

## LEAP Quarterly Report November 2012

Welcome to the fourth LEAP quarterly report, FTI's communication to keep everyone up to date with progress in our *Justice in Europe* campaign and to engage the LEAP network in EU justice issues.

A big thank you to everyone for the overwhelmingly positive feedback received about these reports – please continue to [let us know](#) what you think. We hope that this will continue to prove a useful and informative bulletin for you all.

### Request for cases

Thank you to those of you who have been in contact about recent cases or developments in EU law. We remain keen to hear about ongoing cases in your jurisdictions. These cases help us to understand key issues in criminal practice in the EU, and to address them through policy work and legal interventions. We are, in particular, interested in hearing about cases in the following areas:

- **The European Arrest Warrant (EAW):** Cases in which execution of an EAW has been refused, but the EAW is not withdrawn, leaving the individual facing a risk of arrest in other Member States, and cases in which the EAW is issued for a very minor offence and where extradition will have a disproportionate impact on the individual.
- **Interpol:** FTI would like to speak to anyone with a client who has been subject to an Interpol red notice.
- **Access to a lawyer:** Cases where access to a lawyer has been denied or restricted, particularly during police questioning and in pre-trial detention.
- **Vulnerable suspects:** Cases in which the suspect or accused is particularly vulnerable, for example due to mental health or age.
- **Legal aid:** Cases where problems with access to publicly funded legal assistance have meant that suspects cannot effectively exercise their rights.

### FTI news

**Annual LEAP conference:** It was great to see so many of you at the annual LEAP conference which was held on 10 and 11 October as a series of events at the European Parliament in Brussels. On the first day, EuroMoS presented the results of the Advancing Defence Rights questionnaire which many of you completed. This was followed by a **discussion about the draft Directive on access to a lawyer** and we were delighted to receive an update on the trilogue negotiations from the European Parliament's rapporteur, Oana Antonescu MEP and from shadow rapporteurs Baroness Sarah Ludford MEP and Timothy Kirkhope MEP. Many thanks to LEAP member Zaza Namoradze from the Open Society Justice Initiative for presenting joint NGO work on this measure and to all of you for your contributions to the discussion.

**EU defence rights report:** On 11 October we launched a [major new report](#) on the state of defence rights in the EU at the Brussels Parliament. The report takes stock of the progress so far under the Procedural Rights Roadmap and highlights the priorities to raise justice standards to an acceptable level. If any of you would like a hard copy of the report please [let us know](#). We were delighted that so many of you were there for our launch event, where Magnus Graner (State Secretary, Swedish Ministry of Justice) gave the keynote speech. We were pleased to hear the Commission confirm its



continued commitment to the Roadmap in its response. Baroness Sarah Ludford MEP then chaired a debate, with MEPs Birgit Sippel, Jan Albrecht and Axel Voss participating, in which significant cross-party support for the Roadmap was shown.

**New web-based map of EU countries' fair trials standards:** In conjunction with our report, we have launched a new [interactive map](#) which provides an overview of the state of fair trial rights in every Member State, including judgments of the European Court of Human Rights; criticisms by international organisations, local press and NGOs; and details of FTI's own cases. We hope that this map will prove a useful resource for you and that you will help us keep it up to date. If there is anything that you think should be added to the map for your country then please [let us know](#). Our thanks to all of you and to EuroMoS and Clifford Chance for assisting us with the research on these projects.

#### **Other publications:**

- We have published fact sheets on the [Directive on the right to interpretation and translation](#) and on the [Directive on the right to information](#) setting out useful information about the content of these two new laws and how they can be effectively used and enforced.
- We have written about European Arrest Warrant reform in the [Huffington Post](#) and in an [article](#) for Public Service Europe. Our work on extradition reform has also been cited in the [Financial Times](#) and the [Economist](#).

#### **Membership news**

**New Members:** We are delighted that seven new members have joined LEAP since our last Quarterly Report, many of whom took part in the Advancing Defence Rights survey and attended the recent events in Brussels. Welcome to Myrddin Bouwan (**Netherlands**), James Brannan (**United Kingdom**), Hans Kjellund (**Denmark**), Dr Ondrej Laciak (**Slovakia**), Karla Nahtigal (**Slovenia**), Elias Stephanou (**Cyprus**) and Dominika Stępińska-Duch (**Poland**). LEAP now has more than 80 members from 24 EU Member States. The updated membership list can be viewed [here](#).

