The Legal Experts Advisory Panel (LEAP) is Fair Trials' fair trials defenders network for Europe.
Fair Trial defenders in Europe

**Law firms**
Legal practitioners are in the front line of the fight to protect the right to a fair trial. Their first-hand experience in police stations, detention centres and courts is an invaluable tool to identify and challenge failures and abuses in the criminal justice system.

**Academic institutions**
Academics help analyse comparative trends and identify the gaps in existing frameworks. Their research work is key to inform legal changes. Academics also provide solid expertise into the legal trainings organised by Fair Trials.

**Civil society organisations**
Civil society organisations help to raise awareness about fair trial issues among the general public and advocate for change. They act as a watchdog against any backsliding on defence rights.
Foreword

The last year has been a challenging year for Europe and human rights, including the right to a fair trial. Several threats to this key founding principle of the European Union, at the heart of the rule of law, come from within the Union itself.

In Poland, an ongoing constitutional crisis is undermining democracy and respect for the rule of law, while putting fair trials at risk by giving the Minister of Justice power to intervene in investigations and prosecutions. In Hungary, the government of Prime Minister Victor Orbán is threatening the freedom of the media and civil society, whilst stirring fear of migrants and anger against the EU. In the meantime, Turkey is drifting farther away from the European Union and values of democracy, rule of law and respect for human rights. Following the 2016 attempted coup, the Erdogan administration enacted emergency provisions that threaten fair trial rights for thousands of people suspected of involvement in the rebellion. Those who fled to Europe face the threat of extradition requests and the Member States in which they found refuge are under pressure to extradite them, notwithstanding concerns that prosecutions are politically motivated and that people would not get a fair trial if returned. Cases of unlawful transfers to Turkey have been reported by members of the Legal Experts Advisory Panel (“LEAP”).

Cross-border justice remains a critical area at the international level, with mechanisms created to fight serious cross-border crime being used in a way that undermines human rights or even abused by authoritarian regimes to chase political dissidents, journalists and activists. Public security concerns only serve to increase pressure on Member States to cooperate with other countries, even where this poses grave human rights risks.

On a more positive note, last year has seen some progress too in relation to the protection of fair trials in the EU, which we are proud to have contributed to.

Firstly, in early 2016, two EU Directives were passed to strengthen the right to be presumed innocent and to protect the rights of children in criminal proceedings. More recently, in October 2016, the Council adopted the Legal Aid Directive, which sets common standards across the EU to ensure financial and judicial support is granted in criminal proceedings to all accused persons who cannot afford a legal defence with their own resources. Thanks to these three Directives, much of the EU’s work to create a package of binding minimum standards on the right to a fair trial (the “Roadmap”) is now complete, seven years on from its endorsement in 2009. As a result, LEAP’s work will now focus on the effective implementation of these key instruments which have the potential to lead the way globally in the protection of this crucial human right and to guarantee that the EU lives up to its commitment to the rule of law.

Secondly, pre-trial detention reforms were recognised by Vera Jourová, the European Commissioner responsible for justice matters, as one of her key priorities. This commitment is all the more welcome in light of the work undertaken by Fair Trials, our partners and LEAP on this subject (“A Measure of Last Resort? The Practice of Pre-Trial Detention Decision-Making in the EU”), which shows how pre-trial detention is being ordered, without effective judicial scrutiny, in cases where detention is not justified, throughout the surveyed countries. As a result, people are spending months and even years in remand in
the absence of real procedural safeguards. This is not just a national problem, as unjustified and lengthy pre-trial detention is threatening mutual recognition between EU domestic courts and hindering cross-border justice cooperation. Therefore, Fair Trials and LEAP welcome the Commissioner’s commitment to EU-wide action on pre-trial detention to resolve this major cause of prison overcrowding in Europe.

Thirdly, in April 2016, the Court of Justice of the EU ruled in joint cases Aranyosi and Caldararu that member states must assess respect for human rights before surrendering a person under a European Arrest Warrant (“EAW”). Before this judgment, many Member States considered that their obligation to respect the judicial decisions of other EU countries was more important than their obligation to protect the human rights of the people in their jurisdiction. While the full implications of the decision are not yet clear, the Court’s reiteration of the primary importance of respecting human rights is welcome.

Against this mixed picture of the state of defence rights in Europe, LEAP will now focus on fighting new and ongoing threats to the right to a fair trial, while also ensuring that the exciting potential of the EU’s minimum standards on procedural rights achieve their potential across Member States. To this end, we are looking to engage more in working with LEAP members to develop local advocacy in individual EU member states and have launched regional-level initiative groups of pooled expertise on critical under-explored issues, such as related to remedies available in national law for violations of the procedural rights standards and the implementation at the national level of the judgements of the European Court of Human Rights and Court of Justice of the EU related to these standards. These national and regional clusters are already developing some very concrete action plans, which we are excited to follow up on and support in the upcoming months and years.

The present report recounts some of the major achievements of the LEAP network over the last year. For ease of reading, we have decided to divide the report into six thematic sections, each one dedicated to a specific aspect of the right to a fair trial and the threats to which it is subject. Throughout the publication, you will find country-focus sections, case studies and infographics that illustrate some of the issues at a glance.

On behalf of Fair Trials, I would like to thank all the LEAP members who have donated their time and money to our work, allowing us to continue our fight for fair trial rights across Europe.

Ralph Bunche
Regional Director (Europe), Fair Trials

LEAP is coordinated by Fair Trials Europe with the financial support of the Justice Programme of the European Union.
Access to justice
However great a country’s justice system, however fair its laws, however independent and impartial its judges; this amounts to nothing if people cannot access justice in practice. Access to justice is about making sure that people have all the means they need to assert and to defend their rights. This is, of course, multifaceted and some people need more support than others. In this section of the report, we focus on access to a lawyer, legal aid, translation and interpretation, and accessible information for suspects on their rights.
Access to a lawyer

In 2013, the EU adopted a Directive that guarantees people facing criminal proceedings in the EU the right to the effective assistance of a lawyer, from the time of arrest through to the conclusion of their case. The transposition deadline passed on 27 November 2016, which means that now the Directive is enforceable and the Commission can initiate infringement proceedings against those Member States that have either not yet transposed it into national law or have transposed it wrongly. Although this is a very welcome step in the right direction, issues remain as to the effective role of the defence lawyer during police interrogations, as well as in cases where the police encourage the accused to waive their right to legal counsel.

Country focus: Malta

In Malta, the Directive on Access to a Lawyer was transposed in November 2016 through Bill 168. This is generally regarded to be a faithful transposition of the Directive, notably in relation to a) private communication between the lawyer and their client; b) the participation of lawyers in identification parades, confrontations between the suspect and the victim and crime scene reconstructions; and c) the right to remedies in cases of non-compliance. However, the Bill raises concerns as to other issues, notably:

- A defence lawyer’s ability to effectively participate during questioning is seriously limited, making the lawyer into little more than a silent observer;
- That police will question the suspect without informing him of the alleged offence until they choose to speak to a lawyer;
- There are no specific provisions which clarify when a vulnerable person can be questioned, leaving the matter to the discretion of the police; and
- That the police can restrict the right of the accused to legal assistance when criminal proceedings against them are already underway.

