Wallasch & Koch
126.	Johanna Wöran	Austria	Legal Practitioner	Deutscher Bundestag
127.	Sabine Zanker	Germany/UK	Legal Practitioner	Hibiscus

FAIR TRIALS INTERNATIONAL

COMMUNIQUÉ

issued after the meeting
ADVANCING DEFENCE RIGHTS IN THE EU
20 February 2013
at the offices of the Open Society Institute, Budapest

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CLIFFORD
CHANCE

Introduction

1. On 20 February 2013, Fair Trials International (**FTI**) brought together leading experts (a list of participants is provided in the Annex) in criminal justice from Austria, Bulgaria, Germany, Hungary and Romania to share information and develop practical strategies to improve respect for defence rights in the EU. The objective of the meeting was to learn about how the new Directives adopted under the Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings[1] (the **Roadmap**) on the right to interpretation and translation and on the right to information in criminal proceedings (together, **the Roadmap Directives**) will help address fair trial issues in those countries. We also wanted to hear about what problems the draft Directive on access to a lawyer and to communicate on arrest might alleviate. We wanted to: (i) find out what is being done to implement the new laws; (ii) think about ways to develop in-country training programmes to inform practitioners about them; and (iii) look at opportunities to work with domestic bodies to ensure that the Roadmap Directives have maximum effect. In particular, we wanted to identify the key issues that training on the new laws should address, the key targets for the training and the best geographical location and timing for the programmes.

2. The group met for a full day at the offices of the Open Society Institute in Budapest. Prior to the meeting, the group was provided with a detailed discussion pack and asked to reflect on the Roadmap Directives and how they could most effectively be implemented, as well as possible challenges drawing on the Roadmap Directives in the higher domestic courts and ways in which references for preliminary rulings from the Court of Justice of the European Union (**CJEU**) could provide greater clarity. These topics were then discussed at the meeting. The remainder of this communiqué outlines the key points raised in the meeting and the key conclusions reached.

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

3. The Directive on the right to interpretation and translation in criminal proceedings (the **Interpretation Directive)**, which was adopted in October 2010, must be transposed into the national law of every Member State by October 2013. The Interpretation Directive will help ensure that nobody is denied a fair trial because they do not understand the language in the country in which they are arrested.[2]

4. **Austria:** No formal qualification is required to act as an interpreter in criminal proceedings in Austria. The law does provide that qualified and certified interpreters should be used if possible, and in 2011 an agency administered by the Ministry of Justice was established to provide interpretation services in criminal proceedings in preparation for implementation of the Interpretation Directive. However, the law does not require interpreters registered with the agency to obtain a particular qualification.

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

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

5. There is a very limited right to written translations of key documents, including the indictment, the final court decision and any decision by an appellate court. If the indictment is interpreted orally, is considered to be easily understandable and the fairness of the trial is not affected then a written translation does not have to be provided. Defendants are only entitled to written translations of parts of the file if they are not represented by a lawyer and if they can establish a specific reason as to why it is necessary; if they have a lawyer, then he or she is expected to explain the documents with the assistance of an interpreter. While the translation itself is free of charge, copies of the documents must be paid for.

6. **Bulgaria:** Suspects are entitled to interpretation free of charge under Bulgarian law, but in practice it is not always provided. There is a lack of availability of interpreters, and in some cases it is not possible to cater for even common EU languages such as Italian. Participants reported that police are often unwilling to try to find interpreters if they are not readily available and will not wait for them to arrive before starting questioning. Interpreters are also unwilling to travel long distances because they are not paid for travel costs or time. There is a register of official interpreters and translators in Bulgaria, but there is very little quality control and no specific standards must be met in order to obtain a licence. Defendants are entitled to written translations of indictments, decisions on detention, the verdict and any decision by an appellate court. However, there is no right to request any additional documents. Further, there is no general right of appeal if suspects are denied interpretation or translation.

7. **Hungary:** In Hungary, the police usually appoint and pay interpreters and, due to this financial dependence, participants reported concerns that interpreters will sometimes try to influence suspects to confess or otherwise cooperate with the police. The interpreters in police stations are also often of a particularly low quality. As private interpreters are not permitted into police stations, lawyers and clients may not be able to speak openly to each other due to the lack of independence of the interpreter. This is especially the case for less common languages because, if a qualified interpreter of a language is not available, any other person with "sufficient knowledge" of the given language may be appointed.

8. Defendants have the right to written translations of indictments, charges and court decisions free of charge but must pay for translations of any other documents to which they have access. There was concern that this is not in compliance with the Interpretation Directive, which requires that defendants be provided with translations of all documents that are needed to enable them to exercise their right of defence.[3] In practice, oral rather than written translations are sometimes provided for decisions extending pre-trial detention. Challenges are occasionally brought about the quality of interpretation or translation, but they are almost never successful.

9. **Germany:** Germany has separate laws and budgets for interpretation and translation in police stations and at the court stage of proceedings. Interpreters at police stations are paid less and, as a result, the quality is often unsatisfactory. Participants reported that they will therefore

[3] See Article 3(1) of the Interpretation Directive

sometimes advise clients to remain silent to avoid confusion caused by poor interpreting. Court interpreters are paid a higher rate set by statute and are of a much better standard.

10. Germany has published a draft law to implement the new Interpretation Directive. While it contains the right to interpretation free of charge, it makes no mention of quality.[4] The draft law does provide for translation of key documents, but it relies on the exception in Article 3(7) of the Interpretation Directive[5] to provide that these only need to be provided in writing if the defendant is not represented. It was agreed that this cost-saving decision has resulted in an unacceptably low standard of implementing legislation and that further work is needed to determine whether it is compliant with the Interpretation Directive.

11. **Romania:** While suspects do have the right to free interpretation under Romanian law, police often try to make suspects pay for private interpreters due to a lack of resources. When a rare language is needed, experts such as university professors may be used, but because police only have 24 hours to carry out initial questioning, there can be logistical difficulties if the person has to travel from Bucharest. As a result, suspects may be forced to accept interpretation in a widely spoken language such as English. In the courts, standards are higher and anyone who needs an interpreter is given one free of charge. There is a list of authorised court interpreters, but there is no organised professional body and, as a result, it is very difficult to complain about poor quality.

12. **The main problems that participants identified with interpretation and translation in criminal proceedings in their jurisdictions are:**
    - The lack of independence of interpreters, who often rely on the police for work and payment, is a problem in Bulgaria and Hungary.
    - Participants from Austria, Bulgaria, Hungary and Romania reported concerns about the inadequate quality of interpreters and the fact that there is often no requirement for a formal qualification before registering as an interpreter or no requirement that certified interpreters be used in criminal proceedings. In Hungary there are additional concerns about the ability of the police to appoint anyone with 'sufficient knowledge' of a given language as an interpreter.
    - There are difficulties in catering for rare languages, especially in remote areas. While participants felt that video-conferencing could provide a solution for the logistical problems that rare languages can cause, it was agreed that facilities for this were some way off in many of the countries in question. The use of telephones was considered to be better than continuing with no interpretation, but it was clear that the presence of an interpreter in person was preferable.
    - The standards of interpretation at police stations are often lower than in courts. This is a particular problem in Germany and Romania where different systems are in place for police stations and court proceedings.

[4] Article 8 of the Interpretation Directive states that interpretation must be of quality sufficient to safeguard the fairness of the proceedings.
[5] This allows for an oral translation or summary of a document where this does not prejudice the fairness of proceedings.

- Austria, Bulgaria and Hungary only provide translations of a limited list of documents, and there is often no right to appeal this or to request additional documents. There is also a problem in Austria and Germany with oral, rather than written translations, being provided, especially when the defendant has a lawyer.
- Participants from Austria reported that, in order to get a file translated, defendants must pay for a copy of the file. This means that translations are not, in practice, provided free of charge.
- There are insufficient provisions to enable suspects and defendants to complain about the quality of interpretation or translation or to appeal where it has not been provided or is inadequate. Participants agreed that audio-recording of police interviews would help with this problem because it would provide an accurate record of the interpretation. Of the countries present, only Hungary currently has audio-recording available, but only on request and upon payment in advance by the suspect.

B. Directive on the right to information in criminal proceedings

13. The Directive on the right to information in criminal proceedings (the **Right to Information Directive**), the second law under the Roadmap, was adopted in May 2012. It must be implemented in the domestic law of every EU Member State by June 2014. The Right to Information Directive will help ensure that people arrested in the EU are provided with key information about basic legal rights and the charges against them.[6]

14. **Austria:** In Austria, suspects are given oral information about their rights before police questioning and are then given a written letter of rights following arrest or detention. The written information is very long and complex and there were concerns that it is difficult for suspects to understand.

15. Both defendants and their lawyers have the right to access the case file. This right is absolute in relation to accessing information necessary to challenge the lawfulness of detention, although in other cases it can be derogated from if there are concerns that it will interfere with the investigation.[7] It is possible to challenge a refusal to disclose the case file. However, in practice, there are some difficulties in gaining effective access because defendants must pay for copies of the file before inspecting it. This can be very expensive (up to 60 cents per page). Participants told us that some court officials will allow defendants or their lawyers to take pictures of the file without charge.

16. **Bulgaria:** In the first 24 hours after arrest at the police station there is only a limited legal obligation on the police to provide information about rights. In practice, however, (although not required by law) the police usually provide a booklet which lists basic rights in several European

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

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

languages that has been published by the Open Society Justice Initiative. Once criminal charges are brought, the system is more regulated and a letter of rights is provided.

17. Limited access to the case file is granted during the early stages of criminal proceedings. This right is absolute in relation to information necessary to challenge the lawfulness of detention, although in other cases it can be derogated from if there are concerns that access will interfere with the investigation. Once the police investigation is complete, both suspects and lawyers are granted full access to the case file (without derogation), although the file can only be inspected in the premises of the investigating authorities or the court building. Copies are only permitted at the trial stage, but the defendant must pay for these.

18. **Germany**: Germany has published draft implementing legislation for the Right to Information Directive which participants considered to be of a good standard. The new legislation will improve the information suspects are given about their rights in criminal proceedings in Germany. Information about the right to access the case file has been included in the draft letter of rights. However, even under the new law, due to concerns about protecting the original documents, access to the entire written case file is only granted if defendants have a lawyer. Unrepresented suspects are only informed about their right to request oral information about the case file and copies of certain documents. FTI agreed to circulate the draft legislation to other countries and to see if an English translation could be produced.

19. **Hungary:** In Hungary, suspects are informed orally about their basic procedural rights (mainly the right to silence) before police questioning. No letter of rights is provided, and the only written information about rights is in the official minutes of the police interview, which are not provided until later in the proceedings and only on request.

20. There is a limited right to access the case file during the investigative phase. There is an absolute right to access experts' opinions and minutes of questioning of the suspect and defence witnesses, but for all other information there is an exception where access would impact on the interests of the investigation. This derogation is widely invoked and applies to all information, including information necessary to challenge pre-trial detention. This can mean that suspects' pre-trial detention is extended with no right for the defence to see the information that justified the extension, and with only very general reasons provided by the court. It was widely agreed that legislative reform will be needed to ensure compliance with the Right to Information Directive.[8]

21. **Romania**: Participants estimated that suspects are only given information about their rights in about twenty percent of cases in Romania. There is no standard letter of rights and only very basic information is provided. It is very difficult to challenge a failure to provide information about rights.

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

22. There is a right to access the prosecution file, but no copies can be made meaning that lawyers may have a very limited amount of time to read a long and detailed file. Copies of the court file can be made, but this only contains the information that is heard during the court proceedings and will often not include evidence that could help the defendant. Legislative changes will be needed to ensure compliance with the Right to Information Directive.

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

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

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

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

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

26. **Bulgaria:** The laws in Bulgaria provide for effective access to a lawyer but in practice there are numerous problems. The police are reluctant to help suspects find a lawyer, and where they do,

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

they will often recommend someone with whom they work closely, in some cases former policemen. There is no right to appeal against a refusal of access to a lawyer.

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

28. **Hungary:** Access to a lawyer is provided on arrest in Hungary, although participants told us that if a suspect cannot afford to pay for representation then the lawyer is appointed by the police who tend to favour those who are more likely to advise their client to cooperate. A number of lawyers are former policemen, and others are financially dependent on work from police, leading to concerns that their independence may be compromised. Police-appointed lawyers are often of low quality and sometimes fail to attend hearings. For juvenile suspects and those suspected of serious crimes, legal representation at the police station is mandatory. Police are supposed to give lawyers sufficient notice to prepare for police questioning, but will often try to circumvent this by sending a fax during the night or phoning when they know the lawyer will be unavailable. The Constitutional Court has recently held that police must give lawyers sufficient notice to enable them to attend the police station, which will hopefully remedy this problem.[10]

29. Confidentiality between lawyers and their clients is protected under Hungarian law, but in practice surveillance is widespread. Participants said that they do not usually speak to their clients, but write questions down and ask them to respond in writing. One of the biggest problems with access to a lawyer in Hungary is the lack of resources available for legal aid. Lawyers are paid as little at EUR10 per hour for attending a police station.

30. **Romania:** The lack of resources available for legal aid in Romania means that only inexperienced or low quality lawyers with limited other work will take on the cases. Participants suggested that after a certain number of years of practice, lawyers should have to take on a minimum number of legal aid cases per year to try and raise standards. Confidentiality between lawyers and their clients is protected under Romanian law and can only be derogated from in line with very limited exceptions on grounds of national security. In reality, however, participants told us that surveillance is standard practice and they assume that their conversations with their clients are recorded.

31. **The main problems that participants identified with access to a lawyer in their jurisdictions are:**
    - Participants from Bulgaria and Hungary reported that where suspects do not have their own lawyer, police will often contact lawyers who they know well and who are likely to advise their client to cooperate. These lawyers are sometimes former policemen.
    - In Hungary, police often do not give lawyers sufficient notice to enable them to get to the police station in time for initial questioning, although this problem may be addressed by a recent Constitutional Court ruling.

[10] Decision no 8/2013 (III.1.) of the Hungarian Constitutional Court.

- Despite relatively strong laws protecting confidentiality between lawyers and their clients in all the countries, it was reported that in Hungary and Romania the police regularly carry out surveillance of conversations.
- There is a lack of resources available for legal aid in all the countries represented at the meeting, and the standard of advice given in these cases can be very low.

D. Key recommendations

32. **Implementation:**
    - Participants expressed concern that Governments may implement the wording of the Roadmap Directives without giving adequate consideration to any steps that must be taken in practice to make them work in conjunction with existing national laws and ensure effective implementation. The result is that technically implementation has taken place, but courts, judges, lawyers and suspects are unaware of the new laws and do not know how to use or implement them. It was therefore agreed that proper training and lobbying of national governments to ensure careful implementation is essential.
    - Work is needed to establish exactly what the Interpretation Directive requires in terms of the quality of interpretation and translation. In particular, if the disparity in standards of interpretation between courts and police stations remains once the Interpretation Directive has come into force, then a referral to the CJEU in relation to whether this is compatible with the Directive could be valuable.
    - Implementing legislation for the Interpretation Directive must ensure the independence of interpreters. Participants agreed that independent regulated bodies of interpreters should be set up to monitor standards and process complaints, and that suspects should be able to select from a list of qualified interpreters.
    - Clarification is needed as to what information must be provided to suspects about their rights and the level of access to the case file required by the Right to Information Directive. In particular, work is needed to establish exactly how wide the exceptions can be under the Roadmap Directives (for example when oral rather than written translations can be provided) and this in an area in which references to the CJEU may be valuable.
    - Once the German implementing legislation for the Roadmap Directives is finalised, translations should be prepared and circulated.
    - Once the Roadmap Directives are in force, FTI would be keen to work with people on preliminary references to the CJEU and to identify areas in which the Commission might bring infringement proceedings. Participants agreed to support FTI in these efforts.

33. **Domestic awareness and training:**
    - Articles should be written in domestic publications that defence lawyers routinely receive to raise awareness of the Roadmap Directives. FTI can assist with drafting these articles.
    - Participants agreed that, in order to attract high quality candidates, training about implementation must be timely and relevant to the participants. It was felt that the best time to conduct the training courses would be around the implementation date of the Interpretation Directive. This would enable people to apply the knowledge gained in their

practice immediately and also to be well prepared for the implementation of the Right to Information Directive several months later.

- Training is usually focussed on judges and prosecutors. Defence lawyers are unable to attend due to the cost and because they cannot spend time away from their practice during the week.
- Participants agreed that summer or weekend courses would be a good way to train defence practitioners, ideally with some form of accreditation enabling it to count towards the professional development requirements for the year.
- Participants felt that training courses would be most effective if they focus on the practical use of the new laws and use real examples. FTI is intending to produce a number of worked examples and sample submissions, which participants agreed would be very useful.
- Local bar associations should be engaged to ensure that training happens throughout the Member States and not just in the main cities.

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

ANNEX

PARTICIPANTS

(alphabetical order)

Attendees

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

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

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

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

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

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

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

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

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

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

Stefan Schumann is a researcher and a lecturer at the University of Linz, Austria. He is qualified as a lawyer in Germany and has worked as an expert for the European Union in the field of criminal

procedural law. His research focuses on transnational criminal justice, criminal law and European law. His recent studies focused on suspects' rights and on the transfer of prisoners..

Apologies

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

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

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

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

FAIR TRIALS INTERNATIONAL STAFF

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

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

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

FAIR TRIALS INTERNATIONAL

COMMUNIQUÉ

issued after the meeting

'ADVANCING DEFENCE RIGHTS IN THE EU'

10 May 2013, Vilnius, Lithuania

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Introduction

1. On 10 May 2013, Fair Trials International ('**Fair Trials**') brought together leading experts (a list of participants is provided in the Annex) in criminal justice from the Czech Republic, Estonia, Latvia, Lithuania and Poland (the '**Expert Group**'). The objective of the meeting was to learn about how the new Directives adopted under the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (the '**Roadmap**') on (A) interpretation and translation; (B) the right to information; and (C) access to a lawyer in criminal proceedings (together, the '**Roadmap Directives**') could help address fair trial issues in those countries.

2. We wanted to: (i) find out to what extent national law and practice already complies with the Roadmap Directives, where it needs improving and what is being done to implement them; (ii) think about ways to develop in-country training programmes to inform practitioners about the Roadmap Directives; (iii) look at opportunities to work with domestic bodies to ensure that the Roadmap Directives have maximum effect. In particular, we wanted to identify the key issues that training on the new laws should address and the key targets, locations and timing for such training.

3. The Expert Group met for a full day in Vilnius, Lithuania. Prior to the meeting, participants were provided with a detailed discussion pack and asked to reflect on the Roadmap Directives and how they could most effectively be implemented, as well as possible litigation drawing on the Roadmap Directives in the higher domestic courts and ways in which references for preliminary rulings from the Court of Justice of the European Union (the '**CJEU**') could provide greater clarity. These topics were then discussed at the meeting. The remainder of this communiqué outlines the key points raised in the meeting and the key conclusions reached.

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

4. The Directive on the right to interpretation and translation in criminal proceedings (the '**Right to Interpretation and Translation Directive**'),[1] which was adopted in October 2010, must be transposed into the national law of every Member State by October 2013. The Right to Interpretation and Translation Directive seeks to ensure respect for the right to a fair trial by ensuring adequate interpretation and translation when the person does not understand the language of the criminal proceedings.[2]

Czech Republic

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

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

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

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

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

Estonia

7. There is no certification requirement for interpreters and translators. The courts, prosecutors, and police have a general obligation to guarantee interpretation, but there are virtually no statutory provisions on the quality of the service. Whilst sworn translators are regulated by the Sworn Translators Act, which sets out requirements relating to examinations, evaluations and ethical conduct, there is no requirement to use sworn translators in criminal proceedings. The number of languages covered by sworn translators is relatively small (presently, only English, Russian, Finnish, German, French, Spanish, and Italian language translators are available) with most languages being represented by only one or two individual translators/interpreters. In practice, therefore, it becomes necessary to use unregulated translators in many cases.

8. For unregulated translators and interpreters, the only quality control mechanism is the potential for being cautioned for incorrect interpretation and/or translation. They are also required to refuse to provide the service if they have insufficient command of the languages at hand. In pre-trial proceedings, for more common languages, the police have staff interpreters and translators whose impartiality is questionable. However, there have been no reported incidences of abuse in this regard.

9. As interviews are not audio-recorded during pre-trial phase, mistakes made by interpreters are difficult to verify after the event. Some defence lawyers have adopted a practice of using interpretation of only such language which the lawyer himself understands (even if that is not the first choice of the client), because this is the only way that the quality of interpretation can be verified on the spot.

10. For procedural steps taken by the police, prosecution, and court, the interpretation and translation is provided at the expense of the state. However, under the current rules, if the defendant is found guilty, s/he will be required to compensate these costs later – a practice out of line with the Interpretation and Translation Directive, which requires that costs be met by the state irrespective of the outcome in the case. For communication between lawyer and client, no state funded interpretation/translation is available. Amendments to the criminal procedure code are being prepared by way of implementation of the Right to Interpretation and Translation Directive, and are expected to be adopted later this year.

Latvia

11. There is no requirement for interpreters and translators to be certified, and no register of certified interpreters and translators from which the police and courts are required to select. For the most common languages, such as Russian, the police and courts have staff interpreters. For other languages, interpretation is outsourced to private companies.

12. A shortage of interpreters means that hearings are liable to be adjourned when interpreters cannot attend. Participants reported that their main concern is with quality: many of the interpreters are more versed in written translation and fail to perform adequately in oral interpretation, while many of the interpreters assigned for less common languages are simply native speakers with no specific training in interpretation. Whilst the cost of interpretation is covered, limits are set on the amount of time for which an interpreter can be used. A legislative amendment is currently being considered in order to implement the Right to Interpretation and Translation Directive and, specifically, to provide interpretation for lawyer and client consultations.

13. Under the Criminal Procedure Law, a translation is only required of the decision to refer the case to the trial court. However, as a matter of practice, translations are also provided of other appealable judicial decisions (such as indictments and judgments). Translation of other documents can be ordered at the discretion of the person in charge of the investigation. For case-file documents, at the point when the defendant has the opportunity to review the file, an interpreter is provided to explain the content of the documents.

Lithuania

14. There is no register of certified interpreters from which the police or the courts are required to select; the only requirement is for the person to be fluent in the relevant language. 'Pre-trial investigation institutions' (prosecution and police) and the courts each have 'in-house' interpreters.

15. In practice, pre-trial institutions check whether a person needs interpretation and ensure that one is present if requested, but there is often no way to check the quality of the interpretation actually provided. If the lawyer, or even the judge, happens to speak the language (for instance, Russian, which many Lithuanians understand, or English), they might be able to pick up mistakes, but in other cases the interpreter has to be trusted to interpret accurately. Whilst it was not deemed to be an issue in the courts, concerns were raised about the independence of interpreters in pre-trial institutions, with one example given of an interpreter being used who was also a witness in the case.

