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POLICY DEPARTMENT C
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

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Development of an EU criminal justice area

STUDY

EN FR

2009

EUROPEAN PARLIAMENT

DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

DEVELOPMENT OF AN EU CRIMINAL JUSTICE AREA

STUDY

Abstract:

Does an EU criminal justice area exist? If so, what are its defining characteristics and shortcomings? What developments would be welcome, and why?

This study aims to answer such questions. At the dawn of the possible ratification of the Lisbon Treaty, it is essential to recall how much the European Union has achieved in this field, and equally important to stress the absolute need to continue in the chosen manner constructing this area in which the lack of borders goes hand-in-hand with free access to justice and the prosecution of offences common to the Member States, overcoming national specificities.

PE 419.604

EN

This document was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs

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LINGUISTIC VERSIONS

Original: EN
Translation: FR

ABOUT THE EDITOR

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Manuscript completed in July 2009

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This document is available on the Internet at:
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SUMMARY

- Criminal law and criminal procedure, as well as their place in international cooperation, are defined in the introduction.
- The first part analyses the substantial and institutional developments that took place before the Amsterdam Treaty to the Lisbon Treaty.
- The European criminal law-enforcement area is viewed (II) from the perspective of the three phases of criminal proceedings: trial preparation, trial and the enforcement of the sentence. A specific section addresses the issue of the protection of personal data. Each section details the legal instruments adopted by the Council in these fields and concisely evaluates the extent of their application in the Member States or the difficulties encountered therein. A table (Annexe II) lists all these different instruments. Finally, there is also a section focusing on integrated cooperation, in particular the role of Eurojust and the future prospects resulting from the Lisbon Treaty as well as the creation of the European Public Prosecutor's Office.
- The third part of the study examines the approximation of national legislation. It describes the current level of approximation of substantive criminal law and of national criminal procedures and lists the supporting legal instruments. Furthermore, Annex III of the study presents these different instruments in table form.
- The fourth part highlights the two driving forces behind the development of a European law-enforcement area, namely the principle of mutual recognition, upon which this construction is now very largely based, and the approximation of legislation which, in the author's view, could also be used in the sense of a decriminalisation of the European criminal justice area.
- Three aspects of the creation of a "common judicial culture" are mentioned (V): the need to agree upon a common basis for the training of magistrates using existing European Union training networks and structures; professional exchanges between practitioners, in particular through the Forum for Justice established by the European Commission in 2008; and the development of a judicial area of new technologies, a European e-justice.
- The final part (VI) presents the elements that could effectively contribute to the development of a European criminal justice area. The deepening of inter-parliamentary cooperation is enshrined in the Treaty of Lisbon. The study raises issues relating to cooperation structures and to the scope of those powers. Finally a section focuses on the evaluation of national criminal law policies and the application of European criminal law by the Member States. In this regard, the work of the CEPEJ could provide the European Union with extremely valuable indicators. Finally, civil society initiatives can also effectively contribute to the creation of a European criminal justice area. The work of the ECLAN network is mentioned here by way of example.
- Lastly, Annex I of the study suggests certain developments in the form of recommendations.

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DEVELOPMENT OF AN EU CRIMINAL JUSTICE AREA

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January 2009. A large-scale real estate fraud is committed in Spain, creating a large number of victims there, as in France and Slovenia, with small savers having lost all their savings. The courts of the three countries seize themselves of the case. The suspect is on the run and allegedly residing in London. The Spanish judge has a search warrant executed there, making it possible to seize documents proving the suspect's involvement, as well as significant amounts of money. At the same time, the judge issues a search warrant notice with a view to his subsequent arrest and court appearance. The suspect is a French citizen and is finally arrested in Slovenia. Following an agreement reached within Eurojust between the judicial authorities of the three countries concerned, it is decided that the Spanish courts, the country in which the highest number of victims are registered, will take sole charge of prosecution. Through a European arrest warrant, the French citizen is handed over to Spain, where he is tried and receives a 10-year custodial sentence with the confiscation of his assets located in France and the United Kingdom. It was possible for the victims to be represented during the trial, with some of them participating via video-link. Five years later, the sentenced person requests release on parole, returning to his country of origin, France, where his family is located and where he has a job. He does not respect his parole conditions, and is incarcerated in France to complete his custodial sentence there.

The European criminal justice area[2] exists, in this example, because the Spanish courts have managed, in agreement with the French and Slovenian courts, and without the borders having constituted an obstacle, to implement all the necessary decisions: search, seizure, arrest, conviction, confiscation, release on parole, revocation of release on parole. The judicial decisions issued throughout the criminal proceedings by the Spanish courts circulated unhindered, as do persons, capital and goods.

The construction of a European criminal justice area is recent. Neither in the work carried out in the framework of the Council of Europe, nor in that of the Treaty of Maastricht had such a goal been set. The Treaty of Amsterdam, through the wider concept of an area of

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[2] For further information, the author would suggest reading Emmanuel Barbe's publication *L'espace judiciaire européen*, 2007, Documentation française, Réflexe Europe.

freedom, security and justice, did set such an objective for the European Union; The Lisbon Treaty took it up again, but did not really define it any more than the Amsterdam Treaty had.
The fact that so much time was needed firstly to define the concept, then to implement it under conditions which still remain far from perfect, is due to the specificities of the criminal law field.

Introduction: Criminal matters: between national sovereignty and civil liberties

A. An issue of sovereignty, the right to punish (jus puniendi)

The right to punish is one of the fundamental expressions of State sovereignty. The rules that govern this right comprise three major elements: the determination of the general rules of criminal law, the determination of censurable behaviour, and finally criminal procedure. Generally speaking, in European countries, this right is governed by the major international texts on human rights: the Universal Declaration of Human Rights, the European Convention on Human Rights and, more recently, the Charter of Fundamental Rights of the European Union. These three texts contain the essential provisions touching on these three main areas.

1. General criminal law

All countries have a body of rules that define the major principles of criminal law: the legality of offences as well as sanctions, application of criminal law in time and space, rules governing limitation periods, rules governing the enforcement of sentences etc. It is undoubtedly the field in which States have the greatest freedom vis-à-vis international law, except perhaps where it concerns the determination of sanctions. Indeed by signing up to international instruments, the Member States of the European Union have dispensed with certain types of sanctions, such as the death penalty or corporal punishment.

2. The determination of censurable conduct

In that it contains a strong moral value, criminal law is the expression of fundamental values of a society. Each State is therefore free to determine the conduct that is censurable on its territory. However, this right is not absolute. In addition to the general rules mentioned above, States' membership of an international system brings with it certain positive and negative restrictions to this right.

- International activity, and for the Member States that of the European Union, requires them to incriminate certain behaviour, pursuant to international conventions, and in the case of Member States of the European Union, to framework decisions. We shall return to this point later (see III).

- A Member State cannot criminally sanction behaviour that would be lawful under the general principles of Community law.

3. Criminal procedure

Under the same restrictions as those indicated above, a country is free to determine the process through which criminally sanctionable conduct can be made an offence: this is criminal procedure. Unlike civil law, in which parties oppose each other within a trial framework, criminal procedure has almost always[3] had as its main figure the Public Prosecutor representing the general interest, that of society, which exercises its right to punish a person. This right is always a State monopoly.
This right is also linked to another expression of sovereignty, namely the monopoly of all States to maintain public order on their territory, a principle that is firmly recalled in the treaties[4].

B. An issue of civil liberties

But beyond the expression of sovereignty, criminal law is above all the place where the fundamental values of a country, this time understood as civil liberties, are expressed. The holding of a criminal trial requires that certain fundamental freedoms be infringed, as do the sanctions that may result thereof. The issue is therefore to determine what guarantees are accorded to citizens faced with the State's right to punish.

1. The infringement of liberties resulting from criminal proceedings...

a) Freedom of movement

This freedom is firstly limited by certain criminal sentences, the most severe being imprisonment, but also including other penalties, often classified as ancillary penalties such as compulsory residence orders, prohibition from certain places etc.
It is also affected by police detention[5] (which in certain cases can apply to witnesses) or during the pre-trial phase, namely in detention on remand, which exists in all States of the European Union, even if the rules governing it vary considerably from one State to another.

b) The right to the protection of the intimacy of private life

During the evidence-gathering, criminal trials often need to employ coercive measures which might constitute an invasion of privacy: searches, access to information held by third parties, in certain cases waiving their obligation of professional secrecy, interception of telecommunications or conversations, police shadowing of suspects etc.

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[3] In certain legal systems, it is possible for a private party to institute criminal proceedings, subject to conditions that are generally limited. This never prevents the Public Prosecutor's Office from intervening.
[4] See in this regard Article K2 paragraph 2 of the Maastricht Treaty[4] (*This title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security*), which became Article 33 of the Maastricht Treaty and 72 of the Treaty on the Functioning of the European Union (TFEU).
[5] Almost all Member States have a police detention system, even if it has very different characteristics depending on the countries.

c) The right to own property

Seizures constitute an infringement of the right to own property (non-permanent loss of enjoyment of property) and confiscation (permanent loss of enjoyment of property).

2. ... requires a greater democratic oversight

Because on the one hand, the determination of what constitutes criminal conduct corresponds with the definition of the fundamental values of a society, and on the other hand criminal sanctions such as the establishment of criminal procedure infringe fundamental freedoms, all the rules relating to criminal law fall within the competence of the legislature. The following paradox must therefore be highlighted: whereas parliamentary democratic oversight is required in the Member States, in the European Union it is not: indeed, the European Parliament actually only has a limited role in the adoption of criminal law rules under the so-called third pillar (see I.B.1b)).

C. Issues that constitute impediments to the creation of international rules

It is the dual character (sovereignty, civil liberties) of criminal law that makes it a more difficult field than any other in which to achieve progress at the international level. It is undoubtedly an area in which the differences between Member States are the greatest, notwithstanding the existence of common international rules which are, ultimately, defined at such a general level as to allow for all the differences. These differences can be found at all levels:

1. in the definition of offences.

Even though the criminal legislations of Member States have many points in common (one could speak of the existence of a certain form of natural criminal law in this regard) there are nevertheless quite substantial differences, especially where it concerns particularly sensitive areas in terms of civil liberty, such as sets of morals, terrorism and organised crime.

This is hardly surprising:

- On the one hand, not all Member States are confronted with the same criminal phenomena: they may therefore have (for example in countries in which there are very active terrorist movements or structured criminal groupings, whether or not of a mafia-type) a legal arsenal that is not known, because not needed, in other countries;

- On the other hand and because once again criminal law embodies values, European societies may have developed significantly different approaches in fields such as freedom of morals, religious or political freedom etc.

These differences sometimes stand out and become conflictual during the negotiation of criminal law approximation instruments within the European Union (see III).

Technically, these differences manifest themselves as follows:

- In certain cases, an offence exists in one country but not in another;

- Sometimes, the same conduct exists in a generic way (for example the crime of terrorism), but its definition varies considerably, which again leads to major differences in the breadth of criminal law (for example with regard to the offence of participation in a terrorist group (see III.A)).

In international law this issue can be seen in the so-called double criminality rule which can be found in all sectors of judicial cooperation (evidence gathering, surrender of persons, enforcement of sentences). A requested State may refuse to enforce a coercive order (search, seizure, arrest, extradition, enforcement of a judicial decision, for example a sentence) if the act that gave rise to prosecution in the requesting State is not classified as a criminal offence in its own legislation. Almost systematically, on top of this first requirement another is added: the criminal offence must be punishable with a custodial sentence of a certain length in the requested State.
It is not always easy to get round the principle of double criminality, as it can call the values of a society into question. This could be noted in a recent case where a Member State refused to enforce a European arrest warrant issued by another for acts of Holocaust denial, such acts being subject to criminal prosecution in the issuing State but not in the executing State.

2. in the criminal procedure system

Although the way in which evidence is gathered in a police investigation differs little from one country to another, the same cannot be said of the way in which persons subject to prosecution are brought before the courts. Justice is actually the area in which national specificities, often linked to traditions that have lasted over several centuries, find their expression. Certainly, since the entry into force of The Convention for the Protection of Human Rights and Fundamental Freedoms in 1953, the European Court of Human Rights has undertaken to define the main human rights standards in criminal procedure. However, it has done so in a negative way, that is to say by defining, through judgements against States, the provisions contrary to human rights. This work of the court has undisputedly contributed to approximating the criminal procedures of the Member States of the European Union; however, a great many differences between them persist.
Beyond the criminal procedure of Member States, which basically either falls into a common law or a civil law framework, these differences are often the manifestation of very dissimilar approaches to relations between the State and the citizen, which determine the balance between the effectiveness of the criminal procedure and safeguards for the person subject to prosecution. These may create difficulties in transporting judicial decisions. A country with a system that is very protective of personal liberties may be extremely reticent to enforce a decision from another country that it, rightly or wrongly, considers to provide lesser protection of fundamental rights than it would itself. When we address the issue of mutual recognition (see IV) we will see the shape that these matters can take.

Without claiming to be exhaustive, it is possible to highlight the main differences between the Member States that, in the light of negotiations conducted within the European Union, appear recurrently.

a) Legality or the freedom of evidence

The legality of evidence system obliges the judge to dismiss evidence that has not been collected in the prescribed manner. This is the opposite of the so-called freedom of criminal evidence system in which the judge is free as to whether or not to accept evidence, obviously subject to certain reservations. Countries that have a legality of evidence system see it as a safeguard against arbitrariness or the risk of a judicial error. They would have even more difficulty accepting a sentence handed down in a system in which there is freedom of evidence.

b) System by which prosecution is organised (existence or not of an investigating judge, the role of the police, the independence of the Public Prosecutor's Office)

The conduct of an investigation varies greatly from one country to another. In some countries, the police have the initiative, under the greater or lesser supervision of the Public Prosecutor's Office or of a court judge; in others, which have the institution of the investigating judge, the investigation really constitutes a judicial phase. This difference is sometimes a source of problems, particularly during the evidence-gathering phase.

c) Use of coercive measures

The judicial systems of the Member States do not all have the same requirements for authorising coercive measures (search, access to information held by third parties etc.). In certain countries it is relatively easy to implement them; in others the conditions required are such as to make it very difficult to proceed with them. These differences can be strongly felt during international investigations, and sometimes give rise to major misunderstandings between judicial authorities.

d) Detention on remand

Even if all Member States have a system of detention on remand, the conditions required both to place a person within it as well as to keep that person there vary considerably. This diversity can pose problems when it comes to extradition, now covered by the European arrest warrant, when the person is required at the investigation stage to undergo a period of detention on remand. In particular, the requirement of the proof of the existence of strong evidence of guilt is not the same in all the Member States, often leading to difficulties and misunderstandings between European magistrates, particularly when it comes to executing a European arrest warrant.

3. In general criminal law

Even though the Member States of the European Union have dispensed with certain types of sanctions (see above) there are still notable disparities between Member States' legislations as to the sanctions that can be ordered by the courts. Sometimes the difference is related to the duration of the sanctions; in certain Member States, the longest custodial sentence is 20 years whilst in others life imprisonment is possible) and their nature (for example the possibility to order loss of rights (see II.A.3 (7)). These differences can create difficulties with regard to the enforcement of sanctions which exist in one country but not in another. The same holds true for the diversity there is in the way

that Member States' legislations address the issue of time-limits after which offences cannot be prosecuted or sentences enforced, or that of the age of criminal responsibility.

I. From the Maastricht Treaty to the Lisbon Treaty: the progressive emergence of the concept of a judicial area

Even though the Maastricht Treaty constituted the start of the European adventure of creating a European criminal law-enforcement area, it was particularly elliptical with regard to the objectives to be achieved and did not mention this concept anywhere. When the experts met to carry out the work under the aegis of this new treaty, they quite naturally envisaged continuing to develop the method used in the framework of the Council of Europe, then in the Convention implementing the Schengen Agreement (see II.A.1a)(1)) which, it should be remembered, had just been adopted.

A. Prior to the Amsterdam Treaty: the absence of an idea about a European area

So as to be able to understand the European Union's work towards a European criminal justice area, it is worth recalling briefly the framework and rules in existence prior to the entry into force of the Amsterdam Treaty (the Maastricht Treaty not having called into question the methods followed prior to its entry into force).

1. The Council of Europe: an inappropriate framework to create a European area.

It was only in 1957[6] and then in 1959[7], through two conventions[8], respectively on extradition and mutual assistance in criminal matters, that the Council of Europe attempted to address the issue of mutual assistance in criminal matters. These conventions, while covering most of this issue, nowhere aimed at the creation of a European criminal justice area, which nobody was calling for. In fact, the work of the Council of Europe aims at creating interoperable mechanisms for the judicial systems of its members, whose specificities and prerogatives are carefully preserved. This can be seen at several levels.

a) The idea of cooperation and not of mutual recognition

The Council of Europe uses the terminology "mutual assistance in criminal matters". This notion is based on the idea of reciprocity, or mutual assistance. This concept, which is very different to the idea of a judicial area, has consequences with regards to the mechanisms used. When, in the framework of criminal proceedings, a judge needs an order be enforced in another country, he issues an application for mutual assistance (called, for the gathering of evidence, an international letter rogatory). The judicial authority of the requested State examines this application and if, in applying the

[6] CETS No.: 024
[7] CETS No.: 030
[8] The 1957 convention no longer applies between Member States; it has been replaced by the European arrest warrant. However, the 1959 convention still to a great extent governs relations between Member States.

international conventions that bind it with the country of the judge of the requesting State, it considers that it should grant the application, it issues an order of national law (for example a search warrant) and returns the evidence resulting from its execution to the requesting judge.

b) A timid approach to the approximation of legislation

The legislative work carried out within the Council of Europe almost never aimed at approximating its members' legislations[9]. In fact, it was only very late on (1997) that the Council of Europe adopted a first convention on substantive criminal law. However, as will be shown, it is difficult for cooperation to go beyond certain limits if work is not undertaken to approximate legislation. Furthermore, the Council of Europe has never adopted instruments aimed at approximating in a positive way the criminal procedures of its members, that is to say, by establishing principles that go beyond the general principles.