These concerns raise fears that these amendments to the criminal law appear to be implementing the Directive on paper, whilst failing to tackle the problems which exist in practice.

Online training

Check out our free online training on Access to a Lawyer here. The course provides an overview of the Access to a Lawyer Directive and other international standards, as well as practical guidance for lawyers on how to make effective use of this legislation in their day-to-day practice.
Legislation and practices of judicial remedies in the EU

Fair trial rights, just as any other human rights, are only meaningful if there are remedies available for those affected. In the case of fair trial abuses, these remedies should be provided by the competent judicial authority and can take several forms, including financial compensation, exclusion of evidence and re-trials. In order to get a clearer picture about the current state of remedies across Europe, from rules to practices, Fair Trials and LEAP established a Working Group on judicial remedies in June 2016. In particular, the Group seeks to explore how to bridge the gap between the law – which has advanced considerably through the procedural rights roadmap and jurisprudence from the European Court of Human Rights (ECtHR) in recent years – and the lack of focus on judicial remedies for any violations of these rights on the other.

The Working Group has been coordinated by Fair Trials and Vania Costa Ramos (LEAP Advisory Board member, Portugal), with Dr Dimitrios Giannoulopoulos (Brunel University London and LEAP member, UK) acting as Academic Advisor.

As a first step, Fair Trials disseminated a questionnaire amongst all members of the Group to obtain an overview from representatives of each Member State. The findings were discussed at an event in Lisbon in January 2017 which sought to understand the differences between the remedies provided by countries for fair trial rights violations. There was a particular focus on violations relating to access to a lawyer which lead to a prohibition on the use of evidence or other judicial remedy, and whether these constitute an "effective remedy" for the violation.

The discussion was advanced further at the LEAP Annual Conference in Athens in March 2017. The meeting was an opportunity to hear from Julia Lafrahnque, a sitting judge at the Strasbourg Court, about the impact of Ibrahim & Others v UK on the availability of remedies for violations of the right to access to a lawyer, and considered the impact of the Ibrahim judgment on the Salduz doctrine which has been read as requiring the exclusion of evidence obtained in violation of this right.

Fair Trials and the Working Group are in the process of producing a policy paper to address how the Ibrahim decision could be interpreted to help guide policy and advocacy developments around violations of the right to access to a lawyer.

Country focus: the Netherlands

The Directive on Access to a Lawyer filled some gaps that existed in the Dutch procedural rights landscape. In fact, the Netherlands lagged behind most EU Member States on access to a lawyer during police interrogations, and so the November 2016 transposition bill was an important step towards recognising this right. Even though some aspects of the lawyer’s role in police stations are yet to be defined, a lawyer can now:

- Make comments and ask questions prior and during the questioning by the police;
- Make a request to pause interrogations to consult with their client; and
- Make statements when:
  - The suspect may not understand the question;
  - The interrogating officer does not comply with interrogation procedure; or
  - The physical or mental condition of the accused is such that it prevents a justified continuation of the interrogation.
**LEAP in Action:**

**training lawyers in police stations**

Lawyers are crucial in upholding fair trial rights from the very first interrogation in the police station. This is not, however, reflected in practice at this early stage. In fact, research shows that lawyers’ role is often limited at the investigative stage, with many lawyers spending little time meeting clients, and some lawyers reluctant to attend interviews. In many jurisdictions, the common practice is for a lawyer to advise their client by phone to stay silent, which is considered to reduce the need for lawyers to attend the interview.

In order to tackle this situation, LEAP members Maastricht University and the Hungarian Helsinki Committee are driving ‘SUPRALAT’, a pilot project seeking to train lawyers on how to increase their impact and protect fair trial rights in police stations. The pilot is being implemented in four EU member states: Belgium, Hungary, Ireland, and the Netherlands, where project partners are developing train-the-trainer sessions that will help to further disseminate the trainings locally.

Anna Pivaty (Maastricht University) and Jodie Blackstock (JUSTICE) presented the project at the LEAP Annual Conference and led a role-playing training session that was met with great enthusiasm by our LEAP members.

To find out more about SUPRALAT, visit the project’s website

http://www.salduzlawyer.eu/

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**Right to Information**

The right to information ensures that anyone arrested knows why they have been arrested and what evidence has been collected against them. It also includes that person’s right to be informed of their rights in case of arrest, such as the right to remain silent or the right to a lawyer, all of which should be stated in a Letter of Rights, which should be written in “simple and accessible” language that people can understand. This right is absolutely essential for anyone wanting to defend themselves or challenge an arrest. In the EU, this right is enshrined in Directive 2012/13, but the effectiveness of its implementation has varied across the EU.

**Making Letters of Rights accessible to everyone**

Working with LEAP member Hungarian Helsinki Committee, Fair Trials is seeking to improve the effectiveness of these Letters of Rights throughout Europe. The “Accessible Letters of Rights” project (part-funded by the European Commission) was launched in 2015 with the aim to better understand how the Directive has been implemented so far. This includes examining what the requirement for “simple and accessible” language for a Letter of Rights means in practice; identifying examples of transferrable good practice related to the provision of information on rights; producing reform proposals; and raising awareness about gaps in the implementation of the Directive.
Thanks to local research provided by LEAP members, Fair Trials has produced a comparative report on the standards and practices around rights notification around the world, focusing in particular on how the Directive is being implemented Letter of Rights across all 28 Member States. We designed a survey to be circulated to the LEAP membership to gain insight into the transposition of the Letter of Rights obligations, to which 42 LEAP members replied.

Each project partner is now focussing their research work on their own jurisdiction with Fair Trials looking at the development and use of the Letter of Rights in France. The resulting country reports as well as the findings of the initial research will be incorporated in a final regional report which will be published in mid-2017.

Legal Aid

Legal aid is financial or legal assistance granted to arrested people who either cannot afford a lawyer or qualify for free assistance because they belong to a specific category (for instance, asylum seekers). This support is essential to ensure a fair chance to present a defence, regardless of a person’s economic situation.

In October 2016, the European Union adopted a Directive on Legal Aid, which set common EU standards to ensure that financial and judicial support is granted in criminal proceedings to all accused persons who cannot afford a legal defence with their own resources. Given certain preconditions, the Directive also establishes that legal aid is made available in European Arrest Warrant (EAW) proceedings in both the executing and the issuing Member State. Fair Trials raised concerns about the limited scope of the Directive in a number of respects including the removal of the right to emergency legal assistance while decisions are made on legal aid. We were, however, pleased that the Directive incorporated some of the recommendations set out in a policy paper that was produced in cooperation with the LEAP network in 2015, including the fact it was extended to apply throughout criminal proceedings, rather than solely at the early stages.

