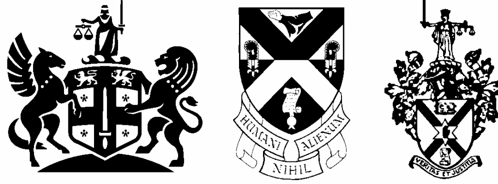

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The Brussels Office Law Reform Update Series

Judicial Co-operation in Criminal Matters

April 2006

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- **WHAT'S NEW?**

- The Austrian Presidency's legislative priorities are: the European enforcement order and transfer of sentenced persons between Member States of the EU; the European Evidence Warrant and further consideration is to be given to procedural safeguards.
- The **European Evidence Warrant** (EEW) was discussed at the Justice and Home Affairs Council on 21 February. Debate centred on the definition of offences. The Justice and Home Affairs Council will address this issue at the end of April.
- The JHA Council in February also dealt with the formal adoption of the **Directive on data retention**. The Directive relates to the provision of public electronic communication services and will oblige telecommunications firms to retain data on phone calls, emails and other internet data for between six months and two years.
- Negotiations have come to a halt on the framework decision on **procedural safeguards**, but the Austrian Presidency has stated that it will continue to work on the issue of procedural safeguards and fundamental rights. The Council's high level working group on criminal law matters has been asked to assess whether the initiative provides added value in relation to the European Convention on Human Rights.
- A Green Paper and public consultation on the conflicts of jurisdiction and principle of ***non bis in idem*** in criminal proceedings was published at the end of December 2005. The Commission is hoping to produce a legislative proposal sometime this year.
- Council Decision 2005/876/JHA on the **exchange of information** extracted from criminal records was adopted on November 21st 2005. It is to be implemented into national law by 21st May 2006.
- A similar proposal, a draft Framework Decision on the **organisation and content** of the exchange of information extracted from criminal records between Member States, was presented in December 2005. It is designed to replace traditional mutual legal assistance provisions, to speed up the transfer of information and establish a European format for a criminal record.
- A Green Paper and public consultation on **presumption of innocence** is due to be published at the end of April.
- A proposal on "**euro-bail"** is due to be published at the end of May. This will be a draft framework decision on mutual recognition of non-custodial supervision orders. Essentially to enable a "foreign" defendant to undertake their bail conditions in their own country/country of habitual residence on the condition that they return to trial.
- In June, the Commission is to release a Communication on creating an **evaluation mechanism** in the field of justice and home affairs, whereby the implementation of existing legislation could be monitored. This represents a new type of initiative in this sector.
- The Commission is currently 'reflecting' on **decision-making policy** in justice and home affairs matters, analysing how the current Treaties could pave the way for a move towards qualified majority voting, as opposed to the current requirement for unanimity in most areas.

• JUDICIAL CO-OPERATION IN CRIMINAL MATTERS

Introduction

The creation of an "area of freedom, security and justice" is a major issue on the European Union agenda. The justification for the creation of a "European Judicial Area" is perceived as the right of each European citizen to expect the Union to address the threat to their freedom and legal rights posed by serious and/or cross-border crime.

In October 1999 a special EU justice summit at Tampere, Finland, agreed the "Tampere Conclusions" which set out three key aims for justice and home affairs: mutual recognition, approximation of procedural law and approximation of substantive law.

Mutual recognition of final decisions between Member States is a process by which a judgment handed down by a judicial authority in one Member State is recognised and enforced by the judicial authorities of another. The Tampere Conclusions call for the principle of mutual recognition to be the "*cornerstone"* of judicial co-operation in civil and criminal matters. The Commission asserts that the principle of mutual recognition is founded on notions of equivalence and trust and that enhanced mutual recognition would facilitate co-operation between authorities and improve the protection of individual rights. The European Court of Justice has highlighted the principle of mutual recognition as a pre-requisite for judicial co-operation.

The proposals aimed at the **approximation of law and procedure** are designed to facilitate mutual recognition by creating common standards. The theory is that, for mutual recognition to thrive, each Member State must have confidence in the others' judicial systems. The Commission argues that setting minimum common standards is the best way of ensuring uniform protection of individual rights throughout the Union. However, some national governments argue that safeguards should be dealt with at national level and under the auspices of the ECHR, not the European Union. Approximation of substantive law is very controversial and any moves to undertake this have been met with resistance from Member States.

These Tampere Conclusions have now been reassessed and on 5 November 2004, the European Council adopted a new policy programme, the Hague Programme. This sets out a new comprehensive programme for 2005-2009 on strengthening the EU as an area of freedom, security and justice. The Commission and Council have determined a more detailed Action Plan with a list of measures for implementation of this programme. Under the Finnish presidency (July-December 2006) another re-assessment of priorities will take place.

The European Commission will propose legislation, either based on provisions of the European Union Treaty or at the behest of the Council of Ministers (the Member States, sitting collectively). Member State governments also have the right to propose legislation. Legislation will usually take the form of a Framework Decision. A proposal will be discussed in the European Parliament, in the Committee on Civil Liberties, Justice and Home Affairs, but the opinion of the Parliament is not binding on the Member States. For a legislative instrument to become law Member States have to reach unanimous agreement. That legislative instrument

then needs to be implemented, or “transposed”, into national law. For example the Framework Decision establishing a European Arrest Warrant was transposed as part of the Extradition Act 2003.

The European Commissioner for "Justice, Freedom and Security" is Italian, **Franco Frattini** (a former Foreign Minister). The Director General is Jonathan Faull. The Presidency is currently held by the Austrians until July 2006 when it will be handed over to the Finnish.

