

FAIR TRIALS INTERNATIONAL

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Submission

**Submission to the European Union Justice and Home Affairs
Council Working Group**

**The European Arrest Warrant: Problems and Recommendations for
Reform**

31 July 2009

About Fair Trials International

Fair Trials International (FTI) is a UK-based NGO that works for fair trials according to international standards of justice and defends the rights of those facing charges in a country other than their own.

FTI pursues its mission by providing individual legal assistance through its expert casework practice. It also addresses the root causes of injustice through broader research and campaigning and builds local legal capacity through targeted training, mentoring and network activities.

Although FTI usually works on behalf of people facing criminal trials outside of their own country, we have a keen interest in criminal justice and fair trial rights issues more generally. We are active in the field of EU Criminal Justice policy and, through our expert casework practice, we are uniquely placed to provide evidence on how policy initiatives affect defendants throughout the EU.

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1 Introduction

- 1.1 FTI takes this opportunity to provide its views to the Working Group on the European Arrest Warrant and to present arguments and case studies supporting the need for reform to ensure the system delivers justice in combating and punishing serious cross-border crime, as originally intended, without undermining the core EU values of upholding the rule of law and guaranteeing the right to a fair trial for all citizens.
- 1.2 In a highly diversified Union where over 500 million citizens live and over 8 million of them currently reside in another member state than that of their nationality, effective justice and home affairs policy clearly depends on mutual cooperation in cross-border cases. However, this cooperation must not be at the expense of basic principles of fairness and justice. Unfortunately, there has not been sufficient assessment of the human costs of the EAW and its potential misuse. Our own casework regularly demonstrates those human costs and we take this opportunity to summarise some of this casework for the Working Group.
- 1.3 The EAW system has been in place long enough to demonstrate some of the dangers that can arise from mutual cooperation, when mutual trust is not fully established. FTI wants to see the EAW system work properly, upholding rather than undermining the justice, freedom and security that form the basis of the EU's mandate. We suggest ways in which the EAW system could be strengthened to deliver greater justice without detracting from suspects' fundamental rights and without allowing the system to be abused through the issuance of disproportionate or improper extradition requests.
- 1.4 We illustrate our suggestions with a selection of case studies. We also provide a more detailed set of conclusions and recommendations deriving from the recent meeting of Fair Trials International's Legal Experts Advisory Panel, in the form of a Communiqué at Annex A.

- 1.5 FTI believes that the EAW fulfils an important aim in ensuring mutual recognition of judicial decisions between states and enabling simpler, speedier extradition procedures within the European area of free movement. However, in order for the scheme to be deemed a real success, it must be just and fair and respect the principle of proportionality and the rule of law.
- 1.6 Furthermore, as FTI has argued elsewhere (most recently, in its Submission^[1] to the Working Group dated 9 July 2009) there are unacceptable differences in rights for defendants across EU member states in the absence of standard minimum procedural safeguards and common standards on legal aid, bail and pre-trial detention. On the other hand, streamlined extradition procedures under the EAW scheme are premised on the principle of mutual trust, including trust in each other's trial procedures. The current absence of common standards in the areas of fundamental procedural rights, bail and pre-trial detention represents a further, separate threat to the integrity of the EAW scheme. FTI believes this is an argument for maintaining pressure both to introduce minimum standards **and** simultaneously to press for a fairer EAW scheme, bearing in mind that without minimum defence rights, extradition carries with it an increased risk of an unfair trial.
- 1.7 For the EAW scheme to operate fairly, member states need to accept responsibility for the financial implications of a justly operating EAW system. They should be financing legal aid so that defendants can obtain legal representation in both the executing and requesting countries and the timely provision of good quality translation and interpreting facilities. These financial implications do not appear to have been fully addressed at EU level and now require urgent consideration.
- 1.8 Below is a non-exhaustive list of significant problems being encountered under the EAW system. Further problems are highlighted in the annexed Communiqué.

