

Legal Experts Advisory Panel

Welcome to the new look LEAP Quarterly Bulletin, March 2015, which provides an update on LEAP's work over the last three months, as well as any updates that may be of interest.

We want these updates to be useful for you, so please do let us know what you like or what you don't like.

Our updates are broken up into the following sections. It's possible to jump to a section using the links below:

• LEAP News

- [LEAP Annual Conference](#)
- [LEAP implementation Strategy Launched](#)
- [New toolkits on the Directives launched](#)
- [New Notes of Advice published](#)

• Justice in Europe

- [The Roadmap Directives](#)
- [The Procedural Rights Package](#)
- [Pre-trial detention](#)
- [European Arrest Warrant](#)
- [Other EU justice-related matters](#)

• INTERPOL

- [INTERPOL confirms initial reforms at meeting with Fair Trials](#)
- [Fair Trials and REDRESS Application to INTERPOL in the case of Djamel Kiti](#)
- [Fair Trials Law Reform Team on tour of INTERPOL events](#)
- [Parliamentary Assembly of the Council of Europe hearing](#)

LEAP News

- [LEAP Annual Conference](#)
- [LEAP implementation Strategy Launched](#)
- [New toolkits on the Directives launched](#)
- [New Notes of Advice published](#)

LEAP Annual Conference 2015

It was fantastic to see so many of you at the LEAP Annual Conference held on the 6-7 February in Amsterdam (read the [full news story](#)). The conference opened with an esteemed panel of speakers – Dennis de Jong from the European Parliament, Steven Cras from the Council of the EU and Bärbel Heinkelmann from the European Commission – giving their perspectives on the three procedural rights directives which are currently under negotiation, after which Judge Lars Bay Larsen from the Court of Justice of the EU (CJEU) spoke about the CJEU's case-law in criminal matters. The second day focused on LEAP's role in the implementation process, with addresses from Prof. Taru Spronken, Advocate General at the Supreme Court of the Netherlands, and LEAP Nuala Mole who

spoke about the CJEU reference procedure. There was also a lively debate on reform of the EAW involving Mr van der Schaft, a prosecutor from the Amsterdam extradition court. Through a range of workshops, LEAP members were able to exchange ideas and develop strategies for enhancing the protection of defence rights across the EU. The full communique from the event is available [here](#).

[Back to the top.](#)

LEAP implementation strategy launched

The LEAP Annual Conference marked the formal launch of LEAP's strategy for effective implementation of the Roadmap Directives, further to a roundtable meeting attended by members of the Advisory Board in October 2014. LEAP has recognised the effective implementation of the Roadmap Directives as a top priority, with the impact of these measures depending on the use made of them in practice. The full strategy is described in the paper 'Towards an EU Defence Rights Movement' (available [here](#)) and refers to the various ways in which LEAP members hope to contribute to national implementation activities through litigation, practitioner training, the production of template pleadings with comparative and EU law arguments, and participation in national legislative discussions. A key part of the strategy is to cooperate with national actors, in particular Bar Associations, in order to take such initiatives forward and Fair Trials staff will be contacting LEAP members to pursue this further in due course.

[Back to the top.](#)

New Toolkits on the Directives launched

To assist with a key part of the LEAP implementation strategy – practitioner training – Fair Trials has produced Toolkits on the [Interpretation & Translation Directive](#) and [Right to Information Directive](#) and [a general Toolkit on using EU law](#), including a section on using the Access to a Lawyer Directive prior to its transposition deadline. These Toolkits include all the key case-law of the ECtHR, EU law and advice on how to use the Directives in practice, from practical advice on actions to take in police questioning with interpreters to sample EU law arguments to use in court. Fair Trials will work with the LEAP Advisory Board to produce written forewords to these Toolkits, placing them in national legal context. The Toolkits are available for consultation [here](#). We would be grateful if LEAP members would circulate these within their networks, including universities, bar associations others.

[Back to the top.](#)

New Notes of Advice published

Fair Trials published 13 new notes of advice in the last 3 months, bringing the total number of jurisdictions covered to 29. Fair Trials would once again like to thank LEAP members who helped with the production of these notes including Dara Robinson (Ireland), Diana-Olivia Hatneanu (Romania), Daniel Roos (Sweden), Balazs Toth (on behalf of the Hungarian Helsinki Committee)(Hungary), Ondrej Laciak (Slovakia), Ondrej Muka (Czech Republic), Jaanus Tehver (Estonia), David McKie (Scotland) and Roby Schons (Luxembourg). All Fair Trials' notes of advice are available to be consulted or downloaded [here](#).