This paper sets out some of the main provisions and proposals in respect of measures relating to criminal law at EU level. We have endeavoured to provide an update on recent developments rather than repeat explanations of longstanding proposals. ***The most recent information is highlighted or is introduced by a title in bold italics.***

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- ## HAGUE PROGRAMME ACTION PLAN

The Commission and Council have produced an Action Plan for the implementation of the political priorities set out in the Hague Programme. There is a heavy programme in criminal law in the Action Plan, including the following specific proposals:-

Legislative proposals for 2005

Area of law	**Proposal** **Year: 2005**
Criminal justice	Communication on mutual recognition of decisions in criminal matters and reinforcement of trust between Member States.
	White Paper on the exchange of information on convictions and the effect of such convictions in the EU.
	Proposal on taking into account convictions in Member States in the course of new criminal proceedings.
	Proposal on the transmission to, and keeping by, the Member State of nationality of information on criminal convictions.
	Communication on the creation of an index of non-EU nationals convicted in an EU Member State. **Not yet published**
	Initiative on the European Enforcement Order and the transfer of sentenced persons between Member States.
	Proposal on mutual recognition of non-custodial pre-trial supervision measures (i.e. bail). **Not yet published**
	Communication on disqualification.
	Initiative on the recognition and enforcement in the EU of prohibitions arising from convictions for sexual offences committed against children.
	Green Paper on conflicts of jurisdiction and double jeopardy (*ne bis in idem*).
	Green Paper on presumption of innocence. **Not yet published**
	Initiative to facilitate the prosecution of road traffic offences. **Not yet published.**

Area of law	Proposal Year: 2005
Prevention and investigation of crime	Proposal on the retention of data processed in connection with the provision of public electronic communication services for the detection, investigation and prosecution of criminal offences.
	Exchange of law-enforcement information: Proposals for • the establishment of a principle of availability of law enforcement relevant information; • adequate safeguards for the transfer of personal data for the purpose of police and judicial co-operation in criminal matters; • common EU approach to use of passenger data for border and aviation security and other law-enforcement purposes; • access by law-enforcement to the Visa Information System; • mutual consultation of DNA databases
Organised crime	Communication on developing a strategic concept on tackling organised crime.
	Communication on crime-proofing of legislation and design of crime preventive measures into products and services.
	Legislative package including instruments on counterfeiting.
	Communication on trafficking in human beings.
	Second report on money laundering and tracing and seizure of proceeds of crime. **Not yet published**
	Communication and proposal of Directive on improved transport security through creation of an area of police and judicial co-operation on the Trans European Transport Networks.

Legislative proposals for 2006

Area of law	Proposal Year: 2006
Criminal justice	Legislative proposal on creation of an index of non-EU nationals convicted in an EU Member State.
	Proposal on driving disqualifications (reformatting the 1998 Convention).
	Report on implementation of the Framework Decision on execution in the EU of orders freezing property or evidence.
	Report on implementation of the Framework Decision on application of the principle of mutual recognition to financial penalties.
	Proposals on conflict of jurisdiction and the *ne bis in idem* principle.
	Green Paper on handling of evidence.
	Green Paper on default (*in absentia*) judgments.
	Recommendation on minimum standards for capturing and exchanging electronic evidence.
Terrorism	Proposal for preventing misuse of charitable organisations for the financing of terrorism.
	Communication on results of the peer evaluation mechanism on terrorism in the 25 Member States.
Organised crime	Action Plan on private/public partnerships to protect public organisations and private companies from organised crime.
	Communication on cyber-crime and cyber-security policy.
	Recommendation and/or proposal to enhance transparency of legal entities to reduce vulnerability to infiltration by organised crime.
	Human trafficking: review of present legislation and proposals for its further development.
	Traffic in human organs, tissue and cells: Review of present legislation and proposals for its further development.

Legislative proposals for 2007

Area of law	Proposal Year: 2007
Criminal justice	Proposal on recognition and execution of alternative sanctions and on suspended sentences.
	Proposal on minimum standards relating to the taking of evidence.
	Proposal on default (*in absentia*) judgments.
	Proposal on approximation of criminal sanctions.
	Proposal on wilful destruction of documentary evidence.
	Proposal on protection of witnesses and collaborators of justice.
Terrorism	Definition of need and scope for legal instruments to ensure that all Member States can freeze assets of designated persons on a preventive basis.
Organised crime	Review and strengthen present legislation on confiscation of criminal assets, whether or not requiring criminal conviction.
	Proposal for approximation of legislation regarding elements of and penalties in the field of tax fraud.
	Proposal on identity theft and identity management measures including a database of identity documents.

Legislative proposals for 2008

Area of law	Proposal Year: 2008
Criminal justice	Proposal completing the European Evidence Warrant.
Organised crime	Examination of standards for return of confiscated or forfeited assets as compensation or restitution to identifiable victims of crime or charitable organisations.
	Research on further areas of approximation e.g. for illicit arms trafficking, racketeering and extortion.

There are no major legislative proposals set out in the Action Plan for **2009** in the area of criminal law.

A. LEGISLATION IN FORCE

EUROPEAN ARREST WARRANT

Legislation: European Arrest Warrant

Status: In force and implemented in the UK by the Extradition Act 2003.

The European Commission adopted a revised report on the application of the European Arrest Warrant - January 2006. ***European Parliament published a report on 27 February, followed by the adoption of a resolution on 15 March. The House of Lords EU Committee released a report on recent developments on 4 April 2006.***

The **European Arrest Warrant** (EAW) is the key mutual recognition initiative in criminal law. Entering in to force on **1 January 2004,** it replaced the traditional extradition system within the EU with an arrest warrant that could be issued by Member State authorities, valid for the entire territory of the European Union. In general, a test of "dual criminality" (i.e. that the act to which the warrant related is an offence in both the issuing and executing states) is required, although for a list of thirty-two offences no such test is necessary. The EAW was transposed into UK law by the Extradition Act 2003.