16. Translations are provided of those documents which, in accordance with the Code of Criminal Procedure, it is mandatory to serve on the defendant: the charge, the indictment and the court judgment. There is no requirement to provide translations of decisions relating to pre-trial detention. The witness statements attached to an indictment are usually translated, but other potentially crucial documents such as expert medical reports are not translated, though participants suggested that they ought to be. Further, the translation of documents is restricted to documents emanating from the pre-trial institutions; documents introduced to the case-file by the defence are not translated. For other documents, the practice is for the lawyer to sit with

the client and an interpreter during a short session and obtain oral explanations of the contents of the documents.

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

Poland

18. There is a register of certified translators, for which the requirement for inclusion is having studied language philology at university. Interpretation at the police station is a cause for concern due to the fact that police officers tend to select from two or three habitual interpreters to whom they usually turn. According to the participants, these interpreters develop a "business" interest in maintaining a positive working relationship with the police, possibly to the detriment of their independence. In the absence of a lawyer – a common problem (see the section on the Access to a Lawyer Directive below) – the interpreter often acts as an adviser to the suspect, which can even extend to advising the suspect informally to 'just plead guilty', perhaps in the genuine belief that this will help the client to end the experience quickly.

19. Interpretation also poses a general problem (both at the police station and at court) where the suspect speaks a local dialect or minority variant of a language: if the defendant speaks Kazakh, for instance, s/he might be allocated a Russian-speaking interpreter and the differences between the languages can lead to inaccuracies; Columbian Spanish is, equally, very different to the Spanish spoken in Spain, giving rise to similar problems. Further, when the suspect is a member of a small expatriate community, interpreters will often also be members of that community and might be acquainted with the suspect. The example was given of a Vietnamese interpreter who altered the evidence given in court by a number of defendants, successfully avoiding their inculpation, which went undetected for some time.

20. The lack of audio recording of interpreted interrogations or in court is also crucial: the example was given of a large drug trafficking case with 15 defendants who spoke various languages, leading to a general murmur at the hearing which impacted upon the fairness of the trial. The lack of records of what was said in police interviews can also become problematic where the language becomes more specialised and incorrect translations can make statements made by the suspect seem more, or less, incriminatory: in a fraud case, for instance, it might be important to know whether a suspect had in fact said 'income' or 'revenue', but without an audio recording, only the term chosen by the interpreter at the time is preserved on record.

21. There is a code of conduct for interpreters and a corresponding disciplinary proceeding but participants had no knowledge of any such disciplinary proceedings ever having taken place.

22. Translations are provided of 'essential documents', which include the charges, the indictment and any appealable judgment. The decision finally convicting and sentencing the person will not be translated. An engaged lawyer will usually be able to insist upon a translation of additional documents but in other cases, the defendant will simply be given an opportunity to look through the case materials before trial with an interpreter explaining relevant parts. If this process is carried out in consultation with a diligent lawyer, this can provide a real opportunity for the

defendant to familiarise himself with the case, but in the case of *ex officio* lawyers, given the financial constraints they face, the defendant's rights of defence might be prejudiced by this process. Participants expressed concern that it is not always clear whether appeal deadlines are affected by the delivery of a translation of a judgment some days after its issue or not.

Common themes

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

a. In Poland, Lithuania and the Czech Republic, there were doubts surrounding the independence of police station interpreters, arising from their commercial relationships with the police, and in Poland and the Czech Republic, the lack of enforcement of the code of ethics for interpreters;

b. In Lithuania and Latvia, there was no central register of interpreters from which police and courts had to choose. This means that there is not even an initial competence hurdle to qualify as an interpreter.

c. Participants from every jurisdiction reported that they had doubts about the quality of interpretation, particularly where the case concerned specialised areas or where the defendant or witness spoke a minority language or dialect; and

d. The practice of providing oral explanations of documents in the presence of an interpreter – instead of a written translation – was liable to impact upon the rights of the defence.

Measure B – the right to information in criminal proceedings

23. The Directive on the right to information in criminal proceedings (the '**Right to Information Directive**'),[3] which was adopted in May 2012, must be transposed into the national law of every Member State by June 2014. The Right to Information Directive seeks to ensure respect for the right to a fair trial by ensuring that suspects are made aware of their rights upon arrest so that they are able to exercise them. It also requires access to the case-file at the investigative phase and prior to trial.[4]

Czech Republic

Notification of rights

24. Suspects are provided with a document entitled 'Advice to charged person' which is essentially a transcription of the Criminal Procedure Code and therefore not easily understood by those who have not had legal training. Its primary function is to confirm to the court that information was given rather than to ensure that the suspect or defendant has understood their rights. The suspect is obliged to sign the letter and the police inappropriately give the impression that it is unimportant and advise the suspect that 'you just need to tell the truth'. The letter is provided in

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

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

Czech, with only an oral but no written translation provided. It covers all the elements included in the Right to Information Directive, but, due to the language, is difficult to understand without the assistance of a lawyer. The letter is provided before interrogation.

Access to the case-file

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

Estonia

Notification of rights

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

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

Access to case materials

28. Lack of access to the case-file at the pre-trial stage is a serious problem in Estonia. The Code of Criminal Procedure states that access to the case-file must not be granted until the case is submitted for trial. In practice, when the Prosecutor applies for the court's approval of pre-trial detention, the Prosecutor submits all manner of documentation to the court and asserts that the suspect is dangerous. The defence, having no sight of these documents, finds it difficult to challenge this. This situation is all the more concerning given that pre-trial investigations can last for up to five or six years. There is a law pending which will provide for access to the case-file for 'important' factual matters and those relevant to pre-trial detention.

29. When the case is sent for trial, access to the file is granted but the manner of access poses problems. Materials are provided on a CD or DVD as pdf copies of a paper file, often containing overwhelming amounts of information running to thousands of pages, from among which the Prosecution may rely on only very narrow sections. The Prosecutor is able to prohibit the

production of paper printouts and/or further digital copies. If the client is detained, the use of electronic files can be a serious problem: a laptop cannot be brought into prison so the lawyer must go through the materials with the client using a slow, outdated computer within the prison.

Latvia

Notification of rights

30. A person arrested in Latvia is provided with a letter of rights which, technically, covers all the elements listed in the Right to Information Directive. However, the letter, which is often not read to the individual concerned, essentially reproduces the text of the Code of Criminal Procedure and is therefore not in accessible language. It is provided at the police station at the point at which the person becomes 'institutionalised', but before then, informal conversations may occur with the police and there is a risk of pressure being brought to bear upon the suspect before he or she is made aware of the relevant rights. Further, the letter is often only produced in Latvian.

31. It was emphasised that, currently, the probative value of evidence obtained in interrogations was the same regardless of whether there had been a failure to notify the person of their rights effectively. It was emphasised that, when the person does not know their rights and the person does not have diligent representation at the police station, there is a need for the failure to notify rights effectively to result in the exclusion of evidence.

Access to the case file

32. Almost no access to the documents in the case-file is granted to the defence during the investigation stage, when the materials are referred to as 'the secret of the investigation'. The investigator, at his discretion, may show some specific documents to the suspect if he/she thinks this will facilitate the process. There are a few exceptions to this approach, for example in cases brought against minors. During the investigation process, suspects may familiarise themselves with the Criminal Proceedings Register (a list of officials who have taken part in the investigation), the detention protocol, a copy of the resolution recognising them to be a suspect, information relating to expert examinations and, where it is the suspect who has requested the expert examination, they are also entitled to review the subsequent report.

33. Access to the case-file is provided when the case is referred for trial and the defendant and defence practitioner have the opportunity to familiarise themselves with the content of the file, if necessary with the assistance of an interpreter. It was reported that investigators sometimes add evidence to the file only at the stage when the trial phase starts, placing the defence at a disadvantage in preparing for trial.

34. Once the investigation is complete, the suspect also has the right to request materials of special investigation actions which are not included in the case file by submitting an application to the investigation judge.

Lithuania

Notification of rights

35. A person arrested in Lithuania is provided with a 'notification of allegation' – a letter summarising the accusation against them – which includes, at the bottom of the page, a list of their procedural rights. These include: the right to be assisted by a lawyer; the right to consult the case materials before trial; the right to access documents at the pre-trial stage; and the right to challenge decisions of the investigative authorities. It does not, however, cover: the right to translation and interpretation; the right to remain silent; and the right to contact consular officials. According to the participants, the Ministry of Justice has, however, taken the view that no reforms were needed as the national law complies with the Right to Information Directive.

36. There is no explanation of how these rights are to be exercised. The document itself contains dry factual assertions. Investigators are required, in law, to provide oral explanations but this is done in a very formulaic manner (the officer will essentially read the rights aloud); usually, suspects are simply told that their lawyer will explain the contents of the document to them. Timing of the notification of rights is also an issue. According to the Code of Criminal Procedure,[5] a person arrested must be questioned as a suspect within 24 hours. The notification of allegation, with the information about rights, must be provided before questioning,[6] but in practice there will be very little time between the two. This places a great burden upon the lawyer who will have to ensure that the rights are understood prior to questioning.

37. While the right to remain silent is provided by the Code of Criminal Procedure, it is phrased defensively – as the right to refuse to testify – which makes its exercise less attractive as it implies non-cooperation. Equally, although no adverse inferences can be drawn from silence in the context of determination of the defendant's guilt or innocence, choosing to remain silent at police interview may affect the attitudes of prosecutors and judges and make pre-trial detention more likely, which would in turn create pressure on the suspect to cooperate.

Access to case materials

38. Under the Code of Criminal Procedure, a Prosecutor can refuse access to case materials at the pre-trial stage if disclosure would adversely affect prospects of the investigation reaching a successful outcome. The current provisions came into force in 2003. In 2004, the Supreme Court Senate ruled that if a Prosecutor sought pre-trial detention, the evidence on which that motion was based would have to be disclosed to the defence.[7] However, in 2006, the Constitutional Court ruled[8] that Supreme Court Senate decisions did not constitute a source of law binding on the lower courts, which retained their independence.

Poland

Notification of rights

39. The letter of rights covers the rights included in the Right to Information Directive. While it is available in some languages, including English, French, German and Russian, it is often not

5 Article 141(6).
6 Article 187.
7 Decision No. 50 of 30 December 2004 of the Supreme Court of Lithuania Senate, paragraph 4.
8 Constitutional Court Ruling of 28 March 2006, available in English - http://www.lrkt.lt/dokumentai/2006/r060328.htm

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

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

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

Notification of accusations

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

Access to case materials

43. During the investigative stage, sufficient access to the case-file is not provided. An amendment to the Code of Criminal Procedure inserted a new Article 156(5a) which provides that, if the Prosecutor applies for pre-trial detention, the evidence on which that motion is based must be

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

made available to the defence, bringing an end to the previous practice of providing no disclosure during the pre-trial stage. However, in 'exceptional circumstances', 'where this would cause extreme problems for the investigation', disclosure can be withheld. For a short time, this new system worked well, but very soon the exception became the rule and there is no effective sanction against this. The Codification Committee has now released draft legislation which will have the effect of removing this exception.

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

Common themes

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

a. In all jurisdictions, whilst information about procedural rights was provided in writing, the language used was dry and legalistic, using the nomenclature or even reproducing the wording of the relevant legal texts or constitution.

b. In Estonia, Poland and Lithuania the right to remain silence was phrased as a right to refuse to answer questions, such that, by exercising it, the suspect would feel s/he was refusing to cooperate. This, combined with the prospect of pre-trial detention, might combine to pressure the suspect into waiving the right.

c. In all jurisdictions, there were problems with access to the case-file at the pre-trial stage. In the case of Estonia, access is withheld altogether, while in Poland, Lithuania and the Czech Republic exceptions allowing access to be withheld were commonly abused.

d. Access to the case-file once investigations were complete posed problems in terms of the modalities of access: in Poland, the costs of obtaining copies were excessive or prohibitive, while in Estonia, it was difficult to consult with detained clients on the basis of digital files.

e. In all of the jurisdictions represented, the failure effectively to notify rights was not taken into account for the purposes of assessing the probative value and/or the exclusion of evidence obtained.

Measure C – Access to a lawyer in criminal proceedings[10]

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

46. The text of the third measure under the Roadmap, which grants suspects the rights to access a lawyer and to communicate with a third party on arrest, which was finally adopted on 7 October 2013.[11] We refer to this as the '**Right of Access to a Lawyer Directive**'.

Czech Republic

Right of access to a lawyer / legal aid

47. The right to have a lawyer present applies throughout criminal proceedings, from the point of arrest through to trial and appeal. When the person is still a suspect in police custody, there are lists of lawyers available and the police will give the suspect time to consult the list and make enquiries. However, there is no entitlement to *ex-officio* legal assistance at this stage, so exercising the right may become impossible. The lawyer who attends the police station can, however, seek their costs back from the state after the event.

48. After the initial arrest phase, the suspect can seek legal aid representation for the case going forward. The court will appoint a lawyer if the defendant requests one, or if it is a case of mandatory defence (which applies if the person is detained pre-trial). The process of court-appointment of the lawyer was described as somewhat bureaucratic. The person must prove that they are impecunious, for instance by supplying proof of entitlement to unemployment benefits. The court will, with his information, appoint a lawyer relatively promptly but it may take up to 14 days for the deed of authorisation to reach the appointed lawyer. Once the lawyer is appointed, they will then usually defend the person throughout the case.

Participation of the lawyer in police interrogations

49. During the interrogation administered by the police, the accused usually sits beside their defence counsel. The lawyer is not allowed to advise his client regarding specific questions. The lawyer can intervene in the discussion with the interrogator only by objecting about the formulation of the question. The lawyer can, however, ask their client questions of their own, provided these are not leading questions. The participation of lawyers in interrogations is regulated by the Criminal Procedure Code and by unwritten conventions. There are no official guidelines regulating this.

Waiver

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

European Arrest Warrant cases

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

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

Confidentiality

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

Remedies

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

Estonia

The right of access to a lawyer

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

Participation of the lawyer in police interrogations

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

European Arrest Warrant cases

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

Confidentiality

57. The confidentiality of consultations between lawyer and client is protected without exception. However, other forms of communication, such as emails and telephone calls, can be intercepted and are 'protected' only by virtue of the rule that they cannot be used as evidence. The inability to use such evidence is not a sufficient remedy as the lawyer's job has still been rendered ineffective by virtue of the fact that it has not been kept private. Calls for enhanced

confidentiality by preventing wire-tapping and the imposition of an obligation to delete any information which is accidentally acquired have as yet had no success.

Remedies

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

Latvia

Right of access to a lawyer

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

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

Participation of the lawyer in police interrogations

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

Remedies

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

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

Lithuania

The right of access to a lawyer

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

Participation of the lawyer in police interrogations

64. The Code of Criminal Procedure states[13] that the lawyer is allowed to 'participate' in the suspect's questioning. There are no official rules or best practice guidelines. The precise boundaries of the lawyer's role will, as a result, vary from case to case according to how tolerant the questioning officer is: while some officers allow the lawyer to advise their clients regarding specific questions asked and tolerate interventions in the discussion, others demand a completely tacit participation of the lawyer. In such situations, lawyers will simply advise their client to remain silent.

65. Under the Code of Criminal Procedure, the lawyer is able to ask questions of the client at the end of the interrogation and may insert notifications into the record. Similarly the lawyer and suspect are able to ask for the revision of the record where the manner in which responses have been recorded is not deemed to be accurate. Participants reported that in some cases, however, officers do not permit any such interventions to happen. Where this is the case, the lawyer may simply add handwritten notes before signing the record.

Confidentiality

66. Broadly speaking, confidentiality is satisfactorily protected. The suspect has a right to a face-to-face meeting with no third party present. There is no confidentiality clause applicable to interpreters, but according to participants, this is not a major concern. The 'Criminal Intelligence'

[13] Article 48(1)(2).

service conducts surveillance activities which may monitor lawyer-client communications; these are not admissible, but they are used operationally.

Remedies

67. Lithuanian law provides no clear regulation as to what evidence is admissible. The relevant provision of the Code of Criminal Procedure[14] states that only information collected through legal means can be considered as evidence.

Poland

The right of access to a lawyer

68. Participants identified many problems faced by suspects in gaining the access to a lawyer which is, in theory, protected by Polish law. These problems primarily related to:

    a. The lack of assistance provided by the police and other pre-trial institutions to enable the suspect to make contact with a lawyer;

    b. The delays inherent within the process of appointing a legal aid lawyer; and

    c. The frequent pressure imposed on suspects by police to waive the right of access to a lawyer in order to avoid delays.

Legal aid

69. At the pre-trial stage, eligibility for legal aid is subject to a means test. At the trial stage, the ongoing reform project being elaborated by the Codification Committee envisages a procedure whereby, if the person wants a legal aid lawyer, they will get one, but may risk having to pay the fees if they are convicted. Certain exemptions are foreseen and it is likely that judges will use these. Participants expressed concerns that the risk of costs exposure may create pressure upon the defendant to waive their right of access to a lawyer.

70. The current system of legal aid does not cater for lawyers' specialisations. The court may appoint a lawyer who, while an expert in maritime law, has never attended a police station. This problem arises because all lawyers, with the exception of members of the Council, are required to do legal aid cases. Within the bigger cities, such as Warsaw, the profession has sought to address this issue by sending a questionnaire to lawyers to establish what sort of legal aid cases they wish to receive. While that system essentially works, it is not country-wide. The court may also appoint a lawyer it trusts, which may not be in the client's interests.

Participation of the lawyer in police interrogations

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

[14] Article 20(4).

Confidentiality

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

European Arrest Warrant cases

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

Remedies

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

Common themes

75. **The main problems that people identified in relation to the right of access to a lawyer in criminal proceedings in their jurisdictions were:**

a. There were problems reported in Poland, Latvia, Estonia and the Czech Republic in relation to 'waivers': the failure to provide prior legal advice about the legal consequences of the waiver meant that suspects might refrain from seeking legal advice at the expense of their defence.

b. Confidentiality of communications between lawyer and client was not always observed: in Poland and Estonia – while the evidence obtained could not be used in court – the information obtained in this way would be used operationally and the lawyer, knowing of the risk of surveillance, would be inhibited in delivering advice to the client.

c. In Latvia, Estonia and Poland, it was reported that there was no reliable system providing for the exclusion of evidence obtained in breach of the right of access to a lawyer (though the relevance of the issue was reduced by the fact that the right to a lawyer was often waived).

d. The systems of appointment of *ex officio* lawyers in Poland (at the national level), Latvia and the Czech Republic were bureaucratic and liable to delays during which the person, though they might not be interrogated, would be likely to be detained (which, in turn, contributed to the problem of 'waivers').

D – Key recommendations

Implementation

a. Participants expressed concern that Governments may implement the wording of the Roadmap Directives without giving adequate consideration to any steps that must be taken in practice to make them work in conjunction with existing national laws and ensure effective implementation. The concern is that whilst technically implementation will take place, courts, judges, lawyers and suspects may remain unaware of the new laws and will not know how to use or implement them. It was therefore agreed that proper training and lobbying of national governments to ensure careful implementation is essential.

b. Implementation of the Directive on Access to a Lawyer will be essential as access to a lawyer at the early stages provides a means of guaranteeing other rights – such as the right to silence – are properly understood and not waived inappropriately.

c. Implementation of the Right to Information Directive must ensure (i) that suspects have sufficient access to the case file to challenge detention effectively; (ii) that disclosure of the case file prior to trial provides a real, adequate opportunity prepare for trial; and (iii) that rights suspects are advised of their rights in a clear, accessible manner upon arrest.

d. Implementation of the Interpretation and Translation Directive must ensure that there are adequate quality control mechanisms capable of ensuring that the fairness of the proceedings is not prejudiced by reason of poor interpretation at the police station. There must, in particular, be a focus on ensuring the independence and adequate qualification of police station interpreters.

e. Once the deadline for implementation of the Roadmap Directives has passed, Fair Trials will be keen to obtain information from local experts on their practical implementation, to assist the European Commission in its monitoring and to highlight possible areas for infringement actions. Fair Trials will also be keen to identify opportunities for references to the CJEU for preliminary rulings. Participants agreed to support Fair Trials in these efforts.

Awareness and training

a. By and large, criminal lawyers working on an *ex-officio* basis and without experience in cross-border cases, look to the domestic criminal and procedural codes as the reference point. To ensure effective implementation, domestic lawyers should be trained to see EU law, the Charter and case-law of the European Court of Human Rights as part of their tools.

b. 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.

c. Citizens themselves should be taught about their rights under the Roadmap Directives to help ensure those arrested are in a position to understand the importance of the rights and are prepared to demand their enforcement. Newspaper articles have a role to play in this regard.

d. The Bar Associations should ensure training of criminal defence practitioners to ensure that they are aware of and comfortable using the Directives (and the EU Charter). Such training should be targeted at all criminal lawyers, and not only the relatively few of them who are actively involved in Bar meetings, cross-border cases and/or international projects.

e. The obligations under the Directive are incumbent on the Member States and state authorities should be encouraged to ensure that all internal rules and guidelines, codes of practice and/or staff manuals pay proper attention to procedural rights, and that violations of these rights are being duly investigated in disciplinary and other proceedings.

Fair Trials International
6 October 2013

ANNEX – PARTICIPANT BIOGRAPHIES
(Alphabetical Order)

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

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

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

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

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

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

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

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

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

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

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

FAIR TRIALS INTERNATIONAL

COMMUNIQUÉ

issued after the meeting of the

FAIR TRIALS INTERNATIONAL LOCAL EXPERTS' GROUP (SPAIN)

18 October 2012

at the offices of Clifford Chance LLP, Madrid:

PRE-TRIAL DETENTION IN SPAIN

OPEN SOCIETY FOUNDATIONS

With financial support from the

Global Criminal Justice Fund of the
Open Society Foundations

Introduction

1. On 18 October 2012, Fair Trials International brought together leading experts in criminal justice from across Spain in order to learn about pre-trial detention in law and in practice (a list of participants is provided in the Annex). Where problems are identified, we wanted to learn about ongoing efforts and new opportunities to challenge these. The Local Experts' Group (Spain) met for a full day on 18 October 2012 at the offices of Clifford Chance, in Madrid.

2. Prior to the meeting, the Group were asked to reflect on several themes: the standards of pre-trial detention decision-making by the Spanish courts, the reasons underlying excessive remand periods, and the opportunities for law reform and litigation. These were then discussed at the meeting. The remainder of this communiqué outlines the key points raised in the meeting and the key conclusions reached.

A. Pre-trial detention decision-making standards

3. The case-law of the *Tribunal Constitucional* (Spanish Constitutional Court) reflects the case-law of the European Court of Human Rights under Article 5 ECHR, specifying that detention may only be based upon a constitutionally sanctioned reason (to counter the risk of absconding or reoffending and/or to prevent interference with evidence), and must be proportionate. The problem lay in the daily application of the law, particularly by the lower courts, where detention was in practice the general rule, not the exception.

