The Law Societies
JOINT BRUSSELS OFFICE

Brussels Agenda

August 07

The Law Societies' monthly publication with the latest EU news

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European Arrest Warrant report card – Member States must try harder

The Commission report on the implementation of the European Arrest Warrant (EAW) since 2005 was published on 11 July 2007. The key message is that the European Arrest Warrant is a success, but there is still work to do. Nearly 6,900 warrants were issued in 2005 by the 23 Member States that sent in figures - twice as many as in 2004. Unofficial statistics for 2006 confirm this upward trend. In over 1,770 cases, the person wanted was traced and arrested. Under the EAW, the time required by Member States to execute requests is much shorter than under the old extradition procedures. Under the old extradition procedures, the average time taken to execute requests was a year; in 2005, using the EAW procedures, the average time taken to execute requests is 43 days; in 2005, using the EAW procedures and where the person consents to surrender, it is 11 days. The comparable statistics for 2004 were 45 days and 15 days respectively.

These times are EU-wide averages though. The UK and Ireland take much longer than the average time, sometimes exceeding the absolute maximum time limit of 90 days. In 2005, the Commission noted around 80

cases (5% of surrenders) where the 90 day time limit of the Framework Directive was exceeded. The report states that this is 'something the Commission very much regrets'.

Practitioners in the UK have rejected this criticism, suggesting that the UK is seeking to strike a fair balance between rapid decision-making and ensuring a fair process. The longer time taken actually operates for the benefit of the defendant in ensuring that there is proper process, with due consideration for human rights and procedural safeguards for the defendant, before they are surrendered. Whilst recognising that this delay contravenes an explicit provision of the Framework Decision, it is suggested that these are necessary steps to ensure that decisions regarding individual EAW cases are compliant with the UK's obligations under the European Convention of Human Rights.

The report notes the constitutional challenges to the legality of the EAW in Poland, Germany and Cyprus, and the recent judgement given by the European Court of Justice in the case of Advocaten voor de Wereld. It notes that 'these difficulties' have been overcome and are no longer obstacles to the application of the EAW.

Some Member States have extended the scope of the EAW in their implementing legislation. In Belgium, the national state can take over execution of the sentence of the wanted person; in Hungary, 'accessory surrender' is possible - where the EAW concerns not only an offence covered by the Framework Directive, but also offences outside the Framework Directive's scope; and in the Netherlands, Sweden and Poland, the state can provisionally arrest a person who is the subject of an Interpol alert issued by a MSS which is not yet party to the Schengen system. The Commission report states that these measures deserve to be considered good practice for those MSS which do not as yet afford the same possibilities.

Finally, the report notes that the principal shortcomings highlighted in transposition across the EU have largely not been remedied. 12 out of the EU27, including the UK, are identified as not having complied fully with the Framework Directive. The following defects in transposition in the UK are specified - modification of the required minimum sentence thresholds - article 4(7)b; reintroduction of double criminality checks where part of the offence is committed on the UK's national territory – article 2; introduction of grounds for refusal, not provided for in the Framework Directive, article 3; the imposition of additional conditions – article 5(1). The report notes that the UK and Ireland seem to ask systematically for additional information, or even to insist on the arrest warrant being re-issued – a requirement which poses problems for certain countries whose legislation does not allow this and which lengthens proceedings considerably.

At the moment, the Commission can only issue report cards for Member States, highlighting what it considers best practice, and regretting failures. Under the new reform treaty, the Commission will have the power to take Member States to the European Court of Justice. In future, the report card may carry the threat of litigation.

WEBLINKS

- **Report from the Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States**

LEGAL FEES
Cap on legal fees in Poland causes concern

The Law Society of England and Wales has expressed grave concern about the Polish government's plan to cap legal fees, arguing that the cap could be the start of an attempt to exclude foreign competitors from Polish markets. The draft legislation will introduce a schedule of fixed fees for legal services, and will impose a maximum fee of around £40 per hour for legal advice. The Law Society is lobbying against this legislation in co-ordination with Polish law firms. The Law Society has also warned that passing this legislation is an anti-competitive move which may result in the mass exodus of British law firms, which would then have economic consequences for businesses in Poland. The Law Society's view is that the Polish government's plan to cap all legal fees will make it financially impossible to provide legal services of the highest standard.

