

Defence Rights in Europe: **The road ahead**

LEAP is an EU-wide community of front line defenders of the human right to a fair trial.

2016

Leap

Legal Experts
Advisory Panel

About the Legal Experts Advisory Panel

The Legal Experts Advisory Panel (“LEAP”) is a pan-EU network of criminal justice and human rights experts, currently bringing together over 150 defence practitioners, NGOs and academics from 28 EU Member States (see Annex 1 for full list of members as at 11 March 2016). LEAP is guided by its Advisory Board, consisting of 28 Members from 25 Member States.

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. In March 2014, in its report *Stockholm’s Sunset*, LEAP set out its priorities for future work by the EU to make fair trial rights a reality in Europe, and it has been working to promote those priorities during the last two years. From April 2014 to March 2016, nine LEAP meetings took place involving well over 200 participants. LEAP members have also helped train over 200 criminal lawyers EU legislation on fair trial rights, which by April 2016 will rise to 240 covering all EU Member States. LEAP is not a single voice and does not require formal sign-up to positions; it acts as a forum for the exchange of expertise from which common concerns and positions emerge, which can be reflected in published LEAP materials.

About Fair Trials

Fair Trials works for fair trials in Europe according to internationally recognised standards of justice. Our vision is a world where every person’s right to a fair trial is respected. Fair Trials helps people to understand and defend their fair trial rights; addresses the root causes of injustice through its legal and policy work; and undertakes targeted training and networking activities to support lawyers and other human rights defenders in their work to protect fair trial rights.

Fair Trials wishes to thank **Alex Tinsley** (Head of EU Office), who is leaving the organisation after four years, for his work coordinating LEAP in 2014-2016.

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Fair Trials comprises a London-based charity (Fair Trials International) and Public Foundation based in Brussels (Fair Trials Europe), the LEAP coordinator, which acts as the hub for all of Fair Trials’ work in Europe.



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1. Since 2009, the Legal Experts Advisory Panel (**LEAP**) – an EU-wide network of over 150 criminal justice experts from all 28 EU Member States coordinated by Fair Trials – has worked to inform the development and implementation of EU criminal justice law and policy and to ensure that the protection of fair trial rights remains a priority. LEAP members not only provide eyes and ears across the EU – identifying the underlying causes of unfair trials when they appear – but they also help explain to policy-makers what changes are really needed, and work to make sure that laws passed in Brussels have a real impact on the protection of fair trial rights in practice. This report provides an overview of LEAP’s work during the past two years which, building on priorities identified in March 2014, has focussed on the following three areas:

A. Contributing to EU policy and legislation

2. One of LEAP’s strengths is the range and breadth of its members’ knowledge and experience. Our NGOs, academics and lawyers work on fair trial rights issues every day, so are perfectly placed to inform the development of legislation. LEAP’s contributions based on the practical challenges which suspects and accused persons face in accessing their fair trial rights in criminal proceedings across the EU are summarised as follows:
 - i. **Impact on the agreed texts of EU laws on fair trial rights:** LEAP’s proposal for the inclusion of a provision prohibiting the presentation of suspects in court in ways which suggest their guilt was reflected in the agreed Directive on the presumption of innocence. Further, its suggestions for an expanded scope and purpose of the individual assessment informed the agreed text of the Directive on procedural safeguards for children suspected or accused in criminal proceedings; and
 - ii. **Informing ongoing negotiations:** LEAP continues to inform the negotiations of the proposed directive on legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings, hoping that a measure is adopted which applies to all suspects and accused, not just those deprived of their liberty, and which ensures that there is an enforceable right to legal aid in the issuing state to ensure dual representation in European arrest warrant cases. LEAP has also provided input in relation to EU measures on the European Public Prosecutor’s Office, the European Criminal Records Information System and terrorism offences, each of which has potential impact on the enjoyment of fair trial rights.

B. Making EU laws on fair trial rights work in practice

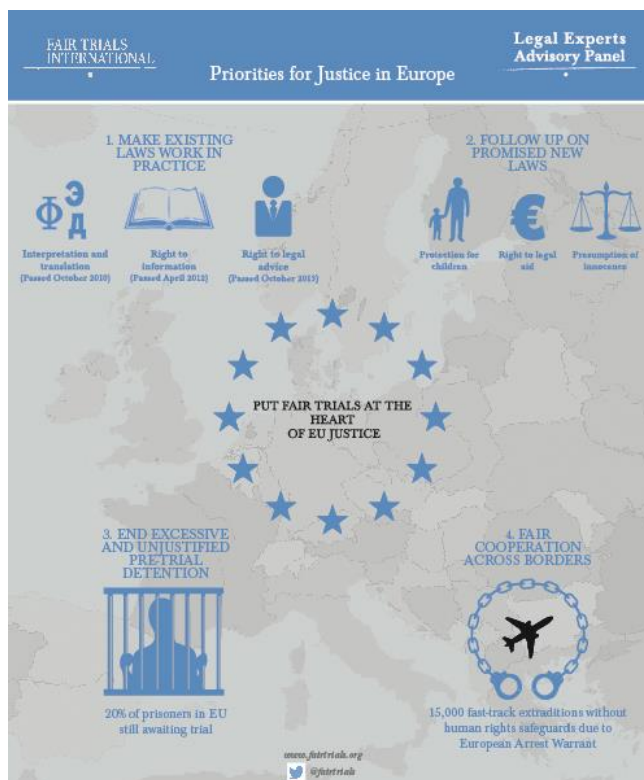
3. LEAP recognises that the adoption of legislation is only the first step towards improved fair trial rights protection, and EU-wide laws on fair trial rights will not have any impact unless they are implemented effectively. LEAP’s contribution in this area is guided by its implementation strategy – *Towards an EU Defence Rights Movement* – launched at the LEAP Annual Conference in Amsterdam in February 2015. Key examples of LEAP’s implementation activities include:
 - i. **Identifying implementation challenges arising in practice**, through surveys on the implementation of the obligations relating to quality of interpretation in criminal proceedings under Directive 2010/64/EU on the right to interpretation and translation in

- criminal proceedings and the right to access the case-file under Directive 2012/13/EU on the right to information in criminal proceedings;
- ii. **Informing developments in national legislation**, through submissions on the transposition of EU directives in Lithuania, England and Wales, Spain and Bulgaria;
 - iii. **Providing training to defence practitioners**, through six residential trainings which will reach 240 lawyers from all 28 EU Member States by April 2016 and an accompanying online training series (toolkits and videos) freely available on the Fair Trials website; and
 - iv. **Sharing expertise with national and regional courts**, through the submission of comparative law analysis in support of cases brought by LEAP members in the domestic context, including in Estonia, Cyprus and Sweden, and through interventions before the European Court of Human Rights including in the notable case of *AT v Luxembourg*.

C. Identifying emerging fair trial rights issues

4. In addition to reacting to and providing expert input on EU initiatives, LEAP's contribution also includes the identification of emerging fair trial rights issues which should be on the agenda of legislators across the EU. Issues which LEAP is currently examining include:
 - i. **Plea bargaining:** Most EU Member States have some form of plea bargaining operating within the criminal justice system, offering efficiency at a time when criminal justice systems are under increasing pressure. But plea bargains can lead to injustice, due to innocent people pleading guilty and cases being resolved behind closed doors, and these concerns have been raised by some LEAP members. LEAP is assisting Fair Trials with a scoping study to map the use of plea bargaining practices, with a view to developing recommendations which ensure that effective safeguards are guaranteed and unjust outcomes are prevented.
 - ii. **Migration and criminal justice:** The arrival of large numbers of refugees since 2015 presents a significant challenge, but Member States choosing criminal justice responses presents a particular cause for concern. Refugees are being prosecuted for offences relating to illegal entry and use of false documents, and are thereby diverted away from the asylum process and into the criminal justice system. People outside their own country are more vulnerable to fair trial rights abuses yet too often inadequate safeguards are in place.
 - iii. **Evidence:** LEAP members have highlighted a number of interconnected issues relating to evidence, including the admissibility of different types of evidence (eg. expert reports, eye-witness evidence and forensic evidence), the challenges which the expanding role of electronic evidence presents for defendants across the EU, and the problems associated with confidential evidence relied on in prosecutions for terrorism offences.
 - iv. **Pre-trial detention:** With input from LEAP, Fair Trials will publish a report in May 2016 setting out the findings of research which it has coordinated into judicial decision-making on pre-trial detention and highlighting the need for EU legislation to address the excessive and unjustified use of pre-trial detention across the EU. As EU Member States face economic challenges in addressing overcrowding in prisons and the integrity of the mutual recognition system continues to be called into question as a result, LEAP hopes that the EU will recognise that action is now needed and bring forth a legislative proposal as a matter of urgency.

1. Since 2009, the Legal Experts Advisory Panel (**LEAP**) – an EU-wide network of over 150 criminal justice experts from the 28 EU Member States coordinated by Fair Trials – has worked to inform the development and implementation of EU criminal justice law and policy. Against the backdrop of increased police and judicial cooperation between Member States, and the proliferation of networks which facilitate such cooperation (including EUROJUST,¹ EUROPOL² and the European Judicial Network³), LEAP's contribution has been vital in ensuring that fundamental human rights, and specifically fair trial rights, remain firmly on the EU's agenda.
2. A unique and respected voice on criminal justice and human rights, LEAP draws on the expertise of its diverse membership – made up of defence lawyers, NGOs and academics – to identify systemic barriers to fair trials across the EU, to contribute to the development of EU laws on fair trial rights, to share information on developments in regional standards and to ensure the effective application of those standards in practice. LEAP members meet throughout the year to discuss key developments and identify strategic responses which are disseminated through communiqués, detailed briefings, position papers, joint letters and face-to-face meetings with policy-makers. In addition, LEAP's input is regularly sought by representatives from all three Brussels-based EU institutions, both in the context of debates of new criminal justice measures and discussions on the implementation of existing ones, with notable impact.
3. In March 2014, LEAP's report – *Stockholm's Sunset: New horizons for justice in Europe*⁴ – celebrated the major progress which the EU had made under the Stockholm Programme, but recognised that there was still work to be done in order to ensure that fair trial rights are fully protected in practice, and identified priorities for future EU work in this area, including: effective implementation of the existing EU laws on defence rights; completing further legislation on legal aid, protections for children and the presumption of innocence; new legislation on pre-trial detention and reform of the European Arrest Warrant (**EAW**). Many Members of the European Parliament tweeted an infographic (opposite) to support LEAP's priorities.



¹ <http://www.eurojust.europa.eu/Pages/home.aspx>

² <https://www.europol.europa.eu/content/page/about-us>

³ http://www.ejn-crimjust.europa.eu/ejn/EJN_StaticPage.aspx?Bread=2

⁴ <https://www.fairtrials.org/wp-content/uploads/Stockholms-Sunset.pdf>

4. With most of these priorities recognised by the EU institutions in the EU agenda for criminal justice in 2015-2019,⁵ LEAP has worked to support the EU institutions in achieving these goals over the past two years. In this report we highlight some of the contributions LEAP has made to the negotiation of the second generation of EU measures on fair trial rights:
 - i. The Directive (adopted but not yet published) on the presumption of innocence and the right to be present at one's trial (the **Presumption of Innocence Directive**);⁶
 - ii. The Directive (agreed but not yet adopted or published) on procedural safeguards for children in criminal proceedings (the **Children's Directive**);⁷ and
 - iii. The proposed directive on legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings (the **Proposed Legal Aid Directive**).⁸
5. Based on a strategy adopted during the LEAP Annual Conference in 2015,⁹ LEAP has also been working and will continue to work actively to ensure the effective implementation of:
 - i. Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings (the **Interpretation and Translation Directive**);¹⁰
 - ii. Directive 2012/13/EU on the right to information in criminal proceedings (the **Right to Information Directive**);¹¹ and
 - iii. Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings (the **Access to a Lawyer Directive**).¹²
6. We refer to the measures mentioned in paragraphs 4 and 5 above as the **Roadmap Directives**.
7. In addition to supporting the EU institutions in these ways, LEAP also assumes responsibility for highlighting other current challenges to the protection of fair trial rights as they arise, in order to open a conversation that will lead to a broader understanding of these issues and promote action by policy-makers where necessary. In a challenging political environment, the threat of terrorism, the influx of large numbers of refugees and asylum-seekers each month and the economic instability of the region present threats to the protection of fair trial rights. As policy-

⁵ European Council Conclusions of 26/27 June 2015 (EUCO 79/14), available [here](#).

⁶ The Directive on the presumption of innocence and the right to be present at one's trial, as agreed, 29 October 2015, available at: <http://data.consilium.europa.eu/doc/document/ST-13471-2015-INIT/en/pdf>.

⁷ Council of the European Union, Procedural safeguards for children in criminal proceedings: Council confirmed deal with EP, 16 December 2015, available at: <http://www.consilium.europa.eu/en/press/press-releases/2015/12/16-procedural-safeguards-for-children-in-criminal-proceedings/>.

⁸ European Commission, The proposed directive on legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings, available at: http://ec.europa.eu/justice/criminal/files/com_2013_824_en.pdf.

⁹ LEAP, Strategies for effective implementation of the Roadmap Directives: Towards an EU defence rights movement, February 2015, available [here](#).

¹⁰ Directive 2010/64/EU of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings, 20 October 2010, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32010L0064&from=EN>.

¹¹ Directive 2012/13/EU of the European Parliament and the Council on the right to information in criminal proceedings, 22 May 2012, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:142:0001:0010:en:PDF>.

¹² Directive 2013/48/EU of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings, 22 October 2013, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013L0048&from=EN>.

makers find themselves under increasing pressure to focus on improving security, the LEAP network of fair trial defenders has an increasingly important role to play.

8. Despite significant achievements having been made to date, the road to effective protection of fair trial rights in the EU continues to unfold before us and the end is not yet in sight. There is further work to be done to complete the Procedural Rights Roadmap (the **Roadmap**) of 2009, with the Proposed Legal Aid Directive still to be agreed and decisions still to be taken on what action (legislative or otherwise) is required to address the overuse of pre-trial detention across the EU. Also, as three fair trial rights directives are still to reach their transposition deadlines, the work to ensure effective implementation will continue for several years to come.

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 proceedings	October 2010: Directive adopted. October 2013: Deadline for Member States to implement into national law.	Ongoing monitoring by the Commission to ensure full 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 to implement into national law.	Ongoing monitoring by the Commission to ensure full transposition and implementation by Member States.
Legal advice accessible from the point of arrest or questioning by police and throughout proceedings	October 2013: Directive adopted.	November 2016: Deadline for transposition into national law.
Arrested persons must have the right to notify someone of their arrest , and the right to communicate with consular officials for non-national defendants	October 2013: Directive adopted.	November 2016: Deadline for Member States to transpose into national law.
Legal aid for people accused of a crime who cannot afford to pay a lawyer	November 2013: Commission proposes a Directive on provisional legal aid for suspects deprived of liberty and those subject to EAW proceedings and a Recommendation on legal aid in criminal cases more generally.	Negotiations to continue.

Defence right	Action so far	Still to come?
Vulnerable suspects like children or those with disabilities need additional support to get a fair trial	<p>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.</p> <p>December 2015: Children's Directive agreed.</p>	<p>Formal adoption of Directive by EU institutions.</p> <p>Member States to implement into national law by agreed deadline.</p>
The presumption of innocence until a judicial determination of guilt or innocence and the right to be present at trial	<p>November 2013: Commission proposed a Directive on strengthening certain aspects of the presumption of innocence and the right to be present at trial.</p> <p>November 2015: EU institutions agreed Directive.</p>	<p>Formal adoption of Directive by EU institutions.</p> <p>Member States to implement into national law by agreed deadline.</p>
The right not to be subjected to excessive and unjustified use of pre-trial detention , which contributes to overcrowded prisons and impacts negatively on the enjoyment of other fair trial rights	<p>June 2011: Commission published Green Paper on Detention.</p> <p>December 2011: European Parliament resolution calls for legislative action on pre-trial detention.</p> <p>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 reliance on pre-trial detention.</p> <p>February 2014: European Parliament EAW report calls for legislative action on pre-trial detention.</p> <p>2014: 12 Member States, including Italy and Romania, write to Commission asking for resources to tackle overcrowding in prisons.</p> <p>January 2015: CSES commences impact assessment of legislation on pre-trial detention for the Commission.</p> <p>July and December 2015: CJEU receives references for preliminary rulings from German courts in cases C-404/15 and C-659/15 on Article 1(3) of the EAW Framework Decision as a ground to refuse surrender due to the poor prison conditions in the requesting state.</p>	<p>Development of the case for EU action on pre-trial detention continues.</p>

9. Further development of mechanisms of police, prosecutorial and judicial cooperation – in the form of the European Public Prosecutor’s Office (**EPPO**), the expansion of European Criminal Records System (**ECRIS**) and the implementation of the European Investigation Order (**EIO**) – will no doubt present new challenges to which the fair trials community remains alert.
10. Above all, the centrality of the EU’s action to protect defence rights is brought into focus by the current trends emerging from the courts. The Federal Constitutional Court of Germany order of December 2015¹³ finding that human rights-based constitutional protections should be applied to refuse execution of an EAW due to the treatment of the requested person would face in the issuing state again highlighted the gaps in mutual trust in the EU. This stands in contrast to the approach being promoted by the Court of Justice of the EU (**CJEU**), which in Opinion 2/13 insisted that EU law enjoined Member States to trust one another and not, save in exceptional circumstances, check whether other Member States had complied with fundamental rights. However these tensions are ultimately resolved, it is clear that EU law places great responsibility on Member States to respect human rights internally, and it is important that the EU ensure Member States are indeed meeting that obligation.
11. A key area in this regard is pre-trial detention. A report to be published soon by Fair Trials, drawing on in-depth research from LEAP members in 10 countries, will be published in May 2016 and will document the pressing need for EU intervention to ensure that national law and practice is improved across the EU.
12. This is one step of several identified in this report as essential to strengthening defence rights and, with that, mutual trust. So long as these steps are not taken, the approach envisaged by the CJEU cannot be justified. LEAP will therefore continue the work described in this report in the interests of fair and effective cooperation and respect for human rights in criminal proceedings.

¹³ Order of 15 December 2015 2 BvR 2735/14 (an English press release of which is available [here](#)).

Overview

13. Since 2009, the EU has made significant progress in enacting laws on fair trial rights in accordance with the Roadmap. The agreement of five EU Directives (the **Roadmap Directives**) which establish minimum standards enforceable across the EU is an important indication of the commitment of EU policy-makers and national governments to addressing the injustices which have arisen from increased judicial cooperation across the EU.
14. LEAP has sought to ensure that practitioners' perspectives are taken into account in this context. LEAP communicates its input in the different phases of the legislative and pre-legislative process through written briefings and in-person meetings (an example is provided in the diagram overleaf). Policy-makers are welcome to, and frequently do, seek LEAP input by contacting its coordinator, Fair Trials Europe.
15. LEAP's contribution to the development of EU legislation has not been limited to laws on fair trial rights. LEAP has also informed discussions on other, related justice and home topics such as the European Public Prosecutor's Office,¹⁴ the expansion of the European Criminal Records Information System¹⁵ and a directive currently under discussion on combating terrorism.¹⁶

The Presumption of Innocence Directive

16. The development of the Presumption of Innocence Directive, agreed by the Council and the European Parliament in November 2015, provides a good example LEAP's role in the legislative context and of the potential for the EU legislator to strengthen international standards.

Case Study: Dan Grigoire Adamescu (Romania)

Mr Adamescu, the owner of a newspaper critical of the Romanian government, was accused of corruption in Romania. Judicial statements made in the pre-trial detention proceedings failed to respect the presumption of innocence.

In a decision to detain Mr Adamescu, the judge referred to "the seriousness of the illegal actions committed by him", describing them as established facts rather than as yet unproved allegations.

At an appeal hearing challenging his detention, the Court of Cassation stated in the grounds for its decision that "the defendant[s] continue to deny committing the crimes of which they stand accused and to challenge the existence of any evidence that justifies a reasonable suspicion that they did, in fact, commit these crimes."

¹⁴ For the latest state of play, see the Policy Debate document of 3 March 2016 (6667/16): [here](#).

¹⁵ Proposal for a Directive of the European Parliament and of the Council amending [the framework decisions governing the ECRIS system]: [here](#).

¹⁶ Proposal for a Directive of the European Parliament and of the council on combating terrorism: [here](#).

17. From LEAP's perspective, the Presumption of Innocence Directive has the potential to reform practices in different Member States that have now been acknowledged to violate the fundamental right to be presumed innocent until proven guilty.¹⁷ The potential for positive impact lies, in particular, in its:
- i. Rule ensuring that public statements including pre-trial judicial decisions and prosecutorial decisions must not refer to the suspect or accused person as being guilty, and remedies must be available in cases of violations (Article 4);
 - ii. Recognition that suspects and accused person must not be presented as guilty in court or in public, e.g. through the use of measures of physical restraint (Article 4a);
 - iii. Confirming that the burden of proof establishing the guilt of suspects or accused persons is on the prosecution, and that any doubt regarding the guilt must benefit the suspect/accused person (Article 5);
 - iv. Acknowledgment of the right to silence and not to incriminate oneself, and the clarification that no negative inferences may be drawn from exercising these rights (Article 6); and
 - v. Restrictions to trials *in absentia* of the suspect or accused, ensuring that generally the accused person has the right to attend his/her trial (Article 8) and ensuring that in case of a violation of this provision, a new trial is conducted (Article 9).
18. Following the proposal by the European Commission in November 2013,¹⁸ 17 LEAP Advisory Board Members from 14 EU Member States came together in March 2014 to discuss the European Commission's proposal. Though the legal frameworks of most Member States refer to the principle, the main problem lies in the incoherent application of these norms in practice. LEAP highlighted, in particular, the following practices undermining the presumption of innocence in practice: (i) public statements of guilt by both public authorities and the media; (ii) increased recourse to reversed burdens of proof on the merits of cases; (iii) inadequate protection of the right to silence, and (iv) the use of compulsory powers to obtain material evidence in violation of the privilege against self-incrimination.¹⁹

Case Study (Luxembourg)

3 men accused of a serious crime were kept handcuffed and in a glass "box" throughout their trial. The handcuffs were only removed when the suspects testified. The suspects' lawyer challenged the use of handcuffs in the absence of any suggestion of violence on the part of the suspects, other than the nature of the allegations, as well as the continuous presence of police in the courtroom "to ensure safety". The judge and police refused, taking the position that every detained suspect must be kept in handcuffs in court, without individual determinations of the necessity of the restrictions being made.

19. LEAP therefore supported the adoption of this measure which fell squarely within the objectives of the Roadmap given that the presumption of innocence lies at the very heart of the notion of

¹⁷ Key judgments of the ECtHR are mentioned in LEAP, *Communique of the meeting on the presumption of innocence and right to be present at trial*, 4 March 2014, Brussels, available at: <https://www.fairtrials.org/wp-content/uploads/Fair-Trials-International-Presumption-of-Innocence-communique.pdf>

¹⁸ European Commission, 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, available at: http://ec.europa.eu/justice/criminal/files/com_2013_821_en.pdf.

¹⁹ LEAP, *Communiqué on the meeting on the presumption of innocence*, cited above.

a fair trial, whilst the right to be present at trial is, with detention conditions, one of the key issues relevant to mutual trust in the context of judicial cooperation.

20. Nevertheless, LEAP saw room for improvement and made suggestions in a position paper²⁰ and a subsequent briefing to the European Parliament with specific amendments.²¹ LEAP suggested, for instance, new wording requiring Member States to ensure that suspects *“are not presented in court or to the media in ways that suggest their guilt, including in particular in prison clothing, handcuffs or the use of enclosures”*, unless justified by specific security concerns. This was a response to LEAP members in the UK concerned about the use of the ‘dock’, a glass box where suspects sit in court, often with police,²² and concerns voiced for some time by lawyers from Luxembourg about the systematic use of handcuffs in courtrooms. The LEAP Advisory Board member for Luxembourg, Roby Schons, took the opportunity of drawing on his extensive experience as a practising defence lawyer to emphasise directly to policy makers the prejudicial notion and impact of such tools on the suspect.
21. The European Parliament took on board some of LEAP’s suggestions in its report published in early 2015, including the point on the presentation of the accused. LEAP was pleased to see that the final agreed text (negotiated under the Luxembourgish presidency) preserved that suggestion, in wording almost identical to that in LEAP’s briefings (see Article 4a). The final text also excludes the drawing of adverse inferences from silence (see Article 6(3)), a UK and Irish practice tolerated by the European Court of Human Rights (ECtHR) but at odds with the general European consensus. This shows how EU legislation in this area can build upon, rather than merely mirror, minimum standards set out in case-law of the ECtHR.
22. The final text also includes a welcome point proposed by the European Parliament: the exclusion of the use of rebuttable ‘presumptions’ of fact and law (see Recital 14, referring to Article 5), e.g. where a person in possession of a certain amount of drugs is presumed to intend to supply them to others, or where a registered driver of a car is presumed responsible for a speeding violation unless he proves another person was driving. This change, which received much attention in Brussels, sends a message against such practices which reverse the golden rule that the burden of proof should be on the state.

²⁰ Fair Trials and LEAP, Joint position paper on the proposed directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, November 2014, available at: <https://www.fairtrials.org/wp-content/uploads/Presumption-of-Innocence-Position-Paper2.pdf>.

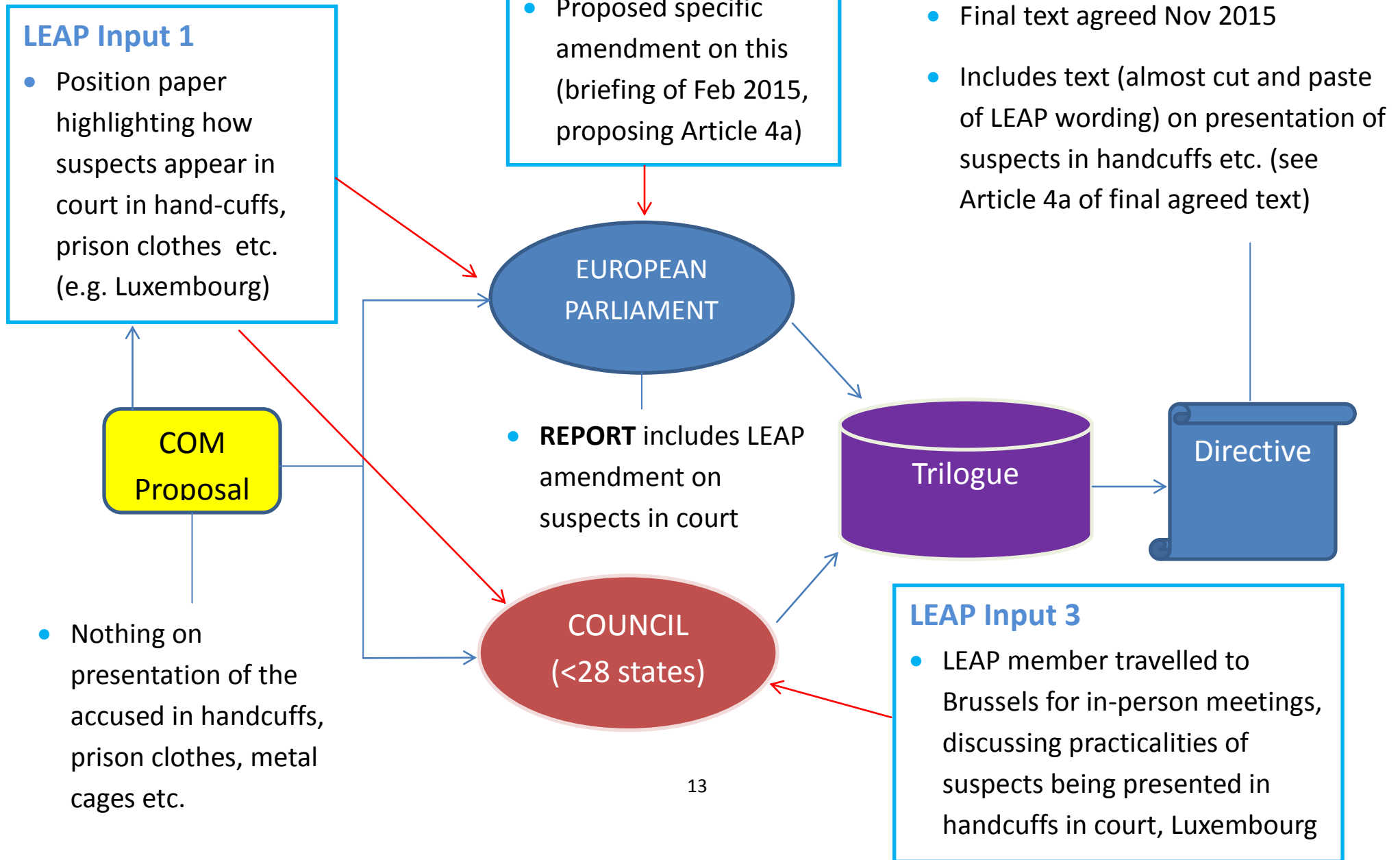
²¹ LEAP, briefing on the Proposed Directive on the presumption of innocence, 14 October 2015, available at: <https://www.fairtrials.org/wp-content/uploads/151014-POI-final-briefing-FINAL.pdf>.

²² JUSTICE, *In the Dock – Reassessing the use of the dock in criminal trials*, 2015, available at: <http://justice.org.uk/wp-content/uploads/2015/07/JUSTICE-In-the-Dock.pdf>.

LEAP's input to EU law:

Presumption of innocence

(Presentation of suspects)



23. However, it should also be recognised that the EU had the opportunity, in this measure, to tackle other (equally if not more important points) and some of the results on these other points could have been more robust:
- i. The final text, for instance, omits other protections proposed by the European Parliament, such as the application of the measure to legal persons;
 - ii. The Presumption of Innocence Directive also includes wording allowing sentences handed down against a person in their absence to be enforced, without clearly requiring that the person – who could be in prison for an offence in relation to which their own evidence was never heard – be informed in writing of their right to a retrial or clarifying what that retrial should entail (see Article 8 and 9); and
 - iii. Stronger wording on remedies (i.e. what is supposed to happen when the rights in the measure are breached) has also been lost in favour of more vague and generalised wording, meaning that little may change on the ground until the provision is interpreted by the CJEU.
24. LEAP will now focus its efforts on contributing to the effective implementation of the Presumption of Innocence Directive at the national level. We anticipate that, given the breadth and generality of the principles it contains, particular care will be needed and many of the issues may only be addressed in cases before the courts.

Procedural Safeguards for Children

25. On 16 December 2015, the EU institutions reached agreement on the Children’s Directive.²³ LEAP welcomes the agreement of these EU-wide minimum standards having identified in its initial position paper on this measure, drafted jointly with the Children’s Rights Alliance for England, the need for legislation to address the inadequacy and inconsistency of the procedural protections from which the 1 million children estimated to be facing criminal justice proceedings in the EU each year can benefit.²⁴ Existing regional and international standards on safeguards for children have not, to date, resulted in sufficiently robust protections for child suspects and accused in practice. The Children’s Directive now places the onus firmly on Member States, with the Commission’s oversight, to ensure that the Children’s Directive is implemented effectively and fulfils its purpose.
26. While the Children’s Directive was still under negotiation, the measure was discussed during the 2015 LEAP Annual Conference at which LEAP members shared their opinions on which aspects were crucial to ensuring its effectiveness.²⁵ From LEAP’s perspective, the potential of the Children’s Directive to benefit children and, indirectly, other suspects lies in its:

²³ Council of the European Union, Procedural safeguards for children in criminal proceedings: Council confirm deal with EP, 16 December 2015, available at: <http://www.consilium.europa.eu/en/press/press-releases/2015/12/16-procedural-safeguards-for-children-in-criminal-proceedings/>.

²⁴ LEAP and CRAE, Joint position paper on the proposed directive on procedural safeguards for children suspected or accused in criminal proceedings, September 2014, available at: https://www.fairtrials.org/wp-content/uploads/Joint-Policy-Paper-FTandCRAE_Updated.pdf.

²⁵ LEAP, Communique of the LEAP Annual Conference, 6-7 February 2015, Amsterdam, available at: <https://www.fairtrials.org/wp-content/uploads/Communique-FINAL1.pdf>.

- i. Recognition of the need for proceedings to be adapted to the specific needs of children, identified through a professional assessment, in order to ensure their effective participation;²⁶
- ii. Identification of additional safeguards necessary to ensure procedural fairness for children, including mandatory access to a lawyer (accompanied by adequate legal aid provision), the audio-visual recording of questioning and the protection of privacy;
- iii. Acknowledgement that, for children, while the assistance of a lawyer is necessary, lawyers are not able to attend to all of their needs in the context of criminal proceedings and there is a role to be played by others, such as the holder of parental responsibility or another appropriate adult; and
- iv. The requirement for a different approach to the deprivation of liberty so as to ensure that detention really is used only as a measure of last resort and that the needs of detained children are adequately met.

Case study: Lithuania

In April 2013 two Afghan boys were apprehended crossing the Lithuanian border from Belarus. Both boys claimed to be minors and sought asylum. Despite a specific clause in the Criminal Code which prevents prosecution of asylum-seekers, 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 need for specialist training for counsel defending children. 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 which appealed the court decision. The boys were acquitted at the end of September 2013. 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.

27. LEAP made numerous contributions to the negotiations of the Children's Directive in an effort to ensure that the adopted measure laid the groundwork for the fulfilment of its potential as identified above. In addition to its initial position paper, LEAP submitted a number of *ad hoc* briefings to the European Parliament Rapporteur – Caterina Chinnici, of the Socialists & Democrats group – and Shadow Rapporteurs from other groups while the European Parliament report was being finalised. This included a joint briefing to the LIBE Committee made jointly with four other NGOs in January 2015.²⁷ We also liaised with all institutions during the trilogues

²⁶ As required by the jurisprudence of the European Court of Human Rights. See, for example, *SC v the United Kingdom*, App. No. 60958/00, 15 June 2004, available at: <http://hudoc.echr.coe.int/eng?i=001-61826>.

²⁷ LEAP and others, Joint civil society position on the draft report of Caterina Chinnici on the proposal for a directive on procedural safeguards for children suspected or accused in criminal proceedings, 26 January 2015, available at: <https://www.fairtrials.org/wp-content/uploads/150126-Joint-NGO-brief-FINAL.pdf?platform=hootsuite>.

and submitted a final briefing in November 2015 prior to the final trilogue meeting.²⁸ These briefings were supported by a letter from Mrs Justice Renate Winter, of the United Nations Committee on the Rights of the Child, discussing the issues raised by LEAP's briefings.²⁹

28. It was encouraging that a number of our concerns were taken on board during the discussions. Several regressive amendments which had been proposed by the Council in its General Approach were resisted, and the scope and purpose of the individual assessment has been more extensively described than in the original Commission proposal, in line with our suggestions (Article 7). We were also pleased that the agreed text followed our suggestion that the individual assessment should be carried out by a multidisciplinary team of professionals where possible. It was also encouraging that the final measure recognises that holders of parental responsibility or appropriate adults have a role to play in supporting the child not only by receiving information about their rights and attending court hearings but also by accompanying the detained child in other stages of the proceedings (Article 15(4)).
29. LEAP's key concerns were not, however, taken on board in the following key areas and we have concerns that the effectiveness of the measure will be undermined as a result.
- i. The exclusion of minor offences in Article 2(5a) drags the Children's Directive below existing human rights standards which deal with children's fair trial rights or rights to be protected from harm, none of which make any distinction between different categories of offence due to the significant impact which any criminal proceedings and sanctions may have on the life of a child.
 - ii. While we welcomed the inclusion of the right of the child to meet with the holder of parental responsibility (or appropriate adult) as soon as possible following deprivation of liberty, it is disappointing that this right is limited to what is "compatible with investigative and operational requirements" (Article 12(5)).
 - iii. The decision to remove the requirement of mandatory representation by a lawyer significantly weakens the safeguards

Case study: United Kingdom

'Sean' has been living with the consequences of being 'named and shamed' as a member of a teenage gang that was terrorising a neighbourhood for over 5 years. The publicity of Sean's identity and picture not only caused him to experience hostility in his community and from his own family members but he has been attacked in the street and harassed on multiple occasions. His grandmother was "door-stopped" by press and when she moved home to avoid the harassment, Sean was left homeless as she wouldn't take him with her for fear the press would follow. His dysfunctional life was made considerably harder through the publicity surrounding his Anti-Social Behaviour Order. Sean does not want other young people to experience such hardship. In his experience, 'naming and shaming makes everyone against you'.

²⁸ LEAP, Briefing to the Rapporteur, Shadow Rapporteurs, Permanent Representations & the Presidency on the proposed directive on safeguards for children suspected or accused in criminal proceedings, 11 November 2015, available at: <https://www.fairtrials.org/wp-content/uploads/Briefing-on-proposed-directive-on-safeguards-for-children.pdf?platform=hootsuite>.

²⁹ Mrs Justice Renate Winter, letter, 11 November 2015, available at: <https://www.fairtrials.org/wp-content/uploads/Renate.pdf?platform=hootsuite>.

established by the Children's Directive (Article 6). This is further exacerbated by the decision to leave the question of legal aid provision to Member States to be answered through national law, which will inevitably result in continued divergence and shortcomings, as highlighted in the Commission's Impact Assessment (Article 18).³⁰

- iv. The inclusion of a proportionality requirement for audio-visual recording is disappointing (Article 9), not least because the process of police questioning is one during which children are potentially most vulnerable. We had hoped that safeguards would be put in place to protect children at this stage in the proceedings.
- v. The inclusion of permitted derogations in relation to key safeguards, including the right to access a lawyer (Article 6) and the right to an individual assessment (Article 7), which LEAP members consider to be two of the most important rights covered by the measure.
- vi. The safeguards included in relation to the deprivation of liberty of child suspects and accused are very limited in scope and do not go beyond what is required for adults. Article 10 of the Children's Directive is simply a reiteration of the requirements under Article 5 European Convention on Human Rights (**ECHR**), as interpreted by the ECtHR, and the provisions relating to the specific treatment of children who are detained fall far short of what is required by the UN Committee on the Rights of the Child in its General Comment 10.³¹
- vii. Article 14 of the Children's Directive is inadequate to ensure that the privacy of child suspects and accused are protected sufficiently to enable them to participate in the trial without being intimidated by media or public interest and ultimately to reintegrate into society. The failure to prohibit third parties, including the media, from publicising details capable of identifying child suspects is disappointing, and the fact that the privacy protections are not stated as enduring after the child reaches the age of 18 means that young people are at risk of being haunted in adulthood by mistakes made as a child.

Legal Aid

- 30. LEAP has contributed continuously and extensively to the challenging negotiations of the Proposed Legal Aid Directive. LEAP has consistently underlined the importance of this measure: the effectiveness of the Access to a Lawyer Directive will be limited if a corresponding right of access to legal aid is not ensured. The Roadmap originally foresaw the two measures being adopted together (the interconnection being obvious); the decoupling of the two measures was done for pragmatic reasons, to ensure that the substantive right was at least agreed first. But it was always clear that the underlying right to legal aid had to be protected as well, so agreement of this measure (with adequate protections) is crucial.

³⁰ European Commission, Impact Assessment accompanying the proposal for measures on legal aid for suspects or accused persons in criminal proceedings, page 6, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013SC0476&from=en>.

³¹ UN Committee on the Rights of the Child, General Comments No 10 on the Convention of the Rights of the Child, 15 January – 2 February 2007, Geneva, available at: <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf>

31. The Commission's original proposal³² was that this measure should apply to persons deprived of liberty in criminal proceedings and those subject to EAW proceedings. The Commission only proposed that the proposal provide for 'provisional' legal aid: an emergency form of funding to cover initial representation while applications for 'ordinary' legal aid were determined. LEAP's original position paper³³ advocated a broader scope for provisional legal aid, arguing that it should apply to all persons (not only those deprived of liberty), in line with the Access to a Lawyer Directive, and that it should ideally cover ordinary legal aid as well. Drawing on extensive experience in EAW cases, LEAP also made clear that legal aid should be available in the issuing state to guarantee the dual assistance in EAW cases envisaged by the Access to a Lawyer Directive.

Why advice from the issuing state matters in EAW cases – example 1

The requested person was wanted in relation to facts for which he had been acquitted nearly 20 years before. It appeared that the case was being pursued again (raising a possible *ne bis in idem* defence). It was only after consultation with an issuing state lawyer – acting pro bono – that it was established that there had been a prosecution appeal against the original acquittal. This resolved that issue (saving unnecessary argument and wasted time on the *ne bis in idem* issue) and helped establish when exactly the statute of limitation would expire for the offence, which raised another defence rights issue in the executing state proceedings.

32. This measure has led to division in both the co-legislating institutions. Within the Council, the adopted General Approach³⁴ sought to reduce the scope of the measure even further than the Commission's proposal, seeking a discretionary exception to the right to legal aid even where the person was deprived of liberty. A group of seven Member States issued a declaration expressing regret at this position, reflecting a clear divide in the Council.³⁵ In the European Parliament, the robust approach taken by the Rapporteur, Mr Dennis de Jong, sought to expand the scope of the measure to cover all cases (in line with LEAP's position) and to cover ordinary legal aid too.³⁶ A number of MEPs from other parties, in particular the European Peoples' Party and European Conservatives and Reformists,

Why advice from the issuing state matters in EAW cases – example 2

Polish citizen "Z" was wanted to serve a sentence in Poland. She was due to give birth and an assurance was given by the Polish authorities to the effect that Z would be detained in an appropriate facility with mother and baby units. However, with the assistance of a lawyer in the issuing state – acting pro bono, in the absence of legal aid – it was established that there was in fact no proper legal basis for such an assurance and that, in fact, there was very limited possibility for detention in mother-and-baby units. The appeal against the initial surrender decision was re-opened on this basis and, the Polish authorities now conceding that inadequate facilities would be available, the appeal was allowed.

³² European Commission, The proposed directive on legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings, available [here](#).

³³ Available at <https://www.fairtrials.org/uncategorized/position-paper-on-legal-aid/>.

³⁴ Available at <http://data.consilium.europa.eu/doc/document/ST-6603-2015-INIT/en/pdf>.

³⁵ The declaration was annexed to the Council conclusions of 14 April 2015, which were published inter alia by the Parliament of Bulgaria (see <http://www.parliament.bg/pub/ECD/184852ST07166-AD01.EN15.DOCX>, p. 9).

³⁶ Report of 18 May 2015 of Mr Dennis de Jong, available [here](#).

proposed amendments to limit the report and the Rapporteur's position was preferred only after a very tight vote in the LIBE Committee.

33. As negotiations have continued, LEAP has repeatedly fed into the process. LEAP issued statements directly to the offices of Rapporteurs and Shadow Rapporteurs in the European Parliament in March 2015 commenting on amendments proposed by other MEPs (broadly reflecting the divisions in Council), and led on a joint briefing³⁷ with other civil society organisations in April 2015 reiterating those positions. With negotiations starting in earnest under the Dutch Presidency (Jan-June 2016), LEAP has contributed briefings to key individuals in the European Parliament, with real case examples from LEAP members' practices (see above).
34. LEAP has provided many detailed arguments supporting the expansion of scope to cover those not detained. We have, for instance, also argued that the exclusion of such cases means a person might be questioned without an EU law right to legal aid, incriminate themselves, and be detained as a result and thus benefit from the EU law right to legal aid but only when it is too late to be of any use. With negotiations focused on legal aid in EAW proceedings, LEAP has pushed for provision to be made for legal aid to ensure assistance by a lawyer in the issuing state, as envisaged in Article 10(4) of the Access to a Lawyer Directive, pointing out that the availability of advice from issuing state lawyers can help the executing state identify issues and assess defence arguments in an efficient manner (see the two case examples cited).
35. With a European Parliament impact assessment on the costs of legal aid ongoing, it is expected that negotiations will turn to ordinary criminal proceedings in the second half of the Dutch Presidency. At the time of presentation of this report, the Proposed Legal Aid Directive is at a crucial phase. It can be envisaged that agreement will be reached on the EAW aspect. But another key issue for LEAP is the ordinary criminal proceedings aspect. It is vital that the final measures ensures robust protection of the right to legal aid, covering all persons including those not deprived of liberty, without derogations, and if possible extending also to ordinary legal aid and quality control.

European Public Prosecutor's Office

36. Over the past year negotiations have been ongoing for the Regulation on a European Public Prosecutor's Office (EPPO), an institution proposed to be created to combat fraud against the EU budget by prosecuting a narrow category of offences in national courts. This is a very large file and, with many positions taken up by like-minded organisations such as the European Criminal Bar Association (ECBA) and Council of Law Societies and Bars of Europe (CCBE), LEAP had mostly concentrated its efforts on advocacy on the remaining Roadmap Directives. However, the measure is important from a fair trials perspective as provision will be made in the EPPO instrument regarding its rules of procedure, and a debate has arisen as to the extent to which it will simply prosecute in accordance with national procedural laws or be governed by discrete EU-level standards. Either way, a standard-setting exercise is underway.

³⁷ Available at <https://www.fairtrials.org/wp-content/uploads/Joint-Civil-Society-Letter-Legal-Aid-Directive-April-2015.pdf>.

37. In June 2015, therefore, a group of LEAP members with expertise in cross-border matters met to discuss the EPPO at around the time negotiations were beginning to touch upon issues of central concern. LEAP issued a communiqué after the meeting including ‘initial thoughts’ on the EPPO, with a primary focus on procedural rights.³⁸ The model currently envisaged by the Council (sole legislator) for the EPPO foresees no concrete provision on procedural rights other than general references to the Roadmap Directives, delegating to Member States the responsibility of ensuring respect for fair trials in EPPO prosecutions.
38. LEAP has expressed serious concerns about this approach and does not believe it is even defensible unless – as an absolute minimum – the Roadmap Directives are: (a) properly implemented; and (b) supplemented by further measures on remedies and pre-trial detention. There is consensus on this point within LEAP and the LEAP coordinator has made the point unequivocally in Brussels at a European Parliament conference on the EPPO of November 2015 and in discussions with policy-makers.
39. However, the Council’s current approach is in any case minimalist and LEAP members have generally taken the view that the regulation establishing the EPPO should aim higher than this. Generally it is thought that the instrument should include specific provisions on procedural rights, to ensure a high common standard. This, of course, has to be approached in light of the political reality in which Member States clearly are not prepared to create significant supra-national procedural codes. The communiqué included some initial thoughts on this, pending further internal discussion. One, for instance, was that it might be possible to bind the EPPO to high standards without writing new standards applicable in the national procedure (e.g. by obliging the EPPO not to make use of derogations on access to the case file even if these are available under national law implementing the Right to Information Directive). LEAP has made these points via its coordinator in Brussels, in the context of a conference in the European Parliament in November 2015, and in bilateral discussions with stakeholders. The file enters a crucial phase at the time of publication.

European Criminal Records Information System

40. During 2015, LEAP contributed to a very brief consultation of the Commission relating to the proposed expansion of the European Criminal Records Information System (**ECRIS**) (which currently covers only EU citizens) to third-country nationals. LEAP members raised a number of issues, in particular relating to the inaccuracy of criminal records information obtained from other countries once an issue was raised in court. There was also some possibility of misunderstanding, despite the use of normalised codes, as to the seriousness of certain offences and penalties.
41. Drawing on LEAP’s input, Fair Trials made the point to the Commission that, although the exchange of criminal records via ECRIS is primarily intended for criminal proceedings, it can also be used for other purposes. The likelihood is that, where third country nationals are concerned, criminal records information is likely to be used for migration purposes (typically, for deportation). In that context, the sorts of inaccuracies raised by LEAP members could be

³⁸ Available at <https://www.fairtrials.org/publications/communique-discussions-on-cross-border-justice/>.

exacerbated by the fact that there may be less opportunity to examine issues regarding the criminal record in an (administrative) migration decision-making context than there would in the context of sentencing decisions in criminal proceedings. One additional safeguard proposed was measures to ensure that rehabilitative effects foreseen by the law of the convicting Member State are duly taken into account in the second Member State.

Terrorism proposals

42. In December 2015, in the wake of the terror attacks in Paris, the European Commission presented a proposal for a directive on combatting terrorism.³⁹ The measure includes proposed amendments to existing EU-level instruments governing the definition of terrorism offences and includes new common rules on the definitions of offences in topical areas such as travelling abroad for terrorism. It also includes provisions on cooperation between Member States' authorities in relation to questions of jurisdiction.
43. The issues arising in terrorism prosecutions were among the topics discussed in the context of the 'Current Criminal Defence Issues' meeting of LEAP in November 2015, and some of the issues raised there are relevant to the proposal. These include: the prevalence of evidence obtained via intelligence agencies; the risks arising from reliance upon evidence obtained in third countries where torture is prevalent; the difficulties arising from broad definitions of terrorism offences; and the poor quality of interpretation of international law in criminal courts. Some of these points were then discussed further at the LEAP Annual Conference 2016.
44. Negotiations on the proposed directive are advancing, with the Council nearing a general approach at the time of writing. Fair Trials has contributed to and co-signed a statement with members of the Human Rights and Democracy Network, drawing the EU Institutions' attention to key issues as the legislative proposal is developed.

Next steps and recommendations

Recommendations to the EU Institutions

- **The European Parliament and Council** should conclude a robust directive on legal aid. This should ensure access to legal aid in EAW proceedings including in the issuing state. It should also, in line with other Roadmap Directives, cover criminal proceedings and ensure that all persons, whether deprived of liberty or not, have an EU right to legal aid matching the right of access to a lawyer in the Access to a Lawyer Directive, particularly in the crucial early phase.
- **The Council** should, as a red line minimum, accept that without (a) a satisfactory directive on legal aid covering all persons and all stages of proceedings; and (b) a directive on pre-trial detention (discussed further below), its existing approach on procedural rights will be fatally flawed. Without these measures, given the frequency of Article 5 and 6 violations against EU Member States found by the ECtHR, it likely that EPPO prosecutions in national courts will lead

³⁹ Proposal for a directive of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA on combating terrorism (COM(2015) 625 final), available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-security/legislative-documents/docs/20151202_directive_on_combatting_terrorism_en.pdf

to such violations. After the EU's possible access to the ECHR, the EU would also be liable as co-respondent. Either would be a serious embarrassment for the EPPO, intended to be a pioneering innovation in justice.

- **The Council** should, in further discussions on the EPPO, aim higher than simply delegating the responsibility for protection of procedural rights to the Member States. As a basic starting point, it could consider pragmatic ways of achieving high standards for the EPPO by making limited provision in the EPPO regulation concerning procedural rights in such a way as to guarantee high standards whilst not encroaching unduly upon Member States' sovereignty.
- **The European Parliament's** Civil Liberties, Justice and Home Affairs committee should ensure that its report on the proposed directive on terrorism takes account of fair trials threats arising from the use of intelligence evidence and the challenges faced by national criminal courts in applying EU law definitions. It is welcome to consult LEAP for further input.

LEAP's next steps

- **LEAP** will continue to supply information, case examples and analysis on all pending legislative proposals, in particular the Proposed Legal Aid Directive, both proactively and as requested by the EU institutions. All EU institutions are welcome to contact Fair Trials' Brussels office should they wish to receive input.
- **LEAP** will supply information to the Council and European Parliament with a view to ensuring that they are made aware of the risks surrounding prosecution of terrorism offences such as those included in the December 2015 proposal of the European Commission, building on recent discussions within the network.

