

# LEAP Meeting 20<sup>th</sup> June 2008

## Minutes

### Attendance

#### FTI Trustees

Dennis Levy (LEAP Chair)  
Peter Lipscombe (FTI Chair)

#### LEAP Members

Giovanna Barca (IT) ASF-I  
Dinko Kanchev (BG)  
Jonathan Mitchell (UK)  
Matthew Pinches (UK)  
Georgios Pyromallis (GR)  
Wouter von Ballegooij (DK)  
Dr. Marianne Wade (GER)

#### Apologies

Oliver Wallasch

#### FTI Staff

Catherine Wolthuizen (FTI Chief Executive)  
Amanda Cumberland  
Priscillia de Corson  
Cindy Nesbit

### Item 1 - Welcome

*Needs a brief summary – e.g. Dennis Levy welcomed all members to the first meeting of LEAP. Clarified the aims of LEAP? Etc.*

### Item 2 - Overview of FTI

*Needs a brief summary*

### Item 3 - Presentation on the transmission of information extracted from criminal records

- 1 Priscillia de Corson gave a presentation on a series of proposed EU framework decisions that aim to facilitate and speed up the transmission of information extracted from criminal records, in order to improve existing system under the 1958 Council of Europe Convention on Mutual Assistance in Criminal Matters. The new proposals include:
  - A framework decision on taking account of convictions in the EU in the course of new criminal proceedings;
  - A framework decision on the organisation and the content of the exchange of information extracted from criminal records, and;
  - A proposal on the establishment of a European Criminal Records Information System (ECRIS).
- 2 These new measures raise serious concerns regarding:
  - the accuracy of the information delivered

- the mutual understanding of this information, and
  - the adequacy of data protection safeguards.
- 3 The slides from this presentation and a detailed discussion paper are attached (Annex 1 &2).

#### **Item 4 – Discussion**

- 4 Following the presentation, LEAP members were asked to discuss the proposals and identify any specific concerns in order to help shape FTI's policy advocacy in this area.  
Concerns were raised about the following areas:

##### *Inaccuracy of information*

- 5 Currently, there are no regulations allowing for a challenge to the accuracy of the information contained in criminal records, and there is no uniformity in the way in which member states record their information. There are also no general rules about remedies in case of transmission of inaccurate information.
- 6 There is a need for a system that would ensure the accuracy of information and allow for the possibility of challenging misinformation.
- 7 This is extremely important as consequences of the transmission of erroneous information may have very serious consequences for defendants at all stages of the proceedings.
- 8 It should be ensured that defendants are informed of any new information in their criminal records. Defendants should also be allowed to view the information shared or exchanged between authorities to assure the accuracy of the information received by the court and to challenge misinformation. Moreover, they must be informed of all requests for information made by member states and transmission of such information as soon as possible.
- 9 For that purpose, a framework decision on minimum procedural rights would be welcome, which should include articles guaranteeing early disclosure to the defendant of requests for exchange of information from criminal records.
- 10 To ensure this early disclosure it is important that the prosecution is obliged to transfer the criminal record to the defendant. It is vital that this happens early enough in the process for the defendant to challenge any misinformation. Careful thought needs to be given to which authority has the responsibility of notifying the defendant of a request for information from his criminal record, and sending a copy of the information exchanged to the defendant. If this responsibility lies with the judge, there is a risk, especially in inquisitorial systems, that the defendant will only learn about this at a very late stage'.
- 11 *Further suggestions on this point, i.e. where should this responsibility lie would be more than welcome.*
- 12 One delegate proposed that the prosecution should have an obligation to prove that

the allegations contained in the criminal record are true.

*Mutual understanding of information*

- 13 Members agreed that the ECRIS “tick box” proposal is not a good system as it will not clearly define the elements of the crime and may lead to errors, confusion and a lack of mutual understanding of the offences committed.
- 14 It was considered of utmost importance to require further information in addition to the identification of offences and sentences in the common list. Members recommended that the European Criminal Record form should expressly mention the legal source and nature of the conviction (the person was convicted for a crime X under law X), as well as a brief presentation of the elements of the crime.
- 15 If such information is to be made available, member states must have a duty to collect data in a reliable and reasonable way. All member states should have to record a universal minimum set of information about each defendant and each conviction. This information should include the person’s full name, date of birth, and a reference to the national law.
- 16 Moreover some delegates proposed requiring all member states to ensure they have transcripts of court hearings (court records), which would encompass information about the charges and the verdict. Such records might be used for further reference when transferring information to another member state.