[Back to the top.](#)

Justice in **Europe**

- [The Roadmap Directives](#)
- [The Procedural Rights Package](#)
- [Pre-trial detention](#)
- [European Arrest Warrant](#)
- [Other EU justice-related matters](#)

The Roadmap Directives

Fair Trials / LEAP opinion in Julian Assange case

Working with LEAP Advisory Board member Christophe Marchand, Fair Trials produced an independent opinion (available [here](#)) on Article 7(1) of the Right to Information Directive, specifically as to whether this imposes any essential requirements in terms of practical modalities for making documents available. The opinion included a number of examples of practices for access to the file in EU Member States, supplied in a very short space of time by LEAP Advisory Board members in response to an enquiry relating to the specific case. Fair Trials regards this as

a good example of how LEAP can support individual litigation before national courts in order to encourage courts to consider the Directives and, where necessary, refer questions to the CJEU. The situation has now evolved: the prosecutor has, as the defence have been asking her to for some time, proposed to question Assange in London, and the defence have requested access to the file before agreeing to this. The report is available [here](#).

Challenging unsatisfactory practices in Spain

In March 2015, LEAP member Rights International Spain (RIS) together with the backing of Fair Trials and others wrote to the Commissioner for Justice, Vera Jourová, to complain of the current situation in Spain (read the letter [here](#)). A draft law which would (partially) implement the first two Directives is not to be adopted until the end of the year – well past the implementation deadlines – leading the European Commission to begin proceedings against Spain. However, additionally, the Spanish police have recently issued a circular specifically ordering officers to keep applying the existing legislation, accepted to be deficient vis a vis the Directives, until the reform takes effect; this leaves the individual to apply to ask the courts to apply the Directives, though in practice they are not doing so. Simultaneously, Red Jurídica Abogados wrote to the Spanish police to ask them to start applying the Directive, in particular by providing access to the police file at the point of questioning (read the letter [here](#)), and LEAP member Alejandro Gamez Selma, of the Asociación Libre de Abogados, met with Fair Trials and the Spanish Permanent Representation in Brussels to raise the same issue. Fair Trials is happy to keen to support LEAP members in other initiatives of this nature.

First preliminary reference hearing at the CJEU on the Roadmap Directives

On 19 March 2015, the CJEU heard its first reference for a preliminary ruling on the Roadmap Directives. The Amtsgericht Laufen (a first-instance court) in Germany, in a case concerning the system of criminal orders for minor offences issued by authorities other than courts, lodged [two questions](#) with the CJEU relating to (i) the Right to Information Directive, vis à vis a requirement for non-residents to designate a person within the jurisdiction for service of such an order, and (ii) the Interpretation and Translation Directive, vis à vis a requirement to lodge an appeal against such an order in the court's language, German. Counsel for Mr Covaci expressed concern over the disproportionate disadvantage to non-nationals caused by the current practice, noting that having a person authorised for the receipt of service was not an adequate safeguard to ensure that a defendant was effectively informed of proceedings. The judge who referred the case, who was present on the day, told Fair Trials it had been this final act before retiring as judge. For more discussion on the challenges of obtaining references, see our [communiqué](#) on strategic approaches to litigation at the CJEU. Advocate-General Bot, of France, will give his Opinion on 7 May.

Access to the case file questionnaire: report

Since June 2014, Fair Trials and members from the LEAP Advisory Board have been collecting responses to a survey with the aim of assessing the extent of defence access to the case file at various stages of criminal proceedings, following the implementation deadline of the Right to Information Directive. We received responses from 17 Member States, each of which presented the range of legislation in place for dealing with access to the case file and also how it is applied in practice within each jurisdiction. Many of the issues highlighted during our series of Advancing Defence Rights meetings in 2013 were still prevalent in the responses and it is clear from our findings that further work is needed to implement effectively the new rules on paper and in practice. The report recommends, inter alia, further study of the question by the European Commission, and calls upon some Member States to review their legislation and practices given the apparent inconsistencies with the Directive.

Having derived a huge amount of information from the Access to the Case File questionnaire (discussed above), Fair Trials has begun a further survey regarding the implementation of the Interpretation and Translation Directive and specifically the obligations regarding the quality of interpretation. You can read the report [here](#).