45. In *Stockholm's Sunset*, LEAP acknowledged that, as praiseworthy as the EU's achievements in adopting laws on fair trial rights may be, the real cause for celebration will come with the effective implementation of these measures, i.e. when they are having a real impact in practice. As Member States have worked to transpose and implement the Interpretation and Translation Directive and the Right to Information Directive, the gap between obligations on paper and adequate protection of rights in police stations and court rooms across the EU remains a source of concern for LEAP. Making a contribution to the effective implementation of these laws therefore continues to be a priority for the network.
46. During a dedicated roundtable meeting in October 2014, the LEAP Advisory Board produced the LEAP implementation strategy – *Towards an EU Defence Rights Movement* – which was subsequently launched at the LEAP Annual Conference in Amsterdam in February 2015.⁴⁰ Taking into account the opportunities available to LEAP members to use their expertise to inform the implementation process, the strategy focusses on four main avenues of contribution:
- i. Identifying implementation challenges;
 - ii. Informing developments in national legislation;
 - iii. Training defence practitioners to use the Roadmap Directives in practice; and
 - iv. Contributing comparative law expertise to inform decisions of national and regional courts.
47. At the most recent LEAP Annual Conference, 5-6 February 2016, in Budapest, Fair Trials brought LEAP members together with different stakeholders from within the criminal justice system (judges, prosecutors and an ombudsman) to provide different perspectives on the challenges faced in the implementation and application of the Roadmap Directives. For example, a judge and prosecutor from Hungary highlighted some of the positive changes that had resulted from implementation of the Roadmap Directives and other initiatives. However, Hungarian LEAP members expressed a more critical view and raised severe concerns with the implementation of EU and ECHR standards in practice, noting, for instance, continuing problems with access to interpreters in rural areas.

Identifying implementation challenges

48. Based on views collected during a series of LEAP meetings in 2013-14, regular telephone calls with the members of the LEAP Advisory Board, discussions at the 2015 and 2016 LEAP Annual Conferences and other occasional LEAP roundtable meetings, a number of themes relating to the first two Roadmap Directives have emerged. A more detailed analysis of these issues has been conducted through a series of LEAP surveys and are summarised below.

⁴⁰ LEAP, *Towards an EU Defence Rights Movement*, available at: <https://www.fairtrials.org/wp-content/uploads/EU-DEFENCE-RIGHTS-MOVEMENT-PAPER.pdf>

A. Quality of interpretation in criminal proceedings

49. The inadequate quality of interpretation in criminal proceedings has arguably been the most consistent concern expressed by LEAP members in recent years. The provisions of the Interpretation and Translation Directive (i.e. Articles 2(8), 3(9) and 5) which require Member States to ensure that interpretation and translation provided where required in criminal proceedings is “of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence” were therefore most welcome.

50. A survey of LEAP during 2015-2016 suggests, however, that to date this has not led to significant improvements in practice, particularly in relation to the provision of oral interpretation, despite the fact that the legal frameworks have been adapted in most countries surveyed. Belgium for example, implemented a national register for interpreters and translators in 2014 with enhanced qualification requirements, although this was not a binding obligation in the Interpretation and Translation Directive.

Case study: Ireland

“I am presently working on an appeal against a claimed wrongful conviction for murder and rape where the appellant claims that poor interpretation put forward a misleading impression to the jury, a view endorsed by junior counsel in the trial, fluent in the language. The language: Irish. Our first constitutional language is still the spoken natural mother tongue in small pockets of the country, and some witnesses in the trial in question opted to give evidence in Irish, requiring an interpreter. Linguistic nuances were, according to my client, conveyed erroneously to the court, a view endorsed by counsel.”

Defence Practitioner and LEAP member, Ireland

51. Notable concerns with regards to implementation of the Interpretation and Translation Directive and specifically interpretation (oral translation) include:

- i. Inadequate transposition of quality requirements into national law: some countries have not yet implemented the Interpretation and Translation Directive into their national laws, such as Portugal and Ireland. Existing provisions in Ireland, Estonia and the Czech Republic do not address the issue of the quality of interpretation and translations. Italian law does not provide any concrete measures to safeguard the quality of interpretation. The critical quality requirement set out in the Interpretation and Translation Directive has not been adequately transposed in Bulgaria or Estonia. The Bulgarian Code states that the translation or interpretation must be ‘accurate’ and the Estonian Code requires it to be ‘precise and complete’. While the terms ‘accuracy’ and ‘precise and complete’ are important factors in determining ‘quality’, the terms convey different, narrower concepts;
- ii. Insufficiently stringent requirements for entry onto registers of interpreters: Without stringent requirements for entry onto registers of interpreters, a register will not enhance

the standards of interpretation and translation as intended by the Interpretation and Translation Directive. Indeed, it could arguably increase the risks of poor quality by creating an unfounded assumption of quality. Examples of failings include Polish, Cypriot and Czech law which not require translators and interpreters to have a certain level of education or experience with regards to the language they will be interpreting, and imposes no requirements in terms of examinations. In the UK and Ireland private companies are responsible for providing interpretation services and set the quality requirements themselves, with concerns that standards are reducing due to financial constraints.

iii. Inability of lawyers to ascertain quality: The lack of quality standards remains a real concern to lawyers. Lawyers recognise that they are rarely, themselves, able to discern quality, except if they speak the same language as the suspect or, in extreme cases, where the interpreter provides unlikely responses or fails to answer control questions correctly.

iv. Police station: Although quality of interpretation was reported to be variable at every stage of the criminal justice process, the quality of interpretation was consistently poor in police stations and during the pre-trial investigations across almost all of the countries surveyed (if any was provided at all). In some countries it was reported that police officers would not bring in an interpreter, where this is required, but rely instead on their own language skills to translate/interpret (for example in Poland, Greece, Belgium). In other countries, police officers regularly call the same interpreter with whom they have already developed a friendly relationship. This causes great concern not only about quality, but also independence.

v. Inadequate provision for meetings between lawyers and clients: Another problem reported by LEAP

concerns the inadequate provision of interpretation for meetings between the lawyers and clients to discuss the case confidentially. In many countries legal aid will not be provide for an interpreter for these conversations, and the lawyer and suspect will have to rely on other detainees to provide interpretation, often a third language even when the suspect and lawyer do not speak it well. Further concerns with regards to a lack of impartiality have been raised with regards to interpreters involved in confidential meetings and then in subsequent interrogations for example.

vi. Inability to challenge poor quality interpretation: Most of the survey respondents reaffirmed previously expressed concerns about the lack of effective remedies available when challenging poor quality interpretation. In Poland and the Czech Republic no right to challenge insufficient interpretation has been created. In Spain, lawyers feared that

Case study: Spain

A British citizen was arrested in Spain and extradited to Greece on a European Arrest Warrant for possession of counterfeit banknote. In the proceedings before the investigating judge, a local lawyer acted as interpreter.

The accused was released on bail but not informed in a language he understood about an obligation to pay the tax authorities as a bail condition. Consequently, he failed to abide by his bail conditions and a new arrest warrant was issued against him.

challenging poor quality would 'upset' the court. Maltese law states that a remedy exists, but does not outline any specific details as to how a challenge to quality would be conducted.

- vii. Ineffective remedies: Closely related is the issue of what remedy is provided if quality is successfully challenged. In Estonia, the results of a procedural act undertaken without effective interpretation are inadmissible, but in most other countries the remedies available are less strong. In Poland, for example, the judge has discretion to decide whether to exclude evidence obtained in connection with procedures involving inadequate translation and interpretation. In several other countries (Cyprus, Czech Republic, Italy), generally an interpreter/translator will be replaced if the quality of the interpretation is effectively challenged, however, in practice this does not happen often.

B. Letters of rights

52. The main innovation of the Right to Information Directive, the requirement to provide a simple and accessible letter of rights, was welcomed by LEAP as a way of addressing the prevalent trend in the EU of providing arrested persons with notifications of their rights in a bureaucratic style (rights phrased essentially as extracts of legislative provisions) and in a mechanical way, meaning suspects do not appreciate the value of, or even read, the letter.

Pre-Directive example (BG)⁴¹

**ПРОТОКОЛ
ЗА РАЗПИТ НА ОБВИНЯЕМ**

Днес..... в гр.София, подписаният -
следовател в Национална следствена служба - гр.София, на основание
чл.138,221,236-237 от НПК, разпитах в качеството на обвиняем по
досъдебно производство №..... по описа на НСлС, лицето:

.....
(им,презиме и фамилия, ЕГН, документ за самоличност)

.....
(гражданство,сем.положение,съимност)

.....
(образование,месторабота,длъжност,сел.тел.)

.....
(адрес,дом,телефон,м-тел,е-мэйл)

Уведомен съм за:

Правото ми да искам отвод на разследващия орган на осн.чл.53 НПК.

Чл.54 НПК Обвиняем е лицето, което е привлечено в това качество при условията и по
реда,предвидени в този кодекс.

Чл.55(1)Обвиняемият има следните права:..да дава или да откаже да дава обяснения по
обвинението...има право защитникът му да участва при извършване на действия по разследването и други
процесуални действия с негово участие, освен ако изрично се откаже от това право.

(3) Обвиняем който не владее български език, има право на устен и писмен превод на
наказателното производство на разбирателен за него език ...

Чл.115(1)НПК Обвиняемият дава обяснения си устно и непосредствено пред съответния орган.

(2)Обвиняемият не може да бъде разпитван по делегация или видеоконференция, освен в
случаите,когато се намири извън пределите на страната и това няма да попречи за разкриване на
обективната истина.

(3)Обвиняемият може да дава обяснения във всеки момент на разследването...

(4)Обвиняемият има право да откаже да дава обяснения ...

Чл.116(1)НПК Обвиняемият и присъдата не могат да се основават само на самопризнанието на
обвиняемия.

(2)Самопризнанието на обвиняемия не освобождава съответните органи от задължението им да

Post-Directive example (NL)



**U bent als verdachte aangehouden en
meegenomen naar het (politie)bureau
of naar een andere verhoorlocatie.
Wat zijn uw rechten?**

*U wordt verdacht van een strafbaar feit en de politie, de Koninklijke marechaussee
of een bijzondere opsporingsdienst heeft u aangehouden en meegenomen naar het
bureau voor verhoor. Dan is het belangrijk dat u weet wat uw rechten en plichten
zijn. Leest u deze folder daarom goed door. In deze folder kan, wanneer de term
"politie" wordt gebruikt, ook een andere opsporingsdienst worden bedoeld.*

Ken uw rechten

- U heeft het recht om te weten van welk strafbaar feit u verdacht wordt.
- De politie heeft het recht om u vragen te stellen. Dit heet een (politie)verhoor.
 - U bent niet verplicht om te antwoorden als u dat niet wilt (u heeft zwijgrecht);
 - U heeft het recht om vóór het eerste verhoor vertrouwelijk met een advocaat te praten.
Verderop leest u daarover meer.
- Als u geen Nederlands spreekt of verstaat, of maar een heel klein beetje, dan hebt u recht
op bijstand van een tolk bij het (politie)verhoor. Vertel het de politie als u hem niet
begrijpt. De tolk kan ook helpen als u met een advocaat wilt spreken. Dit kost u niets.

53. There appears to have been an improvement as a result of the Right to Information Directive. It appears that in some countries at least, written notifications of rights were formerly mixed up with written records of questioning, so that one document would at the same time record in writing (i) the fact of a suspect being made aware orally of his rights; (ii) the suspect's decision

⁴¹ Bulgaria has yet to implement the Right to Information Directive.

not to exercise those rights; and (iii) the charge, as explained orally; and (iv) the content of the answers then given by the suspect to the questions. In *Cierny v. Slovakia*,⁴² in which Fair Trials intervened (see para 77 below), the ECtHR considered a case presenting a record apparently falling within this category (the file before the ECtHR appears to have been limited) and found that the suspects' waiver of their rights had not been knowing and intelligent. In that light, it is important to note that LEAP members have communicated to Fair Trials a number of examples of newly created Letters of Rights which are completely separate, standalone documents. Whilst Fair Trials (with LEAP members) will be further studying the content of these letters and the manner in which they are delivered, this structural difference appears *prima facie* welcome, since it appears more likely that a person will have an opportunity to consider their rights if these are communicated in a form separate from the discussion in which the person is also told what they are suspected of and questioned about their involvement in an offence.

54. However, in some jurisdictions, at the time of writing there has been no change to the existing letter of rights or there is a failure to provide a letter of rights in a systematic way to all arrested or detained suspects as required by EU law. For example in Bulgaria, the letter of rights provided to suspects or accused people deprived of their liberty, is part of a note informing them of the accusations against them, which they cannot keep for later reference. This is a clear violation of Article 5 of the Right to Information Directive.
55. LEAP member, the Hungarian Helsinki Committee, is currently leading a new project (working with Fair Trials Europe, Human Rights Monitoring Institute (Lithuania) and Rights International Spain) to examine more closely the implementation of the obligations under the Right to Information Directive relating to the letter of rights.
56. It will do this by:
 - i. Increasing available knowledge on the status of implementation of the Right to Information Directive;
 - ii. Examining what the requirement for "simple and accessible" language for a letter of rights means in practice;
 - iii. Identifying examples of good practice which are transferrable to other countries;
 - iv. Producing reform proposals and model letters of rights to assist Member States and EU institutions; and
 - v. Raising public and professional awareness locally and at EU level about gaps in transposition.

C. Access to the case file

57. Article 7 of the Right to Information Directive requires that the defence be provided with access to the case file. After the expiry of the transposition deadline, LEAP undertook a survey to examine ongoing challenges within the Member States, as well as improvements. The report on the survey findings, published in March 2015, identifies good and bad practice as well as areas where clarification is needed from the CJEU. See Annex 4 for the full report.
58. Key conclusions from the survey are as follows:

⁴² [*Zachar and Čierny v. Slovakia*](#) App. No 29376/12 (Judgment of 21 July 2015).

- i. **Access to the case file prior to questioning is generally lacking:** Virtually all responses indicate that, at the point of initial questioning (either by police or other investigative authority) suspects do not have prior access to their files. Information is usually limited to an (often very basic) description of the charge. As a result, there is a general practice of lawyers advising clients to remain silent until the file has been seen. It was noted in the survey that lawyers in certain Member States were pushing the authorities to interpret Article 7(1) expansively. We conclude that this would be a useful point for the CJEU to clarify.
- ii. **At the pre-trial investigation stage –**
 - a. **Access is the rule, but derogations exist in most jurisdictions and are applied extensively** – In principle there is a right of access to the case file in all Member States although there are variable rules on whether this is provided *ex officio* or upon request. Furthermore, derogations exist in most jurisdictions and are applied extensively. In particular, derogations linked to the needs of the investigation are being used throughout the pre-trial phase, with the result that the ability of the defence to participate effectively and scrutinise prosecutorial / investigative action is limited and may only become possible upon completion of the investigation. This was the general position; in relation to detained persons, see below.
 - b. **When the suspect is detained –**
 - **The first determination on detention is neglected as a key moment** – The Right to Information Directive mentions in recital 30 that documents should be provided ‘in due time to allow the effective exercise of the right to challenge the lawfulness of the arrest or detention’. Despite this, in general no specific provision is made for access to the case file at the first determination of detention by a court, which is covered by the general rules applicable to the whole pre-trial phase. Given the specific practical challenges associated with this first hearing (e.g. those linked to the transfer of (potentially large) police files to the court following arrest) this specific stage requires clear articulation, which is currently lacking.
 - **Sufficient legal provision is made in most countries for access to documents that are essential to challenging detention** – The survey generally suggested that legal rules provided a right of access to documents which are relevant to a detention decision, though the legislative drafting varied to some extent. A good number of responses found that there was no problem in this regard. One approach which remains under discussion within LEAP is that of requiring the prosecutor to disclose documents referred to in a motion for detention (which, inherently, enables the prosecutor to select which documents are mentioned and therefore need disclosure).
 - **However, in a number of Member States, either in law or in practice, access even to these documents is restricted** – Worryingly, there seemed to be laws in place allowing detained persons and their lawyers to be deprived of access even

to the documents needed to challenge detention. Two replies to the questionnaire in particular expressed serious concern that, in practice, detained suspects are not able to challenge their detention effectively for this purpose.

- c. **There is generally the possibility of obtaining a copy (sometimes electronic) of the file during the investigative stage** – In general, the survey suggested that lawyers were able to consult and make copies of the file during the investigative stage (unless derogations are applied). Practices relating to the availability of the case file at prosecutors' offices do, however, pose problems. In general, lawyers were also able to make paper copies of the file for the client to keep, and in some cases electronic copies could be obtained pre-trial. However, this right was not universal. In one Member State, the right of consultation only allows for notes to be taken, not copies. Restrictions of this nature limit the ability of the defence to participate effectively in pre-trial proceedings and to start preparing for trial.
 - d. **There are generally avenues to challenge refusals of access** – Only two responses seemed to suggest that there was no recourse to a court to challenge a refusal of access at the pre-trial stage. Otherwise, the survey suggested that it was possible to challenge refusals of access at the pre-trial stage. The practice of not issuing a formal decision when denying access has historically made it difficult to exercise this right of challenge and it is not clear yet whether the changed legislation has affected this.
- iii. **The file is generally provided upon completion of the investigation** – In most Member States, there were separate provisions governing access to the full file following completion of the investigation, and it appears that there is generally access to either a full paper copy or an electronic copy. There were some doubts as to whether the defence was receiving unused exculpatory materials, and there were reports of difficulties in preparing an effective defence while in prison.

D. Remedies

59. A discussion has been ongoing within LEAP concerning remedies for violations of procedural rights for several years. A series of meetings in 2012/13, for instance, gathered some initial information as to how procedural violations are sanctioned, through such devices as nullity, exclusion of evidence, and constitutional protections against unfair trials. The Roadmap Directives, though they establish common procedural requirements, do not provide prescriptive rules as to what the consequences should be when the rights conferred by the Roadmap Directives are infringed. For this reason, in its Implementation Strategy,⁴³ LEAP agreed that a focus should be placed upon remedies in the context of the work on implementation of the Roadmap Directives.
60. The 2013 judgment of the ECtHR *Martin v. Estonia*⁴⁴ underlined the relevance of this issue, finding a violation of the right to a fair trial in a case where statements obtained in breach of the right to a lawyer had been formally excluded by the national court, but were nevertheless taken into account (something LEAP members have often pointed to as problematic). LEAP

⁴³ LEAP, *Strategies for effective implementation of the Roadmap Directives*, available [here](#) and at Annex 2.

⁴⁴ *Martin v. Estonia* App. No 35985/09 (Judgment of 30 May 2015).

decided to undertake further work on this in 2016/17. A workshop that met at the Annual Conference in February 2016 discussed the matter in some detail. One issue considered was how infringements of the right of access to a lawyer were sanctioned in national law. The initial indication was that this led to similar remedies, i.e. exclusion of evidence. In other areas, such as the consequences of the illegality of a search uncovering incriminating evidence, there was more variation in the remedy provided.

61. Given the need for further discussion on this crucial issue, from April 2016 a Working Group on Judicial Remedies will be created within LEAP to examine the issue further. The Group will be led by LEAP Advisory Board member Vania Costa Ramos. The group aims to produce a report, building on a survey of LEAP members, for presentation at the 2017 LEAP Annual Conference.

Informing developments in national legislation

62. Member States have, for the most part, introduced new laws or amendments to existing laws in order to bring domestic legislation into line with the obligations contained within the Interpretation and Translation Directive and the Right to Information Directive. The process of transposition has provided an opportunity for LEAP intervention in some Member States, whether through formal consultation processes or *ad hoc* initiatives. LEAP's aim has been to contribute to robust and effective provisions in national law. Examples include:
 - i. **Lithuania:** In March 2014, Lithuanian LEAP members issued a joint submission⁴⁵ to the Legal Committee of the Lithuanian Parliament regarding its consideration of the proposed legislation transposing the Right to Information Directive. The submission highlighted the need for transposing legislation to include the provision to suspects of more comprehensive information about rights, in more accessible language, particularly with regard to the right to silence. It also encouraged the Legal Committee to ensure that defendants' access to case materials, essential to challenging the imposition of pre-trial detention is safeguarded, as provided for in the Right to Information Directive.
 - ii. **England and Wales:** In April 2014, Fair Trials worked with JUSTICE – a UK-based NGO member of LEAP – on a submission in response to a consultation published by the UK Home Office on the proposed amendments to Codes C and H of the Police and Criminal Evidence Act 1984 (“PACE”) and the Notice of Rights and Entitlements (“NoREs”) in order to implement the Right to Information Directive. As a result, the draft NoRE was modified to ensure sufficient information is provided before a police interview and irrespective of whether the person is detained.⁴⁶
 - iii. **Spain:** LEAP has engaged in various initiatives to inform the transposition of the Roadmap Directives in Spain. In July 2014, Fair Trials worked with LEAP member, Rights International Spain, and other local organisations, on a joint letter urging the Spanish government to improve proposed implementing legislation for the Interpretation and Translation Directive and Right to Information Directive. LEAP was pleased to note that the resulting legislation

⁴⁵ LEAP, Submission to the Legal Affairs Committee of the Parliament of Lithuania on the transposition of Directive 2012/13/EU on the right to information in criminal proceedings, 10 March 2014, available at: <https://www.fairtrials.org/wp-content/uploads/Lithuania-Parliament-Submission-English1.pdf>.

⁴⁶ Fair Trials, LEAP and Justice, Joint Submission on proposed changes to Codes C and H of the Police and Criminal Evidence Act 1984 and the Notice of Rights and Entitlements, April 2014, available at: https://www.fairtrials.org/wp-content/uploads/FTI_Joint-Submission-on-Codes-C-and-H-and-NoREs.pdf

included a provision creating an exception to the *secreto de sumario* power in the criminal procedure law, which until then had allowed complete denial of access to the case file. As a result of the change access must be provided to documents necessary to challenge detention. On 25 March 2015, LEAP signed two letters in relation to a circular issued by the chief of the Madrid police instructing police to continue applying existing legislation pending the entry into force of the implementing legislation. The circular was in tension with the obligation of sincere cooperation referred to in Article 4(3) TEU. On the eve of the submission of these letters, LEAP met with the Spanish Permanent Representation in Brussels to set out its concerns and offer the constructive example of good practice, drawn from French LEAP members, of national police authorities complying with international obligations prior to the entry into force of implementing legislation. This position, together with other concerns relating to the substance of the draft implementing legislation, was summarised in a letter dated 31 March 2015.

- iv. **Bulgaria:** In March 2016, Bulgarian LEAP members produced a submission to the Bulgarian Minister of Justice highlighting the flaws and shortcomings in Bulgaria's transposition of the Interpretation and Translation Directive and the Right to Information Directive and urging the Bulgarian Ministry of Justice to take action to resolve these concerns. LEAP members hope to meet with the Ministry of Justice and the Permanent Representation of Bulgaria in Brussels to discuss these concerns further.

- 63. Finally LEAP has started to focus on implementation of the Access to a Lawyer Directive. Lively developments have taken place in the Netherlands: after a Supreme Court judgment of April 2014 (criticised by LEAP members⁴⁷) finding that Dutch law did not foresee a right to assistance by a lawyer during police questioning, the position was reversed in December 2015 in a case brought by a LEAP member; the question now arises as to the cases decided in between. In 2015/16, draft laws implementing the Access to a Lawyer Directive have been put forward in the Netherlands and Belgium, and more should follow in LEAP's 2016/17 year. LEAP has a plan in place to monitor these developments, identify shortcomings in the implementing laws and seek to address these through communication with national authorities.

Training for defence practitioners

- 64. Defence practitioners are the frontline defenders of fair trial rights in national criminal proceedings and therefore have a key role to play in ensuring that their clients are able fully to enjoy their rights as articulated in EU law. While the first two Roadmap Directives make reference to the requirement for Member States to provide training to other actors within the criminal justice system, including judges, prosecutors, police and judicial staff,⁴⁸ no provision is made for the training of lawyers.
- 65. In advance of a series of recent training workshops delivered by Fair Trials and LEAP during 2014-2016, outlined in more detail below, pre-training evaluation surveys found that around

⁴⁷ See 'Access to a lawyer in the Netherlands: Does judicial restraint lead to ECHR non-compliance?' ([here](#)); 'Access to a lawyer in the Netherlands: Should the Dutch Supreme Court look to Strasbourg, Luxembourg or The Hague?' ([here](#)); and 'And suddenly, nothing changed: Access to a lawyer in the Netherlands' ([here](#)).

⁴⁸ Interpretation and Translation Directive, Article 6; and Right to Information Directive, Article 9.

80% of participants from the 4-6 countries represented at each training event had not received training on the Roadmap Directives. LEAP has sought to address this training deficiency through both in-person and online training initiatives.

A. Residential trainings

66. Since 2014, Fair Trials has partnered with LEAP members in Greece (Centre for European Constitutional Law), Hungary (Hungarian Helsinki Committee), Lithuania (Human Rights Monitoring Institute), Poland (Polish Helsinki Foundation for Human Rights) and Romania (Apador-CH) to deliver trainings to 240 lawyers from all 28 EU Member States. The residential training programme provides participants with an in-depth understanding of the rights set out in the first three Roadmap Directives, as well as the relevant ECtHR jurisprudence relevant to their interpretation and application. The training also provides practical guidance on the use of EU law in day-to-day practice, with case studies based on challenging cases described by LEAP members provided as illustration, and an introduction on the role of the CJEU in receiving preliminary references and providing guidance on the interpretation of EU law.



67. LEAP members have contributed to the training workshops by delivering 'Local Focus Modules' that provide the opportunity for participants to examine the particular challenges relating to implementation of the Roadmap Directives in their own jurisdictions and to develop strategies for addressing these in practice. Specific ideas from the most recent training in Athens include raising awareness of the Roadmap Directives and their inadequate transposition and application in the respective Member State for example through organising information events within bar associations, disseminating expertise through blog posts and lawyers' networks as well as writing a letter to the Ministry of Justice and calling for correct implementation of the Roadmap Directives. The lawyers planning such initiatives (from Malta and Greece) were invited to draw on Fair Trials' experience in generating media interest to increase pressure on states and raise awareness of the rights amongst citizens.

Training statistics 2015/16

90 hours of legal training
provided by Fair Trials and
LEAP members in **6**
countries

240 lawyers from 28
countries trained

Expert contribution from **26**
LEAP members

Applications from a further
200 people to attend the
trainings

68. These trainings have proven to have significant impact as recent initiatives have emphasised. During the November 2014 training in Warsaw, a group of lawyers reviewed Polish law in light

of the Roadmap Directives and identified non-compliant practices. They created an informal group through which to collaborate on the implementation of the Roadmap Directives following the training. The group has met several times and has produced guides for people arrested in Poland, addressed complaints to different Polish authorities and shared information with bar associations. The group also met recently with the Human Rights Commissioner of Poland, Dr Adam Bodnar, to discuss implementation of EU law with a view to engaging that institution in legislative reform and litigation processes. This example highlights the potential long-lasting impact of trainings provided by Fair Trials and LEAP.

69. We have also been informed by a number of trainees of the different ways that they have put the training to good effect in their day-to-day practice. Some examples include:
- i. A Latvian lawyer, who participated in the October 2015 workshop in Vilnius, represented his client in an appeal against a conviction at first instance. At first instance, the defendant had initially waived his right to a lawyer, and despite later changing his mind and informing the court of his wish to consult with a lawyer, he was not provided with a lawyer at the next hearing. Having participated in the training and learned that Article 9(3) of the Access to a Lawyer Directive clarifies that any revocation of a waiver to access a lawyer has immediate effect – a provision that is not reflected in the Latvian framework – the lawyer argued that the defendant’s right to a lawyer had been violated by the first instance court and the subsequent judgment was unlawful. The prosecutor in fact agreed with this interpretation and the previous decision was overturned.
 - ii. Other participants too have made use of the newly acquired understanding of the Roadmap Directives: One lawyer from Germany obtained a translation of a document, which had previously not been provided, using arguments based on the Interpretation and Translation Directive. Another lawyer successfully invoked the right to access the case file under the Right to Information Directive in respect of a case in which she had been provided with only limited extracts (roughly 0.1%) of a large electronic file.

B. Online training materials

70. Given the limited number of lawyers which Fair Trials and LEAP are able to train through these residential courses, a series of online training modules – including both toolkits and videos - have been published and are freely available on the Fair Trials website.⁴⁹ The toolkits – on the Interpretation and Translation Directive,⁵⁰ the Right to Information Directive⁵¹ and using EU law in criminal practice⁵² – provide defence practitioners with a comprehensive understanding of the content and rights guaranteed by the Roadmap Directives and relevant ECtHR-case law. The toolkits also provide practical examples, informed by the challenges described by LEAP members, of how to invoke the Roadmap Directives when confronted with domestic legislation and practice which violate the rights in the Roadmap Directives.

⁴⁹ See <https://www.fairtrials.org/press/fair-trials-launch-roadmap-practitioner-toolkits/>.

⁵⁰ Available at: <https://www.fairtrials.org/wp-content/uploads/Language-Rights-Toolkit-FINAL.pdf>.

⁵¹ Available at: <https://www.fairtrials.org/wp-content/uploads/Right-to-Info-Toolkit-FINAL.pdf>.

⁵² Available at: <https://www.fairtrials.org/wp-content/uploads/Using-EU-law-A2L-FINAL.pdf>.

71. Complementing the toolkits, Fair Trials and LEAP have also developed a series of innovative e-training courses covering the Interpretation and Translation Directive, the Right to Information Directive and the role of the CJEU in criminal proceedings. Translations of some of these materials were provided by the European Legal Interpreters and Translators Association enabling their broader circulation.
72. LEAP has now started to adapt these existing materials to create 'Country-Specific Packages'. These consist of selected translated extracts of the Toolkits (covering key issues in the target jurisdictions), local-language forewords written by LEAP Advisory Board members, local-language video forewords and introductory local-language text to facilitate circulation through local bar associations. If successful, this process will be continued in 2016/17 to reach as wide an audience as possible.
73. Sharing LEAP's expertise with national and regional courts LEAP members have worked together to support the implementation of the Roadmap Directives through both the domestic and regional courts. At the national level, the network has provided comparative law analysis to support favourable interpretation and application of the provisions of the Roadmap Directives in domestic cases and to call for preliminary references to be made to the CJEU where necessary.
74. At the regional level, the network has supported Fair Trials in submitting third party interventions in cases before the ECtHR which raise issues addressed by the Roadmap Directives. The objective of the interventions is to draw on EU standards to contribute to improved protection of the rights under Article 6 of the ECHR which will not only impact on Member States of the EU but also the broader membership of the Council of Europe.

Sharing expertise with national courts

75. LEAP has provided comparative law analysis in support of the following cases brought by LEAP members in the domestic context:
 - i. **Estonia:** In October 2015, Fair Trials submitted an opinion to the Estonian Supreme Court concerning the right to information in criminal proceedings.⁵³ Fair Trials explained that the right to access all evidence "essential to challenging effectively (...) the lawfulness of the arrest or detention" is a non-derogable right according to Article 7(1) of the Right to Information Directive. Accordingly, the opinion demonstrates that Art. 34 I (3) of the Estonian Code of Criminal Procedure, which allows prosecutors to restrict suspects' access to this information, is contrary to EU law. The opinion included three statements prepared by LEAP members (from Poland, Spain and Hungary) describing recent amendments to their laws which comply with Article 7(1) of the Right to Information Directive, and drew upon the LEAP Access to the Case File report.⁵⁴ The case was referred from a three-judge panel to the

⁵³ Fair Trials, Opinion of Fair Trials on Article 7 of the Directive 2012/13/EU and Para. 34.1(3) of the Estonian Code of Criminal Procedure, 12 October 2015, available at: https://www.fairtrials.org/wp-content/uploads/151012_Opinion_FINAL-2.pdf.

⁵⁴ LEAP, Survey Report Access to the Case file, March 2015, available at: <https://www.fairtrials.org/wp-content/uploads/Access-to-file-report-FINAL.pdf>.

full six-judge chamber, something which happens only two or three times per year, and will be decided in April 2016.

- ii. **Cyprus:** LEAP and Fair Trials have been working together on a third-party submission to submit to the Supreme Court of Cyprus in support of the application of the Interpretation and Translation Directive and the Right to Information Directive and their binding nature on the court. The case concerns the procedural safeguards which should be applied before foreign suspects accept guilty pleas at the police station. These pleas displace a suspect's right to a trial and resulting in a criminal conviction. While some of the specific facts of the case took place before the implementation deadlines of the relevant Roadmap Directives, we drew on ECtHR jurisprudence, general principles of the CJEU and high court decision of courts in other Member States to argue that: (A) the Roadmap Directives may nevertheless be taken into account as soft law materials which emphasise areas of existing Convention standards; and (B) they are in any case binding upon the courts *now* as to the objective of ensuring the fairness of the proceedings. That being so, (C) the Roadmap Directives should point the Court to a scrupulous approach to any statements given by the suspect early in proceedings in light of the provisions of the Roadmap Directives; and (D) this is an appropriate discharge of this Court's obligations pending the full applicability of the Roadmap Directives to new cases.
- iii. **Sweden:** Fair Trials and LEAP provided an independent opinion⁵⁵ to a submission by a suspect's lawyers on an issue relating to the interpretation of Article 7(1) of the Right to Information Directive and, specifically, the modality of access to evidence provided to a suspect in order to challenge the lawfulness of arrest or detention. A review of some of the ways in which access to the case file is made available to suspects or their lawyers at the pre-trial stage in criminal cases in different Member States of the EU (Austria, Estonia, Bulgaria, Lithuania, Portugal, Romania, Germany, the United Kingdom, Romania and the Netherlands) demonstrated different views among the Member States as to the access that is required by Article 7(1) to facilitate effective challenges to detention. In the event of doubt as to the proper meaning of Article 7(1), and the extent to which it may prescribe certain minimal procedural modalities, the opinion proposed that a preliminary reference to the CJEU may be available (or, as the case may be, mandatory).
- iv. **Spain:** In Spain, LEAP members working with the lawyers' initiative *Asociacion Libre de Abogados* have been particularly active in raising awareness of Spain's obligations in implementing the first two Roadmap Directives. Since a Supreme Court Judgment in 1987, restrictions on consultations with the lawyer before the police interrogation and on access to the case file have made it increasingly difficult for lawyers to give legal advice to detained clients. A LEAP member from Spain worked with colleagues to select a particular case and take a complaint to the Constitutional Court on the basis of the Right to Information Directive, which at that stage had not been transposed into national law. The pleading, available publicly, formed part of a coordinated effort to use the Roadmap Directives in

⁵⁵ Available at: <https://www.fairtrials.org/wp-content/uploads/Fair-Trials-Casefile-Intervention.pdf>

various ways, including training activities and the development of best practice guides organised by the *Asociacion Libre de Abogados*.

- v. **Netherlands:** In the Netherlands, LEAP member Gwen Jansen took a case to the Supreme Court alleging that the denial of access to a lawyer during police questioning (as opposed to just before) infringed defence rights in Dutch law. The judgment of 22 December 2015 developed the law in the Netherlands, establishing that such a right did exist (departing from an earlier ruling of April 2014). The court held that this evolution, in the shadow of the Access to a Lawyer Directive which clearly requires this, would come into the effect on 1 March 2016, giving a window for practice to adjust. The ruling specifically suggests that it was undesirable to avoid a situation in which lower courts might start referring questions on the Access to a Lawyer Directive to the CJEU, and decided to anticipate any ruling by tightening the rules itself. The question now arises as to the consequences for cases in which the questioning took place between April 2014 and 1 March 2016.

Sharing expertise with regional courts

- 76. As part of a strategy to ensure that the ECtHR is taking EU legislation into account and to further develop the standards of defence rights through the ECHR, which go beyond the borders of the EU, Fair Trials and LEAP have been submitting third party submissions to the court in cases that address fundamental principles of defence rights that require clarification or development. In all its submissions Fair Trials draws on the expertise of LEAP network members working on defence rights on a daily basis, thereby providing the ECtHR with specialist comparative expertise on the issues concerned.
- 77. Fair Trials has submitted, with LEAP input, third party interventions in the following cases:
 - i. **Candido Gonzalez Martin and Plasencia Santos v. Spain:**⁵⁶ Fair Trials drew upon comparative law and practice from LEAP concerning access to the case file to highlight the problems in this regard. The intervention⁵⁷ argued that the requirement for a person to be informed of the accusation against them under Article 6(3)(a) of the ECHR, though it did not necessarily require disclosure of the underlying evidence, required that non-provision of this evidence be properly justified and subject to judicial oversight, in line with Article 7 of the Right to Information Directive.
 - ii. **A.T. v. Luxembourg:**⁵⁸ Fair Trials drew upon comparative law and practice from LEAP concerning the insufficient protection of the right to a lawyer in criminal proceedings across the EU and invited the ECtHR to take account of the provisions of the Access to a Lawyer Directive.⁵⁹ In its judgment of April 2015, the ECtHR did in fact take into account the Access to a Lawyer Directive (the first reference to any of the Roadmap Directives in the ECtHR's

⁵⁶ *Cándido González Martín and Plasencia Santos v Spain*, App . 6177/10, available at: [http://hudoc.echr.coe.int/eng?i=001-127146#{"itemid":\["001-127146"\]}](http://hudoc.echr.coe.int/eng?i=001-127146#{).

⁵⁷ Fair Trials, Third party intervention to the ECtHR, January 2014, available at: <https://www.fairtrials.org/wp-content/uploads/Fair-Trials-International-Gonzalez-Martin-Intervention.pdf>.

⁵⁸ *A.T. v Luxembourg*, App 30460/13, available at: [http://hudoc.echr.coe.int/eng?i=001-138871#{"itemid":\["001-138871"\]}](http://hudoc.echr.coe.int/eng?i=001-138871#{).

⁵⁹ Fair Trials, Third party intervention to the ECtHR, March 2014, available at: <https://www.fairtrials.org/wp-content/uploads/AT-v-LUX-Intervention.pdf>.

case-law) in support of its finding that the right of access to a lawyer under Article 6 ECHR includes a right to a private consultation before questioning by the investigating judge.

- iii. **Zachar and Čierny v. Slovakia:**⁶⁰ Fair Trials drew upon comparative law and practice from LEAP to underline the prevalence of unreliable ‘waivers’ of the right of access to a lawyer in the EU and encourage the ECtHR to take a strict approach.⁶¹ The ECtHR found that mere tick-box forms confirming an oral renunciation of rights did not suffice to show a waiver had been effective, bearing in mind the misleading charge which the authorities had put forward (later raised to a charge of a more serious offence). The approach implicitly reflects the need for careful notification of rights and accusations as required by the Right to Information Directive, to which Fair Trials drew the ECtHR’s attention.
- iv. **Vizgirda v. Slovenia:**⁶² This case featured an issue often reported by LEAP members, the use of a ‘third language’ (one other than the suspect’s mother tongue or the language of the proceedings) for interpretation. In light of the Interpretation and Translation Directive, the intervention⁶³ argued that the situation was comparable to that of a person who speaks the court’s language to a limited extent, and required the authorities to exercise control over the quality of the interpretation provided; this included an obligation of ‘subsequent control’ which should lead courts to scrutinise the quality of interpretation previously given.
- v. **Ibrahim & Others v. United Kingdom:**⁶⁴ In this case, it was argued that the o should again take into account the provisions of the Access to a Lawyer Directive when scrutinising the application of provisions of English law allowing the questioning of terror suspects in the absence of a lawyer.⁶⁵ Though restrictions on access to a lawyer might be justified in light of Article 3(6) of the Access to a Lawyer Directive, the evidence obtained in the context of such a derogation should not be used in criminal proceedings, since the purpose of such derogations is to enable preventive action to be taken, and not to enable the collection of evidence in procedures not meeting criminal procedure standards.
- vi. **Magyar Helsinki Bizottság v. Hungary (Grand Chamber):**⁶⁶ Fair Trials drew upon contributions from LEAP members to make arguments regarding the importance of transparency in the handling of information concerning appointments of legal aid lawyers in countries where this falls within the competence of the police.⁶⁷ It was argued that, since the state cannot control the quality of representation in specific cases (this being a matter between accused and counsel), enabling NGOs to access the data concerning legal aid

⁶⁰ *Zachar and Čierny v Slovakia*, App. [29376/12](#) and [29384/12](#) (judgment of 21 July 2015), available at: [http://hudoc.echr.coe.int/eng?i=001-156270#{"itemid":\["001-156270"\]}](http://hudoc.echr.coe.int/eng?i=001-156270#{).

⁶¹ Fair Trials, Third party intervention to the ECtHR, April 2014, available at: <https://www.fairtrials.org/publications/intervention-cierny-v-slovakia/>.

⁶² *Vizgirda v. Slovenia*, App. 59868/08 communicated 16 June 2014, available at: <http://hudoc.echr.coe.int/eng?i=001-145635>.

⁶³ Fair Trials, Third party intervention to the ECtHR, October 2014, available at: <https://www.fairtrials.org/wp-content/uploads/3PI-Vizgirda-v-Slovenia-App.-No.-59868-081.pdf>.

⁶⁴ *Ibrahim & Others v. United Kingdom*, App. [50541/08](#), [50571/08](#), [50573/08](#) and [40351/09](#), (judgment of 16 December 2014), pending before the Grand Chamber, available at: [http://hudoc.echr.coe.int/eng-press#{"fulltext":\["ibrahim"\],"locations":\["GBR"\],"itemid":\["001-148676"\]}](http://hudoc.echr.coe.int/eng-press#{).

⁶⁵ Fair Trials, Third party intervention to the ECtHR, September 2015, available at: https://www.fairtrials.org/wp-content/uploads/151001_Ibrahim_FINAL.pdf.

⁶⁶ *Magyar Helsinki Bizottság v. Hungary (Grand Chamber)*, App. 62676/11, available at: [http://hudoc.echr.coe.int/eng#{"appno":\["18030/11"\],"itemid":\["001-115547"\]}](http://hudoc.echr.coe.int/eng#{).

⁶⁷ Fair Trials, Third party intervention to the ECtHR, June 2015, available at: <https://www.fairtrials.org/wp-content/uploads/HHC-v-Hungary.pdf>.

appointments is one of the only external methods of quality control available, so there was a strong public interest in this information being accessible; by contrast, the fact of lawyers' involvement in criminal cases (as distinct from the lawyer-client relationship itself) was not private information the disclosure of which might be refused in order to protect the right to family life.

Fair Trials Scoreboard

78. We have described above the initiatives which LEAP has undertaken in order to analyse the efforts made by Member States to transpose and implement the Roadmap Directives – and particularly the Interpretation and Translation Directive and the Right to Information Directive. It is concerning, however, that the Commission has not established a consolidated and harmonised system for identifying problems with implementation in practice and holding errant Member States to account. With this in mind, during 2015, LEAP published a consultation paper designed to inform the possible future development of a European Fair Trials Scoreboard: an annual report or “index” showing the extent to which the right to a fair trial has been successfully protected in each of the 28 EU Member States.⁶⁸

79. As Member States focus on implementation of the adopted Roadmap Directives and negotiations on further procedural rights measures, we sought to explore whether a Fair Trials Scoreboard which highlights both good and bad practice could be of value. Indeed, the European Commission has already embarked on a similar exercise focussed on civil justice matters in the EU Justice Scoreboard, upon the success of which we hope the Fair Trials Scoreboard could potentially build. Describing the value of this information tool, Commissioner for Justice, Consumers and Gender Equality, Věra Jourová, explained:

“The EU Justice Scoreboard provides an overview of the quality, independence and efficiency of EU Member States’ justice systems. Together with individual country assessments, the EU Justice Scoreboard helps to identify possible shortcomings or improvements and to regularly reflect on progress. An effective national justice system is crucial for enforcing the Union’s laws in practice and contributing to economic growth. I am convinced that we can learn from each other, making our justice systems more effective, for the benefit of citizens and businesses! This will also increase mutual trust in each other’s systems.”⁶⁹

80. The consultation covered the following:

- i. The **potential purpose, impact and benefits** of a Fair Trials Scoreboard, including providing a measurement of fair trial rights protection; fostering greater discussion of fair trial rights and their role within just and stable societies; highlighting good practices and areas for improvement; tracking trends and developments; providing a tool for advocacy; and overcoming the perception of criminal procedural law as a sovereign matter.
- ii. The **methodology**, including i) the types and sources of data (for example, legal and policy analysis; available statistical data; and perceptions data), ii) the presentation and scoring (for example, numerical rankings; a tier or grouping system; or country summaries), and iii) the content and indicators, with the following list of sub-issues or categories which could be

⁶⁸ See http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2015_en.pdf.

⁶⁹ http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2015_en.pdf.

used as a basis for measuring fair trial rights protection (accompanied by a fuller list of indicators) proposed for consideration:

- a. appropriate institutional framework;
 - b. open and transparent justice;
 - c. efficiency;
 - d. right to liberty;
 - e. presumption of innocence;
 - f. fair chance to present a defence;
 - g. equality before the law; and
 - h. effective remedies.
- iii. The **potential risks and challenges** associated with such a project (including ensuring credibility, data collection challenges, creating complacency among high-ranked countries, and the risk of the initiative being viewed as paternalistic, i.e. seen as imposing one set of values on a large number of countries, which for some may not resonate) and possible mitigation strategies.

81. From the responses received from LEAP members, certain themes emerge:

- i. A majority (83%) believe a Fair Trials Scoreboard would be a good idea;
- ii. A majority (75%) believe they could use it in their own work;
- iii. A majority (91%) believe legal analysis, statistics and perceptions data should be used; and
- iv. Data collection and credibility were widely ranked as the top two risks of the project.

82. The results of the consultation were discussed during the LEAP Advisory Board meeting in November 2015,⁷⁰ with a particular focus on the best way to take forward this initiative. One option raised in the meeting was for LEAP to make submissions to the European Commission with proposals for the incorporation of a criminal justice element within its existing EU Justice Scoreboard, though this naturally presents some issues in so far as it relies on information supplied by the EU Member States' governments. Some LEAP members have reservations as to the credibility of such data. Other options need to be examined and will continue to be explored during 2016. Fair Trials has discussed the matter with the European Commission, and will seek to engage in further discussions with the section responsible for the existing (civil and administrative) EU Justice Scoreboard over the coming year.

Next steps and recommendations

Recommendations to the EU Institutions

- **The European Parliament** should continue to take an active interest in implementation questions, following its Opinion on the application of EU law of 2015.⁷¹ This will ensure continued parliamentary scrutiny of the European Commission's enforcement work.

⁷⁰ LEAP Communique issued after the Legal Experts Advisory Panel Advisory Board Meeting, 20 November 2015, Brussels (available at: <https://www.fairtrials.org/publications/communique-issued-after-the-legal-experts-advisory-panel-advisory-board-meeting>), paras 22-23.

⁷¹ Opinion of the LIBE and JURI Committees of 30 June 2015 on the 30th and 31st Annual Reports on monitoring the application of EU law (available [here](#)).

- **The European Commission** should accelerate the publication of its reports on the implementation of the Interpretation and Translation Directive and Right to Information Directive, which reached their transposition deadlines in October 2013 and June 2014 respectively, to enable LEAP, bar associations and others to comment.
- **The European Commission** should consider taking substantive infringement proceedings against Member States whose legislation does not comply with the Roadmap Directives. Rules governing access to the case file in criminal proceedings should be a priority area.
- **The European Commission** should continue to make EU funds available for projects designed to ensure effective implementation, including through research and training.

Recommendation to the Member States

- **Member States** which have not yet implemented the Interpretation and Translation Directive and Right to Information Directive should do so as a matter of urgency.
- **The Member States**, in particular their ministries of justice, public authorities and relevant parliamentary committees should ensure effective implementation of the Access to a Lawyer Directive. LEAP stands ready to supply comparative best practice to assist with this.

Recommendations to civil society

- **Bar associations** are invited to contact LEAP with a view to collaborating in the adaptation and dissemination of training materials and in contributing to national legislative processes.
- **NGOs** are invited to contact LEAP which stands ready to provide NGOs with a European perspective to assist them in their domestic advocacy relating to implementation of EU law.

LEAP's next steps

- **LEAP** will continue to work to ensure the effective implementation of the first two Roadmap Directives, focusing on supporting members in challenging persisting non-compliance. This work will include communications addressed to the national authorities and also to the European Commission with a view to assisting it in assessing the need for infringement proceedings.
- **LEAP** will complete its fourth Toolkit on the Access to a Lawyer Directive, including an 'Implementation Checklist' for national governmental / parliamentary authorities responsible for that process and initial Country-Specific Packages. In the coming year it will supplement this with further Country-Specific Packages and a Toolkit on the Presumption of Innocence Directive.
- **LEAP** will further undertake a study of the present / proposed national laws governing access to a lawyer in criminal proceedings, in light of the requirements of the Access to a Lawyer Directive. LEAP will then engage in dialogue with the relevant national authorities with a view to contributing to improvements in these laws, providing comparative best practice examples.
- **LEAP** will continue to support its members in their work in court cases linked to the implementation of the Roadmap Directives. It will, in this way, continue to coordinate comparative law input for opinions and for members to use in their submissions.
- **LEAP** will establish a Judicial Remedies Working Group under the leadership of Vania Costa Ramos to conduct a study as to the remedies currently available for infringements of the Roadmap Directives, the existence of variations and case for further EU action. A report on this will be delivered at the Annual Conference 2017.

83. LEAP exists not only to inform the development and implementation of existing EU initiatives relevant to the protection of fair trial rights, but also to identify emerging criminal justice issues which require the attention of regional institutions. For instance, in 2015, Fair Trials and LEAP received information about a range of other issues which could all merit further enquiry, for instance: surveillance of lawyers' conversations with clients; unjustified and excessive searches of lawyers' offices; issues arising in prosecutions of seamen and other transport workers for criminal offences committed at sea and smuggling offences; and the increasing recourse to simplified proceedings with potential adverse impact on defence rights.
84. In recognition of its role in this regard, roundtable meetings in June 2015 and November 2015 provided the opportunity for LEAP members to present and discuss new issues relating to cross-border justice and defence rights protection within the EU. Some of these issues were then further discussed during workshops at the LEAP Annual Conference in Budapest in February 2016. Summaries are provided below. At this point, LEAP has not taken up any firm positions on these issues. The following sections summarise the key lines of initial discussions.

EU action on pre-trial detention

85. Since 2011, LEAP has joined Fair Trials in calling for EU legislation to address the excessive use of pre-trial detention in many Member States. The EU continues to face a long-standing crisis in prison overcrowding that threatens to undermine mutual trust and the functioning and legality of mutual recognition instruments such as the EAW.
86. There are a number of recent examples of courts in the UK and the Netherlands refusing or suspending surrenders pursuant to EAWs based on poor pre-trial detention conditions, drawing on findings of the ECtHR that there are systemic problems in this regard.⁷² Indeed, courts in Germany have recently sought the guidance of the CJEU in cases concerning EAWs from Hungary and Romania respectively, both of which raise concerns regarding detention conditions in those countries.⁷³
87. Overcrowding, and the rights violations and human misery it causes, is driven in part by the overuse of pre-trial detention in contravention of ECtHR standards. As outlined in *Stockholm's Sunset*, Fair Trials and LEAP have long worked together to evidence the inter-relationship between judicial decision-making and overcrowding.

⁷² Examples from the UK include [Badre v Court of Florence, Italy](#) [2014] EWHC 614 (Admin) (11 March 2014) (concerning Italy in general); and *Lithuania v. Liam Campbell*, [2013] NIQB 19 (concerning Lukiskes remand prison in particular); Judgment of the Rechtbank Amsterdam of 17 November 2015 [ECLI:NL:RBAMS:2015:7977](#) (suspending extradition pending further assurances due to the general situation in Hungary).