German law implementing the EAW declared a nullity: The German Federal Constitutional Court decided on 18 July 2005 that the German law implementing the EAW is a nullity. Until the Federal Parliament has passed a new law implementing the EAW, extraditions may only take place from Germany under the law in force before the enactment of the measure implementing the European Arrest Warrant. This may present difficulties for any extradition from Germany to another EU Member State or vice versa, since the Framework Decision on the EAW was intended to replace previous intra-EU extradition arrangements. It may also present a fundamental difficulty for the mutual recognition programme, the essence of which is that court orders from one Member State should be recognised in another without question and without the need for further procedure. [1]

On 27 April 2005 the **Polish Constitutional Court** found that, as a result of a similar provision on extradition in Poland's constitution, Poland cannot constitutionally surrender its citizens under an EAW. However, by means of a power in the Court to suspend the effect of its decisions, it has allowed the Polish law implementing the EAW to remain in force for eighteen months following its decision. [2]

The **Spanish High Court** has recently refused to recognise warrants issued by Germany, adding to the problems faced by the EAW. As a result, Germany will have to revert to traditional, lengthier extradition procedures. The ruling, made on 21 September 2005, came in

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[1] An English-language press release summarising the decision may be found on the German Federal Constitutional Court website.

2 An English-language summary of the Polish Court's decision is available on its website.

response to Germany's release in July of a Syrian-German man wanted in Spain for alleged involvement in the September 11 terrorist attacks on the US. Madrid's request was rejected after the German Federal Constitutional Court's July decision nullifying the national law implementing the EAW. The Spanish court has decided to apply the principle of non-reciprocity and has therefore annulled the effects of German warrants seeking the arrest of approximately 60 German nationals living in Spain.

In contrast to the series of setbacks recently suffered by the EAW, it was upheld by the **Italian Supreme Court** in September, when a warrant issued by the UK was challenged by a man wanted in connection with the failed terrorist attacks in London in July 2005. The Italian court rejected his appeal and allowed the authorities to transport him back to London. The case has been viewed as a successful test of the EAW, in particular of the speed of extraditions made under it.

European Arrest Warrant law challenged in Belgium*:* On 13 July 2005, the Belgian court of arbitration asked the European Court of Justice for advice on the legality of the EAW. The European Court of Justice is empowered to give preliminary rulings on the validity and interpretation of Framework Decisions, where a Member State has accepted jurisdiction. It will firstly decide whether the warrant should have been introduced by a means of a Convention instead of a Framework Decision. Secondly, the Court will examine the Framework Decision's partial abolition of the 'dual criminality' principle, asking why dual criminality has been abolished specifically for these offences and whether this flouts the EU Treaty's fundamental principles of equal treatment and non-discrimination.

Revised report on application of EAW published by the Commission in January 2006
The report is "revised" in the sense that it now takes into account the application of the EAW in Italy (late in transposing the instrument). The broad conclusions of the report are that there are divergences between Member States, notably on grounds for refusal to enforce, and also in terms of meeting the deadline for enforcement. It is worth recalling that the European Commission has no enforcement powers in relation to the incorrect or late transposition of framework decisions.

European Parliament recommendations

The resolution adopted by the Parliament on 15 March, which is based on an own-initiative report published on 27 February, sets out a series of recommendations and comments on the EAW to the Council. The Parliament acknowledged the difficulties of implementation which have occurred throughout several Member States, for example in Germany as described above, and encouraged the Council to address the resulting trust deficit between national courts. Furthermore, the Parliament recommended that the Council take measures against political interference in the application of the EAW, one of the draw-backs of the old extradition system. The Parliament would like the Council to submit an annual report on the measures it has taken to encourage compliance with the EAW throughout the Member States.

On a different note, the Parliament expressed regret at the limit of its involvement in the adoption of the EAW, a so-called 'third-pillar' instrument (Title VI of the Treaty on European Union), which meant that it played a purely consultative role and also that the European Court of Justice cannot control the eventual application of the EAW. Under Article III-260 of the draft Constitution (which, of course, has been shelved for the time-being), the Parliament would have

had an 'enshrined' right to take part in the evaluation process of a measure such as the EAW. In its report, the Parliament urged the Council to abide by the 'spirit' of this provision and involve both the Parliament and national courts in an on-going information exchange and consultation on the implementation of the EAW. Furthermore, Article 42 of the Treaty on European Union provides a 'bridge' which allows Member States to decide to bring a measure like the EAW into what is known as the 'first pillar' where it would be under the democratic control of the Parliament and judicial scrutiny of the European Court of Justice. The Parliament has called for the 'rapid activation' of this transfer measure.

House of Lords EU Committee Report

The purpose of the report was to draw the attention of the House of Lords to the Commission's recent report, referred to above, detailing the level and adequacy of EAW implementation throughout the EU and also to the constitutional case-law which has been generated as a result. The House of Lords report observed that not all Member States have construed the list of 32 offences in the same way. The report noted that a review would be helpful, especially in the context of this list being used for other purposes, i.e. the proposal for a European Evidence Warrant. The report highlighted the seriousness of the Belgian case against the EAW and the resultant destabilising effect on the system as a whole.

FREEZING OF ASSETS

Legislation: Framework Decision on the execution in the European Union of orders freezing property or evidence.

Current Status: Adopted at the Justice and Home Affairs Council on 22 July 2003. Transposition deadline was 2 August 2005.

The purpose of the Framework Decision is to establish the rules under which a Member State shall recognise and execute in its territory a freezing order issued by a judicial authority of another Member State in the framework of criminal proceedings. Freezing orders may be used for securing evidence or subsequent confiscation of property. This framework decision was implemented by the Crime (International Co-operation) Act 2003 sections 20 to 25, section 90 and schedule 4.

A supplementary Framework Decision from 2001 which dealt with definitions and sanctions relating to freezing of assets was scheduled for adoption in 2002. However, at the beginning of 2006 some Member States still had not implemented it. The Commission is to produce a second report on its implementation in the coming months. The first report was published in 2004.

