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Discussion Paper

LEGAL EXPERTS ADVISORY PANEL MEETING

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Discrimination against non-national and non-resident defendants in the EU

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Criminal Justice

1. Introduction

FTI was created in the early 1990s to assist individuals facing trial in a country other than their own. Our long experience of working with non-national defendants suggests that those who face charges outside their own country are often at a significant disadvantage compared to nationals facing charges for similar offences in the same country. We have frequently encountered cases of intentional unequal treatment of non-nationals by criminal justice authorities. In almost all of our cases we see the disadvantages that our clients face because national procedures and legislation do not take into account the specific vulnerabilities of non-nationals in criminal proceedings. In this discussion paper we use the broad term "discrimination" to cover both types of unequal treatment (direct and indirect discrimination).

Discrimination against non-nationals on the basis of nationality remains a problem in criminal proceedings in many member states of the European Union. In its recently published "Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings", the Swedish presidency has acknowledged that '*a person who is involved in criminal proceedings in a country which is not his/her country of residence will know less about his/her rights than residents of that country. Also, the person concerned may not understand or speak the language of the proceedings*'. They concluded that this '*calls for specific measures on procedural rights, in order to ensure the fairness of the criminal proceedings*' to ensure '*citizens' confidence that the European Union and its member states will protect and guarantee their rights*'.

In our experience, non-national defendants within Europe are often subjected to lengthy periods of pre-trial detention as bail is frequently refused to non-nationals; they face major language barriers; do not understand the legal system; and are sometimes the targets of ill-treatment whilst in detention. Member states appear to be failing to take the necessary steps to (A) investigate and prevent cases of direct discrimination against non-nationals and (B) address the particular vulnerabilities of non-national defendants to ensure they are guaranteed the right to a fair trial.

Not only does this lead to serious cases of injustice for individuals; it also risks undermining the European Union's own attempts to create an area of freedom, justice and security and to encourage member states to cooperate in criminal justice matters. A prerequisite for mutual trust is that member states' national criminal justice systems guarantee suspects and accused persons minimum procedural safeguards necessary for a fair trial, whatever their nationality. There would, for example, rightly, be concern about transferring a national of one EU country to face trial in another EU country (under a European Arrest Warrant) if it is known that the person will be given worse treatment than a national of the receiving country.

The aim of this meeting is to explore the disadvantages faced by non-nationals in criminal proceedings and to consider how best to overcome these. We would also like to examine the adequacy of existing legal protections to address these disadvantages and to consider some of the current proposals for new EU legislation in this area. It is suggested that the following topics are discussed during the meeting:

1. The language barrier and proposals for minimum standards of interpretation and translation;
2. Discrimination on grounds of nationality or residence in bail applications;
3. Alternative measures to detention - The European Supervision Order and Eurobail; and

4. Other EU measures to ensure minimum procedural standards are in place in member states and the impact this will have on the position of non-national defendants.

2. Interpretation and translation for non-national and non-resident defendants

It is obvious that access to interpretation and translation facilities is vital to enable defendants to understand the charges against them and to enable themselves properly to defend themselves. Sadly, cases taken on by FTI demonstrate that non-nationals facing trial in some member states are not granted access to appropriate translation and interpretation services. We have, for example, encountered many cases where the lack of adequate interpretation and translation facilities during the pre-trial stages leads to further complications in otherwise simple cases, often leading to disproportionately long pre-trial detention and frequent, avoidable appeals after a defendant has been convicted.

A report funded by the EU Commission as part of its consultations after "a proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union" was published in 2004[1] demonstrates that all member states have enacted legislation granting a right to interpretation. Annex 1 includes the rules and practice regarding the provision of interpretation and translation facilities in a selection of EU jurisdictions.

Our own experience and the Commission's research demonstrate that national regulations regarding the right of defendants to access interpretation and translation services vary enormously across member states:

- In some member states the presence of an interpreter is state-funded during a trial when the suspect does not speak or understand the language of the proceedings.
- Not all member states provide funding for interpretation or translation during the pre-trial stage and for lawyer-client communication.
- Free translation of relevant documents is provided for in all member states, but sometimes this is only done orally. It is not clear who makes the decision regarding the relevancy of documents and whether or not the defence may request the translation of additional documents.
- Even in countries where the state pays for interpretation for lawyer-client communication the amount of hours eligible for state-funded interpretation is sometimes insufficient to prepare a defence.
- Several member states require interpreters and translators to have certain qualifications. Others require no specific qualifications, such as a linguistic education or diplomas.
- The absence of multi-lingual defence lawyers during the interview stage and the lack of audio or video recordings render any control of the quality of translation during interrogations at the pre-trial stage impossible.
- The right to translation of the complete proceedings at the trial stage is limited in many countries. It is often the case that unless the defence specifically asks for a complete translation, the complete proceedings will not be translated and only the questions asked by the Court of the defendants and their answers will be translated.
- The time taken for interpreting and translating is not taken into account when the dates for hearings and the submission of documents is set by the court during the course of a trial. This can lead to long delays and adjournments during the proceedings which could be avoided if the extra time needed for translation and interpretation had been taken into account by the court at the appropriate time.