**Use of the data and Data Protection**

- 17 As stated above, there was a general concern that criminal records would be exchanged without the defendant’s knowledge, denying the defendant any possibility of verifying or challenging the accuracy of the information.
- 18 There was also general concern about the lack of proper data protection systems amongst member states. Measures to facilitate the transmission of sensitive information, such as data contained in criminal records, should not be adopted in the absence of adequate data protection measures.
- 19 Moreover, there were concerns as to who would be allowed to request and receive this information. Members discussed the issue of records being released for “any other purpose” than criminal proceedings. They stressed that there is a need for a clear definition as to what the information will be used for, and that this use should be limited to the legitimate interest of law enforcement. In the absence of a clarification of the nature of “other purposes”, and in the absence of any specific safeguards, the new system of exchange of information allows for the unrestricted and potentially disproportional release of private information without adequate safeguards.
- 20 Members noted that there may also be situations where the home country would not be allowed to use a particular record against its citizen during criminal proceedings, but a different member state can do so. In these cases, the state of citizenship’s law should prevail.

*Likely violations of the right to a fair trial*

- 21 The principle of presumption of innocence should not be undermined by this exchange of information. States should not be taking preventative measures against those with past convictions.
- 22 Consequences attached to the existence of previous convictions should be provided by law.

- 23 Disclosure to the defendant is essential. Defendants should be made aware that their records have been released as soon as possible so that they are able to properly prepare a defense.
- 24 One of the delegates suggested that it might be best to anchor the request for records to the prosecution, as opposed to the judge. That type of system would afford the defendant an opportunity to dispute inaccurate information and prepare a complete defense. As stated above, this should not be the task of the judge or, in inquisitorial systems, the defendant will only learn about this at a very late stage, when sentencing.

*Lack of proportionality of the measure*

- 25 The current proposed system does not take the requirement of proportionality into account. Before allowing for the exchange of information extracted from criminal records, there is a need to check that the aim pursued (public interest or security) justifies the limitation of the individual's fundamental rights (as for instance a person's rights under article 8 ECHR), and to what extent it does justify it.
- 26 One member also noted that given the existence of the principle of availability and developments in Treaty of Prüm (especially Schengen II), the role of this framework decision is unclear. When information is needed for law enforcement purposes, the Schengen system is adequate. It is not clear why an additional system is needed, especially one that has no clear purpose.

**Item 5 - Christian Krapptiz (CK), British Representation of the European Commission**

- 27 CK works for the European Commission in London in the Justice and Home Affairs communications team.
- 28 CK addressed LEAP about the Commission's plan for the future work of Justice and Home Affairs. The Hague program is set to expire at the end of next year so the Commission is working on a new programme.
- 29 In developing the new programme, they are hoping to hear from NGOs and pressure groups who are involved with the day-to-day mechanisms of police and judicial co-operation. They will be launching an open consultation in spring 2009, inviting responses from interested parties. The members stressed that the Commission should also consult with practitioners (judges, prosecutors and defence lawyers) in a more targeted way, because they are the ones who really understand what is necessary and required in the field and who can give the best insight to the barriers that exist.
- 30 They will also be conducted a special Euro-barometer, to poll the views of citizens. They are hoping that the new programme will be adopted under the Swedish presidency.
- 31 The new program is likely to focus on issues of immigration and data sharing/data protection. Other issues will be included, but it is too early to tell what they will be.
- 32 CK indicated that the commission is trying to find ways to adopt a framework decision on defence rights, but the problem is that of the individual member states agreeing to these proposals. The Commission may have proposals but that does not mean they will be accepted.

## **Item 6 – Presentation on alternatives to detention for non-nationals / non-residents**

- 33 Priscillia de Corson gave a presentation on the application of alternatives to detention for non-national and non-resident defendants provided for by two EU proposals:
- the Framework Decision on the European Supervision Order, and;
  - the Framework Decision on mutual recognition and supervision of suspended sentences, alternative sanctions and conditional sentences.
- 34 These proposals aim at returning non-resident suspects to their Member State of residence, providing they comply with the supervision measures. The aim is to ensure the due course of justice and, in particular, to ensure that the person will be available to stand trial in the Member State issuing the European supervision order.
- 35 Whenever reasonable, alternatives to detention should be preferred to detention. There are advantages to alternatives to detention. In the pretrial stage, alternatives provide respect for the presumption of innocence, negate the excessive financial burden of detention, and allow the suspect to maintain employment and relations with friends and family. With regard to post-trial sentencing, alternatives to detention also provide better opportunities for rehabilitation, reduce re-offending and reduce the over-crowding in prisons.
- 36 For more info on these measures, please refer to the presentation slides and discussion paper attached (Annex 3 &4).