Advocating for a fairer legal aid system in Belgium

In Belgium, a new law reforming Legal Aid in criminal matters entered into force on 1st September 2016. The amendments were introduced, and sought to “review applicants’ overall livelihoods in order to provide legal assistance to those who really need it.” The reform is a major setback for the right to legal aid, as it makes it much more difficult for poorer people to access legal assistance. In an interview with Fair Trials, Belgian LEAP member Crépine Uwashema (left) flagged serious challenges with the new law, highlighting specifically:

- Means tests: Under the new law the means test is satisfied for those not in pre-trial detention only in cases where they can demonstrate that they have no “means of subsistence”, which requires proof not only of income/expenditures but also that they are without assets that could be disposed of to pay.
Case-study

Pakistani defendant in France awaits translation for over 10 months in pre-trial detention

In one case from the last year, criminal defence lawyer and French LEAP member Alexandre Gillioen has been fighting over translation rights in a case involving a Pakistani national. The defendant, who has lived in Lyon since 2002, was arrested on charges of cooperating with an illegal migration network and put in pre-trial detention in April 2016. At the time of producing this report he was still in pre-trial detention, 13 months later. The defendant does not speak French, only Urdu-Punjabi. The first interrogation took place in early June 2016 but his client did not understand the charges brought against him. As no written translation of case materials was provided, Alexandre requested a translation into Urdu-Punjabi, at least for the essential elements of the case. The investigative judge agreed to his request but informed Alexandre that the translation might take several months.

When contacted by Alexandre, Fair Trials advised him to write to the French judge and suggest that the issue be referred to the CJEU for a preliminary reference: The Interpretation and Translation Directive provides that suspected or accused persons are provided with a written translation of all essential documents, within a reasonable period of time and the Right to Information Directive requires documents to be made available to defendants if they are needed to challenge the legality of the detention.

Sadly, the national judge overlooked the request for the preliminary ruling. A further appeal to the Supreme Court (Cour de Cassation) in January 2017 was dismissed. Alexandre decided then to ask for an interpreter to be able to speak to his client. Both the first-instance judge and the Court of Appeal rejected his request, dismissing the EU Directive on the Right to Translation and Interpretation. The case is currently pending before the Supreme Court.
• Presumption of indigence: A number of different groups are presumed to qualify automatically for legal aid (e.g. minors, people with a mental illness, stateless persons, etc.). However, under the new law those receiving social assistance are no longer presumed to qualify and must now prove that they have no means of subsistence;

• Fees for Legal Aid services have been introduced, except for specific categories (e.g. asylum seekers, people deprived of liberty, those with no income), requiring legal aid beneficiaries to pay a “user fee” of at least €50 – €20 for the appointment of the defence lawyer; €30 for each proceeding – and the lawyer is only allowed to start work once the contributions have been paid.

Currently, 20 Belgian associations, including some Belgian LEAP members, are working together to introduce an appeal before the Belgian Constitutional Court. Fair Trials is conscious of the importance of effective free legal aid for those who cannot afford a lawyer and is supporting this initiative via an expert opinion backing the associations’ appeal. We fear that the new system creates coercive incentives not to seek legal aid and to waive the right to access a lawyer. Fair Trials is preparing a position paper in response to this reform and its incompatibility with the EU Directives on Access to a Lawyer and Legal Aid.

Right to Translation and Interpretation
Understanding what is happening around you if you get arrested is a natural prerequisite for challenging your charges and preparing an adequate defence. Legal language is already difficult to understand for the average person, and more so in a stressful situation such as when you are under arrest. If you do not know the language of the proceedings, your chance of having a fair trial can be seriously jeopardised.

In the EU, the Directive on the Right to translation and interpretation, in force since October 2013, helps defendants to access interpretation services and translations of essential documents.

The LEAP network has been very active in enforcing this Directive, not least through the delivery of trainings on the right to translation and interpretation to criminal defence lawyers. In early 2017, LEAP member Vania Costa Ramos (above) helped Fair Trials to organise such a training in Lisbon, Portugal. The training was attended by judges, translators and police officers, all of which are a key actors in ensuring the implementation of the right to translation and interpretation. Fair Trials discussed the Directive, the process of its adoption and its importance for the national jurisdictions, while Vania focussed on how to use this tool to challenge practical issues in Portuguese police stations and courts. Moreover, a detailed toolkit was developed by Fair Trials and disseminated in Portugal by the Lisbon Bar association.
Bad interpretation by phone hinders fair interrogations in the Netherlands

Making translation and interpretation available to defendants is generally considered to work well in the Netherlands. However, issues remain as to the quality of these services, and this can greatly impact upon the ability of the defendant to present their defence and to challenge the accusations. This was very much the experience of LEAP member Gwen Jansen, a practising criminal lawyer in the Netherlands.

In a case in which an interpreter was required for an Irish person in Amsterdam, for whom interpretation was necessary to understand the questions and to answer appropriately, no Irish interpreter was available. Instead, an English interpreter was provided. The two languages being identical in writing, it was thought that interpretation would not represent a huge challenge. But this was without taking into account that interpretation would happen on the phone, as is usually the case in the Netherlands.

It was only because Gwen herself understands English, that the defence noticed that the interpreter was not translating the words of the defendant correctly; in fact, some information provided was misleading with consequences for the supposed facts of the case. The police officer was reported to know English himself but did not intervene to stop the incorrect interpretation.

In this case, Gwen sought another interpreter, who was eventually provided, but it’s unclear how the interrogation might have developed, were she not there or had she not known the language of the defendant.
Pre-trial detention
Globally, there are currently close to three million people being held in pre-trial detention. Within the European Union alone, 120,000 people detained. That’s more than 1 in 5 people held in prison that haven’t yet been found guilty of any crime.