2. The Convention implementing the Schengen Agreement: the premises underpinning the work of the European Union

Within the framework of the Schengen agreement and particularly its implementing convention (14 June 1985), the Member States of the European Union have adopted rules complementing and improving, essentially in terms of efficiency, those of the Council of Europe. Some of them, incorporated into the *aquis* by the Amsterdam Treaty, are still in force. Significant progress has been made in mutual assistance in criminal matters (evidence-gathering, extradition), in particular by authorising direct contacts between judicial authorities, who now no longer have to go through the ministries of justice or foreign affairs. However, the method of cooperation used by the Council of Europe has been retained, with just one exception: the creation of the Schengen Information System (S.I.S), a large part of which covers extradition (now the European arrest warrant) (see II.A.1d)(1)(b)(vi)). This common system, which since has undergone major developments in the European Union, constituted the first integrated approach in European criminal justice. It contains data on stolen objects, wanted persons etc.

3. Methodological variation resulting in greater complexity of the European Union's legislative *corpus*

a) The absence of European Union law: the establishment of a legal hotchpotch

A major error was certainly committed at the start of the European Union's work. Instead of creating new European Union law *ab initio*, the legal instruments adopted by the European Union added to the Council of Europe conventions. As such, the extradition convention of 1957, to which the Convention implementing the Schengen Agreement had already been added, had another two instruments joined to it: one convention in 1995 and then another in 1996 (all of which have been revoked since the European arrest warrant).

[9] Even though of course it must be recalled that the mechanism of the Convention for the Protection of Human Rights and Fundamental Freedoms does to a certain extent have such an objective.

Where it concerns the gathering of evidence, the negotiation of a new convention, adding to the convention of the Council of Europe of 1959 like the Convention implementing the Schengen Agreement was completed in 2000[10]. This method has resulted in a legal hotchpotch, difficult for practitioners to grasp, and undoubtedly resulting in an under-use of the instruments adopted by the Council.

b) Variations in the theoretical bases of the instruments

The existing complexity is compounded further. In 1999, in Tampere, the European Council adopted chapter VI (paragraphs 33 to 37) on the mutual recognition of judicial decisions.

This principle, which should be compared to the mechanisms for mutual assistance in criminal matters of the Council of Europe (see A.I.1) described above, takes the following forms, to reuse the example found in the introduction:

– The Spanish judge, in accordance with his national law, issues a decision to search premises situated in London. He transmits this decision to the competent British judicial authority for enforcement. Spain is no longer a requesting State but a State issuing a decision.

– The British judicial authority (Britain is no longer a requested State but an executing State) reviews the legality of the decision, checking whether mutual recognition applies to the decision. However, neither its advisability[11] nor proportionality[12] can be taken into consideration in such a review;

– The decision is directly enforced in the United Kingdom. The British judicial authority does not adopt any new decision.

This change, namely the fact that that a Member State executes the decision of another, does have important consequences with regards to possible grounds to refuse the enforcement of a measure, as we will see in the case of the European arrest warrant (see II.A.1d)(1)).

It is worth noting that such a system should in principle lead to a change in the terminology used hereto in the treaties: the principle of mutual recognition would imply the disappearance of the term “mutual assistance in criminal matters” to be replaced with a “European judicial area”. Strangely the Constitutional Treaty and the Lisbon Treaty have retained the former.

On 15 January 2001, at the request of the European Council, the Council adopted a plan aiming at the implementation of the principle of mutual recognition[13], covering the entire spectrum of legal proceedings described above. As a result, the corpus of the European Union, at least where it concerns evidence-gathering, comprises instruments, some of which were adopted in accordance with the Council of Europe principles (the hotchpotch) while others were adopted in accordance with the principle of mutual recognition. Annex I provides a complete table of instruments indicating whether or not they are founded on the principle of mutual recognition.

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[10] Even this convention has been added to, namely by a protocol, concluded in 2001 (OJ C 326/1 of 21.11.2001)

[11] Usefulness or not of undertaking an act.

[12] Adjustment of means to the aim sought.

[13] OJ C 12 of 15.01.2001

This methodological variation causes additional difficulty for practitioners because the applicable rules and techniques (particularly the grounds for refusal) vary depending on whether or not they are founded on the principle of mutual recognition.

4. A third pillar producing law without any major role for the Commission or the European Parliament

Before the Treaty of Maastricht, none of the issues concerning police cooperation in criminal matters or judicial cooperation in criminal matters had been "formalised" and organised at EU level. Although some informal groups such as the Trevi group[14] had been created, their scope and ambit was nevertheless reduced. Additionally, the Schengen agreement was concluded in June 1985 and its implementation convention in 1990[15] (see part I.A.2). All EU Member States – except for the UK and Ireland – and Norway, Iceland and Switzerland have since that time progressively joined the Schengen area.

The Maastricht Treaty, which was signed in February 1992 and entered into force in November 1993, provided a structured frame (division into pillars) for Member States to discuss Justice and Home Affairs at the EU level. Police cooperation and judicial cooperation in criminal matters were included in the third pillar, Title VI EU, along with other topical areas such as immigration, asylum and visas policies. The latter three areas of cooperation would later be "communitarised" with the Amsterdam Treaty in 1997 and moved to the first pillar.

Before the Amsterdam Treaty, the roles of the European Parliament, the Court of Justice and the European Commission in the field of judicial cooperation in criminal matters were very limited.
The European Parliament could in theory be consulted by the Council, but most of the time it was only informed. As for the Court of Justice: it was competent to interpret conventions only where there was a clause in the text expressly providing for this interpretation. The European Commission's right of initiative was shared with the Member States.
The Council was the main actor in the legislative field. Member States made proposals and upon unanimous agreement adopted legal instruments within the Council structure.

B. Development of a criminal justice area: the post-Amsterdam situation

One of the overall aims of the Treaty of Amsterdam was to provide a high level of safety to citizens within an area of freedom, security and justice. In the Amsterdam Treaty, the reference to particular areas of criminality was broadened in comparison to the Maastricht Treaty. From a reference to terrorism, drug trafficking and *other forms of serious crime*, the EU Treaty was amended to also include racism and xenophobia; trafficking in persons and offences against children, arms trafficking, corruption and fraud.

[14] For instance, Heads of national police forces met in Trevi I to discuss terrorism issues and in Trevi III to discuss organised crime issues.
[15] Convention Implementing the Schengen Agreement, 19 June 1990.

With the adoption of the Treaty of Nice a formal Treaty foundation was given to Eurojust (article 31(2) TEU), which was created in 2002[16]. Eurojust has been recently strengthened by the adoption of a new Council Decision[17] (see part II.B.3.).

1. A growing role for the European institutions

a) For the European Court of Justice

Although quite similar in nature to directives, framework decisions were not gifted with direct effect. Their aim is to impose obligations on Member States, approximating specific areas of law enforcement[18] and judicial cooperation in criminal matters. In addition, unlike directives, they do not benefit from a tight control of implementation by European institutions: no infringement procedure can be initiated against a Member State that has not transposed a framework decision in a timely manner.

The Amsterdam Treaty nevertheless gave jurisdiction to the ECJ to give preliminary rulings on the validity and interpretation of decisions and framework decisions, the interpretation of conventions and on the validity and interpretation of measures implementing them (art. 35 EU). The limit to this jurisdiction lies in the fact that this jurisdiction is conditional. Member States should officially agree on the ECJ's jurisdiction by a specific declaration. Additionally, Member States can choose whether they want their last instance courts only to refer questions to the ECJ, or whether they wish to grant this possibility to any national court. According to the ECJ website, the current situation is as follows:

- UK, Ireland and Denmark have not submitted declarations, nor have Bulgaria, Malta, Cyprus, Estonia, Romania and Slovakia;
- The other Member States have accepted the jurisdiction under the conditions explained above.

b) The European Parliament consulted systematically

A consultative role is given by the Amsterdam Treaty to the European Parliament on third pillar issues (art. 39 TEU). Before adopting a decision or framework decision or establishing a convention, the Council has to consult the European Parliament.

The Parliament is fruitfully active in third pillar issues and produces recommendations and opinions on all relevant discussions on judicial cooperation in criminal matters. Each year the European Parliament will also hold a debate on the progress made in the areas of police and judicial cooperation in criminal matters.

c) A more visible role for the Commission

The Council of the European Union remains the main actor in the decision-making process under Title VI. The Commission should nevertheless be fully involved in discussions in the areas covered by Title VI. The Commission does not have an exclusive

[16] Council Decision 2002/187/JHA 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime.
[17] Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime.
[18] The author will in this note refer to "law enforcement cooperation" rather than "police cooperation" which does not, in our view, reflect the reality of the different forces working in the field.

right of initiative as in the first pillar, but it does share its right of initiative with Member States.

The European Commission has produced interesting evaluation reports on the national implementation of different legal instruments such as the European arrest warrant. Nevertheless, none of those reports would compel Member States to amend their legislation.

2. Member States' reluctance for the development of a criminal judicial area

a) The unanimity rule

The obligation to adopt legal instruments unanimously and the absence of any similar provision to the "constructive abstention" of the second pillar, makes negotiations of legal instruments in the third pillar particularly exhausting. The European Evidence Warrant adopted in December 2008 is a relevant example: more than four years were needed to finally adopt this text.
The unanimity rule and the heavy procedures ancillary to this principle have even led Member States to omit some types of instruments from their negotiations. Conventions, for instance, are hardly used anymore. Conventions already in place are sometimes even changed into instruments that are more easily adaptable to current needs (i.e. Europol Convention of 1995 replaced by a Decision in 2009[19]).

Member States had foreseen the difficulties caused by unanimity and included a *passerelle* provision (art. 42 TEU) according to which provisions falling under the third pillar could be dealt with under Title IV of the EC Treaty. Nevertheless, to our knowledge, this provision has never been used.

b) The fragmented competence of the ECJ

As discussed above (see A.1.a)), only very few Member States have accepted the jurisdiction of the ECJ in the area of judicial cooperation in criminal matters.

3. The progress foreseen with the Lisbon Treaty

The Convention for the future of Europe was rejected by France and the Netherlands in 2005.

The Lisbon Treaty deserves a special mention as far as law enforcement cooperation and judicial cooperation in criminal matters are concerned. With the Lisbon Treaty, EU competencies in this field will be widened. Indeed, the ordinary legislative procedure – co-decision – will be introduced, the ECJ will become competent on a much broader scale, the Commission will be able to act as a proposal force on a more regular basis, and democratic control of the judicial cooperation in criminal matters will also be enhanced with a stronger role of the European Parliament and of national parliaments.
All issues formally placed under the third pillar will be united under Title V of the Treaty on the Functioning of the Union. One Chapter under this Title will be dedicated to judicial cooperation in criminal matters.

[19] Council Decision establishing the European Police Office (Europol) OJL 121 15.5.2009, p. 37-66.

Unanimity will in principle disappear: qualified majority decisions should be extended to all issues covered by the third pillar. Unanimity will nevertheless remain the rule in very specific areas such as the possible creation of a European Public Prosecutor's Office within Eurojust (see II.B.4.b)), and operational police cooperation and rules on "hot pursuit"; unless the procedure of "enhanced cooperation" is used (see II.B.4b)(2) and III.A.4b)).

Co-decision by the European Parliament and the Council in the field of judicial cooperation in criminal matters and law enforcement cooperation are to be introduced; the European Parliament will thus be able to participate fully in the development of an EU criminal justice area.

One other important progress brought about by the Lisbon Treaty is the extension of judicial control by the ECJ to third pillar issues. The ECJ will therefore be able to contribute actively to the development of an EU criminal justice area. Nevertheless, two important limits should be mentioned:
- the ECJ will have no jurisdiction concerning Member States which have benefited from opt outs in certain areas (see below);
- the jurisdiction of the ECJ will only be fully operational five years after the entry into force of the Lisbon Treaty.
This delay is now compared to the draft Constitutional Treaty; it is considered as a drawback for those who would want to see steps taken rapidly in the field of judicial cooperation. On the positive side, one could of course argue that those five years will certainly be used by Member States to implement third pillar instruments that have not been transposed in national law in due time. For instance, the Council Framework Decision of July 2003 on the execution in the European Union of orders freezing property or evidence had only been implemented in seven Member States by August 2005 (the official deadline). By the end of October 2008, eight Member States had still not sent any implementation legislation to the Commission[20].

Some national derogations: the opt outs

Currently, Denmark, the United Kingdom and Ireland benefit from a derogatory status under Title IV of the EC Treaty (visas, asylum and immigration). Nevertheless, in the fields of law enforcement cooperation and judicial cooperation in criminal matters, these three countries are currently participating with all other Member States in the development of an EU criminal justice area.

[20] Report from the Commission based on Article 14 of the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, COM/2008/0885final.

This situation may change if the Lisbon Treaty comes into force. The following lines will describe the case of the United Kingdom[21].
The United Kingdom will have to decide within the five years transitional period on whether or not to opt out completely from law enforcement cooperation and judicial cooperation in criminal matters and. If the United Kingdom decided to choose the opt-out possibility, then all past instruments would cease to apply to the country. After opting out completely, it would nevertheless be able to opt back in on a case-by-case basis for instruments adopted before the entry into force of the Lisbon treaty.
In principle, for instruments adopted after the entry into force of the Lisbon Treaty, the United Kingdom should not be bound. However, it could decide to apply some of those instruments again on a case-by-case basis.

The consequences of the United Kingdom – or other countries – opting out from all cooperation in this field could have an extremely negative impact on the development of an EU criminal justice area. Furthermore, from a practitioners' point of view this situation would seem completely unrealistic. Any analysis of criminal activities in the EU today shows strong ties between the United Kingdom and the other Member States.

II. The law of the European criminal-law area

As indicated in the introduction, criminal proceedings have three main phases, now covered by European law. They are presented here. But the European Union has not limited itself to establishing rules governing bilateral relations between its members; it has actually been highly innovative in creating what shall be described as integrated cooperation, aimed at facilitating the implementation of this law.

A. The three main phases of criminal proceedings

With a view to clarity, it would seem preferable for this presentation to follow the course of criminal proceedings rather than to go over the instruments adopted following a variable methodology by the Council one after another (see above).

1. Preparing criminal trials

The first work of the European Union went into the preparation phase of criminal trials (and in its time that of the Council of Europe). The different activities required for a criminal trial to be held are listed below.

a) Evidence-gathering

The provisions relating to evidence-gathering are governed by the convention of 29 May 2000[22] and its protocol[23] (Council of Europe method). The two framework decisions

[21] Protocol (N°21) on the position of the United Kingdom and Ireland in respect of the area of £Freedom, Security and Justice, OJ C115/295.Ireland and Denmark could also decide to use the opt out possibility in the field of judicial cooperation in criminal matters and law enforcement cooperation.
[22] OJ C 197/1 of 12.07.2000
[23] OJ C 326/1 of 21.11.2001

adopted in accordance with the principle of mutual recognition: on the European evidence warrant (EEW) of 18 December 2008[24] and on the freezing of assets and evidence[25], were added, redundantly, to this convention.

(1) European judges can directly exchange requests for mutual assistance and information

The Convention implementing the Schengen Agreement[26] has made it possible for the judicial authorities of the Member States to directly address requests for mutual assistance to each other. Here we should recall that in the past they had to go through the ministries of justice or even of foreign affairs. The convention of 29 May 2000 enshrined this principle as a system, which has furthermore increased the need for "integrated" cooperation (see II.B.) to facilitate communication between magistrates. The principle of direct communication has been retained for the instruments based on mutual recognition. Even if this functioning sometimes involves a loss of information[27], it has certainly contributed to the emergence, if not of a European criminal justice area, of the criminal law sphere of a European criminal law area with a stronger judicial character.

(2) Evidence-gathering in the requested State can be carried out in accordance with the procedures applicable in the requesting State.

Article 3 of the 1959 convention provides that a request for mutual legal assistance must be executed *in the manner provided for by the law of the requested party*. However, certain countries have the so-called "legality of evidence" system (see Introduction C.2a)). The convention of 29 May 2000 required Member States from then on to accept foreign procedural requirements, provided that they are not contrary to their fundamental principles. While such a measure would seem to be a good idea, in reality it could give rise to very sensitive issues of implementation and oversight with regard to compliance of the courts of one Member State with the procedural formalities of the criminal law of another[28]. Here we should point out that these rules appear to be in contradiction with paragraph 36 of the Tampere conclusions, drafted as follows: *evidence lawfully gathered by one Member State's authorities should be admissible before the courts of other Member States, taking into account the standards that apply there*. This paragraph seems to have been taken up in Article 82 paragraph 1 a) of the TFEU, following on from the Lisbon Treaty.

(3) The taking of testimony is not yet subject to the principle of mutual recognition

[24] OJEU L 350/72 of 30.12.2008
[25] OJ L 196/45 of 2.8.2003
[26] This text is reiterated in a document containing all of the Schengen *acquis* as incorporated into the European Union *acquis*. OJ 22/09/2000
[27] Any application for mutual legal assistance contains various pieces of information (for example that a judge is investigating a specific person). The fact that different pieces of information are cross-checked within Eurojust can enable links between different investigations to be established. If such information is directly exchanged between judges, it is lost, in the sense that no crosschecking can take place.
[28] The application of a foreign law is common in civil cases (international private law), but almost unheard of in criminal law, where the judge only applies his national legislation.

The collection of testimonial evidence (witness and victim testimony, suspect interviews etc.) has not been covered by the work carried out within the European Union framework. The applicable rules are therefore those set out in the Council of Europe conventions. The applicable law is always that of the requested State, other than when the procedural principles of the requesting State apply (see above).

(4) Complex but original rules to enable the interception of telecommunications

It is clearly both impossible and pointless to go into the details of a text that is very complex due to technical factors that underpinned its conception as well as the taking into account of differences between national legislations, with regard to a particularly sensitive area for civil liberties. Two comments will be made in this regard:

– Provisions that go beyond traditional mutual assistance, in which the requesting State seeks the aid of a requested State (in the first example: the suspect uses a telephone in the United Kingdom: the Spanish judge asks to be able to intercept the conversations entered into from this telephone). The convention covers any situation in which the interception of telecommunications is conducted as part of a criminal investigation by a Member State (intercepting State) on the territory of another (visited State), with, and - above all - without its aid. Technology therefore shatters the notion of territoriality, obliging the Member States to think in terms of space and shared sovereignty;

– The text results in greater compliance with the national legislation of each Member State where it concerns interceptions; any interception is subject to the law of the country in whose territory it is carried out (so far there is nothing requiring a Member State which through its own means - as technology enables it to - carries out interception in the territory of another State to comply with the law of that State).