COMPENSATION OF CRIME VICTIMS

Legislation: Council Directive 2004/80 on compensation for crime victims.

Current status: The Directive came into force on 29 April 2004. The implementation deadline was 1 January 2006, with the

exception of Article 12(2) for which the deadline was 1 July 2005.

The Directive requires that by 1 July 2005 each Member State must have a national scheme in place that guarantees fair and appropriate compensation to victims of crime. The Directive also creates a system for co-operation between EU Member State criminal compensation authorities. It will be possible for a victim of a violent intentional crime to make a claim to an authority in his or her own Member States, no matter where the crime occurred. The compensation must however be decided upon and paid by the Member State in which the crime occurred. Home authorities are required to assist the person making the claim. This system was to become operational by 1 January 2006. The UK has implemented this Directive via the Victims of Violent Intentional Crime (Arrangements for Compensation) (European Communities) Regulations 2005.

B. LEGISLATION TO BE IMPLEMENTED

INFORMATION SHARING ON CRIMINAL RECORDS

Legislation: Council Decision 2005/876/JHA of 21 November 2005 on the exchange of information extracted from the criminal record. Transposition deadline by 21st May 2006.

The aim of this Decision is to improve the existing machinery for sharing information on previous convictions so as to make cross-border co-operation more effective. It is the first step in a longer-term plan to improve information sharing on criminal records and establish mechanisms for the mutual recognition of previous convictions. The second phase is proposed in the draft Framework Decision, published in December 2005, on the organisation and content of the exchange of information extracted from criminal records between Member States.

CONFISCATION ORDERS

Legislation: Framework Decision on Crime-Related Proceeds, Instrumentalities and Properties.

Current Status: Adopted at the Justice and Home Affairs Council on 24 February 2005. Transposition deadline is 15 March 2007.

The purpose of this Framework Decision is to facilitate co-operation between Member States as regards the recognition and execution of orders to confiscate the proceeds of crime. Under the mutual recognition principle, a Member State will have to recognise and execute in its territory confiscation orders issued by judicial authorities of another Member State.

MUTUAL RECOGNITION AND ENFORCEMENT OF FINANCIAL PENALTIES

Proposal — Framework Decision on the Application of the Principle of Mutual Recognition to Financial Penalties.

Current Status — The Framework Decision was adopted by the Justice and Home Affairs Council on 24 February and must be implemented by Member States by 22 March 2007.

The Framework Decision applies the principle of mutual recognition in criminal matters to financial penalties of €70 or greater so that financial penalties imposed in one Member State may be enforced in another. Since the passing of this legislation, there has been a proposal for a European system for enforcement of fines for road traffic offences.

C. LEGISLATION PRESENTLY UNDER CONSIDERATION

EUROPEAN EVIDENCE WARRANT

Proposal: — European Evidence Warrant.

Current status: — The European Commission brought forward a proposal for a draft Framework Decision in November 2003. ***Discussed at the Justice and Home Affairs Council on 21 February. Due to be discussed at the Justice and Home Affairs Council at the end of April.***

This is a key judicial co-operation text, building on traditional mutual legal assistance arrangements. The proposal for a European Evidence Warrant (EEW) would create an order issued by a judicial authority in one Member State and enforced by police or other authorities in another Member State to obtain certain types of evidence for use in criminal proceedings. The Commission argues the EEW will be faster and have clearer safeguards for the issuing of a warrant and for its execution than existing procedures. Under newly-developed anti-terrorism agendas, its agreement is of particular relevance.

As originally conceived by the European Commission, the European Evidence Warrant was to replace the existing system of mutual legal assistance (MLA) in criminal matters. The Council (which has the ultimate decision-making power on the legislative text) has now decided that it should work alongside the existing system. It remains to be seen whether traditional MLA methods will be used or the EEW.

This proposal adopts the same approach to mutual recognition as the European Arrest Warrant (EAW). This means that an EEW, following translation, would be executed as if it had been issued according to domestic procedure. Like the EAW, there is a list of offences for which dual criminality (i.e. the act to which the warrant relates is an offence in both the issuing and executing states) is not required. This list includes all the offences on the equivalent EAW list, and adds the following:- infringement of road traffic regulations, smuggling, intellectual property offences, threats and acts of violence against persons, criminal damage, theft, and offences created in implementation of certain EU obligations. The Commission had proposed that the

power of an executing state to make a dual criminality test on an EEW would cease after five years, but the Council has decided that there should simply be a review at that time. Nevertheless, given the long list of offences (with no further definition) for which no such test is allowed, there is considerable scope for an EEW being issued in respect of an act that is not an offence in the executing state.

The proposal contains few specific safeguards for the issuing and executing States. These would be intended to supplement domestic law. In the issuing State, a EEW may be issued only by a judge, court, investigating magistrate or prosecutor. The issuing authority would have to be satisfied that it could obtain the objects, documents or data in a "comparable case" if they were on the territory of its own Member State. This would prevent use of the EEW to circumvent national safeguards on obtaining evidence. For example, it would ensure that prohibitions in the issuing State on obtaining evidence subject to legal, medical or journalistic privilege would apply equally where its judicial authorities were seeking such evidence from another Member State.

The fundamental right not to incriminate oneself is protected, and the *ne bis in idem* principle would be a ground for refusal to execute the EEW. There are additional safeguards restricting the time at which a search can take place and requiring written notice of a search. Legal remedies would also be required in the issuing and executing States when coercive measures were used to obtain evidence. A "territoriality clause" has been added by the Council, i.e. an executing Member State may reject an EEW where any of the acts constituting the offence were committed on its territory.