⁷³ Case C-404/15 *Aranyosi*, July 2015 and Case C-659/15 *Caldararu*, 9 December 2015.

Towards EU action on pre-trial detention:

November 2011: Fair Trials 'Detained Without Trial' report documents widespread misuse of pre-trial detention across the EU.

December 2011: Informed by LEAP, Fair Trials leads calls for effective EU action; the Parliament calls on the Commission to propose a directive, backing 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 the then Vice-President of the Commission, Viviane Reding, to call for progress on the Roadmap and its successor programme, with a focus on pre-trial detention.

September 2013: Fair Trials, together with 22 other NGOs, writes to Viviane Reding 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 on pre-trial detention.

June 2014: Fair Trials and a team of LEAP members commence major research project into practice of pre-trial detention decision-making across the EU.

2015: LEAP members participate in focus group meetings convened by CSES as part the Impact Assessment of pre-trial detention legislation.

September 2015: LEAP members attend conference hosted by Fair Trials to discuss problems with pre-trial detention decision-making and potential solutions.

88. LEAP's work over the years includes the publication of a comprehensive report in response to the European Commission's Green Paper on detention,⁷⁴ and a series of short reports following country-specific expert roundtable meetings in France,⁷⁵ Greece,⁷⁶ Hungary,⁷⁷ Lithuania,⁷⁸ Poland⁷⁹ and Spain.⁸⁰ Building on these initiatives, in June 2014, Fair Trials and a team of domestic experts embarked on a major research project with the objective of developing a unique knowledge base that provides real insight to the problems with judicial decision-making

⁷⁴ Fair Trials, Report "Detained without Trial: Fair Trials International's response to the European Commission's Green Paper on detention", October 2011, London, available at: <https://www.fairtrials.org/documents/DetentionWithoutTrialFullReport.pdf>.

⁷⁵ Fair Trials, Communique following a local expert meeting on pre-trial detention, 13 June 2013, France, available at: https://www.fairtrials.org/wp-content/uploads/Fair_Trials_International_France_PTD_Communique%C3%A9_EN.pdf.

⁷⁶ Fair Trials, Communique following a local expert meeting on pre-trial detention, 27 April 2013, Greece, available at: <https://www.fairtrials.org/wp-content/uploads/Greek-communique-EN.pdf>.

⁷⁷ Fair Trials, Communique following a local expert meeting on pre-trial detention, 21 February 2013, Hungary, available at: <https://www.fairtrials.org/wp-content/uploads/Hungary-PTD-communique.pdf>.

⁷⁸ Fair Trials, Communique following a local expert meeting on pre-trial detention, 9 May 2013, Lithuania, available at: https://www.fairtrials.org/wp-content/uploads/130910_Lithuania-PTD_Final_EN.pdf.

⁷⁹ Fair Trials, Communique following a local expert meeting on pre-trial detention, 4 December 2012, Poland, available at: <https://www.fairtrials.org/wp-content/uploads/Poland-PTD-communique.pdf>.

⁸⁰ Fair Trials, Communique following a local expert meeting on pre-trial detention, 18 October 2012, Spain, available at: <https://www.fairtrials.org/wp-content/uploads/Spain-PTD-communique.pdf>.

on pre-trial detention in ten EU Member States – England and Wales, Greece, Hungary, Ireland, Italy, Lithuania, the Netherlands, Poland, Romania and Spain.

89. Each of the 10 project partners (nine of which are LEAP members) carried out in their jurisdiction: a) a desk review of existing law and statistics; b) a survey of defence practitioners; c) a review of case files; d) monitoring of hearings at which decisions on pre-trial detention were made; and e) qualitative, one-to-one interviews with judges and prosecutors.

Pre-trial detention research

Defence practitioner surveys: **544 lawyers surveyed**

Case file review: **672 files reviewed**

Hearing monitoring: **242 hearings attended**

Interviews with: **56 judges and 45 prosecutors**

90. In addition to this in-country research, Fair Trials hosted a regional experts' seminar, attended by 51 participants from 24 EU Member States, in order to seek input from experts from countries not included in the detailed research methodology. A regional report, providing analysis of the research findings and recommendations for EU action in this area, will be published by Fair Trials in May 2016 and will provide the basis for ongoing LEAP activity on this important issue.
91. There is reason to believe that action with regards to pre-trial detention will be taken at the EU-level. As the necessary first step, the European Commission has ordered an Impact Assessment, which was conducted by the Centre for Strategy and Evaluation Services (CSES) in 2015 – 2016. LEAP members in different EU Member States contributed to this study, by participating in focus group meetings.
92. Further, the Advocate General Yves Bot recently outlined the fact that detention conditions had been recognised as a threat to mutual recognition as early as 2011, and accordingly called on the EU-institutions to take action to ensure that Member States meet their obligations and thus strengthen the instruments, such as the EAW, that are underpinned by mutual recognition.⁸¹ LEAP has responded to this opinion and written a letter to the Commissioner Jourova, emphasising the need for legislation to reduce the use of unjustified pre-trial detention.⁸²

Plea bargaining

93. LEAP is currently supporting Fair Trials in developing a new area of work focussing on the fairness of the growing global reliance on plea bargains, which we define as ***“a process not prohibited by law under which criminal defendants agree to accept guilt and/or cooperate with the investigative authority in exchange for some benefit from the state, most commonly in the form of reduced charges and/or lower sentences”***. The overall aim is to ensure that legal

⁸¹ Advocate General Bot, opinion in Pal Aranyosi (C-404/15) and Robert Cldararu (C-659/15 PPU) (CJEU), 3 March 2016, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=174758&pageIndex=0&doclang=DE&mode=req&dir=&occ=first&part=1&cid=284501>.

⁸² LEAP and Fair Trials, letter to Commissioner Jourova, 10 March 2016, available at: <https://www.fairtrials.org/wp-content/uploads/160310-Jourov%C3%A1.pdf?platform=hootsuite>.

systems for plea deals are accompanied by effective safeguards, to prevent unjust outcomes for defendants and victims and, thereby, maintain trust in criminal justice systems.

94. Plea bargains have clear benefits, with the obvious attraction of efficiency at a time when many countries' criminal justice systems are under increasing pressure and struggling to process cases within a reasonable time. Inefficiency itself can cause serious human rights abuses, with people living for years in a legal limbo awaiting trial and excessive pre-trial detention, and it also seems right to give a person some benefit for admitting guilt and showing remorse early in an investigation. But plea bargains may also lead to injustice, with Fair Trials' recent research in the US, for example, highlighting problems relating to: innocent people pleading guilty; cases being resolved behind closed doors; discrimination and the unaccountability of prosecutors.⁸³
95. Initial research, conducted with the pro bono assistance of Freshfields Bruckhaus Deringer, has shown that a number of EU Member States have had practices which fall within the above definition in place for some time – including Bulgaria, Croatia, Czech Republic, England and Wales, Estonia, France, Germany, Hungary, Ireland, Italy, Lithuania, the Netherlands, Poland, Scotland and Spain. The practice has been introduced relatively recently in Luxembourg,⁸⁴ Romania⁸⁵ and Finland,⁸⁶ and new forms of plea bargaining are currently under consideration in Belgium⁸⁷ and Greece.⁸⁸ Conversely, Portugal's Supreme Court has recently held the practice to be illegal,⁸⁹ and in some jurisdictions such as Sweden, the practice simply does not exist.
96. In 2014, the ECtHR examined in detail for the first time the compatibility of plea-bargaining arrangements with the right to a fair trial in the case of *Natsvlishvili and Togonidze v. Georgia*.⁹⁰ In March 2004, Mr Natsvlishvili was arrested on suspicion of illegally reducing the share capital of the public company for which he was responsible and in which he and his wife together owned 15.55% of the shares and was subsequently charged. His arrest was broadcast on local television and the Governor of the Region also made a public declaration of the State's intention to pursue those who had misappropriated public money. After several months in detention, Mr Natsvlishvili accepted a plea bargain in which he was to be convicted without a judicial examination of the case and fined the equivalent of 14,700 euros in exchange for a reduced sentence. Following the agreement of the court to this deal, the decision became final and could not be appealed.

⁸³ Communiqué issued after Roundtable Meeting: "A Fair Deal: Negotiating Justice." 10 November 2015, Washington DC; available at: <https://www.fairtrials.org/wp-content/uploads/Final-Washington-Plea-Bargain-roundtable-communiqué.pdf>.

⁸⁴ The practice of *jugement sur accord* was introduced on 20 January 2015 Articles 563 to 578 of the Code of Criminal Procedure.

⁸⁵ Introduced as part of the new Criminal Procedure Code, enacted through Law no. 255/2013.

⁸⁶ Introduced with effect from 1 January 2015 in Criminal Procedure Act (689/1997, as amended), Chapter 1, Sections 8-12; Chapter 5b; Criminal Code (39/1889, as amended), Chapter 6, Section 8a; Chapter 8, Section 3a; and Criminal Investigation Act (805/2011, as amended), Chapter 3, Section 10a.

⁸⁷ A revision to Article 216 of the Criminal Procedure Code to introduce a 'preliminary acceptance of guilt' procedure is currently under consideration by Parliament.

⁸⁸ See Articles 45B and 45C of the draft of a new Code of Criminal Procedure.

⁸⁹ See judgment of Supreme Court of 10 April 2013, reported by Supreme Judge Santos Cabral, available [here](#).

⁹⁰ Available at: <http://hudoc.echr.coe.int/eng?i=001-142672>.

97. Mr Natsvlshvili and his wife subsequently brought a claim before the ECtHR, complaining that the plea bargaining procedure was an abuse of due process and that there was no possibility of appealing against the judicial endorsement of the agreement. The ECtHR noted that plea bargaining is a common feature of European criminal justice systems, and that a waiver of certain procedural rights as part of the plea bargaining process was not contrary to Article 6 ECHR provided adequate safeguards are in place. The ECtHR found there to be no violation of Article 6 in this case due to the presence of the following safeguards:
- i. Mr Natsvlshvili had, himself, requested the prosecution to arrange a plea bargain;
 - ii. He had been granted access to the case file;
 - iii. He had been represented by lawyers of his choice who advised throughout the plea bargain process;
 - iv. A judge had overseen the validity of the agreement; and
 - v. Mr Natsvlshvili had confirmed to the judge that he understood the terms of the agreement and its legal consequences and his agreement was not the result of duress or false promises.
98. During a workshop on plea bargaining at the 2016 LEAP Annual Conference in Budapest, LEAP members discussed in more detail the key features of plea bargaining practices within the EU, the types of safeguards which are employed to ensure the fairness of such procedures and particular problems which lawyers and suspects experience in the practical operation of plea bargaining. The key areas of the discussion were as follows:
- i. **Types of plea bargaining:** LEAP members highlighted the very different approaches to plea bargaining found in Member States, including informal processes such as that found in Ireland and the very formalised system introduced in Germany in August 2009. There are also variations in what can actually form the basis of a bargain, with some Member States permitting only sentence reductions with others also allowing charge bargaining. It is clear that the types of safeguards vary according to the specific system in place.
 - ii. **Safeguards:** LEAP members discussed a wide range of safeguards which are found in the systems of Member States to varying degrees, including:
 - a. Judicial oversight ensured through the requirement that the court gives approval to the agreement;
 - b. Access of the defence to the case file;
 - c. Documentation of all discussions in the context of the plea bargain;
 - d. Mandatory legal representation;
 - e. Restrictions to minor offences, so that individuals charged with more serious offences will always have a full trial;
 - f. The right to appeal against the agreement;
 - g. The inclusion of a role for the victim; and
 - h. The requirement that the punishment agreed must be just and compliant with the basic principles of justice.
 - iii. **Concerns arising in practice:** LEAP members from a range of Member States expressed concerns about the fairness of plea bargaining practices for the following reasons:

- a. The over-regulation of plea bargaining practices in some Member States, such as Germany, has made the practice overly bureaucratic and cumbersome with the result that it is rarely used effectively and the benefits are no longer enjoyed;
 - b. Concerns were raised by lawyers from Poland that some defendants are tricked or forced into accepting plea bargains, particularly when they have legal aid representation;
 - c. The impact of plea bargaining on the victims of crime was raised as a further concern, with Member States taking different approaches, for example, to the question of whether or not compensation and pecuniary damages must be settled in the context of a plea bargain;
 - d. Concerns were raised by lawyers from Spain about the possibility that innocent people are pleading guilty due to the sentence reductions which are on offer in return for a guilty plea and the difficult position in which this places lawyers who too frequently are required to advise in the interest of the individual client despite this being contrary to the interests of justice;
 - e. The interaction between plea bargaining processes and the overuse of pre-trial detention, with the latter often encouraging defendants (and particularly non-national defendants) to plead guilty so as to avoid lengthy periods in detention; and
 - f. The impact of plea bargaining practices in other non-EU jurisdictions, such as the US, in the context of extradition proceedings from EU Member States. A lawyer from the UK spoke of witnessing the US practice of over-charging as a tool to break the will of an individual awaiting trial, and also the distinction between clients, such as rich bankers who are well-placed to plea bargain favourable outcomes pre-arrest (such as being bailed back to the UK) and those who only learn about the case upon arrest by which point there is no possibility for UK lawyers to negotiate on their behalf.
99. As Fair Trials continues to develop its global work on the issue of plea bargaining, it will work with LEAP to identify aspects of plea bargaining practices in Europe which provide examples of good practice for use in other regions but also those areas in which fair trial rights are being undermined and in relation to which advocacy aiming at improved fairness is required.

Migration and criminal justice

100. Political responses to the increasing numbers of refugees arriving in the EU since the beginning of 2015 are undermining individuals' fair trial rights, in criminal proceedings arising out of their status or their actions as a refugee and asylum-seeker.
101. Hungary, for example, has created a criminal offence, with a specific procedural regime relating to crossing its fence at the Serbian border. UK authorities have also prosecuted a number of refugees for using false documents and walking through the Channel Tunnel. Such offences create legal obstacles to access to asylum and may divert asylum-

"A number of provisions contained in the amendments to the code raise concern over respect of EU standards and fundamental rights as enshrined in the Charter"

The European Commission in its letter to the Hungarian authorities, discussing fast-track procedures applicable to offences relating to crossing the border.

seekers away from the EU-regulated asylum process, into the criminal justice system. They may also be incompatible with the 1951 Convention relating to the status of refugees, Article 31 of which prohibits the imposition of penalties on account of illegal entry. Where the burden of proving Article 31-type defences rests upon the refugee, an issue may arise in relation to Article 4 of the Presumption of Innocence Directive, which prohibits reversals of the burden of proof.

102. In the case of the Hungarian illegal entry offence mentioned above, a special regime was created for prosecution of these offences; a communication from the Commission to Hungary notes their apparent incompatibilities with the Roadmap Directives. With large numbers of asylum-seekers arriving in the EU, other fast-track systems linked to migration offences may be created and the Commission and other actors should ensure that such procedures do not infringe the common EU standards.
103. LEAP members have also previously pointed to the shortage of interpreters for uncommon languages, and the higher susceptibility of non-resident suspects to pre-trial detention, both of which are liable to impact upon the defence rights of asylum-seekers and refugees as well as infringing their rights under the Interpretation and Translation Directive.
104. In the context of the LEAP Annual Conference in February 2016, the migration issue was discussed in more detail, and yielded some introductory points. Though illegal entry offences are not being prosecuted aggressively elsewhere, as in Hungary, some substantive norms relating to criminal liability are causing problems. For instance, prosecutions in Greece have seen asylum-seekers prosecuted as smugglers simply because they steered the boat to shore (having been instructed to do so by the smuggler). In this and other countries, a problem arose from the fact that, in order for asylum seekers to assert defences based on their status as asylum seekers, they need to apply for asylum, which they may be reluctant to do in the country of prosecution (as they are intending to travel elsewhere). In the Netherlands, the example was given of a woman prosecuted for facilitating criminal offences simply because she had bought an air ticket for an asylum-seeker. The difficulty in these cases is that, although there is a humanitarian defence available, these are applied in a very limited way.
105. A further nexus with criminal justice was identified in the application of exclusion clauses provided for by Article 1F of the 1951 Convention, which may be applied on the basis of information (such as previous convictions / outstanding proceedings) received from third countries. Where fair trial violations occur in these procedures in other countries, the use of the convictions / accusations to support exclusion from asylum may 'import' injustice.
106. Finally, the group considered the link with extradition and the possibility of asylum grants in one Member State being (or not being) recognised in the context of extradition proceedings in another Member state, building on an earlier discussion in 2015.⁹¹

⁹¹ See the communiqué, available at <https://www.fairtrials.org/publications/communique-discussions-on-cross-border-justice/>, paragraphs 57-58.

Evidence

107. In relation to evidence, two different yet interrelated challenges have been identified by LEAP members relating particularly to current developments, including citizens being suspected of having committed terrorism offences or having supported terrorist activities; and the increasing volumes of data that are being presented by the investigating authorities due to technological advancements.

A. Cases involving terrorism charges

108. With regard to defendants accused of involvement in terrorism offences in the EU or abroad, LEAP members have reported that, in such cases, evidence presented in court will often be classified as ‘confidential’ as it stems from sources such as intelligence agencies (national or foreign), which will not disclose either their methods of gathering this evidence or the source of this evidence. It is therefore impossible for lawyers to cross-examine the source (as the author cannot be summoned as a witness), question the method of gathering the evidence, or have it excluded if it was collected unlawfully.

109. In the Netherlands, LEAP members have reported that investigations against suspects of terrorism offences are often started through a report by the secret service, however, this report itself remains confidential and the lawfulness of the information gathered for example through wire-tapping, to start the investigations, is not subject to judicial review or defence scrutiny.

110. In Spain and Greece reports presented by the police or secret service may be re-classified as “official” data, which accordingly should be considered as an “objective truth” by the court and denies the defence the right to question the validity of the content of the source. General principles of procedural law regarding evidence are no longer being respected in the context of evidence from secret sources.

111. Related to this is the experience by LEAP Advisory Board member for Belgium, Christophe Marchand, who also presented at the LEAP Annual Conference, that not only information gathered by national secret services but also foreign secret services is being used in court. This raises more questions as to whether the data was lawfully gathered, especially if there is a convincing suspicion that these secret services (for example) might be applying unlawful interrogation techniques and basing their findings on statements made under duress.

112. These increasingly common practices strongly disadvantage the defence, who additionally often find themselves in the situation that defence witnesses cannot be presented in court, due to the fact that they might be resident in Syria, Somalia, or other countries.

B. Cases involving large amounts of data

113. LEAP members have also raised the issue of electronic evidence as a major problem in criminal proceedings. The use of the internet and computers, credit cards or mobile phones creates a huge amount of data concerning the movement, actions and interactions of individuals. Incredibly large volumes of data are gathered in the context of criminal investigations, and conclusions drawn from them.

114. This data is *per se* only available to investigating authorities, who can confiscate and analyse computers, decipher documents saved on them, and request all available information from sources such as mobile phone companies, banks, and public and private surveillance cameras. Especially at early stages of the proceedings, the raw data will not be made available to the defence in some countries.
115. Large amounts of data are then analysed and decoded, often using specialist and expensive software to support a suspicion of the suspect having committed a certain offence. Depending on the data available, different conclusions can be drawn from it based on the method of analysis and interpretation. The complexity and subsequent high cost of analysing data puts the defence at a strong disadvantage in comparison to the prosecution and police who regularly have more resources to analyse, report and use data to strengthen their case.
116. One LEAP member described a case in which they were involved where it was impossible for the defence to understand the analysis processes of the software involved and question the conclusions drawn. Furthermore, as this software is expensive and generally only available to investigating authorities, the defence has no equally strong and comprehensive method available to question the conclusions drawn, but can only apply common principles of defence procedures, that were not developed for this quantity and type of data.
117. In cybercrime cases, a LEAP member from England and Wales reported that the analysis and deciphering of data can take up to six years, putting the defence at further disadvantage when it comes to producing counter-evidence for events taking place a long time before the trial. Suspects detained pre-trial will often be even more susceptible to disadvantages in such cases: while in prison they often cannot access the data gathered making it impossible to understand and respond to the case against them.

Ne bis in idem

118. LEAP, counting a number of specialist cross-border practitioners in its number, also used the meeting of June 2015 to explore issues relating to the application of the *ne bis in idem* principle.⁹² Having heard a presentation from Prof Anne Weyembergh, members discussed the application of the principle in practice.
119. The meeting featured a wealth of case examples and illustrations of practical difficulties in invoking the *ne bis in idem* principle in criminal proceedings:
- i. Demonstrating the identity of facts was problematic because convicting decisions did not always outline the facts with sufficiently clarity, making it impossible to ascertain whether they were the same as the facts in question in the second proceeding;
 - ii. When the *ne bis in idem* principle was found to apply by an executing state in the context of EAW proceedings, there was no system requiring this finding to be recognised in the issuing state, leaving a risk of further arrest; and

⁹² Communiqué building on the LEAP meeting of 5 June 2015: Discussions on cross-border justice ([here](#)), paragraphs 49-58..

- iii. It appeared that there were divergent national applications of the *ne bis in idem* principle, including one in the UK which might allow for further prosecution based on the same facts based on new evidence uncovered subsequently.

120. The meeting also focused on emerging developments relating to the *ne bis in idem* principles:

- i. The progressive and expansive interpretation of *ne bis in idem* by extradition courts, e.g. (a) a refusal to consider an extradition request because the facts (as alleged by the requesting third country) had been investigated locally by another EU Member State in the context of a previous extradition request (on the basis of the *aut dedere aut judicare* principle) and found to disclose no offence; and (b) a refusal of extradition which relied, in part, upon the existence of previous refusals of the same extradition request by other EU Member States, effectively applying the *ne bis in idem* principle to extradition decisions which relate to the substance of the criminal offence and can, as such, be considered more proximate to a judgment on the merits of a criminal case in another Member State; and
- ii. The development of a practice of ‘mutual recognition’ of positive asylum decisions from EU Member States when the refugee is arrested with a view to extradition in a second Member State. This is something LEAP intends to encourage with further work and was discussed in the Annual Conference of February 2016.

Next steps and Recommendations

Coordinator’s role

- **Fair Trials**, as coordinator, will stay alert as to new issues arising from within LEAP and will explore these further when they appear. Third parties such as bar associations, interest groups and individuals are encouraged to continue informing us of such issues.

Recommendations to the EU and other institutions

Pre-trial detention

- **The EU Institutions** should take account of the findings of the regional report on pre-trial detention to be launched by Fair Trials and LEAP in May 2016 in Brussels. This will add to the body of evidence that establishes a systemic problem with pre-trial detention decision-making in the EU.
- **The European Commission** should, by the end of 2016, undertake an impact assessment for a possible EU measure on pre-trial detention with a view to bringing forward a proposal for a directive in 2017. Without this, it is clear that excessive recourse to pre-trial detention will continue to fuel overcrowding which, in turn, undermines mutual trust and recognition.

Plea bargaining

- **The EU** should consider including plea bargaining as part of any further policy development on EU criminal justice, initially with a view to ascertaining the extent to which extent such procedures are leading to issues with mutual trust. This should, inter alia, be taken into account in negotiations on the provisions on ‘transactions’ in the proposed EPPO regulation; this opportunity to ensure a high common standard of judicial oversight of ‘transactions’.

- **The EU** (in particular the **European Parliament's Subcommittee on Human Rights (DROI)** and the **European External Action Service**) should ensure that issues with plea bargaining are among those it studies when engaging with third countries, e.g. in the context of its 'human rights dialogues' and in the specific programmes of cooperation such as the Eastern Partnership and European Neighbourhood Policy.
- **The Council of Europe** should continue to take an interest in the issue of plea bargaining in Council of Europe states, and ensure that its Directorates-General and experts seek comparative input from EU jurisdictions where appropriate. LEAP stands ready to assist with this.
- **The ECtHR** should disclose a copy of the comparative study of national laws on plea bargaining referred to in the *Natsvlshvili* judgment to enable external scrutiny of its findings.

Migration and criminal justice

- **The European Commission** should pursue its infringement action against Hungary in relation to the substantive law on illegal entry and the procedural regime in place to prosecute it, as these issues are likely to be of broader relevance. EU Member States should take account of this.
- **All EU Institutions** should, in their work relating to the migration situation, take particular account of the challenges faced by migrants caught up in the criminal justice system, ensuring dialogue between DG Home and DG Justice so that overlapping issues are not missed.

Evidence

- **The European Parliament's** research service (its internal think tank) should review the case-law concerning Article 6(3)(d) ECHR (the right of defendants "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him") and seek to identify key principles and the extent to which these are adequate for the handling of electronic evidence.

Ne bis in idem

- **The EU Institutions** should begin to explore the need to assess how the *ne bis in idem* concepts developed by the CJEU are applied in practice to identify shortcomings and divergent practices. This should, as a first step, be reflected in Presidency and Commission work programmes and the priorities for future EU funding calls. This should be approached from a broad justice and home affairs perspective, with consideration given to related asylum and extradition issues in line with the emerging practice of national courts.

LEAP's next steps

- **LEAP** members, working with Fair Trials, will launch a major report in May 2016 documenting the need for EU minimum standards on pre-trial detention, and will organise an event in the European Parliament to ensure discussion of the next steps towards that objective.
- **LEAP** will continue its work on the topic of pre-trial detention, in the first instance by organising a meeting with judicial, prosecutorial and probation personnel to establish what reforms and training within the existing national frameworks could improve the situation, and where EU-level action is needed.

- **LEAP** may, possibly in collaboration with other organisations with experience of plea bargaining, consider intervening in case before the ECtHR to ensure that case-law developed further to the *Natsvlishvili* judgment takes due account of the dangers identified by LEAP.
- **LEAP** will continue to explore the issues around plea bargaining within the network with a view to identifying examples of best and worst practice which may inform the development of standards in this area by different international actors.
- **LEAP** will continue to explore the issues and its coordinator, Fair Trials, will explore possibilities for further work on this topic with organisations specialising in migration and refugees, drawing upon the expertise of LEAP members.
- **LEAP** will continue its discussions on the subject in the course of 2016/17, with a particular focus upon (i) electronic evidence and (ii) evidential issues arising in terrorism prosecutions. This work may include surveys of LEAP members using questionnaires and position papers on the issues.
- **LEAP** will contribute to discussions on the proposed directive on terrorism, in particular to highlight the dangers linked to the use of intelligence evidence in these cases and the need to ensure accurate applications of international law in the criminal courts.
- **LEAP** will continue to explore the application of the *ne bis in idem* principle in practice and seek to enhance awareness of the practicalities of invoking this defence, in order to complement the substantial existing academic work on the substantive principles developed by the CJEU.

I – INFORMING EU LEGISLATION AND POLICY

Conclusions

- LEAP has played an active role in supporting the development of EU legislation in the course of 2014-16, in particular by communicating viewpoints through its coordinator to stakeholders in the context of discussions on the Presumption of Innocence Directive, Children's Directive and Proposed Legal Aid Directive as well as other pending proposals. This has had concrete results and LEAP is determined to see the EU adopt a robust final directive on legal aid in 2016.

Recommendations to the EU Institutions and others

- **The European Parliament and Council** should conclude a robust directive on legal aid. This should ensure access to legal aid in EAW proceedings including in the issuing state. It should also, in line with other Roadmap Directives, cover criminal proceedings and ensure that all persons, whether deprived of liberty or not, have an EU right to legal aid matching the right of access to a lawyer in the Access to a Lawyer Directive, particularly in the crucial early phase.
- **The Council** should take due account of the European Parliament's impact assessment as to the potential costs of its proposed amendments to the legal aid system. The Council should take due account of the fact that, without a robust directive protecting the right to legal aid in criminal proceedings, a significant gap in mutual trust will remain and undermine judicial cooperation.
- **The Council** should, as a red line minimum, accept that without (a) a satisfactory directive on legal aid covering all persons and all stages of proceedings; and (b) a directive on pre-trial detention, its existing approach on procedural rights will be fatally flawed. Without these measures, given the frequency of Article 5 and 6 violations against EU Member States found by the ECtHR, it is likely that EPPO prosecutions in national courts will lead to such violations. After the EU's possible access to the ECHR, the EU would also be liable as co-respondent. Either would be a serious embarrassment for the EPPO, intended to be a pioneering innovation in justice.
- **The Council** should, in further discussions on the EPPO, aim higher than simply delegating the responsibility for protection of procedural rights to the Member States. As a basic starting point, it could consider pragmatic ways of achieving high standards for the EPPO by making limited provision in the EPPO regulation concerning procedural rights in such a way as to guarantee high standards whilst not encroaching unduly upon Member States' sovereignty.

LEAP's next steps

- **LEAP** will continue to supply information, case examples and analysis on all pending legislative proposals, in particular the Proposed Legal Aid Directive, both proactively and as requested by the EU institutions. All EU institutions are welcome to contact Fair Trials' Brussels office should they wish to receive input.
- **LEAP** will supply information to the Council and European Parliament with a view to ensuring that they are made aware of the risks surrounding prosecution of terrorism offences such as those included in the December 2015 proposal of the European Commission, building on recent discussions within the network.

II – IMPLEMENTATION OF EU LAWS ON DEFENCE RIGHTS

Conclusions

- In the course of 2014-16 LEAP has actively supported the implementation of the Interpretation and Translation Directive and Right to Information Directive in accordance with its Implementation Strategy, in particular by: supporting lawyers in their cases before national courts, in particular by providing comparative law expertise; training practitioners (240 from all Member States in person by April 2016), producing training materials and beginning their adaptation to local legal contexts and supporting LEAP members in undertaking onward training; conducting surveys to collect data and inform the EU institutions of conformity issues; contributing to national legislative discussions, again with the support of comparative law drawn from LEAP; and informing public discussions within policy and legal circles.
- In terms of implementation, there has been some notable progress, for instance in relation to the creation of separate letters of rights for arrested persons and reforms of provisions of national law concerning access to the case file in several jurisdictions. Lawyers have begun to use the Roadmap Directives and courts are starting to rely on them and to refer questions to the CJEU. However, there remain some serious issues. In relation to the issue of access to the case file, particular concerns continue in Estonia, Bulgaria and various other Member States.
- The European Commission has monitored the implementation of the Interpretation and Translation Directive and the Right to Information Directive but, approaching two years after the transposition deadline of the later of the two measures, it has yet to take any substantive infringement proceedings or publish its reports on implementation of these measures, though we understand that conformity checks are currently ongoing.

Recommendations to the EU Institutions and others

- **The European Parliament** should continue to take an active interest in implementation questions, following its Opinion on the application of EU law of 2015.⁹³ This will ensure continued parliamentary scrutiny of the European Commission's enforcement work.
- **The European Commission** should accelerate the publication of its reports on the implementation of the Interpretation and Translation Directive and Right to Information Directive, which reached their transposition deadlines in October 2013 and June 2014 respectively, to enable LEAP, bar associations and others to comment.
- **The European Commission** should consider taking substantive infringement proceedings against Member States whose legislation does not comply with the Roadmap Directives. Rules governing access to the case file in criminal proceedings should be a priority area.
- **The European Commission** should continue to make EU funds available for projects designed to ensure effective implementation, including through research and training.
- **Member States** which have not yet implemented the Interpretation and Translation Directive and Right to Information Directive should do so as a matter of urgency.

⁹³ Opinion of the LIBE and JURI Committees of 30 June 2015 on the 30th and 31st Annual Reports on monitoring the application of EU law (available [here](#)).

- **The Member States**, in particular their ministries of justice, public authorities and relevant parliamentary committees should ensure effective implementation of the Access to a Lawyer Directive. LEAP stands ready to supply comparative best practice to assist with this.
- **Bar associations** are invited to contact LEAP with a view to collaborating in the adaptation and dissemination of training materials and in contributing to national legislative processes.
- **NGOs** are invited to contact LEAP which stands ready to provide NGOs with a European perspective to assist them in their domestic advocacy relating to implementation of EU law.

III – Emerging themes

Conclusions

- Beyond the issues featured in the Roadmap and otherwise on the EU agenda (such as pre-trial detention and judicial remedies), there are a range of other issues which concern LEAP members. Fair Trials, as coordinator, remains alert to issues brought to its attention. In 2015/16, however, three issues emerged as being of common and pressing concern: plea bargaining; migration and refugees; and issues relating to evidence.
- LEAP has continued to make the case for a further directive on pre-trial detention and will be publishing a major 10-country research report in May 2016 which will provide further evidence of the need for the European Commission to take action in this area. LEAP stands ready to assist all parties wishing to further this discussion.
- Plea bargaining, as defined in this report, may play a useful role in ensuring the efficiency of criminal proceedings and avoiding unfairness arising from delays. But there are concerns among LEAP members about such processes fostering unaccountability of prosecutors, infringements of the presumption of innocence and discrimination. LEAP has begun discussing this building on comparative law research undertaken for Fair Trials in 2015/16.
- Refugees and asylum-seekers, in the ordinary course, may face difficulties in the criminal justice system due to the absence of interpreters and lack of local sources of support. Political responses to the current influx of migrants give reason to fear that this group is at further risk of unfairness, with one example in Hungary showing procedural guarantees limited for certain specific cases. LEAP has begun to discuss these issues during 2015/16.
- Evidence provides the substance of an accusation in criminal proceedings and LEAP has raised concerns about evidence, and therefore about risks to fair trials, in two specific contexts: terrorism prosecutions, where the provenance and reliability of evidence may be difficult to ascertain, and cases involving large volumes of electronic data where the defence experiences disadvantages linked to the authorities' monopoly of the data.

Recommendations to the EU Institutions and others

- **All EU Institutions** should take account of the findings of the regional report to be launched by Fair Trials, with LEAP members' input, in May 2016 in Brussels. This will add to the body of evidence that establishes a systemic problem with pre-trial detention decision-making in the EU.
- **The European Commission** should, by the end of 2016, undertake an impact assessment for a possible EU measure on pre-trial detention with a view to bringing forward a proposal for a directive in 2017. Without this, it is clear that excessive recourse to pre-trial detention will continue to fuel overcrowding which, in turn, undermines mutual trust and recognition.

- **All EU Institutions** should consider including plea bargaining as part of any further policy development on EU criminal justice, initially with a view to ascertaining the extent to which extent such procedures are leading to issues with mutual trust. This should, inter alia, be taken into account for the purposes of negotiations on the provisions on ‘transactions’ in the proposed EPPO regulation; this opportunity to ensure a high common standard of judicial oversight of ‘transactions’, which may overlap significantly with plea-bargaining systems and thereby contribute to international standards in this area.
- **EU Institutions** (in particular the **European Parliament’s Subcommittee on Human Rights (DROI)** and the **European External Action Service**) should ensure that issues with plea bargaining are among those it studies when engaging with third countries, e.g. in the context of its ‘human rights dialogues’ and in the specific programmes of cooperation such as the Eastern Partnership and European Neighbourhood Policy.
- **The Council of Europe** should continue to take an interest in the issue of plea bargaining in Council of Europe states, and ensure that its Directorates-General and experts seek comparative input from EU jurisdictions where appropriate. LEAP stands ready to assist with this.
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- **All EU Institutions** should, in their work relating to the migration situation, take particular account of the challenges faced by migrants caught up in the criminal justice system, ensuring dialogue between DG Home and DG Justice so that overlapping issues are not missed.
- **The European Parliament’s** research service (its internal think tank) should review the case-law concerning Article 6(3)(d) ECHR (the right of defendants "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him") and seek to identify key principles and the extent to which these are adequate for the handling of electronic evidence.
- **The EU Institutions** should begin to explore the need to assess how the *ne bis in idem* concepts developed by the CJEU are applied in practice to identify shortcomings and divergent practices. This should, as a first step, be reflected in Presidency and Commission work programmes and the priorities for future EU funding calls. This should be approached from a broad justice and home affairs perspective, with consideration given to related asylum and extradition issues in line with the emerging practice of national courts.

LEAP’s next steps

- **LEAP** members, working with Fair Trials, will launch a major report in May 2016 documenting the need for EU minimum standards on pre-trial detention, and will organise an event in the European Parliament to ensure discussion of the next steps towards that objective.
- **LEAP** will continue its work on the topic of pre-trial detention thereafter, in the first instance by organising a meeting with judicial, prosecutorial and probation personnel to establish what reforms and training within the existing national frameworks could improve the situation, and where EU-level action is needed.

- **LEAP** may, possibly in collaboration with other **organisations** with experience of plea bargaining, consider intervening in case before the ECtHR to ensure that case-law developed further to the *Natsvlishvili* judgment takes due account of the dangers identified by LEAP.
- **LEAP** will continue to explore the issues around plea-bargaining within the network with a view to identifying examples of best and worst practice which may inform the development of standards in this area by different international actors.
- **LEAP** will continue to explore the issues and its coordinator, Fair Trials, will explore possibilities for further work on this topic with organisations specialising in migration and refugees, drawing upon the expertise of LEAP members.
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Annex 1: LEAP Membership as at March 2016

NO.	NAME	COUNTRY	CATEGORY	INSTITUTION
1.	Aldis Alliks	Latvia	Legal Practitioner	N/A
2.	Catharine Almond	Ireland	Legal Practitioner	Sheehan & Partners
3.	Niki Andreescu	Romania	NGO Representative	APADOR
4.	Anguelou Kalin Apostolou	Bulgaria	Legal Practitioner	Gaidarov & Dochev Law Firm
5.	Dominique Arvanatis	Greece	Legal Practitioner	N/A
6.	Wouter Van Ballegooij	Netherlands	NGO Representative	European Parliament
7.	Rodrigo Barbosa Souto	Portugal	Legal Practitioner	F Castelo Branco & Associados
8.	Rachel Barnes	UK	Legal Practitioner	3 Raymond Buildings
9.	Joao Barroso Neto	Portugal	Legal Practitioner	Carlos Pinto de Abreu e Associados
10.	Linas Belevicius	Lithuania	Legal Practitioner	Mykolas Romero University/ Xth City Law Firm, Vilnius
11.	Matyas Bencze	Hungary	Legal Practitioner	University of Debrecen
12.	Jodie Blackstock,	UK	NGO Representative	JUSTICE
13.	Mina Bogunovic	Slovenia	Legal Practitioner	Law Firm Završek
14.	Ines Bojic	Croatia	Legal Practitioner	Law Office Ines Bojić

NO.	NAME	COUNTRY	CATEGORY	INSTITUTION
15.	Inga Botyriene	Lithuania	Legal Practitioner	I. Botyrienės ir R.A. Kučinskaitės Vilniaus advokatų kontora
16.	Myrddin Bouwan	Netherlands	Legal Practitioner	Van Appia & Van der Lee
17.	James Brannan	UK/France	NGO Representative	European Court of Human Rights
18.	Danut-loan Bugnariu	Romania	Legal Practitioner	Bugnariu Avocati
19.	Jaime Campaner-Munoz	Spain	Legal Practitioner	Valdivia & Campaner / University of the Balearic Islands
20.	Nicola Canestrini	Italy	Legal Practitioner	Studio Legale Canestrini
21.	Ed Cape	UK	Academic	University of the West of England
22.	Theodora Christou	UK	NGO Representative	Various
23.	Ben Cooper	UK	Legal Practitioner	Doughty Street Chambers
24.	Vania Costa Ramos	Portugal	Legal Practitioner	Carlos Pinto de Abreu e Associados
25.	Scott Crosby	Belgium	Legal Practitioner	Kemmler Rapp Böhlke & Crosby
26.	Balazs Csire	Hungary	Legal Practitioner	Dr Csire
27.	Antanas Damulis	Lithuania	Legal Practitioner	Legal Expert LT
28.	Vladimir Dimov	Bulgaria	Legal Practitioner	ADLege Law Office

NO.	NAME	COUNTRY	CATEGORY	INSTITUTION
29.	Anand Doobay	UK	Legal Practitioner	Peters & Peters Solicitors LLP
30.	Andrejs Elksnins	Latvia	Legal Practitioner	S. Varpins and A. Elksnins Law Office Latvia
31.	Joanna Evans	UK	Legal Practitioner	25 Bedford Row
32.	Mike Evans	UK	Legal Practitioner	Kaim Todner Solicitors Ltd
33.	Masha Fedorova	Netherlands	Academic	Radboud University of Neijmegen
34.	Henry Feltenstein	Spain	Legal Practitioner	Corporate Defense
35.	Markku Fredman	Finland	Legal Practitioner	Fredman & Mansson
36.	Hans Gaasbeek	Netherlands	Legal Practitioner	Lawyers Without Borders
37.	Alejandro Gamez Selma	Spain	Legal Practitioner	Alejandro Gamez Selma law office
38.	Thomas Garner	UK	Legal Practitioner	Gherson sollicitors
39.	Cliff Gatzweiler	Germany	Legal Practitioner	N/A
40.	George Gebbie	UK	Legal Practitioner	Black Chambers
41.	Orestis Georgiadis	Greece	Legal Practitioner	Goulielmos D. & Partners
42.	Dimitrios Giannouloupoulos	UK	Academic	Brunel University
43.	Carlos Gomez-Jara	Spain	Legal Practitioner	Corporate Defense
44.	Maribel Gonzalez Pascual	Spain	Legal Practitioner	Universitat Pompeu Fabra

NO.	NAME	COUNTRY	CATEGORY	INSTITUTION
45.	Anca Grajdán	Romania	Legal Practitioner	N/A
46.	Sylvia Gregorczyk-Abram	Poland	Legal Practitioner	Clifford Chance
47.	Edward Grange	UK	Legal Practitioner	Corker Binning
48.	Alexandru Grosu	Romania	Legal Practitioner	Grosu & Asociații Advocats
49.	Fulvia Guardascione	Italy	Legal Practitioner	Studio Legale Vetrano
50.	Arturas Gutaszkas	Lithuania	Legal Practitioner	VARUL (LT)
51.	John Harper	UK	Legal Practitioner	McClure Collins Solicitors
52.	Diana-Olivia Hatneanu	Romania	Legal Practitioner	Hatneanu Diana-Olivia Law Office
53.	Jacqueline Hodgson	UK	Academic	University of Warwick
54.	Balazs Hoffmann	Hungary	Legal Practitioner	Hoffmann law firm / University of Szeged
55.	Lidija Horvat	Croatia	Legal Practitioner	N/A
56.	Paolo Iorio	Italy	Legal Practitioner	Avocats Sans Frontières Italy
57.	Marion Isobel	UK	NGO Representative	Open Society Justice Initiative
58.	Piotr Jarzab	Poland	Legal Practitioner	Kancelaria Advokacka Advokat Piotr Jarzab
59.	Mar Jimeno-Bulnes	Spain	Academic	Universidad de Burgos

NO.	NAME	COUNTRY	CATEGORY	INSTITUTION
60.	John Jones	UK	Legal Practitioner	Doughty Street Chambers
61.	Andras Kadar	Hungary	NGO Representative	Hungarian Helsinki Committee
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64.	Natacha Kazatchkine	Belgium	NGO Representative	Amnesty International
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66.	Barry Koenders	Netherlands	Legal Practitioner	Pijnenburg Advocaten
67.	Titia Korff	Netherlands	Legal Practitioner	Pijnenburg Advocaten
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Legal Experts Advisory Panel

Coordinated by:

FAIR TRIALS EUROPE

Legal Experts Advisory Panel

Strategies for Effective Implementation

Of the Roadmap Directives:

TOWARDS AN EU DEFENCE RIGHTS MOVEMENT



Co-funded by the Criminal Justice
Programme of the European Commission



INTRODUCTION

1. This paper presents the implementation strategy of the Legal Experts Advisory Panel ('LEAP') for its participation in the implementation of the Directives adopted further to the Roadmap for strengthening procedural rights – Directive 2010/64/EU on the right to interpretation and translation, Directive 2012/13/EU on the right to information, and Directive 2013/48/EU on the right of access to a lawyer (the 'Roadmap Directives').

LEAP and its implementation priority

2. LEAP is a network of over 130 criminal justice professionals coordinated by Fair Trials, a human rights organisation based in London and Brussels. LEAP has been participated actively in the negotiation of the Roadmap Directives, contributing its expertise to inform debate in Brussels through policy briefings and in-person meetings with members of the EU Institutions and the Permanent Representations of the Member States.
3. A series of LEAP meetings in 2013-14 with 58 experts from 25 Member States ('Advancing Defence Rights' meetings) revealed that, within the scope of the Roadmap Directives, there were numerous significant challenges to the effective exercise of fair trial rights. Whilst the provisions of the adopted directives appeared promising, LEAP is mindful of the gap between obligations on paper and compliance in practice.
4. With that in mind, LEAP chose effective implementation of the Roadmap Directives as its first priority for the coming years in its March 2014 report *Stockholm's Sunset*, a message also conveyed in the Strategic Guidelines adopted by the European Council in June 2014.

The plan of action

5. Fair Trials and the LEAP Advisory Board have been discussing specific implementation activities for some time. In order to develop these into concrete plans, a dedicated LEAP roundtable meeting was convened on 8 October 2014 (the 'October 2014 meeting'), with representatives of Austria, Bulgaria, the Czech Republic, France, Hungary, Luxembourg, Netherlands, Romania, Poland, Sweden and the United Kingdom. The conclusions of that meeting inform this paper.
6. The plans set out in this paper are based on the existence of outstanding challenges despite the expiry of the implementation deadlines of the first two Roadmap Directives, as discussed further in part A. In order to tackle these, LEAP, under the strategic guidance of its Advisory Board and its coordinator Fair Trials Europe, will continue to develop its role as a driver of effective implementation at the national level, as discussed further in part B below.
7. LEAP members are well aware that, as individual people within the 28 jurisdictions, they can achieve more through partnerships and discussions with key local actors such as bar associations, police, judiciaries, universities and training bodies. Indeed, we hope that LEAP and all the actors within national legal systems can work together to participate in the advance of respect for procedural rights in what we hope will become an EU-wide defence rights movement.

8. Aside its function as a blueprint for LEAP and Fair Trials to work from, this document is intended as an introduction to third parties with whom LEAP members and Fair Trials will engage in order to broaden the movement and fashion joint initiatives. To discuss potential cooperation with LEAP members in your jurisdiction, contact Alex Tinsley at (alex.tinsley@fairtrials.net).

A. KEY ISSUES

9. Based on views collected in the Advancing Defence Rights meetings of 2013-14, regular telephone calls with the members of the LEAP Advisory Board and other occasional LEAP roundtable meetings, a number of themes relating to the first two Roadmap Directives have emerged. These were discussed at the October 2014 meeting in order to obtain an update following the implementation deadlines.

(1) Quality of interpretation in criminal proceedings

10. This has arguably been the most consistent concern among LEAP members in recent years. At the October 2014 meeting it was reported that, although steps had been taken to implement the Interpretation & Translation Directive in most places, problems formerly reported remained.
11. There continued to be some concerns about the independence of some interpreters vis-à-vis police. Recourse to telephone interpreting also presented quality issues. The possibility of interpretation between lawyer and client was not assured everywhere, particularly when the suspect was detained in a remand centre or prison. The absence of formal qualification requirements also meant quality could be very variable.
12. There remained, further, and across the board, a challenge in verifying quality ex post, in the absence of audio recording. It remained commonplace for there to be conversations in courts about what was actually said in the police interrogation. There was, in addition, an open question as to what remedial obligations should be incumbent upon the courts, in view of the total silence of the Interpretation and Translation Directive on this point.

(2) Letters of rights

13. The main innovation of the Right to Information Directive, the requirement to provide a simple and accessible letter of rights, had been of particular interest in prior discussions due to the prevalent trend in the EU of providing arrested persons with notifications of bureaucratic style, with rights phrased essentially as extracts of legislative provisions, and in a mechanical way which meant that suspects essentially did not appreciate the value of, or even read, the letter.
14. The views offered at the October 2014 meeting suggested that there had been some improvements (and Fair Trials has collated some useful examples). However, elsewhere letters of rights had not changed. Some texts remained technical and often based on legal extracts. Negative phrasings suggesting the invocation of the right to silence was non-cooperative remained liable to dissuade its exercise. In one jurisdiction, it was not possible for the suspect to keep the letter of rights with them.

(3) Access to the case file

15. Again, this has been one of the major themes raised by LEAP in recent years. Complaints have broadly been focused upon three different aspects: (i) the lack of access to the police file at the point of interrogation; (ii) the restriction of access to the file during pre-trial proceedings, leading to difficulties participating effectively at that stage and, in particular in challenging detention; and (iii) the manner in which access is provided and its impact upon trial preparation.
16. At the October 2014 meeting, LEAP members confirmed that access to the case file began after initial questioning, with no Member State apparently having taken the view of Article 7(1) of the Directive that it required access at that stage. As for the pre-trial phase more broadly, there were variable examples. There were some examples of good practice, but some legislations continued to provide for limited access until the completion of the investigation, and powers to restrict access to the case file were still being applied extensively. Some apparently positive legislative amendments in places where problems had been reported had, to date, not resulted in changes in practice.

(4) Remedies for procedural rights violations

17. An open question arising from the varied approach to remedies in the Roadmap Directives, ranging from total silence in the Interpretation & Translation Directive, to a general reference to a 'right to challenge' in Article 8 of the Right to Information Directive, to the fuller but still very generalised text of Article 12 of the Access to a Lawyer Directive, the issue of remedies is also linked to the highly differing systems of remedies in the EU. LEAP members had, during the 2013-14 meetings, generally taken the view that the consequences of procedural violations were not always sufficient to guarantee the effectiveness of those rights.
18. Participants in the October 2014 meeting did not signal any particular changes in relation to remedies, the result of the Roadmap Directives entrusting the effective protection of the rights within them to the Member States and their existing systems of enforcement of procedural rights (exclusion of evidence, invalidity / nullity of procedural acts, disregarding or having diminished regard to evidence etc.). There was general agreement that, whatever substantive rules were adopted in implementation of the Roadmap Directives, it would be important for implementation work to ensure sufficient focus was placed upon the enforcement of those rules.

B. LEAP'S ROLE IN THE IMPLEMENTATION PROCESS

19. LEAP is composed primarily of practicing defence lawyers (some with additional duties within universities, networks and bar associations), non-governmental organisations and academics. The sorts of activities which they can engage in therefore vary to some degree. But as a group, LEAP intends to facilitate the implementation process through a range of activities.

(1) Litigating cases before the national courts and CJEU

20. LEAP comprises roughly 70% practising criminal defence lawyers whose key area of action will be the national courts. LEAP lawyers have been exchanging ideas and experiences at roundtable meetings and LEAP Annual Conferences and will continue to encourage national courts to rely

upon the Roadmap Directives and, if needed, refer questions to the CJEU for preliminary rulings. LEAP members are keen to make arguments before the courts themselves, but also to encourage other lawyers to do so, making persistent issues difficult to ignore for the courts, and also to obtain high-level rulings from the senior courts which will have an impact in practice.

(a) Template pleadings for routine use

21. A particular example of note was provided by the 2013 cohort of the *Conférence* of the Paris Bar, which made an issue of litigation surrounding the issue of access to the file at the point of interrogation on the basis of Article 7(1) of the Right to Information Directive. The group produced template pleadings (one before, and one after the implementation deadline), which was made publicly available, seeking the annulment of police custody proceedings on the basis of the failure to provide access to the police file.
22. The initiative caught the attention of judges, with some progressive courts issuing favourable decisions (though these were overturned on appeal); it also created considerable interest in the implementation process and placed pressure on the legislator; and the initiative could foreseeably result in a ruling from the CJEU. Fair Trials is keen to work with LEAP members to produce such pleadings (which can help save busy legal aid lawyers a lot of time) with the possible value-add of comparative information sourced from different countries. There was a general view at the October 2014 meeting that this would be a useful way to proceed.