These provisions of the 29 May 2000 convention of seem to be little used, undoubtedly due to their extreme complexity.

(5) The European investigation: common investigation teams

The Convention of 29 May 2000 allows for the setting up, following an agreement between two or more Member States, of a team mainly composed of Member States' officers (police or magistrates) which operates in their respective territories. Three points are worthy of particular mention here:

- An officer seconded to a joint investigation team (for example a British officer in Germany) can be asked to carry out investigative measures. This possibility is however circumscribed to a large extent.
- A simple procedure is available for a joint investigation team to request that investigative measures be taken in one of the countries in which it operates.
- The data collected by its members in the territories of Member States that participated in the investigation can be used directly in the proceedings of each of those States. The common investigation team represents a significant change to the traditional methods of mutual legal assistance, enabling a departure from the exclusively reactive mechanism of the international letter rogatory.

Due to the tardy ratifications of the convention, which delayed its entry into force, the Council "extracted" the provisions from the Convention that were necessary to transform

them into a framework decision on 13 June 2002[29]. To date, numerous joint investigation teams have been created. They constitute a quite complex tool to implement, due to the work involved in the prior definition of the tasks and to the training that is required of its officers. Once this stage has been passed, the instrument has proven to be particularly useful. It has enabled considerable success in the fight against terrorism, drugs trafficking and organised crime.

(6) An ubiquitous audience: teleconferences and videoconferences

The technique of videoconferencing, which is used increasingly by Member States to limit transfers of detainees, can be used at European level, but to a limited extent. It is reserved for witnesses (a Member State may consent to it being used for persons against whom legal proceedings have been instituted), and videoconferences are not permitted between more than two Member States. Nevertheless, videoconferencing does represent a significant step forward for a Europe which now covers a very large area.
Teleconferences (telephone interviews) are also possible, under more restrictive conditions.

(7) Controlled deliveries and undercover investigations

The Convention of 29 May 2000 tried to regulate these particular investigation techniques. Controlled delivery consists of the police or customs, under the supervision of the judicial authority, secretly following fraudulent cargo – for example drugs or stolen items – through several countries to try to intercept their recipient. The "undercover" investigation consists of a police or customs officer infiltrating a criminal or terrorist organisation in another country with a view to dismantling that organisation. A case-by-case approach has been used for these two investigation techniques, such that the convention is not binding on Member States.

(8) Non-testimonial evidence: double regulation

The Convention of 29 May 2000 did not specifically address the issue of gathering such evidence. Its protocol, however, introduced rules relating to bank accounts (access to the lists of accounts held by a person under investigation in a Member State, surveillance of bank accounts). These rules are highly innovative but unfortunately as yet no overall assessment of their application has been carried out.
However, two European Union instruments have been added to regulate this area. Indeed, if we refer to the table in Annex 2, one can see no fewer than six instruments governing this area competitively!

(α) Freezing of assets and evidence

This instrument was originally conceived so as to enable the rapid seizure in another Member State of an item either constituting evidence or an object that can be seized during the judgement phase. There are however shortcomings with the original conceptualisation in that it only covers the decision aiming to freeze the assets, and is

[29] OJ L162 of 20/06/2002

incomplete in addressing[30] the issue of their return to the issuing State under the system of mutual recognition.
On 23 October 2008[31], only 19 Member States had transposed this framework decision, some of them incompletely, although the transposition deadline was 2 August 2005.

(β) The European Evidence Warrant

The European Evidence Warrant, adopted on 18 December 2008, was originally based on a European Commission[32] proposal filed in 2003. This text aimed to apply the principle of mutual recognition to evidence-gathering, which would have made unified law possible for the entire process. Unfortunately, committing what some have considered as a major strategic error[33], the Commission limited its proposal to certain types of evidence, excluding from its scope interviews of witnesses or suspects, the collection of DNA and searching for evidence in real-time[34], considering, perhaps not without reason, that prior to their inclusion it would be appropriate to adopt an instrument on procedural safeguards. The text aimed at the application of a mechanism similar to that of the European arrest warrant, particularly where it concerned double criminality (see Introduction C.1). The final result is however very disappointing:

- The Council has had to resign itself to making its application optional in all cases where the investigative measures to be carried out require some measures covered by the instrument (for example a search) and others that are not (for example interviews), which is a precedent under European Union law, considering moreover that the two elements hereunder could highly discourage magistrates from using the EEW.

- Furthermore, but this will be raised again when it comes to taking stock of mutual recognition, the text finally provides for more grounds for the refusal of execution than the Council of Europe conventions, certain grounds which were reserved for example for extradition having now been "imported" into the EEW (ne bis in idem, territoriality clause[35]).

- On the gradual elimination of double criminality, any progress, at least in terms of effectiveness, is unclear for two reasons:

    - Firstly Germany, in an opting out clause, has obtained a review of the system established for certain offences in the European arrest warrant, which could result in the following paradox: it would be easier to surrender a person to the issuing State than their photograph, seized during a search. The probable reason for such a backwards step will be examined in the section on the approximation of legislation (III).

[30] The rules applying to confiscation are not those set out in the framework decision subsequently adopted by the Council (see p. 23) making it possible to circumvent the provisions on dual criminal liability.
[31] 8417/2/08
[32] COM(2003) 688 final
[33] ECLAN 20 November 2008: Report commissioned by the European Commission: Analysis of the Future of Mutual Recognition in Criminal Matters in the European Union.
[34] For example the surveillance of bank accounts.
[35] This clause enables the executing State to refuse to enforce an order issued by the judicial authority of another Member State if a part – albeit minor – of the facts was committed within its national territory.

- Secondly because an in-depth analysis of the text can lead one to the conclusion that while the elimination of double criminality has progressed in certain sectors, it could have gone backwards in others.

b) Seizure for the purpose of confiscation

All the criminal codes of the Member States have provisions making it possible to confiscate certain items of property at the same time as sentencing: the instrument used in an offence (for example the weapon used to commit murder) as well as the proceeds of an offence (money raised through the sale of drugs)[36]. However, a confiscation decision will usually have little chance of being enforced unless the property concerned was seized before the trial; it therefore has to be a possibility in the pre-trial phase. This issue, which until now has been regulated exclusively by the Council of Europe conventions, has been addressed in a framework decision on the freezing of assets (see II.A.1a)(8)(a)). However, the European evidence warrant was not envisaged to apply to this area.

c) Information on the criminal history of persons: the ECRIS system

Knowledge of a person's criminal history is essential both at the investigation phase as well as at the trial phase. All the Member States have organised themselves in such a way as to be able to obtain this information[37], something that often influences investigation or prosecution choices. For a long time it was difficult to obtain such information when sentences were handed down in another Member State, for example in the scenario where a person is arrested in a Member State of which he is not a national. Even though the Commission was grappling with this subject back in 2005 already[38], it was on the initiative of a group of Member States that a pilot project was launched interconnecting criminal records, which is currently functioning most satisfactorily between 14 Member States. The technical and organisational principles thereof were then set out in two framework decisions adopted in February 2009. The first[39] covers the legal framework for these exchanges as well as the obligations and rights of the Member States (below). The second[40] creates the European Criminal Records Information System (ECRIS[41]), which should be in place before 7 April 2012 (the experimental system continues to function for the moment). Its realisation has been entrusted to the European Commission, which will provide the communication interface and the network (at the moment, S-TESTA).

The system is organised as follows:

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[36] Certain countries sometimes provide, generally speaking for drugs trafficking, the confiscation of property of an offender, without it being necessary to demonstrate a link between the offence and this property, sometimes not even its posteriority with the commission of the offence. Finally, certain legal systems allow for confiscation in value terms, that is to say: if the confiscated item could not be seized (for example the offended managed to shield it from the investigation), the confiscation of an equivalent amount belonging to the offender can be ordered.

[37] Albeit with varying speed given that not all yet have a computerised register.

[38] White paper on exchanges of information on convictions and the effect of such convictions in the European Union COM(2005) 10 final.

[39] OJEU L 93/23 of 7.4.2009.

[40] OJEU L 93/33 of 7.4.2009.

[41] European Criminal Registers Information System.

- Each Member State is responsible for the centralisation and storage of decisions to convict its own nationals. To this end, any Member State that sentences a national of another Member State has to transmit that decision to it without delay.

- A table has been drawn up setting out the equivalent offences between different Member States. This will eventually enable some kind of automatic translation into the language of the country requesting information from the Member State that passed the sentence.

- When one Member State needs to know what sentences were passed against the national of another, it addresses itself to that State, which provides it with all the information on convictions in its possession (those handed down by its own courts as well as those transmitted by the other Member States).

- The Member State from which the information was requested must do so within a very short time-frame through an interconnected criminal records system.

Both the current system and ECRIS are however incomplete. Indeed, nothing is envisaged for nationals of third countries, which, as the Commission indicates, constitutes a discriminatory situation against nationals of Member States. Hence, the judicial authority of a Member State wishing to know what sentences had been passed against a national of a third country in the other Member States should address an application to each of them, which in practice it never does. Furthermore, this raises an additional problem, namely that of certainty as regards identity: how is it possible to ensure that the person concerned by a conviction really is the person who was actually sentenced[42]? In order to address this deficiency, the European Commission advocates the creation of a European index of convictions which would contain biometric data, i.e. digital fingerprints, to ensure identification of the person concerned. It would be a so-called "hit-no-hit" system: the index would only contain data on the person and the information that he/she was convicted once or more in one or more Member States. Consultation of the index would enable the requesting Member State to know in which Member State the person had been convicted and have that decision communicated to it. A feasibility study is currently underway as to the setting up of this index.

d) Arrest of the wanted person for trial

The European arrest warrant, created by a framework decision of 13 January 2002[43], entered into force on 1 January 2004.
This instrument was further developed in a framework decision adopted on 6 March 2008[44] aiming to apply the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention.

[42] For the nationals of the Member States the problem does not arise, as the criminal record is normally linked to the register of civil status.
[43] OJEC L 190/1 of 18.07.2002
[44] 17506/08. The text has not yet been published in the OJEU.

(1) The European arrest warrant, the benchmark of mutual recognition

The European arrest warrant, adopted in a hitherto record time in the history of the European Union as well as in the field of international criminal law[45], was the first implementing instrument for the principle of mutual recognition. With overall identical rules it concerns two types of decisions: those aiming at the enforcement of a criminal order (concerning a person who is wanted for trial), and those aiming at the enforcement of sentences (concerning a person who was tried in absentia or did not makes himself available for the sentence to be enforced). The European arrest warrant has set out rules and methods which constitute the benchmark of mutual recognition, that is to say the basis for the comparison of instruments adopted thereafter.

(α) What is the European arrest warrant?

The European arrest warrant is the order of a judicial authority of a Member State of the European Union (issuing State) for the arrest and subsequent surrender of a person in another Member State (executing State).

(β) The key *acquis* of the European arrest warrant

The European arrest warrant has made a certain number of decisive, even landmark — steps forward compared with extradition law.

(i) Unified European Union Law

In substituting the "hotchpotch" (see p.I.A.3a) of texts governing extradition for the European arrest warrant, European law has been unified and therefore simplified. The adoption of a framework decision has furthermore made it possible for a judicial review to be exercised by the Court, albeit limited to only preliminary rulings.

(ii) An exclusively judicial process

Conventional extradition law used to govern relations between States. Extradition was granted by one State to another. The European arrest warrant took this process to the judicial level, excluding any intervention from the executive level. This development represents an essential step in the creation of a European criminal justice area

(iii) A strict limitation on the principle of double criminality

The Framework Decision set out a list of 32 categories of offences (not of offences in the sense of a criminal code). If according to this list the acts that gave rise to the issuance of the European arrest warrant constitute an offence in the legislation of the issuing State (and not of the executing State), and are subject to a custodial sentence of over three years, double criminality cannot be a requirement (see Introduction C.1.). In the opposite case, the enforcement of a warrant can be subject to the condition that the acts subject to prosecution constitute a criminal offence in the legislation of the executing State. The

[45] The Commission's proposal was submitted in early September 2001 and adopted during the European Council of Laeken, in December. The official adoption of the text, due to the usual legal delays did not take place until 13 January 2002.

remaining acts subject to the double criminality requirement make it possible to avoid the difficulties that can arise from differences between the legislations of the Member States with regards to societal issues (mainly abortion, drug use, euthanasia, conduct obviously not figuring on the list). The limitation of double criminality, made possible by the principle of mutual recognition, facilitates cooperation in that it makes it possible to avoid judicial reviews requiring documents to be exchanged (and translated), which slow the process.

(iv) An expeditious process

Following the arrest of the person, the executing State has an overall time-limit of 90 days in which to rule on the surrender. This deadline is not legally sanctioned, but one can note that in practice it is respected everywhere with the result that the slow process of extradition has been replaced with a very swift mechanism, which furthermore is favourable to the persons surrendered[46] and makes it possible for a trial to get underway within a reduced time-frame, which accords with the principles stated in the Convention for the Protection of Human Rights and Fundamental Freedoms.

(v) The surrender of nationals

Traditional extradition law allowed a Member State, even in the European Union conventions of 1995 and 1996, to refuse the extradition of their nationals. The European arrest warrant abolished this principle, which is contrary to the principle of mutual recognition and the trust that underscores it. This constitutes a major development, particularly to enable the simultaneous trial of a criminal group, if one of its members was arrested in a country of which he is a national.

(vi) Use of S.I.S.

Finally, although not a development in itself, the European arrest warrant has retained an essential part of the acquis of the Convention implementing the Schengen Agreement, namely the use of S.I.S.; the mere fact of someone being registered in the system makes their arrest possible[47].

(2) European Judicial Review

All the Member States have the possibility, when a person is arrested to be brought before a court, to substitute detention on remand for an alternative measure (payment of a surety, supervision etc.). According to the Commission, this decision is rarely handed down when the person who should be subject to it does not reside in the Member State where he was arrested, the judicial authority having no means to ensure supervision of the person once that person has returned to his country of residence. This is why on 29

[46] The period of detention in the executing State is not generally taken into account in the time-limits governing detention on remand, even though it clearly impacts on a custodial sentence should this be handed down.

[47] At the time of registration with SIS, each Member State carried out a review to establish whether should a person be arrested on their territory, its law would enable it to accept the enforcement of a European arrest warrant. Should the answer be negative, the Member State would flag this, meaning that the person subject to the warrant would not be arrested if stopped on its territory. This mechanism is remarkable in that it prioritises the investigation to ensure the legal security of the operation.

August 2006, the Commission submitted a proposal for a framework decision[48] aiming at allowing mutual recognition of alternative measures to that of detention on remand, accompanied by an extremely rapid surrender mechanism in cases where the person concerned does not accept the obligation imposed on him. The text was adopted by the Council in March 2009[49]. The mechanism that was ultimately retained enables the judicial authority of the issuing State to order a supervision measure to be enforced in the executing State. In cases of the non-compliance of the person subject to prosecution, the State executing judicial supervision can simply notify the issuing State, as appropriate, which will result if necessary in the issuance of a European arrest warrant for that person. In view of the diversity of measures in the Member States, they are only required to enforce some of them (for example an order requiring a person to reside in a given place), but may refuse others (for example a prohibition on the exercise of a given profession). The decision includes a whole series of grounds for refusal specific to it, in addition to all of those of the European arrest warrant, because in a case of non-compliance with the supervisory measures, the executing State should refuse surrender on the basis of the European arrest warrant. The system relating to double criminality is, by default, that of the European arrest warrant, but the Member States may issue a statement authorising them to completely apply the double criminality requirement. As in the case of the European evidence warrant, this causes a problem with regard to the coherence of the European corpus.

2. Trial

A certain number of instruments adopted by the Council concern the trial phase. It is not easy to categorise them: to a certain extent these instruments may actually be considered as contributing to the approximation of the criminal procedures of the Member States even though care is taken to state that this is not their objective, but rather that of facilitating trials in Europe. It is for this reason that they are mentioned at this stage of the report and in the point on the approximation of legislations.

a) Ne bis in idem and the issue of positive conflicts of jurisdiction

(1) Ne bis in idem

"Ne bis in idem" is a classic principle of criminal procedure according to which: *"No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted"*. This rule, which meets the dual requirement of equity and legal certainty, is recognised and applied in the domestic legal order of those countries that respect the rule of law. It is also enshrined in several international instruments safeguarding fundamental rights, including the Charter of the European Union (Article 50).

Even though the principle is quite simple to implement at national level, it does however create difficulties where two or more States are concerned. This is a frequent scenario, for two reasons:

[48] COM(2006) 468 final

[49] 17506/08. Not published in the OJEU.

- The Member States often consider that their criminal law applies from the moment that an act forming a constituent part of an offence was committed on their territory, albeit minor compared to the others.

- Most attribute wide extra-territorial powers to their courts[50].

Now, the application of the "ne bis in idem" principle can require a State to waive prosecution or trial and therefore its right to punish.

The "ne bis in idem" principle was defined with relative precision at European level in the Convention implementing the Schengen Agreement (Articles 54 and following). The CJEC[51] thereafter issued a certain number of decisions of principle, basing itself on the concept of an area of freedom, security and justice, enabling it to define this principle further. Thus, for example, the Court considered that the illicit trafficking in narcotic drugs and psychotropic substances from one European Union country to another constituted the same criminal act, and could not, as however had been the practice, give rise to prosecution in the first country for the export of narcotic drugs and in the second for their importation[52]. The Court also clarified the circumstances in which a decision not to prosecute taken in a Member State would be binding upon another[53]. This remarkable case law undoubtedly explains why a proposal for a framework decision of the Greek Presidency on 18 November 2003[54] in response to a call for a programme of measures aimed at implementing the principle of mutual recognition of criminal decisions[55] did not come to fruition. It aimed to address the issue of lis pendens[56] and to reduce the possibilities for declaration provided for by Convention implementing the Schengen Agreement, which could strongly limit the scope thereof. The Commission was requested to draw up a broader initiative on the prevention and the regulation of conflicts of jurisdiction as well as on the principle of ne bis in idem. A Green Paper[57] was published in December 2005 but there was no follow-up to it.