Council discussions – 21 February 2006

At the Justice and Home Affairs Council on 21 February, the issue of how an 'offence' should be defined was discussed. The Austrian Presidency suggested an approach, which was agreed by the majority of delegations, whereby the list of 32 offences would be unchanged and a Council Statement would be drafted to assist in interpretation of certain offences, such as racism and xenophobia. Furthermore, it was proposed that a 'recital' be introduced to allow for a peer evaluation on how the EEW is applied.

ACCESS TO CRIMINAL RECORDS AND MUTUAL RECOGNITION OF CONVICTIONS

Proposals:

White Paper on future measures for exchange of information of convictions and use of such information was issued on 25 January 2005.

A further draft Council Framework Decision on mutual recognition of criminal convictions was presented on 17 March 2005 ***and will be debated by the Council on 27 April 2006.***

Draft Framework Decision on the organisation and content of the exchange of information extracted from criminal records between Member States was published in December 2005.

Commission White Paper on exchange of information on convictions and effect of convictions

The Commission's white paper identified three difficulties with the present system: first, in identifying a Member State in which an individual has already been convicted; second, in obtaining information quickly and by a simple procedure; and third, in understanding the information provided. The Commission's proposed solution of a European index of offenders has, however, largely been rejected by the EU Council. The Council agreed three principles on exchange of information on criminal convictions: first, that exchanges of information on convictions must be based on bilateral communications between domestic criminal records offices; second, that each Member State should be required to record all convictions of their nationals from any part of the EU in their domestic criminal records; and third, that there should be an EU index of offenders for non-EU nationals. The Council requested the Commission to bring forward a proposal by summer 2005, but it has been delayed.

Draft Council Framework Decision on taking account of convictions in the course of new criminal proceedings

The Draft Council Framework Decision has not made much progress either in the Council or the European Parliament. It is to be examined by the Parliament's Civil Liberties, Justice and Home Affairs Committee and the Parliamentary rapporteur will be Demetriou Panayiotis, a Greek centre-right MEP. The aim of the Framework Decision is to require Member States to treat convictions in other EU countries as they would domestic convictions. In the UK, convictions are usually only taken into account at the sentencing stage. However, in other EU countries, a previous conviction may determine the procedure used by the court.

The House of Commons EU Scrutiny Committee considered the proposal to be unnecessary and that an exact equivalence of treatment of convictions from other Member States would be likely to operate unfairly.[3] It gave the example of the treatment of spent UK convictions in other countries. It considered the definition of "conviction" to be vague and believed the present definition could include a conditional discharge or binding over.

Draft Framework Decision on the organisation and content of the exchange of information extracted from criminal records between Member States.

This proposal is designed to complement Council Decision 2005/876/JHA on the exchange of information extracted from the criminal record which was adopted on November 21st 2005. The draft framework decision can be seen as "phase two" in relation to work on improving transfer of information. This draft Framework Decision is designed to replace traditional mutual legal assistance provisions in order to speed up the transfer of information. Under the proposal, central authorities in each Member State shall inform their counterparts in other Member States of any convictions handed down against their nationals. In order to facilitate the exchange of information, and indeed to improve mutual understanding, a standardised European format will be developed. A framework for establishing a computerised conviction information exchange will be put in place.

[3] House of Commons EU Scrutiny Committee, 2nd Report, 2005-06, section 6

MUTUAL RECOGNITION OF DISQUALIFICATIONS

Proposal:	Draft Framework decision on the mutual recognition of disqualifications from working with children arising from convictions for sexual offences.
Current status:	Proposal by Belgium presently under discussion in the Council of Ministers. The initiative needs unanimous backing from the Council to be adopted, with Parliament only being consulted. ***European Parliament's Civil Liberties Committee adopted a non-binding opinion on 13 March 2006.***

A disqualification is a type of penalty that does not always appear on a criminal record. Belgium has recently made a proposal for mutual recognition of disqualifications from working with children. This proposal is included in the Hague Programme Action Plan for 2005.

Currently, a person banned from working with children in one Member State can, in theory, get a job working with children in another Member State. Under the draft Framework Decision, all Member States would have to register "professional bans" i.e. a disqualification from working with children, in their criminal records. When sending criminal records to one another, they would have to mention the existence of the ban and state for how long it applies. The Member State in which the banned person presently lives (i.e. not the one in which he or she was convicted) would have to recognise and enforce that ban. A Member State could refuse to recognise the ban for any of the following reasons: the penalty is time-limited and it has jurisdiction to prosecute the offence; the convicted person had no chance to defend him/herself in person; the enforcing state has already convicted the person for the same offence.

If the duration of the ban exceeded the maximum period allowed by the enforcing state, it would be reduced to the maximum. The convicted person would have the right to petition the courts against the recognition but the barring order would stand until a final ruling was handed down. Should the Member State that originally banned the person from working with children review the case, for example by pardoning the convicted person, it would have to tell the Member State where that person is currently living.

Parliament's non-binding report

The Parliament backs the draft Framework Decision but has suggested several amendments, for example, an amendment has been tabled to extend the grounds for refusing to enforce a foreign barring order, to take in to account the concept of *ne bis in idem* (double jeopardy).

Proposal: ***Commission Communication on disqualifications arising from criminal convictions (part of Hague Programme Action Plan)***

Current status ***Communication adopted on 23 February 2006.***

The Commission has released this Communication in order to clarify the concept of 'disqualification', to examine the current legislative framework at European level and to discuss the way forward. A disqualification is primarily preventative in object and effect, whereby a person who has been convicted of an offence is deprived of the ability to exercise certain rights. Given the free movement of persons within the internal market, the Commission stressed in its Communication that there is clear merit in recognising the effect of certain disqualifications throughout all the Member States of the Union.