LEAP members publish articles on the Directives

LEAP Advisory Board member for Portugal Vania Costa Ramos has published an article entitled 'using European law in criminal practice' in the Bulletin of the Order of Advocates in Portugal concerning the Interpretation and Translation Directive and how it may be invoked by practitioners by pleading nullity or irregularity of procedural acts. Fair Trials produced an English translation of the article which is available for you to read [here](#). LEAP member Anna Ogorodova, together with Prof. Taru Spronken, has also published an article in the Erasmus Law Review concerning the Access to a Lawyer Directive, available for download [here](#). Finally, LEAP Advisory Board member for Bulgaria Asya Mandzukova has published a news piece on Fair Trials' site discussing the problems with implementation of the Interpretation and Translation Directive in Bulgaria, available [here](#).

[Back to the top.](#)

The Procedural Rights Package

Legal aid update

In February 2015, Fair Trials and LEAP published a new [position paper](#) on the [proposed directive](#) on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in EAW cases. The position paper calls for the proposed directive to be expanded in scope and content to ensure that every defendant can enjoy their right to access legal representation irrespective of their financial situation, as guaranteed by the Access to a Lawyer directive. On 13 March the Council published its very disappointing [General Approach](#), which would further reduce the scope of the measure by excluding even some cases where the suspect is deprived of liberty. A group of

Member States – Belgium, Bulgaria, France, Italy, Portugal, Spain and Lithuania – have expressed reservations about this, apparently concerned at the weakening of the measure. In the European Parliament, further to the Rapporteur Dennis de Jong's draft report, MEPs have submitted amendments. We have provided supplementary thoughts on the amendments and will be working with other NGO members of LEAP to ensure that the position, due to be voted on in late April 2015, is as robust as possible. We hope that a satisfactory text can be agreed between the Institutions during the Luxembourgish presidency (July-December 2015). We will keep you updated!

Presumption of innocence update

In February 2015, Nathalie Griesbeck (France, ALDE), the European Parliament's rapporteur on proposed directive on the presumption of innocence and right to be present at trial, presented her draft report, taking a radical line by proposing to, inter alia, apply the measure to legal persons; exclude any reversal of the burden of proof; exclude altogether any use of evidence obtained in breach of the rights to silence and not to incriminate oneself; and limit significantly the circumstances in which a judgment can be handed down in a person's absence. Fair Trials, which already had submitted a joint [position paper](#) on the proposal with LEAP, then circulated a briefing with suggestions for members of the European Parliament, some of which have been taken up, on matters including (i) the undermining of the presumption of innocence through the media and the presentation of the accused in handcuffs and prison clothes, and (ii) the exclusion of incriminatory statements made when a witness becomes a suspect and is not advised of their rights. A vote is expected on 30/31 March, with trilogues beginning in the following month.

French presumption of innocence decisions

The French Court of Cassation has granted a cassational appeal against a conviction founded upon statements made in conversation by two suspects left together between questioning sessions in a holding session equipped with covert recording devices, finding that this amounted to a disloyal manoeuvre which violated the right to silence and not to incriminate oneself protected by Article 6(1) ECHR (decision [here](#)). This makes for interesting comparison with a decision of the Court of Appeal in England and Wales of 2012 which found that the incriminating conversations between two suspects held in a police car prior to their being conveyed to the police station were admissible as evidence, inter alia because there had been no trick of subterfuge (decision [here](#)).

Safeguards for Children update

Having already published a joint position with LEAP input on the proposed directive on special safeguards for children suspected or accused in criminal proceedings, Fair Trials has been participating in the further progress of this file, issuing a briefing encouraging MEPs to recognise the importance of individual assessment of children's needs so as to make necessary adaptations of criminal procedure and to work towards an unqualified right of access to a lawyer and audio-visual recording of questioning in all cases. The European Parliament's position was voted upon and adopted in February 2015 and initial discussions between the European Parliament and Commission took place on 10 and 17 March 2015. Fair Trials will continue to ensure that LEAP perspectives are taken into account as these negotiations progress.

Call for cases: legal aid, presumption of innocence, safeguards for children

We would like to thank LEAP members for their input into the position papers we have published. However, negotiations are at a crucial phase and we need practical case examples from the network to help us make the case to the EU institutions and fight for strong protections in the final measures. So, if you have cases showing problems with legal aid, the presumption of innocence or the protection of children in criminal proceedings, please [let us know!](#)

[Back to the top.](#)

[Pre-trial detention](#)

Update on Fair Trials & partners pre-trial detention project

Fair Trials continues its work with partners in 10 EU Member States (including several LEAP members) on an exciting [research project](#) on judicial decision-making in pre-trial detention cases with partners in 10 EU Member States. For more information on the project, see [here](#). The data collection is now almost complete, and reports from each country will be published in the summer of 2015, followed by an expert meeting in London in September 2015. A Regional Report will then be published and launched at the European Parliament in March 2016. While the national reports will focus on the analysis of domestic data and provide recommendations for policy-makers, the Regional Report will provide an overview of the findings, including examples of best and poor practice, to support our ongoing call for EU legislation establishing minimum standards on the use of pre-trial detention. We are planning to complement the research with compelling case studies recorded as videos that demonstrate EU-wide problems relating to pre-trial detention decision-making. If you know of such cases, [please let us know](#).