## **Item 7 – Discussion**

- 37 Following the presentation, LEAP members were asked to discuss the proposals and identify any specific concerns in order to help shape FTI's policy advocacy in this area.  
Concerns were raised about the following areas:

### *Identification of the most suitable country to be under a supervision order*

- 38 The idea underlying the 2 proposals is to allow a person to execute a supervision order in the country where he/she usually lives. This is logical as the very nature of the EU should enable all EU citizens to live in any of the Member States.
- 39 When the state of residence differs from the state of nationality, the state the defendant is most tied to should be the state in which the supervision measures take place.
- 40 Some participants suggested that evidence should be obtained as to where a person can most feasibly reside for bail. They suggested that it would be helpful to have a fact-finding element to the proposals that looks into where the defendant can best be housed. This would be the best way to assure that these measures work.
- 41 Moreover, it was agreed that a suspect is more likely to comply with reporting requirements if he is in the country he wants to be in.

### *The role of the executing state, and the need to grant a right to appeal in this country*

- 42 The lack of appeal in the country of execution of the supervision order raised serious concerns among the participants, as it fails to comply with the requirements of Article 5 (ECHR).
- 43 It was suggested that sentencing country should rely on the country housing the

person to execute the supervision order. The country housing the person on bail should decide the bail conditions, or should at least be able to adapt the conditions. Moreover, police in the executing state can investigate breaches of the ESO; the person shouldn't be automatically sent back to the issuing state if conditions are breached.

#### *Lack of harmonization*

- 44 All member states deal differently with issues like bail. This can lead to discrepancies in the execution of the supervision orders.

#### *Financial costs of bail / European supervision order*

- 45 Another issue to be addressed is the financial costs of bail for non-nationals. There are certain states that apply excessive amounts of bail for non-nationals so that the detained person cannot pay and subsequently remains in jail for an extended period of time. The European Supervision Order does not address this important issue.
- 46 The framework decision on the ESO provides that the suspect should bear the cost of his transfers to the issuing countries if he needs to attend pre trial hearings. This is highly disputable as it will lead to discrimination on the ground of the financial situation of suspects. Many suspects are indigent people who will never be able to support the costs related to the execution of the ESO.
- 47 Participants insisted that if the costs of the execution of the ESO are borne by the executing state, the issuing state – if it considers that pre-trial hearings are needed -should cover the necessary transport costs. The issuing state is the one putting person on trial so that state should cover the costs; the saved costs in prison detention should cover the travel costs.

#### *The importance of proper legal representation*

- 48 Legal representation is needed during bail hearings and all hearings related to alleged breaches of the bail conditions. Without proper legal representation, suspects are more likely to be denied bail and placed on remand.
- 49 However, there are still countries in Europe without a proper legal aid system. Further development and facilitation of mutual recognition of foreign decisions is disputable in the absence of minimum standards of procedural rights across Europe.
- 50 Legal representation is even more important where the Framework Decision provides for a discretionary decision of the judges to send the suspect back to his country of residence. Suspects might face specific human rights risks in their country of residence and, in such situations, they must receive proper legal representation.

#### *Practicability of the transfer*

- 51 There may be practical problems implementing these pretrial transfers. Many countries have trouble transferring prisoners post-conviction, and to do such a transfer during the pretrial stage may not be possible.

#### *Video Conference / E-Justice*

- 52 The proposals could be problematic in building a defense case. It may be more difficult to mount a defense when the defendant is not in the country in which he's accused and does not have regular access to his lawyer.
- 53 The issue of video-conference was discussed briefly. Participants disagreed on the existence of risks inherent to the use of video conferencing. However, they agreed that although it might be acceptable for pretrial hearings, it should not be used in the actual trial.

### **Item 8 - Feedback Session**

- 54 LEAP members felt the discussions had been productive, and encouraged FTI to make appropriate representations based upon the discussions.
- 55 Dennis and Catherine thanked all members for their attendance and active participation, and reassured the group that FTI would report back to members on action taken as a result of the discussion.