2 Main problems with the European Arrest Warrant

Proportionality

- 2.1 Domestic procedures to issue and execute warrants do not always respect the principle of proportionality. This has several implications. Insufficient steps are being taken to prevent extradition for very minor offences. Insufficient attention is being paid by courts to the passage of time since the alleged offence.

Human rights considerations and rule of law

- 2.2 Insufficient attention is also being paid by courts to human rights considerations, and to whether the issue or execution of the EAW is consistent with or offends against the rule of law or otherwise amounts to an abuse of process.

Legal representation and legal aid

- 2.3 Given the serious impact extradition can have on an individual's personal and family life and the likely problems that person will face in following the proceedings in another language and culture, it is essential they should have legal representation and that if necessary this should be paid for by legal aid.

^[1] Submission to the European Union Justice and Home Affairs Council Working Group, *The Roadmap published on 1 July 2009 by the Swedish Presidency, with a view to fostering protection of suspected and accused persons in criminal proceedings*

- 2.4 The rules regarding the availability of legal aid for individuals subject to an EAW are unclear and vary from state to state. Legal aid to support legal representation (in both the requesting state and the executing state) is often limited.

Removal of EAWs

- 2.5 It is unacceptable that individuals in many EU countries have no means of ensuring EAW alerts against them are removed after a decision has been taken in one Member State to refuse to execute an EAW. This is particularly unacceptable in cases where the execution of an EAW has been refused due to passage of time, the mental or physical health of a defendant or one of the mandatory grounds for refusal as laid out in the Framework Decision on the EAW.

3 Some suggestions for improvement

- 3.1 The following is a non-exhaustive list of improvements needed: additional suggestions are made in the annexed Communiqué. Many of these reforms need to be brought about by means of amendments to the Framework Decision on the EAW, for example to emphasize that domestic courts are empowered to apply implementing legislation in a manner that is consistent with fundamental EU rights and freedoms and respect for the rule of law.
- 3.1.1 Checks should be implemented to ensure EAWs are only issued when proportionate to the offence and in the interests of justice. Guidance and training should be offered on the proportionality criteria to be applied.
- 3.1.2 Domestic courts should receive guidance and training on how to exercise their powers to refuse to execute a warrant where, for example: execution will result in a breach of human rights; or the procedures leading to the EAW being issued were unfair, illegal or resulted from misconduct by police or investigating authorities.
- 3.1.3 The EU should introduce common rules on the provision of legal aid in relation to criminal proceedings, especially those relating to EAWs. Legal aid should be made available for legal representation in both the requesting and the executing state. Individuals should usually have lawyers representing them in each country.
- 3.1.4 The duty to provide legal aid to individuals subject to an EAW should be appropriately shared by the requesting and executing state.
- 3.1.5 Common rules implementing fairer laws on bail and pre-trial detention would also help eliminate unfairness in the way the EAW system currently operates.
- 3.1.6 The system for removing EAW alerts from the Schengen Information System, Europol and Eurojust must be as efficient and reliable as the system for issuing them. If an EAW's execution is refused on a final basis in one member state, alerts for that EAW should be removed from the entire system, to prevent the individual's re-arrest in any other member state.

4 FTI Case Studies on EAW

Fair Trials International has worked with many clients who have suffered injustice under the EAW system. Below are some summaries of FTI cases illustrating how the scheme has operated unfairly in

ways which the above recommended changes would help to prevent. More information on many of these cases can be found at <http://www.fairtrials.net/cases/>.

4.1 *Acquitted and released in 1989 –now she is wanted across Europe – Deborah Dark*

In 1989, Deborah Dark was arrested in France on suspicion of drug related offences and held in custody for eight and a half months. Her trial took place later in 1989 and the court acquitted her of all charges. She was released from jail and returned to the UK. The prosecutor appealed against the decision without notifying Deborah or her French lawyer. The appeal was heard in 1990 with no one there to present Deborah's defence. The court found her guilty and sentenced Deborah to 6 years' imprisonment. Again, she was not informed that an appeal had taken place, nor notified that her acquittal had been overturned. As far as she was concerned she had been found not guilty of all charges and was free to start rebuilding her life. In April 2005, fifteen years after the conviction on appeal, a European Arrest Warrant (EAW) was issued by the French authorities for Deborah to be returned to France to serve her sentence.