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MONEY LAUNDERING
ECJ rules on obligation to report

At the end of June the European Court of Justice considered a question posed by the Belgian Constitutional Court in relation to the Second Money Laundering Directive. The *Ordre des barreaux francophones et germanophone* made two applications to the Belgian Constitutional Court to have parts of the Belgian law which transposed the Directive into national law annulled. Under this national law, lawyers who held any suspicion of money laundering were obliged to inform the relevant authorities. The *Ordre des barreaux francophones et germanophone* suggested that this imposition of an obligation to report was an unjustifiable intrusion on legal professional privilege and the independence of lawyers. The question referred to the ECJ was whether Article 1(2) of Directive 2001/97 is contrary to the right to a fair trial contained within Article 6 ECHR, and, as a consequence, Article 6(2) TEU. The Court rejected the claimants' position, arguing that the obligations imposed upon lawyers only apply in so far as they advise their clients in certain financial or real estate transactions. As these activities take place outside of judicial proceedings, they fall outside the scope of the right to a fair trial. Lawyers are exempted from the obligation to provide information to the authorities as soon as they are involved in instituting or attempting to avoid legal proceedings. An exemption such as this was held to be sufficient to safeguard the right to a fair trial.

WEBLINKS

- **Judgment in Ordre des barreaux francophones et germanophone et al v Council (C-305/05)**

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CODES OF CONDUCT
Parliament discusses rules for cross-border services providers

In July, the European Parliament's Internal Market and Consumer Protection committee voted on a report by Lasse Lehtinen MEP, examining the obligations of cross-border service providers. The report includes a call for the European Commission to draw up a work programme to assess the need to strengthen consumer confidence in cross-border trade of services by way of harmonising obligations of cross-border service providers. The Solicitors Regulation Authority of England and Wales has expressed strong concern on this issue and doubted whether there is a need for such an initiative, particularly as the Services Directive is in the process of being transposed into domestic legislation. The report will be submitted to the plenary session in September.

WEBLINKS

- **Lehtinen draft report on obligations of cross-border service providers**

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Law Society of Scotland debates alternative business structures

The Law Society of Scotland approached its London members directly for the first time to canvass their views on how the Society can help them to remain competitive in a changing legal services market The Society's Vice President and Chief Executive lead the discussion, which explored the regulatory challenges from the Clementi Review and the proposed Services Directive, the issues around creating alternative business structures and the impact that the reforms in England and Wales will have on the Scottish legal profession.

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Profiling the profession - Scottish research published

More than 3,000 Scottish solicitors participated in a recent survey conducted by the the Law Society of Scotland on equality. The results dispelled a number of myths about the gender and class make-up of the Scottish legal profession. Fewer than 6% of the profession had a father who was a solicitor and the profession now comes from social backgrounds which broadly represent Scotland's population. The study also predicted that there will be greater numbers of women than men in the profession by 2011. Scottish firms increasingly emphasise work/life balance, the study revealed. 24% of the profession have taken a career break, and over a third of those who have taken a career break have done so for reasons other than maternity leave. 22% of survey respondents felt that they had been discriminated against at some point in their career, and more than one third of those who felt they had been discriminated against were under 35. The Law Society of Scotland has pledged to address this issue, engaging with firms to ensure that their working practices are not discriminatory.

WEBLINKS

- **Equality And Diversity In The Legal Profession In Scotland**

Law Society roundtable on “one share, one vote”

On 12 July, the Law Society of England and Wales hosted a discussion event on the European Commission’s attempts to bolster shareholder democracy. Practitioners and industry experts were joined by an official from the Commission to discuss its work on the principle of “one share, one vote” or proportionality. This would mean that the same voting rights would attach to all shares in listed companies. Debate centred on the extent to which enhanced transparency rules should apply to companies and investors when the principle is not observed - in other words where enhanced control mechanisms exist. The Commission is currently conducting an impact assessment on this matter. A detailed note on the event is available from the Brussels office.

COLLECTIVE REDRESS
Commission brainstorming on next steps

On 29 June, the European Commission held a “brainstorming” event in Leuven to discuss the issue of collective redress for consumers, as part of its preliminary considerations of this issue. While the Commission emphasised that it is keen not to import the excesses of a US-style class action system, it continues to seek comments on the problems or barriers that consumers face when seeking redress. While some participants commented that the extent of the “problem” is unknown, Commission surveys do seem to demonstrate that consumers are reluctant to bring small claims because of the cost and time involved. Experience of bringing group or representative litigation varied amongst the participants. Discussions also touched on questions of funding and on the merits of opt-in and opt-out systems for collective claims. It is expected that the Commission will announce the preliminary results of a study being conducted on this issue and possible avenues for further work in November 2007. A detailed note on the event is available from the Brussels office.

