

Legal Experts Advisory Panel

Coordinated by:

FAIR TRIALS EUROPE

Legal Experts Advisory Panel

Strategies for Effective Implementation

Of the Roadmap Directives:

TOWARDS AN EU DEFENCE RIGHTS MOVEMENT



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The logo for the Oak Foundation, featuring a stylized oak leaf icon to the left of the text "OAK FOUNDATION".

The logo for Open Society Foundations, featuring a stylized white swirl icon to the left of the text "OPEN SOCIETY FOUNDATIONS".

The logo for Clifford Chance, featuring the text "CLIFFORD CHANCE" in a bold, sans-serif font.

INTRODUCTION

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

LEAP and its implementation priority

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

The plan of action

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

A. KEY ISSUES

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

(1) Quality of interpretation in criminal proceedings

10. This has arguably been the most consistent concern among LEAP members in recent years. At the October 2014 meeting it was reported that, although steps had been taken to implement the Interpretation & Translation Directive in most places, problems formerly reported remained.

11. There continued to be some concerns about the independence of some interpreters vis-à-vis police. Recourse to telephone interpreting also presented quality issues. The possibility of interpretation between lawyer and client was not assured everywhere, particularly when the suspect was detained in a remand centre or prison. The absence of formal qualification requirements also meant quality could be very variable.

12. There remained, further, and across the board, a challenge in verifying quality ex post, in the absence of audio recording. It remained commonplace for there to be conversations in courts about what was actually said in the police interrogation. There was, in addition, an open question as to what remedial obligations should be incumbent upon the courts, in view of the total silence of the Interpretation and Translation Directive on this point.

(2) Letters of rights

13. The main innovation of the Right to Information Directive, the requirement to provide a simple and accessible letter of rights, had been of particular interest in prior discussions due to the prevalent trend in the EU of providing arrested persons with notifications of bureaucratic style, with rights phrased essentially as extracts of legislative provisions, and in a mechanical way which meant that suspects essentially did not appreciate the value of, or even read, the letter.

14. The views offered at the October 2014 meeting suggested that there had been some improvements (and Fair Trials has collated some useful examples). However, elsewhere letters of rights had not changed. Some texts remained technical and often based on legal extracts. Negative phrasings suggesting the invocation of the right to silence was non-cooperative remained liable to dissuade its exercise. In one jurisdiction, it was not possible for the suspect to keep the letter of rights with them.

(3) Access to the case file

15. Again, this has been one of the major themes raised by LEAP in recent years. Complaints have broadly been focused upon three different aspects: (i) the lack of access to the police file at the point of interrogation; (ii) the restriction of access to the file during pre-trial proceedings, leading to difficulties participating effectively at that stage and, in particular in challenging detention; and (iii) the manner in which access is provided and its impact upon trial preparation.

16. At the October 2014 meeting, LEAP members confirmed that access to the case file began after initial questioning, with no Member State apparently having taken the view of Article 7(1) of the

Directive that it required access at that stage. As for the pre-trial phase more broadly, there were variable examples. There were some examples of good practice, but some legislations continued to provide for limited access until the completion of the investigation, and powers to restrict access to the case file were still being applied extensively. Some apparently positive legislative amendments in places where problems had been reported had, to date, not resulted in changes in practice.

(4) Remedies for procedural rights violations

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

B. LEAP'S ROLE IN THE IMPLEMENTATION PROCESS

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

(1) Litigating cases before the national courts and CJEU

20. LEAP comprises roughly 70% practising criminal defence lawyers whose key area of action will be the national courts. LEAP lawyers have been exchanging ideas and experiences at roundtable meetings and LEAP Annual Conferences and will continue to encourage national courts to rely upon the Roadmap Directives and, if needed, refer questions to the CJEU for preliminary rulings. LEAP members are keen to make arguments before the courts themselves, but also to encourage other lawyers to do so, making persistent issues difficult to ignore for the courts, and also to obtain high-level rulings from the senior courts which will have an impact in practice.

(a) Template pleadings for routine use

21. A particular example of note was provided by the 2013 cohort of the *Conférence* of the Paris Bar, which made an issue of litigation surrounding the issue of access to the file at the point of interrogation on the basis of Article 7(1) of the Right to Information Directive. The group produced template pleadings (one before, and one after the implementation deadline), which was made publicly available, seeking the annulment of police custody proceedings on the basis of the failure to provide access to the police file.

22. The initiative caught the attention of judges, with some progressive courts issuing favourable decisions (though these were overturned on appeal); it also created considerable interest in the implementation process and placed pressure on the legislator; and the initiative could foreseeably result in a ruling from the CJEU. Fair Trials is keen to work with LEAP members to produce such pleadings (which can help save busy legal aid lawyers a lot of time) with the possible value-add of comparative information sourced from different countries. There was a general view at the October 2014 meeting that this would be a useful way to proceed.

(b) Seeking game-changing rulings from senior courts

23. LEAP members have also reported two interesting initiatives specifically seeking to obtain game-changing rulings from apex courts which will have an impact upon the interpretation and application of the law in practice. In particular, a LEAP member from Spain worked with colleagues to select a particular case and take a complaint to the Constitutional Court on the basis of the Right to Information Directive, still on the issue of access to the case file at the point of the initial deprivation of liberty. The pleading, available publicly, forms part of a coordinated effort using the Roadmap Directives in various ways, including training activities and the development of best practice guides etc. organised by the *Asociacion Libre de Abogados*.

24. In the Netherlands, an appeal before the Supreme Court raised the question whether the rule applicable for the time-being, excluding lawyers from advising during police questioning, was compatible with international standards. Arguments were made about the Access to a Lawyer Directive, and although these were not accepted on the basis that the latter's implementation deadline had not passed, the Supreme Court made a clear call for the legislator to bring national law into line with the Directive, showing how the courts can be used to influence national law.