(2) Preventing conflicts of jurisdiction in the European interest

The requirements imposed by the Court are that solutions be found at the level of prosecution to prevent or at least limit cases of "ne bis in idem".

In addition to the "ne bis in idem" principle, there are several other reasons to attempt to prevent positive conflicts of jurisdiction: a case risks not being addressed in its entirety;

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[50] A case where the criminal law of one State is applied to offences committed outside its territory. Of course, this does not authorise the judicial authority of a Member State to take action outside its territory, but only to prosecute persons for such acts in its courts. Most States therefore retain their jurisdiction where serious crimes are committed by or against one of their nationals.

[51] Which has jurisdiction due to the incorporation of the Schengen acquis into that of the European Union under the Amsterdam Treaty.

[52] Van Esbroeck Case C-436/04 9 March 2006.

[53] Hüseyin Gözütok and Klaus Brügge Joined Cases C-187/01 and C-385/01 11 February 2003. See also Miraglia Case C-469/03 of 10 March 2005.

[54] 6356/03

[55] OJEC C 12 of 15.01.2001

[56] That is to say a positive conflict of competence.

[57] COM(2005) 696 final

the multiple investigations are energy-draining; finally, the trial in several different countries of persons involved in the same case often leads to decisions that are hardly fair.

Unlike the field of civil law, where European regulations define the applicable jurisdiction rules with relative precision, criminal law makes the adoption of binding rules difficult – even extremely difficult. This can partly be explained on the one hand by the "right to punish" which makes the Member State little inclined to accept such rules; it also stems from the fact that a criminal case is not simply a conflict between two parties, but often has an impact on the public order of a country.
To date, only certain provisions included in the decision establishing Eurojust make it possible eventually on the basis of the voluntary participation of national courts, to manage to assign a case to a single country[58]. This will be addressed in point II.B.3.
On the initiative of the Czech Republic, Poland, Slovenia, Slovakia, and Sweden, on 6 April 2009, the Council adopted a "general approach"[59] relating to a framework decision on the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings. This text requires the Member States, without prejudice to the powers of Eurojust, to communicate and to inform each other should there be a risk of conflict of jurisdiction. The text does however exclude any binding measure and the Member States would still be free to choose (subject to the legal constraints arising from compliance with the abovementioned ne bis in idem rules).

b) Trial in the absence of the person prosecuted

The European court of Human Rights interprets the right of a person prosecuted to appear in their trial as one of the elements of the right to a fair trial provided for by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. However, the Court has for a long time recognised that this right is not absolute; under certain conditions the person subject to prosecution can waive that right, of their own free will, in an express or tacit – but not unequivocal – manner. Now, a certain number of framework decisions[60] concerning both the preparation of the trial as well as the enforcement of decisions that are handed down, make it possible to refuse to enforce the requested measure where a person has been tried in his absence without certain safeguards. These are however not defined in a homogeneous way, thereby constituting a source of complication for practitioners, reinforced by the absence of identity of criminal procedures of the Member States on this point. In order to minimise this difficulty, on 26 February 2009, the Council adopted a framework decision[61] modifying six framework decisions concerned by this issue, with a view to also being applied to future implementing legislation for criminal law decisions based on mutual recognition. This instrument defines in this way a certain number of precise conditions in which it is no longer possible to refuse to enforce a judicial decision of another country on the grounds

[58] In its 2003 annual report, Eurojust moreover indicated what in its view were the applicable principles to determine which Member State had jurisdiction in the case of a positive conflict, (that is to say more than one Member State has retained jurisdiction for the same acts).
[59] 8338/09
[60] Six framework decisions are concerned: fines, confiscation decisions, enforcement of sentences or custodial measures, enforcement of probation orders and alternative sentences, European arrest warrant.
[61] OJEU L 81/24 of 27.03.2009

that it was handed down in the absence of the person prosecuted. This method is already used in civil law[62]: if the Member States do not have to amend their criminal procedure where it concerns trial *in absentia*, they nevertheless have every interest in doing so if they want the decisions of their judicial authorities to be recognised and enforced in other Member States. Here we are talking about a method that incentivises the approximation of criminal procedure.

c) The taking into account of re-offending in sentences passed in another country

Although all the Member States, in their general criminal law, take account of re-offending, that is to say the existence, at the time that a case is being tried, of a previous conviction of a person subject to prosecution, they do not all take into account criminal convictions handed down in another Member State. In accordance with the guidelines of the Tampere conclusions, on 24 July 2008, the Council adopted a framework decision[63] requiring the Member States to take previous criminal convictions handed down by another Member State into account when sentencing persons. The foreign decision should be assimilated into a national decision. As with the case of trial *in absentia*, this framework decision does not in any way harmonise the effects of re-offending in the national law of the Member States.

3. Enforcing a sentence

The enforcement of legal decisions is certainly the most complex facet of international law. It is also the area in which the Council of Europe has had the least success. Certainly, extradition law has for a long time made it possible for a State to have a convicted person surrendered to it for that person to serve a custodial sentence passed by one of its courts. This issue is of greater complexity in the case of an application to have a sentence served in one Member State that was handed down in another: for example, to serve a custodial sentence in the United Kingdom that was handed down in Spain; to ensure payment, if necessary by force, of a fine handed down in France to a person residing in Germany; or even to enforce in Italy the remainder of a convicted person's custodial sentence that was originally served in Finland following that person's non-compliance with his obligations. The difficulty in this area can again be explained by the specificity of criminal law (see introduction). The implementation of the mutual recognition programme adopted following Tampere has enabled the European Union to make substantial progress in this field. However, the initial difficulty has to a large extent marked negotiations conducted by unanimity.

(1) ECRIS

This text is mentioned by way of reminder. If a Member State hands down a sentence against a national of another State, it has an obligation to inform that State thereof.

(2) European arrest warrant

[62] See the Regulation of the European Parliament and of the Council, of 21 April 2004, creating a European Enforcement Order for uncontested claims. OJ L 143 of 30.04.2004

[63] OJEU L 220 of 15.08.2008

As indicated on page 25, the European arrest warrant could be used both in the investigation phase as well as to ensure enforcement of a final decision. It should be clarified that where the person arrested on the basis of the European arrest warrant is a national of the executing State, it can require that the custodial sentence be served in its own territory.

(3) Financial penalties

The framework decision of 24 February 2005[64] enables the recognition and enforcement of sentences involving financial penalties in another Member State than that of the court which handed them down, in accordance with the principle of mutual recognition. This text widely reproduces the mechanisms invented for the European arrest warrant, adapting them to the specificities of this type of sentence. On 23 May 2009, only 14 Member States had transposed this text into their national law although the deadline for transposition had been set at 22 February 2007.

(4) Confiscation

In a framework decision of 6 October 2006[65] the Council made it possible, in accordance with the principle of mutual recognition, for confiscation orders handed down by the courts of a Member State to be applied to property, movable or immovable, situated in the territory of one or several other Member States. Bulgaria for example could enforce a confiscation order issued by a Czech tribunal of a building situated in Sofia. Even though the Council's system is relatively complex, in order to respond to the large variety of situations that have to be taken into account, it follows the main lines of the European arrest warrant mechanism, as does the framework decision on financial penalties.

(5) Alternative sanctions to imprisonment

On 27 November 2008 the Council adopted a framework decision concerning the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions[66]. These are decisions which could result in a custodial sentence in case of non-compliance with the obligations laid down therein (for example not to go to certain places nor to meet with certain people).

The framework decision, which is very close in its conception to that on judicial review (see II.A1d)(2)), has two different objectives: firstly, through the recognition of the decision handed down, the enforcement in one Member State of supervision obligations handed down by another. Secondly, if the measures are not complied with by the convicted person, a custodial sanction could be enforced in the executing State. The grounds for refusal are ultimately quite similar to those contained in the European arrest warrant, as well as in the framework decision on the enforcement of custodial sanctions (above). As in the case of other framework decisions adopted after the European arrest warrant, it is however possible for the Member States to refuse the limitation to the supervision of double criminality, which again causes problems where it concerns the coherence of the European legislative corpus.

[64] OJ L 76 of 22.03.2005
[65] OJ L328 of 24/11/2006
[66] OJEU L 337/102 of 16.12.2008

(6) Custodial sentences

The issue of the recognition of custodial sentences is certainly the most complex of all, as it affects personal freedom the most directly. It is therefore understandable that it took until 27 November 2008 for the Council, after long negotiations, to adopt a framework decision[67] governing this matter. The objective of this text is to facilitate the reinsertion of the convicted person by helping him to serve his custodial sentence in the country in which his family or interests are, and by facilitating the granting of a parole measures. In the case in point a Member State that has handed down a custodial sentence against a person can request that it be served in another. Under certain conditions, the consent of the person is not necessary. This instrument, prior to the framework decisions on judicial supervision and alternative sanctions, is the first to have gone back on the possible limitation of double criminality checks. On the other hand, considerable progress has been made in the way in which sentences are enforced, linked to the application of the principle of mutual recognition, as it is not possible anymore, unlike in international criminal law, to convert[68] a foreign sentence into a national sentence. Only certain adjustments are possible, for example in cases where the sentence handed down exceeds what it could be for the same acts in the executing state.

(7) Disqualifications

In certain Member States, the handing down of a criminal sentence may be accompanied by disqualifications: the right to vote, right to drive[69], to exercise a profession etc. A dual issue arises with regard to these disqualifications: firstly to ensure that they are known by the competent authorities of other Member States[70]; then make it possible, within the framework of mutual recognition, for these decisions to be recognised and enforced in Member States other than the one that passed the sentence. Although the notification issue should at least partially be resolved by ECRIS, this is not the case for recognition, due to the wide disparities that remain between the Member States' legislations[71]. Nevertheless, such a measure would seem most welcome and it should be possible to find solutions.

With the exception of disqualifications, each type of criminal sentence has an instrument enabling its recognition and enforcement in the European Union. This multitude of instruments is without doubt unsuited to the judicial reality, as is often the case, in that the same sentence involves several measures: for example, a custodial sentence, a financial penalty and a disqualification. It is therefore reasonable to think that unification would also benefit this field.

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[67] OJEU L 327/27 of 5.12.2008

[68] The conversion mechanism allows the tribunal to retry the case, not with regard to the issue of guilt but on the sentence: the sentence passed down by the requesting State is replaced by the sentence that would normally be handed down in the requested State.

[69] A convention was adopted by the Council on 17 June 1998 on driving disqualification (OJ C 216 of 10.7.98). It was never ratified by the Member States

[70] This is how for example the sentences passed against Michel Fourniret in France for sexual offences were unknown by the Belgian judiciary where this person was working in contact with children.

[71] See on this subject the Communication from the Commission to the Council and the European Parliament: "Disqualifications arising from criminal convictions in the European Union". COM(2006) 73 final

4. The protection of personal data

In criminal matters, the protection of personal data is a contradiction in terms: a criminal trial cannot be conducted without collecting personal – even intimate – data, at times by force, processing it, cross-checking it against other data, and storing it, if necessary for a long period of time. The nature of the data collected and the way it is collected would however call for enhanced protection, which many States would consider difficult to reconcile with the objective behind the information gathering. This is why in many Member States judicial investigations have for a long time been exempt from data protection rules, which probably explains why they have been ignored for a long time at the European level: it was not until the 29 May 2000 Convention[72] that the first rules on data protection in matters of mutual legal assistance were adopted[73]. They only covered the requesting State's subsequent use of the data transmitted by the requested State. The need for more elaborate rules appeared with the development of increasingly structured exchanges, in particular with the use of databases: Eurojust[74], or the interconnection of criminal records for example. Moreover, there is a current trend towards electronic data transmission[75] between judicial authorities, greatly facilitating its circulation. Beyond the solely judicial domain, there has been a considerable increase in the exchange of police data: S.I.S, Europol or Eurojust's access to European databases[76], the principle of data availability enshrined in the Prüm Treaty[77], and data collected from the private sector[78].
This is why the European Commission in 2005 filed a draft framework decision, which, whilst giving due consideration to the specificities of the domain, attempted to introduce some general data protection principles for matters under Title VI of the TEU[79]. The text, following arduous negotiations, was adopted by the Council on 27 November 2008[80]. The framework decision has limited scope, as it only covers the collection or processing of data exchanged between Member States based on the instruments of the third pillar. The system is somewhat artificial, as it is not easy to tell such data apart, which will in fact circulate within non-unified national areas. This unification is not further advanced at the European level either, as the specific rules contained in some instruments (Eurojust for instance or the 29 May 2000 Convention, which are not in fact uniform) will prevail over the framework decision. Finally, data transmission to third countries is subject to provisions which provide in principle for the prior consent of the Member State in the territory of which the data was gathered. The transposition of this framework decision will have to take place before 27 November 2010.

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[72] Article 23. The Convention implementing the Schengen Agreement (1990) did however contain data protection rules, some of which are posted in airports.
[73] The Convention establishing Europol contained provisions on data protection.
[74] Which has an information system allowing data to be cross-checked.
[75] Explicitly provided for in the texts, and which will be facilitated by the establishment of European E-Justice.
[76] Eurodac, Visa Information System
[77] According to this principle, some data, and in particular genetic fingerprints, which are available in one Member State must be accessible to the others.
[78] See the PNRs for instance.
[79] As a reminder, police and judicial cooperation.
[80] OJ L 350/60, 30.12.2008

B. Facilitating the implementation of rules: integrated cooperation

As we have just seen, rules on cooperation are complex. Their implementation requires knowledge of European instruments which not all magistrates can possess: most are only occasionally given cases with ramifications in another Member State. To assist them, European criminal magistrates now have a progressive range of intermediaries on cooperation at their disposal.

1. Liaison magistrates

The institution of liaison magistrates was created by France and Italy in 1992, modelled on the type of exchange that the police had been carrying out for years with their liaison officers. They have been a considerable success, and many countries, within and beyond the European Union, have appointed one. Liaison magistrates are usually based in the Ministry of Justice of their host country. They are real cooperation mediators, facilitating exchanges through their knowledge of both judicial systems which they bring closer together, mainly in collecting evidence (international letters rogatory, European arrest warrants etc.). The existence and development of liaison magistrates, enshrined at the European level in a Joint Action[81] dated 22 April 1996, has not it seems been questioned despite the emergence of multilateral forms of cooperation which will be presented hereunder.

2. The European Judicial Network in Criminal Matters

The European Judicial Network (EJN) in Criminal Matters was established though a Joint Action on 29 June 1998[82] in accordance with the Action Plan to fight organised crime of 28 April 1997[83]. This text was recently repealed and replaced by a Council Decision[84] adopted on 24 December 2008, at the same time as the Decision amending the Decision establishing Eurojust. As opposed to a network of all European criminal magistrates, the EJN has established a group of interconnected contact points, in an attempt to achieve a network effect. They are appointed by their respective Member States. Somewhat like the liaison magistrates, the contact points contribute to solving many different issues (linguistic, legal and logistic) that can arise in matters of mutual legal assistance. In order to carry out its missions, the network has several online tools[85], and in particular:

– A database of comparative law (only accessible to network members). It lists all known investigative measures in criminal proceedings (witness examination, interception of telecommunications, genetic prints, etc.) and indicates for each Member State how and under which conditions they can be used in the context of judicial cooperation;

– A "judicial atlas" to determine which judge has jurisdiction for a particular legal transaction. This tool is essential for direct communication between judicial authorities.

In nearly ten years, the European judicial network has shown its worth. Magistrates however frequently ignore its existence, limiting its efficiency. The decision adopted in December 2008 especially reinforced its links with Eurojust, which hosts it on its premises.

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[81] OJ L 105, 27.04.1996
[82] OJ L 191/4, 7.07.1998
[83] OJ C 251, 15.8.1997
[84] OJ L 348/130, 24.12.2008
[85] http://www.ejn-crimjust.europa.eu/

3. Eurojust

Like the European Judicial Network in Criminal Matters, the liaison magistrates, however efficient they may be, are not really suited to dealing with issues involving several countries. Hence the idea to follow the example set by the police, endowed by the Maastricht Treaty with an integrated organ, Europol. The principle of establishing Eurojust was decided at the Tampere European Council, albeit with some difficulty owing to the doubts expressed by many Member States. The institution is enshrined in the Nice Treaty[86]. The Decision establishing Eurojust[87] was adopted on 28 February 2002, but the political agreement dates back to December 2001, as part of the initiatives taken following the 11 September attacks.

Eurojust, a legal entity, is a body consisting of one National Member per Member State who must be a prosecutor, judge or police officer, *the latter having competencies equivalent to the judge's or the prosecutor's.* The National Members comprise the College of Eurojust. This dual operating mode was designed to reconcile two conflicting visions at the negotiations: one of just a simple assembly of magistrates, and the other of a European judicial agency. Eurojust was given a threefold objective, mainly in the fight against organised crime: a) to promote and improve coordination between the relevant national judicial authorities b) to improve their cooperation by facilitating the implementation of mutual legal assistance; c) to assist the relevant authorities in strengthening the efficiency of their investigations or prosecutions.

To this end, both the National Members and the College have the same powers: to request that an investigation be initiated, that a joint investigation team be set up, and that they be provided with information etc. In practice, as the authorities are not required to accept Eurojust's requests, cooperation is usually by common consensus. However it may be said that requests, especially when originating from the College of Eurojust, place a lot of pressure on national authorities. This occurred for instance in the Prestige case, when Eurojust recommended[88] that prosecutions be grouped in one Member State. In such instances, the involvement of Eurojust raises cases involving only a few Member States to the European level.