(b) Seeking game-changing rulings from senior courts

23. LEAP members have also reported two interesting initiatives specifically seeking to obtain game-changing rulings from apex courts which will have an impact upon the interpretation and application of the law in practice. In particular, a LEAP member from Spain worked with colleagues to select a particular case and take a complaint to the Constitutional Court on the basis of the Right to Information Directive, still on the issue of access to the case file at the point of the initial deprivation of liberty. The pleading, available publicly, forms part of a coordinated effort using the Roadmap Directives in various ways, including training activities and the development of best practice guides etc. organised by the *Asociacion Libre de Abogados*.
24. In the Netherlands, an appeal before the Supreme Court raised the question whether the rule applicable for the time-being, excluding lawyers from advising during police questioning, was compatible with international standards. Arguments were made about the Access to a Lawyer Directive, and although these were not accepted on the basis that the latter's implementation deadline had not passed, the Supreme Court made a clear call for the legislator to bring national law into line with the Directive, showing how the courts can be used to influence national law.

(c) Making the most of the CJEU

25. In June 2014, LEAP members met with a number of experts from areas other than criminal law with experience of preliminary rulings before the CJEU to discuss the challenges and opportunities presented by the availability of this mechanism (the 'June 2014 meeting'). Of little relevance to most criminal practitioners until recently, the CJEU has been seised of one question concerning the interpretation of the first two Roadmap Directives and, given the significant open questions of interpretation which these measures raise, it will be an important avenue.

Discussions at the June 2014 meeting underlined the need for effective strategies to persuade the courts to make references, and coordinated litigation was seen as a promising tactic.

26. The topic was discussed further at the October 2014 meeting where it was agreed that LEAP members would think about specific questions which needed answering from the perspective of their jurisdiction as a first step to developing litigation strategies. Whether Article 7(1) requires access to the police file prior to interrogation seems to be one question in need of answer.
27. Fair Trials and LEAP are mindful that the CJEU has signalled strong support for the principle of mutual recognition, such that it may not be a source of particularly progressive judgments in the area of judicial cooperation; however, in the case of the Roadmap Directives, the outlook is more cautiously optimistic and Fair Trials and LEAP remain keen to ensure that lawyers are sensitised to this process. LEAP members should also recognise that, having been examining this issue for some time, they are well placed to offer support to members of their national bars with less expertise, and should ensure that colleagues are aware that they are able to offer such support.

(d) Practitioner training

28. In advance of a recent training workshop delivered in partnership with LEAP member the Helsinki Foundation for Human Rights in Warsaw, Fair Trials surveyed participants and found that 86% of participants, from five countries, had not received training on the Roadmap Directives. In an effort to address the lack of training, LEAP Members have already participated in a number of initiatives with Fair Trials, training 160 defence lawyers at five workshops across four locations, with another 200 to be trained in another five workshops in three locations across the EU in 2015-16. The current series involves locally-focused courses delivered by local partner NGOs and LEAP members from the relevant country. Fair Trials has also produced online training videos on the first two Roadmap Directives and CJEU, which LEAP Advisory Board members will be complementing with video forewords in the national language placing the courses in national legal context to enhance their local relevance. Fair Trials is keen to keep developing these activities, and enhance cooperation with national bar associations.

Next steps on litigation aspects

- LEAP members and Fair Trials will work together to develop template pleadings invoking the Directives in respect of the four key issues.
- LEAP will work with national bar associations and lawyers' groups to circulate such materials and otherwise promote use of the Roadmap Directives.
- Fair Trials and LEAP will continue to work together on providing practitioner training focused upon using the Roadmap Directives in practice. LEAP members are encouraged to work with their own bars to develop courses based, where helpful, on the Fair Trials' materials.
- LEAP members will think about specific questions which will need to be referred to the CJEU from the perspective of their own national system and which could form the basis of coordinated litigation strategies.

(2) Contributing to national legislative discussions

29. In the last year, LEAP has contributed to national legislative discussions relating to the implementation of the Roadmap Directives. In Lithuania, a submission made by Fair Trials and Lithuanian LEAP members, in consultation with LEAP member the Human Rights Monitoring Institute, was taken into account and some of the changes recommended were included in the final legislative text. In Spain, Fair Trials wrote a joint letter with Rights International Spain and several other NGOs commenting on its draft measure implementing the first two Roadmap Directives (no final measure is adopted yet). Fair Trials also worked with LEAP member for England & Wales JUSTICE to contribute to a government consultation on the implementation of the Right to Information Directive, with some suggestions taken in the final measures.
30. Whilst, in many countries, the process of implementation of the first two Roadmap Directives is 'complete' (in the sense that measures have been adopted), there remain opportunities for this sort of work as practice reveals gaps and CJEU judgments clarify the requirements of the measures. In addition, implementation of the Access to a Lawyer Directive is still underway.
31. Fair Trials notes the example of a group of Polish lawyers, who, following a joint residential training course by Fair Trials and LEAP member the Helsinki Foundation for Human Rights, met to discuss practical ways of ensuring access to lawyers at the police station by providing lists of on-call lawyers. The *Asociacion Libre de Abogados* has also developed a decalogue of best principles offering guidance designed to ensure practice complies with the Roadmap Directives.
32. Fair Trials, in discussion with the LEAP Advisory Board, has recognised that it is not necessarily straightforward for practising lawyers to monitor closely the passage of legislation through the system, or to take on the additional work of organising initiatives. To address this, Fair Trials and LEAP intend to explore greater cooperation with national and local Bar Associations, who will usually be monitoring these aspects more closely. Fair Trials will ensure it adds value as a pan-EU organisation, without encroaching upon the prerogatives of the national bars and umbrella organisations such as the Council of Bars and Law Societies of Europe ('CCBE').

Next steps on national legislative processes / developing best practice

- LEAP members will make introductions to the criminal law sections of the Bar Associations.
- Fair Trials will work with LEAP members and their Bar Associations to find opportunities to contribute to national implementation processes.
- Fair Trials and LEAP will add value by offering comparative expertise drawn from the network and knowledge of the impact national practices have upon mutual trust.

(3) Facilitating the work of the European Commission

33. The Commission has an important oversight role in the implementation process. Member States have to report to it, and it can take proceedings against them for failure to implement EU legislation. This begins with a letter of formal notice, which if not satisfactorily addressed can ultimately lead to a case before the CJEU. Thereafter, if the Member State does not correct the issue, the Commission can take matter back to the CJEU which could impose a financial penalty.

Whilst Commission action is at its own initiative, it can be alerted to problems by means of individual complaints from citizens or interest groups (there is no standing requirement).

34. This opens up an important channel enabling LEAP members and other lawyers within their jurisdictions to take action in respect of non-compliant legislation and practice even if opportunities do not immediately arise to challenge these in court. LEAP can become a contact point to channel this information towards the European Commission through Fair Trials. The more this can be done, the greater a sense the Commission – we are concerned with one team in Brussels with limited resources – will have of what is happening on the ground and be able to act on an informed basis. It was emphasised at the October 2014 meeting that, for practising lawyers in particular, they could not take on duties of coordination, but potentially forwarding occasional links and emails from colleagues to Fair Trials was considered reasonably possible. If constructive suggestions in national legislative processes (see (2) above) are not taken into account, it makes sense to then make the same points the subject of Commission complaints.

Next steps on European Commission complaints

- LEAP members will notify Fair Trials of compliance issues so that it may channel this information towards the European Commission.
- To the greatest extent possible, LEAP members will act as a conduit for other members of the legal profession to come forward with specific case examples of non-compliance.

(4) Influencing the national discussion and establishing LEAP as a source of support

35. In order to ensure maximum uptake by the legal professions in their countries, LEAP members agreed at the October 2014 meeting that it would be essential to raise the profile of the Roadmap Directives and the implementation situation within their state. Many lawyers do not know of the existence of these measures, and thus may be unaware of possible issues in the national implementation. The Advisory Board member for Portugal has produced an article for the legal press and Fair Trials encourages other LEAP members to follow this lead. Fair Trials has plenty of arguments, information and comparative law examples to provide to help LEAP members in the drafting process, and is happy to explore co-authoring such articles.
36. It is hoped that such publications will help to inform local lawyers of LEAP's capacity to assist with litigation and any other activities. LEAP has a great deal to offer, in particular its access to comparative law information drawn from other members of the network and extensive EU law information from Fair Trials and other members; if people come to LEAP, it will be able to add value and help strengthen the work.

CONCLUSION

The message to LEAP

37. LEAP members who have been part of the network for some time will know that, in the first years of its existence, LEAP's primary role was to supply information about the state of play in their own country, to inform discussions in Brussels. That remains a key part of LEAP's function and is, in fact, all the more important in relation to the implementation of the Roadmap Directives now that the European Commission, if given the information, is able to take action.

38. However, with the implementation of the Roadmap Directives, LEAP acquires a greater role in ensuring information flow the other way. LEAP can use training, litigation initiatives and communications to inform, equip and encourage lawyers in the 28 Member States to seize the opportunity and ensure the Roadmap Directives are applied in practice. Fair Trials is delighted that LEAP members are taking on this challenge and looks forward to supporting LEAP in driving implementation at the national level.

The message to third parties

39. In coming months, Fair Trials will be reaching out to other organisations – particularly Bar Associations – to discuss these activities and explore possibilities for further cooperation. Fair Trials approaches this as a pan-EU organisation with a real capacity to add value in national training activities and legislative processes, and looks forward to exploring these possibilities.

40. LEAP members will be encouraged to present this finding to any entities and organisations with whom fruitful cooperation might be established, and Fair Trials likewise encourages any interested parties to make contact with the Legal and Policy team at Fair Trials if they have proposals or would like to know more. We look forward to working with you.

**Fair Trials Europe,
February 2015**

Legal Experts Advisory Panel



COMMUNIQUÉ

of the

LEGAL EXPERTS ADVISORY PANEL

ANNUAL CONFERENCE

6-7 February 2015, Amsterdam



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**CLIFFORD
CHANCE**

INTRODUCTION

1. On 6-7 February 2015, Fair Trials convened the Annual Conference of the Legal Experts Advisory Panel ("LEAP") in Amsterdam, the Netherlands. 68 participants from 20 EU Member States attended, with speakers from LEAP, the EU Institutions, Court of Justice of the EU ("CJEU"), academia and law enforcement intervening over the two day programme. This communiqué summarises the main discussions which took place at the conference.
2. LEAP was established in 2008 to provide an opportunity for experts in criminal justice, fundamental rights and access to justice in the EU to meet and discuss issues of mutual concern and to provide advice, information and recommendations to inform Fair Trials' work. LEAP has since grown from a dozen people to over 130 members from all 28 Member States in 2015. In that time, LEAP has played a key role in informing the development of procedural rights directives adopted under the 2009 Roadmap for strengthening procedural rights in criminal proceedings (the "Roadmap"), and EU justice policy more broadly.
3. In March 2014, LEAP produced its *Stockholm's Sunset* report reviewing the achievements under the Roadmap and setting out the following priorities for EU justice going forward: (1) implementation of the Roadmap Directives already adopted; (2) completion of the Roadmap with further measures on legal aid, the presumption of innocence and special safeguards for children; (3) future EU action on pre-trial detention; and (4) the protection of human rights in mutual recognition systems like the European Arrest Warrant ("EAW").
4. The agenda of the 2015 Annual Conference was designed around those priorities, with implementation of the Roadmap Directives as the key theme, further to a roundtable on the subject in October 2014 (Part A below). It also brought LEAP members together with key policy-makers to discuss measures under discussion by the EU institutions, with a view to completing the Roadmap (Part B below) and explore remaining areas for further action by the EU in the justice area (Part C below).

A. IMPLEMENTATION FOCUS

5. Good legislative progress has been made under the Roadmap, with the adoption of Directive 2010/64/EU of 27 October 2010 on the right to interpretation and translation in criminal proceedings (the "Interpretation and Translation Directive"); Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings (the "Right to Information Directive"); and Directive 2013/48/EU of 22 October 2013 on the right of access to a lawyer in criminal proceedings (the "Access to a Lawyer Directive") (collectively, the "Roadmap Directives").
6. However, the usefulness of these measures lies in their impact on the ground, with much relying on the way the measures are implemented by national legislative authorities and the practice of criminal justice actors further to that legislation, in particular the courts. This aspect of the conference discussed the role of lawyers in ensuring effective implementation in practice.

Advocate General Taru Spronken on implementation

7. LEAP was addressed by Prof. Taru Spronken, formerly of the University of Maastricht, who currently serves as Advocate General to the Supreme Court of the Netherlands. Prof. Spronken spoke of the opinion she had submitted in the case resulting in that court's judgment of 21 April 2014 concerning access to a lawyer (discussed in a trilogy of guest posts on Fair Trials' website).⁹⁴
8. Prof. Spronken proposed to the court that it should take into account the case law of the European Court of Human Rights ('ECtHR') in cases like *Navone v. Monaco*,⁹⁵ which make it clear that the right of access to a lawyer applies during, as well as prior to, police questioning. Importantly, she also pointed to the Access to a Lawyer Directive, which showed a general consensus in the Member States that this was a requirement. However, the Supreme Court found that the Directive was not directly effective yet (its transposition deadline is in November 2016) and that it was 'beyond its powers,' to impose new rules, which it fell to the legislature to adopt. Prof. Spronken did not agree that this was the correct interpretation of the Netherlands' obligations in accordance with the ECtHR case law on access to a lawyer or its obligations under the EU Charter. Prof. Spronken also made the observation that it is not right to say a directive has no effects until its transposition deadline, in accordance with the *Wallonie*⁹⁶ case-law. Though, the ruling was disappointing, it shows how litigation based on the Directives can place pressure upon the legislator to implement them effectively.
9. Prof. Spronken also touched on the importance of ensuring that defendants are made aware of all their rights before they have they can be deemed to have waived assistance from a lawyer. In her academic capacity, together with LEAP members Jodie Blackstock, Ed Cape and Anna Ogorodova, she wrote the book *Inside Police Custody*, examining in detail the arrest and questioning procedures of four Member States. Prof. Spronken explained that the study had found that, in the UK and Wales around 60% of people waive the right to free assistance of a lawyer. The speaker said there is a real need to ask why defendants wanted to waive this important right and ensure that they were adequately informed of the impact this might have.
10. The study had also revealed the importance of the manner in which this right is delivered in ensuring that it can be used effectively. The point at which someone is made aware of their right to assistance, as well as how this information is relayed, and by whom has a considerable impact on the usefulness of the information to the accused. In one place, this information may be given at the point of arrest, a particularly stressful situation and the suspect may not fully appreciate or hear the information they are being told. In contrast, elsewhere, the information might be given by a designated officer not in charge of the investigation, takes with ensuring that it is understood. This highlights that the right to information cannot just be a box ticking exercise by the prosecution to comply but it must be looked at in context so to be fully effective.
11. Another key point made was that an aspect of getting access to a lawyer is how long you have to wait for that lawyer to arrive. In the Netherlands the maximum waiting time for a lawyer is two

⁹⁴ See Bas Leeuw 'Does judicial restraint lead to ECHR non-compliance?', 26 June 2014; Wouter van Ballegooij 'Should the Dutch Supreme Court look to Strasbourg, Luxembourg or the Hague?'; Jozef Rammelt 'And suddenly, nothing changed', all available at www.fairtrials.org/press/.

⁹⁵ *Navone v. Monaco* App. no 62880/11 (Judgment of 24 October 2013).

⁹⁶ Case C-129/96 *Inter-Environnement Wallonie ASBL v Région wallonne* (ECLI:EU:C:1997:216).

hours and after that point the questioning will go on without them. Prof. Spronken also touched on the inadequacies of many summary procedures in place in Member States, and shared an example of individuals at a music festival being taken into police tents, checked for drugs and then being brought into a second tent for questioning despite there being no lawyers on site or any practical way for the accused to request assistance. She highlighted the disregard for procedural rights in many summary procedures and the detrimental effect this has at later stages of the proceedings.

Nuala Mole, AIRE Centre: the CJEU aspect

12. Invoking directives inevitably means their content will need to be clarified at some stage. This raises the question of references to the CJEU, essentially a new actor in criminal justice brought into play by the Roadmap Directives, its involvement in criminal justice prior then having been limited mostly to cross-border measures (EAW and *ne bis in idem*). LEAP members met in June 2014 to discuss how to make the most of this, publishing a communiqué on strategic approaches to litigation at the CJEU in criminal cases.⁹⁷ LEAP member Nuala Mole, Senior Lawyer at the AIRE Centre, spoke further on this issue at the LEAP Annual Conference. Nuala explained that using EU law meant being familiar with other areas of EU law (milk quotas, tax etc.).
13. In this regard, she pointed to *Marks and Spencer plc*⁹⁸ as a case in a totally different area but useful in this context, as it establishes that the state has to take effective measures to ensure that the directive is being properly applied in practice. Nuala also referred to Article 41 of the Charter, the right to good administration, which includes a right to be heard, access to the file etc. (relevant considerations for criminal lawyers), and which was thought for a time to apply to the Member States. Though a recent CJEU judgment⁹⁹ decided that it did not, that judgment did confirm that the rights of the defence, as a general principle of EU law, did apply to Member States, and these also include the right to be heard, access to the file.
14. The procedure before the CJEU was, likewise, not necessarily familiar, with a significant challenge lying in persuading a national court actually to refer a question. The onus is on practitioners to meet this challenge. In this regard, Nuala referred to Fair Trials' Guide to the Court of Justice of the EU, which Fair Trials has since supplemented with an additional interactive video training module.¹⁰⁰
15. Nuala also touched upon the recent *Opinion 2/13*¹⁰¹ of the CJEU on the EU's draft agreement for accession to the ECHR. The CJEU had found that accession on the basis of this draft would interfere with the autonomy and special characteristics of the EU legal order, not least in the 'area of freedom, security and justice' (justice and home affairs). The CJEU had found that ECtHR case-law (such as the recent *Tarakhel*¹⁰² judgment, preventing the transfer of asylum applicants

⁹⁷ 'Strategic approaches to litigation at the CJEU on fair trial rights in criminal cases and the EAW', available at <http://www.fairtrials.org/wp-content/uploads/140818-CJEU-meeting-report.pdf>.

⁹⁸ Case C-446/03 *Marks & Spencer plc* [ECLI:EU:C:2005:763](#).

⁹⁹ Case C-166/13 *Mukaburega v Préfet de police* [ECLI:EU:C:2014:2336](#).

¹⁰⁰ Both of these resources are available at <http://www.fairtrials.org/fair-trials-defenders/legal-training/>.

¹⁰¹ *Opinion 2/13* Request for an Opinion pursuant to Article 218(11) TFEU [ECLI:EU:C:2014:2454](#).

¹⁰² *Tarakhel v. Switzerland* App. No 29217/12 (Judgment of 4 November 2014). The Dublin regulation is applied between the EU Member States and Switzerland by virtue of an agreement between the EU and Switzerland.

to Italy in application of the EU's 'Dublin' Regulation due to a risk of human rights violations) could lead Member States to check each other's compliance with fundamental rights, which would undermine the operation of systems like this (including the EAW) based on mutual trust.

LEAP Implementation strategy

16. LEAP met for a roundtable in October 2014 to discuss the state of play with implementation of the first two Roadmap Directives and agree a strategy for LEAP's role in the implementation process. At the Annual Conference, Fair Trials Europe' Law Reform Officer Alex Tinsley presented the strategy, set out in the document *Towards an EU Defence Rights Movement*,¹⁰³ which focuses on four key areas: (1) quality of interpretation and translation; (2) 'letters of rights', as are required to be given to arrested persons by the Right to Information Directive; (3) access to the case file as required by that directive; and (4) the remedies available for procedural rights violations, a matter left somewhat unclear by the Directives where much depends upon national law. LEAP's strategy, focusing on these areas, is to maximise its contribution to the implementation of the first two Roadmap Directives through:

- a. **Participation in national legislative discussions** – LEAP will work with Fair Trials to write letters to parliaments, ministries of justice and other national bodies taking legislative or other action to implement the Directives.
- b. **Litigation, training, CJEU references** – LEAP will produce template pleadings to help lawyers rely on the Directives in their daily practice, support Fair Trials in providing online, in-person and written training, including on references to the CJEU.
- c. **Informing the European Commission** – LEAP, together with Fair Trials, will work to collate examples of violations of the Directives drawn from national practice and will communicate these to the European Commission.
- d. **Awareness-raising** – LEAP will publish articles, like one of Vania Costa Ramos in the bar bulletin,¹⁰⁴ informing practitioners of the Roadmap Directives and how to invoke them, establishing LEAP as a source of support for other lawyers.

Breakout groups on Implementation

Interpretation and Translation Directive

17. In the workshop on the Translation and Interpretation Directive, it was agreed that adequate interpretation and translation was, in the case of a person who does not speak the forum language, the 'gateway to all other rights,' and that there was increasing need to ensure effective implementation of the Directive as countries become more ethnically diverse.

18. The session was co-chaired with Liese Katschinka, President of the European Legal Interpreters and Translators Association (EULITA), who gave the interpreter's perspective and discussed EULITA's work focused on one of the practical difficulties arising under the measure: the

¹⁰³ Available at: <http://www.fairtrials.org/wp-content/uploads/5A-IMPLEMENTATION-MOVEMENT-PAPER.pdf>.

¹⁰⁴ Vania Costa Ramos, 'Using European law in criminal practice', Order of Advocates Bulletin, Nov 2014, available at <http://www.fairtrials.org/publications/article-the-use-of-european-law-in-criminal-proceedings/>.

difficulty in identifying when interpretation and/or translation is of a sufficient quality. As was pointed out, usually the only check on the quality of the translation is the lawyer themselves. Registers are helpful, but there are costs implications in setting them up, and conditions of access to those registers are key: for example, it was said that in Romania, there is a list of over 10,000 authorised translators but the criteria for admission to this list are insufficiently strict to ensure competence of those selected from it.

19. LEAP members gave various case examples of unsatisfactory practice, showing further implementation work was needed: in Bulgaria, a university student was brought in as an ‘expert translator’ in Arabic, and his ‘every third word’ of translation was challenged. A UK barrister noted that there was inadequate provision for cases where the suspects cannot read the language which they speak, or speak a language with no written form. Michal Zeman from the Czech Republic described the case of a client who was voiceless (mute) who could understand Czech but for whom no adequate system was in place to facilitate his active communication.

Access to the case file: Practitioners experience so far in court

20. The focus of the discussion was Article 7 of the Right to Information Directive regarding the right of access to materials of the case in criminal proceedings. The wording of Article 7(1) explicitly refers to people ‘arrested or detained’ at ‘any stage of the criminal proceedings.’ It was discussed whether the expansive reading of this provision would provide a legal basis for ensuring access to the case file at the point of arrest, prior to questioning, or only during the judicial phase in which pre-trial detention is determined. This issue is discussed further in the report further to a survey of LEAP on access to the case file.¹⁰⁵
21. In relation to access to the file at the police station, LEAP member Alejandro Gamez Selma noted that in Spain, practice among police varied considerably. In order to prompt the implementation of the Directive, he employed various tactics: a social media campaign to raise awareness; production of template pleadings enabling lawyers to invoke the Directive to seek access; taking a case to the Constitutional Court to establish that the Directive should be applied directly; and a criminal complaint against a police officer for breach of the EU law duty to apply the Directive. Some, however, urged caution in relation to the supposed right of access to the file prior to interrogation, noting that a short consultation of a 10,000 page file would not meaningfully increase the possibility of advising effectively in questioning, but courts would presume any statements made at that stage were made on a fully informed basis. In this view, it was better to use Article 7(1) as relating to the judicial review of the lawfulness of detention.
22. Commenting more generally on the pre-trial judicial phase, it was noted that some legislation (Germany) appeared compliant with the Directive, providing for sufficient access to case materials. It was said however that in Estonia, the implementing law appeared to contradict the Directive so plainly that the bar could not see how the government had interpreted the Directive to allow this. In Bulgaria, despite the Directive which has not yet been transposed into domestic legislation, it was said to be difficult, if not impossible, to obtain access to the file during the investigative stage. The majority agreed that sufficient access was given prior to trial, however.

¹⁰⁵ Available at: <http://www.fairtrials.org/wp-content/uploads/Access-to-file-report.pdf>.

23. The group also discussed modalities of access. In Estonia and Germany, access is sometimes limited to only the digital file, which can undermine the ability to view the case file as it may be impossible to get a laptop into prison to show the defendant. A German participant explained that clients had to pay up to €500 for a laptop that they could use to view the materials in their cell. There were also some issues reported about availability of software to view encrypted files and cases of a digital file being given that was password protected, where the prosecution would refuse to give the password.

Developments regarding access to a lawyer in light of the Access to a Lawyer Directive

24. One year into the transposition period of the Access to a Lawyer Directive, designed to concretise the right of access to a lawyer recognised by the ECtHR in *Salduz V. Turkey*,¹⁰⁶ establishing the right to access to a lawyer from the first police interrogation, this workshop enabled LEAP members to discuss the present situation in their own jurisdictions as well as potential methods to ensure effective implementation of the directive.
25. It was said that in Scotland, following the *Cadder* judgement in 2010 which found that the Scottish system enabling questioning in the absence of a lawyer and reliance, albeit with safeguards, on the evidence so obtained was incompatible with the *Salduz* rule, legislation was rushed through to fix the incompatibility, but police were not ready for this and still only a small number of people are assisted in the police station by a lawyer. Positively, the Law Society has produced guidance notes and ran training sessions for Scottish lawyers so that they can be equipped with the skills to assist at this stage. However, there are concerns that much of the advice is being delivered by telephone, raising doubts as to its effectiveness.
26. Dara Robinson, LEAP Advisory Board member for Ireland, described the approach of the Irish Supreme Court in its joint decision in *White and Gormely*¹⁰⁷, following which the Director of Public Prosecutions circulated guidance to the Garda (police), directing them to allow solicitors to be present at the initial interview. Dara reported that although police are not used to having solicitors present, and solicitors are unsure how to give this type of assistance, they have been open-minded and engaged with each other. Unfortunately, the length of time it may take a lawyer to physically get to the police station has led to some defendants waiving their right.
27. The group also focused on practical ways to ensure the effective exercise of the right of access to a lawyer. In Poland, a group of trainees from a Fair Trials / LEAP residential training filed complaints with the Polish Ombudsman asking that police stations be equipped with lists of lawyers and circulating translations of key case-law to lawyers via the Bar Council. Practitioners agreed that it would be useful to engage with bar associations as well as prosecutors, judges and law enforcement agencies as steps are taken to implement this measure.

B. THE VIEW FROM THE EU INSTITUTIONS

The view from Brussels: Completing the Roadmap in light of past experience

¹⁰⁶ Case of *Salduz v. Turkey* App. no 36391/02 (Judgement 27 November 2008).

¹⁰⁷ *Director of Public Prosecutions -v- Gormley; Director of Public Prosecutions -v- White* [2014] IESC 17

Speakers: Dennis De Jong (Member of the European Parliament and rapporteur on the Legal Aid proposal), Steven Cras (General Secretariat of the Council of the EU: judicial cooperation in criminal matters) and Barbel Heinkelmann (European Commission, Unit B1 Criminal Procedural Law)

28. The panel of speakers from the EU institutions updated LEAP members on the progress of the package of measures proposed in November 2013 (draft Directives on provisional legal aid, the Directive to strengthen the presumption of innocence and the right to be present at trial and the Directive on special safeguards for children suspected or accused of a crime).

- **Proposed directive on provisional legal aid**

29. Dennis De Jong first gave his perspective as the European Parliament's rapporteur on the proposed directive on provisional legal aid (the 'Legal Aid proposal'). Steven Cras and Barbel Heinkelmann offered brief comments.

30. He described as 'fundamental to the right to a fair trial', calling for the EU to comply with the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, to which the EU Member States have signed up but with which they do not all comply. He rejected the view that legal aid could be equated with social / welfare measures falling essentially within national competences: this is part of an internationally recognised right. He also commented in general terms that the concept of mutual trust was not yet a reality in Europe, and that whilst the European Parliament supported the fight against cross-border crime, it had been the wrong order to proceed with cooperation instruments without ensuring adequate safeguards first.

31. In relation to specific issues of substance in the Mr De Jong emphasised the Parliament's willingness to discuss the issues highlighted by Fair Trials and LEAP. He explained that the Directive must include the right to legal aid from the earliest moment in proceedings – for all persons, not only those deprived of liberty – and the right for defendants to choose their lawyer. The assessment of means to qualify for legal aid should not be overly restrictive or arbitrary so to ensure that it is available to those who really need it, and he mentioned that the recovery of costs should only apply when the individual has knowingly given false information to undeservedly pass the means test. He emphasised that legal aid should not be perceived as a social/welfare measure that should be reserved to national competence, but that it is clearly within the internationally recognised right to a fair trial and should be treated as such.

32. Mr de Jong noted weaknesses with the 'fragmented approach' taken by the Commission, in which procedural rights issues have been dealt with on a step-by-step basis, rather than in a comprehensive measure, and that this is particularly relevant to the proposed directive on legal aid which is not in complete synergy with the Access to a Lawyer Directive. He found that the position taken by the Council in its General Approach was particularly narrow and that it would be necessary for the Council either to adopt a real measure on legal aid, beyond the limited instrument proposed by the Commission, or it would seriously need to re-examine the cooperation systems themselves. Mr de Jong expressed his willing to stand firm on this point and said he will not bend unless he gets it agreed upon. Steven Cras, commenting on this proposal, pointed out that the Council was mindful of the need for compromise later in the process and had set its starting position accordingly.

- **Proposed directive on safeguards for children suspected or accused**

33. Barbel Heinkelmann discussed the proposed Directive on special safeguards for children in criminal proceedings (the 'Children proposal'), on which Dennis de Jong and Steven Cras made brief comments.
34. Ms Heinkelmann focused on some of the main points of contention, including: mandatory access to a lawyer, specific treatment in custody for juveniles, audio visual recordings and the exclusion of the recovery of costs from children.
35. In relation to access to a lawyer, Ms Henikelmann emphasised the vulnerability of children in the criminal justice system and that there are existing laws in most Member States to deal with them in a specific way. She explained that although access to a lawyer is a 'core provision' of the directive, it was clear that it was also costly, and that making the presence of a lawyer mandatory in all cases involving children may prove difficult for Member States which do not have legal aid systems in place to provide this.
36. As to audio visual recording, Ms Henikelmann also made the point that the Council's position of equating this with the assistance of a lawyer (such that the presence of the latter would obviate the need for the former) was not appropriate as the two serve very different purposes. She noted that it was fortunate the Council did not argue the same way with the access to a lawyer Directive as this would assume where there was audio-visual recording there would be no need for a lawyer! Ms Heinkelmann also observed that the function of audio-visual recording was not just to avoid ill-treatment but to produce a record to enable courts to assess the situation retroactively; this would be useful for the child seeking to demonstrate what really happened but, equally, prevent frivolous challenges at a later stage. Responding on this question, Steven Cras noted that there had been concerns in the Council about an absolute requirement to record questioning and noted the point that in Ireland, there are reports of children playing to the cameras when they know that an interview is being recorded to demonstrate bravado, which could end up counterproductive.
37. In relation to the Children proposal Dennis De Jong pointed out that even if an agreement can be made on the Children proposal, the European Parliament rapporteurs were committed to treating the directives as a package and agreement needed to be made on all the measures or none of them would be adopted.

- **Proposed directive on the presumption of innocence**

38. Steven Cras shared his perspective, from within the General Secretariat of Council of the EU, on the proposed directive strengthening certain aspects of the presumption of innocence and of the right to be present at trial (the 'Presumption of Innocence proposal'). Barbel Heinkelmann and Dennis de Jong offered brief comments.
39. The published approach of the Council was markedly different from the fairly radical draft position put forward by Ms Nathalie Griesbeck, the European Parliament's rapporteur. One point of contention is the application of the measure to legal persons, as proposed by the European Parliament's rapporteur, which the Council opposes. While the Council leaves room for inferences to be made when a client exercises their right to remain silent, the European

Parliament does not agree. Mr Cras also pointed out that the Council is proposing not to include in the measure a specific rule regarding admissibility of evidence obtained in breach of the rights to silence and not to incriminate oneself, an approach consistent with positions taken in the negotiation of the Access to a Lawyer Directive, when the Swedish delegation had resisted the inclusion of a remedies provision which would dictate to national courts how to treat evidence.

40. According to Mr Cras, the 'hardest nut to crack,' has been the right to be present at trial. He mentioned the difficulties in trying to harmonise the laws in the Member States on this issue, particularly given that there is already an EU instrument harmonising protections relating to retrials (which might need review depending on the content of the final directive).
41. In relation to the Presumption of Innocence proposal, Mr De Jong mentioned the issue of the media; he opined that, whilst respecting freedom of expression, authorities should be required to take steps to prevent publications which violate the presumption of innocence. It was hoped that this may be an easier area for the Council and Parliament to reach a compromise.

Breakout groups on the Procedural Rights Package

The Presumption of Innocence

42. LEAP members agreed that, though the presumption of innocence is well-established in general terms across all Member States, the way it is applied in practice varies significantly.
43. One of the common problems identified was the role the media played in undermining the presumption of innocence, covered in Article 4 of the proposed directive. LEAP Advisory Board member for Luxembourg Roby Schons described a case in which, a few months prior to the defendant's trial, a double page spread in a major newspaper claimed the suspect had been 'convicted because of DNA traces in two bank robberies.' During the hearing more articles came out and he was escorted to the court in chains by police. Not only was the information incorrect but the article appeared with the name and photograph of the defendant, and no was attempt was made to conceal his identity. The group agreed that both professional and lay jurors are very open to media influence; there is a need for sanctions where leaks are made to the press however it was noted this can be very difficult to control, and also raises issues relating to freedom of expression.
44. The group also discussed the issue of remedies for violations of the presumption of innocence. In the Luxembourgish case above, a civil claim was made under the civil code and also Article 6(2) of the ECHR. One participant suggested that where a defendant had been wrongly presented as guilty prior to trial, a remedy could be virtually useless as the harm to their reputation would have already been done. As in cases where pre-trial detention is ordered, the suspect has by this point already been branded as guilty. Damages for unjustified pre-trial detention played an important role in providing redress.
45. In relation to rules on the gathering of evidence, a guest from the Serbian Bar Association noted that in Serbia the law obliges the defence to disclose evidence in their possession prior to the prosecution lodging the indictment, essentially reversing the burden of proof. In Poland, where the prosecutor gathers the evidence, judicial review of evidence-gathering may be quite passive and leave the court under pressure to give a conviction when the case is referred to it.

Safeguards for Children

46. LEAP members shared their opinions on which aspects of the proposed directive were crucial to ensuring its effectiveness and identified the three main areas of concern as: the practical realities of the provisions on access to a lawyer, the need for audio-visual recording and ensuring that individual assessments cannot be derogated from in ways which void them of purpose.
47. Participants shared the view that Article 6 of the Commission's proposal – envisaging an absolute right of access to a lawyer – was undermined by the ineffectiveness of the legal aid systems within their Member States. It was said that, in Germany, many lawyers end up representing children pro bono when they do not qualify for legal aid, in order not to leave them without representation. If representation is made mandatory there is a risk that the child will be required to have a lawyer they cannot pay for. In the Czech Republic, children are provided with a lawyer but the role is so badly paid that the quality of the representation is extremely poor. Participants also noted that lawyers should not be expected to provide additional services in relation to child defendants which they are simply not trained to provide. Many of the participants were also concerned that the Children proposal was adding obligations where there was no legal aid system in place to realise them in practice.
48. The way in which children are questioned, and the lack of safeguards in place to protect them during this process, was another common concern. There was agreement that audio-visual recording is not itself sufficient: it was important to have additional safeguards – such as the presence of a social worker – to ensure the testimony of the child is not the result of undue pressure or intimidation. There were also concerns about conversations outside of the formal interview situation which are not captured by the audio-visual recording but which may involve undue pressure being placed on the child suspect. A lawyer is not necessarily able to provide the emotional support necessary in these situations and an example of good practice was given in Portugal where both a lawyer and a social worker must be present during the questioning. It was also said that in Bulgaria, provisions requiring investigations to be carried out by a specially trained officer appear good on paper but the training requirements themselves are insufficient. Examples were given of teachers or psychiatrists being present in the room but their assistance being merely ornamental as they didn't play a remotely active role during questioning.
49. The group heard one example from Bulgaria where two 14 year old girls, who were involved in the murder of another 14 year old, had their case covered extensively in the press before and during the trial. The coverage includes stories online posted about the girls, their names, their photos and their sentences. Even after the girls had served their sentences the press found out where they lived and took pictures of them outside their homes and where they worked. The intervener commented that this showed disregard for the special vulnerability of children during criminal proceedings and also could be seen as infringing on the presumption of innocence.
50. In Italy there is an entirely different system for dealing with child suspects. There is a separate civil procedure with specially trained judges and social service workers. They also have a probation period for children who have committed an offence, in which the child is observed by the social services and if they behave their trial will be cancelled. However, it was said that the process was actually too informal and that the gap between the practices for children and adults

was too big. There was a concern about police using the probation period and incentive of avoiding criminal proceedings to persuade the child to admit to the crimes.

51. LEAP members agreed that ensuring each child has an individual assessment, taking into account the child's personality as well as social and economic background, is a key safeguard for the interests of the child in criminal proceedings. There is a real need for the child actually to understand the rights which are being provided for them, not just to hear them, in order to ensure they are able to participate in the proceedings. In the Czech Republic there is supposed to be a multi-disciplinary assessment of the child from the very beginning of proceedings however it was remarked these assessments did not necessarily lead to significant adjustments. In the experience of our UK practitioner, even when the child was diagnosed with a mental illness, the authorities would make little effort to accommodate their needs. There was a general consensus that more needs to be done to ensure that the criminal proceedings are adapted to deal with the personal problems faced by members of this particularly vulnerable group.

Legal Aid (provisional and ordinary)

52. The Legal Aid proposal, as proposed by the Commission, only requires that provisional legal aid be granted to those deprived of liberty. LEAP members expressed their concerns that the proposal was ineffective in actually tackling the substantive problems with legal aid systems. The discussions highlighted the very different mechanisms used to assess eligibility for legal aid across and how prohibitively low remuneration for legal aid cases was for lawyers.
53. The point at which legal aid is provided, as well as the way in which it is provided, was very different in the various legal systems. In Ireland, for example, there is a strict means test applied at the police station, while in Germany a public defender may be appointed only after the defendant has seen a judge. In Poland it was reported that only 6% of all defendants ever come into contact with a lawyer at any stage of the entire investigative stage; there is a right to assistance during the court phase but suspects are told that if they are found guilty they will have to bear the legal fees. This discourages defendants from exercising their right to a lawyer as most defendants don't want to take the risk. In Portugal, where defence is mandatory, defendants are required to pay the public defenders if they are convicted. In many cases they simply cannot pay and the lawyers end up getting no fee. Overall it was clear that the eligibility requirements for legal aid vary considerably and the income thresholds in order to qualify for legal aid can be so low that relatively few people will actually get it.
54. Across the board participants agreed that lawyers taking on legal aid cases were paid extremely badly and the quality of the assistance was generally very low. A practitioner in Poland remarked that there was a choice between doing the case properly and not earning enough money to live, or cutting corners in the case and making money elsewhere. More complicated cases with more serious charges tended to carry a higher fee but in Spain for example lawyers are still only getting paid as little as €300 for a murder case. In Ireland, and presumably in other states, some lawyers encourage their clients to plead guilty as they will get paid the same amount anyway. There generally was a flat fee regardless of how long the case lasted or how much work you do which discouraged quality lawyers from investing their time in the case.

The view from Luxembourg: The Court of Justice's role in Criminal Cases

Lars Bay Larsen (Judge at the Court of Justice for the EU)

55. With the increasing role of the CJEU in criminal cases, LEAP was pleased to hear from Judge Lars Bay Larsen of the CJEU, who described the CJEU's approach to the development of the case-law in earlier EAW cases such as *Kozłowski*¹⁰⁸ and *Wolzenburg*,¹⁰⁹ which related to the rules regarding refusal of extradition of those resident of or staying in the executing Member State. Responding to the disappointment in some quarters regarding the ruling in *Radu*,¹¹⁰ which had taken a very narrow approach to a question raising an issue as to the protection of fundamental rights in the EAW system, Judge Bay Larsen explained that the CJEU was reluctant to go beyond the facts of a case to address broader issues in the abstract. He shed light on the reasoning behind the ruling in *Melloni*,¹¹¹ underlining the CJEU's line that in order for the EAW system to work, mutual trust must apply uniformly, an essential condition of many EU instruments.
56. The protection of mutual trust had, of course, been a key feature in the CJEU's recent *Opinion 2/13*, relating to the accession of the EU to the ECHR, in which it had expressed concern that ECHR rules could lead Member States to question mutual trust by checking each other's compliance with fundamental rights. This had led one commentator, Prof. Steve Peers, to affirm there was henceforth a 'moral duty' to resist accession which would, in this light, be prejudicial to human rights. LEAP member Nuala Mole, as noted above, also criticised the ruling.
57. Judge Bay Larsen pointed out, however, that the rule was 'mutual trust but not blind trust', referring to recital 19 of Directive 2104/41/EU on the European Investigation Order, which states that the presumption of compliance with human rights 'is rebuttable'. This topic was returned to in depth during the final part of the session, largely focused on the protection of human rights in mutual recognition systems.

C. THE FUTURE OF EU LAW IN CRIMINAL JUSTICE

Plenary session on Mutual Recognition

Kasper Van der Schaft (Lead Prosecutor, International Department, Amsterdam extradition court) and Jozef Rammelt (LEAP Advisory Board for the Netherlands), group debate & discussion

58. A group discussion was held in the final plenary session enabling practitioners to discuss the realities of the European Arrest Warrant (EAW) in practice. LEAP Advisory Board member for the Netherlands Jozef Rammelt spoke to the group, opining that 'instruments dealing with mutual recognitions are based on an absolute fiction' and that mutual trust was liable to result in human rights infringements. He highlighted concerns as to proportionality and the need for mutual recognition of the decision to refuse execution too.
59. Kasper Van der Schaft, the Lead Prosecutor of the international cooperation division of the Amsterdam extradition court, gave his views on whether reforms of the EAW were necessary

¹⁰⁸ Case C-66/08 [Szymon Kozłowski](#) 17 July 2008

¹⁰⁹ Case C-123/08 [Dominic Wolzenburg](#) 6 October 2009

¹¹⁰ Case C-396/11 [Radu](#) 29 January 2013

¹¹¹ Case C-399/11 [Stefano Melloni v Ministero Fiscale](#) – 26 February 2013

and he asserted that he had 'faith in the system'. He emphasised that the instrument was based on mutual trust and he did not see the harm in accepting assurances from the state requesting surrender that human rights would not be abused – a position highly relevant in light of current concerns emitted by, for instance, the ECtHR as to the reliability of assurances given within EU systems. He explained that prosecutors have to treat findings on prison conditions with caution, as evaluations such as Europe's Committee for the Prevention of Torture ('CPT') reports, tended to 'look for problems', a position LEAP does not share.

60. Mr van der Schaft went on to say that prison conditions should be assessed in light of the general living conditions of the member state and that it can be reasonable to ask defendants to serve their sentences in the conditions of the country they are to be tried in. He also emphasised that in Polish cases where they make ad-hoc deals with the Polish prosecutors so to ensure that the extradition can be avoided. LEAP members however asked whether this was not evidence that reform of the EAW Framework Decision is necessary, if prosecutors are actively cooperating to avoid compliance with its requirements.

Workshops on the future of EU criminal justice

Mutual recognition and Human Rights

61. With the European Commission having responded unfavourably to the European Parliament's calls for reforms to address deficiencies in the EAW system, LEAP has been increasingly searching for solutions within the courts. Part of the June 2014 meeting on strategic approaches to litigation at the CJEU was dedicated to exploring ways of obtaining preliminary rulings as to the approach to human rights questions under the EAW. An initial strategy had been devised at that meeting aiming to achieve recognition from the CJEU that judicial decisions finding human rights violations in the issuing Member State should, quite reasonably, require the executing Member State to refuse the EAW.
62. LEAP Advisory Board member for Belgium Christophe Marchand discussed a case falling within the ambit of that strategy, involving an extradition to Romania where the prison conditions are alleged to constitute a violation of Article 3 ECHR. He explained that, having worked with Fair Trials on the case before the Belgian courts, in which a reference to the CJEU had been sought, he was now complaining to the ECHR in respect of Belgium's decision to extradite the person to face those conditions, in the face of numerous judgments of the ECHR against Romania in respect of its prisons. It is hoped that this case could give the ECtHR an opportunity to react to the CJEU's *Opinion 2/13* ruling.
63. Following on from Mr Van der Schaft's speech, there was discussion as to the role of assurances given by issuing judicial authorities, particularly in light of recent developments where expert evidence from Lithuania had revealed that assurances given to the English courts had not been complied with after surrender. There was a certain practical difficulty in obtaining access to the prisons – with local authorities saying such access would be contrary to the concept of mutual trust! – but there was sufficient evidence to establish that assurances had not always been implemented, a point which has since been reflected in a report of the UK House of Lords.¹¹²

¹¹² Available at <http://www.publications.parliament.uk/pa/ld201415/ldselect/ldextradition/126/12602.htm>.

64. This workshop also discussed the European Investigation Order (EIO), which allows mutual recognition of investigative decisions, and unlike the EAW contains an explicit EU-level human rights exception (Article 11(1)(f)) (linked to Recital 19 cited by Judge Lars Bay Larsen). LEAP members thought it positive that it could be used for the benefit of the defence, meeting a current disadvantage in some mutual legal assistance systems, and it was agreed that, as with other measures, much would depend upon the way it was implemented in practice.

Pre-trial detention: updates from the EU project and European Supervision Order

65. In this workshop, LEAP Member Maria Mousmouti gave an update on the findings of the Centre for European and Constitutional Law in Greece in the context of the project with Fair Trials, launched in June 2014, which aims to create a unique knowledge-base on pre-trial detention practices in different Member States so to inform the EU's consideration of potential legislation in this area. The main highlights were: that deference between judges leads to systematic renewals of detention; inadequate substantiation and reasoning of decisions; underuse of alternatives to detention; and the lack in practice of regular reviews required in law.
66. Other participants in the workshop (some involved as partners in the project) shared these concerns, pointing to inadequate systems for continual review of the initial decision over time, essentially a failure to provide ongoing 'sufficient' reasons as required under Article 5(3) ECHR. Broad terms such as 'organised crime' lent themselves to abuse, as they could be interpreted by prosecutors (with the courts deferring to their assessment) as capturing less serious conduct. Electronic monitoring also continues to be inaccessible, with the example given of Greece where a €3,000 deposit is required up front, leaving this a largely academic alternative in most cases.
67. A partial attempt has been made to address pre-trial detention with Framework Decision 2009/824/JHA on the European Supervision Order, which allows supervision measures enforced in another Member State to be imposed as an alternative to custody. Countries had been extremely slow to implement the ESO and the group – composed of 20 criminal justice professionals from 9 countries – had never heard of it being used in practice. LEAP Advisory Board member for Portugal Vania Costa Ramos described the implementation situation in Portugal, pointing to the need for active cooperation between the authorities of the two states in order to make it work in practice.

How rights are enforced: remedies for procedural rights violations in the EU

68. The goals of the Roadmap Directive – and with it, the incremental strengthening which it may bring to mutual trust – fail if the Directives cannot be enforced. Yet, little provision is made for remedies in the texts. The group thought this important: as emerged from this workshop, there is a wide range of rules in place within the different systems for dealing with evidence obtained by a procedural violation, leaving questions as to the need for common minimum standards.
69. The French system was presented as a positive example of the way in which courts can pronounce the nullity of procedural acts, and the evidence collected from them inadmissible. Where defendants can demonstrate a procedural violation, there is the possibility of the act in question being cancelled completely and it was said that many French lawyers promise clients they can get cancellation of the files even for small issues. In Poland, there is no question of

admissibility of evidence and the only option for the defence lawyer is to argue in court that the evidence collected in this way is not credible. In Sweden there are two options available for procedural violations: in most cases the defence can ask for a reduction of the sentence or, as a last resort, there is the possibility for financial compensation – an approach in respect of which it may be asked whether it actually meets the objective, common to all the Directives, of safeguarding *the fairness of the proceedings*. A lawyer from Portugal observed, however, that the system of nullity is strong and extends to the ‘fruit of the poisoned tree’, ensuring subsequent acts based on the impugned act are also removed from consideration.

70. Of course, this would be a controversial area of action for the European Commission, with a prevailing doctrine in EU law in general, but particularly in the criminal sphere, that remedies are an issue for domestic law. However, there was certainly a need for further research– with more discussion needed as to the value add of potential EU action in this domain.

CONCLUSIONS & RECOMMENDATIONS

71. LEAP concluded the following:

- a. **LEAP will deliver its implementation strategy** – In accordance with its October 2015 strategy, LEAP will continue to facilitate the implementation of the Roadmap Directives through litigation, practitioner training, legal publications and channelling information to the European Commission. During the course of 2015, contact will be made with bar associations and others in order to develop new partnerships for this purpose.
- b. **EU must complete the Roadmap measures** – This is an important moment in the life of the Roadmap, and with that the project to strengthen the foundations of mutual trust, with the Legal Aid proposal, Presumption of Innocence proposal and Children proposal already in or nearing trilogue phase. The Latvian, Luxembourgish and, ultimately, Dutch presidencies of the Council should ensure these files progress to their conclusions.
- c. **The European Supervision Order must be implemented** – LEAP, a network of over 140 criminal justice professionals from all 28 Member States, has not seen a single example of the ESO being used in practice. It appears that mutual recognition is more popular in some cases than others. Given that this measure is capable of ensuring better respect for fundamental rights, the European Commission should ensure it is implemented.
- d. **The EU should now consider legislation on pre-trial detention** – With a mounting evidence base showing excessive recourse to detention, the EU should now bring forward proposals to address this. This would help reduce overcrowding, which otherwise appears destined to lead national and/or regional courts to withhold cooperation.

Fair Trials Europe

Legal Experts Advisory Panel

March 2015

Legal Experts Advisory Panel

LEGAL EXPERTS ADVISORY PANEL

SURVEY REPORT:

ACCESS TO THE CASE FILE

MARCH 2015



Co-funded by the Criminal Justice
Programme of the European Commission

About LEAP

The Legal Experts Advisory Panel (“LEAP”) is a network of now over 140 criminal justice and human rights experts, bringing together (at the date of this publication) 109 defence practitioners from 103 firms, 18 NGOs and 14 academic institutions. It is coordinated by Fair Trials Europe and its Advisory Board, currently composed of 25 Members from 22 Member States. Members have in-depth knowledge of the EU’s diverse justice systems and a common commitment to human rights. LEAP

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. In the twelve months preceding this publication, LEAP met four times in three locations, including roundtable meetings, specialised litigation seminars and its Annual Conference, bringing together LEAP members from 21 Member States and representatives of all the EU institutions and Court of Justice of the EU.

Through briefings and direct meetings with policy-makers, LEAP participates actively in the discussions surrounding the negotiation of the directives proposed or adopted under the 2009 Roadmap for strengthening procedural rights. In parallel, LEAP members also work with Fair Trials to provide training, comparative expertise and litigation support to lawyers in the Member States.

About Fair Trials

Fair Trials is a human rights organisation based in London (Fair Trials International) and Brussels (Fair Trials Europe) which 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 others in their work to protect fair trial rights.