In 2004 the Commission presented a proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union in 2004 ('2004 proposal'). This included a right to translation and interpretation. After 3 years of

1 The 2004 proposal and report is attached with this discussion paper.

discussion and despite widespread support, this proposal was not adopted. Six member states opposed the measure on various grounds, including that the TEU did not provide a sufficient legal basis, that the EU's mandate was limited to cross border cases and that the European Convention on Human Rights offered adequate protection to those facing criminal charges throughout the EU.

Thankfully, the Commission is making renewed attempts to create an enforceable right to translation and interpretation across the European Union. On 8 July 2009 the "draft Council Framework Decision on Interpretation and translation for suspects in criminal proceedings was adopted" by the European Commission ("2009 Draft Framework Decision)" a copy of which is attached to this discussion paper. The aim of this draft is to ensure that if suspects do not understand and speak the language used, they are entitled to interpretation from the moment there are informed that they are suspected and until the proceedings are over, including any appeal.

Though the 2009 Draft Framework Decision is a welcome development in an area which is need of urgent reform, FTI is concerned that the right to interpretation and translation must not be considered entirely in isolation from other crucial rights. An interpreter cannot replace a lawyer and though the provisions of the 2009 Framework Decision are an improvement on the *status quo* they do not go far enough. In particular, the scope of the right to interpretation and translation does not include the right to be provided with interpretation or translation as soon as is practicable and it does not include the right to be informed of the right to interpretation and translation during criminal proceedings.

Members of LEAP are invited to:

- *Discuss their own experience of the disadvantages faced by individuals in criminal proceedings due to language barriers. Provide examples of successful appeals in EU jurisdictions on the basis of a failure to provide defendants with interpretation and translation facilities during the pre-trial stage or during the course of a trial.*
- *Consider the extent to which international human rights law requires access to translation and interpretation facilities.*
- *Discuss the extent to which this is also a concern for nationals or residents of countries with more than one official language or who do not speak the official languages of the country.*
- *Consider the existing legislative and procedural rights to interpretation and translation facilities in domestic law and the deficiencies of this legislation.*
- *To explore other practical hurdles to receiving adequate translation and interpretation.*

- *Discuss whether the draft Council Framework Decision on the Interpretation and translation for suspects in criminal proceedings is sufficient to ensure non-nationals have adequate access to interpretation and translation facilities.*

3. Discrimination on grounds of nationality or residence in bail applications

FTI's cases suggest that there is a propensity for courts to refuse bail to non-nationals, where this would be granted to nationals in the same or very similar proceedings. In the pre-conviction phase, unjustified denial of bail is a violation of the presumption of innocence, the right to liberty and the right to respect for one's private and family life. Moreover (as with all detention) the less time a person spends in prison, the easier that person's rehabilitation into society and the lower the risk of re-offending.

The "European Commission green paper on mutual recognition of non-custodial pre-trial supervision measures", which highlights the excessive use and length of pre-trial detention in the EU, perceived a disproportionate number of non-residents held in pre-trial custody. According to the Commission, '*during each calendar year, it is estimated that almost 10,000 EU nationals are detained in pre-trial detention in EU countries other than their normal country of residence. At any moment, there are around 4,500 EU nationals in pre-trial detention in EU countries other than their normal country of residence*'[2].

FTI's experience with individual cases since 2006, demonstrates that non-residents continue to face obstacles to bail and are frequently subjected to long periods of pre-trial detention. Some of the lawyers who represent our clients claim that in some cases, the only reason why bail is refused is that the defendant is a foreigner. In other cases it appears that non-nationals are not made aware of their right to apply for bail and/or are not provided with the necessary legal advice to make such applications.

There are two classic factors considered in bail decisions in much of the EU: (A) the likelihood of further criminal activity whilst on bail -including interfering with witnesses or repetition of offence; and (B) the danger of absconding, which militate against foreigners. As regards the first test, for example, it is routine for a court to look at ties with the community, when it comes to nationals. By contrast, for foreigners the assessment of ties with the community is fraught with difficulties: there is an inevitable lack of personal information before the court and possible cultural differences. As regards the second test, it is understandable that courts in EU member states should seek to reduce the risk of accused persons absconding before trial. In practice, however, the way this is applied often leads to the unequal treatment of non-nationals and non-resident suspects. In particular, the absence of a local bail address will often lead a court to fear that a person will abscond.