4. Judges, virtually without exception, followed the recommendation of the *Ministerio Fiscal* (Public Prosecutor; '*Fiscal*') to order detention. Participants commented that the judges relied disproportionately on the police report put forward by the *Fiscal*, which would often contain bare factual allegations, with no reasons as to why detention was necessary. This made it very difficult to make any meaningful arguments for release, and the defence's submissions would, in any event, systematically be treated less favourably than those of the Fiscal.

5. Participants underlined that the defence's right of access to the file began, in principle, only at the initial detention hearing, when the person is surrendered to the judge after arrest by police. In this context there was never enough time to prepare an effective defence to detention. At subsequent detention hearings duty judges would be reluctant to interfere with earlier decisions on detention, on account of the associated risks of release and a mutual respect between judges. The result was that a defendant, once detained, would generally remain in detention.

6. Some courts were more diligent, and detention was not automatically ordered in some types of cases. For instance, in private prosecutions, detention would rarely be ordered. However, where detention was requested by the *Fiscal*, it would always be followed, especially at the *Audiencia Nacional* (national first-instance court). There was always the possibility of *recurso de apelación* (appeal to a higher court) or, if this proved unsuccessful, a *recurso de amparo* (constitutional protection petition) before the Constitutional Court, though exercising these rights could exacerbate delays so lawyers sometimes felt it best not to do so.

7. As for compensation for unjustified detention, the legal position was considered to be objectionable: in order to obtain compensation, the person had to show that the facts alleged had not occurred, not just that they had been found not guilty. They were, effectively, required to prove their innocence, and proving a negative was virtually impossible.

8. Regarding the use of alternatives to detention, it was agreed that, in the purely domestic context, insufficient use was made of electronic tagging, passport confiscation and reporting requirements. It was suggested that the extra administrative work involved in enforcing these alternatives made them unattractive to the courts. Although participants agreed there was a lack of budgetary resources for justice, it seemed that this did not translate into a preference for less expensive alternatives to detention. Participants who had highlighted the costs of pre-trial detention were told by judges that their role was to ensure attendance at trial, not to manage the budget.

9. As regards cross-border cases, participants agreed that Spanish courts were currently still reticent about employing cross-border supervision arrangements. There were examples cited of agreements where defendants had been allowed to report the Spanish Consulates in Germany and Italy (the availability of the European Arrest Warrant helped secure these arrangements). However, in other cases, defendants were being required to remain in Spain to report regularly, despite having family in other countries. The potential for the European Supervision Order to make an impact was likely to depend on the gravity of the alleged offence, as in serious cases pre-trial detention would still be used.

B. The links between investigation and detention on remand

10. In Spain, the general rule is that the investigation is secret as far as third parties are concerned. This is known as the *secreto sumarial*. In principle, the case-file is still open to the parties to the case. However, *secreto sumarial* can be extended to deprive the defence of access to the case-file. This is an exceptional power. It can be applied for only one month, but on a renewable basis. The use of this power has been criticised by the UN Human Rights Committee as a source of concern in Spain's response to terrorism. It is referred to here as '*secreto*'.

11. *Secreto* was said to be very widely used in cases involving terrorism and organised crime tried before the Audiencia Nacional. Some Participants reported that, in certain parts of Spain, it was also frequently used in other, less serious cases presenting no element of organised crime.

12. S*ecreto*, like pre-trial detention, was granted whenever the *Fiscal* requested it. An investigation would typically begin with a telephone wire-tap, with *secreto* granted at the same time in order to preserve the effectiveness of the investigation. Police reports would then present on-going investigation as useful and pertinent, and the *Fiscal* would rely on these reports in requesting extensions of *secreto*, which would be systematically extended over long periods, sometimes up to two years. When *secreto* was eventually lifted shortly before the trial, investigatory steps described as crucial by police reports would turn out to be irrelevant, evidence uncovered would be clearly inadmissible, or it would be plain that very little investigation had actually been done.

13. When *secreto* applied, the defence were not privy to the details of the investigation, so it was impossible for them to challenge the value of any evidence uncovered or, indeed, the legality of aspects of the investigation and admissibility of evidence obtained. Given that pre-trial detention decision-making relied heavily on the strength of the evidence, this represented a serious inequality of arms when it came to challenging detention. The defence's submissions would therefore be based on the defendant's personal situation, on which less weight was placed than on the state of the evidence.

14. The use of *secreto* was also liable to contribute to delays in the investigation phase, since it insulated the prosecution against close scrutiny of the investigation. This was one reason why defendants often spent extensive periods on remand.

15. Participants were also invited to comment more generally on the reasons explaining the comparatively long time taken for investigations in Spain. In some cases, length was not to be criticised. The example of the 2004 Madrid bombings, which covered several thousand witnesses, letters rogatory to several countries, and much forensic evidence, was cited as one example. This investigation took three years and there was widespread public anger at the delays. However, less high-profile and less-complicated organised crime cases often take up to four years. It was equally true that an average case of, say, a street fight involving just a handful of medical records and witness statements would still often take two years.

16. Participants put forward various reasons for delay:
    a. Time-limits were not rigorously enforced. For instance, the defence might ask to take cognisance of the investigation after expiry of *secreto*, and only then receive a backdated decision extending it.
    b. There was no one independent of the investigation taking charge of the timeframe for preparing for trial. When *secreto* was lifted, it often became clear that very little had, in fact, been done to prepare for trial.
    c. It would often be the case that, once *secreto* was lifted, so much incriminating evidence had been acquired (without the defence being able to suggest steps to obtain exculpatory evidence) that the fairness of the trial would be prejudiced.
    d. The lack of resources in the justice system would generally avail the prosecution if it could not meet deadlines. For instance, the power available in law to extend detention beyond the initial one year (in less serious offences) or two years (in more serious offences) to 18 months or four years respectively, was generally a formality and it was sufficient to say that it had not been possible to bring the case to trial within that time.
    e. There were simply delays in the execution of pre-trial procedural steps. For instance, it might take three months for a witness's statement to be taken once this was granted by the court, or it might take several months for a drug sample to be analysed, during which the defendant would usually be detained.
    f. Finally, it was sometimes in the interests of the defence to delay the investigation but this would not be the case if the defendant is in pre-trial detention.

17. Participants also underlined the lack of any robust accountability mechanism. The *Fiscal* was generally excused by the court for failures to produce information or to comply with deadlines,

on the basis of a lack of resources in the justice system. Police would generally present investigations as more pertinent than they actually were; this would in due course be revealed as unfounded when the case came for trial, but there was no sanction.

18. Delays in preparing for trial, pre-trial detention and *secreto* were said to sometimes be used as a tactic to achieve convictions because suspects were less able to defend themselves and more likely to lose resistance and cooperate or give evidence against co-accused. The Supreme Court had given judgments on *secreto* and pre-trial detention, but its doctrine was itself liable to change over time and was, in any event, not strictly binding on the lower courts. The result was that practice at the first-instance level did not reflect the doctrine.

C. Reform outlook

19. All participants were hopeful that planned legislative reforms of Spanish criminal procedure might lead to some improvements. It was not entirely certain whether the *Anteproyecto de Ley* (draft bill) published by the last Government was still the basis of the current reforms. However, it was certain that the reforms were directed towards a greater separation of prosecutor and court, and that the *secreto* regime would be reviewed.

20. Participants did, however, express concern that redefining the roles of various personnel would not necessarily affect the mentality of justice officials and the way laws were applied in practice. It was noted that there is currently no offence of prosecutorial misconduct, and it was suggested that the reforms must include provisions for sanctions against official personnel for misusing powers, and for procedural sanctions (for instance, if appropriate, the dismissal of the case).

21. It was underlined that these reforms were being steered by a committee sitting in private. Without public proceedings or any consultation, it was difficult to stay informed of progress. This was felt to be a missed opportunity as there was certainly a role for lawyers to play, whether through local bar organisations, universities or NGOs, in ensuring reform discussions took into account the views of practitioners. Although an opportunity to comment would arise once a text was laid before Parliament, there was no formal consultation on the content of the text.

22. There were different reactions to the suggestion of taking more cases before the ECtHR, even though several of the problems identified clearly raised arguable human rights issues. In order to exhaust local remedies, it would be necessary to go through several layers of court hearings, which was likely to take a long time and practising lawyers did not feel that it was always in their client's interests.

23. There was some disagreement as to Spain's record of implementation of ECtHR judgments. Some Participants claimed that in Article 6 cases they had won at the ECtHR, no action had been taken at national level, while others maintained that an ECtHR decision would be implemented if obtained. It was agreed that one of the key points for the forthcoming reforms to adopt would be an automatic review of a criminal case by the national courts wherever the ECtHR found a violation.

24. If prosecutors and judges failed in their duties in relation to pre-trial detention, they should be subject to sanctions. Even without reforms, it was already possible for lawyers to submit a *denuncia* (criminal complaint) and *querella* (interpersonal criminal proceedings) against judicial personnel who had offended against the provisions of the law on pre-trial detention. This would contribute to changing mentalities, which law reform could not bring about by itself. However, this had to be balanced against defence lawyers' need to maintain credibility in order to perform their jobs properly in future cases.

25. As for the use of the media and other channels, Participants noted that in general media took an interest in the arrest and initial detention of an alleged criminal, but rarely in any subsequent stages of the case. This could perhaps be improved.

D. Key recommendations

a. Decision-making standards

- Reforms of the law should provide sanctions for misuse of official powers by judicial officials. These should include professional and pecuniary penalties and procedural penalties (dismissal of the case).
- Existing provisions on compensation for pre-trial detention where the defendant is not proved guilty at trial should be reformed to ensure greater accountability.
- Lawyers should take more cases before the ECtHR under Article 5 in the public interest, provided this coincides with their client's best interests. FTI would be prepared to supply comparative expertise in third-party submissions and/or to assist in the formulation of the European Convention arguments. A favourable decision should be accompanied by lobbying at the Council of Europe level to ensure implementation.
- Lawyers should insist upon a more balanced approach in written applications for release. The difference between practice and theory should be the subject of academic legal comment to heighten awareness of the issues.

b. Excessive periods of detention on remand

- Reforms of the law should address the excessive use of *secreto*, which makes it impossible to challenge detention effectively.
- Time limits should be mandatory and failure to comply with these should result in dismissal of the case.
- Shorter time limits should be set and enforced with longer periods only permitted in the most exceptional cases.
- The defence should engage in dialogue with prosecutors and the courts administration to identify opportunities to reduce the time taken for investigations.

c. General recommendations

- The Committee in charge of the criminal procedure reforms should be encouraged to hold open consultations with the legal profession, academics and NGOs in order to obtain their input on pre-trial detention.

- Greater use should be made of the media to generate awareness of the innocent individuals affected by excessive pre-trial detention. This would place pressure upon Government to take this problem seriously.
- Wherever a defence raises an issue of EU law, courts should be encouraged to make references for preliminary rulings to the Court of Justice of the European Union.

FTI Local Expert Group (Spain)
16 November 2012

FAIR TRIALS INTERNATIONAL

COMMUNIQUÉ

issued after the meeting of the

FAIR TRIALS INTERNATIONAL LOCAL EXPERTS' GROUP (POLAND)

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at the offices of Clifford Chance LLP, Warsaw:

PRE-TRIAL DETENTION IN POLAND

OPEN SOCIETY FOUNDATIONS

With financial support from the

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Introduction

1. On 4 December 2012, Fair Trials International brought together leading experts in criminal justice from across Poland to learn about pre-trial detention in law and in practice (a list of participants is provided in the Annex). Where we identified problems, we wanted to learn about ongoing efforts and new opportunities to challenge these. The Local Experts' Group (Poland) met for a full day at the offices of Clifford Chance in Warsaw.

2. Prior to the meeting, the Group was provided with a detailed discussion pack and asked to reflect on several themes: the standards of pre-trial detention decision-making by the Polish courts, the reasons underlying excessive remand periods, and the opportunities for law reform and litigation. These topics were then discussed at the meeting. The remainder of this communiqué outlines the key points raised in the meeting and the key conclusions reached.

A. Pre-trial detention decision-making standards

3. The Polish criminal code follows the case-law of the European Court of Human Rights (**ECtHR**) under Article 5 of the European Convention on Human Rights (**ECHR**). It has the correct criteria for both applying and extending pre-trial detention and there are a full range of alternatives provided for in law.[1] The problem is how these laws are applied and the practice of the courts, which means that detention is the general rule, not the exception.

4. Judges nearly always follow the recommendation of the prosecutor to order detention.[2] Participants agreed that in cities and higher courts practice has improved over the past few years, but it is still rare for defence arguments for release pre-trial to succeed.[3] The situation is worse in small towns, rural regions and lower courts which follow the prosecutor almost without exception. There was concern that this is partly due to the fact that training of local judges is inadequate, meaning that they are unaware of ECHR standards and of EU laws that they are supposed to be implementing.

5. Courts often fail adequately to review motions relating to pre-trial detention. Courts are often overloaded with applications and, even in routine cases, will be provided with large numbers of case files. Police and public prosecutors can hold someone for 48 hours after arrest following which courts must make a decision on continuing detention within 24 hours. They will therefore not usually have time to review the case files in sufficient detail to make an informed decision. Courts do provide a written decision when imposing pre-trial detention, but this is often very short with minimal detail about the specific case. A recent Constitutional Court case reiterated that it is unconstitutional not to give specific reasons for prolonging pre-trial detention, confirming that it is practice rather than the law itself that it is a problem.[4]

[1] See Articles 249 to 277 of the Polish Code of Criminal Procedure

[2] In 2007, the court accepted 87.9 % of motions of prosecutors applying for detention on remand;
in 2008 the court accepted 88.1% of motions; in 2009 the court accepted 89.4 % of motions; and in the period January to June 2010 the court accepted 90. 31 % of motions (Source: Polish Ministry of Justice website).

[3] A report by the Polish Helsinki Foundations has found that bail in district courts was accepted in 2,411 cases in 2005 but that this rose to 7,174 cases in 2010.

[4] See judgment of the Polish Constitutional Court in case no. SK 3/12, 20 November 2012.

6. Participants felt that reasons given for imposing pre-trial detention were often not adequate and did not take into account the specific circumstances of the case. Release pending trial is often refused on the basis of the severity of the offence and the probability of conviction, with little consideration of the facts of the case or the personal situation of the suspect. Where a case involves multiple defendants, the court will usually impose the same detention order on all defendants without taking into account their different personal circumstances. Some participants had seen cases where decisions had been made due to media pressure rather than a proper review of the case file.

B. Effective participation of the defence in pre-trial detention hearings

7. It is very difficult for the defence to prepare an effective case to argue against detention. The court has access to the entire case file from the start of proceedings, but this is not available to the defence, which is not even provided with the evidence on which the court is basing its decision. Participants hoped that proposed reforms to the penal code, as well as the implementation of the new Directive on the right to information in criminal proceedings, will help address this inequality of arms.

8. Participants were concerned that the legal aid rules in Poland mean that suspects rarely have effective representation in detention hearings. Legal aid lawyers are paid a flat rate and are appointed for the duration of the case. The low rates and minimal chances of success mean that lawyers often file papers in advance of detention hearings but do not attend them in person. Where someone does appear, it is usually a trainee who does not always put forward the most effective arguments. It was reported that more than 90% of suspects in Warsaw are not represented by a lawyer at their first detention hearing.

C. Use of alternatives to pre-trial detention

9. While it is not impossible to persuade the court to use alternatives to pre-trial detention, it is very difficult and is usually only successful where the suspect has clear health problems or other vulnerabilities. Where an alternative is used, it is almost always in the form of monetary bail surety. It was agreed that the other alternatives available under Polish law (such as restrictions on certain activities and obligations to report regularly to the police and to avoid contact with specified persons) should be more widely used. Participants felt that in some cases courts lack knowledge about what other options are available to them and are often unwilling to use these due to concerns that this will cause delays in proceedings and the risk that defendants will not appear at their trial. Electronic tagging is not currently available as an alternative to pre-trial detention in Poland, although it is used post-sentencing. Participants agreed that its use should be expanded to the pre-trial stage, although there was concern about the resources needed for this.

10. The European Supervision Order (**ESO**) has been implemented into Polish law. Participants generally agreed that this is a good instrument that could have a positive impact in Poland. Participants thought that the Polish authorities would be happy to comply with an ESO issued

elsewhere in the EU. However, there was concern that judges would be unwilling to issue an ESO due to the complicated procedure and fear that the suspect would fail to return to face trial. Participants agreed that judges, prosecutors and lawyers will need practical guidance on the types of case and situations where an ESO may be appropriate. It is important to make sure that the ESO operates well from the start, as a few failures could mean that judges lack confidence in using it going forward.

D. The links between investigation and detention on remand

11. While prosecutors and courts do prioritise cases where people are in pre-trial detention, these can still take months or years to come to trial. Most participants were concerned that the courts often rubber-stamp applications by the prosecutor to extend pre-trial detention and that prosecutors habitually file for extensions without good reason.

12. It was acknowledged that some judges, particularly in the higher courts and in the major cities, are increasingly willing to challenge prosecutors for unjustified delays in a case and sometimes extend pre-trial detention on the condition that progress is made in identified areas. While this is welcome, some participants expressed concern that courts will rarely take any action if the prosecutor fails to make the required progress, meaning that there is little motivation to move the case forward. It was felt that, if prosecutors really believed that a defendant would be released if they failed to meet a deadline, cases would proceed to trial much more quickly.

E. Reform outlook

13. Reforms to the Polish Code on Criminal Procedure, in which some participants are heavily involved, are likely to come into force in January 2014. If these are passed in their current form they will make far-reaching changes to Polish criminal procedural law, including on pre-trial detention. The reforms will bring about a move to an adversarial style with a more active role for the court and more opportunities for both sides to present and challenge the evidence at trial and in pre-trial proceedings.

14. The specific reforms that will impact on pre-trial detention are:
    - courts would have to make any evidence on which decisions to impose or extend pre-trial detention are based available to suspects and their lawyers to enable challenges to be made;
    - everyone arrested and detained at a police station will be provided with clear information in writing about their right to apply for legal aid and their right to access a lawyer before police questioning. This will help ensure that all suspects have a lawyer available at their pre-trial detention hearing;
    - prosecutors seeking an extension to pre-trial detention would need to provide new evidence as to why the extension is necessary and would no longer be able to rely on their original arguments; and
    - if pre-trial detention has already lasted for two years, the court would not be able to order a further extension unless the likely sentence if convicted were lengthy and the offence alleged were very serious.

15. Participants agreed that these reforms would be a big step in the right direction. However, there were concerns that the law at the moment is not followed in practice and that further reforms would not necessarily affect the mentality of prosecutors and judges and therefore may not make the differences they are designed to achieve.

16. There were a variety of reactions to the suggestion of taking more cases before the ECtHR, even though several of the problems identified clearly raised arguable human rights issues. Participants generally expressed the view that Poland has been held in violation of Article 5 ECHR numerous times by the ECtHR and the main focus now should be making sure that courts and prosecutors change their practice to reflect the ECtHR's judgments.

17. There was some disagreement as to Poland's record of implementation of ECtHR judgments. Some participants considered that courts did take ECtHR decisions against Poland on Article 5 into account and that this had led to the steady decline in the length of pre-trial detention in recent years, as well as to the number of ECtHR violations against Poland decreasing. Other participants have tried to use ECtHR judgments in submissions but have been told that they do not bind the court. It was agreed that a rule clarifying that ECtHR decisions are binding on the national courts would be useful.

F. Key recommendations

a. Decision-making standards

- There is a need to change the mentality of judges and prosecutors in relation to pre-trial detention. More training is needed of judges and prosecutors. While training programmes are in place, these are not reaching enough people and it is important to make sure that those working at courts outside of the major cities are engaged in these.
- A handbook should be produced containing best practice from other EU countries about the use of alternatives to pre-trial detention. This should include worked examples to assist the court in making use of the possibilities available. This is something that Fair Trials International could put together and that participants could help disseminate.
- The use of electronic tagging should be available as an alternative to pre-trial detention. While its expansion may have a cost impact, in the long term it will save money as holding someone in pre-trial detention is very expensive.
- Lawyers should always attend the pre-trial detention hearings of their clients. This is essential to ensure that the court is aware about information relating to the suspect's personal circumstances and to enable it to make an informed decision.
- Training is needed to educate judges, prosecutors and lawyers about the ESO and when it should be used.

b. Excessive periods of detention on remand

- Courts should require better reasons for the extension of pre-trial detention and should not automatically approve requests for extensions by prosecutors. There should be a presumption of release if no new reasons for detention are put forward.

- Where an extension is conditional on specific progress being made then courts should not further extend pre-trial detention if the prosecutor fails to meet the conditions without giving good reasons.

c. General recommendations

- The Committee in charge of the reforms to the penal code should keep the legal profession, academics and NGOs informed to ensure that they can put pressure on the Government to make sure that the laws retain the current draft provisions to improve pre-trial detention practice.
- The national bar association should make more use of its power to intervene before the Council of Ministers at the Council of Europe.

FTI Local Expert Group (Poland)
13 February 2013

ANNEX

PARTICIPANTS

(alphabetical order)

Adam Bodnar PhD is an assistant professor at the Human Rights Chair of the Warsaw University Faculty of Law and Administration, and a visiting professor at the Central European University in Budapest. Since 2008, he has been the Head of the Legal Division and a member of the Management Board at the Helsinki Foundation for Human Rights. He is also the Senior Legal Expert within the FRALEX network of the EU Agency for Fundamental Rights.

Paweł Brożek is a qualified Polish advocate and works as a criminal defence lawyer in Gdańsk.

Marcin Cieminski is a qualified Polish advocate, holder of a PhD degree from the University of Warsaw and a partner in Clifford Chance's Litigation and Dispute Resolution Team in Warsaw. He also leads the criminal and healthcare/life sciences practices. He has substantial experience in civil, commercial and arbitration proceedings, healthcare/life sciences related matters and regulatory investigations, compliance and criminal matters.

Piotr Kosmaty is a Chief Prosecutor in the Division for Organised Crime and Corruption at the Appellate Prosecutor's Office in Kraków, Poland. His work largely covers the prevention of organised crime, terrorism and drug trafficking. Since 2011 he has been a lecturer at the Polish National School of Judiciary and Public Prosecution. He has published numerous articles concerning criminal law and operational activities.

Bartosz Kruzewski is a qualified Polish advocate and a partner at the Warsaw office of Clifford Chance. He heads the Warsaw Litigation & Dispute Resolution Team and co-heads the Restructuring & Insolvency Practice. He is also a member of the firm's International Commercial Arbitration Practice. Bartosz Kruzewski has extensive experience covering local and international arbitration as well as commercial litigation.