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INTRODUCTION

Background: LEAP's implementation work

1. LEAP participated actively in the negotiations which lead to the adoption of the three first directives adopted under the 2009 Roadmap for strengthening procedural rights in criminal proceedings (the 'Roadmap Directives'). As explained in its March 2014 report *Stockholm's Sunset*, LEAP is supporting further work by the EU on further measures, but its top priority is the implementation of the Roadmap Directives, with a view to ensuring their impact in practice.
2. In October 2014, LEAP met for a dedicated roundtable to develop an implementation strategy, summarised in its February 2015 paper, *Towards an EU Defence Rights Movement*.¹¹³ The strategy focuses on the provision of training and litigation support, but also emphasises the need for cooperation with national governments and legislative bodies responsible for implementation, and the European Commission in its monitoring and enforcement of the Roadmap Directives.

Subject matter & objectives of this report

3. This report provides a snapshot of the situation in 17 Member States in relation to access to the case file – one of the four key issues of concern for LEAP in its EU Defence Rights Movement paper – following the expiry of the deadline for implementation of Directive 2012/13/EU on the right to information in criminal proceedings ('the Directive'). It identifies good and bad practice and areas where clarification of the Directive is needed from the CJEU.
4. Fair Trials hopes that the information collated in this paper will assist the EU Commission in recognising instances of implementation oversight in the various Member States; assist Member States which have not yet transposed the Directive and, for those Member States which have and which are covered by the survey, highlight certain areas of concern; enable lawyers to view their own system through a comparative prism and encourage courts to do the same; inform non-governmental organisations in their domestic advocacy efforts for implementation of the Directive; and provide a useful knowledge base for academics conducting research into the area.
5. We recognise that we are unable, in a study of this nature, to capture every subtlety of the national procedures and we are aware that laws adopted during the study or after may alter the position we present in our findings. As part of the ongoing implementation conversation, we are very happy to receive feedback on the report. For consistency, whilst acknowledging the variety of systems we have referred consistently to the 'suspect' at all different stages in all systems.

Structure of the report

6. The report first reviews the pre-existing principles relating to access to the case-file (Part A), before then reviewing the relevant provisions of the Directive, namely those of Article 7, together with our interpretation of them (Part B) which has informed the conduct of the survey. We then present the background and method of the survey (Part C), then offer country-by-

¹¹³ Available at: <http://www.fairtrials.org/wp-content/uploads/5A-IMPLEMENTATION-MOVEMENT-PAPER.pdf>.

country analysis (Part D), then a thematic analysis (Part E) and finally general findings (Part F). We conclude with recommendations to key actors and stakeholders.

A. PRE-EXISTING STANDARDS ON ACCESS TO THE CASE FILE

7. Access to the case file questions arise in the case-law of the European Court of Human Rights ('ECtHR') relating to Articles 5(4) and 6(3)(a), (b) and (c) European Convention on Human Rights ('ECHR'). These are, essentially, the principles which the EU sought to codify (and possibly build upon) in Article 7 of the Directive. Some are well established, while others require clarification.

Access to the case file prior to initial questioning

8. The ECtHR arguably supports a right of access to documents prior to the first interrogation. Lawyers in France, relying on Article 6(3)(c) ECHR, have argued that the right of access to a lawyer as from the first police questioning established in *Salduz v. Turkey*¹¹⁴ is ineffective without access to the case file. A recent judgment, *A.T. v Luxembourg*,¹¹⁵ seemed to take a negative view on this, suggesting the restriction of the file at this stage was permissible. National courts have also mostly taken that view, though the point remains contentious in several national bars.

Access to the case file during the pre-trial phase

9. Article 6 violations are assessed by the ECtHR after conclusion of the criminal proceedings, so there is no Article 6 case-law concerning access to the case file at the pre-trial stage in isolation. However, in its case-law regarding Article 5(4) ECHR, the ECtHR appears to state a general view in acknowledging 'the need for criminal investigations to be conducted efficiently, which may imply that part of the information collected during them is to be kept secret in order to prevent suspects from tampering with evidence and undermining the course of justice'.¹¹⁶

Challenging pre-trial detention

10. Under Article 5(4), a person detained pre-trial must have access to a procedure meeting essential guarantees of a fair trial, including equality of arms, which requires that 'information which is essential for the assessment of the lawfulness of a person's detention should be made available in an appropriate manner to the suspect's lawyer'.¹¹⁷ Even if there is a legitimate reason for restricting access to the case file (see para. 9 above), this cannot be pursued at the expense of substantial restrictions on the rights of defence;¹¹⁸ the requirement is thus non-derogable.

Access to prepare for trial

11. The ECtHR has given a number of judgments under Article 6(3)(b) in relation to complaints that the failure to provide access to documents in a timely manner before trial has deprived the applicants of the 'time and facilities to prepare a defence'. It notes that 'unrestricted access to

¹¹⁴ See [Salduz V Turkey](#) (Application no. 36391/02).

¹¹⁵ See [A.T. v Luxembourg](#) App. no 30460/13 (Judgment of 9 April 2015).

¹¹⁶ See, inter alia, [Chruściński v. Poland](#), App. no. 22755/04 (Judgment of 6 November 2007),

¹¹⁷ See, inter alia, [Garcia Alva v. Germany](#) App. no 23541/94 (Judgment of 13 February 2001), paragraph 42.

¹¹⁸ See, inter alia, [Dochwał v. Poland](#) App. no 31622/07 (Judgment of 18 September 2012), paragraph 87.

the case file and unrestricted use of any notes, including, if necessary, the possibility of obtaining copies of relevant documents, [are] important guarantees of a fair trial in criminal proceedings, absent which an infringement of equality of arms may arise.¹¹⁹

B. ARTICLE 7 OF THE DIRECTIVE

The requirements of the provision

12. EU Member States' obligations regarding access to the case file are now articulated by Article 7 of the Directive, one of the provisions of the Roadmap Directives attracting the most optimism and discussion within LEAP and at Fair Trials' practitioner training events. A reminder of its text:

'1. Where a person is arrested and detained at any stage of the criminal proceedings, Member States shall ensure that documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers.

2. Member States shall ensure that access is granted at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, to those persons or their lawyers in order to safeguard the fairness of the proceedings and to prepare the defence.

3. Without prejudice to paragraph 1, access to the materials referred to in paragraph 2 shall be granted in due time to allow the effective exercise of the rights of the defence and at the latest upon submission of the merits of the accusation to the judgment of a court. Where further material evidence comes into the possession of the competent authorities, access shall be granted to it in due time to allow for it to be considered.

4. By way of derogation from paragraphs 2 and 3, provided that this does not prejudice the right to a fair trial, access to certain materials may be refused if such access may lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an ongoing investigation or seriously harm the national security of the Member State in which the criminal proceedings are instituted. Member States shall ensure that, in accordance with procedures in national law, a decision to refuse access to certain materials in accordance with this paragraph is taken by a judicial authority or is at least subject to judicial review.

5. Access, as referred to in this Article, shall be provided free of charge.'

13. Pending a ruling from the CJEU it is not completely clear what the provision requires, so we have set out our understanding of the main points as this was a key factor in setting the parameters for our conversations with the LEAP network.

¹¹⁹ See, inter alia, [Beraru v. Romania](#), App. no 40107/04 (Judgement of 18 March 2014), paragraph 70.

Our interpretation of the provisions

Access to the case file upon arrest / prior to interrogation: CJEU clarification needed

14. Whether Article 7(1) introduces a requirement access to the case file from the point of arrest (i.e. prior to questioning) is a talking point. Template pleadings circulated in Spain point to the word *detención* (police arrest) in the Spanish version, suggesting the right of access to the case file arises at the point of arrest itself. Others suggest the provision (only) articulates the equality of arms requirement in judicial procedures for the review of detention, and that it does not extend the right of access to the police phase. The CJEU will have to clarify the point but, for now, as the point is disputed, we chose to explore it with respondents in our survey.

Access to the case file to enable effective judicial review of arrest/detention

15. What is clear is that Article 7(1), at the least, articulates as EU law the requirement in the case-law of the ECHR based on Article 5(4) ECHR (para. 10 above) and requires access to those documents necessary to ensure equality of arms in the judicial challenge to the lawfulness of arrest / detention. Consistently with the case-law, this requirement knows no derogation: while Article 7(4) provides grounds for restricting access to material evidence, it states specifically that this applies only to the broader access to the case file under Article 7(2) and (3) (as to which, see paras. 16 and 17 below), which are themselves ‘without prejudice to [Article 7(1)]’.

The pre-trial stage: access as a rule, subject to reviewable derogations

16. Fair Trials’ understanding is that Article 7(2) expresses the broader view that access to the whole file is necessary to ensure equality of arms. As indicated by Article 7(3), the right of access to all material evidence under Article 7(2) is expressed as applying ‘at the latest’ upon submission of the merits of the accusation to a court, which implies it may be restricted prior to that point. Article 7(4) recognises the possibility of limiting such access to protect the life or rights of another person, or where access could undermine a pending investigation (presumably the instant one) or national security. The possibility of restricting access to the case file pre-trial, where justified, as reflected in the ECHR case-law appears to be reproduced in the Directive.

Judicial remedies for restrictions on access, including at the pre-trial stage

17. In accordance with 7(4) of the Directive, there should be a judicial remedy in respect of failure to provide access to the case file, a requirement implicitly present in Article 8(2) of the Directive and Article 47 of the Charter). Since this requirement applies (in line with the Directive’s scope) throughout the criminal proceedings. Thus – by accident or design – the Directive creates a right to judicial review of (pre-trial) restrictions on access to the case file, irrespective of the person being detained. Whereas in the Article 6 ECHR case-law restrictions on access to the may be ‘remedied’ by providing, on completion of the investigation, sufficient opportunity to prepare for trial, the Directive may be invoked to challenge the restriction at the time it is applied.

Provision of access to the case file to prepare for trial

18. Article 7(3) requires that access be provided to all material evidence ‘upon the submission of the merits of the accusation to a court’, showing a clear line is drawn when the case is actually sent

for trial at which the full file must be provided. Though the requirement to enable the ‘effective exercise of the rights of defence’ may have pre-trial application it certainly requires a sufficient opportunity to consult the file and prepare the case for trial, consistently with the ECHR’s requirement for adequate time and facilities to prepare a case (see para. 11 above). This remains subject to possible restrictions under Article 7(4), i.e. some evidence (witness identities, perhaps) may be withheld even at trial, again subject to judicial review.

C. APPROACH TO THE SURVEY

Status quo ante, 2013

19. In 2013, Fair Trials held a series of six meetings with 56 practitioners from 25 Member States to discuss the situation of defence rights falling within the scope of the Roadmap Directives, under a series entitled ‘Advancing Defence Rights’. This background gave us an initial impression of the sorts of problems which, it was hoped, implementation of the Directive might address.
20. One of the issues most commonly identified by practitioners was the problem arising from lack of or restricted access, at the pre-trial stage, to the evidence uncovered by investigative authorities. There were a number of key findings from the meetings:
- Access to any part the case file at the point of questioning was rarely provided, to either the suspect or their counsel, in any of the jurisdictions represented, with the result that lawyers mostly advised clients not to speak until they had seen the file.
 - In several Member States, though the of principle was full access to the case file in the pre-trial phase, powers to restrict access to the case file on certain grounds – in particular linked to the needs of the investigation – were routinely applied.
 - In some Member States, due to the application of such derogations over long periods of time, access to the case file was routinely not granted until just before or after indictment. This limited the defence’s ability to argue against detention and organise defence strategy during the pre-trial stage.
 - Problems were also reported in relation to the first court hearing following arrest, with insufficient time to review the evidence made available shortly before this (if indeed it was made available at all). This made it difficult to prepare an effective challenge to detention at this stage, even if no substantive restrictions on access to the case file were in place.
 - When access to the case file is provided, there are difficulties in terms of the manner in which access is provided. In some cases, only the lawyer can hold a copy of the file; in others, access can be provided to the client but problems arise due to the limited time to consult files before trial, costs associated with obtaining copies and the difficulties of consulting clients upon the content of the file in prison. These practical restrictions may reduce ability of the suspects and their representatives to mount an effective defence.¹²⁰

The Access to the case file questionnaire, 2014-15

¹²⁰ See [Vilnius Communiqué](#), [Paris Communiqué](#), [Amsterdam Communiqué](#), [London Communiqué](#), [Budapest communiqué](#)

21. In June 2014, Fair Trials distributed a questionnaire on access to the case file to members of the LEAP Advisory Board in order to assess the situation following the passing of the implementation deadline. The purpose of the project was to assess whether the requirements of the Directive had been met, where practitioners felt concerns lay in practice and where further interpretation of the Directive by the CJEU might be required.
22. The questionnaire (see Annex B) comprised nine questions asking respondents to outline the law and practice in their Member States. We focused on the four main stages of criminal proceedings prior to trial, based upon our reading of the ECtHR case-law and the Directive and earlier concerns raised by LEAP members: the police station or upon arrest or charge, the first determination of pre-trial detention, during the investigation and prior to trial itself. LEAP having always historically raised concerns about pre-trial justice, we did not, in this questionnaire, focus upon the withholding of information (e.g. witness identity) at the actual trial.
23. This survey is based upon responses from 17 Member States.¹²¹ The responses are also supplemented with information collected in person at the LEAP Annual Conference in February 2015. It was not necessarily possible to go into the same level of detail for every response; thus, the fact that a country is not listed in a specific paragraph does not of itself mean that the issue is inapplicable in that jurisdiction.

D. COUNTRY-BY-COUNTRY FINDINGS

24. **BE (BELGIUM)** – The initial arrest / questioning stage is provided for by Articles 28 or 47 of the *Code d’instruction criminelle* (‘CIC’), depending on the procedure; they provide for information about the charges but not the underlying evidence. Though this means the investigating judge will take the first decision on detention without the defence having had sight of the file, there is a court hearing Article 21 § 3 of the Law of 20 July 1990 on pre-trial detention ensures there is access (in certain cases a copy or electronic copy is granted) at latest on the day before the first appearance in court where the lawfulness of the detention will be reviewed. During the investigation, Article 21a CIC (where the investigation is led by a prosecutor) or Article 61b (where the investigation is led by a judge), as both amended by a law entering into force on 10 February 2013, entitle interested parties including the suspect to make a reasoned request for access to or a copy of the file. Access to or a copy of the file may be refused if this is ‘required by the needs of the investigation’, where access would cause a danger for third persons or violate the right to privacy, or where there is no legitimate reason for seeking access. In practice, access is usually granted when requested and the legal framework is respected. Upon conclusion of a judge-led investigation, under Article 127 CIC, the file is deposited with the court’s registry as from the first sitting of the chamber which decides whether the investigation reveals sufficient evidence to tried; if the case is prosecutor-led, the file will be made available usually 15 days before the sitting. In practice, access to the case file at this stage is not a problem.
25. **BG (BULGARIA)** – Police arrest without prior charges is regulated by the Act on the Ministry of Internal Affairs, Article 74 of which requires officers to provide the grounds of the arrest but not underlying evidence. If charges are pressed or where arrest is carried out further to a prior

¹²¹ Belgium, Bulgaria, the Czech Republic, Germany, Estonia, Greece, Spain, France, Croatia, Hungary, Ireland, Lithuania, Luxembourg, Poland, Portugal, Romania, United Kingdom.

charge, Article 219 of the Criminal Procedure Code ('CPC') provides that the charge must include a description of the charge and its legal basis together with evidence on which it is based – unless this will obstruct the investigation. Under Article 55 CPC, the suspected person has a right throughout to find out on what ground he is charged, obtain access to the case file and make extracts; however, in practice, these right are only applied at the end of the investigation when there is a specific right to acquaintance with the full materials (Article 228 CPC). Prior to that, extensive application is made of the 'obstruction of the investigation', including whether the person is detained. Objections can be made, though these are not often successful. Practically, the defence lawyer must go to 'extraordinary efforts,' to physically get access to the case file during the investigative stage, particularly prior to the first determination of pre-trial detention. Once the investigative is closed, access is unrestricted and, although there is no provision for making copies of the file, this is not a problem in practice. Measures had not been taken as of October 2014 to implement the Directive.

26. **CZ (CZECH REPUBLIC)** – The Criminal Procedure Code ('CPC') of the Czech Republic remained unchanged following the transposition deadline of the Directive and a single provision, Article 65 CPC, regulates access to the case file at all stages of the proceedings. Article 65(1) provides the right of the accused and their counsel to access the file and 'to make excerpts and notes therefrom, and to have duplicates of the files and the parts thereof made at their own expense.' However, 65(2) gives the prosecutor the power to refuse access if they have 'serious reasons' for doing so; such 'serious reasons' are not clearly defined which leads to abuse. If this derogation is applied, the suspect will usually decide to remain silent during the investigation until the file has been seen. Once the investigation is concluded, access to the case file poses no problem.
27. **DE (GERMANY)** – There were no changes made to the criminal law to transpose the Directive as it was felt that the legislation in place was already in conformity with its provisions. While there is no provision for access to the case file at the point of arrest, Article 147 gives the defence the right to inspect the files which are available to the court or which will have to be submitted to the court if charges are preferred, as well as to inspect officially impounded pieces of evidence. This access may be refused, in whole or in part, if the prosecutor deems that the access may 'endanger the purpose of the investigation'. In the case of the accused being held in pre-trial detention there is a specific provision, Article 147(2), which provides that 'information of relevance for the assessment of the lawfulness of such deprivation of liberty shall be made available to defence counsel in suitable form; to this extent, as a rule, inspection of the files shall be granted.' The main issue faced by the lawyer is getting practical access to the case file, and although the provisions give counsel the right to inspect the evidence this is sometimes limited to only the digital file. There have been cases reported where the files handed over have been encrypted and so require expensive software packages to be bought so as to access them, but also examples of cases where courts have gone to great lengths to ensure effective access, e.g. by supplying a computer for a detainee to consult a large volume of documentation. Access to the case file was not considered to be a major problem.
28. **EE (ESTONIA)** – Section 34(1) of the Code of Criminal Procedure ('CCP'), which was amended to implement the Directive, regulates access to the case file at the pre-trial stage. The suspect can *request* access to evidence which is needed for clarifying the content of the allegation, or which is necessary to challenging an arrest warrant. Both these rights of access can be restricted by the

prosecutor on grounds relating to the life of another person or the interests of the investigation. These derogations can be applied in respect of the material necessary to challenging an arrest warrant, which Estonian lawyers believe to be plainly incompatible with Article 7(1) of the Directive. In practice, the defence frequently does not have access to the necessary documents prior to trial, including those needed to challenge detention. Such restrictions are subject to review by a prosecutor and ultimately the court, though there are no reported challenges yet. Once the investigation is complete, under Section 224 CCP, the full file is provided in electronic form, with the option to request paper copies. Trial preparation on the basis of the electronic copies can be difficult when there is a need to liaise with clients in prison.

29. **EL (GREECE)** – The Directive was transposed in February 2014 in Law Nr. 4236/2014 which amended the Criminal Procedure Code ('CPC') of 1950. Article 101 CPC governs access to the case file at all relevant stages, as the case may be combined with other provisions. There is a right to receive a copy upon request, at the person's request. Articles were inserted by the implementing law – possibly raising an issue of regression – providing that exceptions could be on the basis of risk to life and health and the public interest including the protection of the investigation or national security. It was not clear whether this derogation was *created* by the implementing law, which would amount to regression prohibited by the Directive. The application of these derogations is reviewable by a prosecutor, then a three-judge chamber. In practice, a person deprived of liberty will have access to documents which are essential to challenging the lawfulness of detention. No issue was reported in relation to trial preparation.
30. **ES (SPAIN)** – No provision is made for access to documents upon arrest prior to the judicial phase. There has been significant activity of LEAP members in relation to access to the case file at the police stage, with lawyers invoking the Directives, the Spanish police actively refusing to apply them directly pending the adoption of new legislation, and the courts declining to apply the directives directly. Though the situation will be addressed by a law due for adoption by the end of 2015, the lack of application of the Directive in the meantime is problematic. Once the judicial phase is in course, Article 302 of the Criminal Procedure Law provides for access to the whole case file during the investigation, unless part of the proceedings is declared 'secret'. The judge, upon the request of the prosecutor, is able to declare the investigation secret for renewable 30 day periods. In practice, this power (*secreto de sumario*) is often renewed over lengthy periods of time. It must, however, be lifted at least 10 days before the end of the pre-trial phase. This derogation currently makes no distinction for the purposes of a person detained pre-trial (*prisión provisional*). One version of the draft law proposed by the lower chamber of parliament would have amended Article 302 in line with Article 7(1) of the Directive, but the legislative situation was changing and it was not clear what the text would do.
31. **FR (FRANCE)** – Law n° 2014-535 of 27 May 2014 modified the Code of Criminal Procedure ('CCP') in order to implement the Directive. Article 63-4-1 CCP, as amended, and that where a person is placed under police custody, the person or their lawyer may consult the formal documents relating to the detention – this does not provide a right of consultation of the underlying evidence. After this, under Article 393, upon the first appearance before the prosecutor who will decide whether to prosecute, the lawyer or the person not assisted by a lawyer may consult the case file; under Article 394, these continue to have the right of access to the case file until trial, which will be between 10 days and two months later. In the (relatively few) cases that a judge-

led investigation is carried out, Article 116(5) CCP provides for access to the case file upon the first appearance before that judge. Thereafter, under Article 114 CCP, the file is at the permanent disposal of lawyer; the lawyer must request permission of the judge to provide a copy to the client, and this is often refused; however, the unrepresented suspect has a right to a copy. No derogations to the right of access were mentioned. It follows from the above that, in all cases, at the point at which decisions relating to detention will be taken by the judge of freedoms, the person or their lawyer will have had access (legally speaking) to the file. There were, however, problems reported in practice at the pre-trial stage, notably due to the large size of files which made their consultation at the initial stages difficult. Depending on the type of procedure, different articles make provision for consultation or provision of a copy of the file when the case is sent for trial at the correctional tribunal.

32. **HR (CROATIA)** – Access to the case file is regulated by one provision which is applicable at all stages of proceedings. In theory, according to Article 184 of the law on Criminal Proceedings, the suspect and their lawyer ‘have the right to access the case file after the accused is interrogated, if the interrogation is completed before the decision on conducting the investigation is being brought.’ However, there are wide derogations provided for under Art 184(a) which are frequently used, though their application is limited in time to 30 days. There is never any access to the case file at the point of arrest prior to questioning and police often do not acknowledge that they even have a file available. Article 184(a) guarantees a detained person access to the parts of the case file which establish a ‘grounded suspicion’, that they committed the offence, and any evidence related to the ‘circumstances on which the decision to order or prolong pre-trial detention is being made’. The storage of the file causes huge problems for the defence as it is kept locked in the office of the State Attorney’s Deputy. The lawyer may have to wait hours until the office hands over the file, and as the deputies do not work in the afternoon, there is a very small window of time when the lawyer must be physically present to get the file.
33. **HU (HUNGARY)** – The legislature took steps to implement the Directive with amendments to the Code of Criminal Proceedings (‘CCP’) taking effect 1 January 2014. No provision is made for the provision of access to evidence at the point of arrest prior to questioning. The pre-trial phase in general is regulated by Article 186 CCP, which provides the suspect and their lawyer a guaranteed access to expert opinions and minutes of investigative acts at which they are present; access to other documents is at the discretion of the investigative authority, ‘provided that [such access] does not pose a threat to the interests of the investigation’. Further to recent amendments a formal decision has to be issued on refusal of access to documents, which may be challenged with eight days though the impact is not yet known. Specific provision is made for the situation of a person detained pre-trial by Article 211, which provides for a right to the prosecutor’s motion for detention and a copy of materials on which it is based. In practice, prior to the 2014 amendments, detention motions made reference to general evidence which could not be challenged, leading to several findings of violation of Article 5 ECHR by the ECtHR. However, data is not yet available as to the effect of the new amendments.

34. **IE (IRELAND)** – There is no concept of the ‘case file’ as such,¹²² and in the absence of a consolidated criminal procedure code the rules relating to the disclosure of evidence from a variety of sources. At the point of arrest, there is no requirement for the suspect to receive anything other than the reasons for their arrest, though the basis for the allegation will become clear in the questioning (NB: inferences may be drawn from the suspect’s silence in this interview). Thereafter, a principle of full disclosure applies, requiring prosecutors to disclose evidence to the defence. In simple cases disposed of on a summary basis, this may be a fairly basic exercise, as there may not be formal witness statements to disclose and these cases attract less procedural protection than trials on indictment. In relation to cases tried on indictment, the law requires full disclosure, extending to all materials collected during the investigation, even those which do not assist the prosecution and might assist the defence. Thus, disclosure will often include large amounts of irrelevant security camera footage, phone records, statements etc. which will not be relied upon against the suspect. A recording of a police interview will not, however, be disclosed without a court order. Judicial review proceedings may be brought in respect of failure to disclose important evidence, e.g. where it has been lost or not obtained, seeking the discontinuance of proceedings. There is only very limited use of public interest immunity certificates, allowing the withholding of sensitive information (such as the identity of witnesses), and only in a specialised court (the Special Criminal Court). Though prosecutors comply with this duty, disclosure often happens late rather than early, which is considered to pose a problem in relation to the requirements in Article 7 of the Directive for access to be provided ‘in due time’ to exercise defence rights. As a result, it will be difficult to challenge detention at the early stages and successful challenges will often happen later than the first determination, after evidence has been provided and its admissibility decided.
35. **LT (LITHUANIA)** – Article 181 of the Criminal Procedure Code applies to all stages of the criminal proceedings and states that the suspect or his counsel can access the case file at any stage of the pre-trial investigation. The documents have to be requested in writing by the suspect or the defence counsel, and the request must be decided upon by the prosecutor within seven days of receiving it. Prosecutors have the power to refuse access, and to limit the defence’s ability to take extracts and copies, if such access may hinder the ‘success of the pre-trial investigation.’ In practice, refusals from the prosecutor are very prevalent and access is frequently totally or partially denied. There are no specific provisions for when a person is detained pre-trial and access to the case file is still routinely refused in these cases. There is the option to appeal the decision not to grant access to the prosecuting judge, but our respondent reported that such appeals are often unsuccessful. A reform pending before the *Seimas* since December 2012 will reform the access to the part of the file which is the basis of the motion for pre-trial detention.
36. **LU (LUXEMBOURG)** – Article 85 of *Code d’instruction criminelle* (‘CIC’) provides that (1) following the first interrogation, the suspect, their counsel or the civil party may receive communication of the elements of the file, and (2) communication of the case file elements may be requested in any case by means of a written request addressed by the person or their counsel to the investigating judge. As a result, since the investigating judge takes a first decision as to detention at this point, this is done without the defence having had sight of the file; there is, of course, an

¹²² We will nevertheless refer to ‘access to the case file’, it being understood that for these cases we are referring to the provision to the defence of evidence which is or could be in the possession of the prosecution.

immediate review by a court, at which point the file will have been seen, but the latter may defer to some extent to the investigating judge. Proposed law no. 6758 which will provide for access to the case file prior to interrogation by the investigating judge. However, access to the case file is not provided prior to questioning by police and the proposed law will not address this. It was, in the present situation, desirable to advise silence until the file had been seen though this could be met with complaints that it was obstructionist to the administration of justice. Once the first interrogation is complete access is given 'in the sense of being able to consult the file' but it may not be removed from the chambers of the investigating judge; while some lawyers take photographs of each page, there is currently no provision made for obtaining a copy, paper or electronic, at the pre-trial stage. There are no substantive derogations on the right of access to the case file. Once the case is sent for trial, there is full access to the case file and copies can be made and shared with the suspect, including if the latter is in prison.

37. **PL (POLAND)** – The response related to the current law but reforms will take effect in July 2015. Access to the case file is regulated by Article 156 § 5 of Criminal Procedure Code of 1997, as amended ('CPC') for all stages of the proceedings. Since 2 June 2014 the article has provided: 'if there is no need to secure the proper course of the preparatory proceedings or the protection of important interests of States (...) parties, defence counsels, attorneys and legal representatives are allowed to make copies or photocopies or may be issued certified copies of case files only with the consent of the authority conducting preparatory proceedings'. The pre-June 2014 versions of these exceptions were routinely applied, including in the cases of detained persons, limiting both the ability to participate in pre-trial proceedings and to challenge detention. It is too soon to assess new practice. Article 156 § 5a now specifically caters for the situation of a detained person, providing that the suspect and his lawyer must be provided, as soon as possible, with access to the case files containing the evidence containing the evidence referred to in the prosecutor's motion for detention. This provision is relatively new and has not yet had the impact. However, the general power to restrict access to the case file still applies in respect of other evidence. Restrictions on access can be challenged by interlocutory appeal before a senior prosecutor. Provision of access on completion of the investigation is regulated by Article 321 CPC. Access is usually provided to the hard copy of the file; copies can be made upon request.
38. **PT (PORTUGAL)** – There have been no amendments to the Code of Criminal Procedure code ('CPC') as a result of the Directive, with Article 86 and Article 89 as they stand regulating access to the case file during the investigative stage. The CPC provides that the suspect, their lawyer and any interested third party can access to the case file, make copies and take extracts throughout the entire procedure. Article 89(2) & (3) provide wide derogations to these provisions and allow the public prosecutor to declare part or the entire proceedings 'secret.' This power means they can refuse access to the case files they believe access 'can harm the course of the investigation or the rights of the procedural participants or victims'. Article 194(6) relates to coercive measures and requires that the person be provided with a description of the evidence substantiating the imposition of the measure – provided this will not seriously harm the investigation, the possibility of manifestation of the truth or the life and health of other persons. In practice, there is generally access but when secrecy is applied in more serious cases, challenging detention is problematic. After a formal accusation has been brought there is full

access to the case files and which may usually be taken to the lawyer's office, for a limited time, in order to be copied.

39. **RO (ROMANIA)** – Access to the case file is governed by Article 94 of the new Criminal Procedure Code ('CPC') effective from February 2014. It provides for a right of access to consult the file and take notes, and to obtain photocopies at the suspect's expense. The right of consultation may be restricted, by reasoned decision, for reasons relating to the criminal investigation, though this is limited to 10 days from the initiation of criminal action. In the case of a detained person, the person has the automatic right to the full file. Prosecutors issued a document describing how they would approach the question of copies, stating that a copy would generally be made available subject to possible redactions of information relating to third parties.
40. **UK (UNITED KINGDOM – NB: ENGLAND & WALES ONLY)** – There is no concept of the 'case file' as such;¹²³ rather, provision is made for provision of evidence by the prosecution to the defence. Upon arrest of a suspect, their lawyer will be told what evidence forms the basis for the suspicion, including, occasionally, evidence such as security camera footage. Presently, this information is not given to a person without a lawyer, and guidance from a senior body clearly excludes this, ostensibly in order to protect the person's right to silence by avoiding their asking questions about the evidence. Thereafter, if a decision to charge is made, Part 10 of the Criminal Procedure Rules 2013 requires the Crown Prosecution Service ('CPS') to provide 'initial details of the prosecution case'; this includes a summary of the evidence and/or statements, documents or extracts supporting the prosecution case or, combinations of these and the suspect's previous convictions. These documents must be provided at the latest at the beginning of the day of the first hearing, at which a plea will be given and an initial bail decision taken. Under CPS guidance, prosecutors are supposed to provide copies of any documents on which they intend to rely. These initial details are usually supplied without difficulty, currently in paper, though it is not uncommon for barristers to arrive at court to find no papers available yet, producing delays. After the initial hearing, there is a continuing duty of disclosure under the Criminal Procedure and Investigations Act 1996: prosecutors must disclose material which is capable of undermining the case for the prosecution or assisting the case for the accused. A list is provided to the defence of unused material, which may be requested by the defence.

E. THEMATIC ANALYSIS

INITIAL STAGES

Access to evidence prior to questioning

41. There appears to be very little access to the case file at the point of initial questioning. The main reason seemed to be that the rules applicable for arrest required only the provision of essential information, and not the file, with the right of access to the case file arising afterwards (**LU, FR, BE, ES, FR, IE**). In two responses it was specified that where the initial interrogation is by an investigating magistrate, access to the case file happened after that first interrogation (**LU, BE**). In other responses, the indication was that general rules applicable at the pre-trial stage

¹²³ We will nevertheless refer to 'access to the case file', it being understood that for these cases we are referring to the provision to the defence of evidence which is or could be in the possession of the prosecution.

technically applied at this point (**BG, DE, EE, HR, LT, PL**) but that access was lacking in practice, possibly because these same provisions include derogations in the interests of the investigation, which would be applied at this point (**BG, EE, HR, LT, PL**). Only three responses (**CZ, EL, UK**) indicated that access was provided at this stage, but one of these (**CZ**) mentioned that derogations might be applied and one (**UK**) left unclear the position of unrepresented suspects.

42. The result of this general absence of access to the case file at the point of questioning appears to be that the usefulness of this stage is essentially nil when a person is represented. Several respondents commented that, without access to the evidence, they will simply advise clients to remain silent until they have seen the file. Thus, the initial interrogation loses much value as the suspect will simply choose to wait and challenge the lawfulness of his arrest before a court.

The first hearing on pre-trial detention

43. The requirement for a person deprived of liberty to be brought promptly before a judge has a special place in human rights jurisprudence, though mostly as acts as a guarantor against ill-treatment. LEAP members have, however, also reported that the first detention hearing before a judge is an important moment because a person detained at that point is likely to remain detained for a significant period, as other courts will be slow to interfere with the initial decision.
44. Yet, as several respondents (**HR, BG, ES, FR**) pointed out, the practicalities mean that this stage presents real defence challenges, as the file will be made available to the judge / court only shortly before the deadline, and it will be in movement between authorities prior to that, meaning that in practice there may be very little opportunity for the defence to acquaint itself with the file before this important hearing.
45. Three responses (**BE, PT, UK**) referred to rules providing for specific modalities on access to the case file at the first court hearing – though there may be others which were not mentioned in the responses. However, by and large, the legislation that the respondents referred to include no specific provision regarding the first detention hearing, which is covered by the general rule covering the whole pre-trial stage (**BG, CZ, DE, EE, EL, ES, PL, HU, HR, LT, LU, PL, RO**).
46. Some responses noted that the substantive right of access to the case file might be limited at this point on the basis of derogations, legally available or applied in practice even when the person is detained (**EE, BG, PL, ES**). This was a matter of more general concern and is discussed further below, but clearly derogations linked to the interests of the investigation will be most relevant soon after arrest, so their effect is particularly important to acknowledge at this point.
47. It should also be noted that in two jurisdictions where a first interrogation is taken by an investigating judge without the defence having prior sight of the file (e.g. **BE, LU**) that judge will also take a first decision as to detention and this will accordingly not be done with equality of arms; of course, that decision is immediately reviewed by a court, before which equality of arms will be ensured, but the court might defer to some extent to the investigating judge's view, making the lack of access at the initial stage potentially prejudicial.

THE PRE-TRIAL STAGE AS A WHOLE

In general (i.e. irrespective of the person being deprived of liberty)

General rules foresee access at the pre-trial stage

48. All the responses confirmed that the legislation foresees – in principle – access to the case file during the pre-trial stage (**BE, BG, CZ, DE, EE, EL, ES, FR, HR, HU, LT, LU, PL, PT, RO, UK**). One response (**EE**) noted that this general rule – the result of implementation of the Directive – was in principle an advance on the prior situation in which no access would be provided until closure of the investigation, though the availability of derogations diminished its significance.

Some question marks about extent of access

49. One respondent (**HU**) said that the law differentiates between the different types of material which the defence are entitled to access at this point, entitling the defence to access all expert opinions and minutes of the investigative acts where they can be present, but other documents can only be seen ‘upon the discretion of the investigative authority’. Some responses (**DE, UK**) noted concern about documents which were not considered by the investigative authorities to be material, but which might be relevant, though these could be requested.

Who gets access and how

50. A number of responses (**BG, CZ, EE, EL, HR, HU, LT, RO**) stated or implied that the general rules applied to both suspect and lawyer. Only one response indicated that the right belonged primarily to the lawyer, unless the person was unrepresented, with the possibility of giving copies to the suspect subject to approval which was often not given (**FR**). Where there was a right of consultation, subject to the application of derogations, the person could be put in possession of the file by the provision of a photocopy (**PT, RO, EL**).
51. Responses also showed that access to the case file was something often available only upon request or application (**EE, EL, GR, PT, LT**), as opposed to a right to obtain or an obligation incumbent upon the investigative authority to provide the documents. Respondents did not note that this, as such, caused problems in exercising defence rights. However, respondents were mostly lawyers, and it could be that such a requirement can pose problems for unrepresented suspects.

Derogations, how they operate and their use / effects

52. Two responses (**FR, LU**) no mention was made of derogations, suggesting there was a right of access to the full file. These positive examples show that investigations can be led without the use of secrecy, meaning that the use of secrecy powers should be limited to justified exceptions.
53. In general, however, the right of access to the case file was subject to derogations provided expressly in law (**BE, BG, CZ, DE, EE, EL, ES, HR, HU, IE, LT, PL, PT, RO, UK**). Derogations also took the form of a facility to certify specific items of evidence or information about evidence as being protected from disclosure by public interest considerations (**IE, UK**).
54. Responses mostly referred to derogations protecting the state’s ability to carry out an effective investigation (**BE, BG, DE, EE, EL, ES, HR, HU, LT, PT, RO**). The formulations of such derogations were variable, including, for example: ‘to secure the course of preparatory proceedings’ (**PL**); ‘to protect an important public interest e.g. the inquiry of the investigation,’ (**GR**); ‘if it will not

obstruct the investigation’ (**BG**); ‘if this may damage the criminal proceedings’ (**EE**). In one case (**ES**), the basis for the derogation as a safeguard of investigative efficacy is not in the text of the provision but arises in the case-law interpreting it. Other derogations related to the life and safety of third persons, including the victim (**BE, EE, EL, HR, PT, RO**). One response referred to a derogation so broad – ‘serious reasons’ – that it could lead to abuse (**CZ**). The public interest certificates available in the common law jurisdictions were also broad phrased but their use closely circumscribed by case-law (**IE, UK**).

55. Most of the legislative texts contained no further guidelines, though further guidance may arise from the jurisprudence of the courts (e.g. **ES**). This requires further thought, as the articulation of such derogations may raise an issue vis à vis the need for legal certainty and clarity in implementation of a Directive, particularly for unrepresented persons.
56. In three Member States (**ES, HR, RO**) these provisions regarding derogations on access to the case file were subject to limitations in time (respectively 30 days renewable, 30 days maximum and 10 days maximum). Other responses did not suggest that derogations were limited in time.
57. Various respondents noted that the use of such derogations was prevalent (**BG, EE, ES, HR, HU, LT, PL**), or occasional (**CZ, PT**), in practice. In some cases (**EE, HU, PL**) these comments referred mostly to the practice pursuant to the situation prior to recent amendments, with the impact of the changes (made in order to implement the Directive) not yet known.

The pre-trial stage when a person is deprived of liberty

58. Most responses (**BE, EE, DE, HR, HU, PL, PT, RO**) made specific provision for the situation of a person deprived of liberty, in line with Article 7(1), with different approaches taken to the delimitation of which documents need to be disclosed.
59. In one case, which Fair Trials regarded as positive (**RO**), when the person is detained, that person and their lawyer have the right of access to the full case file, without possibility of derogation. In another (**BE**), the law governing pre-trial detention likewise provided for access to the whole file.
60. Two responses (**HU, PL**) referred to legislation providing for access to documents referred to in the prosecutorial motion for detention, a solution also envisaged by a draft law mentioned in one response (**LT**). Both provisions were new and it remained to be seen how they would operate in practice, a key question since this approach delegates the function of selecting relevant documents to prosecutors, in a context of prior concern about abuse of secrecy powers.
61. Other responses (**DE, EE, HR**) referred to provisions containing a general legal criterion linked to the lawfulness of detention using formulations such as ‘evidence which is relevant to the assessment of ... the existence of circumstances on which the [detention decision] is being made’ (**HR**) or ‘evidence which is relevant to the assessment of the merits of an arrest warrant’ (**EE**).
62. In the common law jurisdictions surveyed (**IE, UK**) the assumption was that evidence would be made available according to the general disclosure rule. One response (**IE**) noted that the timing of disclosure, not always prompt, could make challenging detention difficult.

63. Of concern in relation to detained persons was the fact that, according to some responses, derogations allowed the restriction of access even to evidence essential to the assessment of the lawfulness of detention (**BG, EE, PT, ES**). In one case, the general rule applicable in all cases provided both the right of access and derogation where access would ‘obstruct the investigation’ (**BG**). In another, an amendment specifically implemented the Directive provided for derogation on which applied to the general right of access and the specific right of access to evidence relevant to challenging an arrest warrant (**EE**). In another case, the general rule and its accompanying derogation currently draw no distinction for detained persons (**ES**), though a draft law was being discussed. And in another, the provision requiring access to the evidence sustaining a coercive measure was subject to derogation (**PT**). Such provisions raise manifest issues of compliance with Article 7(1) of the Directive, raising a need for national courts to apply the Directive directly, and for further scrutiny by the European Commission.

Judicial control / review of restrictions on access

64. In some cases, powers to restrict access to the case file were described as belonging to a judge or court on application of the prosecutor (**ES, HR**). In other cases, the power was described as belonging to the prosecutor, subject to the possibility of bringing challenges before a higher prosecutor (**PL**) or court (**EE, EL, HU, PT**). We would observe that the possibility of bringing a challenge only before a higher prosecutor appears unsatisfactory if there is no further challenge available before a judge, given the requirement in Article 7(4) of the Directive and the Charter.

65. The effectiveness of the systems of challenge varied, with some responses more upbeat (**CZ**), but other respondents – going on past practice, new laws having been adopted recently – were less optimistic that such challenges would ultimately result in access being granted (**PL, EE**). In one jurisdiction (**HU**), it was noted that there had previously been a practice of not issuing formal decisions denying access, which made such ‘decisions’ difficult to challenge, with the impact of a new requirement for a formal decision not yet known.

Modalities of access to the case file at the pre-trial stage

66. The modalities of access to the case file varied at the pre-trial stage, though not all responses discussed this in detail. One response noted that the legislation allowed (if access was granted) the making of ‘extracts’, i.e. taking notes, but did not permit the making of copies (**BG**). Another noted that at the pre-trial stage the file could be consulted but not removed from the judge’s office, leaving lawyers to take notes or pictures (**LU**). As mentioned above, in one case, a copy could only be given to the client upon request (**FR**).

67. Other responses commented that there was the opportunity to request a copy of the file, which could be refused in the same way as the substantive right of access (**BE, EL, LT, PL, PT, RO**), though there was no indication that this was problematic. In the common law jurisdictions, disclosure would be provided in the form of copies (**IE, UK**), and a list of material not relied upon of which disclosure could be granted if requested (**UK**).

68. One respondent (**DE**) said only electronic versions would be made available in bigger cases and two examples (**DE, UK**) mentioned that electronic files could be given to the defence which were encrypted, had no passwords or required an expensive software package to be read.

69. There were also complaints of limited time, coupled with the volume of the case file (**FR**) affecting the defence's ability to prepare for hearings properly. One response (**EL**) explained that while copies could be made, the defence have to pay a fee to make copies (an issue which may arise in other jurisdictions too), though the questionnaire did not specifically ask about this.

UPON COMPLETION OF THE INVESTIGATION

Right of access to the case file to prepare for trial

70. Positively, almost all the respondents reported having adequate access to the case file in time for trial. Several responses (**BE, BG, CZ, DE, EE, FR, HU**) referred to laws making explicit provision for the right of access to the entire file upon completion of the investigation, enabling the defence to propose further investigative measures or supplement the file with other evidence. In other cases (**HR, CZ, DE, IE, UK**), provisions applicable throughout the pre-trial phase provided access to the case file at some point prior to trial in any case.

Modalities of access to the case file at this stage

71. Mostly, respondents reported a greater ability to obtain copies of the file at this point. In cases where general rules applied for all stages of the proceedings (**LT, CZ, HR**), the accompanying modalities would govern the modalities of access upon completion of the investigation too.
72. One response (**BG**) stated that even though the applicable law at this point foresaw only consultation of the file, in practice there was full unrestricted access with the ability to make copies, from the moment the case is transferred to the court.
73. One response (**EE**) explained that the law governing this point foresees access to a digital copy, with the possibility for the prosecutor to restrict the ability to print copies, the ability to discuss the case file with a detained person on the basis of an electronic copy (using shared prison computers) could be very limited and undermine the effectiveness of defence.
74. It was reported in one jurisdiction (**ES**) where parts of the proceedings can be declared secret, the full file had to be disclosed at least 10 days before the end of the pre-trial stage and in practise it was usually handed over much earlier. However, in some Member States which had one provision governing the whole criminal procedure (**HU, LT**) access and the ability to make copies, even after the investigative stage, was still theoretically at the will of the prosecution.

F. KEY CONCLUSIONS

75. Based on the above information, we have drawn the following headline conclusions:
- a. **Access to the case file prior to questioning is generally lacking** – Virtually all responses indicate that, at the point of initial questioning (either by police or other investigative authority) suspects do not have prior access to their files. Information is usually limited to an (often very basic) description of the charge. As a result, there is a general practice of lawyers advising clients to remain silent until the file has been seen. It was noted in the survey that lawyers in certain Member States were pushing the authorities to apply an expansive interpretation of Article 7(1), and we conclude that this would be a useful point for the CJEU to clarify.

b. At the pre-trial investigation stage –

- i. Access is the rule, but derogations exist in most jurisdictions and are applied extensively** – There is an in principle access to the case file in all Member States though there are variable rules on whether this is provided by the prosecuting authorities or upon request. There is, however, a problem of derogations linked to the needs of the investigation being used throughout the pre-trial phase, with the result that the ability of the defence to participate effectively and scrutinise prosecutorial / investigative action may be limited and may only become possible upon completion of the investigation. This was the general position; in relation to detained persons, see ii. below.

ii. When the suspect is detained –

1. The first determination on detention is neglected as a key moment –

The general picture was that no specific provision is made for access to the case file at the first determination by a court, which is covered by the general rules applicable to the whole pre-trial phase. The Directive mentions in recital 30 that documents should be provided ‘in due time to allow the effective exercise of the right to challenge the lawfulness of the arrest or detention’, and practical challenges linked to the transfer of the (potentially large) police file to the court following arrest may currently be diminishing the effectiveness of the initial challenge.

2. Sufficient legal provision is made in most countries for access to documents essential to challenging detention –

The survey generally suggested that legal rules provided a right of access to documents which are relevant to a detention decision, though the legislative drafting varied to some extent. A good number of responses found that there was no problem in this regard. The effectiveness of the approach of linking the right of access to the documents mentioned in a detention order is not yet demonstrated.

3. However, in a number of Member States, either in law or in practice, access even to these documents is restricted –

Worryingly, there seemed to be laws in place allowing the application of derogations to the right of access to documents needed to challenge detention. Two replies to the questionnaire in particular expressed serious concern that in practice, detained suspects are not able to challenge their detention effectively for this purpose. Member states are failing to respect the gravity of pre-trial detention and overlooking the necessity to allow it to be effectively challenged.

- iii. There is generally the ability to obtain a copy (sometimes electronic) of the file during the investigative stage** – By and large, the survey suggested lawyers were able to consult and make copies of the file during the investigative stage

(unless derogations are applied). Practices relating to the availability of the case file at prosecutors' offices do, however, pose problems. In general, lawyers were also able to make paper copies of the file for the client to keep, and in some cases electronic copies could be obtained pre-trial. However, there were possibilities to restrict this, and in one example, the right of consultation allows only the taking of notes. Restrictions of this nature limit the ability of the defence to participate effectively in pre-trial proceedings.

- iv. **Challenges to refusal of access** – Only two responses seemed to suggest that there was no recourse to a court to challenge a refusal of access at the pre-trial stage. Otherwise, the survey suggested that it was possible to challenge refusals of access at the pre-trial stage. The practice of not issuing a formal decision when denying access historically was a problem in terms of judicial protection.
- c. **Upon completion of the investigation** – In most Member States, there were separate provisions governing access to the full file in order to prepare for trial, and it appears that there is generally access to either a full paper copy or an electronic copy. There were some doubts as to unused materials not considered to fall within the scope of the case by prosecutors, which could assist the defence. Consultation of documents in prisons could pose practical problems for the preparation of the trial defence.

CONCLUSIONS / FURTHER RESEARCH

76. As noted above, this survey was not exhaustive but it nevertheless hope that it provides a reasonable picture as to the situation in over half the Member States. We would hope for different actors involved in this process to take the matter forward as follows:

- a. **The European Commission** should ensure that Member States provide it with all the necessary information to conduct a thorough review, covering both the substantive rules regarding access to the case file and the practical arrangements for giving effect to them. It must be prepared to carry out infringement procedures if necessary.
- b. **EU Member State Governments** are welcome to contact Fair Trials via the contacts above if they wish to discuss the content of this report. In particular, we are happy to organise meetings with Fair Trials staff, the LEAP Advisory Board member for the country in question and the Permanent Representation in Brussels, subject to capacity.
- c. **Defence lawyers** should continue to push courts to refer to the Directive when interpreting and applying national laws on access to the case file. Lawyers are welcome to use the comparative information in this report to inform their courts of approaches in other Member States, and to approach LEAP or Fair Trials staff for litigation support.
- d. **Bar associations** should continue the work they are already doing to promote use of the Directive or, if they are not doing so, explore training programmes to help lawyers challenge problems arising in practice. Fair Trials and LEAP are keen to cooperate.
- e. **National courts** should where necessary, interpret provisions enabling the restriction of access to the case file in line with the Directive and, in any event, ensure that these are

not applied at the expense of access to documents necessary to challenging detention. A question as to the proper interpretation of Article 7(1) vis a vis access to the case file prior to questioning should be referred to the CJEU.

- f. **Academics** can help complete the picture sketched in this report with analyses of statistical data, jurisprudence of the courts relating to the relevant provisions of national procedures and constitutional provisions, and how these relate to the Directive.
- g. **NGOs** are encouraged to use the information in this report in their domestic advocacy targeted at parliaments and governments and/or strategic litigation. Fair Trials and LEAP are happy to consider cooperating with such initiatives.

Fair Trials Europe

Legal Experts Advisory Panel

March 2015



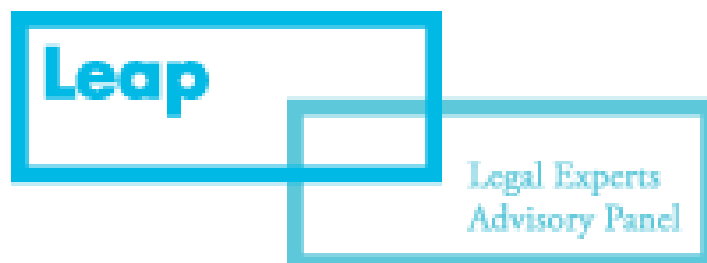
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Annex 5: Communiqué: ‘Discussions on cross-border justice’ June 2015



COMMUNIQUÉ

BUILDING ON THE MEETING OF 5 JUNE 2015:

DISCUSSIONS ON CROSS BORDER JUSTICE

(EUROPEAN PUBLIC PROSECUTOR’S OFFICE / *NE BIS IN IDEM*)

AND UPDATES ON ACCESS TO A LAWYER / ACCESS TO THE CASE FILE



**Co-funded by the Criminal Justice
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**C L I F F O R D
C H A N C E**

INTRODUCTION

1. On 5 June 2015, Fair Trials brought together members of the Legal Experts Advisory Panel ('LEAP') and an external academic speaker in Brussels, with a view to beginning new discussions within LEAP on key cross-border EU justice questions, namely the European Public Prosecutor's Office ('EPPO') and the *ne bis in idem* principle. The same points were also raised in bilateral telephone calls with members of the LEAP Advisory Board in the month following the meeting. This communiqué builds on the meeting and forms a basis for further discussion within LEAP and with policy-makers. It is not a formal position paper, which LEAP may produce subsequently.

