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● WHAT'S NEW?

- The European Evidence Warrant was discussed at the Justice and Home Affairs Council on 1-2 June and a general agreement was reached on the text. Germany negotiated a partial opt-out in relation to dual criminality of certain offences and the Netherlands also forced through some concessions in relation to territoriality.
- The Directive on data retention, relating to the provision of public electronic communication services, which will oblige telecommunications firms to retain data on phone calls, emails and other internet data for between six months and two years will be challenged before the European Court of Justice by Ireland and Slovakia.
- The draft [Framework Decision](#) on Procedural safeguards was discussed at the Justice and Home Affairs Council on 1-2 June. The Member States have moved away from the Commission's original text and are working on a much more limited proposal. The Presidency text differs from the Commission's original proposal in that the scope has been limited and general rights, rather than their specific application, are dealt with, for example, right to information, right to legal assistance, right to interpretation. Certain Member States have proposed a resolution instead of a legislative proposal. The legal basis remains a controversial topic. Work will continue on the basis of a Presidency compromise text. Whilst is states that there will be no "upper-limit" of rights and Member States can therefore exceed the protection provided for, the concern is that the proposal offers very little in comparison with the original draft.
- Following the publication in December 2005 of the Green Paper and public consultation on the conflicts of jurisdiction and principle of *non bis in idem*, the Commission hosted a meeting of experts on 30-31 May to discuss the way forward.
- At the Justice and Home Affairs Council on 1-2 June, a broad agreement was reached on a [draft Decision](#) concerning arrangements for cooperation between asset recovery offices of the Member States. This proposal is aimed at facilitating police efforts to trace the foreign-based assets of criminals. It should allow information to be more rapidly exchanged between Member States in connection with the tracing and seizure of proceeds of crime.
- A Green Paper and public consultation on presumption of innocence was published on 26 April.
- A proposal on "euro-bail" is due to be published in June/July. 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. A meeting of experts took place in Brussels on 9 June to discuss the issue and the question of minimum standards in pre-trial detention.
- At the Justice and Home Affairs Council on 27-28 April, the Council reached political agreement on the text of a [Framework Decision](#) on the fight against organised crime. Under the proposal, committing a crime as part of a criminal organisation will trigger a minimum sentence of two years in prison.

• 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.

Current debate on future of EU policy in justice and home affairs field

In May 2006, the President of the European Commission called for a strengthening of police and judicial cooperation on criminal law at an EU level. Article 42 of the Treaty on European Union provides a 'bridge' which allows Member States to decide to transfer issues in this field (traditionally 'third-pillar' matters) into what is known as the 'first pillar' (the 'Community' arm of the Union). In practical terms, this would mean a move from decisions being taken unanimously by the Council, to the option of setting up a qualified majority voting system. Decision would also be under the democratic control of the Parliament through the co-decision process and subject to the judicial scrutiny of the European Court of Justice (ECJ). The European Commission would have the sole right to initiate legislation.

The decision to 'communitarise' these matters would have to be approved by all of the Member States. Such a move would be very significant in terms of national competence and control and there is currently a great deal of disagreement as to whether it should happen at all. The Council discussed this issue at a summit on 15-16 June.

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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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. ***Czech Constitutional Court found in favour of EAW, 3 May 2006. Arrest warrant agreement to be signed between EU and Norway and Iceland.***

The European Arrest Warrant (EAW) is the key mutual recognition initiative in criminal law. Entering into 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 relates 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.

Arrest warrant agreement to be signed between EU and Norway and Iceland

A very similar agreement to the EAW will be signed in the coming months to regulate the transfer of criminal suspects between the EU and Norway and Iceland. The main difference to the EAW is that under this agreement Norway and Iceland will not be obliged to hand over their own nationals.

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 2006, 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 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 (*in line with the Commission's announcement in May 2006 to make use of Article 42 to speed-up decision making in this field*).

Reaction to the EAW across Europe:

Since coming into force, the EAW has been legally challenged in several countries, including Germany¹, Poland², Cyprus and Belgium. In Belgium, for example, in July of 2005 the Belgian court of arbitration asked the ECJ for advice on the legality of the EAW (the ECJ is empowered to give preliminary rulings on the validity and interpretation of framework decisions, where a Member State has accepted jurisdiction). The ECJ must now decide whether the legal basis of the EAW is appropriate and whether partial abolition of the 'dual criminality principle' is competent. *Judgment will be given on July 11th 2006.*

Outcome of EAW challenge in Czech courts: On 3 May 2006 the Czech Constitutional Court rejected a move which had been taken to invalidate the EAW. The court ruled that it was not, as had been argued, illegal to surrender Czech nationals to other EU Member States, as they are all bound by international human rights standards.

