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The Brussels Office Law Reform Update Series

Judicial Co-operation in Criminal Matters

SEPTEMBER 2005

CONTENTS PAGE

•	WHAT'S CURRENT?	3
•	JUDICIAL CO-OPERATION IN CRIMINAL MATTERS	4
•	HAGUE PROGRAMME ACTION PLAN	5
•	MUTUAL RECOGNITION.....	9
A.	IMPLEMENTED LEGISLATION	9
	EUROPEAN ARREST WARRANT	9
B.	LEGISLATION TO BE IMPLEMENTED	10
	FREEZING OF ASSETS.....	10
	CONFISCATION ORDERS.....	10
	MUTUAL RECOGNITION AND ENFORCEMENT OF FINANCIAL PENALTIES	11
C.	LEGISLATION PRESENTLY UNDER CONSIDERATION	11
	EUROPEAN EVIDENCE WARRANT	11
	ACCESS TO CRIMINAL RECORDS AND MUTUAL RECOGNITION OF CONVICTIONS.....	13
	MANDATORY TRANSFER OF PRISONERS	14
	NON-CUSTODIAL SUPERVISION MEASURES AND PRE-TRIAL DETENTION.....	15
•	COMMON STANDARDS	15
A.	LEGISLATION TO BE IMPLEMENTED	15
	COMPENSATION OF CRIME VICTIMS.....	15
B.	LEGISLATION UNDER CONSIDERATION	16
	PROCEDURAL SAFEGUARDS FOR SUSPECTS AND DEFENDANTS IN CRIMINAL PROCEEDINGS.....	16
	DRAFT FRAMEWORK DECISION ON THE RETENTION OF DATA.....	17
	CRIMINAL OFFENCES IN INTELLECTUAL PROPERTY	18

• WHAT'S CURRENT?

General:

- The UK took over the EU Presidency on 1 July. The UK Presidency will last until 31 December.
- EU justice and home affairs ministers met in an emergency session on 13 July (page 4) and set early deadlines for concluding legislation for the European Evidence Warrant (page 11) and Retention of Communications Data (page 17)
- The Commission and Council have produced an Action Plan for implementation of the Hague Programme, setting out specific EU legislative proposals for 2005 to 2009 in the area of criminal law (details on the Action Plan on pages 5 to 8).

Mutual recognition:

- The German Federal Constitutional Court has declared the German law implementing the European Arrest Warrant a nullity (page 9).
- Political deadline set for December 2005 to conclude legislation for a European Evidence Warrant (page 11).
- The draft Framework Decision on exchange of information from criminal records is close to adoption though still subject to House of Lords scrutiny. It provides for rapid information-sharing using standard forms (page 12).
- New rules on use of information on foreign criminal convictions are proposed by the Commission in a draft Framework Decision. Member States would be required to treat a conviction from another EU jurisdiction as if it was a domestic conviction (page 13).
- The European Commission is to publish proposals this autumn for to allow bail conditions granted in one Member State to be executed in another Member State (page 15).

Common standards:

- All Member States were required by 1 July 2005 to have a scheme guaranteeing fair and appropriate compensation to crime victims. A scheme for EU co-operation in criminal compensation comes into force next year (page 15)
- The Council has committed itself to adopting a Framework Decision on data retention by communications providers by October 2005, despite the opposition of the European Parliament and the concerns of its own legal service (page 17).
- EU-level legislation is proposed requiring criminal sanctions for breaches of intellectual property rights committed intentionally on a commercial scale (page 18)

• 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 in 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. The Commission’s proposed European budget for justice, freedom and security of €7 billion (£5 billion) reflects vastly increased work in this area.

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 for the period 1999-2004. 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 (see pages 5 to 9 below).

The new European Commissioner for "Justice, Freedom and Security" is Italian, **Franco Frattini** (a former Foreign Minister). The United Kingdom took over the Presidency of the European Union on 1 July 2005 and will hold it until December 2005.

The London bombings have given a new impetus to the Council of Ministers to seek agreement on certain aspects of the justice and home affairs programme. An emergency meeting of the justice and home affairs ministers on 13 July agreed deadlines for adopting certain measures currently under consideration. These were the Framework Decisions on the Retention of Telecommunications Data (October 2005), on the European Evidence Warrant (December 2005), and on the exchange of information between law enforcement authorities (December 2005); and the Decision on the exchange of information concerning terrorist offences (September 2005). Detailed information can be found below on the data retention and European Evidence Warrant proposals (at pages 11 and 17 respectively).

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](#) (now published in the Official Journal of the European Union) 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	
	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)	
	Communication on disqualification	
	Initiative on the recognition and enforcement in the EU of prohibitions arising from convictions for sexual offences committed against children	
	Green Paper on conflicts of jurisdiction and double jeopardy (<i>ne bis in idem</i>)	
	Green Paper on presumption of innocence	
	Initiative to facilitate the prosecution of road traffic offences	

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	
Police and customs	Proposal on improvement of law-enforcement co-operation at EU internal borders	
	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 of 22.7.2003 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.