In 2007, Deborah was arrested at gunpoint in Turkey, while on a package holiday with a friend. The police released her and were unable to explain the reasons for her arrest. Upon her return to the UK, she went to the police station and tried to find out the reasons for her arrest. She was told there was no arrest warrant against her.

In 2008 Deborah travelled to Spain to visit her father who had retired there. On trying to return to the UK, she was arrested and taken into custody in Spain, where she faced extradition to France. Deborah refused to consent to the extradition, and was granted an extradition hearing. After one month in custody, the Spanish court refused to extradite Deborah on the grounds of unreasonable delay and the significant passage of time. Deborah was released from prison and took a flight back to the UK. However, her ordeal was not over.

On arrival in the UK, Deborah was arrested again - this time by the British police at Gatwick airport. Once again, she refused to consent to the extradition and was released on bail pending another extradition hearing. The City of Westminster Magistrates' Court refused the extradition in April 2009. As there is no provision for the withdrawal of the European Arrest Warrant, Deborah is still at risk of being re-arrested on the same EAW if she ever leaves the UK and travels across Europe.

4.2 *20 year old Briton being extradited on evidence obtained by police brutality – Andrew Symeou*

Andrew, then a university student of exemplary character and a bright future ahead of him, was on holiday with friends in Zante, Greece in 2007. One night while Andrew was in Zante, another young Briton fell off an unguarded stage in a night-club, tragically dying two days later from his head injury. Andrew insists he was not even in the club at the time – and many witnesses have since confirmed this. He was never sought for questioning at the time, and knew nothing about the incident when he flew home at the end of his holiday.

A year later, he was served with an EAW seeking his extradition to Greece to stand trial for murder and, all appeals having failed, has now been extradited and is being held in custody in Greece. Only during the course of his UK legal challenge did it emerge that the EAW is based on completely flawed evidence, much of it extracted through the brutal mistreatment of two witnesses who have since retracted their (word-for-word identical) statements. We believe that it is an abuse of the EAW scheme to extradite someone to face trial based on this evidence, but the British courts rejected these arguments. Even if the Greek courts ultimately throw out the case, Andrew may well be forced to spend months in a Greek jail awaiting the trial.

4.3 Extradition sought after a grossly unfair trial – Garry Mann

Garry Mann, a 51-year-old fireman from Kent, went to Portugal during the Euro 2004 football tournament. On 15 June 2004 while Garry was with friends in a bar in Albufeira, a riot took place in a nearby street. Garry was arrested along with other suspects some 4 hours after the alleged offences. He was tried and convicted, less than 24 hours after his arrest. He had no time to prepare his defence and standards of interpretation at the trial were grossly inadequate. He was convicted following a widely publicised trial in Albufeira and sentenced to 2 years imprisonment on 16 June 2004. On 18 June 2004 he voluntarily agreed to being deported and was told that provided he did not return to Portugal for a year, he would not have to serve his sentence.

Back in the UK, Garry tried unsuccessfully to appeal his conviction. In October 2004 he lodged an appeal to the Constitutional Court in Lisbon but heard nothing from the Court. Separately, the Metropolitan police applied for a worldwide football banning order against Garry, but in 2005 the Court held he had been denied a fair trial in Portugal and refused the order. Earlier this year Garry was astonished to have been arrested on an EAW, alleging he was wanted in Portugal to serve a 2 year prison sentence. His extradition hearing concluded on 29 July, with judgment reserved until 18 August 2009. We have argued that he should not be extradited to serve a prison sentence following a trial which one British court has already decided breached his basic fair trial rights.

