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Judicial Co-operation in Criminal Matters

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● WHAT'S NEW?

- The UK Presidency of the EU ended in December 2005. The Presidency is now held by the Austrians until the end of June 2006. 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 deadline to conclude negotiations on the **European Evidence Warrant** (December 2005) was not met. The aim is to discuss the EEW at the Justice and Home Affairs Council in February. The key areas of controversy are in relation to: territoriality, legal remedies, competent authorities and definitions of offences.
- In December 2005, the European Parliament adopted a proposal for a directive on the **retention of data** processed in connection with the provision of public electronic communication services. The Directive will oblige telecommunications firms to retain data on phone calls, emails and other internet data for between six months and two years. The Directive is set to be formally adopted by the Council of Ministers at the end of February.
- Negotiations have come to a halt on the framework decision on **procedural safeguards**. At the informal Justice and Home Affairs ministerial Council in January national governments decided to cease discussions on the draft framework decision. The Austrian Presidency has stated that they will continue to work on the issue of procedural safeguards and fundamental rights and 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. The Commission is hoping to produce a legislative proposal sometime this year.
- Council Decision 2005/876/JHA on the **exchange of information** extracted from the criminal record 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 in order to speed up the transfer of information and seeks to establish a European format for a criminal record.
- The European Commission has published a revised report on the application of the **European Arrest Warrant**.
- A Green Paper and public consultation on **presumption of innocence** is due to be published by March 2006.
- A proposal on "**euro-bail**" is to be published at the end of February 2006. 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.

• 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 recently 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.

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 they will hand 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.

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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. Not yet published	
	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 (<i>ne bis in idem</i>).	
	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 <ul style="list-style-type: none"> • 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 <i>ne bis in idem</i> principle.	
	Green Paper on handling of evidence.	
	Green Paper on default (<i>in absentia</i>) 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 (<i>in absentia</i>) 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 has adopted a revised report on the application of the European Arrest Warrant. January 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 was required of “dual criminality” (i.e. that the act to which the warrant related was an offence in both the issuing and executing states), although for a list of thirty-two offences no such test was required. The EAW was transposed into UK law by the Extradition Act 2003.

European Arrest Warrant law a nullity in Germany: The German Federal Constitutional Court [decided](#) on 18 July 2005 that the German law implementing the EAW is a nullity. The grounds were as follows:- first, the German EAW law disproportionately encroached upon the right in the German Basic Law of freedom from extradition. This is a constitutional right which states that where a significant domestic element exists to an offence, extradition could be refused in favour of a prosecution in Germany. Second, the law failed to provide the constitutionally required recourse to a court to review the grant of extradition. 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 against 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

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.

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, came in 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. One of the main issues referred to the Court is whether the wrong legal instrument was used to adopt the warrant and whether it is lawful to have a list of thirty-two offences for which warrants must be enforced, even if they relate to an act the enforcing state does not deem a crime. Rather than the implementing legislation being under scrutiny, this time the validity of the source law – a Framework Decision - is in doubt.

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.

The report from the European Commission in the application of the EAW will soon be published on the European Commission's website. This report is a revised report as 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 in terms of meeting the deadline for enforcement also. It is worth recalling that the European Commission has no enforcement powers in relation to the incorrect or late transposition of framework decisions.

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 this year 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.

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 of which is proposed in the 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.

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 recently for a European system for enforcement of fines for road traffic offences.

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. It is to be fully implemented by 1 January 2006.

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 is due to become operational by 1 January 2006. UK legislation implementing the Directive is expected in late autumn.

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. No agreement was reached under the UK Presidency. The aim now is to discuss the framework decision at the Justice and Home Affairs Council in February.

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 a **priority** for both the Council and the UK Presidency.

As originally conceived by the European Commission, the European Evidence Warrant was to replace the existing system of mutual legal assistance 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 the EEW, following translation, is 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 similar list for the EAW, 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 House of Commons EU Scrutiny Committee has expressed concern that foreign authorities might use this power for “fishing trips” and has raised the question of whether any statements would be made under caution in the UK³.

³ House of Commons EU Scrutiny Committee, 2nd Report, 2005-06, section 7

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 European Evidence Warrant 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 European Evidence Warrant 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.

One of the issues that remains to be addressed is whether the European Evidence Warrant can be used by the **defence**. There is no explicit reference to use by the defence in the draft instrument. For some this is seen as a cause for concern and the argument is that the text should be clear on the point. The Home Office however, has stated (informally) that the EEW will be available for the defence, but how this procedure will be put in place is up to each national system. For example, would the defence request a judicial authority to issue a European Evidence Warrant, or the prosecutor/investigating magistrate?

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 European Evidence Warrant. 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 a European Evidence Warrant where any of the acts constituting the offence was committed on its territory.

Evidence Based Safeguards

The Commission is currently working on a series of Green Papers including one on evidence-based safeguards which will be published June/July 2006. The Law Society is conducting an EU funded study on Evidence Based Safeguards in partnership with other European Bar Associations. The findings of this report will be used by the European Commission in the formulation of their strategy in this area.

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.

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 had 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 unnecessary and that an exact equivalence of treatment of convictions from other Member States would be likely to

operate unfairly⁴. 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 is a new proposal and 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 the central authorities of 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.

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.

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.

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 other, 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 the 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 same offence.

⁴ House of Commons EU Scrutiny Committee, 2nd Report, 2005-06, section 6

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 will have to tell the Member State where that person is currently living.