Detained without a trial and for an undefined period, the human toll can be immense. Besides the destructive impact on the people involved and their families, pre-trial detention is also one of the main causes of prison overcrowding and represents a huge economic burden on public expenditure.
Fair Trials regional report on pre-trial detention in the EU

In May 2016, Fair Trials published a regional report on the use of pre-trial detention within the EU, after collecting evidence in 10 Member States (working with partners in England and Wales, Greece, Hungary, Ireland, Italy, Lithuania, the Netherlands, Poland, Romania, and Spain). The research (part-funded by the European Commission) - A Measure of Last Resort? The practice of pre-trial detention decision-making in the EU - found several shortcomings common to many countries, including:

- Overreliance on prosecutorial evidence: often, the judges appear to give more consideration to the evidence provided by the prosecution, whilst failing properly to engage with the evidence brought by the defence.
- Formulaic reasoning: pre-trial detention decisions were found to be abstract and lacking any contingent reference to the specificities of the case in question. This is sometimes evident in “copy-and-paste” decisions provided by the pre-trial judge.
- Illegal reasoning: pre-trial detention was also found to be granted based on illegal grounds, such as bowing to pressure from public opinion, punishing the defendant where the conviction is not assured, extracting confessions, prejudice and discrimination. Other reasons, at odds with standards affirmed by the ECtHR case-law and include the gravity of the alleged offence, the risk of flight of the defendant when he has solid links to the place of residence, or the risk of interference with the investigation even if no concrete reason is given.
- Absence of automatic and effective reviews: in several jurisdictions, reviews of the pre-trial detention decision do not happen at regular intervals but need to be requested by the defendant and are heard at the discretion of the judge. In some instances, reviews happen in the absence of the defendants themselves and are generally found to be ineffective as they repeat the abstract reasoning provided in previous hearings, not taking account of how circumstances have changes such as progress made in the investigation making interference with it no longer possible.
- Poor use of alternatives to detention: pre-trial detention could be limited if judges made greater use of existing alternatives, such as bail, probation, or electronic monitoring. One of the main reasons why alternatives are so rarely relied upon is that the judicial authorities often do not have sufficient knowledge of and/or trust in them. This situation calls for both adequate training for judges and for sustained investment in these alternatives.

Pre-trial detention also increases the chances of a defendant being exposed to torture or to inhuman or degrading treatment. Over the last year, many LEAP members have reported instances of physical and psychological violence by police against their clients, as well as inadequate medical care, and clients being prevented from having contact with their family.
Through their research, Fair Trials’ local partners and LEAP members from England and Wales contributed to the reform of the region’s Criminal Procedure Rules. Professor Ed Cape and Dr Tom Smith conducted desk-based review of practice and procedure, surveyed criminal defence practitioners, observed hearings, reviewed prosecution case files, and interviewed judges, magistrates and prosecutors. One of the significant findings of the research was that courts, on average, took very little time to consider these vital decisions about the liberty of unconvicted individuals – particularly at an early stage when evidence and disclosure might be incomplete. Additionally, the research suggested that adequate time often wasn’t available for the defence to consider information supplied to it about the prosecution case prior to a PTD hearing. Over the course of 2016, Ed and Tom were engaged with the Committee charged with the reform of the Criminal Procedure Code, including through the submission of a position paper, attendance at a Committee meeting, and ongoing dialogue and consultation with the Secretariat. At the end of this process, the Committee responded positively to the findings of the report and changed the Rules, including to ensure that people are given sufficient time to consider evidence before pre-trial detention hearings and to require courts to take sufficient time in hearings to consider the parties’ arguments.

The publication of the report was just the starting point of a wider campaign to fight against abusive pre-trial detention. Only weeks before the publication, the European Commissioner for Justice, Consumers and Gender Equality, Věra Jourová, included action on pre-trial detention as a key priority for the European Commission to work on over the next few years. This declaration was supported by a cross-party group of Members of the European Parliament (GUE/NGL, S&D, Greens/EFA, ALDE) and by the Italian Permanent Representative to the EU.

“My priority here is to improve the procedural safeguards related to pre-trial detention. The lack of minimum procedural safeguards for pre-trial detention can hinder judicial cooperation.”

Vera Jourová – European Commissioner of Justice, Consumers and Gender Equality, May 2016

Fair Trials and LEAP presented the findings of the report at the European Parliament, advocating for change in several areas.

Roundtable with experts on pre-trial detention

In July 2016 Fair Trials and the LEAP network organised a roundtable of experts from 10 EU member states, including defence lawyers, prosecutors, judges, probation officers and civil society representatives to discuss the findings and recommendations outlined in the report. The group:

- Identified the challenges faced by different stakeholders within criminal justice systems in relation
to making effective decisions on pre-trial detention and the ways in which EU legislation could address these challenges;

- Discussed the recommendations set out in the report, and identified potential challenges relating to the implementation of the recommendations;
- Established what contribution probation services might be able to make to the pre-trial detention decision-making process as well as improving levels of confidence in - and increasing the use of - alternatives to detention; and
- Identified how judges, prosecutors and probation services could be engaged in a unified movement for EU action on pre-trial detention.

Event at the OSCE Human Dimension Implementation Meeting (HDIM)

The OSCE HDIM is the biggest human rights conference within the OSCE region, which brings together civil society representatives from every participating member state. In September 2016, we took advantage of this opportunity to organise a panel considering the misuse of pre-trial detention across the OSCE region. Fair Trials’ Chief Executive, Jago Russell, and Regional Director for Europe, Ralph Bunche, presented the findings of our report before a multinational audience. The Polish section of our LEAP network actively engaged in the event, highlighting the misuse of pre-trial detention in Poland, something that echoed the words of the Polish Commissioner for Human Rights Adam Bodnar, also a panellist at the event.

European Commission roundtable meeting

In October 2016, Fair Trials and LEAP members from Hungary (Hungarian Helsinki Committee) and Lithuania (Human Rights Monitoring Institute) joined a roundtable meeting organised by the European Commission on pre-trial detention. The Directorate General for Justice showed great interest in our work, underlining that considerable advocacy efforts need to be put in national contexts in order to secure EU-wide reform. In the view of stepping up local impact, Fair Trials and LEAP are developing national action plans to enhance the implementation of the Roadmap Directives and to advocate for reform where needed, including in relation to pre-trial detention decision-making.

The way forward: tackling practical barriers to pre-trial detention reform

We discussed our advocacy strategy with our LEAP Advisory Board members in October 2016, and interesting suggestions were made with a view to stepping up the reform process and building consensus. These included:

- Highlighting in courts the link between overcrowded prisons and inhuman or degrading treatment to argue that the judge would be accountable for this, in cases where they have ordered pre-trial detention unfairly;
- Training judges on both the risks that pre-trial detention entails in terms of torture, inhuman or degrading treatment, and on EU legislation on alternative measures, including the European Supervision Order, to show the judge that pre-trial detention is not always the only solution; and
• Tackling unexpected incentives to placing people in pre-trial detention. In Germany, for instance, public defenders are paid more if their client is in detention.

**Case-study**

8 years in pre-trial detention in Poland

One of the main criticisms of pre-trial detention is how routinely it is used. As we showed in our regional report on the use of pre-trial detention in the EU, too often people who have not been convicted of any crime spend several weeks in detention. At times, the detention can last months, or years, without any trial. Our partner and LEAP member Helsinki Foundation for Human Rights shared with us a case from Poland, where a person spent about eight years in remand.

Michał was first detained in mid-May 2009. The pre-trial detention decision was consecutively extended no less than 29 times, and each time the criminal court would repeat the same justifications: a) a severe penalty is to be imposed on the defendant, if he is found guilty, b) prima facie evidence indicates that he had committed the imputed offences and c) the defendant risked perverting the course of justice. However, throughout this period, not one of the courts has ever indicated how Michał could have possibly interfered with the proceedings. In the end, Michał was detained for seven years and ten months.