4.4 Warrant based on police brutality – Yarrow and Tonge

Michael Tonge and Lee Yarrow were arrested on holiday in Crete in 1999 after a nightclub fight in which Michael sustained injuries. Lee was released from police custody after 4 days but Michael was held on remand for 4 months, during which he was beaten, kicked, flogged with rope and denied food and medical treatment. He was then released and came back to England, only for both men to receive EAWs in 2005, with no explanation for the delay. At their eventual trial in Greece, charges were dropped against Lee. Michael was convicted of assault, served a short sentence in Greece and was released and returned to the UK in August 2007. Once again, an EAW was executed despite serious police misconduct and abuse and following unreasonable delay.

4.5 UN called their trial unfair, but brothers extradited anyway – Michael and Brian Hill

In 1997 the Human Rights Committee of the United Nations reported that Michael and Brian Hill had been denied a fair trial in Spain following their arrest in 1985 and were entitled to a remedy “entailing compensation” as a result. But Spain failed to comply with this ruling. Instead, it issued an EAW seeking the brothers’ extradition to Spain. In October 2005, Michael Hill was arrested in Portugal and extradited to Spain where he served 7 months for breach of parole conditions. They had already served three years in prison in Spain.

Conclusion

FTI is grateful for this opportunity to provide our views on the EAW and illustrate them with some of our clients’ experiences. We would be delighted to deal with any queries on this Submission: contact details are provided on page 2.

ANNEX A

FAIR TRIALS INTERNATIONAL

Communiqué issued after the Fair Trials International Legal Experts
Advisory Panel Meeting (15 May 2009, London)

The European Arrest Warrant



Criminal Justice 2008

With financial support from Criminal Justice Programme

European Commission – Directorate-General Justice, Freedom and Security

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 interest and concern and to provide advice, information and recommendations to inform FTI's work.
2. The second meeting of LEAP took place in London on 15 May 2009. LEAP members representing seven European countries were in attendance and the meeting was chaired by HH Dennis Levy QC.
3. As part of its casework, FTI regularly receives requests for assistance in cases which involve a European arrest warrant ('EAW') and FTI has become increasingly concerned about the human rights issues which arise out of the operation of the EAW scheme. The topic of the May meeting was therefore the law and policy surrounding Extradition and the EAW.

Injustice arising from the EAW Scheme

4. It is clear that a person's extradition to another country can have a serious impact on the enjoyment of their basic rights to liberty, to respect for their private and family life and, in some cases, their right to a fair trial. Although it was accepted that states should continue to cooperate in bringing to justice those guilty of criminal offences, it was considered that the fast-track system for extradition within Europe (the "EAW") was, in many cases, leading to injustice.
5. The following problems with the operation of the EAW scheme were, in particular, identified:
 - i. Authorities in member states are not fully taking into account the burdensome effects of extradition on individuals and as a result there is an absence of sufficient safeguards against extradition for very minor offences.
 - ii. Domestic procedures to issue and execute warrants do not always respect the principle of proportionality and EAWs have, in practice, been issued for very minor offences. Not only does this lead to injustice in individual cases but also places a significant and unjustified burden on the resources of member states. This is also contrary to the underlying purpose of the EAW scheme, being to tackle serious organised crime and terrorism.
 - iii. The right to an effective appeal against a decision to extradite has not been granted to individuals subject to an EAW in all Member States. Furthermore, the rules regarding the availability of legal aid for individuals subject to an EAW are unclear

and vary from state to state. There is also limited availability of legal aid to support legal representation in the requesting state and the executing state.