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. Has not received scrutiny in Council or Parliament yet.

The proposal for a Framework Decision was made on 24 January 2005 not by the Commission but by three Member States. Its aim is to require Member States to take charge of their nationals and residents sentenced to a prison term in another Member State and to enforce the sentence imposed. The present system for transfer of prisoners is governed by the 1983 Council of Europe Convention on the Transfer of Sentenced Persons, which those proposing the initiative say is slow and bureaucratic.

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 are now working on a draft proposal that we expect to be published by the end of February.***

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. The European Commission's proposal is expected by the end of December 2005.

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 and launched a public consultation. The deadline for submissions is March 31st. The Commission is expected to publish a legislative proposal on this 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 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.

Green Paper discusses 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 also be raised as well. Currently, Article 55 Schengen enables Member States to provide for exceptions, which are related to interests in prosecuting specific cases in a 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. Article 35 TEU – the UK has not.

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**
- [Miraqlia](#) (**Case C-469/03**),
- [Hiebeler](#) (**Case C-493/03**)
- Further preliminary rulings are to be expected in *Case C-436/04 Van Esbroeck* (Case C-436/04), *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

The Framework Decision on data retention – Member State initiative

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.

Following the London bombing in July 2005, Justice and Home Affairs Ministers, meeting in an emergency session in the wake of the attacks, affirmed that this measure was a priority and made a commitment to agree the Framework Decision by the end of October 2005.

Political and legal challenge

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”.

In addition the European Parliament contended that the proposed data retention rules involved regulating the telecommunications sector. This an area in which the European Parliament has the right to be co-legislator under first pillar provisions. The Parliament repeatedly threatened to challenge the Council (Member State governments sitting collectively) before the European Court of Justice if MEPs were not allowed to participate in the process. On matters in the police and judicial co-operation field the Parliament only has the right to be consulted. The opinion that they give is not binding on the Member States.

The Parliament rejected the draft Framework Decision, citing legal, technical and financial concerns. Despite this rejection, MEPs generally supported the idea of data retention, but warned that any proposal which did not appoint them co-legislators would provoke further delay in its adoption.

A new proposal – European Commission proposes a draft Directive

In September 2005, the European Commission then published its own proposal for a [draft Directive](#) on retention of data processed in connection with the provision of public electronic communication services. This will oblige telecommunications firms to retain data on phone calls, emails and other internet data for between six months and two years.

The draft Directive proposes a much greater degree of harmonisation than that found in the draft Framework Decision, but it needs both Council and Parliament backing to become law.

The European Parliament reached [agreement](#) in December 2005. The **draft Directive is set to be formally adopted by the Council of Ministers at the Justice and Home Affairs Council at the end of February.**

Key provisions

The following are some of the key elements of the new compromise agreement

Purpose of the Directive: to ensure that the data is available for the purposes of investigating, detecting and prosecuting serious crime. 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 EU Arrest Warrant Framework Decision.

- **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 are 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.

Issues and negotiations

Council Ministers exerted considerable political pressure on Parliament to accept their demands concerning this Directive. The Framework Decision proposed in 2004 was originally favoured by several Member States. Many other delegations were prepared, however, to consider the draft Directive proposed by the Commission, albeit for a price.

Addressing Parliament's Civil Liberties, Justice and Home Affairs Committee on 13 October 2005, Charles Clarke stated that whilst the Council was generally in favour of pursuing a 'first pillar' approach (i.e. an approach with Parliament appointed co-legislator) to the new data retention rules, it was also "absolutely determined" to make a final decision on their adoption before the end of the year. He urged MEPs to assume a flexible approach to the proposals, making it clear that if Parliament tried to force major changes upon the new legislation, the Council would not consent, and would adopt the Framework Decision in spite of queries regarding its legality and Parliament's rejection of it.

Autumn 2005 saw months of inter-institutional wrangling involving thinly-veiled political threats from the Council and angry protests from MEPs. In an effort to show how seriously it takes its role as co-decision-maker, Parliament laboured at break-neck speed to adopt an opinion on the data retention measures.

Its Civil Liberties Committee hoped to impose less onerous obligations on telecommunications companies than those favoured by the Council. The MEP in charge of producing the opinion originally proposed a mandatory retention period of three months. By November, this period was looking increasingly likely to be set at six to twelve months. In its plenary session on 14 December 2005, however, the Parliament appeared to have had yet another change of heart. The Commission's original proposal would have forced telecommunications firms to retain data on phone calls for a year and internet data for six months. In its December vote, Parliament agreed to widen these mandatory storage periods to six to twenty-four months. This about-face was the result of a deal struck between Parliament and EU Justice and Home Affairs Ministers

on 2 December 2005, in which Ministers agreed to support Parliament's right to co-decision in return for MEPs' backing on a text acceptable to the Council.

Future of the proposal

The agreement is currently awaiting formal adoption by the Council. It continues to provoke controversy, however, with Ireland already threatening to challenge the Directive's legal basis before the European Court of Justice. Meanwhile, the German Liberal MEP, Alexander Alvaro, has taken 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 AVAILABILITY

At the Justice and Home Affairs Ministerial Council in October, Commissioner Frattini outlined his [proposal](#) promoting the "**principle of availability**". Essentially a proposal 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 is being 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 are processed. An implementation deadline of 30 June 2007 has been proposed.

PROTECTION OF PERSONAL DATA

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.

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 are nearing adoption 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.

But 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 of 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 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 are 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.