After being approached by Michał’s lawyer, HFHR submitted an opinion to the Court of Appeal in Warsaw, denouncing the excessive detention and referring the court to the pre-trial detention standards developed in the jurisprudence of the European Court of Human Rights (ECtHR). HFHR considered that pre-trial detention of a duration of nearly eight years is a clear violation of the European Convention on Human Rights. Nonetheless, the Court of Appeal in Warsaw upheld the application of the most severe preventive measure against Michał for another three months.

**In focus: Alternatives to pre-trial detention**

Alternatives to pre-trial detention vary greatly from country to country and can come in various forms such as financial guarantees, supervision measures, electronic monitoring etc. LEAP members shared interesting insights into their national experience with alternatives to pre-trial detention during the LEAP Annual Conference. In Belgium, for instance, electronic monitoring is on the rise because of prison overcrowding whereas, in Germany, this measure is largely unused. In Spain, the most common alternatives to detention are reporting requirements, where the defendant must appear regularly before the court, and surrender travel documents. In Italy, bail
can be accompanied by one or more of the following measures: bans from visiting certain restaurants or bars; loss of custody of your children; removal from the family home; and bans on approaching places frequented by the victim.

Almost across the board, a consensus emerged on the underuse of alternative measures. Financial guarantees were also considered not to be as available in practice to poorer people as they are to wealthier individuals because, in some cases, judges do not exercise discretion appropriately in order to fix an appropriate financial amount.

Whilst taking into account the differences between jurisdictions, pre-trial services were agreed to be an area worth exploring to decrease the use of detention. In particular, where pre-trial services are tasked with reporting on the defendant’s situation and assessing the appropriateness of custody or of alternative measures, they were considered to be extremely useful to lawyers who often lack the time, expertise and impartiality required to produce this analysis.

In focus: compensation for wrongful pre-trial detention

In many EU countries, people who have been held in pre-trial detention can claim compensation, particularly where the detention decision was unjust or they are not ultimately convicted. As discussed elsewhere in this report, suitable remedies are an essential tenet to enforcing human rights and specifically the right to a fair trial. Moreover it has become apparent from conversations with policy-makers and justice actors, that compensation can be an effective deterrent to the abuse of pre-trial detention: states being mindful of the financial implications of detaining someone when it is not necessary. Unfortunately, defendants entitled to compensation often do not make claims due to a lack of knowledge of the right, insufficient funds to pay a lawyer, and/or adverse cost risks.

Fair Trials and international law firm Clifford Chance are developing a research project to better understand and compare the different compensation regimes in Europe. Template questionnaires will be circulated to all LEAP members to get a detailed insight into domestic rules and practices. The research will specifically look into legal provisions, the extent of their use, and compensation levels, as well as barriers to individuals accessing compensation.

The results of the research will be used to inform future EU advocacy and to design tools to help people exercise their right to compensation following pre-trial detention.

Online Training

Challenging a pre-trial detention decision can be extremely difficult. This is why we have developed an online training for criminal defence lawyers. The different modules provide an overview of international standards and show how these can be used in practice in day-to-day cases. The course is free and can be easily accessed through this link.
22% People detained pre-trial of all the detainees in the EU

This is how pre-trial detention is abused

Reasoning
Reasoning for granting pre-trial detention is often abstract and formulaic. Illegal reasons such as public pressure are sometimes adopted to send people in remand.

Reviews
Reviews of the pre-trial detention decision often follow the same abstract reasoning. In some countries, they are not automatic and are carried out without hearing the defendant.

Alternatives
Alternatives to pre-trial detention include electronic monitoring and other non-custodial measures. However, they are poorly known or trusted by the judges, and therefore rarely used.

What happens in pre-trial detention?

Police violence
17.87% of LEAP members have reported cases of police abuse on their clients whilst in pre-trial detention over the last year.

Loss of social bonds
People in pre-trial detention have a hard time keeping in contact with family and friends. Many of them undergo painful psychological stress, leading to high levels of depression.

Loss of jobs
When put in pre-trial detention, people may lose their jobs and their professional reputation. Often this means cutting a fundamental financial source for the family of the defendant.
Cross-border justice
Since 9/11, countries have made it quicker and easier to extradite people to face trial or serve a sentence. Effective extradition systems are crucial but these changes have come at the cost of respect for basic human rights, with people being extradited to countries where their human rights are at serious risk or to serve sentences imposed after an unfair trial. LEAP members have been involved in cases where extradition has led to detention for months before a trial is due to start, or where it has been used disproportionately for minor crimes where the human and financial cost of extradition is disproportionate. In today’s climate, with growing pressure for ‘tough on crime’ policies the situation is only expected to worsen.

In the US, for example, publicly declared support for torture by the new presidential administration casts doubts as to the respect for human rights in cross-border justice cooperation. In response to the US attempt at a “Muslim travel ban”, the EU foreign policy chief asserted that this was not the “European way” of fighting crime. This European commitment to tackling justice and home affairs challenges while respecting human rights and the rule of law, however laudable, is sadly not always evident in intra-EU cooperation, as the work of Fair Trials and LEAP on the European Arrest Warrant shows.
In the EU, the European Arrest Warrant ('EAW') was rushed in shortly after 9/11 to allow swift transfers of accused and convicted people between Member States. Whilst being a useful tool to prevent evasion from justice across the EU’s open borders, the EAW has also contributed to fair trial abuses when executed without sufficient judicial scrutiny or used in inappropriate cases and has had a devastating impact on people’s lives. People can lose their livelihoods, and face separation from their families.

Reforming the EAW to meet human rights standards has been one of Fair Trials’ key campaigns in Europe for many years. In 2011, we produced a comprehensive report on its use and advocated for basic changes to how it works. Many of our reform recommendations were adopted at a national level in the UK and, in January 2014, the European Parliament called for the introduction of new EU-wide safeguards in the European Arrest Warrant. However, despite persistent advocacy efforts, legal changes have not followed suit and, as the case to the right shows, the EAW continues to be abused within the Union.

15 years after its adoption, the EAW continues to be used disproportionally by Member States. In a recent case from May 2015, five Greek students, who were in Milan to demonstrate against EXPO 2015 together with thousands of other people, found themselves sought through an EAW issued by the Italian authorities. The students were accused of joining a 300-man "black block" group, which was responsible for damaging cars, shops and banks during the demonstration. However, the Italian authorities did not clarify the exact offence for each of the students, instead claiming that there was “collective responsibility” for the offences. The students faced detention as a result of the EAW.

The Greek courts considered the accusations so vague as to make it impossible to examine whether the surrender would be unfair or proportionate. The judges found that the students had already been taken to a police station in Milan, where they were treated as accused people (without any of the appropriate procedural protection) even though they had not been formally accused of any offence.