Academy of European Law conference on Supervising Matters related to Detention

Fair Trials' Law Reform Officer, Jemima Hartshorn, will speak along with other experts at the seminar on *Supervising Matters related to Detention* (Strasbourg, 7-8 May) organised by the [Academy of European Law \(ERA\)](#), continuing the series in which a number of LEAP members have participated in recent years. Jemima will be speaking on "The need for alternatives: the impact of physical prison conditions in the context of pre-trial detention" and will highlight the strong impact of pre-trial detention on preparing for trial as well as on personal lives. Jemima will join Mauro Palma of the Council of Europe, Willem van der Brugge of the Confederation of European Probation and other prisons and probation experts. Further information on this conference and the registration form can be found [here](#).

European Commission launches consultation on pre-trial detention

The European Commission has tasked a London-based consultancy firm (Centre for Strategic and Evaluation Services ('CSES')) with carrying out an impact assessment regarding potential EU action in the area of pre-trial detention in criminal proceedings. Such impact assessments are required before bringing forward legislative proposals. As we highlighted in a previous LEAP bulletin, the current Commissioner for justice, Ms Vera Jourová, spent time in pre-trial detention and we hope that, after many years of campaigning, a proposal could finally be on the horizon. It may be that CSES could be interested in speaking with LEAP members, so we may be in touch with you further about this.

Call for compelling human stories on pre-trial detention!

Given that EU action on pre-trial detention may be on the horizon, we have all the more need for **compelling human stories showing the impact of unjustified and excessive pre-trial detention**, of which we can make video and written profiles to make the case to policy audiences. If you know of any compelling cases and your client might be interested in telling us their story to promote our campaign for EU minimum standards on pre-trial detention, please [let us know](#).

[Back to the top.](#)

European Arrest Warrant

Jago Russell speaks at the Extradition Lawyers Association event on CJEU jurisdiction

On 26 February 2015 Fair Trials' Chief Executive Jago Russell spoke at a seminar of the Extradition Lawyers Association ('ELA') on the 'Changes to the Jurisdiction of the CJEU from 1 December 2014.' Jago offered his view on the important connection between the EAW and Roadmap Directives with the work of the CJEU, and chaired a discussion of expert practitioners on the opportunities and challenges posed by this expansion of the CJEU's role. For more discussion on the challenges of obtaining references, see our [communiqué](#) on strategic approaches to litigation at the CJEU, further to the LEAP meeting held in June 2014.

French decision on recourse to arrest warrants

The French Conseil constitutionnel has found that the provision of French law enabling an investigating judge to resort directly to issuing an arrest warrant for a person resident outside the jurisdiction, whereas in the case of a person resident within the Republic the judge is required to seek to hear the person first, is not incompatible with the principles of equality before the law and diligence in the exercise of official action (decision [here](#)). To the extent that the judgment relates to EU cases, it will be interesting to see whether the implementation of the European Investigation Order – which enables Member States to order other Member States to question a person, and represents an alternative to issuing an EAW – will affect the position.

Irish decision on interpretation of surrender

In a decision of 26 February 2015, the Irish Supreme Court considered the question whether the provisions of Irish law providing that a person 'shall not be surrendered' where there is a risk of a violation of human rights also applied for the purposes of a decision, following surrender of the person, to consent or not to a further prosecution by the issuing Member State other than the one for which the person was surrendered. The Irish Supreme Court took the view that the lower court had erred in considering the concept of 'surrender' as excluding such a decision, finding that although some matters were best raised in the issuing Member State's courts a person could not be excluded from raising human rights considerations before the executing Member State's courts. Read the decision [here](#).

[Back to the top.](#)

Other EU justice-related matters

Defence rights in the Western Balkans

Following the roundtable meeting which Fair Trials hosted in Podgorica, Montenegro, in October 2014, we published a communiqué of the meeting in January 2015 which is available [here](#). The meeting provided the opportunity for representatives from civil society organisations and bar associations from Albania, Kosovo, Macedonia, Montenegro and Serbia to discuss the state of fair trial rights protection within the region and possible avenues for future collaboration, with a particular focus on the EU accession process as a driver for criminal justice reform. The communiqué summarises the key themes emerging from the discussions and lays the groundwork for future collaborative work to improve defence rights protection in the region. This collaboration has continued during the past few months, with Fair Trials' Head of Law Reform speaking at events hosted by the Belgrade Center for Human Rights in Belgrade (January 2015) and the Kosovo Rehabilitation Centre for Victims of Torture in Pristina (February 2015) on the excessive and unjustified use of pre-trial detention and our campaign for EU-level action.