**Local Experts Groups:** On 18 October 2012, we held our first Local Experts' Group meeting in Madrid. The meeting drew together leading criminal law practitioners and academics to discuss pre-trial detention in Spain. In a detailed and engaging discussion, participants focused on the practical reasons why detention was, in practice, the general rule, pointing out things like the excessively close relationship between prosecutor and judge, and the excessive use of a judicial power to block any access to the case-file for months or years. The group also discussed strategies to tackle these problems through lobbying and litigation with FTI's assistance. Many thanks to LEAP member Christian Mesia for all his help in organising this. We are looking forward to the next Local Experts' Group meeting in Warsaw in December.

**LEAP Sub-groups:** FTI is continuing to build up a number of LEAP specialist sub-groups which will allow LEAP members and FTI's policy and casework teams to share ideas and exchange information on topical issues of mutual interest outside of formal meetings. On **28 November from 1pm – 3pm** we will be holding a meeting to discuss **vulnerable suspects**, the next measure in the Roadmap of procedural rights. If you have particular expertise working with vulnerable suspects and would like to attend the meeting either in London in person or by video-conference please [let us know](#). As part



of the discussion we will be looking at a [report](#) we have prepared from the results of the Advancing Defence Rights questionnaires that are relevant to vulnerable suspects, on which safeguards are provided for vulnerable suspects in practice in each Member State.

**Young defender training modules:** Many of you have given your time to our European Young Defenders training events over the past three years – some of you are former young defenders yourselves! We have now produced a series of online training modules which we hope will be used by young lawyers across Europe to improve their knowledge of cross-border issues and EU law. Modules on the European Arrest Warrant, the European Supervision Order, the European Court of Human Rights, the Court of Justice of the European Union and the use of media in criminal cases are now [available on our website](#). Each module contains a guide to the relevant topic as well as scenarios to help prepare an effective defence. Please do circulate these to lawyers you work with.

**Publications:** If you have recently published an article on interesting fair trials or cross-border justice issues, please [send it in](#) and we will circulate it in the next quarterly report.

### [Recent developments in EU criminal justice](#)

**European Supervision Order – implementation date approaches:** A reminder that the implementation date for the European Supervision Order (ESO) is fast approaching. The ESO, which lays down rules according to which one Member State must recognise a decision on supervision measures issued by another Member State as an alternative to pre-trial detention, must be implemented by all Member States by **1 December 2012**. We have published a [guide to the ESO](#) which sets out some of the situations in which an ESO may be appropriate. Our guide suggests arguments to raise where courts are unwilling to use ESOs to ensure the mechanism offers a real and practical alternative to pre-trial detention. Please [let us know](#) what steps your country is taking to transpose the ESO into national law and tell us about any cases in which you try to use it.

**The right of access to a lawyer – trilogues begin:** Trilogue negotiations between the European Parliament and the Council are now underway and we were delighted to welcome the measure's rapporteur, Oana Antonescu MEP, to our event in Brussels to hear that, albeit slowly, progress is being made. For more detail about the process leading up to this see our new report [‘Towards an EU law on the right to access a lawyer’](#). We will be working with other NGOs in the coming months to keep the pressure on the Parliament and the Council to agree on a strong text for this new law.

**The right to interpretation and translation:** LEAP Members Liese Katschinka, President of EULITA and Dr Ellen Moerman, a legal translation and interpreting specialist, [wrote about](#) the potential damage to fair trial rights which could be caused by recent changes in the interpreting and translating services provided in courts in the UK in May's Quarterly Report. In September, FTI provided a [submission](#) to a UK Parliamentary inquiry on this issue, stressing the need to make sure that the UK is fully compliant with the Directive on the right to interpretation and translation by the implementation date in October 2013. Please [let us know](#) if you are aware of any steps being taken to implement this Directive in your own country. We are hoping to hold a small meeting on this issue next year.

**Extradition:** In October, the UK Home Secretary announced her intention to seek reform of the European Arrest Warrant as part of a wider decision that the UK must make by 2014 as to whether



to opt-out of various EU criminal justice laws (more information on this point is available [here](#)). She in particular recognised the need for a proportionality test to be introduced in the EAW system and the need to prevent people being extradited to wait for months or years in a foreign jail before their trial starts. FTI has long campaigned for these reforms and was delighted by the Home Secretary's statement. We will now be encouraging the UK Government to work with other Member States who support reform of the EAW system to bring about the amendments required for a fair and effective extradition system. If you think your government would support these amendments please [let us know](#).