Background

2. LEAP has, in recent years, played an active part in the development, discussion and implementation of EU justice legislation, including on mutual recognition instruments (European Arrest Warrant ('EAW'), European Supervision Order ('ESO') etc.), the directives adopted under the 2009 Roadmap for strengthening procedural rights and potential EU legislation on pre-trial detention. In all of this work, LEAP has consistently recognised the necessity of effective cooperation, but has highlighted the need for mutual recognition systems to operate on the basis of an adequate system of safeguards for the rights of individuals, ensuring the credibility of the system as a whole, and it will continue to work for the completion of that project.
3. In parallel, policy discussions have continued regarding the EPPO, a construction which foresees cooperation between Member States based on mutual trust – notably in the admission of evidence obtained in other Member States – and the conferral of centralised law enforcement powers upon an EU agency while relying on the Member States' internal law, subject to EU norms, to deliver procedural protection for the individuals prosecuted, presenting significant overlap with LEAP's previous work. Currently, it appears doubtful that the institution will ultimately be created. However, since discussions continue, Fair Trials was keen to explore with LEAP the extent to which learning from its existing work could helpfully inform the development of the EPPO discussion in Brussels, and to identify initial thoughts for further discussion of this topic. Part I of this paper deals with this topic.
4. In addition, Fair Trials is well aware that LEAP possesses an extensive fund of knowledge and experience, not limited to the above topics. In particular, members' work together on cross-border cases equips the network as a whole with a unique insight in this area, as to both sources of injustice and good practice. Fair Trials was therefore keen to explore, initially, the application of the *ne bis in idem* principle in practice, seeking to identify key challenges to the effective enforcement of the principle and emerging trends in the courts, adding usefully to the large body of case-law and academic commentary. Part II of the paper deals with this topic.
5. This paper seeks to identify key thematic issues of interest to LEAP; lines of further enquiry for meetings, litigation activities, research, consultations etc.; and, in relation to the EPPO, an initial set of 'initial thoughts' for further discussions with the EU institutions and other stakeholders and within the broader LEAP membership (in the context of the 2015 Annual Conference).

Recipients of this communiqué, both within and outside LEAP, are welcome to contact Alex Tinsley at alex.tinsley@fairtrials.net to discuss the content further.

I – THE EUROPEAN PUBLIC PROSECUTOR’S OFFICE

Preliminary points

About the 5 June 2015 meeting

6. The part of the 5 June roundtable dedicated to the EPPO was introduced by LEAP member Dr Marianne Wade, of the University of Birmingham and one of the leading experts on this topic. A discussion paper was circulated referring to the following issues: the rationale, competence and basic structure of the EPPO; choice of trial jurisdiction; investigative measures and the admissibility of evidence; procedural rights of suspects and accused persons; and judicial review. Participants were also asked to raise other issues which they thought merited LEAP’s attention.
7. The meeting took place against the backdrop of increasingly confident speculation that the EPPO proposal would not, ultimately, come to fruition. It nevertheless seemed appropriate for LEAP to consider the issues arising in the debate and assess where it would be best placed to contribute, should the outlook change under the Luxembourgish presidency (July-December 2015).
8. This document does not reflect a settled LEAP position on the EPPO, which would be impossible to achieve on the basis of a short meeting. Rather, it draws upon the views expressed and raises ‘initial thoughts’ on the basis of Fair Trials, as coordinator, can engage with EU policy-makers.

Legislative reference points for the meeting

9. The discussion here is based upon state of play of the EPPO file in the summer of 2015. In advance of the Justice and Home Affairs Council of 15-16 June 2015 in Luxembourg, the Latvian Presidency put forward a policy debate document summarising the status of discussions at expert level¹²⁴ (the ‘**June 2015 State of Play**’) within the Council (the legislator on this file). The Council expressed broad conceptual support for the first 16 articles of the proposed regulation as set out in the June 2015 State of Play, and welcomed the advances made on the articles 17 to 33.¹²⁵ This being the last ministerial level milestone on the file, the June 2015 State of Play is taken as the reference point here. In discussing the file this document will also refer to the European Commission’s original proposal of July 2013¹²⁶ (the ‘**Commission Proposal**’); the interim resolution of the European Parliament of March 2014¹²⁷ (the ‘**First EP Resolution**’); and the interim resolution of the European Parliament of April 2015¹²⁸ (the ‘**Second EP Resolution**’).

¹²⁴ Proposal for a Regulation on the establishment of the European Public Prosecutor’s Office – *Policy debate* (Council Document 9372/15)

¹²⁵ Outcome of the 3396th Council Meeting 9951/15
(http://www.consilium.europa.eu/en/meetings/jha/2015/06/Outcome-of-the-Council-meeting_EN_pdf/)

¹²⁶ Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office COM(2013) 534 final (<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013PC0534&from=EN>).

¹²⁷ European Parliament resolution of 12 March 2014 on the proposal for a Council regulation on the establishment of the European Public Prosecutor’s Office

LEAP's approach to the EPPO

10. LEAP, in its engagement with the EU institutions, seeks to aid policy-makers in the development of EU justice legislation and to ensure that sufficient provision is made to safeguard individual rights. It does not take political positions. Accordingly, LEAP members were keen to emphasise that if the decision had been taken by the 'founding fathers' to task the EU with setting up an EPPO, the only question for LEAP was as to the manner in which this was done and how this would affect the protection of defence rights. That will be the central concern for LEAP.
11. It follows that LEAP will not consider anything in the EPPO better or worse by virtue of greater powers being conferred on the EPPO and EU courts or retained within national authorities. It will consider a proposal better or worse if it affects defence rights favourably or adversely.

A SINGLE PROSECUTOR, DIFFERENT PROCEDURAL LAWS

Hopes and expectations

12. In advance of the publication of the Commission Proposal, various commentators had suggested that an EPPO regulation should include a set of enumerated procedural rights for those prosecuted by the EPPO. A study led by the University of Luxembourg had put forward a set of 'Model Rules'¹²⁹ to that effect, including self-standing obligations regarding access to a lawyer. The European Criminal Bar Association, in its 'cornerstones' document issued February 2013, also took the position that an EPPO regulation should, as a minimum, include a 'catalogue of rights', pointing out that Article 86(3) envisages that the regulation should cover 'rules of procedure', ensuring a uniform standard of protection fixed at the highest level.¹³⁰

Where we are now

13. The Commission Proposal had, from the outset, already proposed protecting defence rights through reliance on the Member States national laws implementing the directives adopted under the Roadmap for strengthening procedural rights¹³¹ (the '**Roadmap Directives**'). Although the Commission had – to its credit, LEAP members commented – proposed to include some further rights within the body of the regulation, including a provision on rights concerning evidence, these were well short of a full enumeration of rights and in any case, as at the June 2015 State of Play, procedural rights questions are based entirely on the Roadmap Directives.

(http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2014-0234#ref_1_1).

¹²⁸ European Parliament resolution of 29 April 2015 on the proposal for a Council regulation on the establishment of the European Public Prosecutor's Office

(<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2015-0173+0+DOC+PDF+V0//EN>).

¹²⁹ 'Model Rules for the Procedure of the EPPO' available at: <http://eppo-project.eu/design/eppodesign/pdf/converted/index.html?url=f407f0c18e139b7f8f9c04ffd26a1396.pdf&search=>

¹³⁰ European Criminal Bar Association, 'Cornerstones for a Draft Regulation on the Establishment of a European Public Prosecutor's Office ("EPPO") in Accordance with ART. 86 PAR. 1-3 TFEU' available at: http://www.ecba.org/extdocserv/201300207_ECBACORNERSTONESONEPPO.pdf, page 4.

¹³¹ 'Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (2009/C295/01)' (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:295:0001:0003:en:PDF>)

Discussion at the 5 June roundtable

14. At the 5 June roundtable, LEAP members expressed disappointment as to this solution. It was pointed out that there are quite fundamental differences between Member States in the area of procedural rights – such as trials in absentia in Italy, rules restricting access to evidence in Spain, Poland and elsewhere, the anomalous right to silence in the United Kingdom – which themselves cause difficulties in the existing mutual recognition systems. A citizen may validly say ‘*civis Europeus sum*’ wherever the EPPO decides to prosecute them, but in practice this means invoking the national procedural law of that country, not an identifiable common set of rights.

The Roadmap solution

15. It is true that the Roadmap Directives should, in theory, create common substantive standards. However, as recognised by the German Federal Bar even before the Commission Proposal, ‘European Union citizens receive a bad image of the European Union if a European Public Prosecutor’s Office is created before the steps contained in the [Roadmap] have been *completed and completely implemented into national law*’¹³² (our emphasis).
16. However, first, the experience so far with implementation of the Roadmap Directives is less than satisfactory. LEAP members have identified shortcomings in implementation, e.g. rules allowing for total restriction of the case file in Estonia, the continuing absence of lawyers in police questioning in the Netherlands, the suspect’s inability to retain a written letter of rights in Scotland, and continuing issues regarding notification of rights in Slovakia. The European Commission is yet to take any substantive infringement proceedings against any Member State. In Fair Trials’ trainings, over 80% of lawyers consistently say they have never used the Directives in practice. If reliance on the Roadmap Directives is to be the final solution, it is an imperative *sine qua non* that effective implementation of the Roadmap Directives should be ensured.
17. Secondly, the Roadmap Directives are an incomplete set of measures. They mostly cover (in relation to criminal proceedings) the case-law of the European Court of Human Rights on subparagraphs, (a), (b), (c) and (e) of Article 6(3) and aspects of Article 5(2) and (4) of the European Convention on Human Rights. That itself leaves Article 6(3)(d) – witnesses, confrontation etc. – and the bulk of Article 5 principles relating to arrest and pre-trial detention.

The absence of measures on core areas – including pre-trial detention and judicial remedies

18. The absence of a Roadmap Directive on pre-trial detention seriously undermines the sustainability of the EPPO proposal in its current form. The EPPO will have power to request pre-trial detention before national courts, as envisaged by Article 26(7) of the Commission Proposal, and Article 26b(1) of the June 2015 State of Play. Here, safeguards depend upon national law.
19. Currently, as research on pre-trial detention decision-making has shown, there are significant differences in national legislation in this area, presenting significant risk of variable protection. In Romania (as in France), the court reviewing pre-trial detention does not technically have

¹³² Joint position of the *Bundesrechtsanwaltskammer* (German Federal Bar) and *Deutscher Anwaltverein* (German Bar Association) on the creation of a European Public Prosecutor’s Office, November 2012 available at: <http://www.brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-europa/2012/november/position-of-the-brak-2012-48.pdf>, section III, paragraph 1.

jurisdiction to assess the reasonableness of suspicion, as long required by Article 5(4) case-law. Some countries have 'public order' grounds for detention; others do not. Standard periods within which persons may be brought before a judge following arrest vary from 24 to 72 hours.

20. It is true that even without specific measures the EPPO will, when prosecuting any person, be bound by its general obligation to act consistently with the Charter, including the right to a fair trial and the right to liberty, which the Court of Justice of the EU ('CJEU') may interpret by way of preliminary rulings. Thus, the CJEU recently confirmed that while provisional detention was not regulated by the EAW Framework Decision, it should be consistent with the Charter, providing further guidance based on the ECHR.¹³³ However, the problem surrounding pre-trial detention is simply too big for occasional generalised statements of the CJEU to act as a guarantor of consistent protection.
21. What is more, the entire structure of the Roadmap Directives relies heavily upon national systems of remedies for procedural violations. Differences exist between regimes with formalistic approaches to invalidity of procedural acts resulting in strict exclusionary regimes, and those with more discretionary approaches. It appears likely that interpretation of Article 12 of the Access to a Lawyer Directive¹³⁴ by the CJEU may help to define some guiding principles regarding judicial protection of Roadmap rights, but this is some distance away. In the absence of any sort of common principles on remedies and exclusionary rules, the actual enforcement of rights protected by the Roadmap Directives, and with that the useful effect of these measures, is a matter largely unregulated and in which variable levels of protection may well arise.

Initial thoughts on the Council's current approach

- Reliance on national law implementing the Roadmap Directives, if the Council ultimately wishes to limit its ambitions to this, will leave EPPO prosecutions open to censure in national courts (and the ECtHR) so long as (a) effective implementation of all Roadmap Directives is not ensured, in law and in practice; (b) further measures are not adopted under Article 82(2)(b) TFEU – most urgently on pre-trial detention – in order to ensure that even these minimum rules at least cover the full range of core defence rights and are sufficiently enforceable.

A qualitatively different exercise?

The EPPO should be a model of fairness

22. The EPPO is a solution to a problem of coordination and the limitations of Eurojust and OLAF, and is intended to prosecute where Member States are failing to do so. However, it will still do so in national courts. The EU is not creating a supra-national criminal jurisdiction with the EPPO.
23. Linked to this, the logic behind the idea of creating a uniform set of procedural rights – the need to ensure uniform protection for the citizen and guard against forum-shopping – is not

¹³³ Case C-237/15 PPU Lanigan, judgment of 16 July 2015.

¹³⁴ 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 [2013] OJ L294/1 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:294:0001:0012:EN:PDF>)

comparable to the logic of creating procedural rules for a truly supra-national penal body, such as the International Criminal Court, which by definition needs an independent set of rules.

24. However, it remains the case that the creation of the EPPO represents a standard-setting exercise. The EPPO will be a flagship enterprise of the EU and its biggest innovation in the area of justice and home affairs since the EAW. It would be an embarrassment, and undermine the EU's credibility in promoting human rights externally, if the mistakes made with the EAW - chiefly, the failure to incorporate adequate safeguards into a new system - and the EPPO were undermined by criticisms of infringements of fundamental rights. The EU is required by the TFEU to accede to the ECHR; if and when that happens, criticism could come in the form of judgments of the ECtHR against the EU and/or Member States linked to prosecutions of the EPPO. Against that backdrop, it is necessary to ask whether the Council has set its ambitions too low in delegating respect for procedural rights to the Member States, subject to the requirements of the Roadmap Directives. Would the better choice have been to establish a 'catalogue of rights' for EPPO prosecutions, as some hoped? The German Federal Bar and German Bar Association, in their joint position, have stated that 'the introduction of [the EPPO] should be a clear step towards a European code of criminal procedure which provides for Europe-wide rights of accused persons, harmonised national prerequisite conditions for investigative measures, uniform rules for necessary defence as well as European judicial review'.¹³⁵ Is this right?

The difficulty of codifying procedural rights in an EPPO Regulation

25. LEAP members have underlined that the EU does not possess a federal jurisdiction within which to apply a set of federal rules of procedure. The TFEU does not establish such a jurisdiction. Pragmatically, there are also arguments against codifying procedural rights exhaustively in the regulation itself. Procedural rights require a lot of articulation. The Model Rules initiative demonstrated the challenge of trying to cover a wide range of rights in sufficient detail, e.g. protecting the right of access to a lawyer in a codified rule. The Access to a Lawyer Directive, by contrast, includes 12 discrete articles, which then require further measures from the Member States to be implemented into national law. And even if the Council were to codify procedural rights in the regulation, it appears unlikely that it could provide enough clarity without 're-inventing the wheel' and negotiating a full set of procedural rights provisions again. And even if one accepts - as has been suggested by Permanent Representations and the European Commission - that the Roadmap *acquis* should in due course be 'codified' or 'consolidated' as a single instrument, the legal basis for that would remain Article 82(2)(b) TFEU, providing for directives establishing 'minimum rules'. Article 86(3) provides the legal basis for a regulation establishing 'rules of procedure' applicable only to the EPPO, and it seems to be a recipe for complexity and uncertainty to have two different overlapping procedural regimes.

Potential routes towards solutions

- *Retain the Roadmap approach, but preclude EPPO from exercising derogations*

¹³⁵ Joint position of Bundesrechtsanwaltskammer (The German Federal Bar) and Deutscher Anwaltverein (German Bar Association) on the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, October 2013 available at: <file:///C:/Users/policy.intern2/Downloads/Position-BRAKDAVEuPublicProsecutor2013.pdf>, page 1.

26. A partial solution may lie in the substantive rather than the formalistic answer to this issue. What matters is that the EPPO respect high standards, not what sort of law it is bound by. The danger in the Roadmap Directives lies in provisions like Article 8 of the Access to a Lawyer Directive (derogations) or Article 7(4) of the Right to Information Directive¹³⁶ (derogations on access to the file), which create discretionary powers inviting prosecutors to flirt with infringements of the ECHR. The EPPO could be precluded by its founding regulation from exercising them (provided this did not lead to unjustifiable inefficiencies), ensuring that its procedures were an example of fairness. For example, while it may be permissible under Spanish law or Polish law to restrict access to the file, the EPPO should not use that power. The fact that procedural laws in France and Luxembourg foresee no such powers shows that it is possible to prosecute effectively without them. The EPPO should be bound to follow that this 'highest common denominator'. This approach would enable the Member States to retain their existing sovereignty over criminal procedure law (subject to the Roadmap Directives) while helping to ensure that the EPPO was seen to be observing satisfactorily high standards.

- *A common exclusionary / remedial principle?*

27. As mentioned above, however, the Roadmap Directives do not address certain – quite fundamental – aspects, most notably the question of admissibility of evidence (save for the broad language of Article 12 of the Access to a lawyer Directive). In the absence of a directive on this issue, the citizen faces fundamentally divergent systems and it appears likely that, in some instances, these will result in variable standards. This is, in part, because the case-law of the ECtHR has, to date, been unclear on the point, falling short of prescriptive statements as to the manner in which remedies should be provided (though certain cases currently pending may lead to greater clarity). And in time valuable additions may come from the CJEU, particularly in relation to Article 12 of the Access to a Lawyer Directive. However, that provision is, in accordance with its legal basis, deferential to Member States' existing approaches to evidence. In order to achieve consistent level of protection, a common remedial principle or rule could be established within the Regulation, covering both the use of evidence obtained in breach of the Roadmap Directives and the fruits of the poisoned tree.

- *Make provision in the Regulation for the specificities of the EPPO?*

28. There are, in addition, certain areas where provision will need to be made to address the specific nature of the EPPO and the way the Roadmap Directives apply to it – particularly in the context of cross-border investigations. For instance, if a person is prosecuted in Member State A, but the EDP requests an EDP for Member State B to undertake a search in his jurisdiction, does the suspect or accused person benefit from the provisions of the Access to a Lawyer Directive in that state? And if legal aid is required, will the eventual directive on legal aid apply to Member State B? And if that measure is limited in scope (e.g. if it applies only to persons deprived of liberty, or only at the very initial stages of proceedings, as envisaged by the European Commission's initial proposal), what provision needs to be made in the EPPO to ensure a uniform approach to legal aid in EPPO prosecutions? These issues are not addressed in the Roadmap Directives and would

¹³⁶ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L142/1 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:142:0001:0010:en:PDF>)

need to be addressed in either/both a consolidating directive and/or the EPPO Regulation. Such provisions are needed to address specific defence rights issues arising from the *sui generis* nature of the EPPO system, which will be flawed without them.

29. Finally, no matter what effort is made to ensure effective implementation of the Roadmap Directives, it does appear necessary for an EPPO to have at its disposal material resources to ensure respect for defence rights. For instance, LEAP members report that many places interpretation is still being provided at police stations by relatives, unqualified members of the expatriate community etc. This is a problem in general which the European Commission needs to address with Member States. But it is clear that it represents a resource-driven problem and, in all likelihood, a very intractable one in the long term. The EPPO should have in place systems for locating and funding sufficiently qualified interpreters.
30. And of course, in relation to legal aid, there has to be a discussion as to whether Member States should make available funds for an EU-administered legal aid system. Currently, representation of persons whose cases are referred to the CJEU by national courts may be funded by CJEU-administered legal aid, if this is not covered by the national system – ensuring fairness without variation according to the state. Roughly the same logic applies for the EPPO: access to legal aid should not vary according to the state, so (particularly outside the scope of the Legal Aid Directive) the Council must establish a system for legal aid to be granted on a common basis.

Initial thoughts for an alternative approach to procedural rights

- References to the Roadmap Directives are not sufficient in themselves.
- However, it is equally not necessarily helpful to articulate a full set of procedure rules in the EPPO Regulation, which may create confusion and complexity
- An alternative approach would be to ensure the EPPO Regulation included special rules necessary to (a) bind the EPPO to the highest common denominator, (b) complete gaps in the Roadmap Directives, (c) address specificities of the EPPO arising from its nature as a multi-jurisdictional prosecutor, and (d) establish certain key rules or principles in crucial areas such as to guarantee consistent protection for the citizen in fundamental areas.
- Such special rules would include: excluding the EPPO from invoking any of the problematic discretionary provisions in the Roadmap Directives; provisions ensuring that protections available in the prosecution forum (such as access to a lawyer and legal aid) are available in other jurisdictions where investigative actions are taken; an exclusionary principle or rule ensuring greater uniformity of judicial protection for citizens than the Roadmap Directives do; and enabling powers for the EPPO to establish independent funds and systems to ensure the practical implementation of Roadmap rights dependent on resources, e.g. interpretation services and, crucially, funding of legal aid costs.

FORUM SELECTION

Forum selection in cross-border cases

31. In principle, the rules relating to allocation of jurisdiction, as reflected by Article 27(3) in the June 2015 State of Play, are based upon a substantive objective criterion, namely the Member State

which was the focus of the criminal activity or where the bulk of linked offences was committed. A possibility of deviation is envisaged on the basis of, in order of priority, the habitual residence of the suspect or accused person, the nationality of the suspect or accused person, and the place where the main financial damage occurred. These are, in principle, objective factors.

32. However, in discussions of the EPPO, there have been concerns around forum-shopping. The EPPO will be called upon to select a trial jurisdiction, where there are several Member States having jurisdiction, e.g. due to the cross-border nature of the offence. The existence of variable rules and procedures (e.g. in the relative ease of obtaining coercive measures against the accused) could create an incentive to select a jurisdiction over another, even if the notional criteria do not include considerations of this nature.
33. Participants noted that the establishment of criteria for the selection of trial jurisdiction could, in practice, likely be an advance upon the existing situation vis a vis situations of concurrent criminal jurisdiction. Currently, in cases of concurrent jurisdiction, discussions within Eurojust occur in 'smoke-filled rooms' and its conclusions do not amount to challengeable 'decisions'. LEAP members who have sought to participate have been told that there was essentially no place for legal representation at Eurojust. As a result, all that is left following a Eurojust procedure is a decision of one national prosecutor / judicial authority to seize the relevant national court, that court's jurisdiction depending on ordinary criteria (e.g. territorial jurisdiction). A centralised decision by an EPPO, applying a transparent set of forum criteria, would enable a more transparent allocation of cases. In that regard, LEAP members shared the view – as expressed in the First EP Resolution¹³⁷ and Second EP Resolution¹³⁸ – that forum decisions should be the subject of judicial review before the Union courts (see below).

Initial thoughts on forum selection

- Forum shopping is a concern, particularly given differences in national procedures in some areas (e.g. in obtaining coercive measures), creating an incentive to select a forum based on considerations of efficacy.
- However, the existence of a central set of criteria, enforced by way of centralised judicial review, would be procedurally more transparent than the current system for resolution of conflicts of jurisdiction.

TRANSACTIONS

34. We refer here to the provisions of the proposed regulation (Article 29 in the June 2015 State of Play) enabling the EDP to propose that the suspect pay a lump-sum fine which, once paid, entails the final dismissal of the case, a power available in cases of lower seriousness meeting certain conditions. This is, essentially, a negotiated end to the case and has evoked comparisons with the process of plea-bargaining in the US and elsewhere – and brings with it associated concerns.
35. The central concern about 'plea bargains' in general is that they confer significant power upon prosecutors to force suspects to plead guilty, proposing lower sentences which appear attractive to a person who faces a potentially much heavier sentence upon conviction. This shifts the

¹³⁷ Paragraph 5(vii).

¹³⁸ Paragraph 24.

application of criminal law away from the trial process with attendant trial guarantees (legal representation, an impartial factual arbiter etc.) towards a different forum, possibly with less judicial oversight and less protection for the presumption of innocence and other rights. Particular concern has been aired about plea bargaining with a financial element, where the risk of accepting a plea deal or not will be assessed based on calculations of the proposed fine.

36. The practice of plea-bargaining is common in Europe (see the comparative study in *Natsvlishvili and Togonidze v. Georgia*¹³⁹ paragraphs 62-75), and appears to be tolerated by the ECtHR on the following conditions: (a) the bargain has to be accepted in full awareness of the facts of the case and the legal consequences and in a genuinely voluntary manner; and (b) the content of the bargain and the fairness of the manner in which it had been reached between the parties must be subject to sufficient judicial review (*Natsvlishvili*, para. 92). As a starting point, the proposed regulation should be examined from that standpoint.
37. In the June 2015 State of Play, criterion (a) appears to be addressed through the provision of a specific right to legal advice on the advisability of accepting or refusing the proposal and its legal consequences (an example of a concrete procedural right conferred in addition to the general right of access to a lawyer foreseen by the Access to a Lawyer Directive, meeting a specific demand of EPPO proceedings, as suggested above). Though this provision includes a reference to national law, the clear nature of the provision leaves little room for circumvention.
38. In relation to criterion (b), however, the June 2015 State of Play leaves greater cause for concern. The proposed Article 29(3a) envisages the EDP shall seek judicial supervision where this is required under national law. The extent and scope of jurisdiction exercised by the courts over transactions may vary significantly, leaving scope for the EPPO to operate in significantly different legal conditions depending on the Member State. This appears incompatible with the fact that the criteria for proposing a transaction are fixed, common criteria of EU law, which require a uniform scope of judicial review (as to which, see judicial review below).

Initial thoughts on transactions

- The decision to dispose of a case by way of transaction is a centralised decision based on policy considerations and the application of uniform criteria specified in the EPPO Regulation. Subjecting it to national procedural regimes appears likely to detract from uniformity and, with that, legal certainty for the citizen.
- Fair Trials will consult the LEAP Advisory Board as to current systems for transactional disposals of criminal cases to establish an understanding of the range of safeguards available and divergences between them.

MUTUAL ADMISSIBILITY OF EVIDENCE

39. One of the central concepts of the EPPO is the mutual admissibility of evidence collected by EDPs in different Member States. The Commission Proposal foresaw that ‘where the court considers that its admission would not adversely affect the fairness of the procedure or the rights of defence or other rights as enshrined in the Charter of Fundamental Rights of the European Union, evidence presented by the EPPO shall be admitted in the trial without any

¹³⁹ *Natsvlishvili and Togonidze v. Georgia*, App. No. 9043/05 (ECHR, 29 April 2014).

validation or similar legal process even if the national law of the Member State where the court is located provides for different rules on the collection and presentation of such evidence' (Article 30), a provision which remains essentially unchanged in the June 2015 State of Play.

40. The above provision, as noted by the Meijers Committee¹⁴⁰, is very broad and gives little concrete guidance for national courts. At best, it requires a lot from the CJEU in providing a uniform approach – if references are made to it for preliminary rulings, which is not guaranteed. The possibility of divergent national approaches to the mutual admissibility principle and its fundamental rights exception thus appears likely. By way of illustration, in the EAW context, national courts in different countries continue to apply fundamental rights exceptions to the mutual recognition obligation in contrasting ways, and – eleven years after implementation – the CJEU has still not been given an opportunity to comment properly upon the question.
41. The European Parliament has stated that the EPPO Regulation should draw upon the criteria already agreed in Directive 2014/41/EU¹⁴¹ on the European Investigation Order in this context, but apparently not in relation to admissibility but in relation to the ordering of investigative measures in the second Member State.¹⁴² Thus, an EDP in Member State B could be precluded from undertaking an investigative step to assist the investigation in Member State A on the basis that this would be fundamentally incompatible with its national law. The admissibility of evidence is left as a general reference to mutual admissibility qualified by human rights.
42. Discussion of this point at the 5 June roundtable focused on the existing situation vis a vis evidence obtained in other Member States under conventional mutual legal assistance arrangements. Lawyers have argued for the exclusion of evidence obtained via letters rogatory from other countries on the basis that it (indirectly) violates a fundamental constitutional rule, but have success only where the violation is obvious and is authored by a non-EU state. It was further noted that, practically, invoking possible violations as a basis for excluding imported evidence depends upon effective assistance from a lawyer in the other state concerned.

Initial thoughts on mutual admissibility of evidence

- Article 30 of the Commission Proposal represents an unsatisfactorily broad provision which preserves a formal commitment to human rights compliance while not providing any concrete standard for use in practice.
- The importing of grounds for refusal from the EIO would seem a more balanced approach though it remains to be seen how the EIO Directive will be implemented in practice.

¹⁴⁰ Meijers Committee, 'Note of Meijers Committee on the proposed Council Regulation on the establishment of the European Public Prosecutor's Office (COM(2013) 534 final', 25 September 2013 (<http://www.statewatch.org/news/2013/sep/eu-meijers-cttee-european-public-prosecutor-office.pdf>).

¹⁴¹ Directive 2014/41/EU of the European Parliament and of the council of 3 April 2014 regarding the European Investigation Order in criminal matters [2014] OJ L130/1 (<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0041&from=EN>)

¹⁴² European Parliament resolution of 29 April 2015 on the proposal for a Council regulation on the establishment of the European Public Prosecutor's Office, paragraph 20.

JUDICIAL REVIEW

EU decisions reviewed by EU courts

43. Article 86(3) TFEU makes clear that the regulations pertaining to the EPPO will regulate ‘the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions’. The Commission, in Article 36 of the Commission Proposal, envisaged allocating the function of judicial review to national courts, providing that the EPPO ‘shall be considered as a national authority for the purpose of judicial review’. Since – responding, perhaps, to calls from ECBA and others that certain decisions should be subject to review by an EU court – the Council has begun contemplating a different approach. The June 2015 State of Play sets out an ‘option 2’ providing that ‘only procedural measures taken by the EPPO on the basis of Articles [18(6), 27(4)] [and] shall be subject to review of their legality before the CJEU in accordance with Article 263 TFEU’. The key question is what items need to appear in that list – what should be seen as an EU decision amenable to EU judicial review?

What should be seen as EU decisions

The European Parliament’s position

44. The First EP Resolution stated that ‘decisions taken by the European Public Prosecutor before or independently from the trial, such as those described in Articles 27, 28 and 29 concerning competence, dismissal of cases or transactions, should be subject to the remedies available before the Union Courts’ (paragraph 5(vii)). The Second EP Resolution repeated that ‘decisions taken by the Chambers, such as the choice of jurisdiction for prosecution, the dismissal or reallocation of a case or a transaction, should be subject to judicial review before the Union courts’ (paragraph 24), and that ‘for the purposes of the judicial review of all investigative and other procedural measures adopted in its prosecution function, the EPPO should be considered to be a national authority before the competent courts of the Member States’ (paragraph 25).

Questions raised at the 5 June roundtable

45. It was observed by LEAP members at the 5 June roundtable that difficulty with allocation of jurisdiction to national / EU courts arises from the wording Article 86(2) TFEU, which is clear that the EPPO ‘shall exercise the functions of prosecutor in the competent courts of the Member States’ – hence the reference in the Second EP Resolution to the EPPO being subject to national judicial in respect of its ‘prosecution function’. However, as was emphasised by LEAP members, the approach rests upon the assumption that investigations are overseen by national judiciaries, and it is questionable how far this assumption works in respect of genuinely trans-national investigations. Is the national court really in a position to oversee such an investigation?
46. In addition, it was observed that allocating general judicial oversight of the EPPO to national courts leaves those courts with the resolution of EPPO-specific issues – e.g. questions concerning the admission of evidence obtained in other Member States, which may require analysis of foreign national law to determine – as the case may be via references for preliminary rulings to the CJEU. As was noted at the 5 June roundtable, this leaves too much to discretion. For instance, the central extradition court in Spain, despite being the last (merits) instance in EAW cases, has never referred a question (despite clear issues arising, e.g. as in the case that gave rise

to the *Melloni*¹⁴³ judgment, referred by the Constitutional Court on a later *amparo* challenge following the decision by the National Court). The risk of misapplication of the EPPO Regulation by the competent national courts appears significant, and bearing in mind the potential impact on the individual's defence, this cannot be considered satisfactory. One LEAP member suggested that the EPPO could perform its 'prosecution function' before national courts, in the sense of bringing a case to trial, but with judicial review lying before the EU courts. This would ensure that individuals had the right to enforce the proper application of the EU law principles without relying on national courts to make references to the CJEU. However, this obviously raises issues as to the allocation of powers envisaged by Article 86 TFEU and it is one LEAP will discuss with other stakeholders going forward.

The specialised tribunal option

47. One option which has been much discussed is that of creating a specialised tribunal attached to the General Court under Article 257 TFEU (a/the 'Specialised EU Court'). The advantage of such a tribunal would lie in its expertise and multinational composition – enabling it to address disputes which the national courts might be less well placed to adjudicate upon – and its status as an EU court, which makes it better placed to develop a uniform approach to EPPO cases. The question, however, comes back to the limits of its jurisdiction: what should be an EU decision calling for EU judicial review? This is something LEAP will discuss further on the basis of the general considerations regarding judicial review below.

Initial thoughts on judicial review

- The TFEU provides clearly that the EPPO will prosecute before the national courts, but also enables the EU to establish rules applicable to judicial review. So there is scope to allocate judicial review competences in a balanced manner.
- 'EU decisions' – decisions taken by the EPPO on the basis of uniform EU criteria provided in the EPPO Regulation – should be reviewable by an EU court of full jurisdiction (be it the General Court or a specialised court attached to it). These should as a minimum include decisions on forum, transactions and competence.
- It is not yet clear, on the basis of existing knowledge, whether judicial remedies provided for ordinary procedural actions provide sufficient consistency of treatment between cases, even where common substantive norms exist by virtue of the Roadmap Directives. It is crucial that the position regarding judicial remedies be assessed at an EU level and not left to chance, as it is currently.

II – NE BIS IN IDEM

48. Part of the 5 June roundtable was dedicated to the *ne bis in idem* principle, with a view to assessing how this principle is currently applied in practice following extensive development of the case-law by the CJEU in recent years. It was made clear at the outset that (though Commission representatives have occasionally mentioned this as a remote possibility at EU law

¹⁴³ Case C-399/11 *Melloni*, judgement of 26 February 2013.

conferences¹⁴⁴) there is currently no indication in any high-level document that any legislation on this topic is envisaged in the foreseeable future.

49. The session was introduced by Prof. Anne Weyembergh, of the Université Libre de Bruxelles. The presentation covered the main sources of law – Article 50 of the Charter of Fundamental Rights, Article 54 of the Convention Implementing the Schengen Agreement ('CISA') and Article 14 Protocol 7 to the ECHR – and the case-law of the CJEU (primarily based on Article 54 CISA), identifying areas of uncertainty which remain to be resolved. These included the exact level of factual identity needed to constitute the *idem* element of the defence, and whether exceptions provided by Article 55 CISA are compatible with Article 50 of the Charter. Prof. Weyembergh made the observation that, ultimately, *ne bis in idem* was not a panacea: it intervened downstream, when a conflict had arisen, whereas conflicts should ideally be resolved earlier. Participants were then invited to comment on the way these principles are applied in practice and the challenges arising from the defence perspective. The key points are summarised below.

Application of *ne bis in idem* in practice

50. The discussion confirmed, first of all, that cases raising *ne bis in idem* defences arise relatively frequently in practice. A number of different case examples were cited, mostly focusing on the challenges of establishing the conditions for application of *ne bis in idem* were satisfied.
51. The key practical challenge lay in the difficulty in actually establishing that the case fell within the *ne bis in idem* principle. One case was noted in which an investigation was closed in Austria (in a manner finally disposing of the case and barring further prosecution there), and the LEAP member was asked to seek the closure of the case in Portugal. This presented a challenge because the Austrian decision in question did not outline the facts which made it difficult to establish the *idem factum* element. An issue was also raised in Portugal vis a vis the nature of the decision as one finally disposing of the case under Austrian law. A request for information was sent via Eurojust to the Austrian authorities concerning the accusations in Portugal, enabling them to confirm the identity of facts which they ultimately did whilst also confirming the preclusive nature of the decision. Though the right result was ultimately reached, the process was not straightforward. It was also pointed out that the defence had not been able to contribute effectively to the process of dialogue through Eurojust. In consultations following the roundtable, another LEAP member confirmed that the reasoning of merits decisions in France is often such that it is often difficult to demonstrate the identity of facts required to establish a *ne bis in idem* defence elsewhere.
52. A particular difficulty was also raised in relation to the application of the *ne bis in idem* principle in EAW cases. The example was given of a person arrested and convicted in the Netherlands for drug trafficking (the conviction was for being in possession of the drugs on 1 July in the Netherlands). Subsequently, in Germany, the client was arrested on the basis of a French EAW relating to transportation of the same shipment through France during the month of June. In Germany, where the client was represented by a LEAP member, the judicial authority refused extradition on the basis of Article 3(2) of the EAW Framework Decision. However, the French

¹⁴⁴ E.g. the Academy of European Law's 2014 Criminal Justice conference, 17 October 2014, Trier.

authority has not removed the EAW and a French LEAP member is now challenging the EAW at source in France, though this poses a problem in terms of standing (the suspect being absent).

53. This highlights the problem with the fact that – whilst Article 3(2) of the EAW Framework Decision, worded substantially the same as Article 54 CISA, is recognised by the CJEU as pursuing the same objective as the latter provision – its application by a judicial authority in the EAW context does not address the outstanding prosecution in the issuing country. To do that, Article 54 CISA would have to be invoked directly in the issuing country, which may not be possible without physically travelling to the country and facing arrest, despite it being established in the EAW finding that the prosecution falls within the *ne bis in idem* principle. Participants were agreed that given the shared finality of Article 54 CISA and Article 3(2) of the EAW Framework Decision, a finding based on the latter provision should give rise to obligations upon the issuing state to discontinue its prosecution, setting aside any restrictive standing rules precluding applicants from seeking this from outside the country. This, it was agreed, would be an important issue to be put before the CJEU by way of a preliminary ruling.
54. Finally, it was pointed out that, despite the extensive case-law of the CJEU in this area, there appear to be divergences in the way the principle is applied by some national courts. In the UK, for instance, an inquest (a non-criminal inquisitorial investigation of the cause of death) is ongoing in relation to a car accident in Portugal, where a criminal proceeding has been finally concluded. The lawyer in the UK has indicated that the UK could, according to its own interpretation of *ne bis in idem*, still prosecute for an offence despite it being clearly the same facts, apparently reserving the right to revisit the same acts in light of facts subsequently arising, or in light of the fact that the Portuguese authorities would not have taken into account all relevant available evidence.

Emerging developments related to *ne bis in idem*

Discussion of ne bis in idem in the extradition context

55. There were also some examples given of national courts using the *ne bis in idem* principle in relatively progressive ways, beyond the principles established in the CJEU case-law, in particular in relation to cases involving extradition requests from third countries. Thus, in one Spanish case, Article 54 CISA had effectively been interpreted as precluding extradition as well as further prosecution. A Ukrainian extradition request to Austria had been rejected on the basis of the non-extradition of own nationals, but, in line with the *aut dedere aut judicare* principle, the Austrian authorities had examined whether the file put forward by Ukraine disclosed any criminal offence capable of prosecution in Austria. They found that it did not. When the same extradition request was then made to Spain, the court found that the first Austrian decision – which was equated to a dismissal of the substance of the allegation – precluded Spain, as a fellow EU Member State, not just from re-examining the case on its merits but also from surrendering the person to face prosecution on the basis of that allegation in a third country.
56. A comparable example was cited of a case involving concurrent jurisdiction over trafficking offences in Spain and Morocco. Spain refused extradition to Morocco as the suspect was a Spanish citizen, and its own investigation was concluded by a judicial decision discontinuing the case for lack of evidence (*sobreseimiento*). The same Moroccan extradition request was then

made to Belgium, where it was considered questionable due to the risk of torture and of the use of evidence obtained by torture, but the Belgian authorities did not wish to refer to this as a ground for refusing extradition for diplomatic reasons. Instead, reliance was placed on the CJEU decision in Case C-398/12 *M*¹⁴⁵ (establishing that a decision not to refer a case to the trial chamber constitutes a final decision precluding further prosecution in other jurisdictions, even though the case could be reopened in the first jurisdiction if new evidence were uncovered); on this basis, the earlier Spanish decision was regarded as precluding further prosecution in Belgium, and with that extradition to face prosecution in a third state for the same acts.

57. Another argument raised in third-country extradition cases is that the extradition refusal itself (as opposed to internal investigations by the first Member State) should preclude consideration of extradition by a subsequent Member State. It was observed that, whereas extradition refusals on grounds particular to the first state (e.g. nationality of the suspect) did not naturally appear to require recognition, extradition refusals on more generalised grounds should call for recognition by other Member States' courts. Indeed, in one case (represented by a different LEAP member), again in Spain, an extradition request from Turkey was rejected on the basis that the same request had been rejected by the courts in the Netherlands and Italy (the decisions had been based on substantive analyses of the criminal allegation, finding that it criminalised legitimate protest actions). Where more generalised grounds were involved, participants opined that there was a good case for arguing for 'mutual recognition' of extradition refusal decisions.

Mutual recognition of asylum decisions

58. This is most arguable in relation to *non-refoulement* obligations. An example was given of a refusal of extradition by the United Kingdom (based upon the person's status as a refugee under the 1951 Convention relating to the Status of Refugees), which was treated as precluding extradition from Spain. Fair Trials has, in the context of its work on INTERPOL, seen a number of cases where such informal 'recognition' of asylum decisions / extradition refusals based on asylum and *non-refoulement* considerations has played a part. The report *Strengthening INTERPOL*¹⁴⁶ documented, for example, a case of a Russian refugee whose Finnish asylum decision was recognised by the Spanish courts; a Belarusian refugee whose Lithuanian asylum decision was recognised by the courts of Italy (even as precluding the initiation of extradition proceedings any consideration of the extradition request) and Bulgaria. These decisions all rely on the status of the first authority as part of an EU Member State to give indirect legal force to its decisions. Though the primary legal bases for this approach remain the 1951 Convention and Article 3 ECHR, it appears likely that the development of mutual recognition of criminal decisions in the *ne bis in idem* context has contributed to this judicial practice.

59. The Croatian organisation the Centre for Peace Studies ('CMS') has, in fact, called for the EU to establish 'mutual recognition of asylum decisions' on a formal basis.¹⁴⁷ Whilst legislation may not

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¹⁴⁶ Fair Trials International, 'Strengthening Respect for Human Rights, Strengthening INTERPOL' available at: <http://www.fairtrials.org/wp-content/uploads/Strengthening-respect-for-human-rights-strengthening-INTERPOL4.pdf>

¹⁴⁷ Centre for Peace Studies, 'Conflicts of extradition law and refugee protection law: Mutual recognition of asylum and non-refoulement among EU Member states' available at: http://www.cms.hr/system/publication/pdf/49/Conference_recommendations_Final.pdf

be an immediate possibility, there is certainly a legal basis for such recognition in the context of case-by-case judicial decision-making, in the concept of sincere cooperation between Member States, as articulated in Article 4(3) TEU, since recognition of asylum decisions ensures the effectiveness of the Common European Asylum System to prevent refugees being serially subjected to extradition proceedings. The European Commission has itself confirmed in answers to parliamentary questions from Fair Trials' patrons in the European Parliament that EU Member States must take into account the grounds on which an earlier asylum grant was made when considering an extradition request from the country of origin. It is clear that a ruling on the point from the CJEU would contribute significantly to the development of a uniform approach.

Conclusions on *ne bis in idem*

- Whilst the principles developed by the CJEU are useful, some challenges arise in practice, in particular due to (a) difficulties ascertaining, from the written decisions pertaining to acquittals / convictions, the identity of the facts and the nature of the first decision; (b) the need to obtain clarifications and information from other Member States' authorities as to these matters; and (c) the need for legal assistance (which requires funding) in other states.
- Progressive uses of the *ne bis in idem* principle in national courts should be shared and used to help develop a judicial culture focused on the recognition of earlier extradition refusal decisions / asylum grants. This could be facilitated through articles and practical instruments. LEAP, already spanning all 28 EU Member States, can help facilitate the exchange of such information among practitioners to ensure it is advanced before the courts.

III – A.T. v. LUXEMBOURG COMPLIANCE

The A.T. v. Luxembourg judgment

60. On 9 April 2015, the ECtHR gave judgment in the case of *A.T. v Luxembourg*¹⁴⁸, a case taken by LEAP Advisory Board member for Luxembourg Roby Schons in which Fair Trials intervened.

61. The case established –

- a. A violation of Article 6(3)(c) of the Convention by Luxembourg due to
 - i. denial of access to a lawyer at initial questioning before police (see paragraphs 67-75); and
 - ii. denial of an opportunity for the lawyer and client to discuss the case in private before the first interrogation by the investigating judge (see paragraphs 85-91).
- b. No violation of Article 6(3)(c) due to the denial of access to the case file until after the first interrogation by the investigating magistrate (see paragraphs 79-84).

62. In relation to the opportunity for a private discussion between client and lawyer prior to the judicial interrogation, the ECtHR appears to have been establishing a new point in its jurisprudence (no prior case is cited). In so doing, it noted that such an opportunity was explicitly required by Article 3 of the Access to a Lawyer Directive (this is the first reference to any of the Roadmap Directives in a judgment of the ECtHR).

¹⁴⁸ *A.T. v Luxembourg*, App. No. 30460/13 (ECHR, 20 April 2013).

63. EU Member States, as signatories to the Convention, must secure to all those within their jurisdiction the rights flowing from the Convention, in line with Article 1 of the Convention. As the President of the Court has underlined, they must take account of developments in the case-law and give them effect. Accordingly, it was helpful to examine the extent to which EU Member States complied with the requirement recognised in *A.T.* or if action would be needed to implement it (anticipating LEAP's likely focus on implementation of the Access to a Lawyer Directive in 2016 in the run-up to the transposition deadline).

The situation in the Member States represented

64. The following comments were made in this regard at the meeting:

- a. In **Luxembourg**, additional focus is now being placed upon access to a lawyer. One case was recently dismissed due to the absence of a lawyer at the early stages. A proposal currently before the parliament will address the requirements of *A.T.* and the Directive by ensuring consultations (20-30 minutes) before questioning by the police or investigating judge. The bigger issue remained access to the case file (see below).
- b. In **Belgium**, the '*Salduz* law' provides that the lawyer should have access to the client before interrogation (though without access to the file – see below). If, after initial questioning by police, the police decide to take the case further to the investigating judge, the lawyer is able to join the client, but there is no further opportunity for private consultation (*A.T.* concerned specifically that second stage).
- c. In the **Netherlands**, the greater issue was that, for the time being, there still was no access to a lawyer *during* questioning as a rule, except for some categories of offences. This continues to be the subject of debate at the time of publication. If a person is arrested, the lawyer will be notified and if s/he arrives within one hour will be entitled to consult with the client. If the arrest is prolonged after 6 hours, the lawyer has another opportunity to meet with their client. If a person is not arrested, they will be invited to be examined as a suspect and advised to consult a lawyer beforehand. Police are, in practice, contacting lawyers themselves even if the person appears on invitation. Reforms initiated in 2015 remain pending at the time of publication.
- d. In the **Czech Republic**, there is no problem in relation to the opportunity to consult with the lawyer prior to interrogation. Access to the case file is an occasional issue (see below). There were no pending reforms.
- e. In **Portugal**, no issue was reported in terms of the issue of consultations with the lawyer, though again there were issues raised in relation to access to the case file (see below).

The continuing issue around access to the file

65. The ECtHR took the view in *A.T.* that 'the Court finds that Article 6 of the Convention cannot be interpreted as guaranteeing unlimited access to the criminal case file as from before the first interrogation by the investigating judge, where national authorities have reasons relating to the protection of the interests of justice sufficient for not undermining the efficacy of the investigations' (paragraph 81, our translation). The decision became final on 14 September 2015.

66. Some LEAP members have indicated that they do not adhere to the logic of the judgment. In particular, whilst it is established in the case-law that authorities may limit access to the case file in order to protect the investigation, as *A.T.* itself reiterates, this is possible '*where national authorities have reasons*' (our emphasis). It seems difficult to understand this other than as a requirement for *case by case* reasons. Yet, the lack of access to the file prior to early questioning in Luxembourg resulted from an invariable rule of procedure (the file was made available only after the interrogation). This point was not addressed in the decision.
67. The need for a case by case approach appears to be supported by Article 7 of the Right to Information Directive. Article 7(4) allows restrictions on access to the file where this is 'strictly necessary' and refers to a '*decision* to refuse access to certain materials' (our emphasis), suggesting that there is no room under Article 7 for absolute procedural blocks on access to the case file. It is clearly possible for Article 7 to require this even if Article 6 of the Convention does not, since EU law may provide more extensive protection than the Convention.
68. There continue to be different views within LEAP as to the merits of access to the case file prior to initial interrogations, and this was discussed at the 5 June roundtable:
- a. On the one hand, the lawyer is less able to advise effectively without knowing the basis for the suspicion at this stage, as recognised by the ECtHR in the case of *Sapan v. Turkey*¹⁴⁹ (which *A.T.* disapproved of). For this reason, lawyers will often simply advise silence until the client has had access to the file. This should, of course, be without adverse consequences. Yet, lawyers note that this may make it harder to challenge an initial request for detention, and that judges may criticise them for obstructing procedure. Some feel that access to the case file at the initial stage would enhance the usefulness of the initial questioning phase.
 - b. On the other hand, the lawyer will not be able to review a large file in a meaningful way in the short period within which questioning takes place, before appearance before a judge, and yet the availability of the file would appear to legitimise questioning further. This is, of course, a practical reservation rather than a principled objection, and it has been noted that in some cases authorities make available a summary of evidence well before questioning (e.g. in financial cases when the person is not detained), enabling the defence to identify areas which can be clarified at this stage.
69. The view expressed by LEAP, as expressed in its Toolkit on the measure, is that Article 7 of the Right to Information Directive requires access to the file pre-trial, subject to case-specific exceptions which must be justified individually (pages 40-41). If, despite the file being available, it cannot meaningfully be assessed prior to questioning, it can be examined with more time later. In any case, there should be no adverse consequence to the exercise of the right to silence, whether this is advised by the lawyer due to the impossibility / impracticability of examining the file or for any other reason.

¹⁴⁹ *Sapan v. Turkey*, App. no. 17252/09 (ECHR, 20 September 2011).

Conclusions on *A.T. v. Luxembourg*

- There may be occasional problems in some Member States with regard to the possibility of a private consultation between lawyer and client prior to judicial interrogation, as required by *A.T.* LEAP will monitor this point in the context of implementation of the Access to a Lawyer Directive in the course of 2016, among other requirements of that Directive.
- There continues to be a discussion around access to the case file prior to police questioning, irrespective of the ECtHR's findings in *A.T.* which do not appear totally convincing and which responded to a narrow complaint based on Article 6 only. The discussion appears to reveal a – worrying – practical reality of criminal procedure in that one of the main reasons lawyers want access to the file is to avoid systematically advising silence, on the basis that the exercise of that right in practice carries some adverse consequences for the client. That is something which the Commission should bear in mind when considering implementation of the Directive on the Presumption of Innocence once the latter is adopted.