Following public outcry from local NGOs and town councils, the Greek authorities finally refused to surrender the students.
Ensuring prison conditions are assessed before surrender

Many Member States have interpreted the EAW and the concept of mutual recognition underlying it as precluding courts that are asked to surrender a person from considering the human rights implications of surrender on a wanted person. This extended to concerns about whether the person would be detained in inhuman or degrading prison conditions in the country requesting surrender.

In early 2016, two Preliminary References were considered by the Court of Justice of the European Union (CJEU), Aranyosi and Căldăraru (C-404/15 and C-659/15 PPU). In both cases, the applicants risked enduring inhuman or degrading treatment due to appalling prison conditions in Hungary and Romania respectively. The CJEU was asked whether the court considering whether to surrender should do so even if there is a risk of inhuman or degrading treatment to the requested person.

In its final decision (5 April 2016), the CJEU ruled that Member States are obliged to respect the fundamental rights of requested people when considering an EAW. It clarified that Member States must not surrender a person while there is a real risk that they will be subjected to detention conditions that infringe their fundamental rights.

Despite this welcome development, issues remain as to how the executing authorities engage with evidence on detention conditions. Firstly, it is not clear whether the executing authority is obliged to consider this information on its own initiative, if the defendant does not raise it. Secondly, it is unclear how a court in one Member State can obtain evidence on the detention system of another to establish whether detention facilities violate fundamental rights.

In response to these challenges, Fair Trials and LEAP members from Lithuania (Lithuanian Human Rights Monitoring Institute), Poland (Helsinki Committee in Poland), Romania (APADOR-CH) and Spain (Rights International Spain) are running the Beyond Surrender project (part-funded by the European Commission) to consider the treatment and experiences of people subjected to EAWs, after the warrant has been executed. The five organisations are working together to document real-life experiences and to build compelling human stories, which will be used to campaign for minimum standards within the surrender process as a sound basis for mutual recognition.
LEAP in Action:
Coordinating work to defeat EAW due to poor prison conditions in Greece

It’s always good when LEAP’s knowledge or experience has a direct impact in a concrete case. This is what happened when we responded to a request for assistance from LEAP member, Daniel Jones, whose clients faced surrender from the UK to Greece pursuant to an EAW, despite compelling evidence of poor prison conditions and the risk of police violence. Daniel consulted his fellow LEAP members to find out if there were any cases in which other domestic jurisdictions had declined extradition to Greece for those reasons.

LEAP Member Anna Oehmichen from Germany informed Daniel of two German cases that supported his argument in court. In the first case, the court found that abstract general assurances would not suffice and would lead to the rejection of the extradition request. In the second case, the Higher Regional Court in Stuttgart denied surrender of a person who had been convicted in Greece, due to poor prison conditions.

Daniel was able to craft his defence by referring to those cases, which were cited by the UK court in the final judgment. As a result, the court discharged the appellants and ruled that surrender to Greece cannot take place when it is established that the requested person is likely to be held in a prison where detention conditions are proved to be inhumane.

Advocating for the European Parliament to monitor fair trial rights in justice evaluation

In light of ongoing violations of rule of law principles within the EU, in 2016 the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs ("LIBE-Committee") began considering the establishment of a scoreboard to assess how well Member States adhere to fundamental principles of democracy, rule of law and fundamental rights (DRF Scoreboard).

In June 2016, LEAP and Fair Trials contributed to the drafting process of the Parliament report and submitted a position paper arguing that: (i) criminal justice matters, and, more specifically, the protection of fair trial rights, be included in the proposed DRF Scoreboard; and (ii) the methodology for the DRF Scoreboard be sufficiently robust to ensure its credibility. One specific focus concerned the promotion of fair trial rights as a necessary precondition for cross-border justice mechanisms, such as the EAW, to work fairly and effectively. The EAW needs mutual trust among EU jurisdictions to function, and mutual trust is in turn affected by respect for fair trial standards.

The final report, as adopted by the European Parliament, responded in part to our recommendations but more work is needed to mainstream fair trial rights considerations in cross-border justice matters.

Building consensus on the need to reform the EAW in Europe

Issues surrounding the EAW were also discussed during the LEAP Annual Conference on 3rd-4th March 2017 in Athens, where support for its reform came from multiple stakeholders. Judge Inga Reine from the Court...
LEAP lawyers have regularly worked for clients who have fallen victim to abusive INTERPOL Red Notices. In 2016, we helped LEAP member, Italian defence lawyer, Nicola Canestrini in the case of Iranian activist and political refugee Saied (not his real name). Saied was arrested in Italy as a result of a Red Notice issued by Iran. On 6th August, 2016 Saied checked into a hotel in Italy, where he was about to spend his holiday. Shortly after, two teams of police agents burst into the hotel and arrested him, apparently acting as a result of the Red Notice. His Red Notice was based on claims that Saied had bribed a company, apparently related to the Iranian government. After the arrest, he was brought to jail where he awaited extradition. He spent five days in custody, fearing extradition to Iran, even though he had been granted asylum in the UK several years earlier.

Nicola contacted us for help get Saied removed from INTERPOL’s “wanted person” lists. Relying on INTERPOL’s new policy regarding individuals with refugee status, an application was made to INTERPOL to removal all information on Saied entered in relation to a criminal case which was an apparent pretext to prosecute Saied because of his political views. Two months after the request was sent, the good news arrived: the General Secretariat of INTERPOL certified that the defendant was no longer subjected to the Red Notice and all information regarding his person had been cleared from INTERPOL’s database.

In order to further support the court’s judgment in *Aranyosi and Caldararu*, the European Commission announced that it is working on a list of indicators for minimum standards on prison conditions, together with the EU Fundamental Rights Agency. This will help courts to adequately assess the level of respect for human rights in other Member States.

of Justice of the European Union, outlined the jurisprudential evolution of her court from *Meloni* to *Aranyosi and Caldararu*, showing how the CJEU moved from the original presumption that human rights would be respected in the country seeking a surrender to a position where countries asked to make a surrender have some control over this.
Third-country extradition

It is not, of course, only EAWs that can have an impact on fair trial rights – these crucial human rights are at stake in virtually every type of cross-border cooperation mechanism. One specific area of concern for Fair Trials and LEAP has been the abuse of INTERPOL. INTERPOL, the world’s largest international policing organisation, plays a vital role in fighting crime, connecting police forces across the globe to facilitate the arrest and extradition of people wanted for serious crimes. However, we believe that its systems - particularly its international ‘wanted person’ alerts (“Red Notices”) - are being abused by countries around the world to persecute refugees, journalists and peaceful political demonstrators, at huge personal cost to these individuals.

In focus: Turkey

The 2016, the failed coup in Turkey spurred a backlash the administration of President Erdogan against anyone who was suspected of involvement. The emergency provisions enacted in the immediate aftermath of the attempted coup, and subsequently prolonged at regular intervals, are threatening the human rights of many Turkish citizens, including the right to a fair trial. Local and international civil society has expressed its concerns over the biased trials of hundreds of people, including journalists, judges, lawyers, doctors, professors and members of the military. In October 2016, LEAP joined an international coalition of NGOs, including Fair Trials, in calling for the Turkish authorities to put an end to human rights violations under the state of emergency.