The Annex to the Communication lists all the current instruments in place and includes legislation on combating sexual exploitation of children (Framework Decision 2004/68/JHA), corruption in the private sector (Framework Decision 2003/568/JHA) and abuse of the right to vote and stand for election at municipal and European elections (Directive 94/80/EC and 96/30/EC respectively). The Commission concluded that there is a relatively limited number of these instruments whereby a disqualification is automatically attached to the perpetration of a certain crime and examined two possible approaches:

- an EU wide disqualification automatically triggered by the commission of certain offences wherever they occur throughout the Union;
- extending the effect of a national disqualification to the whole EU territory.

Both approaches would require an improvement in the exchange of information on convictions and disqualification and, in addition, would necessitate a thorough impact assessment study on human rights before any legislation was proposed. The Commission concluded that it favoured the second option and pledged to pursue the work already undertaken. In terms of mutual recognition, the Commission indicated that a 'sectoral' approach was preferred and that progress would be focussed on those areas for which there already exists a common basis between Member States, for example, driving disqualifications.

MANDATORY TRANSFER OF PRISONERS

Proposal Draft Framework Decision on a European enforcement order and transfer of sentenced persons between Member States of the EU.

Current status: Proposal made by Austria, Sweden and Finland. ***Working document discussed at European Parliament's Civil Liberties and Home Affairs Committee on 21 March, deadline for amendments set for 21 April, vote scheduled for 15 May. To be debated by Justice and Home Affairs Ministers on 27-28 April and the Presidency hopes to finalise the proposal at the Justice and Home Affairs Council on 1-2 June.***

This proposal was made on 24 January 2005 by Austria, Finland and Sweden as it was perceived that the current system, governed by the 1983 Council of Europe Convention on the Transfer of Sentenced Persons, was slow and bureaucratic. The aim of the proposal is to speed up the process of transferring a sentenced person from one Member State to their 'home' Member State, where it is felt that 'optimum social rehabilitation' can be achieved.

This would enable a sentenced person to serve out the remainder of their sentence in the Member State of origin, where they are legally resident or where they have particularly close links. The original text has already been amended by the Council and the Parliamentary rapporteur, Ioannis Varvitsiotis, highlighted the following issues in his working paper:

- As currently drafted, the opinion of the sentenced person must be sought in relation to the transfer, but this opinion need not be taken into account. Therefore, consent would not be necessary to enable transfer (consent is required under the current rules). Some Member States are wary of this departure and have sought the opinion of the Council's Legal Service. It is a concern mirrored by certain MEPs and the rapporteur is calling for a definition of the meaning of 'opinion' and the responsibilities arising from it.
- The proposal does not provide for the victim(s) to be informed about the transfer.
- The Council has amended the proposal to include a procedure for adapting the sentence imposed in order to make it compatible, when necessary, with the law of the Member State to which the sentenced person is being transferred. The rapporteur has emphasised that this concept should be treated with caution as it could be contrary to mutual recognition.
- The proposal would oblige a Member State to accept a prisoner if the crime was one of the same 32 offences which have been identified for the purposes of the European Arrest Warrant. For these offences, no verification of 'double criminality' (i.e. that the act in question is a crime in both jurisdictions) would be required in order to compel one Member State to recognise and enforce a sentence imposed by another Member State.

These issues, and several more, will continue to be debated over the coming months. The proposal requires the unanimous support of the Council, with the Parliament playing a purely consultative role.

NON-CUSTODIAL SUPERVISION MEASURES AND PRE-TRIAL DETENTION

Proposal:	European Supervision Order (i.e. Bail).
Current Status:	The Commission published a Green Paper on mutual recognition of non-custodial supervision measures and pre-trial detention. The Commission is now working on a draft proposal that is to be published at the end of May.

The European Commission is looking into preparing a mutual recognition instrument relating to non-custodial supervision measures and pre-trial detention.

In its Green Paper the Commission identifies the problems relating to pre-trial supervision measures. It states that the excessive use (and length) of pre-trial detention is one of the main causes of prison overpopulation. Owing to the risk of flight, non-resident suspects are often remanded in custody, while residents benefit from alternative measures.

DOUBLE JEOPARDY AND CONFLICTS OF JURISDICTION

Proposal:	Green Paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings.
Current Status:	The Commission published a Green Paper at the end of December 2005 and launched a public consultation. The deadline for submissions was 31 March 2006. The Commission is expected to publish a legislative proposal by Autumn 2006. The Green Paper is accompanied by a staff working paper which contains most of the analysis that forms the basis of the debate.

In this Green Paper, the Commission outlines the possibilities for the creation of a mechanism which would facilitate the choice of the most appropriate jurisdiction in criminal proceedings, and also for a possible revision of the rules on *ne bis in idem*. The Commission paper starts from the premise that:

a) Crime is becoming more international in scale and therefore EU criminal justice is increasingly confronted with situations where several Member States have criminal jurisdiction to prosecute the same case.

b) Multiple prosecutions can affect the efficiency and duration of the respective proceedings. Moreover, multiple prosecutions can impose considerable additional burdens on the individuals involved. As a consequence, the concerned individuals can be subjected to disproportionate restrictions as parallel (and often repeated) national prosecutions can limit their freedom of movement and impair their rights and interests.

c) Multiple prosecutions are detrimental to the rights and interests of individuals and can lead to duplication of activities. They increase psychological burdens and the costs and complexity of legal representation.

d) In a developed area of freedom, security and justice it seems appropriate to avoid, where possible, such detrimental effects, by limiting the occurrence of multiple prosecutions on the same cases.

e) An adequate response to the problem of (positive) conflicts of jurisdiction would be to create a mechanism for allocating cases to an appropriate jurisdiction. Where prosecutions are concentrated in a single jurisdiction, an issue of *ne bis in idem* would no longer arise.