IV – EUROPEAN SUPERVISION ORDER

70. The Framework Decision on the European Supervision Order (ESO) was due for implementation in October 2012. An initial report by the European Commission on 6 February 2014¹⁵⁰ criticised the fact that only 12 Member States had implemented it. Further legislation has been adopted since, for instance in Spain, the United Kingdom and France. However, to date, LEAP has yet to encounter a case in which an ESO has actually been used.
71. For instance, in a recent case, the LEAP Advisory Board member for Cyprus was working on a case in which a resident of France was being prosecuted in Cyprus, with proceedings ongoing despite critical professional engagements in France. France had, by the time the case came before the relevant pre-trial court, adopted implementing legislation (as of 1 October 2015) – but Cyprus had not. Initially, the court was willing to grant a one-time order allowing the suspect to report to the Cypriot embassy in France for a 12-day period, to enable him to attend a crucial professional appointment. At the time of writing, with the criminal proceedings still pending, applications are being made to the court to extend this arrangement as the suspect has been informed that he is at risk of losing his job in France. The only solutions being examined are ‘classic’ solutions involving the Cypriot embassy in France, without the possibility of an ESO (which would involve the transfer to supervision measures to the French authorities themselves), due to the absence of laws implementing the ESO Framework Decision in Cyprus.
72. In another case, the LEAP Advisory Board member for Portugal had a case involving a German national for whom it was considered to have a measure of house arrest transferred to Germany, but there was no implementing legislation there to allow this, so it was not ultimately possible.

¹⁵⁰ European Commission, ‘Report from the Commission to the European Parliament and the Council on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention’, 5 February 2014, (http://ec.europa.eu/justice/criminal/files/com_2014_57_en.pdf).

73. At the 5 June 2015 roundtable, participants were asked for updates concerning this measure, with the following (sadly limited) results:

- a. In **Luxembourg**, there is no legislation implementing the ESO Framework Decision and this is all the more problematic since Luxembourg has a large non-resident working population and its internal legislation on pre-trial detention appears directly discriminatory against non-residents (likely to be non-nationals), requiring an additional condition for detention (e.g. risk of interference with evidence) for a person resident inside the jurisdiction whereas a person resident outside the jurisdiction can be detained merely if they are accused of an offence carrying a sentence over a two-year threshold.
- b. In the **Czech Republic**, the ESO Framework Decision has been implemented legally but it is not used in practice, and there appears to be doubt as to whether it will be used in European Arrest Warrant cases.
- c. In the **Netherlands**, there are rumoured to have been some uses of the ESO (including one case involving a transfer to Hungary), but no verified uses within the LEAP network.

74. In order to ensure enhanced use of the measure, LEAP and Fair Trials continue to raise its profile through publications, for instance with articles for the Penal Reform International blog¹⁵¹ and the UK criminal law practitioner publication Archbold Review.¹⁵² However, the reality is that – since the ESO Framework Decision does not create an invocable right for the individual – the defence is not able to insist upon the use of the instrument (all the more if there is no implementing law). Simple issues like the unavailability of translations of the potential executing state’s legislation mean that convincing national authorities to use the system is an uphill struggle.

75. In August 2015, Fair Trials Europe, as coordinator of LEAP, attended an expert roundtable organised by the Conference of European Probation in which several probation practitioners directly involved in the transfer of supervisory measures between Member States participated. At that meeting, it was confirmed that there were some uses of the ESO Framework Decision, but it was noted that – for that measure as for the Framework Decisions on transfer of custodial sentences and probation decisions – the initiative lay primarily with these authorities. Thus, one probation service gave the example of a computerised system which would automatically flag up cases of non-residents potentially eligible for prisoner transfers. LEAP believes that better dialogue between these authorities and the defence – best placed to bring eligible cases to light, since they will be furthering the suspect’s interests – might enhance use of the ESO.

¹⁵¹ B Min, ‘The European Supervision Order for transfer of defendants: why hasn’t it worked?’, 25 September 2015, Penal Reform International blog, available at <http://www.penalreform.org/blog/the-european-supervision-order-for-transfer-of-defendants/>.

¹⁵² J Blackstock and A Tinsley ‘The arrival of European law in criminal proceedings’, Archbold Review Issue 8 September 21, 2015, available at <http://cornerstonebarristers.com/wp-content/uploads/2015/09/Archbold-Review-September-2015-PRESS.pdf>, p. 5.

Conclusions on the ESO Framework Decision

- There continue to be insufficient uses of the ESO Framework Decision, even for the limited category of cases in which this instrument may be used, even where implementing legislation is available.
- Awareness of the ESO Framework Decision may be on the increase, and there has been some further legislative implementation, but this is not so far translating into additional use of the instrument by national authorities.
- Enhanced dialogue between the defence and probationary / pre-trial supervision authorities might help encourage use of the instrument, and Fair Trials will explore opportunities to ensure this sort of dialogue.
- In any case, the ESO represents a solution for a narrow category of cases, and will not be capable of making serious inroads into the general problem of pre-trial detention in the EU, for which dedicated legislation is required.

CONCLUSION

76. Fair Trials and LEAP members will circulate this communiqué to appropriate parties and continue discussions within the LEAP network according to the specific issue and/or jurisdiction. If you have comments or wish to discuss any of these matters with Fair Trials and/or a LEAP member for your jurisdiction, please contact alex.tinsley@fairtrials.net.

**Fair Trials / LEAP
October 2015**

Attendees at the 5 June 2015 roundtable:

- Vania Costa Ramos, LEAP Advisory Board member for Portugal
- Scott Crosby, LEAP member (EU / Belgium)
- Carlos Gomez Jára, LEAP Advisory Board member for Spain
- Christophe Marchand, LEAP Advisory Board member for Belgium
- Ondrej Muka, LEAP Advisory Board member for the Czech Republic
- Jozef Rammelt, LEAP Advisory Board member for the Netherlands
- Roby Schons, LEAP Advisory Board member for Luxembourg
- Wouter van Ballegooij, LEAP member (EU / Netherlands)
- Marianne Wade, LEAP member (EU / United Kingdom)
- Anne Weyembergh, guest (EU / Belgium)

Annex 6: Fair Trials Scoreboard Consultation Paper



Towards a European Fair Trials Scoreboard Consultation Paper

2015



Co-funded by the Criminal Justice
Programme of the European Commission



Introduction

1. This consultation paper is designed to inform the possible future development of a European Fair Trials Scoreboard: an annual report or “index” showing the extent to which the right to a fair trial has been successfully protected in each of the 28 EU Member States. There is no doubt that this would be a huge and daunting task raising some challenging issues:
 - a. Reaching a shared understanding of what a fair trial looks like across the different legal systems and legal cultures within the EU.
 - b. How do we make sure that a Fair Trials Scoreboard is useful for different stakeholders, including regional and domestic policy-makers, judicial actors, law enforcement authorities, lawyers, academics and non-governmental organisations? and
 - c. How do we go about measuring the extent to which the right to a fair trial is enjoyed in different Member States, and how can we mitigate the risks associated with such a project?
2. This paper sets out our initial thoughts on the key issues for consideration before deciding whether to embark on this project. After providing some context on Scoreboards used in the context of other human rights issues (with further information in Annex 2), Part A focuses on the potential benefits, risks and challenges of a Fair Trials Scoreboard, how it might be presented and methodology (the types of factors to look at and sources of data). Part B focuses on the potential content of a Fair Trials Scoreboard (with ideas for potential indicators of fairness in Annex 1).
3. While a broad consultation of all stakeholders would ultimately be necessary, we are seeking your valuable input before rolling out the consultation to other parties. **This paper sets out questions in blue.** We are however keen to get your thoughts on any and all aspects of the proposal, so please do not feel constrained by the questions we ask. Your full and frank feedback is what we’re after! You can either add your responses to this paper and scan them to us, or you can complete the online version of the questionnaire which will be emailed separately. Alternatively, your thoughts would be welcome via email (alex.tinsley@fairtrials.net). Please provide your responses by 31st August 2015 so that we can discuss the outcomes at the Annual Advisory Board meeting in October 2015 and report back to all LEAP members at the LEAP Annual Conference in February 2016.
4. It may well be that the outcome of the consultation is that this is not a project which Fair Trials and LEAP should undertake, but we hope you will agree that the process of discussing how the right to a fair trial could be defined and measured is valuable in and of itself even if a Fair Trial Scoreboard, undertaken by Fair Trials with LEAP input, is not the eventual outcome.

Background

5. Fair trial rights are the cornerstones of safe and stable societies. They ensure public confidence in the justice system, prevent unfair trials from being used as a tool of repression and encourage investment and economic growth. The protection of fair trial rights also prevents the devastation caused by wrongful convictions, not only for the defendant, but also for the victims of crime and society as a whole. The central role which fair trial rights play in just societies, as reflected in all international and regional rights instruments, has placed them beyond dispute.
6. Yet despite being widely recognised, our own casework and consultations with LEAP members demonstrate that fair trial rights are routinely abused, including within EU Member States. As the European Area of Freedom, Security and Justice has developed, the mutual recognition of judicial decisions in criminal matters has defined the EU’s approach to criminal justice, while

also highlighting the significant differences between the ways in which Member States protect fair trial rights. Nowhere has this been more evident than through the operation of the European Arrest Warrant, and the seriousness of the situation has been highlighted by the ambitious legislative programme pursued under the Procedural Rights Roadmap; the EU's answer to the challenge of building mutual trust between Member States necessary to underpin much-needed cooperation in order to combat crime.

7. It is against this backdrop that Fair Trials hopes to work with LEAP to explore the possibility of producing a European Fair Trials Scoreboard; an annual report or “index” showing the extent to which the right to a fair trial has been successfully protected in each of the 28 EU Member States. As Member States focus on the implementation of the adopted Roadmap Directives and negotiations of further procedural rights measures, we would like to explore whether a Fair Trials Scoreboard which highlights both good and bad practice could be of value. Indeed, the European Commission has already embarked on a similar exercise focussed on civil justice matters in the EU Justice Scoreboard, upon the success of which we hope the Fair Trials Scoreboard can build. Describing the value of this information tool, Commissioner for Justice, Consumers and Gender Equality, Věra Jourová, explained:

“The EU Justice Scoreboard provides an overview of the quality, independence and efficiency of EU Member States’ justice systems. Together with individual country assessments, the EU Justice Scoreboard helps to identify possible shortcomings or improvements and to regularly reflect on progress. An effective national justice system is crucial for enforcing the Union’s laws in practice and contributing to economic growth. I am convinced that we can learn from each other, making our justice systems more effective, for the benefit of citizens and businesses! This will also increase mutual trust in each others’ systems.”

8. In order for a Fair Trials Scoreboard to achieve impact, it will inevitably require the buy-in of all key stakeholders which may not be easy to achieve. Domestic authorities are generally very protective of their sovereignty in relation to criminal justice and as such are likely to be resistant to the sort of external interference and pressure which a Fair Trials Scoreboard might be used to impose. It may also be challenging to get the media and the public on board, given that work to improve the fairness of criminal justice systems is often not popular due to the public perception of the beneficiaries (eg. those accused of committing crimes) and the de-prioritisation of fair trial rights issues as a human rights concern. The most significant challenge, however, will almost certainly arise as we try to define the right to a fair trial and develop a methodology for measuring its protection. This is particularly the case given that Europe is a region of exceptional legal and linguistic diversity which could make it difficult, if not impossible, to find a common basis upon which to assess the criminal justice systems of different Member States.

Consultation Questions:

- **Do you think that the Fair Trials Scoreboard could be a valuable project for Fair Trials and LEAP?**

Yes/ No/ Maybe

Please explain your answer

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- What does the right to a fair trial mean to you?

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- How is protection of the right to a fair trial best achieved?

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A. Defining the challenge

a. What is a Scoreboard?

9. A Scoreboard (or Performance Index) is an information tool which collates quantitative and qualitative data to highlight good and bad practice, illustrate trends and provide complex comparative information in an easily digestible format.

i. Purpose

10. Scoreboards provide a common point of comparison between countries. They allow countries with different approaches and cultures to be compared at a basic level in order to draw out commonalities and differences. As a general rule they rank or group countries based on performance in certain categories, motivating countries that do poorly to improve, and countries that do well to stay at the top. Progress and trends, at the domestic and regional level, can be monitored through annual updates.
11. Scoreboards generally try to measure and compare performance in a policy area – such as the right to a fair trial - that might otherwise appear to be immeasurable. The characteristics of a fair trial are challenging to define, let alone to measure, with no general statistics demonstrating the extent to which the right to a fair trial is upheld in a particular country or region. This is a problem which a Scoreboard might be able to tackle by dividing the issue into a series of sub-topics which are more easily measurable through various indicators.
12. Over the past two decades, Scoreboards and Performance Indexes have become a very popular way to disseminate information about issues in a way that is easily read and understood. Leading researchers on this topic have shown that where, in the 1990s there were only about two dozen regularly updated information tools of this nature, by 2010-2014 there are over 140,¹⁵³ produced by governments, universities, and NGOs (amongst others) as a way to raise awareness of particular topics and inform developments on particular policy issues. Annex 2 provides an overview of 17 Scoreboards and Performance Indexes over a range of policy issues for your review.

ii. Impact

13. The proliferation of Scoreboards has been accompanied by demonstrated impact in a number of areas. By raising awareness of issues through the accessible presentation of complex data, Scoreboards are often referred to in the mass media, drawing in a far wider readership than the information might have received if presented in academic papers or NGO reports. The World Justice Project, for example, describes the success of its Rule of Law Index by stating that “Index findings have been referenced by heads of state, chief justices, business leaders, public officials, and the press, including cites by more than 500 media outlets in nearly 80 countries”.¹⁵⁴
14. In addition to (and almost certainly as a result of) receiving public and media attention, Scoreboards can help shape policy by using the publication of information to create social

¹⁵³ Judith G. Kelley, Beth A. Simmons, “The Power of Performance Indicators: Rankings, Ratings and Reactivity in International Relations,” Paper prepared for annual meeting of the American Political Science Association, August 27-September 1, 2014, Washington DC, page 7. There are more international indexes generally, but the Kelly and Simmons criteria are strict - the information must be public, cross-national, and comparative, and the index must be updated at regular intervals. This shows that not only is there an increase in GPIs, there is an increase in quality and an increase in recurring, regularly updated, GPIs.

¹⁵⁴ World Justice Project Rule of Law Index 2014 webpage, available at: <http://worldjusticeproject.org/rule-of-law-index>.

pressure. Ranking systems create a spirit of competition between countries, encouraging action to address deficiencies so as to improve position in the rankings. The United States' annual Trafficking in Persons Report (TIP Report) provides a useful example of the impact which Scoreboards and Performance Indexes can have. The TIP Report assesses the efforts made by national governments to combat trafficking and protect its victims. It allocates countries one of three tier ratings (1 to 3), with an additional "watch list" of countries which are at risk of being down-graded to Tier 3. A recent study has shown that governments do respond to the scrutiny exercised by the US through this process, responding most notably to harsher tier rankings.¹⁵⁵ The example of Pakistan is most telling. According to a 2008 press release from Pakistan's Interior Ministry:

*"The United States State Department had previously ranked Pakistan on Tier-2 Watchlist which was a cause of concern for the country. With significant efforts of Ministry of Interior [...] the US has upgraded Pakistan's ranking. This development has improved the stature of Pakistan before the world".*¹⁵⁶

iii. Relevant examples

15. We have included in Annex 2 a summary of 17 Scoreboards and Performance Indexes which illustrate the diverse range of approaches to this task, across a wide range of policy areas. Some of the examples offer generalised assessments of broad issues – such as Amnesty International's annual "State of the World's Human Rights" report, which describes human rights standards on a country-by-country basis. It focuses on areas in which each country is succeeding and those in relation to which it needs to improve but does not assign rankings. While the State of the World's Human Rights report does occasionally address concerns relating to fair trial rights protection, it does not do so in a systematic way but rather only when a country is doing particularly well or particularly badly in upholding these rights. There is therefore no comparative data which can be drawn on fair trial rights protection.
16. There are other examples which deal more concretely with criminal justice issues. The World Justice Project's Rule of Law Index analyses the state of the rule of law in 99 countries worldwide. The Index measures the rule of law using 47 indicators organized around 9 factors. This is much broader than the right to a fair trial: "Criminal Justice" is just one of the 9 factors which is in turn divided into seven sub-factors and only one of these is "Due process of law and rights of the accused". Under this sub-factor, the Rule of Law Index "[m]easures whether the basic rights of criminal suspects are respected, including the presumption of innocence and the freedom from arbitrary arrest and unreasonable pre-trial detention. It also measures whether criminal suspects are able to access and challenge evidence used against them; whether they are subject to abusive treatment; and whether they are provided with adequate legal assistance. In addition, it measures whether the basic rights of prisoners are respected once they have been convicted of a crime." The data on criminal justice, however, is only perceptions data, collected through an expert questionnaire and a general population poll. The expert questionnaire on criminal law is made up of only 34 opinion-based questions, while the general population poll includes only two questions on criminal law.¹⁵⁷

¹⁵⁵ Judith G. Kelley and Beth A Simmons, "Politics by number: Indicators as Social Pressure in International Relations", *American Journal of Political Science*, Vol 59(1), January 2015.

¹⁵⁶ Ibid, with reference to Associated Press of Pakistan, "Upgradation of Pakistan on human trafficking list a significant achievement", 28 June 2012.

¹⁵⁷ The World Justice Project Rule of Law Index questionnaire and general population poll are available at: <http://worldjusticeproject.org/questionnaires>.

17. The EU Justice Scoreboard, which is described as “an information tool aiming to assist the EU and Member States to achieve more effective justice by providing objective, reliable and comparable data on the quality, independence and efficiency of justice systems in all Member States”, focusses only on civil, commercial and administrative cases. It does not provide an overall ranking of Member State justice systems, but rather presents the data collected for each Member State across various indicators which measure the efficiency of justice systems, the quality of justice systems and the independence of the judiciary. The EU Justice Scoreboard relies on a range of existing sources of information, including the Evaluation of European Judicial Systems (described below), Eurostat, the World Bank and the European Judicial networks, and also the input of specific contact persons on national justice systems.
18. Finally, the European Commission for the Efficiency of Justice Systems (CEPEJ) publishes an annual Evaluation of European Judicial Systems which ranks Council of Europe countries based on the efficiency and fairness of their judicial systems. While the Evaluation does examine public expenditure on the criminal justice system (including on legal aid), levels of public confidence in the legal system and whether there are court interpreters and translation services provided (many of which are relevant for the consideration of fair trial rights protection), it does not go into sufficient detail to determine to what extent defendant’s rights are being upheld. Additionally, this index looks to the court systems of a country overall and does not focus solely on criminal courts.
19. While there are certainly existing Scoreboards and Performance Indexes that look at some of the information that the Fair Trials Scoreboard might cover, they do so in a general way, either looking at human rights protection in general, or by examining broader aspects of the justice (or criminal justice) system without a specific and detailed focus on fair trial rights protection in criminal proceedings. The Fair Trials Scoreboard could potentially therefore fill a gap in the current “index” market. An alternative approach would be to encourage and support the development of the existing Scoreboards and Performance Indexes discussed above to better measure and reflect performance in the area of fair trials.

b. Benefits of a Fair Trials Scoreboard

20. In addition to filling the gap left by other Scoreboards and Performance Indexes which do not address the standards of fair trial rights protection in detail, there are potentially a range of benefits which a European Fair Trials Scoreboard could provide. These should of course be considered in light of the equally significant list of risks and challenges associated with such a project, which we deal with in more detail below.

i. A measurement of fair trial rights protection

21. The main objective of the Fair Trials Scoreboard would be to create and apply a measurement of fair trial rights protection. Currently, there is no method of reliably measuring whether fair trial rights are being respected within the criminal justice systems of different countries. By measuring fair trial rights protection, the Fair Trials Scoreboard could allow countries to see what works and what does not within their own jurisdiction, and to identify improvements which could and should be made. All countries claim to provide basic fair trial rights, but a measurement of fair trial rights may help to prevent the rights from being provided in law without being applied in practice.

ii. Fostering discussion

22. A Fair Trials Scoreboard could foster greater discussion of fair trial rights and their role within just and stable societies. Currently, when human rights, rule of law, and development issues are

discussed, fair trial rights do not feature to the same extent as other issues, such as freedom of expression and freedom from corruption. As we have seen in relation to other Scoreboards and Performance Indexes, by presenting data in an easily accessible format which allows for comparisons between jurisdictions, the Fair Trials Scoreboard could attract the attention of the media and the public and, consequentially, domestic and regional policy-makers. This, in turn, might cause greater attention to be paid to fair trial rights at the international and regional level, and that they feature in discussions of human rights, rule of law, and development

iii. Highlighting good practices and areas for improvement

23. By analysing the performance of each Member State, the Fair Trials Scoreboard could demonstrate not only how justice systems are working overall but also those areas that need improvement and those in which the system is working well. This could enable countries to see what is and is not effective in their own criminal justice systems and find suitable remedies.
24. A country with a low overall score may have a very high score in one of the areas examined. This country would be able to investigate further what it is about the high scoring area that is working well and apply similar approaches to those areas which are not. The same would be true of a country that has a high score overall but a lower score in one category. Further, countries can draw on the experiences of others, as illustrated in the Fair Trials Scoreboard, and identify methods of rights protection which may also work within their system. This could increase the flow of ideas between countries and a spirit of cooperation, facilitating greater fair trial rights protection across the region.

iv. Tracking trends and developments

25. The Fair Trials Scoreboard would almost certainly need to be regularly updated, allowing for recent developments, trends and changes to be tracked and highlighted. Countries that score poorly would then be on notice that the international community is paying attention to how they implement fair trial rights. Countries that decide to make changes to their system could have the opportunity to show the international community the changes they are making and that they are becoming more effective in providing these rights. Additionally, countries that score well could be held accountable to at least maintain the quality of rights they are providing so that they do not fall in the rankings.
26. The ability to compare the fair trial rights protection offered by different countries could also help to identify and track regional trends and developments. The Fair Trials Scoreboard could potentially show whether the policy or practice of one country is unique to that particular country or whether it forms part of a broader trend within the European criminal justice context. Further it could perhaps illustrate where international and regional priorities lie in relation to fair trial rights protection, and how they shift as events occur and time passes.

v. A tool for advocacy

27. The Fair Trials Scoreboard could also function as a useful tool for advocacy at both the local and regional level. By not only providing an overall score of a country's performance with regard to fair trial rights protection, but by providing scores relating to individual issues, the Fair Trials Scoreboard could provide evidence to support local and regional advocates in calling for change on specific issues. At the regional level, the Fair Trials Scoreboard could be used to demonstrate the need for improved protection of fair trial rights across the EU and might inform decisions regarding the allocation of structural and development funds.

28. In addition to pointing out particular issues within both the regional and domestic criminal justice systems which need improvement, the Fair Trials Scoreboard could also assist advocates in monitoring the effectiveness of initiatives which are intended to address concerns by showing what is really happening on the ground within these systems. Through regular updates to the Fair Trials Scoreboard, advocates would hopefully be able to identify and illustrate which initiatives are and are not working. It could be used to demonstrate where further initiatives and resources are required, and prevent spending cuts in areas where improvements are being made.

vi. *Overcoming the perception of criminal procedural law as a sovereign matter*

29. Criminal law is widely perceived to be a purely sovereign issue in which regional and international bodies should not interfere and in relation to which it is not appropriate for one country to comment or criticise the practice of another. This has continued to be the case despite the fact that the right to a fair trial is widely recognised as a fundamental human right which international law requires states to uphold and which it is in states' collective interest to secure. Even within the European Union, despite the development of the European Area of Freedom, Security and Justice, Member States still consider themselves to be largely free to develop their own systems of criminal justice and prosecute and punish defendants as they see fit. The challenges which have arisen through the operation of the European Arrest Warrant have highlighted, however, that this approach is not sufficient as a basis for the mutual trust necessary to bolster mutual recognition. By illustrating the extent to which fair trial rights are respected across Member State's respective criminal justice systems, the Fair Trials Scoreboard may help to overcome the perception that criminal law is purely sovereign and increase the discussion and development of these international rights.

Consultation questions:

- **How would you rank the outlined benefits of the Fair Trials Scoreboard, with 1 being the most important benefit and 6 being the least important?**

Benefit	Rank (1 = most important, 6 = least important)
Measuring fair trial rights	
Fostering discussion	
Highlighting good practices and areas for improvement	
Tracking trends and developments	
Providing a tool for advocacy	
Overcoming perception of criminal procedural law as a sovereign matter	

- Do you consider there to be any other benefits which the Fair Trials Scoreboard could produce?

Yes/No/Maybe

If so, what are they?

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- Would you use the Fair Trials Scoreboard in your own work?

Yes/No/Maybe

If so, how? If not, why not?

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c. Methodology

i. Content and indicators

- Scoreboards are valuable because they take an inherently unmeasurable policy issue – such as protection of the right to a fair trial – and make it measurable by developing a framework within which the issue can be broken down into sub-issues or categories with indicators which can be measured. The OECD Better Life Index, for example, measures the well-being of societies by assessing 11 topics – housing, income, jobs, community, education, environment, civic engagement, health, life satisfaction, safety and work-life balance – each of which are accompanied by a basket of one to four indicators. The Global Gender Gap Report measures the magnitude and scope of gender-based disparities by examining the gap between men and women in four categories – economic participation and opportunity, educational attainment,

health and survival and political empowerment, each of which is measured by two to five variables.

31. Clearly the decision as to how best to measure the protection of fair trial rights in EU Member States will be critical to the success of any Fair Trials Scoreboard. In Section B below, we have proposed a list of sub-issues or categories which could be used as a basis for measuring fair trial rights protection (with a fuller list of indicators included in Annex 1). An assessment of the content and methodology of other Scoreboard and Performance Indexes has demonstrated that the list of sub-categories and indicators need not be comprehensive, and that in fact a shorter list of each which is examined in detail and in a robust, credible and defensible manner may be preferable. We therefore look forward to receiving your input on which of the list of sub-issues and indicators would be most relevant for a Fair Trials Scoreboard.

ii. *Types and sources of data*

32. The choice of data types and sources is crucial to ensure the credibility, and consequential success, of the Fair Trials Scoreboard. In order to assess the extent to which Member States protect the right to a fair trial within criminal cases, both protections in law and in practice should be examined. While legal analysis will certainly be necessary, it will not alone provide an accurate representation of whether or not fair trial rights are enjoyed in practice. In order to obtain the full picture, there are two ways to assess the practical enjoyment of fair trial rights: firstly, by looking at available statistical data, and secondly, by ascertaining the perceptions or opinions of key stakeholders, such as lawyers, suspects and defendants and the public as a whole.
33. In order to ensure that the process of producing and reviewing the Fair Trials Scoreboard is as efficient as possible, consideration should be given to what existing sources of data might be used so as to avoid reinventing the wheel. While the question of where the data for a Fair Trials Scoreboard could come from would inevitably need to be revisited once we have a clearer idea on what the list of issues and indicators might be, some initial thoughts on existing sources are as follows:
 - a. Legal and policy analysis: Analysis of legal provisions relevant to the protection of the right to a fair trial will no doubt exist, to some extent, on a country-by-country (if not regional) basis. The European Commission, for example, is currently funding a number of research projects designed to examine the extent to which Member States have implemented various EU criminal justice laws, including the Roadmap Directives on the right to interpretation and translation and the right to information and the Framework Decisions relating to detention. The results of this research could, for example, feed into the Fair Trials Scoreboard. It would be important for any such legal analysis to include a review of both legislation and case-law (including case-law of the European Court of Human Rights on the protection of Articles 5 and 6 of the ECHR in criminal cases in the relevant Member States). Further, Fair Trials' existing notes of advice on criminal proceedings in all EU Member States could also provide a useful starting point.
 - b. Available statistical data: There are various ways in which national statistics can inform a determination of a country's performance in protecting fair trial rights and it is hoped that Member States are, for the most part, producing such statistics on an annual basis – for example, pre-trial detention rates, conviction rates, acquittal rates, overturned conviction rates and budgetary figures for legal aid and other aspects of the criminal justice system. Certain other Scoreboards already feature certain statistical data which could also be used

for the Fair Trials Scoreboard, such as the CEPEJ annual evaluation of European Judicial Systems. While this report covers both civil and criminal justice, and focuses on the efficiency and quality of justice rather than the protection of fair trial rights, it does cover relevant issues and sets out statistical data of value.

- c. Perceptions data: The opinions of key stakeholders in the criminal justice system – such as defence lawyers, suspects and defendants and the public as a whole – provide a valuable way of assessing how the criminal justice system (and indeed fair trial rights protection) is working, or perceived to be working, in practice. Perceptions data does have obvious drawbacks because it is based on subjective evidence and requires the participation of a significant number of representatives of the relevant stakeholder group. However, having conducted some small-scale perceptions testing during the LEAP Annual Conference in February 2015, we consider that combined with other sources of data, this might be a useful component of the Fair Trials Scoreboard.

Consultation questions:

- **Do you agree that legal analysis, statistical data and perceptions data are the three best types of data to be used in the Fair Trials Scoreboard?**

Yes/No/Maybe

If no, what other suggestions do you have?

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- **What sources of statistical data on the criminal justice system are there within your Member State?**

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- **Do you pay attention to it/ consider it to present an accurate reflection of what is happening in practice?**

Yes/No/Sometimes

Please explain your answer:

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- What sort of perceptions data would you find most interesting and who are the key stakeholders we would need to ask?

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iii. *Presentation and scoring*

34. Once the data for a Scoreboard has been collated, decisions regarding the analysis and presentation of the data for each Member State would need to be made to ensure that the tool produces all of the benefits referred to previously, particularly by enabling Member States to see how they compare to others with regard to fair trial rights protection. There are three main ways in which data can be presented in a Scoreboard or Index: numerical rankings; a tier or grouping system; or country summaries. Each of these are discussed in more detail below.

Numerical rankings

35. A classic approach to data presentation is to use a numerical ranking, in which Member States are placed in order according to the extent to which they comply with the indicators being measured. The main advantage of this approach is that it is extremely easy to understand, providing a clear basis for determining how a Member States compares to other Member States on a particular policy issue. A further advantage is that this format places pressure on Member States to improve their ranking and can be used as an effective advocacy tool by those seeking to influence Member States in making necessary legal and policy improvements.
36. There are, however, disadvantages to this approach. Firstly, it requires a very sensitive method of analysis of data across all issues and indicators in order to distinguish between Member States for ranking purposes. Secondly, given that it will inevitably be difficult to distinguish between two Member States, numerical rankings may obscure the fact that countries ranked closely together are more similar than they are different. This means that the differences

imposed on them by the numerical ranking system are artificial and that a country may have scored higher than the next but they may be fairly identical according to the data.

37. The final disadvantage is that this type of ranking can create complacency among the higher ranked countries over time. If the ranking consistently ranks the same countries in the top spots, over time these countries may feel secure in their positions and stop striving to make improvements. It is likely that countries at the top may believe that they already have fair trial rights that are strong enough and do not need to make improvements or changes.

Tier or grouping system

38. Using a tier or grouping system of presentation can address some of the disadvantages associated with the numerical ranking presentation. In this method, the countries are grouped by performance rather than ranked. There are many ways in which this could be done, for example by allocating one of three or four tiers (as in the US Trafficking in Persons Report) or by assigning a traffic light designation (eg. green for good, orange for mediocre, and red for poor) either to a country's overall record or to its record on individual sub-issues.
39. This method of presentation helps to show which countries are actually similar in ranking rather than highlighting minute or artificial differences to distinguish between one country and the next. It can also help solve the problem of complacency of countries at the top as it will become apparent that they could easily fall to the next lowest category because there is no limit to the number of countries that could be in each category. If a more detailed approach were to be applied, providing a traffic light designation on a sub-issue by sub-issue basis, a more detailed and sensitive analysis of the findings relating to a particular country and comparison between different countries might be achieved.

Country summaries

40. Many policy indexes provide country summaries which set out a more in-depth picture of what is happening in each country and may be combined with a ranking or tier presentation or may not. Summaries can be an effective way of highlighting both positive and negative aspects of a particular Member State's activities. This approach is less likely to make the top performing countries complacent as they have specific recommendations as to how to improve. Additionally it removes the numerical pressure, allowing Member States to focus on making real change within their laws and practices rather than focusing on improving their position in a ranking. On the other hand, this type of presentation is necessarily lengthy and can be less accessible for readers. This means it may be less likely to gather the attention of media and a wider audience.

Consultation question:

- **Which of the three suggested presentation/scoring methods do you think would be most effective for a Fair Trials Scoreboard?**

a) Numerical rankings

b) Tier or grouping system

c) Country summaries

Please explain your answer:

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d. Risks and challenges

41. Taking on a project of this magnitude would certainly involve a significant number of risks and challenges. We consider the following to be the most significant and set out some ideas as to how they could be overcome and mitigated.

i. Credibility

42. Each of the above-listed benefits associated with the Fair Trials Scoreboard depend upon its content being considered credible by its readership. The credibility of the tool will ultimately depend upon (i) agreement being reached between key stakeholders on which issues and indicators should be used to measure fair trial rights protection, and (ii) the quality and reliability of the data upon which any conclusions, scorings and/or rankings are based. Other Scoreboards and Performance have been criticised for their lack of credibility, with the Global Slavery Index a prime example. It has been criticised for its use of “unreliable, incomplete and inappropriate data”, and for extrapolating data from one country to other “similar” countries for which no such data is available. Peculiar examples include the extrapolation of UK data to Iceland, and the extrapolation of US data to Germany.¹⁵⁸
43. The risk of the Fair Trials Scoreboard’s credibility being questioned could hopefully be mitigated through careful planning and methodological design. We would need to ensure that (i) the Fair Trials Scoreboard is built around themes and indicators which do indeed illustrate whether or not each Member State does comply with fair trial rights obligations, (ii) the different types of data upon which indicators are measured is collected using sound and reliable methodology, and (iii) the organisation(s) responsible for producing the Fair Trials Scoreboard, whether Fair Trials, LEAP and/or another organisation/body, is/are considered to be experts in the criminal justice field. This consultation is a key element of the process and critical to ensuring that any Fair Trials Scoreboard is designed with credible methodology from the outset. Similarly, the more experts who feed into the data collection and analysis process, the more credible the output is likely to be, so collaboration could be key to ensuring the credibility of the Fair Trials Scoreboard. Finally, the credibility of a Fair Trials Scoreboard could be enhanced by sharing

¹⁵⁸ Joel Quirk and André Broome, “The politics of numbers: the Global Slavery Index and the marketplace of activism”, 10 March 2015, available at: <https://www.opendemocracy.net/beyondslavery/joel-quirk-andr%C3%A9-broome/politics-of-numbers-global-slavery-index-and-marketplace-of-ac>.

draft results with Member States in advance, to provide the opportunity to explain the conclusions which have been reached (and any associated ranking etc), to identify the steps which could be taken to improve the situation and to take account of any further input or comment which the Member States wish to make.

ii. Data collection

44. The Fair Trials Scoreboard's true value would ultimately be determined by the quality of the data which is used as the basis for its findings. Different types of data can be used to support the conclusions reached in Scoreboards and Performance Indexes; some may be existing data collected from other publications and sources (including governmental sources) whereas other data may be collected specifically for the purpose of the particular Scoreboard (through specific research methodologies). When planning the structure and methodology for the Fair Trials Scoreboard, careful thought must be given to the availability of credible data, the possibilities for collecting fresh and reliable data and who is best placed to obtain it in each case.
45. The data collection challenges can be reduced by limiting the scope of the study to that which is realistically achievable. While a fully comprehensive assessment of fair trial rights protection in all EU Member States would be the ultimate aim, it may be better to focus on a small number of factors and associated indicators in order to ensure that the necessary data is obtainable. The option of expanding the list of issues and indicators would always be available, once the methodology and the credibility of the Fair Trials Scoreboard has been established. Further, full consideration should be given to what existing data can be used so as to avoid reinventing any wheels. While the use of secondary data means that the Fair Trials Scoreboard would always be slightly out-of-date, this would not be unusual as many other Scoreboards and Performance Indexes use such data.

iii. Creating complacency

46. A further risk associated with the publication of a Fair Trials Scoreboard is that it might result in complacency among high-ranked countries. The experience of other Scoreboards and Performance Indexes has shown that when countries consistently rank at the top of an index, they become complacent rather than striving to do better.¹⁵⁹ Additionally, there is limited motivation for these countries to make improvements, even in areas where they are not excelling, because such improvements will not register in a higher ranking. This complacency could cause standards to stay the same instead of inspiring countries to have a spirit of competition and work always to do better. Further, there is also the risk that in the context of criminal justice, consistent high ranking could potentially lead to the perception by the governments in question that there are too many safeguards in place and that a re-balancing is required with retrogressive steps the consequence (eg. reductions in legal aid provision).
47. Breaking down the index into several sub-issues could provide a more sensitive assessment of each Member State's protection of fair trial rights and may highlight any areas where they are not top-ranking.¹⁶⁰ It is unlikely that any country would achieve a top score or ranking across all sub-issues and therefore those countries that score highly overall can see where they might need to make improvements.

¹⁵⁹ Sally Engle Merry, "Measuring the World: Indicators, Human Rights and Global Governance: with CA comment by John M Conley", *Current Anthropology* Vol 52 (S3), 2011.

¹⁶⁰ See, for example, Legatum Prosperity Index, available at: www.prosperity.com/#!/sub-indicies.

48. A further way of mitigating the risk of complacency is for the Fair Trials Scoreboard to provide recommendations for every Member State, irrespective of where they feature in the ranking. Country spotlights or summaries are a common feature of Scoreboards and Performance Indexes and can provide a narrative as to what a particular country is doing well, any improvements they are attempting, and where further work is needed. Providing recommendations on improvements to countries could help them focus on what should happen for them to provide better fair trial rights and could point out that all countries could improve.
49. The choice of ranking method could also help to mitigate the risk of complacency. Grouping countries according to a tier system, a traffic light system or some other scale could be preferable to a strict 1-28 ranking of all Member States. This would mean that countries would know they were in the top tier but would not necessarily have the knowledge that they were number one or two in the overall ranking. Likewise, countries in the bottom would know they are there, but not necessarily be labelled as “the worst”. This can still create competition between countries, because they want to move up into higher groups.

iv. Paternalism

50. All Scoreboards and Performance Indexes run the risk of being seen as imposing one set of values on a large number of countries, which for some may not resonate. This is a particular challenge within Europe given the significant diversity in Member States’ legal systems. This can be interpreted as paternalistic and unfair, producing results which fail to recognise the different approaches adopted in different jurisdictions and opening the door to the accusations of cultural relativism which, in a global context, are often waged against countries in the Global North and the West.
51. The most important way to mitigate this risk is by conducting a widespread consultation with all key stakeholders across all EU Member States, to ensure that the adopted methodology reflects wide-ranging values and opinions. The consultation with LEAP members from all Member States is the first step in this consultation process. Cooperation or partnership with LEAP members and other groups in producing a Fair Trials Scoreboard could also allow for a more balanced viewpoint. If a governmental institution was to assume responsibility for producing the Fair Trials Scoreboard, a regional body, such as the European Commission, could be preferable to a domestic government so as to ensure neutrality.

Consultation questions:

- **How would you rank the outlined risks and challenges associated with the Fair Trials Scoreboard, with 1 being the most significant/concerning and 4 being the least significant/concerning?**

Risk/challenge	Rank (1 = most significant, 4 = least significant)
Credibility	
Data collection	
Complacency	

Paternalism

- Do you consider there to be any other risks or challenges associated with the Fair Trials Scoreboard?

Yes/No/Maybe

If so, what are they?

- Do you think our suggestions regarding mitigation of the above-listed risks and challenges are adequate?

Yes/No

If not, what other suggestions do you have?

B. Content

52. As we have already identified, the process of defining what makes a trial fair is not straightforward, especially in a region such as Europe which is home to such a diverse range of legal cultures and traditions. While a potential benefit of the Fair Trials Scoreboard is that it could facilitate the development of a common understanding of what a fair trial should involve and what protection of the right to a fair trial requires, the task of developing the content of the Fair Trials Scoreboard remains nonetheless daunting.

53. There are of course many different perspectives which could inform the interpretation of whether or not a trial is fair. The perspective of the defendant may, for example, differ from that of society as a whole. Some people may take the view that the outcomes of a trial ultimately determine whether or not it was fair or not – ie. was the right decision reached in the end - while others would argue that given in most cases the accuracy of the outcome cannot be conclusively proven, procedural fairness is the most objective basis upon which to assess the overall fairness of the trial – i.e. were fair procedures followed (regardless of the ultimate outcome). A further approach is currently under discussion in relation to the development of the post-2015 development agenda: the level of trust in the justice system is being considered as an indicator of fairness. We know, therefore, that there are various ways to define and measure fairness and have endeavoured to reflect each of them in the proposal set out below. We hope that this consultation will help us to elaborate a LEAP approach to this challenging topic.
54. This section describes the eight issues which we have identified as building blocks of the right to a fair trial:
- a. appropriate institutional framework;
 - b. open and transparent justice;
 - c. efficiency;
 - d. right to liberty;
 - e. presumption of innocence;
 - f. fair chance to present a defence;
 - g. equality before the law; and
 - h. effective remedies.
55. For each issue we have also identified a list of sub-issues which could be used as a basis for developing the Fair Trials Scoreboard methodology. A more extensive list of the potential indicators which might be used to measure each sub-issue is set out in Annex 1. Our view is that it would be far too ambitious for a Fair Trials Scoreboard to cover all of the issues, sub-issues and indicators which we have listed below. Indeed, most of the scoreboards and indexes which we have reviewed (see Annex 2) address only a small number of issues and associated sub-issues in relation to the overarching topic. We therefore hope that your input will help us to determine which are the most important issues to include, to identify a smaller number of issues which are illustrative of fairness overall.
- a. Issue 1: Institutional framework**
56. The institutions of justice – the courts, the judiciary, the prosecutorial service, the criminal bar – each has a key role to play in ensuring that fair trial rights are respected in all criminal proceedings. Each element of a fair criminal justice system must have adequate financial and human resources, have competence ensured through training and be sufficiently independent so as to avoid corruption or improper influence impacting on the course of justice.
57. We propose the following four sub-issues in relation to Issue 1: Institutional framework:
- a. Competent, independent and impartial judiciary
 - b. Competent and fair prosecutor service
 - c. Competent and fair police service
 - d. Competent and fair police service
- b. Issue 2: Open and transparent justice**

58. It is widely understood that not only must justice be done; it must also be seen to be done. An open and transparent justice system is therefore a key characteristic of a criminal justice system in which fair trial rights are protected as it can be subject to public oversight therefore protecting public confidence in its operation. Key components of an open and transparent justice system include the publication of all crimes in a way which is accessible to the public, the public nature of hearings as a means of protecting public confidence in the justice system and the publication of reasoned judgments which allow a defendant to understand the decision which has been made (and ascertain whether there is a basis for challenging it) and which protect against arbitrariness.
59. We propose the following three sub-issues in relation to Issue 2: Open and transparent justice:
- a. Crimes published as laws
 - b. Public hearings
 - c. Publication of reasoned decisions

c. Issue 3: Efficiency

60. Everyone facing criminal charges is entitled to be tried without undue delay. This is intended to limit the uncertainty faced by an untried person and any stigma attached to the unresolved and ongoing nature of the accusation. Further, delay can become associated with a deterioration of quality or availability of evidence, and with any delay being used as a basis for placing undue pressure on the defendant. Increasing numbers of criminal cases, however, have resulted in the adoption of various methods for shortening or bypassing the trial. Efficiency should not be treated as an end in itself, as it must be balanced with the need to ensure that defendants have adequate time to prepare their defence and to ensure that fast-track or out-of-court processes do not result in fair trial rights compromises being made elsewhere. Finally, the requirement of 'special diligence' dictates that the fact of an individual's detention should impact on the time within which a case is brought to trial and concluded. People have a right to be tried without undue delay to minimise pre-trial detention and reduce the human impact of criminal proceedings.
61. We propose the following four sub-issues in relation to Issue 3: Efficiency:
- a. Trial without delay
 - b. Impact of detention on efficiency
 - c. Adequate safeguards around the use of out-of-court procedures
 - d. Adequate safeguards around the use of fast-track/summary proceedings

d. Issue 4: Right to liberty

62. While the right to liberty is not a fair trial right per se, restrictions on the right to liberty pre-conviction can commonly be associated with fair trial right violations, both in terms of (a) the procedural rights which should be upheld when determining whether or not the right to liberty should be restricted through arrest or detention and (b) the impact on the ability of an individual to exercise his or her fair trial rights. The start of criminal proceedings is often marked by police arrest. This temporary loss of liberty may be entirely justified and authorised by law, but arbitrary arrests have long been a feature of oppressive regimes and remain common today. Extended periods of pre-trial detention are also common for people that have not been convicted of any criminal offence, many of whom will ultimately be cleared of any wrongdoing. This can be justified to ensure vital evidence is preserved or to protect witnesses but if not strictly necessary, pre-trial detention violates the right to liberty and the presumption of innocence. Any pre-trial detention must be kept under regular review, so as to ensure that the

grounds for detention remain valid throughout the period of detention and that release is ordered to the extent that they do not. The conditions of pre-trial detention – including the level of access to the outside world and the specific detention conditions – may also impact on the fairness of the trial given the impact on an individual’s ability to prepare their defence.

63. We propose the following six sub-issues in relation to Issue 4: Right to liberty:

- a. Use of arrest
- b. Use of pre-trial detention
- c. Access to reasons for arrest or detention
- d. Access of pre-trial detainees to outside world
- e. Review of detention
- f. Detention conditions

e. Issue 5: Presumption of innocence

64. A fundamental element of the right to fair trial is that every person should be presumed innocent unless and until proved guilty following a fair trial. This is why the responsibility falls on the state to prove guilt and to discharge the presumption of innocence. Due to the presumption of innocence, a person cannot be compelled to confess guilt or give evidence against him/herself. It is for the state to produce evidence of guilt, not for the defendant to prove innocence. In general, therefore, a suspect’s silence should not be used as evidence of guilt. Because of the serious consequences of conviction, the state must prove guilt to a high standard. If doubt remains, the defendant must be given the benefit of the doubt and cleared because the state’s “burden of proof” has not been met.

65. We propose the following five sub-issues in relation to Issue 5: Presumption of Innocence:

- a. Right to silence/ not to incriminate oneself
- b. Safeguards relating to, and recording of, questioning
- c. Safeguards relating to evidence collection
- d. Burden and standard of proof
- e. Prohibition of public pronouncements of guilt

f. Issue 6: Fair chance to present a defence

66. A person charged with a criminal offence faces the overwhelming power of the state. The right to a fair trial therefore requires that the defendant be given a fair chance to present a defence in order to counteract this imbalance. In order to have such a chance, the defendant must have access to a lawyer (and the means to pay for a lawyer where necessary), access to all the information needed in order to build and present a defence, including information about fair trial rights as well as the case being built against him or her, and the ability to attend court and defend himself or herself by challenging any or all evidence put forward by the prosecution.

67. We propose the following nine sub-issues in relation to Issue 6: Fair chance to present a defence:

- a. Notification of rights
- b. Information about charges
- c. Disclosure/ access to case-file
- d. Access to lawyer
- e. Access to legal aid
- f. Adequate time and facilities to prepare defence
- g. Attendance of defendant at court
- h. Right to defend oneself in person

- i. Ability to challenge evidence

g. Issue 7: Equality before the law

68. All people are entitled to equality before the law. Within criminal proceedings, this means that no defendants should be placed at a disadvantage because of certain characteristics, including their age, their nationality or their having a disability. Discriminatory laws relating to fair trial rights, or the discriminatory implementation of fair trial rights protections must be prohibited and in certain circumstances, special adaptations to criminal procedures will be necessary in order to ensure that certain groups of individuals can enjoy their fair trial rights on an equal basis with others. The extent to which a country appropriately accommodates the needs of all defendants is a determinant of whether the criminal justice system is fair, even-handed and fully respectful of fair trial rights.
69. We propose the following five sub-issues in relation to Issue 7: Equality before the law:
- a. Prohibition of discrimination
 - b. Provision of interpretation and translation facilities
 - c. Safeguards for child defendants
 - d. Safeguards for defendants with disabilities
 - e. Safeguards for non-national defendants

h. Issue 8: Remedies

70. Without an adequate system of remedies in place, it will be very difficult for individuals to enforce their fair trial rights once violated. Remedies may be accessed within the criminal proceedings, for example through the treatment of evidence collected in violation of fair trial rights or as a consequence of a fair trial rights violation or through an effective system of appeals and retrials. Remedies may also be accessed following the conclusion of criminal proceedings, through post-conviction/acquittal complaints mechanisms and compensation mechanisms. Remedies are vital to ensure that rights are practical and effective rather than theoretical and illusory.
71. We propose the following five sub-issues in relation to Issue 8: Remedies:
- a. Effective remedies for procedural rights violations during criminal proceedings
 - b. Effective system of appeals
 - c. Effective system of retrials
 - d. Other complaints mechanisms
 - e. Effective and adequate system of compensation

Consultation questions:

- **Do you agree with our proposed list of eight issues? Are there any issues which you would add or remove?**

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- Given that we are unlikely, at least initially, to be able to include all eight issues in the Fair Trials Scoreboard, how would you prioritise their importance, with 1 being the most important, and 8 being the least important?

Issue	Rank (1 = most important, 8 = least important)
Institutional Framework	
Open and transparent justice	
Efficiency	
Right to liberty	
Presumption of innocence	
Fair chance to present a defence	
Equality before the law	
Remedies	

- Do you agree with the sub-issues which we have proposed for each issue? Are we missing anything? Which do you consider to be the most and least important sub-issues?

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- Do you have any comments on the indicators proposed for each issue in Annex 1?

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C. Concluding thoughts and next steps

72. We are very grateful to you for taking the time to read this consultation paper. We recognise that the process of developing, compiling and publishing the Fair Trials Scoreboard is a daunting and ambitious task, and we look forward to receiving your input on whether it would be a worthwhile endeavour.
73. We look forward to receiving your responses to the consultation questions which appear throughout this paper. You can either add your responses to this paper and scan them to us, or you can complete the online version of the questionnaire which will be emailed separately. Alternatively, your thoughts would be welcome via email (alex.tinsley@fairtrials.net). Please provide your responses by 31st August 2015 so that we can discuss the outcomes at the Annual Advisory Board meeting in October 2015 and report back to all LEAP members at the LEAP Annual Conference in February 2016.

Consultation questions:

- **Once we have completed the consultation of LEAP members, we plan to extend the consultation to other key stakeholders. Who do you think are the most important people, organisations, office-holders for us to consult?**

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- **Would you be interested in participating in a roundtable meeting to discuss the Fair Trials Scoreboard in more depth?**

Yes/No

- **Would you be interested in joining a LEAP Sub-committee with responsibility for progressing the Fair Trials Scoreboard plans with Fair Trials?**

Yes/No

- **Please do add any additional comments.**

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Annex 1

Indicators

This Annex sets out a proposed list of indicators in relation to each of the sub-issues set out in Section B of the Consultation Paper. It is envisaged that each of the proposed indicators could be measured through legal and policy analysis, statistical data or perceptions data as appropriate.