LEAP members are invited to address the following issues:

- *Their own experience of unequal treatment of non-nationals in bail decisions.*
- *Whether national laws either explicitly discriminate against non-nationals or specifically seek to prevent such discrimination.*
- *What measures may be explored to redress linguistic, legal, and other barriers to obtaining provisional release experienced by non-residents?*
- *What legal arguments and practical measures have been successful in EU jurisdictions to ensure non-nationals are granted bail?*
- *What avenues are available on a European level to where a non-national has been discriminated against by virtue of being a foreigner in a bail decision?*

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2 Commission Staff Working Document, *Accompanying document to the Proposal for a Council Framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union* {COM(2006) 468 final}, Impact Assessment. SEC (2006) 1079.

4. The European Supervision Order and Eurobail

In practice, non-national defendants are regularly denied their right to bail and consequently their right to liberty simply because they are foreigners. In addition, non-nationals and non residents are unable to benefit from alternatives to pre-trial detention, detention and from suspended sentences. One way of addressing this would be to put in place mutual recognition regulations allowing the transfer of pre-trial detention measures from one member state to another. This is an issue which the European Commission has sought to address:

- In 2004 the European Commission issued a green paper on mutual recognition of non-custodial pre-trial supervision measures;
- In 2006 the Commission published the "Proposal for a Council Framework Decision on the European Supervision Order (ESO) in pre-trial procedures between member states of the European Union ('The Proposal')."

The ESO aimed to give non-resident European suspects, having their abode in another member state, the right to return home under the supervision of their home state while waiting to be tried. The idea was that this would reduce the risk of non-national defendants being held unnecessarily in custody or subject to long-term non-custodial supervision measures in the member state where the alleged offence took place. The ESO would therefore provide a mechanism through which a judicial authority in member state A could impose a non-custodial supervision measure on the foreign suspect which would be recognised and enforced in member state B where he is normally resident. The authorities in member state B would supervise compliance with the order and would also be responsible for returning him for trial were he not to return on his own when summoned to do so by the trial State. In 2009 the European Parliament proposed amendments to the Proposal and a Framework Decision to implement the European Supervision Order is still pending.

The main issue which was addressed by the Proposal is the fact that non-custodial pre-trial supervision measures are not currently recognised between member states of the European Union. In 2008 LEAP considered the Proposal and raised concerns about, *inter alia,* the practicality of the Proposal, the absence of a right to appeal supervision orders and the financial implications of the scheme. It was suggested that the ESO scheme may also be more likely to be successful if the costs of funding the transfer and supervision of individuals is borne by the country of residence. Though measures to enable non-nationals to return to their home state whilst awaiting trial were welcomed, it was clear from the discussions that the provisions within the Proposal cannot be the only measure to redress the disadvantages faced by non-national defendants during the pre-trial stage.

One of the other policy options considered within the proposal was the EUROBAIL scheme. This model works on the basis of a division of functions between the trial court and the court of the suspect's country of residence. The trial court makes a preliminary assessment of whether or not the offence is 'bailable'. If the answer is yes, the suspect is sent back to his or her country of residence, where the court makes the final decision on provisional release. The state of residence is responsible for sending the person back to the trial state (if required). This policy option was not considered in much detail in the Proposal and was not taken forward by the commission.

Fair Trials International had historically preferred the EUROBAIL scheme as we perceived that a court in the suspect's country of residence would be more likely fairly to assess the ability to grant bail subject to conditions and to decide on the conditions which it would be appropriate to apply. The ESO, by contrast, would leave these decisions to the court in the

trial country, retaining a significant risk of discrimination against non-nationals in the court's exercise of their discretion. However as the application of the EUROBAIL system may be frustrated by fears of protectionism by member states towards their citizens, the system may be less workable than the ESO.

LEAP members are invited to consider:

- *The extent to which the ESO would address the risk of discrimination against non-nationals in bail decisions.*
- *Whether the EUROBAIL system is, in fact, preferable to the ESO and whether it is politically realistic.*
- *Improvement that could be made to the ESO proposals.*
- *The current status of the proposals for a European Supervision Order, the political barriers to the legislation and the likelihood that they will be implemented.*
- *If appropriate, how support for the ESO could be fostered.*
- *What efforts will be necessary, alongside the ESO scheme, to ensure courts in the trial country take advantage of the ESO scheme and are increasingly willing to grant conditional bail.*

5. Other EU measures to ensure minimum procedural standards and the impact this will have on non-national defendants

The specific vulnerabilities of non-national defendants are not limited to the sphere of interpretation and translation in criminal proceedings. An absence of minimum standards of procedural safeguards in criminal proceedings across EU member states affects all EU citizens. For non-national defendants the burdensome effects of facing charges in an unfamiliar system with significant language barriers are exacerbated by inconsistent application of existing international fair trial standards and the ECHR. FTI is frequently contacted by non-nationals facing trial abroad who are not fully aware of their rights, the charges against them or the procedures which are to be applied during the pre-trial stage and the trial. Ultimately, this hinders the development of a European area of justice, freedom and security as the implementation of the mutual recognition principle presupposes that member states have faith in each others' criminal justice systems.