Currently, there are no binding rules at EU level which adequately deal with conflicts of jurisdiction in criminal matters while proceedings are ongoing. The current EU provisions neither require Member States to take concrete steps to avoid/solve conflicts of jurisdiction cases nor do they provide for a procedure/mechanism which would assist them in dealing with such questions. National authorities are free to institute their own parallel prosecutions on the same cases.

The only legal barrier is the principle of *ne bis in idem*, laid down in Articles 54-58 of the Convention Implementing the Schengen Agreement ("CISA" or Schengen Convention) (at page 58) However, this principle does not prevent conflicts of jurisdiction while multiple prosecutions are ongoing in two or more Member States and can lead to a situation of "first come first served" in terms of preference given to which ever jurisdiction can take a final decision first. The *ne bis in idem* principle can only come into play, by preventing a second prosecution on the same case, if a decision which bars a further prosecution (*res judicata*) has terminated the proceedings in a Member State.

The Commission argues that if a mechanism can be established that would lead to a balanced choice of jurisdiction, instead of conferring an exclusive effect to the "fastest" prosecution ("first come, first served"), discussions on *ne bis in idem* could be re-launched with increased prospects of success.

The Green Paper discusses the need to clarify certain elements and definitions in relation to *ne bis in idem* - for instance regarding the types of decisions which can have a *ne bis in idem* effect, and/or what is to be understood under *idem* or "same facts". The issue of derogations will be examined as well. Currently, Article 55 of CISA enables Member States to provide for exceptions, which are related to interests in prosecuting specific cases in certain jurisdiction (e.g. territoriality, national security offences or acts of officials of a Member State). The ECJ has developed important guidelines for the interpretation of the CISA, which shall be the guiding principles to any further steps by the EU legislator as regards the EU wide principle of *ne bis in idem.*

The ECJ has jurisdiction in criminal law cases to hear a preliminary reference from a national court where the Member State has conferred jurisdiction on the ECJ, via the mechanism of Article 35 TEU – the UK has not and therefore does not recognise the competence of the ECJ in this field. The following cases are of note in relation to the European Court of Justice.

More details can be found in the annex/staff working paper to the Green Paper at page 48. Gözütok & Brügge, Joined Cases C-187/01 and C-385/01; Miraglia (Case C-469/03); Hiebeler

(Case C-493/03); Van Esbroeck (Case C-436/04)[4]. Further preliminary rulings are to be expected in Gasparini Case (C-467/04), Van Straaten (Case C – 150/05), Bouwens (C-272/05) and Kretzinger (C-288/05).

• DATA RETENTION AND INFORMATION SHARING – EU LEVEL INITIATIVES

DATA RETENTION

Proposal*:* ***Directive 2006/24/EC*** on retention of data proposed in September 2005.

Current Status: ***Formally adopted at Justice and Home Affairs Council on 21 February 2006.***

Negotiations on this issue had been underway for some time. In April 2004, the UK, France, Ireland and Sweden put forward a proposal for a Framework Decision on retention of data processed for the purpose of prevention, investigation, detection and prosecution of crime and criminal offences including terrorism. However, there was great political and inter-institutional debate about whether the Member States acting within the field of police and judicial co-operation, the so called "third pillar", could take steps to legislate on issues that affect telecommunications companies - an area of law and policy that falls within the "first pillar". ***Ultimately a Directive on this issue was adopted and the Framework Decision dropped.***

In September 2005, the European Commission published its own proposal for a draft Directive on retention of data processed in connection with the provision of public electronic communication services. ***This Directive was formally adopted at the Justice and Home Affairs Council on 21 February 2006*** and will oblige telecommunications firms to retain data on phone calls, emails and other internet data for between six months and two years.

The Directive creates a much greater degree of harmonisation than that which was found in the draft Framework Decision, but it required both Council and Parliament backing to become law. The European Parliament reached agreement in December 2005.

Purpose of the Directive: to ensure that data is available for the purposes of investigating, detecting and prosecuting 'serious crime', as defined by each Member State in its national law. The Commission originally included the objective of "prevention" of crime in the text. This was deleted by Parliament, which concluded that the concept of prevention was "too vague" and could lead to abuse of the system from national authorities. Parliament also deleted the words "serious criminal offences such as terrorism and organised crime", choosing instead to use the term "serious crimes". Member States "shall have due regard" to the 32 serious crimes listed in the European Arrest Warrant.

[4] More detail on the Van Esbroeck case can be found in the Law Societies April ECJ Update

Key provisions

The following are some of the key elements of the new Directive:

- **Mandatory retention period**: six to twenty-four months for telephone, email and internet data.

- **Reimbursement of costs to telecoms firms**: to be regulated at national level (i.e. no mandatory reimbursement as originally proposed by the Commission and supported by the Parliament).

- **Type of data**: only 'traffic' and 'location' data can be retained. National authorities will therefore, for example, have a record of a number called, when it was called and from where it was called. The Directive does not authorise the recording of the content of any communication.

- **Unsuccessful calls**: defined as a communication where a telephone call has been successfully connected but is unanswered. Data on such calls only need be retained if a telecoms firm already stores such data.

- **Supervisory authority**: each Member State must designate the responsibility for monitoring the application of the Directive's provisions on the security of the stored data to a public authority. This authority must act with complete independence in exercising its functions.

- **Push system**: Member States must ensure that data retained in accordance with the Directive is only provided to the competent national authorities, in specific cases and in accordance with national legislation.

- **Sanctions**: unauthorised access or transfer of data will be punished by "effective, proportionate or dissuasive" penalties, either administrative or criminal.

- **Implementation**: deadline of eighteen months for telephone data, thirty-six months for internet data.

- **Review**: to take place three years after implementation. It will cover the types of data to be retained and mandatory retention periods. It will be up to the Commission to decide whether to propose amending the Directive.

- **Data protection and data security**: Member States will be obliged to ensure that providers of publicly-available electronic communications services or of a public communications network comply with, as a minimum, certain prescribed data security principles with respect to data retained in accordance with the Directive.