Maciej Kuśmierczyk is an academic in the area of criminal law, cross-border proceedings and human rights and is a practising defence lawyer at Małecki & Rychłowski, Warsaw. He also teaches criminal procedure at the University of Warsaw with a focus on comparative studies in defence rights.

Bolesław Matuszewski is an advocate in private practice representing clients in criminal, civil and administrative cases. Prior to entering private practice, he was employed as a commercial lawyer in the Warsaw office of Weil, Gotshal & Manges and has also worked as a trainee advocate at Warsaw firm I&Z s.c., where he specialised in criminal, civil and administrative litigation.

Paweł Osik is an associate at Pietrzak & Sidor, Warsaw. He was formerly a coordinator of Human Rights and Settlements with the Past programme run by the Helsinki Foundation for Human Rights.

Irmina Pacho is a lawyer at the Helsinki Foundation for Human Rights in Warsaw.

Mariusz Paplaczyk is a barrister and a specialist in criminal cases including criminal international relations. Since 2005 he has been practising as a lawyer and a managing partner of the law firm Wiza Paplaczyk & Partners Advocates Partnership. In October 2010 he was elected President of the Association of Polish Lawyers. In 2011 he became a member of the team appointed for the purposes of the Polish Commission of Criminal Law Codification. He takes part, together with the representatives of the UN office in Poland, in the training of police officers and border guards in human trafficking, slavery and illegal border crossing.

Mikołaj Pietrzak is a partner at Pietrzak & Sidor in Warsaw, where he specialises in a wide range of legal work, including defending European Arrest Warrant cases. He has a master's degree in law at the Faculty of Law and Administration of the University of Warsaw. He has been a member of the Warsaw Advocates' Chamber since 2001 and a deputy member of the Warsaw Advocates' Council since 2010. He has participated in proceedings before the Constitutional Tribunal of Poland and before the European Court of Human Rights.

Jacek Potulski PhD is a solicitor at Kopoczyński Solicitors and Legal Advisers, Gdynia. He is a penal law expert and has worked as a defence lawyer specialising in financial crimes. Jacek Potulski has been a lecturer and researcher at the Faculty of Law and Administration, University of Gdańsk since 2003. He has published widely on penal law and is the co-author of the Lex Legal Information System.

Zuzanna Rudzinska is a lawyer at the firm Wardyński and Partners in Warsaw, Poland. She has a particular interest in cross-border criminal justice and defence rights.

Agnieszka Serzysko PhD is an academic specialising in European criminal law and justice, cross-border proceedings and human rights. She has worked on projects with the Helsinki Foundation for Human Rights and with the European Research Academy in Trier. She has published numerous articles about European criminal law and justice.

Dominika Stępińska-Duch is an advocate and a member of the Dispute Resolution and Arbitration Practice Group at Wardyński and Partners law firm in Warsaw, Poland. She specialises in criminal litigation and is a member of the European Criminal Bar Association.

Jakub Tamborski is a graduate of the Faculty of Law and Administration at the University of Warsaw and a Ph.D. student. He is an advocate of the Warsaw Bar Council and specializes in criminal law and human rights. Jakub Tamborski is also an Advisor to the Polish Parliament in the areas of justice and human rights.

Janusz Tomczak is a lawyer at the firm Wardyński and Partners in Warsaw, Poland. He practises in cross-border criminal cases in which fundamental rights issues arise and has experience of representing non-nationals accused of business crime. Janusz is a member of the European Criminal Bar Association and the International Bar Association.

Marcin Warchoł PhD works in the criminal law department of the Polish Ombudsman's office and is a specialist in temporary arrest issues.

Małgorzata Wąsek-Wiaderek PhD is a leading criminal procedure academic at the Catholic University in Lublin and has published numerous articles on pre-trial detention in Poland. She is also a member of the Research Office of the Polish Supreme Court and a member of the Polish Commission of Criminal Law Codification.

Prof. Paweł Wiliński is a Professor of law and Chief of the Department of Criminal Procedure at Adam Mickiewicz University in Poznań, Poland. He is the Senior Counsel and Vice-director of the Constitutional Complaints Department at the Constitutional Court of Poland and a member of the Polish Commission of Criminal Law Codification. Since 2010 he has been an ad-hoc judge at the European Court of Human Rights, Strasbourg, France. He has previously worked at the European University Viadrina, Frankfurt and is the author of more than 100 publications on criminal procedure, criminal law, international criminal procedure.

FAIR TRIALS INTERNATIONAL STAFF

Catherine Heard is Head of Policy at FTI and is responsible for FTI's campaigning, lobbying and networking activities. Catherine produced the 2011 Reports on Pre-Trial Detention and the European Arrest Warrant, and has published widely on EU criminal justice and extradition. Catherine previously worked as a solicitor in commercial litigation, and has an LLM in Human Rights Law from Birkbeck College, London.

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

Alex Tinsley is Strategic Caseworker at FTI. Alex produced the 2012 Guide to the European Supervision Order. Before joining FTI, Alex worked at the Legal Service of the European Commission and the Court of Justice of the European Union, and volunteered the immigration detention charity BID.

FAIR TRIALS INTERNATIONAL

Hungarian Helsinki Committee

COMMUNIQUÉ

issued after the meeting of the

LOCAL EXPERT GROUP (HUNGARY)

21 February 2013

at the offices of the Open Society Institute, Budapest:

PRE-TRIAL DETENTION IN HUNGARY

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Introduction

1. On 21 February 2013, Fair Trials International and the Hungarian Helsinki Committee brought together leading experts in criminal justice from across Hungary to discuss pre-trial detention in law and in practice (a list of participants is provided in the Annex). Where we identified problems, we wanted to learn about ongoing efforts and new opportunities to challenge these. The Local Expert Group (Hungary) met for a full day at the offices of the Open Society Institute in Budapest.

2. Prior to the meeting, the Group was provided with a detailed discussion pack and asked to reflect on several themes: (i) the standards of pre-trial detention decision-making by the Hungarian courts; (ii) the reasons underlying excessive remand periods; and (iii) the opportunities for law reform and litigation. These topics were then discussed at the meeting. The remainder of this communiqué outlines the key points raised in the meeting and the key conclusions reached.

A. Pre-trial detention decision-making standards

3. The Hungarian criminal procedural code follows the case-law of the European Court of Human Rights (**ECtHR**) under Article 5 of the European Convention on Human Rights (**ECHR**). It has the correct criteria for both applying and extending pre-trial detention and there are some alternatives to detention provided for in law. Judges are granted wide discretion in the law's application.[1] The problem lies in how these laws are applied and the practice of the courts, which means that detention is the general rule, not the exception.

4. In Hungary, suspects are placed in custody prior to any order for pre-trial detention. A 72-hour temporary deprivation of liberty[2] may be ordered by the investigating authority, the prosecutor and the judge if there is a well-founded suspicion that the suspect has committed a criminal offence punishable with imprisonment and it is likely that pre-trial detention will be ordered.[3] After 72 hours, an investigating judge must either make an order that the suspect be held in pre-trial detention, or the suspect must be released. There are two general criteria for ordering pre-trial detention: (i) the crime is punishable by a term of imprisonment; and (ii) there is a well-founded suspicion that the suspect has committed the particular crime. Participants agreed that it is very difficult to challenge that there is a well-founded suspicion since the defence is usually not granted access to the case file at the pre-trial stage.

5. There was acknowledgement that while some judges are careful to make sure that the prosecutor has (as required by law) established a well-founded suspicion that the suspect committed the crime, the majority nearly always follow the motion of the prosecutor to order

[1] See Articles 126 to 135 of Act XIX of 1998 on Criminal Proceedings. As an alternative to pre-trial detention the court may impose a curfew or house arrest, issue a restraining order or impose monetary bail.
[2] Paragraph (1) of Article 126 of Act XIX of 1998 on Criminal Proceedings.
[3] Paragraph (2) of Article 126 of Act XIX of 1998 on Criminal Proceedings.

detention.[4] Participants highlighted that prosecutors often request pre-trial detention when it is not necessary and that judges agree to these requests almost automatically. As judges must rely on the information provided in the prosecutor's file, it can be difficult for them to fully check the facts of the case.

6. Once the court has established that there is a well-founded suspicion that the suspect committed the crime, it must look at whether one or more of the special grounds for imposing pre-trial detention exist.[5] Participants felt that the special reasons given for imposing pre-trial detention are often inadequate. The court usually determines that there is a well-founded reason for pre-trial detention based on the information in the motion submitted by the prosecutor, without giving any detailed reasoning. This is despite a clear requirement from the Supreme Court that if a suspect is held in pre-trial detention due to a risk of absconding, this must be justified by specific conditions relating to the accused.[6]

7. It is very difficult for the defence to prepare an effective case against pre-trial detention. The defence is granted very limited access to the case file at the pre-trial stage. With the exception of any experts' opinions and records of the suspects', and any defence witness' questioning, suspects and their lawyers can only access the case file if it is not prejudicial to the 'interests of the investigation'.[7] This means that the case file is usually only disclosed to suspects after the completion of the investigation. Many participants felt that this made pre-trial detention hearings biased in favour of the prosecution because the defence is unable to: (i) access the information needed to determine whether the decisions for pre-trial detention are in fact justified; or (ii) put forward an effective case against a prosecutor's request for detention. Most of the participants agreed that law reform is needed in this area. In cases where pre-trial detention is being requested or has been imposed, the general rule should be that the information required to challenge the decision on pre-trial detention is disclosed and prosecutors should have to establish why disclosure of specified documents is not in the interests of justice.

8. A suspect's personal circumstances very rarely have an impact on pre-trial detention decisions. Examples were given of people with strong ties to Hungary who had surrendered to the police voluntarily, but who were not granted release pending trial because of a risk of absconding. It is also very difficult for suspects to obtain documents proving their ties to Hungary (such as birth certificates of dependent children) that may support their release pending trial in the initial 72

[4] Research by the Hungarian Helsinki Committee found that in 2011, 5,712 out of 5,980 prosecutorial motions were approved, equivalent to 95.5 percent. Source: National Penitentiary Headquarters upon inquiry by the Hungarian Helsinki Committee.

[5] The special grounds are: (i) the defendant has absconded or remains hidden from the court, the prosecutor or the investigative authority; has attempted to abscond; or a new criminal procedure has been initiated against him or her during the proceedings involving a crime subject to imprisonment (Sec. 129(2a)); (ii) if there is reasonable cause to believe that the presence of the defendant cannot be ensured due to the risk of absconding, remaining hidden or other reasons (Sec. 129(2b)); (iii) if there is reasonable cause to believe that he or she would interfere with the course of justice if not held in pre-trial detention (Sec. 129(2c)); or (iv) if there is reasonable cause to believe that the defendant would accomplish the attempted or planned criminal offence, or commit another offence punishable by imprisonment (Sec. 129(2d)).

[6] See Decision no. BH 2009/7 of the Supreme Court.

[7] Paragraph (2) of Article 70/B of Act XIX of 1998 on Criminal Proceedings.

hour custody period. The Hungarian Helsinki Committee referred to pending cases in the ECtHR challenging this.[8] It was reported that if the suspect has any previous convictions, even if minor and for offences committed many years ago, or the maximum possible sentence is lengthy, then pre-trial detention will almost always be imposed. Unemployed people and non-nationals are also highly likely to be detained. Where a case involves multiple defendants, the court will usually impose the same detention order on all defendants without taking into account their personal circumstances. Participants agreed that pre-trial detention decisions should be based on the facts relating to the suspect before the court, not made automatically due to past activities or the seriousness of the offence.

9. Many participants were concerned that police regularly put pressure on suspects to cooperate to avoid pre-trial detention. Due to the likelihood that the prosecutor's motion will be followed by the court, this is often successful. In a survey carried out by the Hungarian Helsinki Committee in 2004, a considerable number of suspects questioned claimed that the authorities had exerted some form of pressure on them to obtain the evidence required for a guilty verdict: 35.9 percent claimed the officer promised they would be released if they confessed to the crime and 27.88 percent claimed the interrogator told them that they would be put in pre-trial detention or the detention would be prolonged if they did not confess.[9] It was also noted that in cases with numerous defendants, it was not unusual for one defendant to avoid detention if he or she agreed to give evidence against co-defendants. The poor conditions and lack of basic facilities available in pre-trial detention in Hungary can also put psychological pressure on suspects to cooperate. It was agreed that a good way to reduce this practice would be to record interviews in the police station. This would provide evidence of undue pressure where it was exerted and would also exonerate wrongly accused police officers where the claims are false. There would, of course, remain the risk that investigators would exert pressure on defendants outside of official interviews.

B. Use of alternatives to pre-trial detention

10. Despite the severe overcrowding in Hungarian jails,[10] alternatives to pre-trial detention are rarely used. House arrest is sometimes accepted as an alternative but police and prosecution authorities often complain about the heavy administrative and personnel burden involved in effectively enforcing house arrest (particularly in the absence of electronic monitoring) and this can lead to the court deciding in favour of pre-trial detention. Some participants felt that courts are reluctant to use alternatives to pre-trial detention due to concerns about the risk that this entails if the defendant absconds or reoffends. It was considered that information from other EU jurisdictions on best practice for the use of alternatives would be valuable.

[8]Shortly after the meeting the ECtHR delivered its judgment in X.Y. v. Hungary (application no. 43888/08) and held that the Hungarian Government failed to provide evidence that the requisite access to documents was made available to the applicant. In cases Hagyó v. Hungary (application no. 52624/10), A.B. v. Hungary (application no. 33292) and Baksza v. Hungary (application no. 59196/08) Hungary was also found to be in breach of Article 5 ECHR.

[9] András Kádár, Presumption of Guilt, Hungarian Helsinki Committee, Budapest, 2004, p. 70. Available at: http://helsinki.hu/wp-content/uploads/Presumption_of_Guilt.pdf

[10] According to the latest official statistics dated December 31, 2012 Hungarian prisons are on average at 137 percent capacity. Source: http://www.bvop.hu/?mid=77&cikkid=1973

11. Electronic tagging is not currently available in Hungary, and participants felt that courts would be much more willing to use alternatives such as house arrest and curfews if it were introduced. Shortly after the meeting, it was announced that the testing of the electronic bracelets will begin during 2013.[11] Electronic tagging would also give defendants the flexibility to continue with their lives by, for example, going to work or continuing their studies.

12. The European Supervision Order (**ESO**) has been implemented into Hungarian law, although many participants were not aware of this. However, participants felt that it was unlikely to be used in practice as its application would be difficult and complex and judges would not be willing to use it without proof that defendants subject to an ESO would not abscond. It is most likely to be used in relation to neighbouring countries where the authorities already cooperate on a regular basis. Participants agreed that judges, prosecutors, and lawyers will need practical guidance on the types of cases where an ESO may be appropriate and that more work is needed from the European Commission on implementation.

C. The links between investigation and detention on remand

13. There are regular reviews of pre-trial detention in Hungary, both before and after the indictment is filed.[12] However, it is very rare that an initial decision to detain is reversed. Some judges, particularly in Budapest, are increasingly willing to look at alternatives later in the proceedings but this is not widespread. Courts do not usually make continuing pre-trial detention conditional on the investigation progressing or raise concerns about the length of time that an investigation is taking; indeed, they have no legal obligation to take this into account. Judges also do not have the power to direct the investigation in order to ensure that it takes place efficiently. Participants felt that legislative reform to enable judges to take the length and progress of the investigation into account when deciding on continuing pre-trial detention could be useful. Standards of review may be improved by a recent Ministry of Public Administration and Justice publication[13] circulated among judges, which made it clear that courts should make a fresh decision at each review of pre-trial detention due to recent ECtHR Article 5 cases relating to Hungary.

14. Prosecutors sometimes extend investigations for as long as is necessary to find evidence sufficient to obtain a conviction, with defendants remaining in pre-trial detention in the meantime. This can result in defendants being detained for up to two years during the investigatory phase, which can be extended to four years for the most serious offences as, following charge, defendants may be held for additional lengthy periods in detention before conviction.[14]

D. Reform outlook

[11] See: http://mno.hu/magyar_nemzet_belfoldi_hirei/a-nyomkoveto-karperec-teszt-elott-1144515
[12] See Articles 131 and 132 of Act XIX of 1998 on Criminal Proceedings.
[13] Not publically available.
[14] See Article 132(3) of Act XIX of 1998 on Criminal Proceedings.

15. The number of cases in which Hungary is found in breach of Article 5 ECHR by the ECtHR is increasing.[15] The Government is aware of the issues and is showing some willingness to encourage implementation of the decisions, but progress is slow. In particular, this requires a shift in the attitude of judges and prosecutors, which vary greatly across Hungary. Additional training is needed to ensure that all judges and prosecutors are aware of the decisions and what they mean in practice.

16. Legislative reform is needed to improve the access of the defence to the case file at the pre-trial stage. The limits placed on access under the current law prevent defence lawyers from preparing effectively for pre-trial detention hearings and make the process heavily weighted in favour of the prosecution. This reform should be forthcoming due to the need to implement the Directive on the right to information in criminal proceedings by June 2014.[16] If the required reforms are not introduced, this is an area where a reference to the Court of Justice of the European Union **(CJEU)** may be appropriate.

17. There should also be legislative reform to enable judges to take into account the length of investigations and the progress that is being made when reviewing pre-trial detention. If judges were able to make continuing detention conditional on certain progress being made by prosecutors then proceedings could be concluded more efficiently and effectively.

E. Key recommendations

a. Decision-making standards

- There is a need to change the mentality of judges and prosecutors in relation to pre-trial detention. More training of judges and prosecutors is needed, particularly in relation to ECtHR decisions and international standards. While training programmes are in place, these are not reaching enough people, and it is important to make sure that those working at courts outside of the major cities are engaged in these.
- Judges should be required to provide reasoned decisions which take into account the arguments for and against pre-trial detention in each individual case. This would reduce the excessive weight placed on the prosecutor's motion, as well as on previous convictions and the seriousness of the offence.
- Research should be undertaken into the practicality of recording police interviews to reduce the pressure placed on suspects to cooperate to avoid pre-trial detention.
- Legislative reform is needed to improve access of the defence to the case file at the pre-trial stage. This should be forthcoming due to the need to implement the Directive on the right to information in criminal proceedings, and if it is not, a CJEU reference may be appropriate.[17]

b. Alternatives to detention

[15] In February 2013 there had been four violations found since October 2012 alone.
[16] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:142:0001:0010:EN:PDF
[17] Ibid

- Work should be undertaken to increase the willingness of judges and prosecutors to use alternatives to detention. Sharing best practice with other EU countries could be valuable in this respect.
- The use of electronic tagging should be available as an alternative to pre-trial detention. While its expansion may have a cost impact, in the long term it will save money as holding someone in pre-trial detention is very expensive. In particular, this would increase the use of house arrest.
- Training is needed to educate judges, prosecutors and lawyers about the ESO and when it should be used.

c. Excessive periods of detention on remand

- Courts should require better reasons for the extension of pre-trial detention and should not automatically approve motions for extensions by prosecutors. The use of a recent Ministry of Public Administration and Justice publication, which made it clear that courts should make a fresh decision at each review of pre-trial detention on extension decisions, should be monitored.
- Prosecutors should be required to provide evidence on the progress of the investigation to establish the need for continuing pre-trial detention at each review hearing, and judges should be given the express power to consider the efficiency of the investigation as a factor relating to the decision about whether to authorise pre-trial detention.

Local Expert Group (Hungary)
May 2013

ANNEX

PARTICIPANTS

(alphabetical order)

dr. Bencze, Mátyás is an Associate Professor of law at the University of Debrecen. A former judge, he has conducted extensive research in the field of theoretical and sociological problems of adjudication. Professor Mátyás has published extensively on EU and constitutional law.

dr. Bieber, Ivóna is a legal officer in the Detention and Law Enforcement Programme of the Hungarian Helsinki Committee.

dr. Fazekas, Tamás is a human rights and criminal defence attorney who specializes in freedom of expression and drugs related cases. Since 2001, he has worked for the Hungarian Civil Liberties Union as a legal aid service officer. Tamás Fazekas also works with the Hungarian Helsinki Committee's Human Rights Legal Counselling Program to provide legal aid to victims of human rights violations both in Hungary and at the ECtHR and the CJEU, and to monitor prisons and police detention facilities with the Hungarian Helsinki Committee. He was awarded Pro Bono Attorney of the year 2012 by the Hungarian Bar Association.

dr. Magyar, Gábor is a partner at Magyar György és Társai in Budapest. He has worked on cases at the European Court of Human Rights, the European Court of Justice and the European Commission. He has experience with criminal procedure and pre-trial detention, human rights law, the European Arrest Warrant, data protection, and tort law.

dr. Gyalog, Balázs is an experienced defence attorney and has worked for the Hungarian State Treasury and the law firm Bánáti Ügyvédi Iroda. He is also an active member of the Budapest Bar Association, contributing to an initiative to reform the system of public defenders.

Ms. Isobel, Marion is a Legal Officer at the Open Society Justice Initiative (OSJI). In recent years she has worked to promote effective implementation of the European Court of Human Rights judgment in *Salduz v Turkey*. Marion is qualified as a solicitor in Australia.

dr. Kádár, András is a criminal defence attorney and co-chair of the Hungarian Helsinki Committee (HHC). He has been responsible for the HHC's various projects aimed at reforming Hungary's *ex officio* appointment system in criminal cases. He was actively involved in the organisation's advocacy efforts during the drafting process of Hungary's legal aid law in 2003. He has participated in several conferences and seminars dealing with the issue of defence rights and legal aid, and published a number of articles on the topic, with special regard to the need for reform in the criminal field.

dr. Kara, Ákos works at the Criminal Law Codification Department of the Ministry of Public Administration and Justice. He has also served as Head of Delegation and Legal Advisor at the Ministry of Justice.

dr. Ligeti, Miklós is the Legal Director of Transparency International Hungary, an organization dedicated to mitigating corruption, promoting transparency and ensuring accountability in the public sector. He previously worked as Head of the Statistical and Analysis Unit at the Ministry of Justice

and Head of the Statistics and Coordination Unit of the Ministry of Interior, where he was responsible for criminal codification and crime statistics.

dr. Lőrik, József is an experience criminal defence attorney in Budapest.

dr. Matusik, Tamás is a Judge at the Central District Court of Buda. He has also served as an expert consultant for the Hungarian Helsinki Committee on the issue of criminal law reform in Hungary. He published an article about ECHR pre-trial detention standards and suggested best practices for Hungarian judges in 2012.

Ms. Omboli, Katalin is a program associate with the Open Society Justice Initiative. Now based in its Budapest office, Ms. Omboli has served as a program coordinator for the Open Society Foundations' Education Support Program in both Budapest and London.

Jámborné dr. Róth, Erika is an Associate Professor on the law faculty at the University of Miskolc.