Eurojust National Members have broad access to their own Member States' judicial information; similarly, Eurojust has been given access to the main European databases through successive Council decisions. Individual powers may also be conferred upon National Members by their Member States (for instance, the right to issue international letters rogatory), but only a few States have availed themselves of this prerogative. Eurojust functions in a rather informal way. Whenever a National Member is seized by a magistrate of his or her country, and the College decides to go ahead with the case, the relevant National Members meet and exchange information to help solve the case. Meetings can also be organised in The Hague,[89] at Eurojust's headquarters; they enable all protagonists in the case (magistrates and investigators) to consult with the help of

[86] Article 31 TEU.

[87] OJ L 63/1, 6.03.2002

[88] Case Nr. 27/FR/2003). The "Prestige" was an oil tanker that sank off the French and Spanish coasts in November 2002, leaving behind it a considerable amount of pollution in both countries.

[89] Eurojust finances participants' trips to the meeting, which greatly contributes to making such meetings possible.

simultaneous interpretation, which allows for an unprecedented level of judicial cooperation.
Eurojust maintains relations with Europol and OLAF[90]. As these institutions were established on different legal bases, their relations are governed by negotiated agreements, validated by the Council. This probably explains why the content of such agreements is inadequate, and hence the relations between Eurojust on the one hand, and OLAF and Europol on the other. This approach greatly differs from that of Member States where relations between the judiciary and police for instance are governed by law. In this regard, it is striking to note that when "recasting"[91] the decision to establish Europol, the Council did not redefine relations between Eurojust and Europol, which it could have done in a separate decision (the issue of relations between Eurojust (third pillar) and OLAF (first pillar) is of course much more complex, and could only be envisaged if the Lisbon Treaty enters into force).
Eurojust, following the example of Europol, has entered into cooperation agreements with third countries, as provided under the decision creating it, which at least allows it to have interlocutors in many different countries around the world.
The number of cases which national judicial authorities refer to Eurojust is steadily increasing (from 202 in 2002 to 1193 in 2008, i.e. an 83% annual increase), even though this includes a large proportion of solely bilateral cases (80% in 2008). Eurojust is therefore a resounding success for the European Union where it concerns mutual assistance in criminal matters.
Eurojust, and now also Europol, are financed by the community budget (€ 24.8 M in 2008) (with the exception of National Members' salaries): the European Parliament is therefore its budgetary authority.
The recent revision of the 2002 Decision establishing Eurojust[92] did not make any major changes to how it is run but strengthened it and increased its independence. Moreover, it allows Eurojust to avail itself of its own liaison magistrates.

4. The perspective for European criminal justice in the Lisbon Treaty

a) Eurojust

The recent revision of the Eurojust decision should not overshadow the considerable potential afforded to the agency by the Lisbon Treaty. Article 85 of the TFEU provides the legal basis to give it binding powers over national judicial authorities in initiating investigations, increasing the level of coordination, creating joint investigation teams and especially in solving conflicting claims of jurisdiction.

b) The European Public Prosecutor's Office

However successful it may be, Eurojust remains an agency to facilitate cooperation, which may soon have the power to establish guidelines. It cannot however be considered

[90] European Anti-Fraud Office. This Office was established by a Commission Decision dated 28 April 1999 (OJ L 136, 31.5.1999)
[91] That is to say the replacement of the Europol Convention of 26 July 1995 (OJ C 316, 27.11.1995) with a Decision.
[92] OJ L 138/14, 4.6.2009

an organ of European justice. The Lisbon Treaty contains provisions which enable it to move in that direction.
For the past twenty years or so, at the request of the European Parliament, the European Commission has been promoting the idea of creating a European Prosecutor, in charge of prosecuting offences which affect the financial interests of the Union. This would make it possible for greater rigour to be exercised in ensuring the prosecution of such offences. Such an endeavour raises two problematic issues:

- It will at some stage infringe upon Member States' "right to punish". If a European Prosecutor is in charge of prosecutions, he or she will be replacing one or several Member States in doing so. This explains why some of them are extremely hostile to the idea of such a Prosecutor.

- It implies a decision on the applicable substantive law (the definition of offences and sanctions) and especially on the criminal procedure to be applied by the European Prosecutor. Conventions have been adopted under the overarching framework of the Maastricht Treaty providing for a definition of offences against the Communities' financial interests, however they do not contain a common definition of applicable sanctions, and an applicable European criminal procedure simply does not exist.

The Commission, in a Green Paper dated 11 December 2001[93], attempted to square this circle by tabling the idea of a new organisation with both a European Prosecutor and other delegate European prosecutors. However no drafts were ever submitted to the Council based on the text. On the other hand, as opposed to a European Prosecutor, the Lisbon Treaty under Article 86 TFEU contains provisions for a European Public Prosecutor's Office, established from Eurojust[94]. The difference between a "European Prosecutor" and a "European Public Prosecutor's Office" seems to imply that the organ could only be of a collegiate nature. The fact that this "European Public Prosecutor's Office" would be established "from Eurojust" corroborates this analysis. However, as in the Eurojust structure, a President could be envisaged for this European Public Prosecutor's Office who, like the President of the Eurojust College, would be a *primus inter pares*, in charge of representing the institution.
The outlines of the institution authorised under the Lisbon Treaty are noteworthy:

(1) Scope

The European Public Prosecutor's Office will limit itself to combating crimes affecting the financial interests of the European Union. However, the European Council may adopt a decision extending the powers of the European Public Prosecutor's Office to include the fight against serious crimes with a cross-border dimension (Article 86 (4)). Such a

[93] COM(2001) 715 final
[94] During the Laeken European Summit (14 and 15 December 2001), the European Council, under paragraph 57 of its conclusions (SN 300/1/01), decided that *if the institution of a European Public Prosecutor is established, its seat will be determined in accordance with the provisions of the Decision of 8 April 1965*, either in Luxemburg, Brussels or Strasbourg but not in The Hague, even though Eurojust is seated there.

decision would have to be taken unanimously, after obtaining the approval of the European Parliament and after consulting the Commission. A decision in favour of such an extension would be particularly appropriate, especially for the fight against trafficking in human beings. The fact that the decision must be taken unanimously does however render this very unlikely.

(2) Procedure

Article 86 (1) provides for a unanimous procedure with the consent of the European Parliament (as opposed to a simple Opinion). However – and this is something that is not in the Constitutional Treaty – it is possible for a group of at least nine Member States, if no agreement can be reached in the Council, and the case has been referred to the European Council, to establish enhanced cooperation which other Member States cannot oppose.

(3) Jurisdiction

The Lisbon Treaty, reiterating in this case to the provisions of the Constitutional Treaty, States that the European Public Prosecutor's Office shall be *responsible for investigating, prosecuting and bringing to judgement, where appropriate in liaison with Europol, the perpetrators of, and accomplices in offences against the Union's financial interests*. The Treaty also sets out a general guiding principle: the European Public Prosecutor's Office *shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences*. In other words, it follows the guidelines set out in the Commission's 2001 Green Paper (see above) and seems to rule out any option in favour creating a European criminal procedure.

The Council will also have to adopt regulations (paragraph 3) *to determine the general rules applicable to the European Public Prosecutor's Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions*.

While the Lisbon Treaty does make a European Public Prosecutor's Office possible, most probably through enhanced cooperation and with jurisdiction limited to offences against the Union's financial interests, considerable work remains to be done to determine in particular the applicable rules of procedure, rules governing the admissibility of evidence etc. However the option of enhanced cooperation should simplify this task. The existence of such a European Public Prosecutor's Office, even with those limitations, would constitute an essential step towards a system of European criminal justice, more efficient in combating forms of crime which are inherently cross-border in nature (trafficking in human beings, in migrants especially) and which afflict the most deprived people in society.

III. Creating the conditions for more in-depth cooperation: the approximation of laws

As previously mentioned, some approximation of Member States' criminal laws appears necessary. It was actually provided for in the Amsterdam Treaty[95] ; the Lisbon Treaty will allow it to take place by co-decision[96].

A. The approximation of Substantive Criminal Law (definition of offences and sanctions)

Though much has been done since the Amsterdam Treaty to approximate Member States' criminal laws by means of framework decisions, the European Union was not the first to initiate such a process. For instance, the 20 April 1929 Geneva Convention[97] approximated Signatory States' laws on the definition of counterfeiting.
Two points about this exercise initiated by the European Union must be clarified from the outset:

- This is not about a European Criminal Code which judges could apply directly. Each Member State will keep its own criminal code, but must ensure that it complies with the laws adopted by all, in a manner to be explained hereafter. This is why the Lisbon Treaty provides that a directive should be used as opposed to a European regulation

- Approximation is what is sought, not unification. Actually, Member States are committed to the criminalisation of certain conduct as a minimum, but remain free to criminalise more widely. As such, pursuant to Article 2 (2) (b) of the Framework Decision of 13 June 2002[98] on combating terrorism, each Member State must take the necessary measures to ensure that the following deliberate acts are punishable: "*participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way,* ***with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group***". The last part of the sentence was added during the negotiations on the text because some Member States wanted to avoid incriminating too widely. However, the Member States which do not or rarely require such a condition (knowledge of the fact that participation will contribute to the criminal activities of the terrorist group) were not obliged to amend their legislation. European instruments do not therefore require particular conduct to be decriminalised.

This is one of the reasons why the mechanism to limit the principle of double criminality established with the European arrest warrant (see II.A.1.d) (1)) gave rise to problems with a number of subsequent instruments (see above), as some countries managed to obtain the right not to apply certain European arrest warrant rules on double criminality for offences (in particular terrorism) which had however been the subject of approximation through a framework decision. Their stance, despite introducing disparities in the instruments, is not illogical. The European Arrest Warrant System was adopted on the premise that the

[95] Article 29(d) of the TEU provides for *(...)approximation, where necessary, of rules on criminal matters in the Member States, in accordance with the provisions of Article 31(e).*
[96] Article 83 TFEU.
[97] 0.311.51.
[98] OJ L 164, 22.06.2002.

offences for which double criminality is no longer an issue constitute common offences. But, as the example above shows, this is far from being the case. The system created for the European arrest warrant therefore to a certain extent renders the negotiations on the approximation of legislations relatively useless.
It is appropriate to recall why the European Union, and for the past twenty years also most international organisations, have undertaken such work on approximation.

1. The reasons for approximating criminal laws

a) To express international disapproval

The adoption of a common standard for the approximation of criminal law can, at least in some areas, constitute a political act, frequently adopted in reaction to a particularly shocking current event: for instance, the tragic death of fifty Chinese nationals between Calais and Dover on 19 June 2000 led to the framework decision commonly called "sanctions against smugglers"[99]. The 11 September 2001 attacks led to the adoption of the framework decision on Terrorism.

b) The need for mutual assistance in criminal matters

One clearly positive aspect of approximating criminal laws is that it limits the double criminality requirement, under the conditions explained above. Another positive development is the approximation of sanctions in addition to the criminalisation of offences, as initiated by the European Union in some framework decisions, as the double criminality requirement frequently comes with a minimum sentence requirement (see Introduction C.1).

c) Preventing the phenomenon of sanctuary Member States

The European Union has gone even further in the approximation of sanctions, as in certain cases it has also imposed minimum custodial sentences for the most serious offences: for instance, the crime of counterfeiting the euro must be punished by a custodial sentence of at least eight years, as must the crime of participating in a terrorist group. This is important to prevent one State acting as a form of sanctuary for any particular type of offence owing to a large disparity of sanctions.

2. The technique of approximation

The European Union has adopted a large number of texts on the approximation of substantive criminal law. Annex 3 contains a table with a description of the behaviour criminalised for each instrument. But what it is useful to recall briefly is the structure of these framework decisions.

a) Definition of the offence

The behaviour which is to be criminalised under Member States' criminal law is always described in minute detail. Generally this description is positive (what must always be criminalised), but sometimes it is also negative (what there is no obligation to criminalise). Generally, the text states that there is also an obligation to apply it to the

[99] OJ L 328/1, 5.12.2002

instigation, complicity in and attempt to carry out an act, in order to ensure wider approximation.

b) The jurisdiction of courts and tribunals

It would not make sense to create joint offences without also ensuring that the courts and tribunals of the Member States are able to prosecute them, and therefore the European Union's approximation instruments always contain provisions on the jurisdiction of the courts and tribunals, in other words concerning the area in which the criminal law applies. In principle, in order to respect the legal tradition of certain Member States, the Council only rarely imposes extraterritorial jurisdiction. It has however done so in the past in certain instruments (see for instance the Framework Decision of 29 May 2000 on Counterfeiting the Euro[100], which institutes a form of universal jurisdiction).

c) Liability of legal persons

The concept of liability of legal persons for criminal offences was introduced into European Union law by the Second Protocol to the Convention on the protection of the European Communities' financial interests[101] of 19 June 1997. It has since been included in most of the instruments on the approximation of criminal laws. It places an obligation on Member States to adopt the necessary legal measures to ensure that a legal person can be held responsible when the offence which is the subject of the approximation instrument was committed on its behalf. This responsibility extends to cases where the commission of the offence was made possible owing to the legal person's failure to exercise control. The European Union does not place an obligation on Member States to adopt sanctions of a criminal nature. They can be of an administrative nature.

3. The area of approximation

Under the third pillar, the Council undertook an undoubtedly broader approximation of legislation than what was expressly provided for in the Amsterdam Treaty. Another problem arose in defining the European Union's jurisdiction versus the jurisdiction of the Communities, ruled upon by the Court.

a) The criminal law of the third pillar

The Amsterdam Treaty's text on the approximation of Member States' criminal law did not give the Council a very broad mandate: organised crime, terrorism and drug trafficking. However, at the Tampere summit, a unanimous decision was taken not to limit itself to those offences. Consequently, quite a large number of them were approximated.

b) Criminal law and Community law

The Council's biggest hurdle has been the approximation of offences to criminally sanction the violation of certain rules introduced under Community law. Indeed, until the judgement of the Court of 13 September 2005[102], the Council used the instruments provided by the third pillar. However, following an appeal by the European Commission

[100] OJ L 140/1, 14.06.2000
[101] OJ C 221,19.07.1997
[102] C-176/03

against a Framework Decision adopted by the Council on 12 July 2005 on the protection of the environment through criminal law[103], followed by other judgements on the same issue, the Court ruled that only the Community had jurisdiction over the approximation of criminal law, to ensure respect for the rules defined under Community law. However, Community law cannot serve as a legal basis for instruments with a solely repressive objective (accordingly, the provisions of the Transport Treaty cannot serve as a legal basis to organise the collection of so called PNR data [104] aimed at combating terrorism[105]). The Lisbon Treaty, by eliminating the pillars, will solve this problem.

4. The approximation of substantive criminal law under the Lisbon Treaty: a fundamental development

Article 83 TFEU contains all the provisions on the approximation of Member States' substantive criminal law. It can now be approximated through directives adopted under the ordinary legislative procedure, co-decision and qualified majority voting. This is truly revolutionary, as a Member State could be obliged, subject to the reservations set out hereunder, to criminalise conduct against its will. Two restrictions were introduced to make such a solution acceptable:

a) Partially limited scope

The treaty identifies nine particularly serious crimes with a cross-border dimension: terrorism, organised crime, illicit drug trafficking, trafficking in human beings, money laundering, arms trafficking, counterfeiting of means of payment, computer crime, sometimes called "euro crimes". The Treaty allows for the approximation of the definition of criminal offences and sanctions. Framework decisions have already been adopted for most of these offences, but there is no harm in discussing directives against the new basis provided by the Lisbon Treaty to improve on existing texts. The Council may, unanimously, adopt a decision broadening its scope to include further offences, on condition that they have the same characteristics (seriousness, cross-border dimension).

b) The "brake-accelerator" clause

Under Article 83, if a Member State is of the opinion that a draft directive for the approximation of substantive criminal law would affect *fundamental aspects of its criminal justice system*, it may request that it be referred to the European Council. In that case, the procedure is suspended. If no consensus can be reached, a group of at least nine Member States can proceed with enhanced cooperation. This provision was called the "brake-accelerator"[106] clause by French law professors. It is unclear to what extent this provision will impede any more far-reaching approximation of laws than what has been undertaken so far.

B. The approximation of criminal procedure (the mutual recognition process)

[103] OJ L 255, 30.09.05.
[104] Passenger Name Record..
[105] C-317/04 and C-318/04.
[106] In French "frein-accélérateur".

The approximation of criminal procedure is envisaged in the Treaty under Article 31 (1) (c) of the TFEU: *Common action on judicial cooperation in criminal matters shall include: c) ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation*. This notion of "compatibility" in rules applicable in the Member States calls for some approximation of criminal procedure, at least to promote cooperation. And incidentally it is, in the light of the substantial work carried out by the European Union in terms of organising trials and approximating Member States' substantive criminal law, more than just half hearted.
To refresh our memories let us recall the "in absentia" framework decision (see II.A.2b)) which constitutes a sort of alternative approach to approximating Member States' laws. It can be to the advantage of a Member State to adopt certain procedural rules to enable decisions rendered by its courts and tribunals to be circulated smoothly in other Member States, but they are under no obligation to do so.
It is worth mentioning three other texts, two of which have already been adopted and a third which is probably even more important but on which negotiations failed.

1. The texts adopted

a) The status of victims in criminal proceedings: the pretence of approximation.

The Framework Decision concerning the standing of victims in criminal proceedings[107] adopted three years after the Tampere summit on 15 March 2001, is the first text to attempt to approximate Member States' criminal procedures. Though this text does grant victims a number of rights in criminal proceedings (assistance and protection, information, counsel, the right to compensation in the course of criminal proceedings) which apply to all victims (and hence not only to victims in cross-border trials), it was in fact negotiated on the basis of Member States' established national law. Careful reading of the text in fact reveals that none of the measures it contains is actually binding.
However, two positive points may be singled out:

- The Court, in the Pupino judgement[108], shows that it could have consequences for victims. In the case in point, under Italian law, it indicates that the examination of victims under protected conditions accorded to certain categories of victims, should also be applicable to others who were not included in the law.

- The text provides that any European Union resident may make a complaint in his State of residence concerning an offence committed in another.