Online training

Our free online training on cross-border justice is available here. The course will help you challenge cases of injustice, whenever respect for human rights and cross-border cooperation come into tension.

In the meantime, EU member states are grappling with extradition requests from Turkey. This is very much the case in Greece, where there have been several extradition requests for former members of the Turkish military. In Germany, as our LEAP member Anna Oehmichen reported, a Higher Regional Court recently declared all extraditions to Turkey inadmissible.
Outrage in Bulgaria over secretive transfer of Turkish citizen to Ankara

In contrast, in Bulgaria, several extradition requests to Turkey have been carried out secretly against the decisions of domestic courts. The following case was shared by our LEAP member and criminal defence lawyer in Bulgaria Asya Mandzhukova.

Abdullah Büyük fled to Bulgaria in February 2016 where he applied for political asylum. A few weeks after his arrival, Turkey issued an INTERPOL alert against him on charges of terrorism and money laundering. The Bulgarian Sofia City Court and the Bulgarian Court of Appeal in Sofia both refused to extradite Mr. Büyük finding that Turkey had failed to present any evidence relating to the charges against him; that the charges were likely to be politically motivated; and that Mr. Büyük was unlikely to be given a fair trial in Turkey.

Despite the courts’ findings in the extradition proceedings, on 27th July, through a separate administrative procedure, the Bulgarian vice-President Margarita Popova denied Mr. Büyük’s asylum request. The grounds for the refusal were not disclosed and Ms. Popova has since dismissed questions from the public and the media.

Just a few days later, Mr. Büyük was secretly taken to the border and handed over to the Turkish authorities by the Bulgarian Ministry of Interior. The operation was revealed only because the transfer received extensive media coverage in Turkey.

Read more from our LEAP member Asya Mandzhukova here.
The Disappearing Trial
To many, the idea of justice conjures up distinct images. The wood-panelled courtroom. The judge in their gown. A jury sat attentively. Two sides fighting for justice. Grandstanding speeches. We’ve all seen the films.

In reality, the trial is disappearing.

Plea deals, or trial waiver systems, are growing at an incredible rate. It’s true that they can offer a faster and sometimes more efficient approach, and this can help to bring down waiting times and save victims of crime from having to relive painful experiences. As a result, its use, all over Europe and beyond has sky rocketed. These days, millions of cases are settled without a trial, and without all of the procedural protections that come with a fair trial.

While plea deals have developed and spread across the globe, the same cannot be said for the safeguards that should accompany the decision to waive the right to a fair trial. Fair Trials, with the help of LEAP, is beginning to map the overuse of trial waiver systems, and to share practice between countries from both within Europe and outside.
Exchanging information about plea-bargaining in Europe with African legal experts

At the Annual Conference of the Pan-African Lawyers Union (PALU) in Nairobi on 13th-14th October 2016, Fair Trials convened two panel sessions which focussed on improving protection of the rule of law in Africa and which drew on expertise of its EU-wide network of criminal justice experts - LEAP.

The two sessions, featuring presentations from lawyers, a prosecutor and civil society representatives from both Africa and Europe, were attended by 60 lawyers, many of whom expressed enthusiasm for engaging in future initiatives led by Fair Trials and LEAP. A full panel was devoted to trial waiver practices to start a conversation amongst the African legal community on how its benefits can be maximised while any risks it presents to fair justice are minimised. Agata Stajer, a Polish LEAP member, took part in the event in Nairobi and provided a detailed insight into the use of trial waiver systems in Poland.

Surveying European law and practice around trial waiver systems

As part of our global research on trial waiver systems, Fair Trials sought the help of the LEAP network in surveying domestic legislation and practices relating to waivers of the right to a fair trial. As a general finding, we observed that the use of such systems has increased over time, especially since 2000, and is now an established practice in many European countries, although its use varies greatly. In the higher courts of England and Wales, for example, in 2014 70% of all criminal cases, and 90% of convictions, were resolved through a trial waiver (known as “guilty plea”).

Country focus: plea-bargaining in Spain

In Spain, plea-bargaining can be compared to a similar practice that goes under the name of conformidad. In cases of conformidad, the defendant generally admits his guilt before the trial, which makes him eligible to a reduced sentence. On paper, no negotiation with the prosecution is supposed to be involved but, what seems to be a legitimate procedure, can actually hide some abusive practices.

Firstly, conformidad is actually discussed informally between the defence and the prosecution. These talks are also held before the judge, thus compromising his impartiality from the outset of the trial.

Secondly, the prosecution is reported to use conformidad as a way to, in effect, blackmail the defendant. In fact, the prosecution often asks for the maximum sentence available for the charge in question if the defendant does not admit his guilt.

In reality, there are often reasons why the maximum sentences would not be applicable, because of mitigating circumstances, but all too often the defendant lacks the knowledge and confidence to challenge the prosecution’s threats.

As a result, conformidad can lead to defendants admitting guilt for something they never committed, out of fear of serving a longer sentence in prison if they maintain their innocence.
The diminishing use of trials can threaten human rights protection and the rule of law by sidestepping procedural safeguards and risking coercion. It can also undermine the rule of law by reducing public scrutiny of police and prosecutorial practices and rights violations.

Legislators across Europe have put in place different mechanisms to mitigate these risks and secure fair treatment for defendants who plead guilty.

In a number of countries - including Croatia, Estonia, France, Ireland, Luxembourg, Macedonia and Switzerland - the law insists on the participation of a defence lawyer in order for a trial waiver to be valid. In Germany and Spain, defendants receive a copy of all evidence intended to be used at trial before they are asked to make a decision to waive their right to a full trial. In Germany, judges in cases involving trial waivers (known as Absprachen) may take a more active role in examining evidence in order to verify the confession of the defendant. In Hungary and other jurisdictions, trial waivers are not available to juvenile defendants.

Having completed the initial study, Fair Trials and LEAP are eager to look at opportunities for more in depth work, seeing what lessons can be learnt and shared across different member states, and how they can benefit the rest of Europe.