- **Future measures**: Member States are permitted to derogate from the mandatory retention period in certain circumstances. If a Member State wishes to gain an extension of the maximum retention period, it must immediately notify the Commission and inform all other Member States of the measures it wishes to take and the grounds

for introducing such measures. Within six months of a notification, the Commission will approve or reject the national measures suggested.

Post adoption issues

On 21 February, the Directive was formally adopted by the Council. However, both Ireland and Slovakia voted against the Directive and it is likely that there will be more controversy to come, with Ireland already threatening to challenge the Directive's legal basis before the European Court of Justice. In addition, prior to the adoption of the Directive, the German Liberal MEP, Alexander Alvaro, took his name off a report he drafted on the proposal in protest at Parliament's agreement to longer retention periods and no mandatory reimbursement of costs. Many other MEPs are furious with their Parliamentary colleagues for "selling out" to the Council. Even though a deal has been struck, it is unlikely that the debate on data retention is over.

DATA SHARING – PRINCIPLE OF AVAILABLITY

Proposal:	Proposal on the exchange of information under the "principle of availability"
Status:	An implementation deadline of 30 June 2007 has been proposed. ***Opinion of the European Data Protection Supervisor released on 13 March 2006. To be debated by Council on 27 April 2006.***

At the Justice and Home Affairs Ministerial Council in October 2005, Commissioner Frattini outlined his proposal promoting the "principle of availability"**.** This proposal is essentially to allow intelligence held on suspected criminals by one Member State, to be available to law-enforcement authorities in other Member States.

It will ensure that law-enforcement authorities of all Member States will have access to information, but will also have to respect other Member States' restrictions on processing data. The proposal needs unanimous support from the Council to become law, whilst the Parliament will only be consulted.

Unlike the Schengen Convention (which provides for the exchange of information between law-enforcement authorities, but which does not oblige Member States to reply to requests), this proposal dictates that police would have to respond to demands for information from other Member State's authorities within twelve hours. If police are not able to provide the requested information within this time, they will have to state why they are not able to do so and how they might go about obtaining the data.

The proposal covers information already in existence, however, and does not require Member States to collect or retain data (though it was made in conjunction with the Commission's proposals on data retention and data protection, as described above). The police can refuse to provide the information requested in some circumstances, which include the protection of the fundamental rights of persons whose data is processed.

PROTECTION OF PERSONAL DATA

Proposal: The Commission's proposal for a Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters was published in October 2005. This responds to the need for a comprehensive data protection regime at EU level.

Status: ***Consideration of draft report prepared by the European Parliament's Civil Liberties and Home Affairs Committee on 21 March 2006,[5] to be discussed at Committee on 18 April and finalised for 4 May.***

This proposal is designed to offer the safeguards and protections that underpin the data sharing and data retention provisions. It is worthy of note, however, that the data retention provisions have now been adopted (Directive 2006/24/EC), whereas the protection provisions have only just been proposed.

Provisions concerning data protection do already exist at EU level. Reference has to be made, for example, to specific rules for Europol and Eurojust. The Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data is particularly relevant.

However, Directive 95/46/EC does not apply to the processing of personal data in the course of activities provided for within the framework of police and judicial co-operation in criminal matters. It does not apply to the processing of personal data in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union and in any case to processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law. Thus, the present proposal will contribute to a more complete data protection regime.

This Framework Decision is designed to ensure that fundamental rights, with special attention to the right to privacy and to the protection of personal data, will be respected throughout the European Union. It shall also ensure that the exchange of relevant information between the Member States will not be hampered by different levels of data protection in the Member States.

The proposed Framework Decision includes general rules on the lawfulness of processing personal data, provisions concerning specific forms of processing, transmission and making available of personal data to the competent authorities of other Member States, further processing, in particular further transmission, of data received from or made available by the competent authorities of other Member States. It also deals with the rights of the data subject, confidentiality and security of processing, judicial remedies, liability, sanctions and supervisory authorities. It establishes a working party on the protection of individuals with regard to the

[5] See also the corresponding Working Document of the Committee

processing of personal data for the purpose of the prevention, investigation, detection and prosecution of criminal offences.

Particular attention has been paid to the principle that personal data is only transferred to those third countries and international bodies that ensure an adequate level of protection. The Framework Decision provides for a mechanism aiming at EU wide compliance with this principle. The Council of Ministers have begun negotiations on this issue. The European Parliament will deliver a non-binding opinion.

Discussion of draft Framework Decision in Parliament

The draft Framework Decision was discussed at the European Parliament's Civil Liberties and Home Affairs Committee on 21 March. One of the major issues (also a concern of the Council) was whether the proposal should cover both cross-border and internal exchanges. Martine Roure, the Parliament's rapporteur, supports such a move and an Austrian EU Council Presidency representative present at the meeting confirmed that the Member States appear to be in favour of this extension as well.

The Parliament has several concerns with the current draft, for example, the fact that the rules will cover neither Europol (the EU police office) nor Eurojust (the EU prosecuting unit). The rapporteur proposed that, within two years of the Framework Decision being implemented, the Commission should make a move to enable Europol and Eurojust to be covered by the same regime. Furthermore, in relation to information derived from non-EU States, an amendment has been tabled to ensure that such information is properly vetted, for example, not extracted under torture. Other members of the Committee felt that this issue should not be dealt with under the Framework Decision.

The Commission representative present at the meeting explained that the Commission had proposed establishing a committee to decide whether data could be exchanged with non-EU countries.

The US administration has expressed 'concern' in relation to Article 15 of the proposal, whereby an EU Member State, receiving data from another Member State, could not pass on this data to a third country unless the level of protection in that country was adequate. There will be an opportunity for EU and US ministers to discuss this issue on 3 May in Vienna.

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