As a response to this worrying trend, the Commission presented a proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union in 2004 (“2004 proposal”). After 3 years of discussion and despite widespread support, this proposal was not adopted. Six member states opposed the measure on various grounds, including that the TEU did not provide a sufficient legal basis, that the EU's mandate was limited to cross border cases and that the European Convention on Human Rights offered adequate protection to those facing criminal charges throughout the EU.

Reform in this area has, however, remained a priority under the Hague Programme and in 2009 the Swedish Presidency published its “Roadmap with a view to fostering the protection of suspected and accused persons in criminal proceedings (“Roadmap’)”. The Roadmap envisaged a ‘right-by-right’ approach unlike the 2004 proposal which intended to set out six procedural rights simultaneously. The first proposal delivered under this new approach is the draft *Council Framework Decision on the Interpretation and translation for suspects in criminal proceedings.*

The Roadmap envisages that separate legal measures will cover:

- Information on Rights and Information about the Charges;
- Legal Aid and Legal Advice;
- Communication with Relatives, Employers and Consular Authorities;
- Special Safeguards for Vulnerable Persons; and
- The Right to Review of the Grounds for Detention.

Though FTI welcomes the Roadmap and renewed efforts by the EU to protect the defence rights of suspects in criminal proceedings, we are concerned that there is no detail in the Roadmap about how or when legislation will be enacted.

It is not expected that the Roadmap will be discussed in detail during this meeting but that it will form the specific focus of future meetings. Members of LEAP are, however, to start considering the roadmap and its implications for non-national defendants:

- *The extent to which the implementation of minimum procedural safeguards within the EU will resolve the problems faced by non-nationals and non-residents to secure a fair trial.*
- *Whether additional provisions are necessary to ensure the special needs of non-nationals are adequately catered for in future measures by the EU concerning the 6 rights identified in the Roadmap?*

ANNEX 1

Below is a compilation of the rules and practices regarding the provision of interpretation and translation facilities in a selection of EU jurisdictions[3] which may assist members of the LEAP panel during the meeting:

Belgium

Article 31 of the Languages Act 1935 (*Loi concernant l'emploi des langues en matière judicaire*, published in Moniteur Belge 22 June 1935) grants every person who is questioned in the course of an investigation the right to use the language of their choice for all their oral statements. If the interviewers do not understand the interviewee's language of choice they have to call a sworn interpreter. The cost of an interpreter is borne by the State, however this does not include the cost of lawyer-client communication unless the detained person is eligible for legal aid (even then the number of hours of interpretation paid for by the state are strictly limited). There is no emergency scheme for linguistic assistance. Relevant documents are only translated for free into Dutch, French and German. The interviews are not audio or video recorded, nor is there a system to verify the accuracy of the interpretation and translation. Furthermore, interpreters and translators do not need specific qualifications.

Germany

For persons who do not speak German, the court appoints an interpreter for any interrogation or court hearing, (s. 185 of the Court Organisation Act). Interviews are always audio recorded which allows for verification of the accuracy of the interpretation. Court proceedings are not translated in their entirety. Defendants statements are translated however, documents are only translated when knowledge of the documents is necessary for the defendant to make use of their procedural rights [s. 187(1) Court Organisation Act]. The cost of interpreters and translators is borne by the State, even where an interpreter is needed for lawyer-client communication.

England and Wales

Upon arrest a custody office must determine whether or not the suspect requires an interpreter, if he/she does an interpreter must be arranged as soon as is practicably possible to inform the suspect of his rights in a language he understands. An appropriate interpreter will be appointed free of charge for the duration of any court proceedings when required. However there is no scheme for emergency linguistic assistance. As certain qualifications are required for interpreters to be included on court lists, the State is able to ensure that interpreters are sufficiently qualified. It is not common practice to record interviews which require the assistance of an interpreter. Normally the interpreter records everything in writing and the suspect is asked to verify the accuracy of the written record. If he agrees with the contents he can sign the record, if not, he can indicate in what respect the interpretation is inaccurate. The however this method of verification is extremely questionable as it is not possible for defendants to spot inaccuracies in interpretation. Where the defence requests it, prosecution documents are translated.

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3 This information is compiled from a report written by Taru Spronken and Marelle Attinger, Faculty of Law, Department of Criminal Law and Criminology of the University of Maastricht, the Netherlands and was funded by the European Commission and from 'Suspects in Europe- Procedural Rights at the investigative Stage of the Criminal Process in the European Union' (2007) edited by Ed Cape, Jacqueline Hodgson, Ties Prakken and Taru Spronken.