(c) Making the most of the CJEU

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

26. The topic was discussed further at the October 2014 meeting where it was agreed that LEAP members would think about specific questions which needed answering from the perspective of their jurisdiction as a first step to developing litigation strategies. Whether Article 7(1) requires access to the police file prior to interrogation seems to be one question in need of answer.

27. Fair Trials and LEAP are mindful that the CJEU has signalled strong support for the principle of mutual recognition, such that it may not be a source of particularly progressive judgments in the area of judicial cooperation; however, in the case of the Roadmap Directives, the outlook is more cautiously optimistic and Fair Trials and LEAP remain keen to ensure that lawyers are sensitised to this process. LEAP members should also recognise that, having been examining this issue for some time, they are well placed to offer support to members of their national bars with less expertise, and should ensure that colleagues are aware that they are able to offer such support.

(d) Practitioner training

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

Next steps on litigation aspects

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

(2) Contributing to national legislative discussions

29. In the last year, LEAP has contributed to national legislative discussions relating to the implementation of the Roadmap Directives. In Lithuania, a submission made by Fair Trials and Lithuanian LEAP members, in consultation with LEAP member the Human Rights Monitoring Institute, was taken into account and some of the changes recommended were included in the final legislative text. In Spain, Fair Trials wrote a joint letter with Rights International Spain and several other NGOs commenting on its draft measure implementing the first two Roadmap Directives (no final measure is adopted yet). Fair Trials also worked with LEAP member for England & Wales JUSTICE to contribute to a government consultation on the implementation of the Right to Information Directive, with some suggestions take in the final measures.

30. Whilst, in many countries, the process of implementation of the first two Roadmap Directives is 'complete' (in the sense that measures have been adopted), there remain opportunities for this sort of work as practice reveals gaps and CJEU judgments clarify the requirements of the measures. In addition, implementation of the Access to a Lawyer Directive is still underway.

31. Fair Trials notes the example of a group of Polish lawyers, who, following a joint residential training course by Fair Trials and LEAP member the Helsinki Foundation for Human Rights, met to discuss practical ways of ensuring access to lawyers at the police station by providing lists of on-

call lawyers. The *Asociacion Libre de Abogados* has also developed a decalogue of best principles offering guidance designed to ensure practice complies with the Roadmap Directives.

32. Fair Trials, in discussion with the LEAP Advisory Board, has recognised that it is not necessarily straightforward for practising lawyers to monitor closely the passage of legislation through the system, or to take on the additional work of organising initiatives. To address this, Fair Trials and LEAP intend to explore greater cooperation with national and local Bar Associations, who will usually be monitoring these aspects more closely. Fair Trials will ensure it adds value as a pan-EU organisation, without encroaching upon the prerogatives of the national bars and umbrella organisations such as the Council of Bars and Law Societies of Europe ('CCBE').

Next steps on national legislative processes / developing best practice

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

(3) Facilitating the work of the European Commission

33. The Commission has an important oversight role in the implementation process. Member States have to report to it, and it can take proceedings against them for failure to implement EU legislation. This begins with a letter of formal notice, which if not satisfactorily addressed can ultimately lead to a case before the CJEU. Thereafter, if the Member State does not correct the issue, the Commission can take matter back to the CJEU which could impose a financial penalty. Whilst Commission action is at its own initiative, it can be alerted to problems by means of individual complaints from citizens or interest groups (there is no standing requirement).
34. This opens up an important channel enabling LEAP members and other lawyers within their jurisdictions to take action in respect of non-compliant legislation and practice even if opportunities do not immediately arise to challenge these in court. LEAP can become a contact point to channel this information towards the European Commission through Fair Trials. The more this can be done, the greater a sense the Commission – we are concerned with one team in Brussels with limited resources – will have of what is happening on the ground and be able to act on an informed basis. It was emphasised at the October 2014 meeting that, for practising lawyers in particular, they could not take on duties of coordination, but potentially forwarding occasional links and emails from colleagues to Fair Trials was considered reasonably possible. If constructive suggestions in national legislative processes (see (2) above) are not taken into account, it makes sense to then make the same points the subject of Commission complaints.

Next steps on European Commission complaints

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

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

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

CONCLUSION

The message to LEAP

37. LEAP members who have been part of the network for some time will know that, in the first years of its existence, LEAP's primary role was to supply information about the state of play in their own country, to inform discussions in Brussels. That remains a key part of LEAP's function and is, in fact, all the more important in relation to the implementation of the Roadmap Directives now that the European Commission, if given the information, is able to take action.
38. However, with the implementation of the Roadmap Directives, LEAP acquires a greater role in ensuring information flow the other way. LEAP can use training, litigation initiatives and communications to inform, equip and encourage lawyers in the 28 Member States to seize the opportunity and ensure the Roadmap Directives are applied in practice. Fair Trials is delighted that LEAP members are taking on this challenge and looks forward to supporting LEAP in driving implementation at the national level.

The message to third parties

39. In coming months, Fair Trials will be reaching out to other organisations – particularly Bar Associations – to discuss these activities and explore possibilities for further cooperation. Fair Trials approaches this as a pan-EU organisation with a real capacity to add value in national training activities and legislative processes, and looks forward to exploring these possibilities.
40. LEAP members will be encouraged to present this finding to any entities and organisations with whom fruitful cooperation might be established, and Fair Trials likewise encourages any interested parties to make contact with the Legal and Policy team at Fair Trials if they have proposals or would like to know more. We look forward to working with you.

**Fair Trials Europe,
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