Case study:
Flavia Totoro

Flavia, an artist, was arrested at a public demonstration in Spain in 2011, together with eight more demonstrators. She was charged with assaulting a police officer. On the day of the trial, Flavia was offered a deal. As part of the deal, she and all the others accused would have to accept their guilt. In exchange, no one would go to prison. She was told by her lawyer that “she either plead guilty or all the others accused would be at risk of being sentenced to imprisonment”. Despite having enough evidence to prove her own innocence at trial, she accepted her guilt to protect her fellow demonstrators. Flavia didn’t know the other demonstrators, but she knew there was a risk that someone might be sentenced to prison if she maintained her innocence, a risk that she could not take.
Equal justice
Criminal proceedings can be a daunting prospect for anyone. However, they can be particularly overwhelming experiences for children and vulnerable adults. Discrimination also jeopardises the right to a fair trial for many people, including ethnic and religious minorities, foreign nationals, and people with disabilities.
The idea of equal justice has long been recognised as a central tenet of the right to a fair trial, not only by Fair Trials, but also by the European Commission, who initially included the idea of special protections as part of the Stockholm Roadmap of procedural defence rights, which called for EU-wide safeguards for “suspected or accused persons who cannot understand or follow the content or the meaning of the proceedings, owing, for example, to their age, mental or physical condition”.

So far, the only legislation introduced has been on the rights of children, but LEAP members are continuing to work at a national level to develop protections for all vulnerable suspects and groups who potentially suffer from discrimination in justice systems across the EU, for example the work on translation and interpretation address the particular needs of those who can’t understand the local language.

The introduction of legislation to address the special needs of children accused of crimes, while welcome, is of course just the first step, and Fair Trials, working with LEAP will monitor and, where necessary, intervene to ensure the law translates into practice.

**LEAP in Action:**
**advocating for the fair treatment of vulnerable groups in Sweden**

Vulnerable groups, such as children, the elderly and people with disabilities should be treated with special diligence in the criminal justice system, just as in any other field. Public authorities, however, sometimes fail to even recognise the special needs of these groups in criminal proceedings.

Civil Rights Defenders, a Stockholm-based human rights organisation and LEAP member, reported on the treatment of vulnerable accused people in criminal proceedings in Sweden. According to the report, the Swedish authorities are failing to identify the needs of vulnerable accused people and consequently to protect their rights.

Even though the government conducted three official investigations concerning individuals accused of a crime in 2016, none of them singled out vulnerable persons as a group deserving stronger safeguards. People with mental disabilities specifically suffer from indirect discrimination when it comes to the enjoyment of their fair trial rights throughout the proceedings, including when being informed of and when waiving their rights.
Training lawyers to better defend children in criminal proceedings

Together with LEAP members APADOR (Romania) and Hungarian Helsinki Committee (HHC, Hungary), Fair Trials is coordinating a project (part-funded by the European Commission) to better protect the defence rights of children in the criminal justice system.

The main objective of this project is to better help defence lawyers to effectively represent children in criminal proceedings. Over the course of the project, we will identify the practical barriers to the participation of child suspects and defendants that their legal representatives could address, we will examine existing practices and engage experts in training lawyers working on cases of child suspects. As a final outcome, we will develop interdisciplinary training programmes for defence lawyers, whilst enhancing network opportunities.
FACT-SHEET

Equal justice?

Here are the groups that are most likely to be discriminated according to LEAP members*

- 23.80% Ethnic and religious minorities
- 42.86% Foreigners, migrants and refugees
- 11.90% People with disabilities
- 17.86% People from disadvantaged backgrounds
- 4.76% Juveniles

* The percentages are based on the answers provided by the LEAP members to the question: "In my jurisdiction, the most disadvantaged/vulnerable group with regard to the criminal justice system is..."
Presumption of innocence
The right to be presumed innocent means that no person is treated as a criminal unless and until they have been found guilty by a court after a fair trial. It is for the state to establish guilt, not for the defendant to establish their innocence.
The EU Directive on Presumption of Innocence was adopted in 2015 and followed a process in which LEAP made significant contributions. As a result, the final Directive included a number of LEAP’s suggestions: it sought to protect the right to silence, establishing that evidence obtained in breach of this principle (i.e. when a person is forced to incriminate themselves) would be generally inadmissible, to enshrine the rule that the burden of proof rests with the state; and to give individuals tried in their absence a right to claim a review of their case. As LEAP’s initial reaction showed, this was a welcome initiative.

LEAP, though, saw room for improvement and made suggestions in a position paper and subsequent briefing to the European Parliament with specific amendments. 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 in part a response to LEAP members in the UK raising concerns over the use of the ‘dock’, a glass box where suspects sit in court, often with police, and concerns voiced for some time by lawyers from Luxembourg about the systematic use of handcuffs in courtrooms. We were delighted that the Directive was ultimately amended to create this important protection.

**LEAP in Action:**
advocating for the abolition of the dock in England and Wales

The way a defendant is presented in court has an impact on a number of aspects, including prominently on their right to be presumed innocent. In England and Wales, the main threat to this in courtrooms is the “secured dock”, a separate section of the courtroom where the defendant sits during the trial.

In Magistrates’ Courts, the dock often takes the form of a floor-to-ceiling glass cabin, down one side of the courtroom. In Crown Courts, generally located in older buildings, the dock had to be retro-fitted into the existing structure. Sometimes, this means that the old open dock, basically fencing, is enclosed by glass walls. The result looks like a big glass box has been dropped in the middle of the courtroom. In either case, the defendant is at the back looking at the backs and heads of the people attending the trial. The legal team is distant and is unable to talk to the client during the trial. Sometimes, the only way for the defendant to catch the judge’s attention to intervene in the trial, is to bang on the glass or waive towards the judge.

In 2015, JUSTICE, a LEAP member, published a report that showed how the dock impacts on the right to a fair trial, including the ability of the defendant to participate in his trial, his right to be presumed innocent, and on impartiality of both judges and juries. The report advocates the abolition of the dock, as it ultimately depicts the defendant as an offender from the very start of the trial.

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The idea to work on the abolition of the dock came in early 2015, during the LEAP Annual Conference in Amsterdam, when Jodie Blackstock (Legal Director at JUSTICE) met
with other LEAP members and discussed their national experience with the dock. Jodie found that in several jurisdictions, the dock was actually considered as a major breach of the right to a fair trial. These exchanges were key to JUSTICE understanding how other countries ensure a fairer balance between the right to be presumed innocent on the one side and security concerns in courtrooms on the other. Since then, JUSTICE has been working closely with law-makers and others to abolish the dock from courtrooms in England and Wales.

Developing guidance for lawyers on the presumption of innocence

Fair Trials has developed a Toolkit on the Presumption of Innocence Directive, which will help lawyers to understand the implications of the different aspects of the presumption of innocence and to provide practical guidance for invoking the Directive before national courts.

In order to develop practical tips for lawyers, Fair Trials sought the support of the LEAP membership to gain a better understanding of the challenges they face when defending the right of their clients to be presumed innocent. Together with LEAP members, we will then determine strategic ways in which the Directive can be used in practice to ensure that the rights of the accused are respected.

With this purpose in mind Fair Trials conducted a breakout session on the Presumption of Innocence Toolkit during the LEAP Annual Conference. The focus was to get a sense of the main threats to the right to be presumed innocent until proven guilty in each Member State.

With the practical information that we gathered, we designed a follow-up survey to identify potential ways in which the provisions of the Directive could be used to challenge these threats to the presumption of innocence.