[Back to the top.](#)

INTERPOL

- [INTERPOL confirms initial reforms at meeting with Fair Trials](#)
- [Fair Trials and REDRESS Application to INTERPOL in the case of Djamel Ktiti](#)
- [Fair Trials Law Reform Team on tour of INTERPOL events](#)
- [Parliamentary Assembly of the Council of Europe hearing](#)

INTERPOL confirms initial reforms at meeting with Fair Trials

On 15 September 2015, Fair Trials' Chief Executive Jago Russell and Law Reform Officer Alex Tinsley met with the recently appointed new Secretary-General of INTERPOL, Mr Jürgen Stock, and other members of INTERPOL's staff (INTERPOL [press release](#) / Fair Trials [news story](#)). The meeting, building on an earlier meeting in September 2013, continued the constructive dialogue between the two organisations in recent years. INTERPOL also communicated a change to its practices, whereby alerts circulated by national police are not immediately visible to other authorities (as they used to be) and become visible only after INTERPOL has conducted its review. Fair Trials looks forward to continuing the discussion with INTERPOL and other parties, with contact recently made with the UN Special Rapporteur for Human Rights Defenders and an event planned in the UN Office for Drugs and Crime Congress in Qatar. INTERPOL has itself launched a Working Group which will be reviewing INTERPOL's rules, including the operation of the Commission for the Control of Files ('CCF').

[Back to the top.](#)

Fair Trials and REDRESS Application to INTERPOL in the case of Djamel Ktiti

At the end of January Fair Trials, together with REDRESS, submitted an application to the CCF to challenge a red notice concerning Mr Djamel Ktiti circulated by the National Central Bureau (NCB) of Algeria. He has twice been arrested – in Morocco and Spain – and held in provisional detention for extended periods of time on the basis of this information. On both occasions, the States concerned have not extradited Mr Ktiti, due to a decision of the UN Committee Against Torture establishing that the information underlying the case against him (and also the basis for the red notice) may be based on evidence obtained by torture and that Mr Ktiti faced an unacceptably high risk of torture if he was returned to Algeria. Read the application [here](#). The joint action with REDRESS evidences the ever-broadening discussion and interaction of different organisations in different fields in relation to the INTERPOL question.

[Back to the top.](#)

Fair Trials Law Reform Team on tour of INTERPOL events

In December 2014, Fair Trials' Law Reform Officer Alex Tinsley spoke at a conference organised by Croatian human rights organisation the Centre for Peace Studies on conflicts between asylum and extradition and mutual recognition of asylum decisions between EU Member States, focusing on the role of INTERPOL red notices in leading to the arrest of EU-recognised refugees in other Member States. Alex spoke together with Prof Steve Peers, conference organiser Mitre Georgiev and members of the authorities in Croatia. View his presentation [here](#). Alex also spoke at a conference on INTERPOL and challenges in the defence of Russian clients organised by Doughty Street Chambers, discussing the case of Petr Silaev and the procedure for challenging red notices before the CCF. View that presentation [here](#). On the same evening, Fair Trials' Head of Law Reform, Libby McVeigh, spoke at an event hosted by Dyers Chambers on the role of INTERPOL in the 21st century, discussing the problems of INTERPOL abuse alongside Richard Elsen of Byfield Consultancy and Peter Caldwell of Dyers Chambers. View Libby's presentation [here](#).

[Back to the top.](#)

Parliamentary Assembly of the Council of Europe hearing, Yerevan, Armenia

In May 2015, Fair Trials' Law Reform Officer Alex Tinsley will speak alongside a representative of INTERPOL at a hearing of the Legal Affairs and Human Rights Committee of the Parliamentary Assembly of the Council of Europe ('PACE'), which in October 2014 undertook to produce a report on the question of abuses of the INTERPOL system. The rapporteur is Mr Bernd Fabritius (EPP, Germany). PACE's report is a key development, demonstrating regional bodies' increasing awareness of how INTERPOL's activities impact upon their own remits relating to the protection of

human rights and political freedoms, and its recommendations will be for INTERPOL, which is currently reviewing its rules further to a resolution adopted at its General Assembly in November 2014.

[Back to the top.](#)



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