FAIR TRIALS INTERNATIONAL STAFF

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

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

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

FAIR TRIALS INTERNATIONAL

COMMUNIQUÉ

issued after the meeting of the

LOCAL EXPERT GROUP (GREECE)

27 April 2013

PRE-TRIAL DETENTION IN GREECE

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With financial support from the Global Criminal Justice Fund of the Open Society Foundations

1. On 27 April 2013, Fair Trials International brought together leading experts in criminal justice from across Greece in order to learn about pre-trial detention in law and in practice (a list of participants is provided in Annex A.)Where we identified problems, we wanted to learn about ongoing efforts and new opportunities to challenge these. The Local Experts' Group (Greece) met for a full day at the Radisson Blu Park Hotel in Athens.

2. Prior to the meeting, the participants were asked to reflect on several themes: (i) the standards of pre-trial detention decision-making by the Greek courts; (ii) the reasons underlying excessive use of remand; and (iii) the opportunities for law reform and litigation. These topics were discussed at the meeting. The remainder of this communiqué outlines the key points raised in the meeting and the key conclusions reached.

A. Pre-trial detention decision-making standards

Legal Framework

3. Historically, the Greek penal code created a presumption of pre-trial detention, which could be based on the seriousness of the allegations among other factors. However, the law was reformed in the 1981 so that, according to the law, pre-trial detention would be regarded as a measure of last resort which could only be imposed when certain prerequisites were met. This created a legal presumption of release.

4. Pre-trial detention can be imposed if one of the following elements is met:
    a. The person is accused of a felony[1] AND
    b. Does not have either any known residence in the country, or
    c. Has made preparations to facilitate his absconding, or
    d. Has been a fugitive in the past, or
    e. Has been declared guilty for escape from prison or for violations of restrictions regarding his/her place of residence, or
    f. If, by setting the accused free and taking into consideration characteristics of either the accused's life or characteristics of the crime at hand, it is likely the accused will reoffend.[2]

Risk of Reoffending

5. Participants highlighted the final element, allowing judges to impose pre-trial detention on account of vague reference to "characteristics" of the person or the alleged crime, as particularly problematic.

6. Two recent changes in the law were discussed:
    a. In 2009, the law (Art. 282)3811/2009 created objective criteria to guide judges on pre-trial detention imposed for the purpose of preventing re-offending. This reform provided that, in order to impose pre-trial detention for the purpose of preventing re-offending, the possible sentence had to be at least 10 years, and the suspect must have had two prior convictions for the same or a similar offence.
    b. This was later amended in 2012 to the current position, stating that a suspect could be remanded in pre-trial detention if faced with at least a 10 year sentence and with

[1] An exception to the rule that a crime must be a felony in order for PTD to be ordered exists in the case of serial manslaughter, which is technically a misdemeanor yet qualifies a suspect for PTD.
[2] Article 282(3), Greek Criminal Procedure Code.

reference to the vague provision on consideration of characteristics of the person or the crime at hand.

7. This change, and the lack of criteria for such consideration, brought back an element of discretion, and thus arbitrariness, to judges' decisions about pre-trial detention. The repeated changes, first limiting and later reviving the discretionary power of judges to detain suspects pre-trial, have contributed to a lack of implementation of human rights standards regarding reasoned detention decisions.

Problems in Practice

8. Greek law controlling pre-trial detention, namely the Criminal Procedure Code and Constitution, broadly complies with the standards of the European Court of Human Rights. However, participants raised various problems in practice, which suggest that the law is not being implemented consistently by judges.

Reliance on proscribed reasons for detention:

a. Legal limits on the reasons for the imposition of pre-trial detention are not respected. Many judges have not psychologically and institutionally adapted to the legislature's desire to limit pre-trial detention. It is common for judges to continue to rely on unlawful reasons for an over-use of pre-trial detention, including "to avoid a similar offence in the future," without specific reference to objective characteristics of the accused that create such a risk.
b. Participants noted that judges were often seen to make decisions on pre-trial detention based on the seriousness or nature of the alleged offence, although this is not a permitted reason for detention.
c. Similarly, judges were seen to rely on pre-trial detention in order to satisfy a public appetite for justice, although this reason is not lawful.

Lack of reasoned judgment:

a. Participants expressed concern that judges' decisions about pre-trial detention frequently lack reasoned judgment, repeating sections of the law by rote and making no reference to the specific characteristics of the case or the individual characteristics of the defendant that might suggest risk of flight or likelihood of interference with the evidence.
b. This problem extended to judges on justice councils[3] tasked with deciding whether pre-trial detention could be extended first from 6 months to 12 months, and then beyond the 12 month time limit provided by law (to a maximum of 18 months[4]). The extension of detention from 12 to 18 months is intended to operate as an exceptional measure governed by the Constitution (Article 6(4)), which should require a more detailed justification for reasons for the extension, taking into consideration all of the evidence and real events on which the finding of exceptional circumstances are based. However,

[3] Judicial councils are made up of the presidents of the three highest courts (the Supreme Court, the Council of State, and Comptrollers' Council, plus members chosen by lot from among judges who have served in the high courts for at least two years.
[4] Art. 287(2)(b), Greek Criminal Procedure Code.

in these decisions too, there was rarely evidence of reasoned judgment or reference to individual characteristics of the case or defendant.[5]

Routine use of pre-trial detention

9. It is notable that, despite the relatively firm time limits set out in legislation on pre-trial detention in Greece, pre-trial detainees make up roughly a third of total inmates in Greece's prisons, suggesting that the use of pre-trial detention is wide and routine, if not as long as in some other jurisdictions.

10. A number of possible reasons for this were discussed:
    a. The structure of pre-trial detention hearings predisposes judges to agree with the recommendations of prosecutors. Where a judge disagrees with the recommendation of the prosecutor regarding pre-trial detention, the case is referred to a judicial council or special magistrate. In such cases, the imposition of pre-trial detention usually prevails. The accused person has no such automatic right for review of the decision by the justice council when there is disagreement between the judge and the defence, creating an inequality in the procedure. Only the public prosecutor of second instance can lodge an appeal against the decision of the council.[6]
    b. Some judges seem to be using pre-trial detention as punishment for the alleged crime itself, in order to make up for the perceived inevitability of trial delays and lack of convictions. The ECHR has frequently found violations by Greece due to the excessive length of pre-trial detention and the incompatibility of Greek court procedures with the presumption of innocence and the right to liberty. Since 2007, the ECHR has found more than 40 violations of Article 6(1) on account of the length of proceedings before the criminal courts.[7]
    c. Pre-trial detention was seen by both the judiciary and to some extent, the public, as a crime-fighting measure rather than solely a way to ensure attendance at trial. This was considered to be the case, for example, with some white-collar defendants who were later acquitted, but had nevertheless been subject to pre-trial detention. The perception was that judges supervising these cases felt that pre-trial detention was necessary to satisfy the public's desire for justice in such cases, given the economic crisis.
    d. The crusading or vigilante mentality prevalent among some members of the judiciary was exacerbated by an overall weakness in social policy. There was a tendency on the part of the Greek legislature to criminalize social problems, so that endemic issues such as financial mismanagement and drug addiction were left to the criminal courts in the absence of supportive civil or social measures, such as harm reduction policies for drug users and sex workers, or systematic reform of financial institutions[8].

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[5] See Lambropoulous, Effi, "Pre-trial Detention in Greece," in *Pre-Trial Detention: Human Rights, criminal procedural law and penitentiary law, comparative law* , ed. P.H.P.H.M.C. van Kempen: "The judicial council in order to decide has to examine all the prerequisites for detention from the beginning; however, the judicial councils in the majority of the cases are restricted to repeating the prerequisites of the law in order to justify their decision, without explaining sufficiently the reasons for that." Pg 428.

[6] *Id* at pg 425.

[7] *Nerratini v. Greece*, ECHR 43529/07, 18 December 2008; see also *Michelioudakis v. Greece*, ECHR 54447/10, 3 April 2012, which has been made a 'pilot case' for review by the court with the aim of addressing the structural deficiencies which lead to excessive delays before the criminal courts. This means that, in the year following the judgment, the ECHR freezes its examination of similar cases, of which there are around 50 currently pending before the Court.

[8] Participants mentioned in particular recent arrests of 31 alleged sex workers, followed by forced HIV testing and pre-trial detention. The suspects were later cleared of all criminal charges. See, eg, UNAIDS letter condemning the action 10 May 2012, available at:

B. Effective participation of the defence in pre-trial detention hearings

11. By law, the defendant has the right to be heard at all stages of the criminal proceedings and, in theory, has a wide range of defence rights at this stage, including the right to be heard[9]; the right to remain silent, deny the charges, and submit a written defence statement[10]; to be informed and receive copies of all the evidence in the case file and for sufficient time to prepare his/her defence[11]; to present evidence in his/her defence and to examine the evidence against him/her[12]; to access a lawyer at any stage of the investigation[13], etc. However, participants described the detention hearing as lacking basic features of procedural fairness. The hearings are not public and are not adversarial.[14] Adjudication was usually in favour of pre-trial detention. Access of the defence to the case file at this stage was minimal, with defence lawyers often given no more than five minutes to review the documents and prepare arguments.

12. The lack of time to prepare defence arguments and evidence was especially acute for legal aid cases. In the pre-trial phase, the court appoints lawyers for those unable to pay private defence counsel from a list drawn up by the district or city bar association. The list is not differentiated as to speciality, so it often happens that the lawyer assigned to a criminal case does not have a background in criminal law. The lawyers on the legal aid list frequently had no time to examine the case and could not therefore offer appropriate support. Their presence at court was merely a formality and did not amount to an effective defence.

13. Another problem for the effective participation of the defence was the low quality of interpretation for non-Greek speaking defendants, leaving the accused with only a vague sense of the proceedings and an inability to intervene when needed. Court interpretation in Greece is not highly regulated. A list of accredited interpreters is maintained, but in reality anyone can apply to be listed without being obliged to submit any proof of certification as an interpreter. Usually, people wishing to serve as court interpreters simply wait outside the courts and are "on call." In the vast majority of cases, the interpreters are non-professionals who have a certain command of the language needed and attempt to assist the suspect as best they can. There is no established code of ethics or other mode of ensuring quality and impartiality. Participants referred to cases where interpreters were related to the accused and had been convicted of similar crimes. Remuneration is minimal and not sufficient to attract quality professional interpreters.

14. The procedure within the justice councils (tasked with adjudicating differences of opinion between prosecutors and judges and with ruling on requests for extension of pre-trial detention) was also generally not public in the experience of participants and neither the prosecutor nor the defence were permitted to attend. The practice of holding justice council hearings extending detention in private has been criticised by the European Court of Human Rights. In response to this criticism, law 3346/2005 was adopted, specifically granting the right to be heard by the justice council. However, this law has since been replaced, with the justification that the requirement that both parties be present was creating further delays in

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http://www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2012/may/20120510psgreece/

[9] Article 20 Greek Consitution; Art 287(5) Greek Criminal Procedure Code.

[10] Articles 104, 273 Greek Criminal Procedure Code.

[11] Articles 101, 102 Greek Criminal Procedure Code.

[12] Articles 104, 273, 274 Greek Criminal Procedure Code.

[13] Articles 96, 100, 273(2) Greek Criminal Procedure Code.

[14] Art 241, Greek Criminal Procedure Code.

the pre-trial period. The current practice before the justice councils in detention extension hearings is for neither of the parties to be present unless the council determines that their presence is necessary. The lack of openness of the procedure contributed to judges' ability to rule on pre-trial detention without providing reasoned judgment, since there are no observers and no one is there to provide a check on the judge's behaviour.

C. Use of alternatives to pre-trial detention

15. Article 282(2) of the Greek Criminal Procedure Code sets out conditions which can be imposed by the court when granting the defendant release pending trial, as an alternative to pre-trial detention. These include imposing an order which prohibits a defendant from living in, or moving to, a certain place; a restriction on the defendant leaving Greece; an order prohibiting communication with certain persons; and an obligation to pay a financial surety in order to secure release. Article 282(3) states that pre-trial detention should be an exceptional measure allowed in serious cases if none of the other restrictive conditions can secure the defendant's presence in the proceedings or prevent him from committing further crimes.

16. Although provided for by law, these alternatives to detention were not used regularly in practice. They were usually requested in written submissions by defence counsel, rather than at the instigation of the prosecution or judge. Further, the fact that the available alternatives are spelled out in the penal code makes innovation cumbersome and legislature-led. For example, electronic monitoring/ankle bracelets were not provided for in law (and additionally were perceived to be too expensive, the cost of pre-trial detention notwithstanding).

17. Alternatives such as participation in a residential drug treatment program were sometimes available in lieu of pre trial detention, but were the exception and required extensive work on the part of the defence, for example by locating appropriate programs and ensuring that the defendant was enrolled and complying with the program.

18. The European Supervision Order has not yet been adopted in Greece, though it is under review. It was considered that this would be of assistance in lessening over-reliance on pre-trial detention in the case of foreign nationals, who are routinely subject to pre-trial detention on the grounds that they do not have a local address, and who make up 64% of all pre-trial detainees in Greece. This was the case even where the foreign national suspect in fact had a local address, but was still perceived to be a flight risk based on their foreign national status alone. Alternatives short of detention, such as the suspect turning in his passport or being subject to residential limits, were available and sometimes used, but rarely. Participants suggested that it might be helpful for judges and prosecutors to learn about the approaches taken in other jurisdictions in relation to alternatives to detention.

D. Links between investigation and detention on remand

19. The Greek Criminal Procedure Law provides for timelines in which investigation must take place, with extensions possible. There was a tendency on the part of prosecutors and judges to make felonies out of relatively small cases that could have been framed as misdemeanours. This allowed judges to impose pre-trial detention more easily, as pre-trial detention cannot be used for misdemeanours (carrying sentences of five years or less).

20. Although there is a strict 18 month time limit on pre-trial detention,[15] in practice it was possible to get around this limit through the fragmentation of cases. For example, a suspect would be accused of 5 counts of an offence, prosecuted for one or two of them and placed on pre-trial detention, then later formally accused of more of the counts arising from the same case or from a different one, and placed on pre-trial detention for those as well. In this way pre-trial detention periods can accumulate and a suspect can be detained for 2 or 3 years in total before a case is tried. This technique has so far been used in serious cases where the investigation cannot be finalised within 18 months.

21. Pre-trial detention is sometimes used to encourage confessions or testimony against a suspect's co-accused. Because there is no formal plea bargain system, prosecutors rely on other means to coerce testimony and confessions. One of these is to offer a suspect release from pre-trial detention in exchange for cooperation with the prosecution.

22. Detention is also used, as mentioned above, to punish offenders when the court believes there are problems with an investigation such that a conviction is not likely or that delays will cause any judgment to be too late to satisfy the public desire for justice.[16] This was the case, for example, in high profile prosecutions of businessmen and bankers prosecuted in the wake of the economic crisis. It was perceived that the defendants were prosecuted mainly to satisfy the public appetite for justice, and that the defendants would in time be acquitted. Therefore participants felt that judges subjected these defendants to pre-trial detention knowing that, if a conviction were to come, it would not be for many years, which would not ameliorate public anger over allegations of economic mismanagement.

23. Police custody in the early days following arrest also occurs,[17] in cases where a suspect is caught red-handed, or if he cannot be brought immediately to court. Police detention can also take place in exceptional circumstances by presidential decree. This authority is sometimes abused. Suspects may be held for days in police stations, without being permitted to notify anyone of their arrest and without access to a lawyer, and are often subject to abusive behaviour by police.[18] Through this process, suspects are often accused of felonies based on no other evidence than the word of a police officer, as no further investigation is done and the formal accusation procedure is not followed. Participants described suspects subject to this procedure as traumatised and in need of rehabilitation after their time in the police station and later on remand.

24. In some cases, suspects who were earlier released on remand would be arrested before the court date to ensure their appearance, without any warning being given to the lawyers of the court date. Participants felt that this was a tactic used by prosecutors to deny lawyers access to the accused in the days leading up to trial.

E. Prison conditions

[15] Article 6(4) of the Greek Constitution and Article 287(2), Greek Criminal Procedure Code.

[16] See also Lambropoulous, *infra* pg 437, "Legislative initiatives to shorten the pre-trial detention time and prevent abuses during the last decade caused the reaction of law enforcement agencies which, when they considered that the accused should be detained, they preferred to increase the charges against him/her or the seriousness of crimes committed in order to protect society and have more time for their investigation."

[17] Articles 275-277, Greek Criminal Procedure Code

[18] Council of Europe Committee for the Prevention of Torture, *Report to the Government of Greece*, 10 January 2012, pp. 38-42.

25. Though this was not a focus of the discussion, participants felt it was impossible to discuss pre-trial detention in Greece without commenting on the inhuman conditions in Greek prisons. Pre-trial detainees are usually not kept in separate facilities from convicted prisoners, so the appalling conditions of Greek prisons affect pre-trial detainees just as much as other prisoners.[19] Defence lawyers' practice has changed to include more visits to prison because so many of their defendants are held there. Lawyers are forced to draft memos in police headquarters and in squalid conditions in overcrowded prisons. Despite sustained criticism of Greek prison conditions, there has been no real improvement.[20]

F. Foreign defendants

26. 49% of all prisoners in Greece, and 64% of pre-trial detainees, are foreign nationals.[21] This does not include people detained in immigration centres. Foreign defendants are overwhelmingly subject to pre-trial detention, and suffer throughout the judicial process from a lack of knowledge of Greek language and inability to communicate with counsel, prison staff, and even other inmates, as interpretation services are provided only in the court, and not in prison. Participants considered that the reasons for such a high proportion of foreign national criminal defendants were complex (including the large number of migrants in Greece, the clandestine nature of the lives and livelihoods of many irregular migrants, and xenophobic attitudes on the part of the public, police and prosecutors), but that many of them were likely to have been acquitted if they had proper access to legal assistance in a language they could understand.

G. Reform outlook

27. Legislation around pre-trial detention has been reformed numerous times over the past fifteen years, including changes as recent as 2012. Though some participants felt there was further room for reform, for example by requiring reference to objective criteria for detention (as was required in the 2009 reforms and later reversed in 2012), in general the problems leading to the over-use of pre-trial detention in the Greek justice system had more to do with the implementation of existing law, and some participants were concerned that further changes to the law might serve only to obscure matters further.

28. Participants raised the following reform ideas:
    a. The most serious problem in need of reform was the lack of reasoned judgment by judges and justice councils in deciding to order and extend pre-trial detention. As such, there is a need for a change in mindset and culture amongst judges at all levels.

    b. Concrete criteria to determine who constitutes a flight risk should be established and referred to in detail by judges in making decisions on pre-trial detention.

    c. Greater due process guarantees, including a proper open hearing with the opportunity for argument and evidence from the defence, are also required.

    d. Ongoing training for the judiciary on international and domestic legal norms relating to pre-trial justice is needed.

[19] Council of Europe Committee for the Prevention of Torture, *Report to the Government of Greece*, 17 November 2010, pp. 49, 52, 58, 62-66.
[20] Council of Europe Committee for the Prevention of Torture, *Public Statement Concerning Greece*, 15 March 2011.
[21] Council of Europe Annual Penal Statistics, *SPACE I: Survey 2008*, 22 March 2010 (most recent statistics available).

e. Judgments from the European Court of Human Rights criticising the lack of reasoned judgment in justice councils in particular should be better implemented.

H. Key Recommendations

Decision making standards

29. Some participants felt that the laws establishing the criteria for imposing pre-trial detention needed to be reformed in order to permit judges less discretion, and to require more detailed reasoning in decisions to detain. Others felt that the repeated changes to the criminal procedural code may have helped contribute to the lack of clearly implemented legal standards in pre-trial detention decision making, and that more emphasis should be placed on enforcement of existing laws and standards.

30. Similarly, legal challenges on both a domestic and international level were needed to address the lack of reasoned judgment in pre-trial detention decisions. However, more important than further litigation was the pressing need to implement existing decisions from the European Court of Human Right, recommendations of the CPT, and domestic legislation which already requires such reasoning.

31. Training should be provided to judges and prosecutors on international legal standards and judgments against Greece on Article 5 and 6 issues. Monitoring of reasoning from judicial councils on extensions of detention could also be instituted.

32. Either party should have the right to appeal a pre-trial detention decision to the justice councils, rather than an automatic review only when the judge disagrees with the prosecutor.

33. Targets and performance evaluations for judges and prosecutors should have built-in expectations that a certain percentage of cases should be released pending trial. For example, the Inspector of the Supreme Court has the duty to monitor the action of judges, but never in twenty years has a judge been sanctioned for an inappropriate or excessive use of pre-trial detention.

Effective Participation of the Defence

34. Greece should implement legislative and practical reforms to ensure that defence counsel has access to the case file, in particular to evidence used by the prosecution in order to argue that a suspect should be detained, with enough time to ensure that the defence is able to collect evidence and develop arguments in favour of liberty. This should be forthcoming due to the need to implement the Directive on the right to information in criminal proceedings, and if it is not, a CJEU reference may be appropriate.[22]

35. A larger role for both the prosecution and the defence should be initiated for the extension of detention periods past twelve months. The defendant should be allowed to be present at these hearings if they so request it. As extension of pre-trial detention past twelve months is intended to be an extraordinary measure, the prosecution should be required to put forth fresh arguments based on objective evidence as to why detention should be extended, and the defence should have both the time and faculties to respond to these arguments.

[22] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:142:0001:0010:EN:PDF

Links between investigation and detention on remand

36. Reforms should be developed to the fast track system for processing suspects caught red-handed, such that suspects are not subjected to long periods in police custody and are afforded the same rights as others.

Alternatives to Detention, Foreign Nationals and Prison Conditions

37. Greece should develop a dedicated pre-trial services linked with social service agencies in order to implement alternatives like house arrest which can be difficult to enforce for indigent and non-resident defendants.

38. It should also pilot programs for innovative alternatives, such as electronic tagging, in which these can be trialed and monitored with a minimum of risk for the judges taking part and with a full cost/benefit analysis so as to address concerns regarding the expense associated with such measures.

39. An exchange of best practices in which jurisdictions successfully employing alternatives to detention share their experiences with others could assist judges and legislators who are hesitant to employ such alternatives.

40. Greece should consider implementing the European Supervision Order, and judges should be trained on its use to reduce over-incarceration of foreign nationals.

41. Greece should also propose and implement improvements to its system of translation and interpretation for non Greek speakers, in line with the need to implement the Directive on the right to interpretation and translation.[23]

42. It should be noted that encouragement of alternatives to detention should be an urgent priority for the Greek government in order to improve prison conditions due to overcrowding.