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.

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](#)

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.

At the Justice and Home Affairs Council on 1-2 June, a broad agreement was reached on a [draft Decision](#) concerning arrangements for cooperation between asset recovery offices of the Member States. This proposal is aimed at facilitating police efforts to trace the foreign-based assets of criminals.

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. ***Deadline for transposition was 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 2005 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. ***Council agreed text at Justice and Home Affairs Councils on 1-2 June 2006.***

This is a key judicial co-operation text, building on traditional mutual legal assistance arrangements. The proposal for a European Evidence Warrant (EEW) will 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.

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 theoretical 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. In the issuing State, an 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 – however only an optional ground for refusal, not mandatory. 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 agreed text – 1-2 June 2006

The Council reached a general approach on the EEW on 1-2 June 2006. The agreement was based on a compromise text put forward by the Presidency which, in particular, addressed the concerns of Germany (definition of offences) and the Netherlands (territoriality). Germany succeeded in negotiating an opt-out for six of the thirty-two offences listed in the EEW, namely, extortion, terrorism, racism, environmental crime, sabotage and cyber-crime. These offences were highlighted by the German constitutional court in its recent ruling on the European Arrest Warrant. Germany's concern was based on the fact that there is no EU-wide definition of these crimes and therefore a suspect may not be clear of what they are being accused. Most Member States were opposed to including definitions as it would be tantamount to harmonising the criminal laws of the Member States. For the six offences listed above, Germany will not automatically refuse to enforce an EEW, but will firstly verify whether the offence constitutes a crime in Germany before complying (i.e. Germany will apply the dual criminality principle, which was meant to be waived for the listed offences).

The Netherlands had been insisting on the right to refuse to comply with an EEW relating to offences committed wholly or partly on Dutch territory (due to the fear that it would be inundated with requests concerning drug-trafficking). The addition of this so-called “territoriality clause” was strongly opposed. However, it has been agreed that such a provision will be included but it can only be invoked in “exceptional circumstances”. The EEW will be reviewed by the Council within five years of its entry into force. The text will now be finalised and will be formally adopted by the end of the year. It is likely that the implementation deadline will be at the end of 2008.

ACCESS TO CRIMINAL RECORDS AND MUTUAL RECOGNITION OF CONVICTIONS

- Proposals:**
- 1) [White Paper](#) on future measures for exchange of information of convictions and use of such information, 25 January 2005.
 - 2) Draft [Council Framework Decision](#) on taking account of convictions in Member States in the course of new criminal proceedings, presented 17 March 2005. *Discussed in Council’s Working Party on cooperation in criminal matters on 5 April 2006. 1st exchange of views on [Working Paper](#) in Parliament’s Civil Liberties Committee 4 May 2006.*
 - 3) [Framework Decision](#) on the organisation and content of the exchange of information extracted from criminal records between Member States, 22 December 2005. *Discussed on 2 March 2006. [Opinion](#) of European Data Protection Supervisor released on 29 May 2006.*

1) 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.

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

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.

1st exchange of views in Civil Liberties and Justice and Home Affairs Committee, 4 May 2006 - The discussion was based on the Working Paper which had been prepared by the *rappporteur*, Demetriou Panayiotis. In this Paper it is explained that, currently, information on convictions in other Member States is governed by Articles 13 and 22 of the 1959 European Convention on Mutual Assistance in Criminal Matters. However, this Convention does not cover the legal consequence which should be attached to foreign convictions. The rapporteur argues that the absence of international regulation on this matter has resulted in nationals of other Member States being sentenced purely on the basis of their criminal record in the country where the trial takes place, with the courts in “complete ignorance” of convictions in other Member States. The rapporteur highlighted several issues, emphasising that this proposal should be dealt with in close cooperation with that concerning extraction of information from the criminal record (*rappporteur* – Mr Diaz de Mera). The rapporteur raised the question of whether the definition of 'convictions' should also include decisions of an administrative authority which can be appealed against in the criminal courts.

3) 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.

Opinion of European Data Protection Supervisor (EDPS) of 29 May 2006

Although the EDPS supports the proposal in theory, it states that it cannot move forward in isolation as the proposal does not in itself guarantee sufficient protection of personal data. To that end, it is advised that this proposal should not enter into force until the Framework Decision on the protection of personal data (currently being negotiated in Council) is in place and a specific provision in one of the final articles of the present proposal should be inserted to ensure this sequence. In terms of content, the EDPS suggested that the categories of people who can request data from criminal records should be limited. In addition, the EDPS recommended that it would be more efficient if an obligation was established for the central authority of the convicted person's nationality to notify any updates/cancellations to the central authorities of

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

those other Member States or third countries that have made information requests in the past, prior to the update.