Unfortunately, the report on the transposition of this framework decision[109], drafted with some difficulty by the Commission in view of the lack of information transmitted by the Member States, shows that most either only partially transposed the text or not at all. In this regard, according to the report, the option of lodging a complaint from abroad was not transposed at all.

[107] OJ L 82, 22.3.2001
[108] C 105/03
[109] COM(2004)54 final/2

b) The Directive relating to compensation for crime victims

The 29 April 2004 Directive relating to compensation to crime victims[110] is mentioned here even though it does not really relate to Member States' criminal procedures. Its objective is to ensure that each Member State has a compensation scheme for victims of violent intentional crimes committed in their respective territories, *which guarantees fair and appropriate compensation to victims*.

2. The breakdown of discussions on certain procedural rights accorded in the context of criminal proceedings in the European Union

On 28 April 2004, the Commission tabled a proposal for a framework decision on certain procedural rights in criminal proceedings throughout the European Union[111]. The text was intentionally restricted to a number of points considered to be essential in cross-border proceedings: the right to legal assistance[112], before and after the trial, to free interpretation and translation, to sufficient assistance for persons having difficulty following the trial, to communication with the consular authorities, and to suspects being informed of their rights. Lengthy discussions took place at the highest level (the JHA Council addressed the issue on several occasions and the European Council, in June 2006, called for the closure of negotiations) but did not achieve anything. The last text discussed[113], which was accepted by at least 21 Member States, was rejected by others, which challenged the jurisdiction of the European Union to legislate beyond the procedures established under European Union law (the European arrest warrant for instance). Incidentally, the rights contained in the latest version of the draft could hardly be considered to represent important changes in Member States' procedures, as they concerned minimal safeguards.

3. The approximation of criminal procedure in the Lisbon Treaty

Article 83 (2) of the TFEU is considerably more comprehensive than Article 34 of the Amsterdam Treaty which gave the European Union jurisdiction to approximate Member States' criminal procedure. It is useful to briefly recall its content. It allows States, *to the extent necessary to facilitate mutual recognition of judgements and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension*, to establish minimum rules to *take into account the differences between the legal traditions and systems of the Member States*. Proposals are adopted following the ordinary procedure by means of directives, the only instrument authorised. Article 83 defines the scope of approximation: admissibility of evidence between Member States, the rights of individuals in criminal proceedings, the rights of victims of crime, and any other specific aspect of criminal procedure which the Council has identified in advance by a decision, acting unanimously after obtaining the consent of the European Parliament. Though the Treaty limits the possible areas for approximation, it does leave a wide scope for such

[110] OJ L 261, 06.08.2004
[111] COM(2004) 328 final
[112] Under civil law, on 27 January 2003 the Council adopted a directive which guarantees access to legal aid (OJ L 26, 31.01.2003).
[113] 10287/07

work to be undertaken in future. In addition, the provisions on the "brake-accelerator" clause were repeated for the approximation of criminal procedure.

C. How to approximate general criminal law?

The differences between the general criminal laws of the Member States identified earlier (see Introduction C) sometimes cause problems in the enforcement of decisions. This is what led for instance to the Framework Decision of 24 February 2005 on the Confiscation of Crime-Related Proceeds, Instrumentalities and Property[114], which aims at approximating Member States' general criminal law on confiscation sanctions. Under this framework decision, each Member State must take the necessary measures to enable it under its national law to confiscate the instrumentalities and proceeds from criminal offences punishable by deprivation of liberty for more than one year. The text also imposes broader confiscation procedures, i.e. which can be extended to the property of a person convicted of an offence. Other areas of general criminal law could also if necessary be approximated to facilitate cooperation: most noteworthy are the age at which a person becomes criminally liable, and the mechanisms applicable to time limitation of legal actions or other sanctions such as disqualification.
However, the 24 February 2005 framework decision was adopted on the basis of Articles 29, 31 (1) (c) and 34 (2) (b) of the TEU. The provisions of these articles do not seem to be replicated in those of the Lisbon Treaty on the approximation of criminal laws.

IV. Mutual recognition vs. approximation of laws

The principle of mutual recognition now exists in most instruments of the European Union, and covers almost all aspects of criminal trials. It is now possible, by taking stock of the progress made in mutual recognition, almost ten years after the Tampere European Council, to assess whether it would be useful to to redress the balance of the Council's work in favour of the approximation of laws

A. Ten years after Tampere: taking stock of mutual recognition

Any assessment of mutual recognition must be based on the two aims identified in the Tampere conclusions: to facilitate cooperation, and ensure judicial protection and respect for individual rights. Several observations must be made from the outset:
a) To date, practitioners are only really using the European arrest warrant. Some Member States have fallen behind in transposing the Framework Decision on freezing property and evidence (see II.A.1a) (8) (a)) and the date for the transposition of the other instruments has not yet expired.
b) It must be borne in mind that the negotiations carried out since Tampere were subject to unanimity, which most probably slowed any progress both towards facilitating cooperation and to developing judicial safeguards for individual rights.
c) In this assessment it is not always easy to draw the line between what was directly achieved through the principle of mutual recognition and what may have been achieved

[114] OJ L 68, 15.03.2005

through different means: the opportunities arising out of the Amsterdam Treaty, the intervention of the CJEC, or the progressive increase in the role of the European Commission (see I.B.1). For instance, what made it possible for the European arrest warrant to enter into force so quickly was the introduction in the Amsterdam Treaty of framework decisions.

1. Facilitating cooperation

a) The mitigated success of the European arrest warrant five years after its adoption

Almost five years after its mandate entered into force, the Council has just published its final report[115] evaluating the European arrest warrant.[116] It confirms a number of points which had already been raised concerning its first operational years, in particular in the second report of the Commission[117] on the implementation of the framework decision, published in 2007.

(1) A positive evaluation

The first observation is made in the light of the slow pace invariably characterising the ratification of international conventions. By 2005, all Member States had transposed the Framework Decision establishing the European Arrest Warrant, an unprecedented speed for the entry into force of an international instrument, especially one involving such radical changes. To do so, some Member States undertook constitutional changes. This can all be ascribed to the Amsterdam Treaty. However, some delays in transposing subsequent instruments based on mutual recognition demonstrate how special the success of the European arrest warrant really was.

Moreover, the number of European arrest warrants issued and executed has been constantly increasing. Even in the absence of statistics on the incidence of extradition before the entry into force of the European arrest warrant, everything seems to point to the fact that this instrument is so efficient that it is massively used; possibly even overused (see the issue of proportionality point β below).

Finally, the time-limits for surrender have been considerably shortened, both ensuring efficiency and guaranteeing the surrender of the persons against whom a European arrest warrant is issued.

(2) Which must however be qualified

(α) Room for improvement in transposition

The Council report makes a series of recommendations on transposition. However it is the Commission report which[118] draws a more honest picture of the way in which Member States at times failed to comply with the obligations imposed by the framework

[115] 8302/09

[116] Evaluation carried out in accordance with article 8 (5) of the Joint Action of 5 December 1997 establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime.

[117] COM(2007) 407 final

[118] See paragraph 2.2.3 page 8

decision. Basically, many of them included limitations on the enforcement of the European arrest warrants in their laws[119], or established operational procedures[120] which are inconsistent with the spirit and letter even of the framework decision.
This situation resulted in great inequalities throughout Europe in the enforcement of European arrest warrants which are all the more damaging considering that in some cases the conditions are stricter than those imposed in the conventions of the Council of Europe which the European arrest warrant replaced. Moreover the framework decision is imprecise about certain enforcement procedures, resulting in real problems in the practical implementation of the European arrest warrant, with conditions and procedures greatly varying between Member States.
It is important to recall that the provisions of the Treaty on the implementation and enforcement of European law by Member States largely prevent the CJEC from exercising appropriate oversight over the transposition procedure: the Commission does not have the option of referring a matter to the Court, and the preliminary ruling mechanism has hardly ever been used, and never to challenge the existence, in national laws, of additional conditions limiting the efficiency of the European arrest warrant. The remaining preliminary review mechanism is ill-suited to oversight of national laws as a whole, something that would however be needed in some Member States. This poor transposition, difficult to remedy under the Amsterdam Treaty, probably means that the text will need to be reworked if the Lisbon Treaty enters into force. This would moreover allow some shortcomings in the text identified during the mutual evaluation exercise to be corrected.

(β) Its sometimes difficult implementation

Amongst the 22 recommendations of the Council Expert Group, some of which relate to transposition problems, two concern essential points:

Firstly the State of execuution does not have the option of carrying out a review of proportionality during the surrender procedure, which is problematic. In other words, although it may legally be possible to issue a warrant for stealing a bag of sweets, such a warrant may be challenged if examined against the principle of proportionality. This principle is however guaranteed in many Member States, giving rise to much tension. It is admittedly by definition a vague concept, which therefore, from the standpoint of the efficiency of the European arrest warrant, should only be introduced with great care.
Finally, it would appear that the proper implementation of the European arrest warrant is limited due to magistrates' lack of information concerning both the applicable law and existing cooperation mechanisms (the European Judicial Network, Eurojust). Language barriers paired with limited knowledge about the legal systems of other Member States constitute additional problems. This naturally brings us to the crucial issue of magistrate and legal personnel training (see V.A).

[119] Non compliance with the minimum sentence thresholds; reintroduction of dual criminal liability checks; alteration of non-mandatory grounds for refusal into mandatory ones; different rules depending on whether the person requested is a national of the country or not.
[120] Appointment of an executive body where a judicial authority is needed; imposition of additional conditions, in particular for documents which must be provided by the issuing-State, and non-compliance with the time-limits for surrender in case of an appeal before the higher court.

b) The worryingly inefficient course taken by texts adopted after the European arrest warrant

The inefficient course taken by instruments adopted after the European arrest warrant corresponds chronologically to the time when difficulties were encountered in transposing the European arrest warrant, at least in some Member States. Indeed it appears that the very principle of mutual recognition caused some backward steps to be taken.

As such, the European evidence warrant contains grounds for non-enforcement which had only been applicable to extradition or the enforcement of criminal sentences: territorial provisions, the principle of *ne bis in idem* etc. Whereas with the Convention of 29 May 2000 and its Protocol, and especially the ensuing integrated cooperation established to help magistrates in the practical implementation of its rules (see II.B.), judicial cooperation now functions rather well in Europe, both instruments to collect evidence adopted with the principle of mutual recognition clearly appear more difficult to implement and contain more grounds to justify non-execution. The choice will be clear for any judge faced in future with the option of using international letters rogatory within the framework of the 29 May 2000 Convention or the European evidence warrant.

Once again from the standpoint of efficiency, the instruments for the enforcement of criminal sentences also clearly represent a step backwards, in particular with regard to limitations on double criminality checks. As mentioned earlier, this poses a real coherence problem in the corpus of the European Union between on the one hand the European arrest warrant and on the other instruments for which the issues at stake in terms of civil liberties *a priori* were identical, if not, of a lower order. Regardless of this the European Union now however has legal instruments which allow for the enforcement of almost any sentence.

2. The judicial protection of individual rights

The Tampere conclusions concerning the "judicial protection of individual rights" did not stipulate whether these apply to the accused or to victims. In this regard, what is clear is that the enhanced capacity of the judicial authorities of the European Union to combat organised crime is a positive feature for victims of such crime and in particular of trafficking in human beings, child pornography etc. This should never be overlooked.

Regarding the accused however, the outcome is more complex than it seems.

With the European arrest warrant the speed at which surrender takes place is a very positive feature compared with the time-lines experienced with extradition (see II.A.1d) (1) (b)(iv)). On the other hand, considerable transposition disparities have led to major inequalities of treatment between persons on trial in the European Union, depending on whether they were arrested in a country which carefully adhered to the framework decision or not. Moreover, the lack of control of proportionality mentioned earlier may sometimes imply that the automatic implementation characterising many aspects of the European arrest warrant can have negative repercussions.

On the other hand one may suggest that the steps backwards in efficiency, in particular in gathering evidence, are positive for the persons prosecuted, giving them more guarantees.

The mechanism to reduce double criminality (see II.A.1d) (1) (b) (iii)), because of the way in which the approximation of offences took place (see III.A.), does not sufficiently

protect the individual's rights. Reduced efficiency can therefore arguably be a positive development in the protection of the rights of the individual. Moreover, the fact that the ground of *ne bis in idem* is now a ground for possible non-enforcement of a decision to gather evidence, which it is not in the conventions of the Council of Europe later complemented by European Union law, is, for the strict adherence to this principle, positive, as in law it also applies to prosecutions.
But the real problem with regard to the protection of individual rights in applying the principle of mutual recognition to mutual assistance in criminal matters most probably lies elsewhere. It is useful at this juncture to recall paragraph 33 of the conclusions of the Tampere European Council:

33. Enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate cooperation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities.

The European Council did not provide a definition of mutual recognition. One could therefore assume that reference was made to the principle established for the internal market, in particular in the famous "Cassis de Dijon" judgement[121]. But such a system, implemented for 30 years already in civil law justice under the Brussels Convention, does pose some problems in criminal law[122]. The decision of a judge in one Member State comes with a system of values: the country's specific criminal law, criminal procedure, and its general criminal law. To recognise it, and therefore to accept to enforce it, implies acceptance of these values. It is noteworthy that with the "Cassis de Dijon" judgement, the Court, to rule that the German system banning the import of liqueurs with an alcohol content below a certain level does not comply with Community law, argued that "Cassis de Dijon" was freely available in France, and that banning it from import in Germany could not be justified on public health grounds.
This clearly shows how difficult it is to transpose this reasoning to criminal judicial matters. National decisions in matters of criminal justice are very specific "products", much more complex than a physical product. Such a system, especially in view of Member States' lack of knowledge about other States' judicial systems, is therefore based on trust, with at its core membership of the European Union and respect for Article 6 of the TEU. What is true however is that this trust is easier to attain with similar systems. It is easy to see for instance how intense mutual assistance in criminal matters is between countries in geographical areas with similar laws, for instance in the Benelux and especially between Nordic countries.
This is most probably why the European Council clearly linked mutual recognition to the approximation of laws. This point has sometimes been overlooked[123], possibly because

[121] Case 120/78
[122] It can also be so in civil law, for family law, an area in which there are great differences between Member States, for instance in divorce, same sex marriage etc..
[123] See the report of ECLAN, finalised on 20 November 2008, produced at the request of the European Commission, paragraph 24 op. cit.

the Tampere conclusions seemed to place a stronger emphasis on mutual recognition than on approximation.
This choice, ten years ago, in favour of a system based on mutual recognition, constitutes a paradox which is worth emphasising: the concept was applied to criminal matters despite it being a highly sensitive area, and even though very little had been done in approximating the laws; in contrast, in building the internal market, and currently in the area of immigration policy, the grounds had already been largely harmonised when the principle of mutual recognition started to be applied. In 1998, only a few texts had been adopted for the approximation of substantive criminal law (see Annex 3) and none had been adopted (or even envisaged) for the approximation of general criminal law or criminal procedure. Negotiations on the latter floundered overall (see III.B.2), and none were ever envisaged in the first place for the former.

This choice in favour of mutual recognition, which some considered premature considering the level of approximation, probably has two reasons:

- The principle of mutual recognition aims at facilitating trials conducted in a Member State of the European Union. This is a vital necessity. Europe's internal area is very open, and it is inconceivable for a trial such as the one mentioned in the introduction not to be conducted within reasonable time, which is incidentally a condition for a fair trial under the Convention on Human Rights and Fundamental Freedoms. It was therefore inconceivable, particularly with the objective of achieving the necessary progress to meet the challenges Europe faces notably in terms of organised crime or terrorism, to wait for a sufficient level of approximation of laws, especially of criminal procedure, which are undoubtedly the furthest apart.

- The major differences between common law and civil law must not be under-estimated; that is why, and they are entirely within their rights to do so, common law countries consider that it is very difficult to approximate their procedure with civil law procedure. It is therefore no coincidence that common law countries introduced the concept of mutual recognition to mutual assistance in criminal matters during the preparations for the Tampere summit. The same countries made a proposal to introduce, under Article 83 of the TFEU (Lisbon Treaty), the "brake-accelerator" clause (see III.A.4b)).

The tensions felt during the negotiations, confirmed by the poor transposition by some Member States of the Framework Decision establishing the European arrest warrant, were probably due the speed at which things happened, or at least to a lack of sufficient or even prior approximation of criminal law:

- Firstly, of substantive criminal law, because the approximation method used, together with the reduction of double criminality cases created by the European arrest warrant (see III.A.), entailed difficulties which at times came to light during the enforcement of some European arrest warrants, when differences in the law turned out to be too great to overcome, despite the work done to approximate it.

- Then of criminal procedure, because the instruments proposed, in particular to try positively to establish some fundamental procedural guarantees, floundered (see III.B.).

B. A new focus

The principle of mutual recognition is enshrined in the Lisbon Treaty[124]. The Council and the European Parliament are therefore under an obligation to implement it. However, one may opine that the work to be done must be redirected, to enable the EU criminal justice area to develop evenly (independently of the fact that it is essential to develop, among practitioners – magistrates, lawyers, policemen – a real common judicial culture which would inevitably promote the trust needed for mutual recognition (see V)).
Firstly it is clear that, as a minimum, the work on the minimum guarantees which failed in 2008 must be completed. In other words, without attempting to homogenise the criminal procedures of the European Union's Member States, it is essential to reach common standards on a number of points. The European Court of Human Rights has already worked on this, but more needs to be done to create a European criminal justice area which will increasingly function through mutual recognition. The approach adopted for instance with the *in absentia* judgement could offer a possible solution to this: it consists of defining procedural criteria of a certain level that facilitate or even allow for decisions to be circulated.
Secondly, it is probably not particularly wise for work on the approximation of criminal law always to increase the level of penalisation rather than decrease it, which can incidentally project a negative image of the European Union. Consequently one would be justified in believing that there will be continued rejection of the mechanism established by the European arrest warrant to reduce double criminality checks (which is however positive in that it speeds up cooperation), resulting in a real problem of coherence within the European corpus.