Local Expert Group (Greece)

June 2013

[23] Directive 2010/64/EU of the European Parliament and of the Council 20 October 2010 on the right to interpretation and translation in criminal proceedings, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:280:0001:0007:en:PDF

FAIR TRIALS INTERNATIONAL

Fair Trials International

Local Expert Group (Greece)

Athens, 27 April 2013

PARTICIPANTS

(Alphabetical Order)

Ms Danai Bitsaki is a criminal lawyer working in Athens and Crete.

Dr Panayotis Christopoulos practices criminal and public law in Athens. He holds a PhD in Criminal law and he is widely published on the subject in Greece, where he is a member of the Greek Society of Criminal Law, the Greek Criminal Lawyer society, and the Athens Bar Association.

Ms Marianna Diamanti is a criminal lawyer and member of the Athens Bar Association.

Mr Orestis Georgiades is a lawyer at Goulielmos D. and Partners in Thessaloniki, Greece. He has extensive experience as a criminal defence lawyer in cross-border cases. Orestis has also served as a legal advisor and member of the administrative board of Greek Helsinki Monitor (GHM), an NGO that monitors, publishes and lobbies on human rights issues in Greece. He is a member of Fair Trials International's Legal Experts Advisory Panel.

Mr Christos Lambakis is a criminal lawyer in Thessaloniki and a PhD candidate in Criminal Law at the University of Thessaloniki.

Mr Theodoros Mantas is head of the Theodore Mantas and Associates Law Firm, where he focuses systematically on criminal law. He is active in both the Athens Bar Assocaition and the Greek Criminal Lawyer Society, and has participated as a representative of the Athens Bar Association in its appeal before the International Criminal Court at the Hague for violations of international norms and human rights during the war in Iraq. He has appeared in a number of international cases and is widely published within Greece.

Ms Panayota Masouridou is a criminal lawyer who is active in pro bono work on behalf of migrants in Greece.

Ms Nuala Mole is founder of the AIRE Centre (Advice on Individual Rights in Europe) and has worked for more than 25 years on human rights in Europe. She is on the Board of the European Human Rights Law Review, has brought more than 70 cases before the ECtHR, ECJ and UK courts and is the recipient of many international human rights awards. She has studied European law at the College of Europe and speaks Greek fluently.

Ms Marina Themistocleous is the author of research conducted on behalf of the AIRE Centre on Pre-Trial Detention in Greece.

Mrs Katerina P. Pournara is a criminal lawyer in Athens.

Mr Georgios Pyromallis is a criminal lawyer in Greece and the head of the George Pyromallis Law Office in Athens. He is also a member of Fair Trials International's Legal Expert Advisory Panel.

Dr Demetra Fr. Sorvatzioti is an associate professor of law at the University of Nicosia (Cyprus). She is widely published on both Greek and comparative Criminal Law including the treatment of prisoners and vulnerable defendants. She is also a practicing criminal lawyer.

Mr Michaelis Zafiropoulos is a criminal lawyer in Athens. He is Secretary-General of the Athens Bar Association and serves on its board of Directors.

Fair Trials International Staff

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

Rebecca Shaeffer is a Law Reform Officer at Fair Trials International. Her current work focuses on implementation of the EU's Roadmap on criminal procedural rights and pre-trial detention. Rebecca has worked on criminal justice and migration issues for a number of organizations including Human Rights Watch, African and Middle Eastern Refugee Assistance (Cairo) and the American Civil Liberties Union. She has a juris doctor (J.D.) from Georgetown University in Washington, D.C.

COMMUNIQUÉ

issued after the meeting of the

LOCAL EXPERT GROUP (LITHUANIA)

9 May 2013

PRE-TRIAL DETENTION IN LITHUANIA

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Introduction

1. On 9 May 2013, Fair Trials International and the Human Rights Monitoring Institute ('HRMI') brought together leading experts in criminal justice from across Lithuania in order to learn about pre-trial detention in law and in practice (a list of participants is provided in Annex A.) Where we identified problems, we wanted to learn about ongoing efforts and new opportunities to challenge these. The Local Experts' Group (Lithuania) met for a full day in Vilnius.

2. Prior to the meeting, the participants were asked to reflect on several themes: (i) the standards of pre-trial detention decision-making by the Lithuanian courts; (ii) the reasons underlying excessive use of pre-trial detention; and (iii) the opportunities for law reform and litigation. These topics were discussed at the meeting. The remainder of this communiqué outlines the key points raised in the meeting and the key conclusions reached.

A. Pre-trial detention decision-making standards

Procedure

3. Under Lithuanian law, pre-trial detention decisions are taken by the Investigating Judge at the request of the Prosecutor. The Prosecutor submits a motion to the Judge, which contains only basic information including the background to the arrest of the individual, the charge against them and the grounds for detention.[1] Participants explained that judges generally adopt a "rubber-stamping" approach towards the requests of the Prosecutor, with whom the Judge is more closely connected than with the defence lawyer. One participant expressed it as follows: "When the defence lawyer comes to court, people frown and wonder why he is there. When the Prosecutor comes to court and goes straight into the Judge's room, no-one is surprised".

4. Participants suggested that it is much simpler for judges to order detention when asked to do so by the Prosecutor than to review, in detail, the longer submissions of the defence lawyer. The arguments of the defence lawyer are rarely taken into consideration. Defence lawyers are treated differently from prosecutors. Rather than an equal participant in the process, it was suggested that they are viewed as "obstacles to the justice system".

5. There are very few cases in which all the circumstances are examined, and it is not unusual to see motions from prosecutors which are identical – even containing the same spelling mistakes – demonstrating a failure to address the need for pre-trial detention on a case-by-case basis. Too often, judges appear to ignore the legislation, apply their own understanding of the legal framework and listen only to the grounds presented by the Prosecutor. One participant suggested that prosecutors are able to select the pre-trial judges to whom they submit their motion, and do so strategically in order to obtain a positive decision from those judges who are known to be more inclined towards ordering detention.

6. Pre-trial judges are often new judges without extensive experience. After five years, they will undergo a review of their competence and the quality of their decision-making could be raised at this stage. Otherwise, aside from the appeal process,[2] there is no oversight of their decisions. Therefore, a judge will not face any repercussions following a decision ordering pre-trial detention, irrespective of how unjustified that decision may have been. Further, participants suggested that judges are not necessarily experts in the application of the law. They have

[1] Article 123, Code of Criminal Procedure.
[2] Articles 130-131, Code of Criminal Procedure.

undergone the judicial selection procedure, but they do not approach the law professionally. These young judges are then confronted by prosecutors and defence lawyers with far more extensive experience. They also face political pressure, knowing that their decisions on pre-trial detention will be scrutinised by politicians and this may impact on his or her future career progression.

7. Under the Code of Criminal Procedure, restrictions on the right to access the case file should only apply in "exceptional" circumstances.[3] In practice, however, access is often denied. The defence lawyer is entitled to review the content of the motion but no other part of the case file. The lawyer has access, therefore, to only very limited information which excludes, for example, any mitigating factors which might assist in developing the case against pre-trial detention. In 2004, the Supreme Court Senate published a decision[4] which dealt extensively with the interpretation of various provisions of the Code of Criminal Procedure relating to pre-trial detention. The decision stated, inter alia, that the suspect and his lawyer in all cases have a right to access the portion of the case file which the prosecutor has submitted to the pre-trial investigation judge when pre-trial detention is sought. Prosecutors were thereby prevented from completely refusing the defence counsel's access to the case file. In 2006, however, the Constitutional Court ruled that these decisions of the Senate are not legally binding, as only decisions in the case-law of the Supreme Court constitute precedents. [5] This has resulted in confusion and legal uncertainty.

8. The lawyer is therefore dependent on information obtained from the client. One participant commented that defence lawyers are essentially "blindfolded", and as a result, mitigating circumstances – such as the potential impact of detention upon the life of the individual – are not taken into account. One participant spoke of being able to access the case file in a small number of cases where the extension of detention rather than the initial detention was being considered. These were, however, described as "one-off" cases, and where access to the case file was provided, there was only a very short period of time given in which to review a large amount of material. Other participants referred to having been granted access to the case file only 10 minutes before the commencement of the pre-trial hearing, which is inadequate for the preparation of a meaningful defence.

9. Defence lawyers are able to appeal, on behalf of their clients, decisions ordering pre-trial detention and they do. Under the terms of the CCP,[6] such appeals must be considered and determined within 7 days of reception, and this requirement is generally respected.
10. The participants identified the quality of state defence lawyers as a key factor impacting on the quality of pre-trial detention decisions. State defence lawyers are very poorly paid and there are limits on the number of hours of work for which they can be paid on in relation to any particular case. Participants noted that whilst private defence lawyers will be provided with adequate notice of the pre-trial detention hearing, the same does not apply for state defence lawyers who are sometimes only given an hour's notice before the commencement of the pre-trial detention proceedings. This presents challenges for the state lawyer in obtaining information about the client, who they are unable to meet or speak with prior to the hearing. They are unable to collect any positive information about the individual which could be used to challenge a motion for detention.

[3] Article 181(1), Code of Criminal Procedure.
[4] Decision No. 50 of 30 December 2004 of the Supreme Court of Lithuania Senate, paragraph 4.
[5] Constitutional Court Ruling of 28 March 2006, available in English - http://www.lrkt.lt/dokumentai/2006/r060328.htm.
[6] Articles 130-131.

Substance

11. Under Lithuanian law,[7] pre-trial detention can be ordered where the potential sentence for the offence charged is one year or more and:

    i. there are grounds for believing that the person will escape or abscond, which must be assessed having regard to the defendant's personal circumstances and record of convictions;
    ii. there is evidence that the person will interfere with the investigation; and/or
    iii. there are grounds to believe the person will offend if released.

12. Due to the nature of the process applied in practice, and described above, examples of reasoned pre-trial detention decisions are rare. This makes an assessment of the substantive basis of such decisions difficult to carry out.

13. In reality, the length of the potential sentence is treated as the key determinant of whether pre-trial detention should be ordered as the strictness of the possible sanction facing the individual is treated as an indicator of whether or not that individual will abscond if released. An individual charged with a serious crime is automatically detained based on the presumption that the suspicion of such a crime gives the individual a reason to flee. In some cases, a manipulation of the charges is used to ensure pre-trial detention is ordered. An example was given by one participant of a client who was suspected of committing a large fraud, although no figures had been presented by the Prosecutor as to the extent of the alleged offence. Despite no information as to the extent of the damages, and therefore no clarity as to whether this should be treated as a serious or petty offence, the Prosecutor proceeded on the basis of a serious crime in relation to which the client was subjected to pre-trial detention.

14. Participants noted that pre-trial detention decisions are often based on an assessment of the evidence demonstrating whether or not an individual committed the offence in question. The attitude of prosecutors seems to be that detention is the only way to ensure that an individual tells the investigating authority everything and admits his guilt. The presumption of innocence is therefore not respected.

15. It is rare for the court to look at the detail of the situation on a case-by-case basis. The Judge often simply trusts the data provided by the Prosecutor, and the presumption is that the person will abscond and carry out more criminal activities.

16. Participants noted the particular challenges facing foreign nationals, who are usually deemed to present a risk of absconsion without giving any thought to whether or not they have ties to Lithuania. The Criminal Procedure Code specifies that, when the court assesses whether a particular individual presents a flight risk, consideration should be given to the place of residence of the individual,[8] so if there is no place of residence, as will be the case for many foreign nationals, substantial grounds are found to justify pre-trial detention. Defence lawyers do attempt to demonstrate the close relationships which a foreign national has developed in Lithuania, but more often than not, judges do not take seriously arguments relating to social relationships, despite the fact that the CCP requires that regard be had to the suspect's marital and employment status and other relevant circumstances.[9] They are concerned to establish the relationship to the State and then make decisions on pre-trial detention accordingly.

[7] Article 122(8), Code of Criminal Procedure.
[8] Article 122, Code of Criminal Procedure.
[9] Ibid.

17. The courts may use the potential for an individual to obstruct an investigation through tampering with evidence as a justification for ordering pre-trial detention. Participants expressed concern that this ground for detention was not being used appropriately. This ground is frequently raised in cases involving financial crimes, in which all relevant papers will have been taken away by the investigating authorities so there is no possibility for the individual to interfere with the evidence. In these circumstances, participants felt that it is not appropriate for individuals accused of financial crimes to be subjected to pre-trial detention.

18. Participants noted that the role of public opinion in shaping the nature of pre-trial detention decisions is significant. The public is often shocked when they read in the press of the pre-trial release of accused persons, and the media plays a key role in shaping this opinion. Judges are influenced by such attitudes and, as a result, feel pressured to make the strictest decision. Detention should be the last resort, but this is not applied in practice.

B. Use of Alternatives to Detention

19. Lithuanian law provides for the use of house arrest, residence restrictions, probationary measures, financial security, the seizure of documents, regular reporting at the police station or the provision of a written undertaking not to leave the country as alternatives to pre-trial detention.[10] Participants noted that detention is far more frequently ordered than the available alternatives. Whilst there is a requirement in the law to adhere to the principle of proportionality,[11] this is rarely applied in practice.

20. There are challenges with assessing the patterns of decision-making in relation to alternatives to detention as court documents generally do not indicate where a request for an alternative to be ordered has been made. The court is constrained to making a decision as to whether or not to order detention as requested in the motion submitted by the Prosecutor. Judges are not at liberty to refuse to order detention but apply a less restrictive measure in its place. Whilst the defence lawyer may raise the issue of alternatives, these can only be considered by the Judge if the Prosecutor consents. The Prosecutor may also initiate a request for an alternative measure to be ordered as a response to a judge's refusal of detention. The use of alternatives to detention is, therefore, at the discretion of the Prosecutor.

21. Participants did share examples of house arrest being used as an alternative to detention for foreign nationals. This was, however, expressed to be the exception rather than the rule.

22. Participants had little knowledge of the European Supervision Order, suggesting that there have been no public discussions about the measure nor any evidence of its implementation in Lithuania. There was agreement that the introduction of the ESO in Lithuania would be a welcome development, particularly when cases of individuals such as Michael Campbell – an Irish national who has so far been in pre-trial detention in Lithuania for five years – are taken into account.

23. Concerns were, however, raised that the effective implementation of the ESO would still depend on a change of attitude amongst the Lithuanian judiciary given that this will add a new factor to the decision-making process; judges will be required to consider not only the trustworthiness of the individual in question, but also the trustworthiness of the Member State

[10] Article 120, Code of Criminal Procedure.
[11] Article 11, Code of Criminal Procedure.

of which he is a national. It was also suggested that it is unlikely that the investigating authorities in Lithuania would be willing to let go of their suspect given the risk of losing them.

24. It was suggested that the exposure of the Lithuanian judiciary to the practices of their judicial colleagues in other Member States may have a positive impact, particularly in relation to the question of alternatives to detention.

C. The links between investigation and detention on remand

25. Participants highlighted that there are significant problems relating to the length of pre-trial detention in Lithuania, particularly when organised crime is involved. According to the law,[12] individuals can be held in pre-trial detention for up to 12 months in total, unless the case is recognised as being very complex or particularly voluminous, in which case the maximum period is 18 months prior to the case being referred for trial.
26. Participants suggested that the reason for individuals being held in pre-trial detention for such lengthy periods was that charges are presented at a very preliminary stage in the investigation, when sufficient evidence has yet to be compiled.

27. In addition, participants raised the issue of the lack of competence of investigators. There is a lack of training resulting in pre-trial investigators having neither theoretical nor practical knowledge of the relevant issues on a particular case, which causes delays to the investigation process.

28. As the defence does not have adequate access to the case file, it is impossible to monitor the progress of the investigation and challenge the decision to keep someone in detention for long periods of time. The defence is unable to keep the pressure on the Prosecutor to act efficiently and effectively in relation to the investigation. The law dictates that if there has been no action on the investigation for 2 months or more, the individual must be released. [13] Prosecutors work around this by carrying out minimal activities so as to demonstrate that the investigation is still technically underway.

29. Participants also raised concerns about the length of pre-trial detention after the case has been referred to the trial court but prior to the first-instance determination as to guilt or innocence. There is no statutory limit on detention during this period.

30. In addition, participants explained that appeals against first-instance determinations would often take a long time to be heard, during which time the person would also be detained. To the extent that this sort of detention is considered, under Lithuanian law, to be provisional detention and not imprisonment in execution of a final custodial sentence, the authorities' failure to progress appeals quickly represents a failure to exert the special diligence required wherever the presumption of innocence continues to apply.

D. Reform outlook

31. Given the role that the culture amongst the Judiciary and the Prosecution plays in determining the patterns of pre-trial detention decisions, and the frequency with which practice does not replicate the approaches required by legislation, legislative reform should not be treated as the only answer. Judicial policies, as determined by the Court of Cassation or the Supreme Court,

[12] Article 127, Code of Criminal Procedure.
[13] Article 127(7), Code of Criminal Procedure.

should also be taken into consideration. Participants suggested that obtaining progressive decisions of the highest-ranking officials should be prioritised as a means of initiating change.

32. Legislative reform is, however, under consideration. On 21 February 2013, a roundtable meeting was convened in Parliament in which issues surrounding pre-trial detention were discussed. A bill amending the regulation of pre-trial detention is before Parliament,[14] and is scheduled for consideration in Autumn 2013. The bill seeks to promote the use of alternatives to pre-trial detention by giving the Judge some discretion in deciding which remand measure to grant when pre-trial detention is sought by the Prosecutor. The bill also aims to reduce the maximums terms of pre-trial detention during the pre-trial investigation stage of the proceedings, as well as to guarantee the defence at least partial access to the case file when pre-trial detention is being sought. A further piece of legislation, submitted to Parliament in September 2012, relates to the introduction of electronic monitoring as an alternative to detention. Parliament is contemplating reform and it is therefore the time for advocacy action to take place.

33. There has been no open invitation for public comment on the legislative proposals, but certain parties – including HRMI – have made submissions. There is also a Working Group within the Bar Council working on these amendments, and also on the implementation of the existing Code of Criminal Procedure, but, according to the participants, this group seems to be becoming increasingly passive.

34. The Ministry of Justice has also drafted legislation which will implement the Framework Decision on the European Supervision Order and this will shortly be submitted to parliament for consideration.[15] The approach to the detention of foreign nationals may change as a result of this.

35. Participants suggested that the European Court of Human Rights is no longer viewed as a useful forum in which to raise issues relating to pre-trial detention in Lithuania due to the length of proceedings and the costs involved. Clients are often not interested in pursuing this course of action.

E. Key recommendations

Decision-making standards

36. Steps must be taken to address the problems arising from the judicial practice of "rubber-stamping" the motions for pre-trial detention submitted by prosecutors. There is a need to change the mentality of both judges and prosecutors which may only be achieved through training, particularly in relation to ECtHR decisions and international standards.

37. Judges should be required to provide balanced and reasoned judicial decisions which take into account the arguments for and against pre-trial detention in each individual case and which comply with the requirements of the law. Training is required in order to ensure that judges are aware of factors which should not be taken into account when making a decision regarding pre-trial detention (eg. the seriousness of the offence and the potential length of the sentence) and of how to apply the factors which should be taken into account (eg. the likelihood of the person interfering with the investigation). The National Administration of Courts and the Centre for

[14] Bill No. XIIP-109, registered on 6 December 2012.
[15] Draft Bill No. 13-2350-01, not yet submitted.

Education of Judges, which have responsibility for training both judges and prosecutors, should be encouraged to deliver such training.

38. Irrespective of their junior status, judges involved in pre-trial detention decision-making must be encouraged to make robust and legally-justified decisions on pre-trial detention. Targets and performance evaluations should have built-in expectations that a certain percentage of cases should be released pending trial, therefore encouraging career-sensitive judges to avoid the pressures to adopt the conservative approach by applying a presumption of detention rather than liberty.

39. Legislative reform is needed to improve access of the defence to the case file at the pre-trial stage. This should be forthcoming due to the need to implement the Directive on the right to information in criminal proceedings, and if it is not, a reference to the Court of Justice of the European Union may be appropriate. Advocacy should also focus on elevating the content of the 2004 decision of the Supreme Court Senate to legislative or precedential status.

40. Defence lawyers should receive training, perhaps delivered by the Bar Association, which provides them with the tools to insist upon lawful pre-trial detention decisions which demonstrate a more balanced approach. Guidance should also be provided on how to develop effective strategic litigation in order to obtain progressive decisions of the higher courts which complement the legislative reform process. Standards of legal representation should also be evaluated with a view to ensuring that individuals relying upon state representation are not disadvantaged in any way.

41. Media representatives should receive training, perhaps through Lithuania's Journalist and Publication Ethics Commission, to encourage them to understand the defendant's perspective, the presumption of innocence and the need for balanced reporting which does not provide a prejudicial representation of the case. The media should be used to its full advantage to generate awareness of the innocent individuals affected by excessive pre-trial detention. This would place pressure upon the Government of Lithuania to take the problem seriously.

42. Given the influence which academic writing can have upon the Judiciary, Academics should be encouraged to write about the issues surrounding pre-trial detention, and particularly the difference between law and practice and the problematic procedures which govern decision-making.

Alternatives to detention

43. Work should be undertaken to increase the willingness of judges and prosecutors to use the existing range of alternatives to detention available under Lithuanian law, in accordance with the principle of proportionality established by law. Sharing best practices with other EU Member States could have positive impact in this respect.

44. Legislative reform is needed in order to give judges and the defence a more active role in determining whether alternatives to detention should be ordered. The current prosecutor-led system should be replaced by one in which the judge is able to choose an alternative to detention despite the failure of the prosecution to suggest one and the defence is able to propose an alternative in response to a prosecutor's motion requesting detention.

45. Lithuania should consider implementing the European Supervision Order, and judges should be trained on its use to reduce over-incarceration of foreign nationals who are too frequently deemed to be a flight risk without a reasonable assessment of their personal circumstances.

Excessive periods of detention on remand

46. Training should be provided to prosecutors to improve competence and reduce delays. Prosecutors should be encouraged to resist presenting charges at preliminary stages in investigations and rather wait until sufficient evidence has been gathered.

47. Steps must be taken to enable the defence to monitor the progress of the investigation so as to participate effectively in detention review hearings, including being granted access to the case file.

48. Similarly, judges should require better reasons for the extension of pre-trial detention and should not automatically approve motions for extensions by prosecutors. Judges should also have an automatic right of review of detention at regular intervals.

49. Prosecutors should be required to provide evidence on the progress of the investigation to establish the need for continuing pre-trial detention at each review hearing, and judges should be given the express power to consider the efficiency of the investigation as a factor relating to the decision about whether to authorise pre-trial detention.

September 2013

Annex A

PARTICIPANTS

(alphabetical order by surname)

Inga Abramavičiūtė is a lawyer specialising in criminal law, working at the law firm ADVERSUS. She is a consultant for the Human Rights Monitoring Institute. She is president of Council of Lithuanian Centre for Human Rights; Deputy of the presiding member of Lithuania's journalists and publishers ethics commission; and Presiding member of the Coordination Council of Legal Aid at the Ministry of Justice.