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. European Parliament's Civil Liberties Committee adopted a [non-binding opinion](#) on 13 March 2006. **Parliament adopted [legislative resolution](#) on 1 June 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 adopts legislative resolution, 1 June 2006

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). In addition, the Parliament is calling for disqualification orders imposed by non-EU countries to be included within the scope of the proposal, if this is legally possible.

Related issue: 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 Parliament's Civil Liberties and Home Affairs Committee on 21 March 2006. ***Adoption of Committee's [Report](#) on 17 May, adoption of [legislative resolution](#) in plenary on 14 June. Debated by Justice and Home Affairs Ministers on 27-28 April and 1-2 June 2006.***

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 originally 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).
- 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 thirty-two 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.

The Report, consolidating the discussions and concerns outlined above, was adopted by the Civil Liberties Committee on 17 May 2006

The Report recommends that it should be obligatory to seek the opinion of the prisoner, prior to a transfer to another Member State. Amendments have also been suggested in relation to allowing the receiving country to obtain details relating to the prisoners behaviour in the prison from which they are being transferred. The Parliament also suggested imposing a 30-day standard time limit to allow Member States to decide whether to accept a prisoner (as opposed to a 3-week limit as originally drafted). The proposal requires the unanimous support of the Council, with the Parliament playing a purely consultative role.

Council discussions 1-2 June

The Council focused on two of the unresolved issues, namely the consent of the sentenced person and the consent of the executing State to the forwarding of the judgment. The majority of Member States agreed that the consent of the sentenced person would be required for transfer to a Member State other than that in which the person has permanent legal residence, for example if an English person was being transferred to England, but was legally resident in Germany, their consent would be required to do so. Furthermore, it was agreed that consent of the executing state would not be required when the sentenced person was being transferred to:
a) their home country where they are legally resident; or b) their home country or country of legal residence to which he or she would have been deported anyway after having served the sentence; or c) their country of legal residence unless such right of residence would be lost as a result of the judgment.

The Council will amend the text in accordance with what has been agreed so far but there remain issues to be resolved, notably, the definition of residence.

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. ***Commission hosted a Meeting of Experts on minimum standards in pre-trial detention procedures on 9 June 2006. The Commission is now working on a draft proposal that is to be published in June/July 2006.***

The European Commission is looking into preparing a mutual recognition instrument relating to non-custodial supervision measures and pre-trial detention, to be published in June/July.

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.

Meeting of Experts on pre-trial detention procedures, 9 June 2006

The aim of this meeting was to allow governmental and national experts to exchange views on their domestic pre-trial procedures. The delegates discussed to what extent there is divergence between Member States and whether this will constitute an obstacle to the mutual confidence required to take any legislative action. Following the contributions from the national delegations it was clear that the length of pre-trial detention can vary greatly from Member State to Member State. The Portuguese expert explained that in certain extreme circumstances, pre-trial detention can last up to 54 months in Portugal. The Italian expert highlighted the link in Italy between the duration of pre-trial detention and excessive trial delays. There was general consensus for the need to have a systematic review of pre-trial detention to ensure that circumstances had not changed to the extent that detention was no longer a justifiable option. However, this was another area which was dealt with very differently throughout the Member States, some countries requiring weekly reviews, others 3-monthly reviews. It was concluded that further work was required to decide on a) when a detainee has to first be presented before a judge; b) the definition of 'pre-trial detention' (as in certain Member States there are several stages between arrest and trial); c) the conditions which require to be satisfied before detention is appropriate; and d) the grounds for review of the detention. Juvenile suspects were discussed as a category requiring special attention and the need to have statistical evidence to back up any future action was emphasised.

The UK governmental experts were generally cautious as to the need for a Commission initiative in this area. Doubt was expressed as to whether there is a sound legal basis for such a proposal and whether the Commission can add any value to the work already ongoing in the Council of Europe, by way of the European Convention of Human Rights.

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. **Commission hosted experts meeting on 30-31 May 2006.**

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 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 – **opinion published on 8 June 2006**), Bouwens (C-272/05) and Kretzinger (C-288/05).