V. A Common European Judicial Culture?

What is a common judicial culture? These terms could certainly be defined in many different ways. Without having too high expectations and in order to be as objective as possible, a factual statement can be drawn: a common European judicial culture includes having strong ties between the existing national judicial cultures. Those ties imply similarities, through harmonisation of legislation, for instance, but they also imply common goals in judicial developments, such as common training grounds, professional cooperation between the main judicial stakeholders and sharing of common interests.

Hence, a common judicial culture is more than just "understanding" and "trust" of different judicial systems; it shows a further development of the cooperation between Member States in the field of criminal matters.

[124] Article 82 TFEU.

However, before reaching the ultimate stage of a "common European judicial culture", emphasis should still be put on enhancing mutual trust and understanding. Acording to Panayiotis Demetriou the Council *should take immediate action to promote the creation of a real European judicial culture in criminal matters focusing on judicial training and on procedures to evaluate the quality and efficiency of justice*[125]. Strengthening mutual confidence still requires an explicit effort to improve mutual understanding among judicial authorities and different legal systems; this could in particular be accomplished through **judicial training**[126].

A. A similar EU judicial training is needed[127]

1. Common needs

The need for training has been expressed by different *judicial* professional bodies. A strict approach would limit the question of European training to judges, prosecutors and judicial staff. It is nevertheless important in our view not to forget other professionals who, similarly, need to gain a thorough knowledge of European law, such as lawyers, law enforcement officers, military judges, justices of peace, judges in commercial courts, prison officials etc.

The report of Diana Wallis, which led to the adoption by the European Parliament of a resolution on the role of the national judge in the European judicial system on 9 July 2008[128] was in particular drafted on the basis of a survey completed by judges in the Member States.

The answers highlighted:

- significant disparities in national judges' knowledge of Community law[129] across the European Union, with awareness of it being sometimes very limited;
- the urgent need to enhance the overall foreign language skills of national judges[130];
- the difficulties experienced by national judges in accessing specific and up-to-date information on Community law;
- the need to improve and intensify the initial and lifelong training of national judges in Community law[131];

[125] Panayiotis Demetriou *Proposal for a Recommendation to the Council*, 30.06.2008 B6-0335/2008.

[126] It is also worth mentioning that training of the judiciary and of judicial staff is listed as an important goal in the Lisbon Treaty. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed in Lisbon, 13 December 2007, OJ 2007/C306/01, articles 65(h) and 69.A1(c).

[127] The author will in this part refer partly to another ad hoc briefing paper drafted for the European Parliament: "Strengthening judicial training in the European Union", April 2009 http://www.europarl.europa.eu/activities/committees/studies/download.do?language=en&file=25491

[128] 2007/2027(INI).

[129] References to Community law should be understood as also including Union law.

[130] 39% of respondents considered that foreign languages constituted a barrier to adequate information on Community law.

[131] 61% of respondents had never attended a European training Programme or any national training programme concerning Community law.

- the judges' relative lack of familiarity with the preliminary ruling procedure, and the need to reinforce the dialogue between national judges and the Court of Justice[132];
- the fact that Community law is perceived by many judges as excessively complex and opaque;
- the need to ensure that Community law lends itself better to application by national judges.

Rapporteur Maria Grazia Pagano has suggested an evaluation be conducted to look at the current state of judicial training across Europe. It is our view that currently existing national and European existing structures are already in agreement on the level and nature of training that is needed to improve the training situation for members of the different national judiciaries. European judicial training should not only cover the different legal systems, but also – and maybe especially – the instruments that apply the principle of mutual recognition and the instruments that are ancillary to this principle: it is the national judges – being the first judges of Community law – who will apply those instruments. The only way they can do this properly is if they have a profound knowledge of the instruments and the way they work.
A reinforced dialogue between national judges and the Court of Justice should also be implemented. The principle of direct effect, harmonious interpretation and state liability, and the power to make a reference for a preliminary ruling give the national judges a fundamental role in the EU legal system. *However, there is a dissymmetry between that important role and the importance that has been given to training.*[133].

2. ...leading to common judicial training principles?

a) Training on what?

There remain doubts as to whether or not there is a will among the Member States, let alone a legal basis, for the development of a harmonised EU curriculum[134], and this with respect to the general legal education, specialised preparatory judicial education or continuous training.

There is general agreement that the *scope* of the training needed by these professionals can be summarised as follows:

- Language training in at least one EU language different from the mother tongue of the person receiving the training;
- Training in primary EU law and on general principles of EC/EU law;
- Training in secondary EU law with an emphasis on EU legal instruments, whether adopted under the first or the third pillar, and on instruments applying the principle of mutual recognition;

[132] 32% of respondents consider themselves unfamiliar with the procedure and only around 5% have made at least one reference for a preliminary ruling.
[133] Diana Wallis, Speech delivered to Europe Week Giessen in Germany on 5 May 2008.
[134] Although the Committee on legal Affairs (in an opinion attached to Jo Leinen's Report) has defended that measures to support the training of the judiciairy and judicial staff *which are to be adopted by codecision (...) may include the approximation of laws and regulations of the Member States (...).* Jo Leinen, Report on Parliament's new role and responsibilities in implementing the Treaty of Lisbon (2008/2069(INI)), 19.32009. Opinion of the Committee on Legal Affairs, 1.7.2008.

- Training in the role of the national judge as a Community judge. This includes practical training on how the national judiciary can obtain help in their interpretation and application of EU legislation through, e.g. European Court of Justice (ECJ) decisions or procedures. In particular, the national judges need practical training on the preliminary ruling procedure (e.g. when and how to ask questions to the ECJ) as a guarantee of common interpretation – or determination of the validity – of the various Community legal instruments;
- Training on comparative law in order to have a better knowledge of other legal systems within the EU. This is particularly important when the EU law leaves the possibility for magistrates to apply the law of their counterpart (e.g. on civil law issues), or when the counterpart should understand why a specific decision was taken in another Member State when applying an EU instrument (e.g. within the frame of cooperation in criminal matters such as decisions relating to the European arrest warrant).

With respect to *training methodologies*, the various documents listed in this note furthermore illustrate a common understanding among the Member States that:

- there is a need to combine cost-effective IT-based training methods with the more expensive and time consuming face-to-face training;
- face-to-face training, in order to be effective, involves a reduction of traditional lecturing and an increase of interactive, problem-solving based learning, i.e. through:
  - case studies, where the judges/prosecutors actively participate in solving cases (either alone or in groups) and then compare the result of their work with the outcome of other trainees and/or the other relevant courts,
  - simulation exercises, such as completing a standard request or order form, asking preliminary questions to the ECJ or exchanging information via electronic means,
  - study visits and exchange programmes,
  - training on how to use IT and other Open Space Technologies, etc.
- the most pragmatic and effective way to combine, on the one hand, enhancement of national judiciaries' EU law capacities and, on the other hand, the building of confidence and trust between the national jurisdictions, is through trans-European or multi-country training activities, where judicial professionals from different Member States can meet, work and learn together, in order to exchange knowledge and experiences about each other's legal systems and procedures.

Training the trainers could also become an effective solution. This has in particular been suggested by the Commission in a Communication on Judicial Training in the European Union[135]. Another interesting proposal made by the Commission would be to organise periods of training in the premises of the European Court of Justice and of Eurojust.

It should be mentioned that any training would be pointless unless judges and prosecutors have access to relevant European and foreign legal documentation (literature and case

[135] Communication from the Commission to the European Parliament and the Council on judicial training in the European Union, 29.06.2006, COM(2006)356 final.

law). The European Parliament has insisted that judges should have access to academic literature in their mother tongue for a better understanding of Community law[136]. Additionally, the European Parliament has called upon Member States *to renew efforts in order to make available to national judges up-to-date information on Community law in a systematic and proper manner*.

b) Training by whom?

National training schools

Organisation and implementation of judicial training in the EU falls primarily under the responsibility of each Member State. There are generally two types of trainings offered: initial and continuous.

As far as initial training is concerned, Member States have chosen very different approaches. For instance, the UK organises an *induction programme* for newly appointed judges; France and Portugal organise initial trainings of two and a half years and two years respectively before a candidate can officially exercise themselves as a judge or prosecutor.

Continuous training seems to have developed over recent years in most European countries. For instance the Judicial Studies Board (JSB) in the UK aims to become a Judicial College by 2010 and to improve the frequency of training sessions. *The protected time should be five days per year* according to the JSB[137]. The French National School of Magistrates (*Ecole Nationale de la Magistrature)* proposes training sessions on European and international law. Nevertheless, it should be noted that continuous training has only been made compulsory for French magistrates since 1 January 2008.

Additionally, as stated by the Commission in its 2006 Communication [*t*]*here are sometimes major inequalities in access to training as between judges, prosecutors and lawyers*[138]. The fact that a number of Member States distinguish between recruitment and training of judges and prosecutors should not prevent those two bodies of professionals to have common training programmes where substantive knowledge of EU law or legal linguistic training are concerned.

Continuous training is of essence a limited training since only a few days per year can be dedicated by any professional to this activity. Therefore, other forms of training, such as e-learning, should be developed in addition to "face-to-face" training. This new possibility could even be implemented on a compulsory basis for judges, prosecutors and judicial staff to complement their initial and continuous training.

Common training activities could be organised associating at least two national schools or national training institutes. This is already the case in the Netherlands, for instance,

[136] 2007/2027(INI).
[137] Judicial Studies Board, Annual Report 2007-2008.
[138] Communication from the Commission to the European Parliament and the Council on judicial training in the European Union, 29.06.2006, COM(2006) 356 final, paragraph 10.

regarding specific training dedicated to the European Arrest Warrant. Courses were organised by the SSR (national training institute for members of the judiciary in The Netherlands) in cooperation with Germany and Belgium[139].

The European Judicial Training Network

The European Judicial Training Network (EJTN) was created in October 2000 on the basis of a Charter adopted in Bordeaux. The EJTN was later registered under Belgian law as a non-profit International Association[140]. Today a total of 29 national – mostly training – institutes are members of the network, which has furthermore welcomed a few observers such as Croatia, Bosnia Herzegovina, Norway, the Council of Europe and the Commission.

The EJTN implements cross-border training opportunities[141] and exchange programmes for judges and prosecutors and for trainers. On its website it also provides practical details on different e-learning tools, such as the *CoPen training* programme, as well as disseminating information about relevant open enrolment training programmes offered by selected training organisers.

Although an operating grant was established for the EJTN by the Programme 'Criminal Justice'[142], the EJTN does need to be strengthened. This point is already mentioned in a number of official EU documents since the Laeken European Council of December 2001[143] and in particular in the recent Communication of the Commission on the future multiannual Stockholm programme[144]. Strengthening the EJTN would allow the EJTN to propose more training and design common EU training programmes.

Other actors

A few additional actors will be mentioned here.

EIPA and ERA

Both the European Institute of Public Administration (EIPA) – through its European Centre for Judges and Lawyers in Luxembourg – and the Academy of European Law (ERA) in Trier propose fee-based trainings designed for judges, prosecutors and judicial staff. Both are also recognised by EU institutions as major European judicial training partners, and both have grant agreements with the European Commission.

The Lisbon network (Council of Europe)

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[139] Evaluation Report on the Fourth Round of Mutual Evaluations "The Practical application of the European Arrest Warrant and corresponding surrender procedures between Member States" Report on the Netherlands, 27 February 2009, 15370/2/08.

[140] Its Statutes were approved by Royal Decree of 8 June 2003.

[141] Those training opportunities are described in a catalogue in the EJTN website.

[142] OJ L 58, 24.2.2007, p.13.

[143] Presidency Conclusions, European Council meeting in Laeken, 14 and 15 December 2001. SN 300/1/01 REV 1, p.13.

[144] Communication from the Commission to the European Parliament and the Council, An area of freedom, security and justice serving the citizen, COM(2009)262final, 10.06.2009, p. 11.

The Committee of Ministers of the Council of Europe has established a specific judicial training network, the Lisbon Network, in 1995, as part of the legal cooperation programmes in order to enable the different judicial training bodies in Europe to become better acquainted with each other, to exchange information on matters of common interest and to support, by means of this dialogue, the setting up or further development of judicial training facilities in the Member States of the Council of Europe. The members of the Network are national judicial training institutions. In its strategy document adopted in September 2006, the Lisbon Network emphasises that: *unless the right training is provided for legal professions, judicial systems cannot function effectively and will forfeit public trust*[145]. It also stresses that the Lisbon Network has to move on from being an information exchange network to a body tasked at the pan-European level with providing active support to improve judicial training and ensure complementarity with the work of the European Union.

Cooperation between all actors of judicial training is essential to share good practices, to use synergies, and also for reasons of complementarity. The author would recommend following the approach suggested by both the European Commission in its 2006 Communication and the Council in its Resolution of November 2008 concerning a Network of legislative cooperation between the ministries of justice: namely to make enhanced use of the existing European training providers and networks to focus on the development, organisation and delivery of the training. The national judicial schools/court administrations and the existing European-level training providers and networks should furthermore be encouraged – both politically and by being able to obtain the necessary financial support – to establish longer running cooperation programmes. These should aim not only to develop and implement specialised EU law training activities for "end users" (i.e. judges, prosecutors and other judicial staff), but also to identify and transfer good training practices to the national judicial training bodies, including the development of training programmes and materials, as well as training methodologies appropriate to the specific target group.

This approach would have two additional advantages: firstly, it would not only motivate, but obligate, the European training providers and networks to continuously develop their knowledge, expertise and methodologies in line with the legislative developments; and secondly, by encouraging multi-country activities, legal professionals from different countries would obtain the opportunity to meet and, while establishing a common understanding of the various EU rules and judicial cooperation instruments, go further than their national legal background to think about European law beyond the traditional concepts of law, learning and understanding the legal systems of other Member States; thus creating trust and an improved cross-border judicial cooperation.

[145] Available on http://www.coe.int/t/dghl/cooperation/lisbonnetwork/presentation/Strategie_en.pdf

B. ...and so are exchanges amongst practitioners

1. The number of professional networks is increasing

Training and unrestricted access to relevant documents are particularly important; but no less important is the development of professional contacts and exchange of best practices through operational cooperation.

Usually, European professional networks acting in the field of criminal justice are either gathered around a profession, i.e. "Union internationale des huissiers de justice", or a topic, i.e. the Camden Asset Recovery Inter-Agency Network (CARIN).

The number of European and international networks is increasing. They participate in exchanging best practice[146], drafting guidelines and raising European institutions' and national authorities' awareness on certain topics. Some of those networks are informal (i.e. CARIN), whilst others are created by common agreement of the Member States at European level (i.e. the European Judicial Network[147]).

Many of them already benefit from specific funding from the European Commission; nevertheless, it seems to be the Commission's intention to enhance this cooperation even further. According to its latest Communication on the future Stockholm programme[148], *with the EU's support, the various networks of professionals must be strengthened, coordinated and better structured*.

2. The Justice Forum

The Justice Forum (the "Forum") was established by the Commission's Communication of 4 February 2008 on the creation of a Forum for discussing EU justice policies and practice[149]. The Forum was officially launched on 30 May 2008 and was created following the European Council's request in the Hague Programme, for the establishment of a system providing an objective and impartial evaluation of the implementation of EU policies in the field of justice.

It is a permanent consultative mechanism composed by Member States, judicial bodies, practitioners, specialist non-governmental organisations, academics and users of justice systems. The Commission invites a representative of the Council of Europe and Eurojust, and the European Judicial Networks (in criminal and in civil and commercial matters) are to be represented as well as relevant professional European networks active in the justice field at EU level. The Commission also involves academic networks (European Criminal Law Academic Network ECLAN, International Association of Penal Law AIDP, Eurodefensor, ERA, EIPA) in order to promote a scientific, objective approach and to enable a robust exchange of views by including experts with differing views. The

[146] For instance, the Joint investigation teams expert network meets once a year with Europol and Eurojust's support.
[147] Council Joint Action 98/428/JHA.
[148] Communication from the Commission to the European Parliament and the Council An area of freedom, security and justice serving the citizen, COM(2009)262final, 10.06.2009, p. 11.
[149] COM/2008/0038 final

Commission includes the ECJ and intends to invite the Fundamental Rights Agency of the European Union[150].

The objective of the Forum is to review and provide feedback on EU justice instruments and policies, as well as practicing in a transparent and objective manner, with the possible aim of launching new legal instruments. By bringing professionals together, the purpose is that the Forum will furthermore promote mutual trust between EU justice systems. Additionally, the Forum is becoming the first channel of communication between the EU institutions and practitioners.

The Forum meets regularly since its creation, in the form of plenary sessions[151] or sub-groups in specific fields of interest or issues identified as warranting attention.[152].

Three sub-groups have met during the Forum's first year of existence:

- in July 2008 on the subject of "Mutual recognition in criminal matters";
- in November 2008 on "Judicial training and the needs of legal professionals to apply EU law";
- in March 2009 on "European E-Justice. Information and Communications Technologies and the European Justice System".

Each sub-group meeting led to interesting practical suggestions to improve the current situation or to propose new initiatives.

The next meetings announced before the end of 2009 will most probably be at the meeting on "Procedural rights" and another one on the occasion of the launch of the E-Justice Portal.

On the condition that the work of sub-committees is well thought out and organised, the Justice Forum is an interesting initiative that should be further developed. Member States should also take a greater interest in these discussions[153]. Additionally, the question of the choice of the topics discussed is crucial in our view.

C. Use of new technologies in view of the creation of an European e-Justice[154]

In order to guarantee that free movement of persons does not mean free movement of crime and criminals, many instruments have been adopted in the field of judicial cooperation in criminal matters (see Annexes II and III):

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[150] Communication from the Commission on the creation of a Forum for discussing EU justice policies and practice of 04.02.2008.
[151] The first plenary session took place on 5 June 2009.
[152] Communication from the Commission on the creation of the Forum for discussion EU justice policies and practice of 04.02.2008, paragraph 37.
[153] Only a handful of national representatives were present at the Forum's plenary in June 2009.
[154] More information on this subject can be found in Carla Botelho's study "Towards a European Strategy on E-Justice" written for the European Parliament in May 2009.
http://www.europarl.europa.eu/activities/committees/studies.do?language=EN

The Community legislator soon came to realise that modern electronic technologies could be useful and helpful for improving the efficiency of instruments that deal with cross-border situations. Thus, all forms of transmission of an international rogatory letter[155] European arrest warrant[156], freezing orders[157], confiscation orders[158] or decisions requiring a financial penalty[159] are accepted providing they are capable of producing a written record under conditions allowing the executing State to establish authenticity.