Issue 1: Institutional Framework	
Sub-issues	Indicators
a) <i>Competent, independent and impartial judiciary</i>	<ul style="list-style-type: none"> • Nature of recruitment process • Nature of initial and ongoing training • Nature of ongoing assessment • Extent of diversity • Number of judges per 100,000 people • Remuneration (beginning and end of career) • Terms of office (retirement; length of mandate; renewable mandate, probation) • Disciplinary proceedings (nature and number) • Use of special tribunals which displace ordinary courts (nature and number) • Public perception • Stakeholders' perception • Relevant ECtHR/ national case law (pending and final)
b) <i>Competent and fair prosecutor service</i>	<ul style="list-style-type: none"> • Nature of recruitment process • Nature of initial and ongoing training • Nature of ongoing assessment • Number per 100,000 people/ 1000 cases • Adequacy of resources • Remuneration (beginning and end of career) • Diversity • Status vis a vis executive power • Extent of role in criminal proceedings (eg. conduct/supervise investigations; charge; present case in court; propose sentence to judge; appeal; discontinue case without decision of judge; end case by imposing/negotiating a penalty; other significant powers) • Disciplinary proceedings (nature and number) • Public perception • Stakeholders' perception • Relevant ECtHR/ national case law (pending and final)
c) <i>Competent and fair police service</i>	<ul style="list-style-type: none"> • Number of cases concluded by police (as opposed to prosecutors/judiciary) • Number of complaints (successful and unsuccessful) against police officers and police staff • Public perception • Stakeholders' perception

	<ul style="list-style-type: none"> • Relevant ECtHR/ national case law (pending and final)
d) Competent and independent criminal bar	<ul style="list-style-type: none"> • Number per 100,000 people/1,000 cases • Nature of initial and ongoing training • Organisation of the profession • Regulation of fees • Quality standards and supervision of lawyers • Complaints process (nature and number) • Disciplinary proceedings (nature and number) • Sanctions against lawyers (nature and number) • Public perception of lawyers • Stakeholders' perception • Relevant ECtHR/ national case law (pending and final)

Issue 2: Open and transparent justice

Sub-issues	Indicators
a) Crimes published as laws	<ul style="list-style-type: none"> • Laws published in common language • Laws certain and consistently applied • Regularity of updates to Criminal Code to incorporate new crimes and remove crimes which are no longer law • Existence of crimes in law which are not published/easily accessible • Public perception • Stakeholders' perception • Relevant ECtHR/ national case law (pending and final)
b) Public hearings	<ul style="list-style-type: none"> • Use of closed or partially closed trials (nature and number) • Use of non-oral hearings (nature and number) • Nature and extent of public access to pre-trial proceedings • Method of publicising time and venue of hearings • Public perception • Stakeholders' perception • Relevant ECtHR/ national case law (pending and final)
c) Publication of reasoned decisions	<ul style="list-style-type: none"> • Availability and accessibility of judgments • Time between delivery and publication of judgments • Languages of publication of judgments • Content of published judgment (eg. reasoning; references to key evidence) • Public perception • Stakeholders' perception • Relevant ECtHR/ national case law (pending and final)

Issue 3: Efficiency

Sub-issues	Indicators
a) Trial without delay	<ul style="list-style-type: none"> • Rules governing determination of reasonable time • Clearance Rate and Disposition Time in different types of criminal cases (minor/misdemeanours and serious cases) • Total number of criminal law cases pending • Average length of proceedings for selection of offences (from charge to final decision) • Average length of time between charge and commencement of trial for selection of offences • Public perception • Stakeholders' perception • Relevant ECtHR/ national case law (pending and final)
b) Impact of detention on efficiency	<ul style="list-style-type: none"> • Average length of proceedings (from charge to final decision) for selection of offences where defendant in pre-trial detention (at any point) • Average length of time between charge and commencement of trial for selection of offences where defendant in pre-trial detention (at any point) • Public perception • Stakeholders' perception • Relevant ECtHR/ national case law (pending and final)
c) Use of out of court procedures	<ul style="list-style-type: none"> • Existence of systems for out of court disposal of cases (eg. cautions; plea bargaining; non-prosecution agreements) • Existence of legal safeguards to govern use of out of court disposals • Percentage of criminal proceedings concluded through different types of out of court disposals • Percentage of out of court disposals which are subsequently challenged (for procedural impropriety or other reasons) • Transparency of out of court disposal procedures • Public perception • Stakeholders' perception • Relevant ECtHR/ national case law (pending and final)
d) Fast-track/ summary proceedings	<ul style="list-style-type: none"> • Types of cases which can be fast-tracked/are subject to summary proceedings • Percentage of criminal proceedings which are dealt with through fast-track/summary proceedings • Access to full range of procedural rights during fast-track/summary proceedings • Appeal process for fast-track/summary proceedings • Percentage of convictions following fast-track/summary proceedings which are overturned on appeal/become subject to re-trial • Public perception • Stakeholders' perception • Relevant ECtHR/ national case law (pending and final)

Issue 4: Right to Liberty

Sub-issues	Indicators
a) Use of arrest	<ul style="list-style-type: none"> • Powers of arrest • Legal basis for arrest in different circumstances • Numbers of arrests per year • Percentage of arrests which result in release without charge; out of court disposal; acquittal following trial; conviction following trial • Number of challenges/successful challenges for unlawful arrest. • Public perception • Stakeholders' perception • Relevant ECtHR/ national case law (pending and final)
b) Use of pre-trial detention	<ul style="list-style-type: none"> • Legal basis for pre-trial detention • Length of pre-trial detention permitted by law; experienced in practice • Availability of alternatives to pre-trial detention • Number of defendants subjected to pre-trial detention; percentage of total number of defendants per year • Number of defendants subjected to alternatives to detention; percentage of total number of defendants per year • Number and rate of pre-trial detention requests by the prosecution • Number of pre-trial detentions ordered by judicial officers • Number and proportion of acquitted pre-trial detainees • Number and proportion of pre-trial detainees who receive a non-custodial sentence • Number and proportion of pre-trial detainees who receive a custodial sentence shorter than the duration of pretrial detention • Number and proportion of pre-trial detainees who are released due to insufficient evidence • Public perception • Stakeholders' perception • Relevant ECtHR/ national case law (pending and final)
c) Access to reasons for arrest or detention	<ul style="list-style-type: none"> • Procedure for notification of reasons for arrest or detention • Provision of access to materials necessary to challenge lawfulness of arrest or detention • Public perception • Stakeholders' perception • Relevant ECtHR/ national case law (pending and final)
d) Access of pre-trial detainees to outside world	<ul style="list-style-type: none"> • Use of incommunicado detention • Facilities for confidential communication with lawyer • Access to legal resources

	<ul style="list-style-type: none"> • Access to IT facilities • Right to receive visits • Right to inform third person of arrest or detention • Public perception • Stakeholders' perception • Relevant ECtHR/ national case law (pending and final)
e) Review of detention	<ul style="list-style-type: none"> • Mechanisms for challenging lawfulness of pre-trial detention • Mechanisms for reviewing lawfulness of pre-trial detention • Number and proportion of pretrial detainees who are released upon review • Number and proportion of successful challenges of lawfulness of detention • Public perception • Stakeholders' perception • Relevant ECtHR/ national case law (pending and final)
f) Detention conditions	<ul style="list-style-type: none"> • Number of challenges/successful challenges relating to poor prison conditions • Third party reports of poor detention conditions. • Public perception • Stakeholders' perception • Relevant ECtHR/ national case law (pending and final)

Issue 5: Presumption of Innocence

Sub-issues	Indicators
	<ul style="list-style-type: none"> • Rates of acquittal
a) Right to silence/ not to incriminate oneself	<ul style="list-style-type: none"> • Protection in law of right to silence/not to incriminate oneself (including any limitations) • Rules governing waiver of right to silence • Existence of prohibition on use of confessions elicited under torture; ill-treatment; other coercion • Public perception • Stakeholders' perception of practical enjoyment of right to silence/not to self-incriminate • Relevant ECtHR/ national case law (pending and final)
b) Rules relating to and recording of questioning	<ul style="list-style-type: none"> • Existence of standard, formalized and publicly accessible rules for the conduct of interrogations • Provision of mechanisms for recording questioning (including written/audio-visual recording) • Accessibility of records for defendant and legal representatives. • Public perception • Stakeholders' perception

	<ul style="list-style-type: none"> • Relevant ECtHR/ national case law (pending and final)
c) Evidence collection	<ul style="list-style-type: none"> • Legal provisions governing evidence collection • Mechanisms for ensuring authenticity of evidence • Use of agent provocateurs • Use of surveillance techniques • Public perception • Stakeholders' perception • Relevant ECtHR/ national case law (pending and final)
d) Burden and standard of proof	<ul style="list-style-type: none"> • Legal provisions governing the burden and standard of proof • Circumstances in which the burden of proof is reversed • Existence of strict liability offences • Number of appeals made/won on basis of burden and/or standard of proof not being observed (also as percentage of total number of appeals) • Public perception • Stakeholders' perception • Relevant ECtHR/ national case law (pending and final)
e) Public pronouncements of guilt	<ul style="list-style-type: none"> • Existence of prohibition of public pronouncements of guilt by judges, prosecutors, police and government officials • Existence of regulations to ensure media coverage does not violate the presumption of innocence • Public perception • Stakeholders' perception • Relevant ECtHR/ national case law (pending and final)

Issue 6: Fair chance to present a defence

Sub-issues	Indicators
a) Notification of rights	<ul style="list-style-type: none"> • Legal rules governing notification of rights (including letter of rights) which comply with requirements of Right to Information Directive • Stakeholders' perception of effectiveness of notification of rights • Public perception of accessibility of language in the letter of rights • Relevant ECtHR/ national case law (pending and final)
b) Information about charges	<ul style="list-style-type: none"> • Legal rules governing notification of nature and cause of charges and provision of updated information which comply with Right to Information Directive • Public perception • Stakeholders' perception of effectiveness of notification of nature and cause of charges • Relevant ECtHR/ national case law (pending and final)

c) Disclosure/ Access to case-file	<ul style="list-style-type: none"> • Legal rules governing disclosure of evidence to defendant at different stages of proceedings, including circumstances in which disclosure can be lawfully withheld, which comply with requirements of Right to Information Directive • Public perception • Stakeholders' perception as to whether or not disclosure in practice complies with legal requirements • Number of appeals made/successful on the ground of failure to disclose evidence • Relevant ECtHR/ national case law (pending and final)
d) Access to lawyer	<ul style="list-style-type: none"> • Legal rules governing access to a lawyer which comply with Access to a Lawyer Directive • Perception of stakeholders as to whether or not the right of access to a lawyer is enjoyed in practice • Perception of defendants/ public as to whether or not right of access to a lawyer is enjoyed in practice • Ability to communicate confidentially with lawyer in police custody, detention facilities, courtroom • Percentage of defendants without a lawyer during police interview, throughout pre-trial stage, at trial • Relevant ECtHR/ national case law (pending and final)
e) Access to legal aid	<ul style="list-style-type: none"> • Legal rules governing provision of legal aid for legal advice; and for representation in court, including eligibility criteria and ability to choose • Percentage of defendants who rely upon legal aid • Percentage of applications for legal aid which are successful • Availability of quality assurance systems for legal aid • Perception of defendants/public/other stakeholders of quality of legal aid lawyers • System of accreditation for legal aid lawyers • Budget for legal aid per inhabitant; as percentage of overall criminal justice budget; as percentage of GDP per inhabitant; as percentage of annual budget • Relevant ECtHR/ national case law (pending and final)
f) Adequate time and facilities to prepare defence	<ul style="list-style-type: none"> • Time limits prescribed by law • Circumstances in which additional time will be granted • Perception of stakeholders as to whether adequate time is granted and whether requests for more time are generally successful or inappropriately refused • Public perception • Relevant ECtHR/ national case law (pending and final)
g) Attendance of defendant at court	<ul style="list-style-type: none"> • Legal provisions governing waiver of right to attend trial and appeal • Percentage of trials/appeals at which defendant does not appear.

	<ul style="list-style-type: none"> • Legal provisions relating to requirements for in absentia trials • Percentage of trials which are in absentia trials • Rights to retrial after unlawful in absentia trials • Number of applications/successful applications for retrial following in absentia trials • Legal provisions relating to use of video conferencing in lieu of defendant attending trial • Percentage of trials at which video conferencing is used with/without consent of defendant • Number of applications/successful applications for retrial following use of video conferencing • Public perception • Stakeholders' perception • Relevant ECtHR/ national case law (pending and final)
h) Right to defend oneself in person	<ul style="list-style-type: none"> • Legal provisions governing the waiver of the right to legal representation • Legal provisions governing the right to defend oneself in person • Number/percentage of defendants who defend themselves. • Public perception • Stakeholders' perception • Relevant ECtHR/ national case law (pending and final)
i) Ability to challenge evidence	<ul style="list-style-type: none"> • Grounds upon which admissibility of evidence can be challenged. • Remedies for successful challenge • Perception of lawyers as to whether admissibility rules operate fairly • Number of appeals/successful appeals on grounds of inadmissible evidence used as basis for conviction • Public perception • Stakeholders' perception • Relevant ECtHR/ national case law (pending and final)

Issue 7: Equality before the law

Sub-issues	Indicators
a) Prohibition of discrimination	<ul style="list-style-type: none"> • Existence of guarantee of equality and prohibition of discrimination within criminal proceedings, and on what grounds • Existence of training courses for judges, prosecutors and police on equality and non-discrimination • Availability of disaggregated data • Perception of stakeholders as to whether individuals are subjected to differential treatment on account of race, colour, ethnicity, descent, sex, pregnancy, maternity, civil, family or

		<p>carer status, language, religion or belief, political or other opinion, birth, national or social origin, nationality, economic status, association with a national minority, sexual orientation, gender identity, age, disability, health status, genetic or other predisposition toward illness or a combination of any of these grounds, or on the basis of characteristics associated with any of these grounds</p> <ul style="list-style-type: none"> • Perception of public as to whether criminal justice system operates without discrimination • Relevant ECtHR/ national case law (pending and final)
b) Provision of interpretation and translation facilities		<ul style="list-style-type: none"> • Criteria for becoming an interpreter/translator in criminal proceedings • Rules governing provision of interpretation and translation at different stages of proceedings (during interrogation, communication with lawyer, pre-trial instances, investigative acts, trial) which comply with Interpretation and Translation Directive • Rules governing waiver of right to interpretation and translation • Mechanisms for assessing interpretation and translation needs • Mechanisms for complaining about failure to provide/quality of interpretation and translation services • Mechanisms for checking quality of interpretation and translation services in individual cases • Remedies for successful challenges of failure to provide/quality of interpretation and translation services • Funding of interpretation and translation services • Use of videolink (or other) technology to facilitate provision of interpretation • Conviction rates of defendants using interpretation/translation services (compared to overall conviction rates) • Public perception • Stakeholders' perception • Relevant ECtHR/ national case law (pending and final)
c) Safeguards for child defendants		<ul style="list-style-type: none"> • Number of children facing criminal proceedings each year • Percentage of defendants who are children • Definition of juvenile/ child within criminal justice system • Minimum age of criminal responsibility • Specialism of judges, prosecutors, police and lawyers • Process for individual assessment of child's specific needs • Special favourable arrangements applied during pre-trial proceedings • Special favourable arrangements applied during judicial proceedings • Public perception • Stakeholders' perception

	<ul style="list-style-type: none"> • Relevant ECtHR/ national case law (pending and final)
d) Safeguards for defendants with disabilities	<ul style="list-style-type: none"> • Number of persons with disabilities facing criminal proceedings each year • Percentage of defendants who have disabilities • Percentage of defendants with disabilities in pre-trial detention • Conviction rate of defendants with disabilities compared to overall conviction rates • Process for individual assessments of needs of defendant with disability • Circumstances in which defendant with disability is deemed to be in need of specific accommodations • Special favourable arrangements applied during pre-trial proceedings • Reasonable accommodation in detention • Special favourable arrangements applied during judicial proceedings • Public perception • Stakeholders' perception • Relevant ECtHR/ national case law (pending and final)
e) Safeguards for non-national defendants	<ul style="list-style-type: none"> • Number of non-national defendants facing criminal proceedings each year • Percentage of defendants who are non-nationals • Percentage of non-national defendants in pre-trial detention • Percentage of defendants in pre-trial detention who are non-nationals • Conviction rate of non-national defendants compared to overall conviction rates • Public perception • Stakeholders' perception • Relevant ECtHR/ national case law (pending and final)

Issue 8: Remedies

Sub-issues	Indicators
a) Remedies for procedural rights violations during criminal proceedings	<ul style="list-style-type: none"> • Legal provision for remedies for procedural rights violations (exclusion/assessment of weight of evidence; fruits of poisoned tree; sentence reduction; retrial) • Public perception • Perception of stakeholders of effectiveness of remedies for procedural rights violations • Relevant ECtHR/ national case law (pending and final)
b) System of appeals	<ul style="list-style-type: none"> • Legal provisions for appeal in criminal cases (automatic/permission required; what standard is applied?) • Number of appeals/successful appeals against conviction

		<ul style="list-style-type: none"> • Public perception • Perception of stakeholders of accessibility/fairness of appeals system • Relevant ECtHR/ national case law (pending and final)
c) System of retrials		<ul style="list-style-type: none"> • Legal provisions for retrial in criminal cases • Number of retrials ordered and on what basis • Characteristics of retrials – any limitations? • Public perception • Perception of stakeholders of retrial system • Relevant ECtHR/ national case law (pending and final)
d) Other mechanisms	complaints	<ul style="list-style-type: none"> • Any other system of review within criminal justice system (eg. Criminal Cases Review Mechanism etc) • Legal provisions for review by such mechanisms • Number of reviews conducted and on what basis • Number of reviews which overturn conviction and on what basis. • Public perception • Perception of stakeholders of accessibility/fairness of review mechanism • Relevant ECtHR/ national case law (pending and final)
e) Compensation		<ul style="list-style-type: none"> • System for compensation for miscarriage of justice/ unlawful pre-trial detention • Number of applications/successful applications for compensation for miscarriage of justice/unlawful pre-trial detention was granted • Average amount of compensation granted • Public perception • Perception of stakeholders of accessibility/fairness of compensation system. • Relevant ECtHR/ national case law (pending and final)

Annex 2

Examples of Scoreboards and Performance Indexes

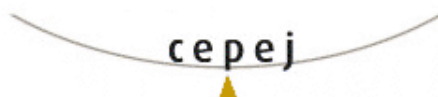
This Annex provides summaries of 17 Scoreboards/ Performance Indexes to illustrate what could potentially be achieved with a Fair Trials Scoreboard. The following Scoreboards/ Performance Indexes are included:

1. Better Life Index, OECD
2. Corruptions Perceptions Index (Transparency International)
3. European Judicial Systems – Edition 2014 (2012 data): efficiency and quality of justice (CEPEJ)#
4. EU Justice Scoreboard (European Commission)
5. Freedom in the World (Freedom House)
6. Gender Inequality Index (UNDP)
7. Global Age Watch (HelpAge International)
8. Global Gender Gap (World Economic Forum)
9. Global Peace Index (Institute for Economics and Peace)
10. Global Slavery Index (Walk Free Foundation)
11. The Justice Index (National Center for Access to Justice)
12. Index of Economic Freedom (The Heritage Foundation)
13. Legatum Prosperity Index (Legatum Institute)
14. Rule of Law Index (World Justice Project)
15. State of the World’s Human Rights (Amnesty International)
16. Terrorism Index (Institute for Economics and Peace)
17. Trafficking in Persons Report (United States Department of State)

Title	Better Life Initiative/ Better Life Index/ How's Life? Report
Organisation	Organisation for Economic Co-operation and Development (OECD)
Date established	2011
Policy area	Economics
Objectives	The Better Life Initiative collates statistics which go beyond GDP in order to portray various aspects of life that matter to people and that shape the quality of their lives. This allows for a better understanding of what drives the well-being of people and nations, and what needs to be done to achieve greater progress for all. The two core products of the initiative are the Better Life Index , an interactive web-based tool created to engage people in the debate on well-being and the How's Life? Report , published every two years, which presents the data collected under the Better Life Initiative.
Data sources	The data collected under the Better Life Initiative is mostly from official sources, such as the OECD or National Accounts, United Nations Statistics and National Statistics Offices. Perception data from the Gallup World Poll is also used.
Topics & Indicators	11 topics, each built on one to four indicators: <ul style="list-style-type: none"> i. Housing (Dwellings without basic facilities, housing expenditure, rooms per person); ii. Income (household net adjusted disposable income, household net financial wealth); iii. Jobs (employment rate, job security, long-term unemployment rate, personal earnings); iv. Community (quality of support network); v. Education (educational attainment, student skills, years in education); vi. Environment (air pollution, water quality); vii. Civic engagement (consultation on rule-making, voter turnout); viii. Health (life expectancy, self-reported health); ix. Life satisfaction (life satisfaction); x. Safety (assault rate, homicide rate); xi. Work-life balance (employee working very long hours; time devoted to leisure and personal care).
Presentation of results	The OECD has not assigned rankings to countries. Instead, <i>Your Better Life Index</i> is designed to let the user investigate how each of the 11 topics can contribute to well-being.
Examples of Impact	A lot of media coverage. Notable recent response involving initiatives to improve work/life balance - http://www.fastcompany.com/3044626/work-smart/steps-we-can-all-take-to-defy-our-culture-of-overwork ; http://www.afr.com/business/health/give-yourself-a-break-make-room-in-your-work-for-you-20150311-13nbic
Limitations	Limited to 35 countries. Analysis based on a "universal well-being definition" which doesn't take into account socio-economic and cultural differences.
Latest publication	http://www.oecdbetterlifeindex.org/



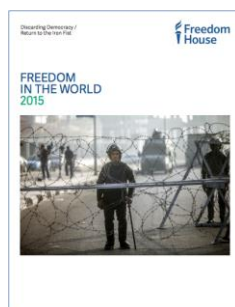
Title	Corruption Perceptions Index
Organisation	Transparency International
Date established	1995
Policy area	Corruption/ Rule of Law
Objectives	To measure the perceived levels of public sector corruption worldwide.
Data sources	The Corruption Perceptions Index is a composite index – a combination of opinion polls – drawing on corruption-related data collected in the previous 24 months by a variety of reputable institutions. The data comes from organisations including the World Bank, the World Justice Project, the African Development Bank and the Economist Intelligence Unit. Transparency International reviews the methodology of each data source in detail to ensure that the sources used meet Transparency International's quality standards.
Topics & Indicators	There are no specific topics or indicators as the Corruption Perceptions Index aggregates scores from other polls, giving a score of 0-100, with 0 being the most corrupt and 100 being without corruption.
Presentation of results	Numerical ranking of countries based on how corrupt they are perceived to be.
Examples of Impact	<p>"Our Corruption Perceptions Index sends a powerful message and governments have been forced to take notice and act."</p> <p>Lots of media coverage and a 'go to' reference point for an assessment of corruption. Examples - http://edition.cnn.com/2014/12/03/world/asia/china-transparency-international-corruption-2014/; http://www.independent.co.uk/news/world/australasia/global-corruption-index-australia-drops-out-of-top-10-countries-and-uk-not-good-enough-9900971.html</p>
Limitations	<p>The CPI is limited in scope, capturing perceptions of the extent of corruption in the public sector, from the perspective of business people and country experts. Complementing this viewpoint and capturing different aspects of corruption, Transparency International produces a range of both qualitative and quantitative research on corruption, both at the global level from its Secretariat and at the national level through Transparency International's network of National Chapters based in over 90 countries around the world.</p> <p>Countries which do not feature in a minimum of three of the Corruption Perceptions Index's sources.</p>
Latest publication	http://www.transparency.org/cpi2014/



Title	Evaluation of European Judicial Systems
Organisation	European Commission for the Efficiency of Justice (CEPEJ)
Date established	2006
Policy area	Justice
Objectives	To facilitate the comparison of judicial systems and the exchange of knowledge on how they function, and to highlight organisational reforms, practices and innovations, which enable improvement of the service provided to court users. CEPEJ aims to provide policy makers and justice professionals a practical and detailed tool to better understand the operation of the public service of justice in Europe in order to improve its efficiency and its quality in the interest of more than 800 million Europeans.
Data sources	The collection of figures is based on reports by member states and entities, which are invited to appoint national correspondents entrusted with the coordination of the replies to the Scheme for their respective states or entities. The 2014 report is based on statistics from 2012.
Topics & Indicators	The evaluation covers 16 topics, each with two to seven indicators: <ul style="list-style-type: none"> i. public expenditures allocated to justice and the functioning of courts; ii. access to justice; iii. court users rights and public confidence; iv. courts; v. alternative dispute resolution; vi. judges; vii. non-judge staff in court; viii. court efficiency; ix. prosecutors; x. status and career of judges and prosecutors; xi. lawyers; xii. execution of court decisions; xiii. notaries; xiv. judicial experts; xv. court interpreters; and xvi. judicial reforms.
Presentation of results	Countries are ranked under each topic and indicator, but a comprehensive ranking is not provided.
Examples of Impact	No notable media coverage.
Limitations	All information provided by states must be verified by quality which is a lengthy process. Further, the data is quite old (2012 data used for 2014 report). Finally, throughout the report, references are made to methodological problems which arise from comparing different countries with different circumstances.
Latest publication	http://www.coe.int/t/dghl/cooperation/cepej/evaluation/default_en.asp http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf



Title	EU Justice Scoreboard
Organisation	European Commission
Date established	2013
Policy area	Justice
Objectives	The EU Justice Scoreboard is an information tool aiming to assist the EU and Member States to achieve more effective justice by providing objective, reliable and comparable data on the quality, independence and efficiency of justice systems in all Member States. Such data is essential to support reforms in national justice systems required to render justice systems more effective for citizens and businesses.
Data sources	The Scoreboard uses different sources of information. Most of the quantitative data are currently provided by the Council of Europe Commission for the Evaluation of the Efficiency of Justice (CEPEJ) with which the Commission has concluded a contract in order to carry out a specific annual study. The Scoreboard also draws upon additional sources of information, namely Eurostat, the World Bank, the World Economic Forum, the European judicial networks (in particular the European Network of Councils for the Judiciary, which provided replies to a questionnaire on judicial independence) and the group of contact persons on national justice systems. Further data are also obtained through data collection exercises and field studies on the functioning of national courts.
Topics & Indicators	The Scoreboard covers three topics, each of which is supported by [] indicators: <ul style="list-style-type: none"> i. Efficiency of justice systems – length of proceedings; clearance rate; pending cases; efficiency in specific areas. ii. Quality of justice systems - monitoring, evaluation and survey tools to support the quality of justice systems; information and communication technology systems help to reduce the length of proceedings and to facilitate access to justice; Courts' communication policies; Alternative Dispute Resolution (ADR) methods help to reduce the workload of courts; promoting training of judges can help to improve the effectiveness of justice; resources; and share of female professional judges. i. Independence of the judiciary - perceived judicial independence; and structural independence.
Presentation of results	The Scoreboard contributes to identifying potential shortcomings, improvements and good practices and aims to present trends on the functioning of the national justice systems over time. It does not present an overall single ranking but an overview of the functioning of all justice systems based on various indicators which are of common interest for all Member States.
Examples of Impact	Contributes to developing country-specific recommendations in the area of justice for Member States. Widespread media coverage - http://www.novinite.com/articles/167082/Bulgaria+Ranks+Last+But+One+in+Perceived+Judicial+Independence,+EU+Justice+Scoreboard; http://www.globalpost.com/article/6412637/2015/03/09/justice-systems-improving-majority-eu-states-official-report; https://english.sta.si/2112175/perceived-judiciary-independence-down-in-slovenia
Limitations	Age of data cannot account for current changes being made in Member States
Latest publication	http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2015_en.pdf



Title	Freedom in the World
Organisation	Freedom House
Date established	1972
Policy area	Political rights and civil liberties
Objectives	To enable policymakers, the media, international corporations, civic activists, and human rights defenders to monitor trends in democracy and track improvements and setbacks in freedom worldwide.
Data sources	Analyst and advisor reports based on news articles, academic analysis, NGO reports and individual contracts.
Topics & Indicators	<p>The report focuses on 7 issues, which are supported by a series of indicators:</p> <p>Political rights</p> <ul style="list-style-type: none"> i. Electoral process ii. Political Pluralism and Participation iii. Functioning of Government <p>Civil liberties</p> <ul style="list-style-type: none"> iv. Freedom of expression and belief v. Associational and Organisational rights vi. Rule of law vii. Personal autonomy and individual rights
Presentation of results	A descriptive text is provided for each country, as well as two numerical ratings—from 1 to 7—for political rights and civil liberties, with 1 representing the most free and 7 the least free . The average of a country or territory's political rights and civil liberties ratings determines whether it is Free, Partly Free, or Not Free.
Examples of Impact	<p>Widespread media coverage:</p> <p>http://www.rferl.org/content/human-rights-freedom-house/26817217.html</p> <p>http://www.businessinsider.com.au/the-15-least-free-countries-in-the-world-2015-1#belarus-1</p> <p>http://www.al-monitor.com/pulse/originals/2015/02/tunisia-free-arab-judiciary-political-challenges.html</p>
Limitations	<p>Data is from the previous year.</p> <p>Assumes a democratic point of view; that democracy is 'freer' than other forms of government.</p>
Latest publication	https://freedomhouse.org/report/freedom-world/freedom-world-2015#.VR7M_nF-So

GENDER INEQUALITY INDEX

Title	Gender Inequality Index (GII)
Organisation	UNDP
Date established	2010
Policy area	Equality
Objectives	The GII illustrates the position of women in over 150 countries, providing insights in gender gaps in major areas of human development. The indicators highlight areas in need of policy intervention and the GII stimulates action to overcome systematic disadvantages of women.
Data sources	The GII uses existing publicly available data, including from WHO, UNICEF, UNFPA, the World Bank, the UN Department of Economic and Social Affairs, the UNESCO Institute for Statistics, the International Parliamentary Union, and the International Labour Organization.
Topics & Indicators	<p>The GII measures gender inequalities in three areas of human development, using the following indicators:</p> <ul style="list-style-type: none"> (i) Reproductive health - maternal mortality ratio and adolescent birth rates; (ii) Empowerment - proportion of parliamentary seats occupied by females and proportion of adult females and males aged 25 years and older with at least some secondary education; and (iii) Economic status expressed as labour market participation - labour force participation rate of female and male populations aged 15 years and older. <p>The GII measures the human development costs of gender inequality, thus the higher the GII value the more disparities between females and males.</p>
Presentation of results	Numerical rankings.
Examples of Impact	<p>Reference point on gender inequality. For example:</p> <p>http://www.huffingtonpost.com/darius-mans/from-food-security-to-reg_b_6887820.html</p> <p>http://www.telegraph.co.uk/women/womens-life/11467002/Chinas-straight-man-cancer-are-Chinese-women-finally-on-the-rise.html</p> <p>http://montrealgazette.com/news/world/opinion-twenty-years-after-the-beijing-declaration-on-womens-rights-progress-remains-slow</p>
Limitations	The GII, as any other global composite index, is constrained by the need for international comparability. The GII has also been criticised on the basis that it doesn't account for unpaid labor or household labor, which suggests the gap might be even wider than it looks <i>in all countries</i> . Plus, the measure of parliamentary participation doesn't include seats women might (or might not) hold in local government.
Latest publication	http://hdr.undp.org/en/content/gender-inequality-index-gii

Global AgeWatch Index 2014

Title	Global Age Watch Index
Organisation	HelpAge International
Date established	2013
Policy area	Equality
Objectives	<ul style="list-style-type: none"> i) To measure and improve the quality of life and wellbeing of older people, ii) To highlight successes and shortcomings of strategic responses to population ageing challenges across the globe; and iii) To stimulate demand for and supply if sufficient age- and sex-disaggregated data as necessary to generate evidence for policy making.
Data sources	The Global Age Watch Index uses data from publicly available international databases (including the International Labour Organization, World Bank, United Nations Population Division, and World Health Organization).
Topics & Indicators	<p>The Global Age Watch Index focuses on four main domains, each supported by various indicators:</p> <ul style="list-style-type: none"> i) Income security - pension income coverage, poverty rate in old age and relative welfare of older people, GDP per capita. ii) Health status - life expectancy at 60, healthy life expectancy at 60 and relative psychological wellbeing. iii) Capability - employment rate and educational attainment of older people. iv) Enabling environment - social connections, physical safety, civic freedom and access to public transport.
Presentation of results	Numerical ranking.
Examples of Impact	<p>Media coverage:</p> <p>http://www.moroccoworldnews.com/2014/10/141184/morocco-ranks-83-on-global-age-watch-index-2014/</p> <p>http://au.ibtimes.com/best-worst-countries-grow-old-according-global-age-watch-index-1377344</p> <p>http://america.aljazeera.com/articles/2014/9/30/global-demographicsagingindex.html</p>
Limitations	<p>The Index exposes the limitations of existing data. Sufficient data was only available in international data sets for 96 countries, resulting in many countries not being included. The lack of data disaggregated by sex also means that it has not been possible to analyse the different situations of older women and men.</p> <p>The data is at least 2 years old, and there is no data for civil and political rights of older people.</p>
Latest publication	http://www.helpage.org/global-agewatch/



THE GENDER GAP REPORT 2014

Title	Global Gender Gap
Organisation	World Economic Forum
Date established	2006
Policy area	Equality
Objectives	To produce a framework for capturing the magnitude of gender-based disparities and tracking their progress.
Data sources	Existing data produced by ILO, World Economic Forum, UNESCO Institute for Statistics, Central Intelligence Agency, World Health Organisation and Inter-Parliamentary Union.
Topics & Indicators	<p>The Global Gender Gap Index examines the gap between men and women in four fundamental categories (subindexes), each of which are supported by two to five indicators:</p> <ul style="list-style-type: none"> i) Economic Participation and Opportunity - labour force participation rates, ratio of estimated female-to-male earned income, wage equality for similar work, the ratio of women to men among legislators, senior officials and managers, and the ratio of women to men among technical and professional workers. ii) Educational Attainment - ratios of women to men in primary-, secondary- and tertiary-level education, and ratio of the female literacy rate to the male literacy rate. iii) Health and Survival - sex ratio at birth and women's and men's healthy life expectancy. iv) Political Empowerment - ratio of women to men in minister-level positions, ratio of women to men in parliamentary positions and ratio of women to men in terms of years in executive office.
Presentation of results	Numerical ranking.
Examples of Impact	The report calls attention to gender based disparities. It is used by numerous universities, schools, researchers, media entities, businesses, governments and individuals as a tool for their work. The World Economic Forum also launched a Global Gender Parity Group and Regional Gender Parity Groups that have collectively committed to strategies to improve and increase the use of female talent.
Limitations	The World Economic Forum has recognised that as its work is quantitative, it is limited by the data which is available for use. For example, insufficient global data on violence against women prevented inclusion of this variable in the "health and well-being" dimension.
Latest publication	http://reports.weforum.org/global-gender-gap-report-2014



Title	Global Peace Index
Organisation	Institute for Economics & Peace
Date established	2008
Policy area	Peace
Objectives	<p>The GPI is intended to contribute significantly to the public debate on peace. The project's ambition is to go beyond a crude measure of wars—and systematically explore the texture of peace.</p> <p>By generating new information about the state of peace at the global level, the GPI aims to make a valuable contribution to better understand how civil society, researchers, policymakers and government can create a more peaceful society.</p>
Data sources	The data is sourced from a wide range of respected sources, including the International Institute of Strategic Studies, The World Bank, various UN Agencies, peace institutes and the EIU.
Topics & Indicators	<p>The Global Peace Index uses three themes and 22 indicators that gauge the absence of violence or the fear of violence:</p> <ol style="list-style-type: none"> the level of safety and security in society; the extent of domestic or international conflict; and the degree of militarisation.
Presentation of results	Countries are assessed per indicator on a scale of 1-5; the index is also displayed as a map with countries coloured based on their score.
Examples of Impact	<p>The Index is currently used by many international organisations, governments and NGOs including the World Bank, the OECD, and the United Nations.</p> <p>News coverage: http://www.theguardian.com/global-development/2014/jun/18/global-peace-index-2014-cost-of-war http://www.telegraph.co.uk/news/worldnews/middleeast/syria/10906939/Syria-replaces-Afghanistan-as-worlds-least-peaceful-country.html</p>
Limitations	Difficulties in defining and measuring peace.
Latest publication	http://www.visionofhumanity.org/sites/default/files/2014%20Global%20Peace%20Index%20REPORT.pdf

Title	Global Slavery Index
Organisation	Walk Free Foundation
Date established	2013
Policy area	Human Trafficking
Objectives	The Global Slavery Index estimates the number of people in modern slavery in 167 countries. It is a tool for citizens, NGOs, businesses and public officials to understand the size of the problem, existing responses and contributing factors, so they can build sound policies that will end modern slavery.
Data sources	<p>Prevalence – secondary source estimates, random sample surveys, extrapolation process and country-level adjustments.</p> <p>Government responses – government survey.</p> <p>Vulnerability – Variables measured using a wide range of sources, including Cho, Dreher & Meumeyer’s “3P” Anti-trafficking Policy Index, United States Department of State’s Trafficking in Person’s Report, Central Intelligence Agency (CIA) World Fact book, Corruption Perception Index, World Bank’s Worldwide Governance Indicators Project, Cingranelli-Richards (CIRI) Human Rights Database, the Global Peace Index and the United Nations’ Human Development Index.</p>
Topics & Indicators	<p>The Global Slavery Index looks at three main issues:</p> <ul style="list-style-type: none"> i) Prevalence ii) Government responses – measured according to extent to which following objectives are met: survivors of modern slavery are identified, supported to exit and remain out of modern slavery; criminal justice mechanisms address modern slavery; coordination and accountability mechanisms for the central government are in place; attitudes, social systems and institutions that enable modern slavery are addressed; and businesses and governments through their public procurement stop sourcing goods and services that use modern slavery. iii) Vulnerability – based on the five dimensions of slavery policy, human rights, development, state stability, and discrimination.
Presentation of results	<p>The index is divided according to the three issues:</p> <ul style="list-style-type: none"> i) Prevalence - a ranking of countries based on the estimated number of people in slavery. ii) Government actions - a ranking and stop light system based on the indicators. iii) Vulnerability - a ranking based on the mean level of vulnerability.
Examples of Impact	The Index has been quoted in parliamentary discussions, used as material in government and business workshops, and the figures have been disseminated in numerous languages and publications around the world. The GSI figures have also been used in the 2014 Mo Ibrahim Index for African Governance, the Social Progress Index and the Financial Times Ltd. Analyse Africa database.
Limitations	It is difficult to quantify the number of people in slavery because slavery is not reported. The data for countries that are ranked but no direct data was available is extrapolated by comparing similar countries.
Latest publication	http://www.globalslaveryindex.org/findings/



Title	The Justice Index
Organisation	National Center for Access to Justice
Date established	2014
Policy area	Justice
Objectives	The purpose of the Justice Index is to increase public understanding of the importance of our justice system, and in so doing to encourage the adoption of best practices to increase access to justice in all parts of the country.
Data sources	Qualitative and quantitative data collected on a state by state basis, using existing sources where possible. Wide range of data collected by researchers, and included on the basis of the following questions: i) Does the data illuminate access to justice? ii) Is new research needed to produce the data, or has the data already been produced? iii) Can sources of authority readily be cited to support the findings revealed by the data? iv) Does the data reveal laws, rules, or practices with statewide effect, or can they be understood in terms of the portion of the state to which they apply? v) Is the data current – was it produced within the past three years? The Justice Index web site may include data older than three years, but the indexing function of the Justice Index will generally look back only three years.
Topics & Indicators	The Justice Index focuses on four main issues: i) Number of Lawyers for People in Poverty; ii) Support for Self-Represented Litigants; iii) Support for Litigants with Limited English Proficiency; and iv) Support for People with Disabilities.
Presentation of results	Numerical rankings.
Examples of Impact	News coverage: http://www.tulsaworld.com/opinion/readersforum/david-riggs-equal-access-to-justice-more-than-just-words/article_8eb9e7b5-332a-5836-90f2-86ccd88db683.html http://www.civilbeat.com/2014/11/study-says-hawaii-ranks-2nd-for-access-to-justice/ http://wfpl.org/kentucky-among-worst-states-in-accessibility-for-poor-disabled-in-criminal-justice-study-says/
Limitations	Only covers US, using data from the past three years.
Latest publication	http://www.justiceindex.org/findings/

2015 Index of Economic Freedom

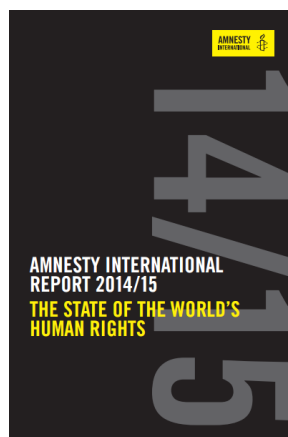
Title	Index of Economic Freedom
Organisation	The Heritage Foundation
Date established	1995
Policy area	Economics
Objectives	To help readers track over two decades of the advancement in economic freedom, prosperity, and opportunity and promote these ideas in their homes, schools, and communities.
Data sources	Existing data from various sources, including Economist Intelligence Unit, Freedom House, U.S. Department of Commerce, U.S. Department of State, Transparency International, Office of the U.S. Trade Representative, Organisation for Economic Co-operation and Development, African Development Bank, International Monetary Fund, Asian Development Bank, United Nations Economic Commission for Latin America, World Bank, various news and magazine articles and official government publications of each country.
Topics & Indicators	The Index of Economic Freedom measures economic freedom based on 10 quantitative and qualitative factors, grouped into four broad categories, or pillars, of economic freedom: <ul style="list-style-type: none"> i) Rule of Law (property rights, freedom from corruption); ii) Limited Government (fiscal freedom, government spending); iii) Regulatory Efficiency (business freedom, labor freedom, monetary freedom); and iv) Open Markets (trade freedom, investment freedom, financial freedom).
Presentation of results	Numerical ranking.
Examples of Impact	News coverage: http://nehandaradio.com/2015/03/20/the-2015-index-of-economic-freedom/ http://www.theindependent.co.zw/2015/04/02/ritesh-anand-economic-freedom-key-to-long-term-success/ http://www.theportugalnews.com/news/portugal-improves-its-economic-freedom-score/34232
Limitations	Some of the factors are based on historical, rather than current information .
Latest publication	http://www.heritage.org/index/



Title	Prosperity Index
Organisation	Legatum
Date established	2010
Policy area	Economics
Objectives	The Prosperity Index is the only global measurement of prosperity based on both income and wellbeing. It is the most comprehensive tool of its kind and is the definitive measure of global progress.
Data sources	Existing data sources, combining established theoretical and empirical research on the determinants of wealth and wellbeing
Topics & Indicators	Focuses on eight core pillars of prosperity, each supported by 89 indicators: <ul style="list-style-type: none"> i) Economy ii) Entrepreneurship and opportunity iii) Governance iv) Education v) Health vi) Safety and security vii) Personal freedom viii) Social capital
Presentation of results	Numerical ranking.
Examples of Impact	News coverage: http://www.dailymail.co.uk/news/article-2818646/Britain-leapfrogs-Germany-list-world-s-prosperous-nations-lags-Norway-Australia-Iceland.html http://www.cbc.ca/news/business/prosperity-index-ranks-canada-5th-in-world-1.2821919 http://www.theguardian.com/news/datablog/2014/nov/03/european-countries-dominate-in-global-prosperity-rankings http://cyprus-mail.com/2014/11/04/cyprus-falls-ten-places-in-prosperity-index-since-2012/
Limitations	Data lag can lead to undesirable inconsistencies, especially when the data are not updated annually for every country on specific variables.
Latest publication	http://www.prosperity.com/

The **Rule** of **Law** INDEX

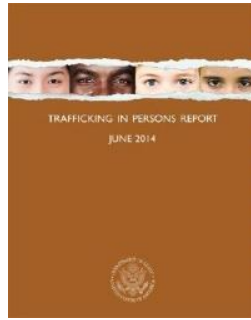
Title	The Rule of Law Index
Organisation	World Justice Project
Date established	2010
Policy area	Justice
Objectives	To create a comprehensive way to see whether countries adhere to the rule of law in practice. It is a tool to strengthen the rule of law by: assessing a nation's adherence to the rule of law in practice; identifying a nation's strengths and weaknesses in comparison to similarly situated countries; and tracking changes over time.
Data sources	Two original sources of data collected from independent sources by the World Justice Project in each country: i) a General Population Poll; and ii) a series of Qualified Respondent's Questionnaires.
Topics & Indicators	48 rule of law indicators organized around nine issues: i) limited government powers; ii) absence of corruption; iii) order and security; iv) fundamental rights; v) open government; vi) regulatory enforcement; vii) civil justice; viii) criminal justice; and ix) informal justice. The scores of the indicators are built from over 400 variables drawn from assessments of the general public (1000 respondents per country) and local legal experts.
Presentation of results	Numerical ranking.
Examples of Impact	News coverage: http://www.news.lk/news/business/item/2134-wjp-rule-of-law-index-2014-sri-lanka-ranks-above-all-peers-in-south-asia-in http://www.dailytimes.com.pk/national/11-Aug-2014/pakistan-at-96-among-99-countries-in-rule-of-law-index
Limitations	Covers only 97 countries. It does not explain the causes of the conditions it describes or prescribe remedies.
Latest publication	http://worldjusticeproject.org/rule-of-law-index



Title	The State of the World's Human Rights
Organisation	Amnesty International
Date established	2006
Policy area	Human Rights
Objectives	To document human rights violations around the world and to highlight the strength of the human rights movement and the progress which has been made in certain areas.
Data sources	Various existing sources, including Amnesty's own research and UN reports.
Topics & Indicators	There are no indicators used across the board for every country. The report summarises and comments on human rights abuses in each country, categorised under priority headings (ie: freedom of religion or belief, impunity – enforced disappearances, counter-terrorism and security, violence by armed groups, etc.), which are selected according to the key issues in each country.
Presentation of results	Country summaries, with no scoring or rankings.
Examples of Impact	News coverage: http://newsfirst.lk/english/2015/02/sl-features-prominently-in-ais-annual-state-of-the-worlds-human-rights-report/80278 http://www.atimes.com/atimes/Southeast Asia/SEA-02-260215.html http://tvnz.co.nz/national-news/nz-risks-breaching-human-rights-amnesty-5445834
Limitations	The report on each country is individualised, making meaningful comparisons between countries impossible.
Latest publication	https://www.amnesty.org/en/documents/pol10/0001/2015/en/



Title	Global Terrorism Index
Organisation	Institute for Economics and Peace
Date established	2012
Policy area	Security
Objectives	To analyse and aggregate available data related to terrorism to better understand its various properties and to examine these trends to help inform a positive and practical debate about the future of terrorism and the required policy responses.
Data sources	Data from the Global Terrorism Database (GTD) which is collected and collated by the National Consortium for the Study of Terrorism and Responses to Terrorism (START), which is supported by the Department of Homeland Security.
Topics & Indicators	The four factors counted in each country's yearly score, are: <ul style="list-style-type: none"> i) Total number of terrorist incidents in a given year; ii) Total number of fatalities caused by terrorists in a given year; iii) Total number of injuries caused by terrorists in a given year; and iv) A measure of the total property damage from terrorist incidents in a given year. Each of the factors is weighted between zero and three and a five year weighted average is applied to try and reflect the latent psychological effect of terrorist acts over time.
Presentation of results	Countries are ranked in order 1-124 based on a score of 0-10 which rates the impact of terrorism.
Examples of Impact	News coverage: http://www.theyucatantimes.com/2014/12/mexico-and-the-us-in-risk-of-terrorism-global-terrorism-index/ http://www.thisdaylive.com/articles/nigeria-ranked-fourth-on-global-terrorism-index/194505/
Limitations	Only updated every two years, so data soon out of date. Terrorism is also very difficult to define and analyse. It has also been criticised for failure to include Palestine, so as to exclude Israeli acts which fall within the definition of terrorism. While the index claims that its database only includes acts which are contrary to international humanitarian law, the "two out of three" criteria allows for legal actions to be included, such as those carried out by Palestine against Israel. See http://www.globalresearch.ca/the-dirty-little-secret-behind-the-global-terrorism-index-gti/5418297 for more.
Latest publication	http://www.visionofhumanity.org/sites/default/files/Global%20Terrorism%20Index%20Report%202014_0.pdf



Title	Trafficking in Persons Report
Organisation	US Department of State
Date established	2001
Policy area	Human Trafficking
Objectives	To raise global awareness, highlight efforts of the international community and encourage foreign governments to take actions against all forms of human trafficking.
Data sources	The TIP Report is based on information from U.S. embassies, government officials, non-governmental and international organizations, published reports, news articles, academic studies, research trips to every region of the world, and information submitted to tipreport@state.gov .
Topics & Indicators	<p>Tier rankings and narratives in the 2014 TIP Report reflect an assessment of the following:</p> <ul style="list-style-type: none"> i) enactment of laws prohibiting severe forms of trafficking in persons, as defined by the TVPA, and provision of criminal punishments for trafficking offenses; ii) criminal penalties prescribed for human trafficking offenses with a maximum of at least four years' deprivation of liberty, or a more severe penalty; iii) implementation of human trafficking laws through vigorous prosecution of the prevalent forms of trafficking in the country and sentencing of offenders; iv) proactive victim identification measures with systematic procedures to guide law enforcement and other government-supported front-line responders in the process of victim identification; v) government funding and partnerships with NGOs to provide victims with access to primary health care, counseling, and shelter, allowing them to recount their trafficking experiences to trained social counselors and law enforcement in an environment of minimal pressure; vi) victim protection efforts that include access to services and shelter without detention and with legal alternatives to removal to countries in which victims would face retribution or hardship; vii) the extent to which a government ensures victims are provided with legal and other assistance and that, consistent with domestic law, proceedings are not prejudicial to victims' rights, dignity, or psychological well-being; viii) the extent to which a government ensures the safe, humane, and to the extent possible, voluntary repatriation and reintegration of victims; and ix) governmental measures to prevent human trafficking, including efforts to curb practices identified as contributing factors to human trafficking, such as employers' confiscation of foreign workers' passports and allowing labour recruiters to charge

	prospective migrants excessive fees.
Presentation of results	<p>Countries are placed into one of four tiers:</p> <p>Tier 1 - Countries whose governments fully comply with the TVPA's minimum standards for the elimination of trafficking.</p> <p>Tier 2 - Countries whose governments do not fully comply with the TVPA's minimum standards but are making significant efforts to bring themselves into compliance with those standards.</p> <p>Tier 2 Watch List - Countries whose governments do not fully comply with the TVPA's minimum standards, but are making significant efforts to bring themselves into compliance with those standards, and for which: a) the absolute number of victims of severe forms of trafficking is very significant or is significantly increasing; b) there is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year, including increased investigations, prosecution, and convictions of trafficking crimes, increased assistance to victims, and decreasing evidence of complicity in severe forms of trafficking by government officials; or c) the determination that a country is making significant efforts to bring itself into compliance with minimum standards was based on commitments by the country to take additional steps over the next year.</p> <p>Tier 3 - Countries whose governments do not fully comply with the TVPA's minimum standards and are not making significant efforts to do so.</p>
Examples of Impact	<p>News coverage:</p> <p>http://www.bangkokpost.com/opinion/opinion/518419/it-time-for-action-not-words-on-trafficking</p> <p>http://m.jordantimes.com/165-human-trafficking-cases-recorded-in-jordan-in-2014</p> <p>Research into the impact of the TIP Report has shown that governments do respond to the scrutiny exercised by the US through this process, responding most notably to harsher tier rankings. The study provides Pakistan as an example- Kelley, Judith G., and Beth A Simmons, 2014 "Politics by number: Indicators as Social Pressure in International Relations" <i>American Journal of Political Science</i>.</p>
Limitations	The standards used by the TIP Report are those set out in the US Trafficking Victims Protection Act, created by the US with no external influence, leading to criticisms of the paternalistic nature of the TIP Report.
Latest publication	http://www.state.gov/documents/organization/226844.pdf