Ingrida Botyrienė is a lawyer specialising in criminal law, working at I.Botyrienės ir R.A.Kučinskaitės Vilniaus advokatų kontora. She frequently gives expert evidence on Lithuanian criminal law to courts in other jurisdictions, and has conducted comparative research on criminal law in EU Member States.

Algamantis Čepas is a Senior Research Fellow at the Criminal Justice Research Department at the Law Institute of Lithuania. A member of the Lithuanian Association of Criminology, he has published widely on criminal justice and human rights, including on detention and prisoner transfers in the EU.

Aurelijus Gutauskas was recently sworn in as a Supreme Court Justice. He lectures at the Institute of Criminal Law and Procedure at Mykolas Romeris University, was formerly a researcher for the Institute of Law and has published the book 'Organized Crime in Lithuania'.

Artūras Gutauskas is a lawyer at the Law Firm VARUL (Vilnius). He has a growing criminal practice in white collar and cross-border criminal defence cases. He is a member of the European Criminal Bar Association. He attended in an observer capacity.

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

Adomas Liutvinksas is a lawyer specialising in criminal law, working at the law firm 'Ex Lege'. With over 30 years' experience, he was recently described by the magazine Veidas as one of the best criminal defence lawyers in Lithuania.

Andrius Nevera is a lawyer specialising in criminal law and a former Deputy Prosecutor General. He worked at the research department of the Supreme Court of Lithuania for six years and authored the books 'Human Rights in Lithuania' and 'Principles of State Criminal Jurisdiction'.

Leonas Virginijus Papirtis is a lawyer specialising in criminal law, working at Advokato L.V. Papircio kontora. He is the current Chairman of the Lithuanian Bar Association (Lietuvos Advokatūra)

Rolandas Tilindis is a counsel and advocate, specialising in criminal law, working at the professional legal partnership Baltic Legal Solutions (Lithuania). He is a former Chief Prosecutor and has worked as national representative of Lithuania at Eurojust.

Regina Valutytė is vice-Dean at Mykolas Romeris University, focusing on EU law and criminal procedure. She has written on, inter alia, state liability for the failure of national courts to refer questions to the Court of Justice of the EU.

FAIR TRIALS INTERNATIONAL STAFF

Libby Clarke is Head of Law Reform at Fair Trials, with responsibility for coordinating the organisation´s campaigning and lobbying work. Before joining Fair Trials, Libby worked as a Senior Consultant at the Humanitarian Organization for Migration Economics in Singapore, the Legal Officer at The Equal Rights Trust and a Strategic Litigation Solicitor at Refugee and Migrant Justice. Libby is a UK qualified solicitor with an LLM in Human Rights Law.

Alex Tinsley is a Law Reform Officer at Fair Trials International. Alex produced the Guides to the European Supervision Order and Court of Justice of the EU included in this pack. Before joining Fair Trials, Alex worked at the Legal Service of the European Commission and the Court of Justice of the European Union, and represented detained foreign nationals at the charity BID.

FAIR TRIALS INTERNATIONAL

COMMUNIQUÉ

issued after the meeting of the

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Introduction

1. On 13 June 2013, Fair Trials International brought together leading experts in criminal justice from France in order to learn about pre-trial detention in law and in practice (a list of participants is provided in Annex A.) Where we identified problems, we wanted to learn about ongoing efforts and new opportunities to challenge these.

2. Prior to the meeting, the participants were asked to reflect on several themes: (i) the effectiveness of judicial oversight of detention; (ii) alternatives to detention; (iii) the reasons underlying excessive use of detention; and (iv) the opportunities for law reform and litigation. This communiqué outlines the key points raised in the meeting and the key conclusions reached.

A. Specific characteristics of the French system

The Judge of Freedoms and Detention

3. Before beginning the discussion about the procedure for pre-trial detention decision-making, participants were asked about their general observations on the Judge of Freedoms and Detention (the 'JLD'), a position created by the Law of 15 June 2000 strengthening the presumption of innocence and the rights of victims.[1]

4. Participants explained that, traditionally, the investigating judge (the 'IJ') in charge of the investigation of the case was also responsible for placing people in provisional detention or placing them under judicial supervision (where they are at liberty but subject to specified obligations imposed by the judge) until such time as the case was referred to the trial court. The incompatibility between the IJ's investigative and judicial functions was recognised by a thorough study on criminal procedure[2] prior to the 2000 reform. The issue was described at the meeting as the impossibility 'of cycling whilst also watching oneself pedalling'. The choice was therefore made to create a separate judge with responsibility for detention matters: the JLD.

5. Participants generally agreed that, fundamentally, the creation of the JLD represented progress. The separation of functions mitigated, to some extent, problems such as the pressure defendants might find themselves under to cooperate knowing that the person asking the questions (the IJ) also had the power to place them in detention. However, problems in the detail of the procedure have to some extent limited the benefits of the innovation, as described below.

The rise of summary proceedings

6. Participants underlined that the impact of the JLD has to be considered in the context of the increased recourse to summary proceedings, in which the prosecutor, if he considers that an investigation is unnecessary, refers the case direct to a trial court rather than seising an IJ to direct the investigation. This means that any advances or developments in terms of the practice of pre-trial detention in cases involving an IJ were not representative of criminal justice as a whole, as summary proceedings account for a large proportion of all criminal proceedings.

7. Whilst pre-trial detention does occur in summary proceedings, it is much shorter, and longer terms of pre-trial detention with greater human impact occur in cases where an IJ directs a

[1] Law no 2000-516 of 15 June 2000.

[2] 'La mise en état des affaires pénales', 1991, otherwise known as the 'Delmas-Marty' report after its primary author, available at: http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/914059500/0000.pdf.

longer investigation (referred to here as 'investigation cases'). Accordingly, participants' comments were invited primarily on investigation cases.

B. Effectiveness of judicial oversight of detention

Procedure and respect for defence rights

8. Despite the creation of the JLD, under the current procedure in investigation cases, it is incorrect to say that the IJ is deprived of decision-making powers. The IJ is able to place the suspect under judicial supervision himself, and that decision takes effect unless appealed. If the IJ believes that the person should be detained, he refers the file to the JLD complete with a reasoned opinion as to why the person should be detained, and the JLD takes the decision as to detention.

8. Participants expressed doubts about this procedure. To begin with, the IJ makes the recommendation of detention knowing that the power to make the decision ultimately lies with the JLD; this produces a divestment of responsibility which might lead the IJ to recommend detention more readily. However, at the same time, the JLD in effect acts a second-instance decision-maker, receiving a file already full of reasons why the person should be detained. Participants explained that, while some JLDs take risks and depart from the IJ's recommendation, others perform an only very cursory review and simply confirm the IJ's recommendation. In addition, the spirit of collegiality and judicial solidarity might make a JLD reluctant to disagree with the IJ (a colleague), particularly at smaller bars where many of the JLDs were former IJs themselves.

9. The procedure was, further, said to be skewed in favour of the prosecution: since 2004, the prosecutor has been able to seise the JLD directly if the IJ opts to place the person under judicial supervision.

10. Reference was also made to general concerns within the profession about the JLD taking decisions in urgency, without time to study the file in depth, resulting in a perfunctory and incomplete judicial review of detention.

11. One view was expressed, however, that the involvement of the JLD provided the defence with a greater opportunity to obtain a quality decision, in particular because of the possibility to request a postponement of up to four days before the JLD takes his decision. This, it was said, could enable the defence to obtain more information on the accused and available alternatives to detention. In this regard, it was noted that the law prohibits the lawyer from contacting family members while the suspect is in *garde à vue* (police custody), so at the point where the IJ makes his recommendation there will have been very little opportunity to build a case. However, if a postponement is requested in order to gather more information regarding the person and their attachments, the person is liable to be detained in the meantime. Four days (the statutory limit for the postponement) of detention is a significant burden for someone with children and a family. A participant explained that 'you cannot gamble' with somebody's freedom in that way. If the JLD orders detention, this can in any case be appealed to the *chambre de l'instruction* (a chamber of the appeal court in each region) and the proceeding before that chamber represent an opportunity to seek release with further information and argumentation prepared in the meantime, so in general postponements are not requested.

12. However, in summary proceedings, participants reported that postponements would be requested more frequently, to avoid rushing to a trial within a few hours which might result in a lengthy prison sentence. In such situations, postponement was considered by participants to be a sensible option.

13. It was reported that the compensation available for providing representation in legal aid cases was generally very low: 1000 € in *criminel* ('criminal') cases, involving the most serious offences, and 450 € in *correctionnel* ('correctional') cases, involving most other offences. These fees are intended to cover the whole procedure, including all visits, hearings with the IJ and detention hearings. As a result, young, ill-paid lawyers are overstretched and often unable to make regular applications for release.

14. Concerns were also expressed about the conditions in which JLDs perform their duties. In practice, the organisation of proceedings between police, IJ and JLD is such that the JLD usually receives the case at the end of the day, often around 6pm or 7pm, along with many other files to consider. In addition, JLDs will often sit in communal offices or overloaded courtrooms. Such conditions are not conducive to effective decision-making. It was also noted that JLDs are in fact judges of a criminal court who are appointed by the President to play that function: there is no separate 'office' of JLD. Thus, in one well-known case, a JLD who became known as 'liberator' for his refusals to order extensions of police custody, and who found little favour with police and prosecutors, was transferred to be president of another chamber where he would have less influence in the conduct of investigations.

15. In general, it was agreed that the better forum for seeking the release of a person detained pre-trial was the *chambre de l'instruction*. However, success rates are not high at the *chambre de l'instruction* either: commonly dubbed the 'confirmation chamber', the latter is criticised for its reluctance to reverse decisions. In Paris, there had recently been a petition signed by many eminent lawyers criticising the *chambre de l'instruction* of the Paris appeal court for being what was described in the meeting as a 'slaughterhouse' systematically confirming decisions.

Substance: judges' assessment and decision-making

16. Under French law (Article 144 of the Criminal Procedure Code) pre-trial detention can be ordered or extended only if it is established, on the basis of precise and substantiated circumstances arising from the case file, that it is the only means to achieve one of the following objectives, which could not be achieved through judicial supervision or an electronically-monitored residence requirement:

    1) conserving evidence or material clues necessary to the manifestation of the truth;
    2) preventing the pressuring of witnesses or victims and their families;
    3) preventing of unlawful collusion between the person under investigation and their co-authors or associates;
    4) protecting the person under investigation;
    5) ensuring that the person under investigation is at the disposal of the court;
    6) bringing the offence to an end or preventing its further commission; [and/or]
    7) bringing an end to the exceptional and persistent disturbance to public order caused by the gravity of the offence, the circumstances of its commission or the extent of the harm caused by it. Such disturbance shall not arise solely from the media resonance of the case. This ground does not apply in *correctionnel* matters.

17. Participants shared the view that decisions extending detention or applications for release are often perfunctory and formulaic, to the extent that little is gained from reading them. An order might simply assert the necessity of detention to prevent a suspect absconding, without addressing the fact that the suspect has a local address, a family and a stable life. It was said that the reasoning in a decision ordering release is often not any more enlightening.

18. It was felt that the JLDs and, in particular, the *chambre de l'instruction* in fact oversee detention in a more informal manner, through off-record conversations with IJs to which the defence are often not privy, rather than purely responding to (respectively) applications for release or appeals against JLD decisions. This contributes to a sense among defence lawyers that actual the written decisions formally satisfy the requirements of law without bearing witness to the actual decision-making.

19. Participants were asked, specifically, about the 'public order' criterion in Article 144(7) of the Criminal Procedure Code, which allows pre-trial detention to be ordered if this is necessary to put an end to a serious disturbance to public order resulting from the offence. Following reforms in 2007, this ground is now only available in criminal cases, involving the most serious offences, and is unavailable in *correctionnel* cases involving other offences.

20. There was general agreement that the 'public order' ground was a broad, ill-defined criterion which could encompass a very wide range of facts and allowed detention to be ordered too readily. However, there were divergent views as to the impact of the 2007 reform. On one view, the reform could be considered essentially cosmetic in nature: if the relevant judge wishes to detain a person, there are still plenty of grounds available on which to order this. On another, the exclusion of the 'public order' ground in *correctionnel* cases was moderately useful, though the expansive manner in which the other grounds were applied meant that detention remained a very easy option for the judge. On a final view, however, the 2007 reform did have a significant impact. It was said that, in 2007, the figure of pre-trial detainees dropped sharply from 20,000 and stabilised at about 16-17,000, a decrease attributable only to the reform as there was no other significant change at the time. An alternative statistic was, however, provided, indicating that of those referred for trial in investigation cases, 40% were detained, with no significant change after 2007. However, it was pointed out that this rate applied to a lower number of cases, as increasingly only the most complex cases became investigation cases (with others going to summary proceedings), and given the nature of the cases the rate of detention was to be expected.

21. The view was expressed that some of the other criteria for pre-trial detention also required further legislative attention. One criterion regularly abused is the provision relating to the risk of absconding. The judge looks for *garanties de représentation* – factual elements providing assurance that the person will not abscond. It is at the judge's discretion whether to consider that a person's social attachments counterbalance any risk of absconding and decisions in this regard often overlook even solid attachments, leaving the non-resident in a very invidious position.

22. One of the aids which may be available to help lawyers combat this form of injustice, in particular by relying on *enquêtes sociales* (personal situation inquiry) (in less serious correctional cases) or *enquêtes de personnalités* (inquiry into the person) (in more serious correctional cases and criminal cases) established by non-profit organisations providing pre-trial assistance ('bail organisations'). These inquiries are based on information collected in interviews with the accused person, which is then verified. Their results are recorded as a report in accordance with established parameters. This forms an independent record which may be of assistance to the court deciding on pre-trial detention.[3] For subjects without fixed

[3] One such organisation, the *Association de politique criminelle appliqué et de réinsertion sociale* ('APCARS') was represented at the meeting. In 2012, Apcars prepared over 16,000 *enquêtes sociales* and 549 *enquêtes de personnalité*. Subsequently to the meeting, a member of Fair Trials' staff observed a hearing in the *Tribunal de grande instance* of Paris in which an *enquête sociale* prepared by APCARS was taken into account by a chamber deciding, in a *comparution immédiate* case where a one month adjournment was necessary, whether the person should be detained until the next court date. The court granted bail.

abode, the *enquête sociale* can lead to a proposal for accommodation by a charitable organisation and, thereby, provide a sufficient *garantie de representation* for the judge. However, ultimately, achieving fairness depends upon a fairer judicial assessment.

23. It was, finally, observed that judicial decision-making occasionally displayed disloyalty to the spirit of the law while complying with its letter, in particular in relation to the characterisation of the facts. For example, it is open to the judge to qualify a simple theft as a major crime needing complex investigation – which in turn justifies more extensions of detention – and this depends on the judge's sovereign power of assessment of the facts, so loyalty to underlying legal principles is essential.

C. Alternatives to detention

24. French law lists 17 possible judicial supervision obligations which must be ordered in preference to detention if they are sufficient to achieve the relevant objective. Participants were asked about the frequency with which recourse was had to such alternatives to detention, whether they were duly considered before detention, and what could be improved.

25. The view was expressed that the judges do comply with the 'last resort' approach and consider whether alternatives are available before ordering detention. Many suspects are placed under judicial supervision. Where judges are aware of the options and have sufficient confidence in them, they do not seem to be especially reluctant to use it.

26. One difficulty with judicial supervision arises from the fact that it is ordered too readily. Judges take insufficient account of the burden which judicial supervision places upon the subject. This is particularly problematic because once a person is not in detention, the case loses priority and is treated without urgency, meaning that judicial supervision obligations, often significantly restrictive of freedom, may last a long time: a person might, for instance, spend 5 or 6 years required to attend a police station on a weekly basis or unable to enter certain localities. Judicial supervision could also be a punishment in itself: a doctor prohibited from exercising for five years, albeit at liberty, will suffer an irreversible professional impact. Such problems are compounded by the fact that there are no time limits on the use of judicial supervision.

27. A distinction was drawn between the two main kinds of judicial supervision obligations: (i) *pointage* (regular reporting to a police station or 'clocking in'), the standard, simple form of judicial supervision which involves no investment on the part of the state; and (ii) *socio-éducatif* ('socio-educational') obligations, more resource-intensive measures involving drug treatment, training and so on. The management of socio-educational judicial supervision has been delegated to the private sector and especially bail organisations which face huge financial challenges. Many have closed down in recent years, reducing the options available to judges.

28. Recourse to socio-educational judicial supervision may also be lacking because of IJs' and JLDs' insufficient grasp of what it actually involves. The view was expressed that judges 'do not know the product' which is available to them, and non-profit organisations face challenges in communicating with the judges to ensure they understand what options are available. In addition, judicial supervision (with the exception of *pointage*) is less easily ordered as it requires a programme to be established; ordering detention, by contrast, requires only a signature.

29. It is, in principle, possible for the defence to mitigate this to some extent by liaising with a bail organisation to (for instance) find temporary accommodation for those without an address, or devise a socio-educational alternative to detention. However, there was perhaps scope for increased dialogue between defence and bail organisations. By and large, defence lawyers focus primarily on contacting family and placing evidence of social attachments before the judge to try to counter prosecutorial assertions regarding the risk of absconding.

30. The view was, moreover, expressed that judicial supervision was not, in practice, an alternative to detention but an alternative to liberty. The use of judicial supervision has no real impact on the numbers of people detained; it simply means that of those who are not detained, more are subject to unjustifiably onerous obligations.

31. It was remarked that the use of judicial supervision appears to be on a downward trend, despite the wide recognition that it is preferable to having someone in detention. It was suggested that this was quite possibly due to the economic situation. Among the judicial supervision obligations, some of them, involving 'socio-educational' obligations such as health and drug treatment, implied ongoing costs. It was said that an organisation providing such services would receive payment (of approximately 950 €) per six months of service, with payment ceasing altogether after three years.

32. Participants were asked whether some forms of judicial supervision worked better than others. It was said that some obligations can impact positively on the case: for instance, if a person duly attends drug or alcohol treatment further to judicial supervision obligations, this can reflect positively on them later, when the trial court comes to sentencing. In other cases, obligations can be difficult to comply with: a person required not to attend their family home might sleep in the car for a period, and at some time infringe the obligation. It was felt that more could be done to protect the victim whilst also reaching a more practicable judicial supervision settlement taking into account the possibilities of compliance for the suspect. There is also a lack of 'joined-up' thinking between departments: organisations which find bail accommodation for suspects are funded by the Ministry of Social Affairs, and there is no dialogue with the Ministry of Justice which administers the judicial system.

33. Finally, participants made remarks on the system of electronically monitored residence requirements, which since 2010 has been regulated by a separate decree[4] and has to be considered separately from general judicial supervision obligations. It was said that, in reality, this device is seldom used: approximately 450 times annually in recent years. It takes several weeks to put in place, and is not a realistic solution for shorter periods of detention. It is, in any case, of no use to the most vulnerable, who in many cases simply have no residence to which to be assigned for the purposes of monitoring.

D. Excessive remand periods

34. The problem of long-term detentions arises only in investigation cases, as simpler cases will generally be handled by way of summary proceedings. The complexity of cases now being dealt with in investigation cases means that detentions can often be very long: 25 months, on average, and some much longer. The investigation process has itself become more complicated, in part as a result of reforms by successive *Gardes des sceaux* (ministers of justice) designed to make the investigation process more adversarial, with more participation of defence lawyers, but also because of the increased reliance on forensic evidence. It might, for instance, take six months to obtain DNA expertise, and the defence will then request a counter-expertise which will take a further six months. If it becomes necessary to obtain evidence from abroad, delays can be even longer.

35. It was noted that lengthy pre-trial detention periods in investigation cases were attributable to delays in bringing a person to trial (particularly before the assize courts in murder, sexual offences and other serious crimes) once the investigation is complete.

[4] Décret n° 2010-355 du 1er avril 2010 relatif à l'assignation à résidence avec surveillance électronique et à la protection des victimes de violences au sein du couple.

36. Concern was expressed about the automatism with which extensions of detention are requested by the prosecution while such prolonged proceedings are ongoing. Young prosecutors, often with little knowledge of the case, request extensions systematically, simply asserting that the Article 144 conditions are met.

37. It was said that, ultimately, the key question is whether the judge wishes to refer the case to the trial court with the person detained or not. If the answer is yes, the law allows the judge sufficient latitude to ensure that the case qualifies for all available extensions and to complete the necessary investigative steps within the time limit.

38. There was, finally, general concern regarding the impact of pre-trial detention on final sentencing by the trial court. If a defendant has been detained for eight months pre-trial, the judge will often order 16 months' imprisonment in a case where eight months would themselves seem amply sufficient punishment in relation to the facts. As a result, one lawyer explained that they would often advise clients that it was best to spend two years detained pre-trial, be released and appear before the tribunal as a free man than to get to trial more quickly and appear as a detained person. In the former case, the court would see the 'punishment' as having been served; in the latter, there would be a temptation to impose additional time so as to cover the time already served.

39. Given the importance of 'winning the battle' at the pre-trial stage, the concerns raised in relation to the effectiveness of judicial review of detention, discussed above, become all the more significant.

E. Reform outlook

40. Participants were asked about two of the major reforms discussed during the day: the creation of the JLD in 2000, and the removal of the 'public order' criterion in *correctionnel* cases in 2007. They were asked to comment on the social and political impetus for such reforms.

41. It was said that the 2000 reform was motivated by 'reason', the 2007 reform by 'emotion'. The latter reform was a reaction to the so-called *Outreau* case, a disastrous case which produced a number of miscarriages of justice. Thirteen people were implicated of serious chid sex offences and detained for several years pre-trial (one died in prison), in the context of intense media pressure on the inexperienced IJ handling the case, before the assize court eventually acquitted them. The subsequent outrage at the failings in the case pervaded even the political and academic classes and the case gave rise to a parliamentary commission, which was televised. The 2000 reform, on the other hand, as noted above, was the product of a steady academic reflexion about the allocation of judicial and investigative functions in France.

42. Participants were also asked for their general observations on what needs to happen in order to reduce recourse to pre-trial detention. A variety of opinions were expressed. It was said that advantage should be taken of the one thing which is not susceptible to circumvention and involved no human assessment of facts: time limits. Work should be done to reduce these, as investigation cases simply expand to fill the available time and could shorten commensurately. It was also suggested that the 'public order' criterion (absent in many other national legislations) should simply disappear altogether. It was also said that prison itself, as an institution, is only 200 years old and its use at the pre-trial stage had only recently come under scrutiny. Other observations made it clear that in order to meet the challenge of reducing recourse to pre-trial detention, a change of mindset among judicial and prosecutorial personnel is required.

