

# FAIR TRIALS INTERNATIONAL



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Experts Advisory Panel Meeting (Cambridge, 28 March 2011)

The European Arrest Warrant



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## **Introduction**

1. Fair Trials International (“FTI”) formed the Legal Experts Advisory Panel (“LEAP”) in 2008 to provide an opportunity for experts in criminal justice, fundamental rights and access to justice in the EU to meet and discuss issues of mutual concern and to provide advice, information and recommendations to inform FTI’s European policy position. The seventh meeting of LEAP took place at Fitzwilliam College, University of Cambridge, UK on 28 March 2011. 16 LEAP Members and 6 invited guests, representing 12 European jurisdictions, attended. The meeting was chaired by HH Dennis Levy QC.
2. LEAP meetings allow FTI to draw on a wide range of practitioner expertise and provide invaluable input into FTI’s policy and campaigning work. This has had a significant impact and aided FTI in its calls for greater protection for defence rights across Europe. The EU’s fast-track extradition system, the European Arrest Warrant (“EAW”), has been discussed at two previous LEAP meetings. These have allowed LEAP members to express their serious concerns about the impact the EAW has on the fundamental rights of requested persons.
3. These concerns were raised in a letter sent by a group of LEAP members, together with FTI, to Commissioner Viviane Reding in October 2010. Mrs Reding responded, accepting there was “significant room for improvement in the operation of the European Arrest Warrant”. In March 2011 the Council of Europe’s Commissioner for Human Rights, Thomas Hammarberg, recognised that FTI had drawn attention to the need for reform of a system which “has been used in cases for which it was not intended, sometimes with harsh consequences on the lives of the persons concerned”.
4. This final LEAP meeting on the EAW focused on the key flaws in the EAW system and suggestions for reform ahead of the publication of a detailed FTI report (later launched at an event at the European Parliament on 3 May 2011).

## **The European Arrest Warrant**

5. The Panel agreed that the following flaws had been identified with the EAW system:
  - i) inadequate protections for fundamental rights;
  - ii) disproportionate use of the EAW for minor offences;
  - iii) the absence of legal representation in the issuing as well as the executing State;
  - iv) the failure by issuing States to remove EAWs when other Member States have refused to execute them;
  - v) the lack of adequate appeal processes in some Member States.

## **Fundamental rights**

6. The EAW is based on mutual trust in the justice systems of all EU States. However, this trust is sometimes misplaced as not all European countries offer sufficient protection for the fundamental rights of suspects, defendants and prisoners. In this context blind faith in other States’ ability to adequately respect fundamental rights is inappropriate and is causing widespread injustice.
7. The EU’s continuing work on the Roadmap of procedural safeguards represents one part of the solution to this problem. External safeguards aimed at raising the level of protection for defence rights across the EU is a crucial counterpart to

enhanced cooperation. However, given the severe human impact of extradition and the great risk of the process violating the fundamental rights of requested persons, internal safeguards for human rights are also needed within the EAW legislation itself.

8. In some States the human rights implications of extradition are not being considered at all prior to surrender being ordered. This is unacceptable. The ECtHR in *MSS v Belgium and Greece* has recently held that Member States do not fulfil their own obligations under the ECHR by merely assuming, in the face of contrary evidence, that another Member State will protect the fundamental rights of individuals sent to their jurisdiction, simply by virtue of that State being a signatory to the ECHR. Although *MSS* concerned the expulsion of an asylum seeker under the Dublin II Convention, it is clearly analogous to extradition proceedings and should be applied at extradition hearings throughout the EU.
9. Some Member States already consider the fundamental rights aspects of extradition and their implementing legislation explicitly allows extradition to be barred where it would violate the Convention rights of the requested person. However, in too many States the human rights bar is being interpreted in a way which sets it so high it is virtually impossible to meet in practice. This is the case even where detailed and recent evidence has been adduced as to the risk of infringement if extradition takes place.
10. Greater guidance must be provided to judges, either through training or the insertion of a human rights bar in the Framework Decision on the EAW, to ensure that in extradition decisions mutual recognition does not always “trump” fundamental rights concerns. Without respect for fundamental rights at the centre of the EAW, there will be a continued erosion of trust in the instrument and the principle of mutual recognition more generally. In addition, insufficient weight is being given to the EU law principle of “effective judicial protection”.