• MUTUAL RECOGNITION

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.

A. IMPLEMENTED LEGISLATION

EUROPEAN ARREST WARRANT

Legislation:

[European Arrest Warrant](#)

Status:

In force and implemented in the UK by the [Extradition Act 2003](#). The German law implementing the European Arrest Warrant was declared a nullity on 18 July 2005 by [decision](#) of the German Federal Court.

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 but was valid for the entire territory of the European Union. In general, a test was required of “dual criminality” (i.e. that the act of to which the warrant related was an offence in both the issuing and executing states), although for a list of 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 (a constitutional right requiring 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.

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

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.

An English-language summary of the Polish Court's decision is available on its [website](#).

B. LEGISLATION TO BE IMPLEMENTED

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 is **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 report on its implementation late this year.

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.

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. The Member States have committed themselves to adopting legislation by December 2005 and its implementation is foreseen by 2007.

This is a key judicial co-operation text, building on traditional mutual legal assistance arrangements. Following the London bombing, its agreement is a **priority** for the Council. 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.

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 original proposal for the European Evidence Warrant stated that it is to be used for obtaining objects, documents and data already in existence and does not include the taking of evidence from suspects, defendants, witnesses or victims. Certain types of evidence are also excluded, principally the taking of body samples and obtaining evidence in real-time, such as interception of communications and monitoring of bank accounts. Evidence requiring further enquiries (such as the commissioning of an expert's report) is also excluded.

However the limitations as to the use of the warrant have been somewhat modified by discussions in the Council as there is now a move to include in the ambit of the European Evidence Warrant evidence that is uncovered in the context of an investigation based on an existing warrant but not "identified" in the original warrant. If the executing authority considers such evidence to be relevant, it may also be collected and transferred under the warrant. Statements made by persons "with whom the executing authority is confronted", including spontaneous remarks, where relevant, may also be taken and transferred under the warrant. 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 UK¹.

The proposal contains 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.

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.

As originally conceived the European Evidence Warrant was to replace the existing system of mutual legal assistance in criminal matters. The Council has now decided that it should work alongside the existing system.

The House of Commons EU Scrutiny Committee has expressed concern that the mutual recognition should be applied to orders where the person affected did not have the right to be heard when the order was made².

¹ House of Commons EU Scrutiny Committee, 2nd Report, 2005-06, section 7

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

The justice and home affairs ministers however did reaffirm at their emergency Council meeting following the London bombings that the framework decision on the European Evidence Warrant would be agreed **by December 2005**.

ACCESS TO CRIMINAL RECORDS AND MUTUAL RECOGNITION OF CONVICTIONS

Proposals:

Draft [Council Decision](#) designed to speed up the sharing of information between Member States relating to criminal convictions was presented by the European Commission on 13 October 2004, while this year a [White Paper](#) on future measures for exchange of information of convictions and use of such information was issued on 25 January and a further draft [Council Framework Decision](#) on mutual recognition of criminal convictions was presented on 17 March.

1. Draft [Council Decision](#) on exchange of information extracted from criminal records

The aim of this draft 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. This proposal has been finalised and will shortly be adopted by the Council, subject to the outcome of scrutiny by the House of Lords and Swedish Parliament.

2. 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.

3. Draft [Council Framework Decision](#) on taking account of convictions in the course of new criminal proceedings

The Draft Council Framework Decision had not begun its 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 unfairly³. 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.

MUTUAL RECOGNITION OF DISQUALIFICATIONS

Proposal: [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 Council of Ministers.

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

The Action Plan also indicates that the Commission will bring forward a communication on disqualifications in 2005 and a proposal on driving disqualifications in 2006.

MANDATORY TRANSFER OF PRISONERS

Proposal: [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 the proposers say is slow and bureaucratic.

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

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.

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 in autumn 2005.

• COMMON STANDARDS

The proposals aimed at the approximation of laws are designed to facilitate mutual recognition by creating common standards. The theory is that, for mutual recognition to thrive, each Member States 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.

A. LEGISLATION TO BE IMPLEMENTED

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.

B. LEGISLATION UNDER CONSIDERATION

PROCEDURAL SAFEGUARDS FOR SUSPECTS AND DEFENDANTS IN CRIMINAL PROCEEDINGS

Proposal: Draft [Framework Decision](#) on certain procedural rights in criminal proceedings throughout the European Union

Current status: Following a public consultation and Green Paper the Framework Decision was published on 28 April 2004. It is still under discussion amongst Member States in the Council of Ministers. There has been a [House of Lords inquiry](#) and the European Parliament has [reported](#) on the proposal.

The draft Framework Decision proposes the following procedural rights:

Access to legal advice, both before and during trial: It is proposed that suspects and defendants should be entitled to legal advice throughout all "criminal proceedings".