- iv. The Framework Decision on the EAW makes it clear that the EAW scheme is subject to the obligation to respect fundamental rights and the rule of law. Courts in member states have not, however, been effective in upholding the integrity of the EAW scheme by using the European Convention on Human Rights and the human rights protections in their own constitutions to ensure that the injustices which arise out of the implementation of the EAW are addressed.
 - v. There is regrettably much uncertainty and ambiguity concerning the status of the Framework Decision on the EAW within the constitutional framework of the European Union and domestic legal systems. Constitutional challenges to domestic legislation implementing the Framework Decision on the EAW in Germany, Poland and Cyprus represent this ambiguity. This has contributed to the reluctance of domestic judicial authorities to interpret the Framework Decision on the EAW and respective implementing legislation in light of fundamental principles of European law, including respect for fundamental rights and the free movement of people.
 - vi. It is unacceptable that individuals in many EU countries have no means of ensuring EAW alerts against them are removed after a decision has been taken in one Member State to refuse to execute an EAW on general grounds such as the passage of time. In some cases, EAW alerts have remained in place even after a person has served their prison sentence in the state issuing the warrant.
6. In order for the EAW scheme to be deemed a real success the scheme must operate in a just and fair way which respects fundamental rights, the principle of proportionality and the rule of law. Proposals to provide guarantees of basic procedural rights across Europe should be welcomed but would not, in themselves, be sufficient to remedy the flaws with the EAW.

Action Required for a Fairer EAW Scheme

7. The following urgent action was recommended by the panel:
- i. Extradition and the prospect of a trial abroad is in and of itself hugely burdensome on individuals and should not be used for minor offences. Appropriate procedures must be implemented in executing states to ensure EAWs are only issued when proportionate to the offence. The chapter on proportionality in the European Arrest Warrant Handbook is not sufficient to ensure member states respect the principle of proportionality when issuing an EAW.
 - ii. Judicial authorities in member states have the authority to ensure extradition procedures within Europe respect the rule of law, the fundamental principles of EU law and human rights guarantees in domestic constitutions. Domestic courts should be more willing to exercise this authority to refuse to execute a warrant where:

- a. the execution of the warrant will result in a breach of human rights;
 - b. the procedures leading to the EAW being issued were unfair, illegal or resulted from misconduct by police or investigating authorities.
- iii. Training should be provided to defence lawyers to equip them to use EU constitutional principles to challenge inappropriate uses of EAWs.
- iv. Compensation schemes must be made available to individuals who have spent time spent in custody pending the completion of proceedings relating to an EAW which does not lead to a charge.
- v. The EU should introduce common rules on the provision of legal aid in relation to criminal proceedings, especially those relating to EAWs. Legal aid should be made available for legal representation in both the requesting state and the executing state and it was essential for individuals to have lawyers representing them in each country
- vi. The financial burdens resulting from the implementation of EAWs should be borne by the issuing state to create a disincentive against inappropriate uses of the EAW scheme.
- vii. Mutual recognition of judicial decisions must be pursued and promoted within Europe for decisions not to execute a warrant just as they are for decisions to issue a warrant. Decisions to refuse to execute an EAW on general grounds, such as the passage of time, by one Member State should be recognised in other member states.
- viii. The system for *removing* EAW alerts from the Schengen Information System, Europol and Eurojust must be as efficient and reliable as the system for *issuing* EAW alerts. The system for removing EAW alerts must also be made more accessible to individuals.
- ix. Further research is needed into the fate of individuals against whom EAWs had been executed in order adequately to gauge the success of the EAW scheme. In particular, it would be instructive to collect statistics on the conviction and charge rates in cases where individuals have been surrendered under an EAW. It is also necessary to determine what legal aid and legal representation is available to individuals being tried after the execution of an EAW against them. Research in these areas by the European Union, Member States and independent bodies like EuroMos must be encouraged and supported.
- x. Coordinated action must be taken by civil society organisations across the EU to highlight the cases of injustice which are currently arising from the EAW scheme. As well as lobbying for change to the Framework Decision on the EAW, member States should be lobbied to fulfil their duty to ensure that the domestic

implementation of EAW scheme complies with the fundamental principles enshrined within the European legal system.

Conclusion

8. The EAW scheme was implemented to ensure perpetrators are brought to justice and do not take advantage of Europe's open borders to escape responsibility for criminal offences. Faith in the EAW scheme and, more broadly, in the ability of the European Union to build an area of freedom, justice and security within Europe will be undermined if the EAW continues to cause injustice in individual cases. Mutual cooperation in criminal justice must remain subject to the fundamental principles underlying the European Union: respect for human rights and the rule of law.