F. Key recommendations

Effectiveness of judicial oversight of detention

a. The judiciary should be made aware of the defence's perception that the formal process of pre-trial detention decision-making is something of a simulacrum, with the real decision-making happening behind the scenes in conversations between the judges to which the defence are not privy and cannot influence. Documents such as the present communiqué should be forwarded to judiciary bodies to begin this dialogue.

b. Bar association networks should be used to circulate template reasoning for the use of defence lawyers, with reference to national and international case-law which can be adapted to allow the systematic challenging of decisions which fail adequately to justify the conclusion that detention is necessary. This would be particularly beneficial where a risk of absconding is asserted despite evidence showing that the defendant has a stable life.

c. The post of JLD should be elevated to an independent judicial office, instead of merely being a function to which a judge of the criminal court is assigned.

d. Cases where pre-trial detention leads to serious injustice should be publicised in order to draw attention to abuses of pre-trial detention; likewise, examples of good practice by IJs, JLDs and/or *chambre de l'instruction* judges should be held up as models.

Alternatives to detention

e. The power to impose judicial supervision should be expressly framed as one applying 'where strictly necessary', to combat the use of judicial supervision as an alternative to liberty and an additional reassurance in cases which do not genuinely require close supervision.

f. Where judicial supervision is imposed, there should be a requirement for an automatic review of the necessity of maintaining the obligations after one year, failing which the judicial supervision order would become void. The law should in any case require the automatic, progressive lightening of obligations (in particular the frequency of *pointage*) over time.

g. There should be greater dialogue between the criminal defence bars and bail organisations to develop a more coordinated approach whereby a package of socio-educational judicial supervision obligations can be effectively proposed and explained to the competent judge.

h. Statistical data should be collected regarding re-offending rates in cases where the person is placed in pre-trial detention as against cases where the person is subject to socio-educational judicial supervision, to develop the understanding of the long-term advantages of judicial supervision.

i. France should be encouraged to implement the Framework Decision on the European Supervision Order, which may help mitigate the proportionally greater likelihood of detention and/or the human impact of judicial supervision where the defendant is a foreign national.

Excessive detention periods

j. The length of detention in investigation cases appears to be linked to the increasing complexity of those cases and the difficulty for the IJ effectively to direct such investigations, which require the participation of many different institutions and actors. Academia and the legal professions should be encouraged to view the ongoing debate about the role of the IJ in French criminal proceedings through the prism of detention and the serious, irreversible human impact which arises from lengthy detentions.

Reform outlook

k. The legislature should be encouraged to remove the 'public order' criterion from the Code altogether. France has repeatedly been found in violation of the ECHR in cases where this provision has been applied, showing its susceptibility to abuse. France should show international leadership vis-à-vis other countries which have similar provisions in their laws and drop the criterion altogether.

l. The Ministries of Justice and Social Affairs should be encouraged to coordinate the provision of socio-educational judicial supervision measures by bail organisations and the administration of justice, including by training judges regarding the kinds of measures which are available and their effectiveness.

m. Further research should be carried out to assess whether the fact of the defendant appearing before the trial court as a detained person and the length of the pre-trial detention until then impact upon the type of sentence ordered and, if the sentence is custodial, its length.

Fair Trials International

Local Expert Group (France)

8 October 2013

Annex

PARTICIPANTS

(in alphabetical order)

Bruno Aubusson de Cavarlay is the new President of the *Commission de suivi de la détention provisoire* (Provisional Detention Monitoring Committee). He is a researcher at the *Centre de recherches sociologiques sur le droit et les institutions pénales* (Centre for Sociological Research on Criminal Law and Criminal Justice Institutions), specialising in criminal statistics. He did not represent the Committee at the meeting.

Marie Guiraud is a lawyer at the Paris Bar, specialising in criminal law. She practices in all areas of criminal law, and also acts in cases relating to prisons and terrorism. She is a member of the Legal Action Group of the *Fédération international des droits de l'homme* (FIDH), representing civil parties before the Extraordinary Chambers of the Criminal Courts of Cambodia. She studied human rights law at University College London.

Anta Guissé is a lawyer at the Paris Bar specialising in criminal law, with a particular focus on international criminal law, having worked for the defence in cases before the UN International Criminal Tribunal for Rwanda, and the Extraordinary Chambers of the Criminal Courts of Cambodia.

Frédéric Lauféron is the President of the *Association de politique criminelle appliqué et de reinsertion sociale*, which works toward better use of alternatives to detention, including by providing background information to the courts on the material and social situation of defendants.

Raphaële Parizot is a Professor of criminal law at the University of Poitiers, having been Maître de conferences at the Sorbonne (Université Paris I). Raphaële is Vice-President of the *Association de recherches pénales européennes* (European Criminal Studies Association), undertaking a cross-border study of criminal procedure in France, Spain and Italy.

Serge Portelli is a chamber president at the Court of Appeal of Versailles, and former head investigating judge at the Créteil tribunal in Paris. He has practised as an investigating judge for over 25 years and has written extensively on criminal justice and preventing reoffending.

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.

Philippe 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.

ANNEX 4: JOINT NGO LETTER ON CONTINUED WORK ON FAIR TRIAL RIGHTS, JULY 2013

Ms Viviane Reding
Vice-President of the European Commission
Commissioner for Justice, Fundamental Rights and Citizenship
B-10409 Brussels
Belgium

15 July 2013

Dear Vice President Reding,

Following the vote of the Civil Liberties, Justice and Home Affairs Committee of the European Parliament to adopt the Directive on the right of criminal suspects to access a lawyer and to communicate with consular officials and other third parties upon arrest (the "Directive"), our organisations – national and international NGOs working on justice and human rights – write to recognise the achievement of the European Commission, Council and Parliament on reaching agreement on this important instrument. The agreed text is a hard-won compromise that has the potential to improve substantially the rights of suspects and accused persons within the EU.

For this potential to be realised, however, effective implementation is crucial. We call upon the Commission to ensure that all three procedural rights directives so far agreed under the Roadmap (the Roadmap Directives) are implemented effectively by working with Member States as they transpose them into domestic law and providing training programmes for government officials, judges, police, prosecutors and lawyers.

Given the interdependent nature of the rights set out in the Stockholm Programme (the "Roadmap"), the full extent of the protections provided for by this Directive cannot be fully realised without the adoption and implementation of the other envisaged measures on procedural rights. In particular the Council recognised in the Resolution on the Roadmap that the promised measure on legal aid is necessary to ensure that the right to access a lawyer is effective. **We call upon the Commission, Council and Parliament to press forward, as a matter of urgency, with the unfinished agenda of the Roadmap.**

Legal Aid

Whilst we recognise that, in order to facilitate the passage of the Directive, the question of legal aid was removed from consideration and postponed to a later date, progress on legal aid cannot be delayed indefinitely. Without legal aid, the enjoyment of other protected rights may remain elusive in practice. The UN Guidelines on Access to Legal Aid in Criminal Justice Systems were adopted by the UN General Assembly in December 2012, placing legal aid high on the global agenda. We therefore urge the Commission to issue a robust proposal for a directive on the right to legal aid, for those who need it, in all circumstances in which the need for access to a lawyer has been recognised and guaranteed under the Directive. We hope that the forthcoming measure will include, as a minimum, standards relating to eligibility for legal aid, timely decisions, scope of legal aid, choice of lawyer and independence and quality of the lawyers providing legal aid.

Vulnerable Suspects

We also call upon the Commission to publish a directive on vulnerable suspects. This proposal must be designed to ensure that all accused persons are able to understand and follow the content of any criminal proceedings in which they are involved. This includes, but is not limited to, children, non-nationals, and people who have physical, mental, intellectual or sensory impairments. Without such additional legislative protection, large numbers of suspects caught up in the criminal justice systems of Member States may not be able to adequately exercise their rights provided by the Roadmap Directives.

Pre-Trial Detention

Little progress has been made on the important issue of minimum standards for pre-trial detention in the two years since the Commission's Green Paper on Detention was published for consultation. The existence and application of appropriate safeguards relating to the use of pre-trial detention are key factors in the fair operation of, and public trust in, existing mutual recognition measures. We therefore urge the Commission to continue its work on pre-trial detention in the EU by committing to revisit the case for legislative action which we believe is necessary.

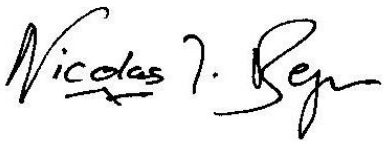
Stockholm Programme and Beyond

Important progress has been made to improve protections for criminal suspects in the past three years. The measures that have already been achieved promise to provide a lasting legacy, to improve the operation of important judicial cooperation measures, and to bolster respect for one of the key principles on which the European Union is founded: respect for human rights and the rule of law. With the European Parliament elections due in May 2014, the appointment of a new Commission, and the conclusion of the time-period allocated for the Stockholm Programme

following soon thereafter, we call upon the Commission, Council and Parliament to commit to maintaining momentum on the remaining Roadmap measures, and particularly a broad legislative proposal on legal aid, to ensure that the Stockholm Programme is concluded within the allocated timeframe. The need to improve respect for human rights in practice, and to facilitate mutual trust and recognition between Member States, has grown no less urgent than it was when the Roadmap was first proposed in 2009. We therefore urge the Commission, the Council, and the Parliament to ensure that the protection of defence rights continues to be a key feature of the new legislative programme that will follow in 2015.

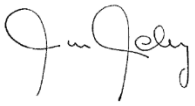
Yours sincerely,

Jago Russell, Chief Executive Officer, Fair Trials International



Dr. Nicholas Berger, Director, Amnesty International, European Institutions Office

Zaza Namoradze, Director of Budapest Office, Open Society Justice Initiative



Mark Kelly, Director, Irish Council for Civil Liberties

Andrea Coomber, Director, JUSTICE

Cc:

Lithuanian Presidency of the Council of the European Union
President of the Republic of Lithuania, Dalia Grybauskaitė
Minister of Justice, Juozas Bernatonis

Ambassador, Permanent Representative of Lithuania to the EU, Raimundas Karoblis,

Representative of Irish Predidency of the Council of European Union (January – July 2013)
Alan Shatter T.D, Minister for Justice, Equality and Defence

PPE Group
Salvatore Iacolino , Manfred Weber, Simon Busuttil, Carlos Coelho, Elena Oana Antonescu, Georgios Papanikolaou, Roberta Angelilli, Mario Mauro, Erminia Mazzoni

S&D Group
Birgit Sippel, Claude Moraes, Sylvie Guillaume, Rita Borsellino, Emine Bozkurt, Roberto Gualtieri, Tanja Fajon, Carmen Romero López, Silvia Costa

ALDE Group
Niccolò Rinaldi, Renate Weber, Baroness Sarah Ludford, Nathalie Griesbeck, Cecilia Wikström, Ramon Tremosa i Balcells, Andrea Zanoni, Leonidas Donskis, Louis Michel

Verts/ALE Group
Judith Sargentini, Jan Philipp Albrecht, Tatjana Ždanoka, Rui Tavares, Raül Romeva i Rueda

ECR Group
Timothy Kirkhope

GUE/NGL Group
Kyriacos Triantaphyllides, Cornelis de Jong, Cornelia Ernst, Miguel Portas, Nikolaos Chountis, Marisa Matias

ANNEX 5: JOINT NGO LETTER ON PRE-TRIAL DETENTION, SEPTEMBER 2013

Ms Viviane Reding
Vice-President of the European Commission
Commissioner for Justice, Fundamental Rights and Citizenship
B-10409 Brussels
Belgium

10 September 2013

Dear Vice-President Reding

Pre-trial detention in the EU

As the European Commission, Council and Parliament have recognised, 'excessively long periods of pre-trial detention are detrimental to the individual, can prejudice cooperation between the Member States, and do not represent the values for which the European Union stands'.[1] We are writing to you now to follow-up on the European Union's work to tackle this problem and to urge the Commission to continue its work in this area beyond the current legislative programme, including developing a timeframe for tabling a legislative proposal setting common minimum standards for the use of pre-trial detention in the EU.

We understand that the European Commission is at this stage intending to focus on monitoring the implementation of three Framework Decisions: the European Supervision Order (**ESO**); the Prisoner Transfer Framework Decision; and the Framework Decision on the application of mutual recognition to judgments and probation decisions and is not currently proposing legislation. We take note of this emphasis on effective implementation but would highlight that only one of the three Framework Decisions, the ESO, has the potential to impact on pre-trial detention. While it may go some way to alleviating problems faced by non-nationals by enabling them to return home while awaiting trial, even this is very limited in scope. In addition, the three Framework Decisions are all pre-Lisbon measures and the European Commission therefore currently has no enforcement powers if problems with their implementation are identified.

Pre-trial detention can be validly imposed where necessary to ensure that justice is served, evidence and witnesses are protected and suspects do not escape prosecution. However, the reality is that standards in pre-trial detention regimes vary widely across the EU and frequently fall short of human rights and other international standards. We therefore welcomed the Commission's Green Paper and engaged actively in the Commission's consultation. The Commission's consultation attracted widespread recognition of problems with pre-trial detention in Europe, its impact on the effective operation of mutual recognition measures and considerable support for EU intervention to tackle the problem (a summary of these uncontroversial conclusions and recommendations is enclosed). In particular:

i. In December 2011, Members of the European Parliament overwhelmingly supported a resolution on detention in the European Union, which called for a legislative proposal on the rights of persons deprived of their liberty to ensure pre-trial detention remains an exceptional measure, used in compliance with the presumption of innocence and the right to liberty;
ii. Over fifty non-governmental organisations responded to the consultation and overwhelmingly agreed that new EU laws would help to address the problems with pre-trial detention in Europe; and
iii. Six Member States stated that legislative action is required. Several other Member States accepted that the current system of pre-trial detention poses a threat to mutual trust and continued judicial cooperation across EU borders.

There is much more that needs to be done to: (i) reduce the excessive periods of time that people arrested and accused of criminal offences spend in pre-trial detention before they have been convicted of any crime, and (ii) to increase the use of alternatives. This is particularly important in relation to children and other vulnerable suspects, who can suffer

[1] Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention, COM(2011) 327, Brussels 14 June 2011.

serious long term effects from even a short time in pre-trial detention. We also believe that more systematic information gathering will be crucial in order to understand how pre-trial detention is being used in practice across the EU. This will provide a strengthened basis for future decisions on the effect that the Commission's work on detention is having and on what further steps (legislative or non-legislative) are needed to protect fundamental rights and prevent unjustified and excessive pre-trial detention from undermining mutual trust and cooperation.

We therefore urge the Commission to:

1) use its powers[2] to introduce a proposal to include the development, production and dissemination of statistics on pre-trial detention in the European statistical programme to assess the use of alternatives to, and length of, pre-trial detention in Member States and the numbers of cases in which non-nationals are permitted to return home pending trial. We would, of course, be delighted to assist with the development of such a proposal; and

2) commit to take further EU action to establish minimum and enforceable EU standards on pre-trial detention under the next Commission work programme and to review the need for a legislative proposal on common minimum standards on the use of pre-trial detention if, as we expect, the implementation work and statistical information collected shows this to be necessary.

Yours sincerely

Amnesty International
Association Européenne pour la Défense des Droits de l'Homme
APADOR
Association for the Prevention of Torture
Czech Helsinki Committee
Defence for Children International
European Criminal Bar Association
Federation Internationale de L'ACAT
Fair Trials International
Harm Reduction International
Human Rights Monitoring Institute, Lithuania
Hungarian Helsinki Committee
International Centre for Prison Studies
Irish Penal Reform Trust
JUSTICE
Law Society of England and Wales
League of Human Rights, Czech Republic
Liga voor Mensenrechten
Observatoire International de Justice Juvenile
Open Society Justice Initiative
Prisoners Abroad
Quaker Council on European Affairs

[2] See Article 13(3) of the European Statistical Law (Regulation (EC) No 223/2009)

Cc:

PPE Group
Salvatore Iacolino , Manfred Weber, Simon Busuttil, Carlos Coelho, Elena Oana Antonescu, Georgios Papanikolaou, Roberta Angelilli, Mario Mauro, Erminia Mazzoni

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Director-General, Legal Adviser to the Council - Hubert Legal

Director-General (General Secretariat to the Council), Justice and Home Affairs - Rafael Fernandez-Pita Y Gonzalez

Permanent Representative of Austria – Walter Grahammer

Permanent Representative of Belgium - Dirk Wouters

Permanent Representative of Bulgaria - Dimiter Tzantchev

Permanent Representative of Croatia – Vladimir Drobnjak

Permanent Representative of Cyprus – Kornelios S. Korneliou

Permanent Representative of Czech Republic - Martin Povejsil

Permanent Representative of Denmark – Jeppe Tranholm-Mikkelsen

Permanent Representative of Estonia – Matti Maasikas

Permanent Representative of Finland – Jan Store

Permanent Representative of France – Philippe Etienne

Permanent Representative of Germany – Peter Tempel

Permanent Representative of Greece – Théodoros N. Sotiropoulos

Permanent Representative of Hungary – Péter Gyorkos

Permanent Representative of Ireland – Rory Montgomery

Permanent Representative of Italy – Stefano Sannino

Permanent Representative of Latvia – Ilze Juhansone

Permanent Representative of Lithuania – Raimundas Karoblis

Permanent Representative of Luxembourg – Christian Braun

Permanent Representative of Malta – Marlene Bonnici

Permanent Representative of Netherlands – Pieter De Gooijer

Permanent Representative of Poland – Marek Prawda

Permanent Representative of Portugal – Domingos Fezas Vital

Permanent Representative of Romania – Mihnea Ioan Motoc

Permanent Representative of Slovenia – Rado Genorio

Permanent Representative of Slovakia – Ivan Korcok

Permanent Representative of Spain – Alfonso Dastis Quecedo

Permanent Representative of Sweden – Dag Hartelius

Permanent Representative of United Kingdom – Jon Cunliffe CB

About the Legal Experts Advisory Panel (LEAP)

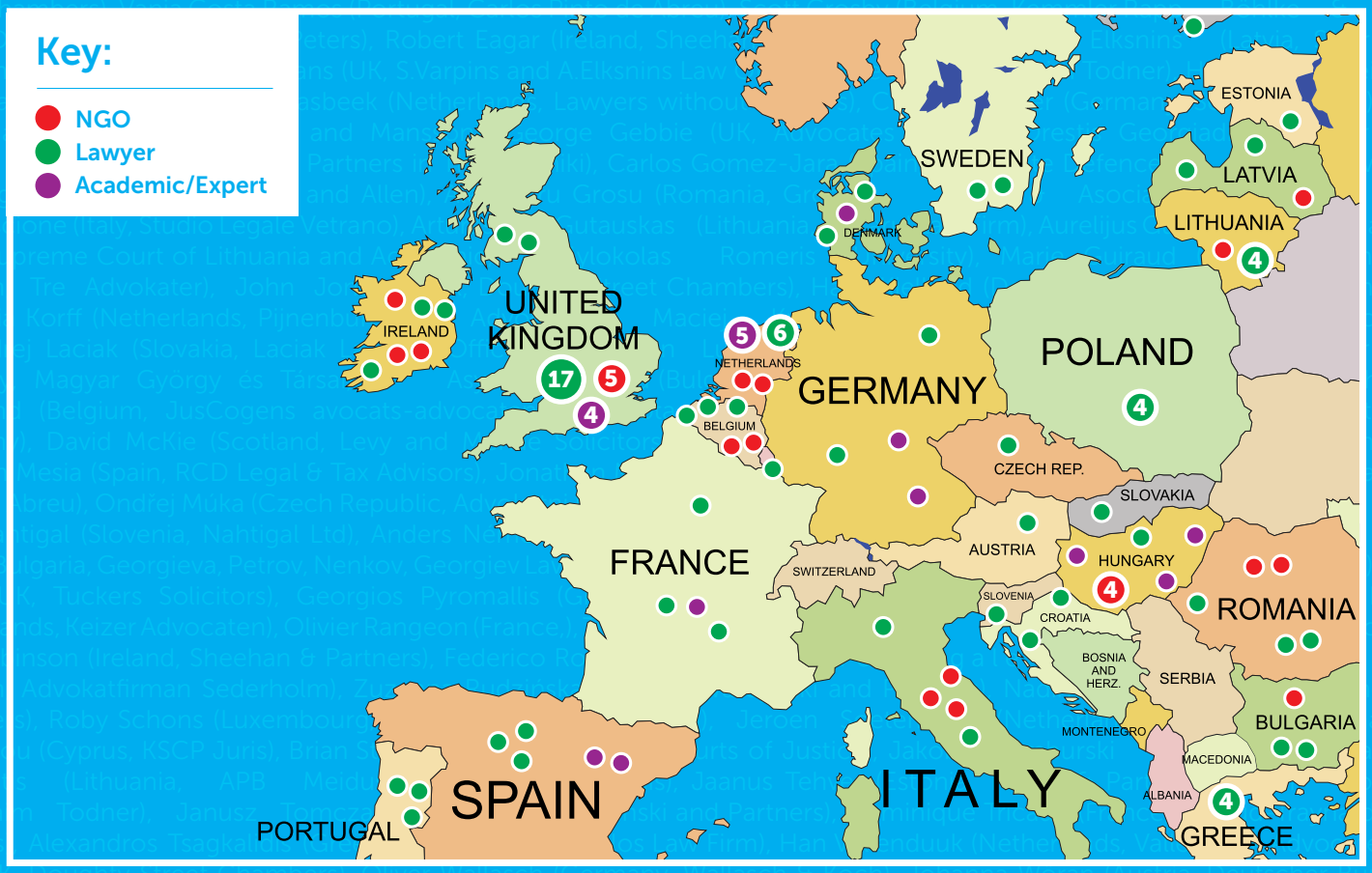
LEAP provides a unique opportunity for strategic networking between criminal justice and human rights experts in Europe, currently bringing together 85 defence practitioners, 20 NGOs and 17 academics from 28 EU countries. Members have in-depth knowledge of Europe's many criminal justice systems and a broad understanding of the many barriers to justice.

LEAP meets regularly to discuss criminal justice issues, identify common concerns, share examples of best practice and identify priorities for reform of law and practice. Fair Trials International (as coordinator of LEAP) has convened 12 LEAP meetings in the last year (taking place in Belgium, France, Greece, Hungary and Lithuania, Poland, the Netherlands, Spain and the UK) involving over 200 participants.

LEAP has identified clear priorities (set out in this report) for future work by the European Union to make fair trial rights a reality in Europe.

LEAP's Annual Conference took place in October 2013, bringing together over 70 experts representing 23 Member States to discuss the future of criminal justice in Europe.

LEAP's membership across Europe



Legal Experts Advisory Panel
UK: c/o Fair Trials International, Temple Chambers, 3/7 Temple Avenue, London, EC4Y 0HP
Belgium: c/o Fair Trials International, 85 Avenue des Nerviens, Box 10, B-1040, Brussels
(+44) 20 7822 2370 | office@fairtrials.net

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