WEBLINKS

- **Study by the University of Leuven on alternative means of consumer redress**

ENVIRONMENTAL CRIME
Parliament discusses and the Court raises doubts

The European Parliament's Legal Affairs Committee held an initial discussion of a proposed directive that would align Member States criminal sanctions for environmental offences on 25 June 2007. The proposal is the successor to a framework decision on the same subject, annulled by the European Court of Justice in September 2005. On 28 June 2007, Advocate General Mazák gave an Opinion on a legal challenge by the Commission to the Framework Decision on ship-source pollution. While upholding the competence of the Community to adopt criminal law measures that are necessary to enforce Community law, the Opinion noted that a directive should not specify the type or level of criminal sanction beyond stating that Member States must ensure they are "effective, proportionate and dissuasive". This puts into doubt provisions of the proposed directive on environmental crime, as well as those contained in another proposal on infringements of intellectual property rights. Discussions are set to continue in the autumn.

- **Advocate General's Opinion in case C-440/05 Commission v Council**
- **Proposal for a Directive on the protection of the environment through criminal law**
- **European Parliament Working Document on the protection of the environment through criminal law**
- **Law Society of England and Wales response to a proposal for a Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights**

SERVICE OF DOCUMENTS
Common Position reached on new Regulation

Following a five-year review by the Commission of the operation of Regulation 1348/2000 on the service of documents in civil and commercial matters, the Council has reached a common position on a replacement Regulation designed to make the process quicker and more certain. The new Regulation introduces an obligation on receiving states to effect service within one month of receipt and sets a time limit of one week for the addressee to refuse service. New obligations are added to ensure that the addressee is advised of their right to refuse service, and a rule on the consequences of refusal. Member States are required to set a proportionate fixed fee for service. In an attempt to keep costs down Member States are also required to accept postal service, provided that there is an acceptable form of receipt. The Regulation will receive final approval towards the end of the year and enter into force shortly after.

- **Common Position adopted by the Council on the service of documents in civil or commercial matters**

COMPANY LAW
Commission publishes vision for simplifying EU business environment

On 12 July, the European Commission published a Communication on simplifying EU rules in the areas of company law, accounting and auditing. The Communication proposes two options for the simplification of directives in these areas: either to review all existing directives with a view to limiting them to deal only with specific cross-border problems; or to focus on concrete, individual simplification measures. The Commission suggests that simplification of the body of European company law that concerns cross-border matters and accounting and auditing is best achieved by introducing individual simplification measures, such as some exemptions from accounting rules for small business. Stakeholders are invited to submit their views on these proposals by mid-October 2007. On 11 July 2007, the European Parliament approved a proposal to simplify the 3rd and 6th Company Law Directives, by removing the requirement for expert reports during the drafting of terms of mergers or divisions. This proposal must now be approved by Member States.

WEBLINKS

- **Communication on a simplified business environment for companies in the areas of company law, accounting and auditing**
- **European Parliament approved text of proposed Directive to simplify the 3rd and 6th Company Law Directives**

ASYLUM AND IMMIGRATION
Green paper on the future Common European Asylum System

The European Commission wants EU Member States to consider creating a Common European Asylum System (CEAS), with a single procedure for assessing asylum applications, and a single protection status for people allowed into the EU on humanitarian grounds. The Commission published a Green paper on asylum on 6 June, launching a first stage consultation. The responses to the consultation will shape the second stage of the construction of CEAS. It is anticipated that the proposal for CEAS will be adopted by the end of 2010. Four years ago, the "Dublin system" for asylum was implemented, intended to ensure that asylum seekers have their claim processed in the first EU member state where they declare themselves. Under this system, if the asylum seekers make a second claim in another Member State, they ought to be sent back to the first country where they applied. This system has been criticised for putting the responsibility of processing asylum seekers entirely on frontline, pre-dominantly southern Member States, such as Malta, Spain and Italy. However, asylum and immigration remain politically difficult, and persuading recalcitrant Member States to share the burden more equally may be a daunting task. Written responses to the Green paper should be sent to the Commission by 31 August. There will be a public hearing on the Green paper on 18 October.

WEBLINKS

- **Green Paper on the future Common European Asylum System**

SPORTS LAW
EU makes first move into sports law

On 11 July 2007, the Commission sought to spark an EU-wide debate on the social, economic and organisational aspects of sport by publishing its "White Paper on Sport". Until now, despite high profile cases such as the ECJ ruling in "Bosman", the EU's involvement in sport has been limited to competition law and internal market rules, and only in so far as it constitutes an economic activity. The forthcoming Reform Treaty will give the Commission new powers to make legislative proposals in sporting matters. The substance of the White Paper covers the role of sport in society, enhancing public health and other matters. It also deals with the organisation of sport, covering free movement of players, protection of minors and regulation of agents, corruption and transfers. The Commission will follow up the White Paper with a period of structured dialogue with stakeholders and Member States, and will organise a conference in autumn 2007.