Access to interpretation and translation for non-native defendants: It is proposed that the free assistance of an interpreter is to be an automatic right for a suspected person who cannot understand or speak the language used in court.

Protection of persons who cannot understand or follow the proceedings: Certain suspects are in a weaker position than the average person owing to their age or their physical, mental or emotional condition when it comes to understanding or following the proceedings. Courts and investigators will be required to consider whether the suspected person is in need of specific attention and should take the necessary steps to offer that person the appropriate attention.

Communication and consular assistance to foreign detainees: It is proposed that a detained person should be entitled to have family members, persons assimilated to family members and his or her employer informed of the detention.

The Letter of Rights: It is proposed that Member States be required to produce a short, standard written statement of basic rights - with common EU headings under which national provisions are listed.

The procedural safeguards legislation faces controversy in the Council as regards whether there is a need for it and whether the EU has power to make it. It is not among the UK Government's priorities for its presidency.

DRAFT FRAMEWORK DECISION ON THE RETENTION OF DATA

Proposal: Draft [Framework Decision](#) on retention of data processed for the purpose of prevention, investigation, detection and prosecution of crime and criminal offences including terrorism.

Current status: Under discussion in the Council and in the European Parliament. Political deadline for adoption of **October 2005** with swift implementation period. Legal difficulties may prevent adoption.

This is not a European Commission proposal but a joint Member State initiative though it carries the same weight. It was made by France, the **United Kingdom**, Ireland and Sweden in April 2004. Following the London bomb-attacks, the justice and home affairs ministers meeting in emergency session affirmed that this measure was a **priority** and committed themselves to agreeing the Framework Decision by September.

Its **aim** is to establish rules on the retention of communications traffic data by service providers for purposes of crime prevention, investigation, detection and prosecution. Service providers would be required to retain a standard list of data on communications by the Internet, mobile phones (including messaging services) and fixed telephones. It would include the time, place and individuals involved in any communication, though the content would not be retained. The data is to be retained for twelve months (though it is allowable for Member States to derogate by introducing data retention requirements of 6 months up to 48 months).

Procedurally the Council's power to make this Framework Decision has been questioned by its own legal service, and it may be exposed to legal action by the European Parliament if it presses ahead. The Commission, which has also received legal advice that the Council's initiative is *ultra vires*, is planning to bring forward its own proposal on data retention this year.

The European Parliament has expressed support for a [resolution](#) rejecting the proposed Framework Decision. It has not formally passed the resolution yet, on the grounds that it would prefer to examine the Commission's proposal before examining the proposed Framework Decision.

The existing EU data protection regime (in Directives 95/46/EC, 97/66/EC and 2002/58/EC) does not cover data protection in police and criminal matters. The Commission is to bring forward a Framework Decision on data protection in police and criminal matters in December 2005.

CRIMINAL OFFENCES IN INTELLECTUAL PROPERTY

Proposals: [Legislative package](#) including a Directive on criminal measures for enforcement of intellectual property rights and a Framework Decision to strengthen the criminal law framework to combat intellectual property offences

Status: Proposal made by Commission on 12 July 2005

The proposed legislative package will include two different legislative instruments. The reason is that there are two different legal bases that underpin this action – Article 95 of the Treaty of Rome (the “first pillar”) and Articles 31 and 34 of the Treaty on European Union (the “third pillar”).

Member States would be required by the proposed Directive to ensure that intentional infringements of intellectual property rights on a commercial scale are treated as offences. Imprisonment, fines and confiscation are to be available as penalties, as are destruction of goods, closure of establishments, ban on engaging in commercial activities, judicial supervision, judicial winding-up, ban on access to public assistance or subsidies and publication of judicial decisions. The draft Framework Decision provides for maximum sentences and a threshold for maximum fines. It would also entitle the holder of the rights to assist in the investigation and set out jurisdictional rules.

The argument for action at EU level in this area is that there are great disparities between the national systems in relation to the sanctions imposed for breaching intellectual property rights. Such disparities allow counterfeiting and piracy to become a lucrative arm of organised criminal activity, hamper the proper functioning of the Internal Market, and present problems for consumer protection in terms of health and safety. The EU needs to take action therefore to standardise the approach taken by Member States by setting minimum standards.

This approach is not new as such. Article 61 of the World Trade Organisation’s Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) lays down minimum standards for means of enforcing trade-related intellectual property rights which can include imprisonment and/or monetary fines. Members States **may provide** for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale.⁴ In addition Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights indicates under recital 28 that “in addition to civil and administrative measures, procedures and remedies provided for in Directive 2004/48/EC, criminal penalties **also constitute, in appropriate cases**, a means of enforcing intellectual property rights”.

⁴ TRIPS agreement concluded on 15 April 1994 and signed by all members of the World Trade Organisation.