Commission hosts Experts Meeting on conflicts of jurisdiction and ne bis in idem, 30-31 May 2006

The Commission opened the debate by reiterating that rules on determining jurisdiction should facilitate legal certainty and improve cross-border prosecution and law enforcement. While most delegates, Member States and independent experts, agreed that multiple prosecutions are in the interests of neither the state nor the defendant, there was little consensus on how this issue should be tackled. The majority of Member States, most represented by their prosecuting agencies, stated that the current practice based on informal contacts and information exchange was satisfactory and that they could not see the need for any legislative instrument in this area as suggested by the Commission. Moreover, in cases where a conflict of jurisdiction did arise, it

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

was agreed that Eurojust was best placed to deal with this. The strong message from the majority of Member States was that a flexible system for determination on a case-by-case basis was the most appropriate. However, others, principally Italy, were arguing that in the interests of protecting the individual there should be strict criteria that would pre-determine the choice of jurisdiction.

On the question of *ne bis in idem* there was concern that the determination of this concept as found in articles 54-58 of the Schengen Convention was best left to the ECJ. It was felt by many that the jurisprudence should be allowed to develop over time rather than be “codified” in a framework decision. Although some Member States, pointed out the importance of the rights of the individual in the process, there was no detailed debate on the mechanism by which the defendant could be involved in the decision to determine jurisdiction of proceedings. Certain delegates, pointed out the need for an effective means to challenge the decision.

The European Commission stated that the next step would be to grant a research project, currently the subject of a tender process, to conduct an impact assessment into the state of play regarding conflicts of jurisdiction and the problems that exist. According to the Hague Programme, the European Commission is scheduled to produce a draft framework decision on this matter by the end of 2006.

PRESUMPTION OF INNOCENCE

Proposal: [Green Paper on the presumption of innocence published on 26 April 2006](#)

Current Status: **Consultation on Green Paper closed on 9 June 2006**

Green Paper on the presumption of innocence, 26 April 2006

The aim of this Green Paper is to determine whether the term ‘presumption of innocence’ is understood in the same way throughout the EU and what rights flow from its application. The presumption of innocence is enshrined in Article 6(2) ECHR (the right to a fair trial) and further guidance can be found in the related case law. The Green Paper questions whether the ECHR case law provides the generally accepted notion of the presumption of innocence and, if not, why not and what is lacking? The burden of proof, privilege against self-incrimination, the right of silence and the right not to produce evidence are all examined in this Paper and the general intention of the Commission is to ascertain whether systemic divergences in how this concept is protected in different Member States pose a problem to mutual trust and, if this is the case, whether EU legislation would be helpful. If the feedback from the consultation suggests that it is necessary, the Commission will consider drafting a proposal for a framework decision on evidence-based safeguards.

• 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. **Implementation deadline 15 September 2007.**

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.

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 and 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 – Ireland and Slovakia

On 21 February, the Directive was formally adopted by the Council. However, both Ireland and Slovakia voted against it and they intend to challenge its legal basis before the ECJ. The

Directive was based on Article 95 TEC which refers to the functioning of the internal market, however, Ireland and Slovakia argue that the purpose of the Directive is primarily concerned with law enforcement and therefore it should not have been adopted in the way that it was (had it been adopted as a third-pillar instrument, unanimity would have been required). Ireland and Slovakia may rely on the ECJs judgment of 30 May 2006 in the joined cases of *Parliament v Council* (C-317/04) and *Parliament v Commission* (C-318/04), which concerned the EU/US agreement on the transfer of personal passenger data to US law enforcement agencies. The Court annulled this agreement, ruling that it lacked an appropriate legal basis.

DATA SHARING – PRINCIPLE OF AVAILABILITY

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.

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 **Adoption of Committee report on 18 May 2006, adoption in plenary of [legislative resolution](#) on 14 June 2006.**

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 are still under consideration.

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 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.

⁵ See also the corresponding [Working Document](#) of the Committee

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 2006. 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 at the meeting explained that the Commission had proposed establishing a committee to decide whether data could be exchanged with non-EU countries.

Committee report adopted on 18 May, followed by legislative resolution 14 June 2006

The concerns of Parliament outlined above were consolidated into a Report which was adopted on 18 May, accompanied by the adoption in plenary of the Parliament's legislative resolution on the proposal detailing their suggested amendments to the text in line with the issues raised in the Report. In general, the Parliament has called for stricter protection of personal data than the regime proposed by the Commission. Of particular concern is the transfer of data to non-EU countries; an issue tied to the recent ECJ case annulling the EU/US data transfer agreement due to its incorrect legal basis (not its substantive content). Parliament is extremely keen that the Council reach agreement on this proposal by August 2006.