### [Recent cases in which LEAP Members and FTI have been involved](#)

**Trial observation in Turkey:** LEAP Member Hans Gaasbeek has sent us a report of proceedings that he observed in Turkey, an EU candidate country, in July 2012 which raised serious fair trial issues. At the trial, 47 lawyers were accused of working for the leader of the Kurdistan Workers' Party (PKK) Abdullah Öcalan. The observing lawyers and NGOs were extremely concerned about the fairness of the trial. It was held in a cramped and unventilated courtroom, and the presiding judge is reported to have displayed an unprofessional and disrespectful attitude towards the defence, apparently having been instructed to handle the case in a limited amount of time. The defence also had serious objections concerning the independence of the court, as the same judge is alleged to have taken decisions concerning the unlawful arrest of the lawyers, the unlawful search and seizure of the lawyers' offices and files, and the imposition of pre-trial detention. Although nine lawyers were released in July, 24 remain in detention and the trial date has been postponed.

If there are significant appeals in the higher courts in your Member State concerning the European Arrest Warrant, access to lawyers or pre-trial detention, we would [like to know](#) about them.

### [Recent cases filed or decided at the European courts](#)

**Opinion of Advocate General Sharpston in Case C-393/11 Radu (CJEU):** This case arose from the issue by Germany of four European Arrest Warrants in respect of Mr Radu, who is resisting surrender from Romania. The questions referred to the CJEU required the Advocate General to consider important issues involving both proportionality and human rights in relation to the EAW system. The Advocate General opinion states that the arrest and detention of individuals under an EAW does constitute an interference with Article 5 ECHR and Article 6 of the Charter, albeit one that will in most cases be justified as "necessary in a democratic society" in accordance with the tests developed by the ECtHR in this respect. Nevertheless, such detention must be proportionate and not arbitrary.

On the issue of human rights, the Advocate General deems it to be clear, based upon the implicit wording of Article 1(3) of the EAW Framework Decision, that the authorities in the executing Member State are bound to take human rights into account when considering whether or not to execute an EAW. She considers the test set out by the ECtHR in cases of extradition to be "unduly stringent" and suggests that the test in EAW cases should instead be that "the deficiency (...) in the trial process should be such as fundamentally to destroy its fairness". Regarding the required standard of proof, AG Sharpston suggests that the requested person should be required to "persuade the decision-maker that his objections to the transfer are substantially well-founded".



Both of these issues are for the national court to decide upon. You can read the opinion [here](#). We will of course keep you informed about the Court's decision in this case.

**Opinion of Advocate General Bot in Case C-399/11 Stefano Melloni (CJEU):** In 2004, Italy issued an EAW in respect of Mr Melloni, who had been sentenced *in absentia* to ten years imprisonment for bankruptcy fraud. Mr Melloni appealed his surrender on the basis that Spanish constitutional law requires extradition where a conviction has been handed down *in absentia* to be made conditional upon the availability of a retrial. The Spanish court referred a question to the CJEU as to whether this requirement was consistent with Spain's obligations under EU law given that the amendment to Article 4 of the EAW Framework decision (which deals with trials *in absentia*) does not require that surrender be refused where the requested person has instructed a lawyer who was aware of and present at the trial, as was the case with Mr Melloni. The Advocate General's opinion found that the intention of this amendment was to facilitate mutual recognition by establishing clearly defined circumstances in which executing authorities may refuse surrender. As Mr Melloni's case did not fall within these circumstances surrender could not be refused. You can read the full opinion [here](#).

**Case C-42/11 Joao Pedro Lopes Da Silva Jorge (CJEU):** In September, the CJEU ruled that Member States cannot limit the non-execution of a European Arrest Warrant on a particular ground solely to their own nationals, while automatically and absolutely excluding nationals of other Member States. The defendant was a Portuguese national living in France subject to an EAW requiring him to serve an outstanding sentence. The defendant did not consent to surrender and wanted to serve his sentence in France, but under French law the relevant discretionary refusal ground in Article 4(6) of the EAW Framework Decision is only available to French nationals. The ruling followed the opinion of Advocate General Mengozzi which was included in the last [LEAP Quarterly Report](#). The full judgment is available [here](#).

**Tsonyo Tsonov v Bulgaria (No. 3) Application 21124/04 16 October 2012 (ECtHR):** The applicant in this case alleged that there had been a violation of his rights under Articles 6(1), (2) and (3)(c) of the ECHR. Dismissing his claim relating to the admissibility of evidence as manifestly unfounded, the Court went on to find a violation of the applicant's right to free legal assistance under Articles 6(1) and (3)(c). Noting that it is in principle for national courts to determine whether the conditions of financial need and necessity for the sake of fairness are met, the Court held that the lack of reasons given by the Supreme Court for its denial of free legal assistance, the complexity of the proceedings and the deprivation of liberty in this case led to the conclusion that Article 6 had been breached.