WEBLINKS

- White Paper on Sport

Corrigendum: Brussels Agenda July 2007 made reference to the Framework Decision on procedural rights. The article inaccurately reported that a last minute compromise deal of a legislative initiative only in relation to cross-border cases was rejected by a group of Member States, including the UK and the Republic of Ireland. The text under discussion was a Presidency text that covered all criminal proceedings and the Council were unable to reach agreement on this text. A draft Framework Decision (proposed by the UK and others) in relation to cross-border cases, plus a Political Resolution providing non-binding practical measures had been under discussion at the April Council.

Criminal sanctions for employers – a review of the UK situation

The European Commission has announced a proposal for a Directive to impose criminal sanctions on employers of third country nationals who are illegally staying or working in breach of their residence. Illegal employment is regarded as one of the most important factors encouraging illegal immigration into the EU. Small and medium sized enterprises and seasonal employers are identified as key areas where illegal employment takes place. The objective of the proposed Directive is to penalise employers of illegally-staying third country nationals, in order to reduce illegal immigration. The proposal will not apply to EU national workers from the 27 Member States.

It has only recently (and controversially) been ruled by the European Court of Justice that the EU has competence to impose criminal sanctions in respect of breaches of EU law – the so-called "First Pillar".

In the UK there has already been a shift in the burden of proving employees' legitimacy onto employers with the introduction of new civil and criminal penalties in the Immigration and Asylum and Nationality Act 2006. Neither of these provisions are currently in force. The UK's Border and Immigration Agency has initiated a consultation process on the proposed implementation of the powers in the 2006 Act. The consultation document stresses that the overall objectives are –

(a) to clarify the rules about who is allowed to come to the UK and why, thus helping employers benefit from migration; and

(b) to gather as much information on those travelling to the UK before they arrive (including biometric visas) in order to implement a more effective border security system.

All migrants will be required to have a business sponsor. All businesses which sponsor migrant workers will be rated either A or B according to good practice criteria. A register of accredited business sponsors will be maintained. Unless a business is accredited and rated A or B, it will not be able to sponsor a migrant worker. Sponsors who fail to comply with their obligations will be downgraded or removed from the register.

Meanwhile in the EU, the proposal will now be discussed by the European Parliament, debated by the Council of Ministers and, assuming everyone can eventually agree, adopted. This is likely to take a few years. The UK has the right to choose whether it will opt into the EU measure or not. If it does opt in, and the measure still resembles the current proposal, a somewhat different system is on offer. The new EU proposal does two things which the current UK consultation does not -

(a) it requires employers to pay outstanding wages, taxes and social contributions for the person working irregularly;

(b) it deals with the sub-contracting issue by making the main (and any intermediate) contractor liable for the fines or offence as well.

The current UK system is designed to focus on businesses that have a continuous flow of international employees, placing them under the microscope with visits from the authorities, follow up visits, checks of documents and files etc. The new EU proposal aims to concentrate on bad employers, focusing more on making sure the employees (and the taxman) get paid and preventing avoidance using the sub-contractor liability argument. Either way, it looks like human resources departments throughout Europe are going to be under increased surveillance regarding foreign employees.

Biography

Louise Hodges is a partner at Kingsley Napley and specialises in fraud and business crime litigation. She is currently the Secretary of the European Criminal Bar Association and a member of the EU Committee.

Professor Elspeth Guild is a partner at Kingsley Napley and professor of European Migration Law at the University of Nijmegen in Holland. She is currently Special Advisor to the House of Lords Inquiry into Economic Migration in the EU.

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- **Directive 2007/36 of 11 July 2007 on the exercise of certain rights of shareholders in listed companies**
- **Commission launches public consultation on new anti-discrimination measures**
- **Green Paper on the adaptation to the negative effects of climate change**
- **24th Annual Report from the Commission on monitoring the application of the Community Law (2006)**

About us

The Law Society of England & Wales set up the Brussels office in 1991 in order to represent the interests of the solicitors' profession to EU decision-makers and to provide advice and information to solicitors on EU issues. In 1994 the Law Society of Scotland joined the office and in 2000, the Law Society of Northern Ireland joined. The office follows a wide range of EU issues which affect both how solicitors operate in practice and the advice which they give to their clients. For further details on any aspect of our work or for general enquiries, please contact us: **brussels@lawsociety.org.uk**

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