### **Proportionality**

11. It is unacceptable that EAWs are being issued for minor offences. Given the huge financial and human impact of extradition, the EAW should be reserved for serious crimes.
12. In order to combat the disproportionate use of extradition, Member States should be legally required to carry out a proportionality assessment before issuing an EAW. Although some Member States currently undertake such a proportionality assessment, others, which apply the principle of legality in decisions whether to prosecute, do not. Guidance in the Handbook on the EAW is insufficient to deal with this problem. Instead the Framework Decision on the EAW should be amended to include a proportionality requirement for issuing States.
13. EAWs for the purposes of prosecution should not be issued if there is no real likelihood of a custodial sentence being imposed at the end of the trial process. The likely sentence which will be imposed should form a greater role in assessing whether an EAW should be issued.
14. As another means to ensure that the EAW system is used in a proportionate manner, more consideration should be given to the idea of attaching financial ramifications to issuing an EAW. If there were financial implications to issuing a warrant this may ensure that sufficient care is taken over the decision about whether the EAW is necessary in the circumstances and if there are alternatives

to extradition. At present, EAWs are too easy to use: in Poland they are easier to issue than domestic warrants. One member had seen an EAW used to check whether a supervision order had been complied with.

15. However, a proportionality test in the issuing State alone is not enough. Certain key factors which affect the proportionality of extradition, such as the impact extradition will have on the family life of the requested person, only come to light in the executing State. For this reason it is essential that the executing State should also be required to determine whether extradition would be proportionate. This double proportionality check would offer an important protection for requested persons.

### **Dual representation**

16. The requested person should be provided with legal assistance in both the issuing and executing State. In most EAW cases requested persons are only provided with legal assistance in the executing State, meaning they are often represented by lawyers who are unfamiliar with the legal system and human rights situation in the issuing State. This places the requested person at a disadvantage.
17. Many LEAP members have seen the benefits of dual representation in practice. Legal assistance in the issuing State enables negotiation with judges and prosecutors and can lead to a withdrawal of the warrant or the requested person consenting to surrender.
18. Although dual representation can have cost implications, it is important to note that it can often help prevent wasted resources. Timely contact between defence practitioners in the two Member States can prevent the need for evidence requests being made. Furthermore, negotiated withdrawal of a warrant saves the cost of extradition hearings and surrender.
19. The EU should ensure that dual representation becomes the norm in EAW cases, perhaps by including the necessary binding provisions in the forthcoming Directive on the right to legal assistance under the Roadmap of procedural safeguards. Funding to ensure training and the establishment of an effective network of defence lawyers would also assist in establishing an efficient dual representation system.

### **Removal of warrants**

20. Too often EAWs are refused on substantive grounds by the executing State, yet the issuing State refuses to withdraw them. This runs contrary to the principle of mutual recognition as the decision of the executing State should be respected and applied by all other Member States, including the one issuing the EAW.
21. In practice the failure to remove warrants can have a devastating effect on the lives of individuals. Crossing a national border opens them up to the possibility of being re-arrested and detained on the same warrant. This effectively traps the person in the executing State and curtails their right to free movement.
22. The decision to refuse a warrant should be respected by the issuing State, which should withdraw the EAW. Where the EAW has been refused on a technical ground or on the basis of facts which later change, an EAW can be reissued. A requirement that issuing States remove warrants once they are refused could be

added to the Framework Decision. At the very least, guidance on this should be included in a non-binding form, for example in the Handbook on the EAW.

### **Appeals**

23. Too many Member States do not offer a sufficient appeal process for those undergoing extradition procedures. In Spain and the Netherlands, for example, there is no right of appeal in extradition cases.
24. In Member States such as Ireland and France it is possible to appeal but only on limited grounds. In practice this restricts the ability of requested persons to challenge the initial decision that they should be extradited.

### **Conclusion**

25. The EU should take action to reform the EAW to address the problems highlighted above. Defence practitioners see time and again the impact these flaws in the EAW system have on individual lives. The purpose of the EAW is to deliver justice, yet it cannot do this if the fundamental rights of requested persons are sidelined. Reform is necessary to avoid further cases of injustice and a resulting erosion of trust in the EAW and the criminal justice legislative mandate of the EU.