It is also important to mention two other instruments that provide certain measures relating to the use of electronic technologies:
- the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters, article 10,[160] provides for the possibility of a witness or an expert to be heard by videoconference. The requested Member State has to comply with the reasoned request unless the use of videoconference is contrary to fundamental principles of its law.
- the Framework Decision on the standing of victims in criminal proceedings (2001/220/JHA)[161] promotes videoconferences. Article 8, paragraph 4, establishes that each Member State shall ensure that, where there is a need to protect victims - particularly those most vulnerable - from the effects of giving evidence in open court, victims may, by decision taken by the court, be entitled to testify in a manner which will enable this objective to be achieved, by any appropriate means compatible with its basic legal principles, including, of course, videoconference.

1. Cross-border projects

At the EU level there are already a large number of cross-border projects in the field of e-Justice in criminal matters, some aimed towards the mere dissemination of information, others intending to facilitate judicial cooperation. Some of those projects are mentioned in the Impact Analyses carried out by the European Commission annexed to the draft Commission Communication "Towards a European e-Justice Strategy"[162]. The Council Working Party on Legal Data Processing (e-Justice) also prepared a document listing the existing projects in the field of e-Justice[163]. In addition to the ECRIS project discussed above (II.A.1c)), a special mention should be made of some of the projects listed:

Internet portal: EUR-Lex [164]

[155] OJ C197. 12.07.2000.
[156] Article 10, paragraph 4, Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.
[157] Article 4, paragraph 1, Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the EU of orders freezing property or evidence.
[158] Article 4, paragraph 2, Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders.
[159] Article 4, paragraph 3, Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties.
[160] OJ C 197, 12.7.2000
[161] OJ L 82, 22.3.2001
[162] SEC (2008) 1947.
[163] 6358/1/08, REV1, LIMITE, JURINFO 14.
[164] http://eur-lex.europa.eu/

EUR-Lex (formerly Celex) offers direct free access to European Union legal texts, including the Official Journal, relevant treaties, legislation, legislative proposals and case law.

Internet portal: N-Lex[165]

N-Lex is a common access portal for sources of national law. It allows users to search national sites using a single uniform search template. The portal was developed by the Office for Official Publications of the European Communities, together with the EU Member States.

Internet portal: PreLex[166]

The PreLex Internet portal is the database for inter-institutional procedures between the Commission and other institutions. In particular, PreLex provides information on the current state of play in the legislative procedure and monitors the work of the various institutions involved.

European Parliament, Council of the European Union and European Commission document registers

The European Parliament, the Council of the European Union and the European Commission have established freely accessible internet registers enabling all EU citizens to search for those institutions' documents.

Internet portal: European Judicial Network in criminal matters[167]

The European Judicial Network in criminal matters is designed, as a network of national contact points, to promote cross-border judicial cooperation in criminal matters[168].

Eurojust, the European Union's Judicial Cooperation Unit[169]

Eurojust has developed certain ICT tools to empower judicial cooperation and coordination through Eurojust. These include:

- the EPOC software (that is used as the Eurojust Case Management System) and a project to connect it to selected national authorities and enable the exchange of structured information; and
- the secure connection projects aimed at enabling secure communication between Eurojust, the Member States and privileged partners (e.g. Europol);

In addition Eurojust is participating in R4eGov and criminal records projects.

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[165] http://eur-lex.europa.eu/n-lex/

[166] http://ec.europa.eu/prelex/apcnet.cfm

[167] http://www.ejn-crimjust.europa.eu/

[168] The European Judicial Network in criminal matters includes:

(1) Atlas (http://www.ejn-crimjust.europa.eu/atlas_advanced.aspx): enables one to identify the locally competent authority to receive the request for mutual legal assistance and provides a fast and efficient channel for the direct transmission of requests.

(2) Fiches Belges (http://www.ejn-crimjust.europa.eu/fiches_belges.aspx): contains the essential points of the national legislation of the Member States as regards eight different investigative measures. The "fiches belges" provide practical information on what is possible in the framework of mutual legal assistance. The information in the "fiches" is intended for contact points and local judicial authorities to enable them to draw up requests for judicial cooperation.

(3) Solon (http://solon.ejn-crimjust.europa.eu/): glossary containing terms relevant for judicial cooperation in criminal matters.

[169] http://eurojust.europa.eu/

2. Impetus given by the EU institutions for the creation of an European E-Justice

a) Commission Communication "Towards a European e-Justice Strategy"

The objective of this recent Communication is to *propose an overall strategy that creates synergies between efforts at European and national levels and offers the added value of economies of scale*[170].

Bearing in mind all the existing initiatives, the Commission is of the opinion that national and European synergies should be promoted by strengthening the exchange of best practices at national level as well as strengthening European coordination and marshalling e-Justice to help construct the European judicial area.

The Commission came to the conclusion that **the best solution is to launch a European e-Justice strategy, the reason being that:**

• it fosters the development of concrete projects improving judicial cooperation (translations, videoconference, etc.);

• it encourages e-Justice initiatives at national level, in conformity to the principle of subsidiarity, while ensuring consistency at European level through the exchange of best practices;

• it avoids risks of divergent technical solutions, while stopping short of imposing single standards;

• it permits economies of scale and cost savings for national administrations and citizens, without creating an excessive financial burden for the EU and for MS;

• it provides the basis for a pivotal role of EU institutions, while avoiding the (legal and political) pitfalls of legislative action.

According to the Communication, the priority of action at EU level will be the **European e-Justice Portal** and the **reinforcement of judicial cooperation**. As for the European e-Justice Portal it will have at least three functions.

(1) Access to information

The portal will have to provide European citizens, in their language, with data on judicial systems and procedures. In particular, the portal will contain:

- European and national information on victims' rights in criminal cases and their rights to compensation;

- the fundamental rights enjoyed by citizens in each Member State (rights of persons charged in criminal proceedings);

[170] Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, "Towards a European e-Justice Strategy", 30.5.2008, COM(2008)329final.

- fundamental principles relating to citizens' ability to initiate proceedings before a court in another Member State, or to their defense when summoned to appear before such a court.

The portal will also provide practical information, in particular regarding the competent authorities and how to contact them, the use (obligatory or optional) of lawyers and the procedures for obtaining legal aid.

(2) Referral

The portal must refer visitors to existing sites (Eur-lex, Pre-lex, SCADPlus, Eurovoc and IATE), to European legal institutions and to the various existing legal networks and their tools. Moreover, the portal will direct visitors to certain registers interconnected at European level via links to the bodies that manage these projects.

(3) Direct access to certain European procedures

In the long term, fully electronic European procedures could be created.

As for the reinforcement of judicial cooperation, work will be done to continue the interconnection of criminal records, to create a network of secure exchanges for sharing information among judicial authorities, to facilitate the use of videoconferencing and aid translation (development of automated translation tools, database of legal translators and interpreters and online forms for automated translations).

b) The European e-Justice Action Plan

The Council Multi-Annual European E-Justice Action Plan 2009-2013[171] aims to lend structure to work in the area and to set priorities for its implementation. It stresses that e-Justice matters are not confined to certain legal fields and therefore e-Justice has horizontal relevance in the context of European cross-border proceedings.

As for the scope of the Action Plan, an important statement is made: the European dimension of e-Justice should be highlighted and for that reason e-Justice should be renamed European e-Justice. It is intended to being *a step on the way to the creation of a European judicial area, using information and communication technologies*. Therefore, the projects developed under European e-Justice must therefore *have the potential to involve all Member States of the European Union.*

The document considers that European e-Justice has also three basic functions:

- **Access to information** in the field of justice (in particular European legislation and case law and legislation of the Member States) and access via interconnections to the information managed by the Member States in the framework of the public administration of justice (for instance, the interconnection of the databases of Member States' criminal records).

[171] OJ C 75, 31.03.2009.

- **Dematerialisation of proceedings** (for example e-mediation) in particular in order to implement European instruments adopted by the Council, such as the Regulation that created the European Order for Payment Procedure[172].
- **Communication between judicial authorities** should simplify and encourage communication between the judicial authorities and the Member States, more specifically in the framework of instruments adopted in the European judicial area (e.g. videoconferencing or secure electronic networks).

IV. Converging judicial policies: national parliaments' and civil initiatives' role

The Lisbon Treaty establishes the importance of national parliaments, new actors in the development of an EU criminal justice area. Futhermore, civil initiatives such as the activity carried out by the ECLAN network encourage knowledge and development of this particular area.

A. Enhancing inter-parliamentary cooperation

1. Current structural cooperation

There are currently two structured inter-parliamentary cooperation bodies:

- The Conference of Speakers of the European Union Parliaments. In June 2008, it issued Guidelines for Inter-Parliamentary Cooperation in the European Union[173]. In those guidelines, the Speakers of the EU Parliaments consider that their Conference *shall oversee the coordination of inter-parliamentary EU activities*.

- The Conference of Community and European Affairs Committees of Parliaments of the European Union (COSAC) which *enables a regular exchange of information, best practices and views on European Union matters between European Affairs Committees of national parliaments and the European Parliament*[174]. COSAC was set up in Paris on 16-17 November 1989[175]. It can address contributions – without any legally binding effect – to the European Parliament, the Council and the Commission.
Elmar Brok's Report considers that COSAC should play a particular role in debating *legislative activities pertaining to the area of freedom, security and justice*[176] in addition to its current role of *forum for the exchange of information and debate on general political issues and best practices with regards to the scrutiny of national governments.*[177]

[172] Regulation (EC) No 1896/2006.
[173] Guidelines for Inter-Parliamentary Cooperation in the European Union, Lisbon 19/21 June 2008.
[174] Ibid.
[175] Treaty of Amsterdam, Protocol on the role of national parliaments in the European Union.
[176] Report on the development of the relations between the European Parliament and national parliaments under the Treaty of Lisbon (2008/2120(INI)), Rapporteur: Elmar Brok, 13.03.2009
[177] The UK Parliament has, however, in its 35th Report on the EU (Select Committee on European Union Treaty, Thirty-Fifth Report, 2007, www.parliament.uk), introduced the issues of the dilution of COSAC's

What seems clear though is that the future role of COSAC might evolve with the implementation of the Lisbon Treaty and that this role still has to be precisely defined.

Additionally, cooperation is also currently taking place in some other ad hoc forms: joint meetings on topics of common interest organised by the country holding the Presidency; meetings of sectoral committees organised by national parliaments or the European Parliament on a specific topic; Secretaries-General convening regularly to prepare the agenda for the Conference of Speakers; and representatives of national parliaments to the EU are also facilitating exchange of information between different national parliaments, and national parliaments and the European institutions.

2. Future developments: the Lisbon Treaty

a) In what type of dialogue would national parliaments be involved in the field of criminal justice?

The new powers granted by the Lisbon Treaty to the national parliaments include in particular the right to be informed about *the evaluation of policies conducted in the area of freedom, security and justice* and the right to participate actively in the *control of Europol and Eurojust together with the European Parliament*.

Efficiently informing national parliaments of evaluation policies conducted in the area of freedom, security and justice has – in our view – three prerequisites:

- Firstly, a standard evaluation should be put into place. No standardised evaluation scheme currently exists in the EU (see part IV.A.3).
- Secondly, national parliaments should receive this information through an efficient channel. Similarly to draft legislative acts[178], evaluations could be sent directly by EU institutions to national parliaments. If national governments should also receive information concerning evaluation, we believe that the quickest route is probably the most efficient. Therefore, it is our view that national parliaments could be in direct contact with EU institutions "owning" the relevant information.
- Thirdly, inter-parliamentary structures should exist to discuss the information received amongst national parliaments, and between national parliaments and the European Parliament.

The future *control of Europol and Eurojust together with the European Parliament* raises many questions: at what stage will national parliaments be involved and "participate" in the evaluation? What will be the scope of the evaluation for national parliaments? Will it for instance cover international cooperation agreements (whether strategic or operational) of Eurojust and Europol or relations between the different European agencies – which currently falls under the Council's resposibility (see II.B.3)? etc.
The democratic control of Europol's activity has already been discussed in the past. The creation of *Parlopol* – a joint committee with representatives from the European Parliament and national parliaments – was suggested for the first time in a 2002

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activities in light of the Lisbon Treaty. Article 10 of the Protocol on the role of national parliaments furthermore considers that COSAC could *organise inter-parliamentary conferences on specific topics*.
[178] Draft legislative proposals are sent directly by the Commission to national parliaments. See Article 4 of the Protocol on the application of the principle of subsidiarity and proportionality of the Lisbon Treaty.

Communication from the Commission[179]; however, this body has never been officially launched. Taking up this idea and creating a "Parlopol" and a "Parlojust" – could help national members of parliaments and European MPs to have a dedicated forum for evaluating both agencies' activities.

Elmar Brok's report[180] insists on *creating new forms of pre- and post-legislative dialogue between the European Parliament and national parliaments (...)*. For instance, Members of the European Parliament could be invited to speak in plenary of national parliaments, and specialised committees of the European Parliament could organise joint meetings with corresponding national committees. A "formal (inter-parliamentary) cooperation agreement" could be introduced between national parliaments and the European Parliament[181]. Elmar Brok's Report[182] insists also on the importance of developing systematic *bilateral Joint Committee Meetings* in order to create *a permanent network of corresponding committees*.

b) National parliaments become actors in the European legislative procedure relating to judicial cooperation in criminal matters

For the first time, the importance of national parliaments is recognised in the very text of the Treaty – and not only in a Protocol. Article 8 c of the Lisbon Treaty is complemented by a Protocol on the application of the principles of subsidiarity and proportionality and another Protocol on the role of national parliaments in the European Union.

The "orange card procedure" could have a strong impact on the development of a criminal justice area. National parliaments should be able to put weight on decisions taken at a European level; they will be given eight weeks (instead of the six weeks of the Amsterdam Protocol on national parliaments) from the time they receive new proposals in the official languages of the EU[183], in order to react before the document is considered by the Council. National parliaments issuing reasoned opinions on a draft legislative proposal on the basis of non-compliance with the principle of subsidiarity will trigger a new decision procedure. First the Commission will have to review its proposal if a simple majority of votes allocated to national parliaments[184] is required. If the proposal is maintained and the Commission has justified this maintenance, the EU legislator will

[179] Communication from the Commission to the European Parliament and the Council - Democratic control over Europol, COM/2002/0095 final.
[180] Report on the Development of the relations between the European Parliament and national parliaments under the Treaty of Lisbon Committee on Constitutional Affairs, Rapporteur: Elmar Brok (13.03.2009) 2008/2120(INI).
[181] Relations between the EP and national parliaments, European Parliament resolution on relations between the European Parliament and the national parliaments in European integration (2001/2023(INI)), paragraph 15.
[182] Ibid.
[183] The mention of the language is an important aspect. It seems to us that only scrutiny in one official language may allow a national parliament to fully analyse the scope of the document to be examined.
[184] Article 7.1 paragraph 2 of the Protocol on the application of the principles of subsidiarity and proportionality of the Lisbon Treaty states: *Each national parliament shall have two votes, shared out on the basis of the national parliamentary system. In the case of a bicameral parliamentary system, each of the two chambers shall have one vote.*

take into consideration the opinion of the Commission and the reasoned opinions of the national parliaments before examining the proposal. If – by a majority of 55% of the members of the Council or a majority of the votes cast in the European Parliament – the proposal is deemed incompatible with the principle of subsidiarity, the proposal will be dismissed.

In spite of new powers given to national parliaments, three weaknesses affect this procedure:

- national parliaments can only submit reasoned opinions on the compliance with the principle of subsidiarity and not with any other principle (i.e. proportionality), nor on the substance of the text;
- national parliaments only have an "orange card" procedure available to them and not a veto right (a "red card procedure");
- in spite of the much broader scope of the Commission's initiative launched in September 2006, by which national parliaments are corresponding with the Commission on any legislative matter (including white and green papers) within a time frame that is not restricted to a number of weeks, the Lisbon Treaty has only limited the scope of the reasoned opinions to the protection of legislative proposals[185].

Cooperation and participation in the challenges facing judicial cooperation in criminal matters should in our view compel national parliaments and the European Parliament to:

- exchange information in the form of meetings, seminars and documentation, and by making full use of the European Centre for Parliamentary Research and Documentation (ECPRD) and the platform for electronic exchange of information provided by IPEX[186]. As much as possible, national parliaments should receive this documentation directly from the European institutions, and not from national governments. Exchange of information should occur between EU institutions and national parliaments and between national parliaments themselves – in particular to reach the simple majority vote mentioned in the orange card procedure.
- streamline the work of inter-parliamentary structures and organise clear levels of discussion[187]. For that, the role of COSAC and of other inter-parliamentary bodies – whether already existing or to be created, such as a "Parlojust" – should be clearly determined.

Finally, it should not be forgotten that by involving national parliaments more and in a better way, these parliaments are also fulfilling the obligation for all public institutions

[185] COSAC, Annex to the 8th bi-annual report, www.cosac.eu/en/documents/biannual. It is nevertheless important to stress that in this specific case, the Commission has no obligation to amend its proposals or other papers in view of the national parliaments' comments. It is still worthwhile mentioning that the Commission's 2006 initiative seems to have met with success: according to an evaluation conducted by COSAC in 2007, many national parliaments had already used the procedure proposed by the Commission. COSAC, Annex to the 8th bi-annual report, www.cosac.eu/en/documents/biannual. It is nevertheless important to stress that in this specific case, the Commission has no obligation to amend its proposals or other papers in view of the national parliaments' comments.

[186] Interparliamentary EU Information Exchange, launched in July 2006.

[187] As suggested by Article 9 of the Treat of Lisbon Protocol on the Role on national parliaments.

involved in the discussion of European policies to enhance communication with regard to issues of European citizens. COSAC Conclusions adopted in Paris in November 2008 indicate that *the European Union, in order to be better understood by European citizens, should concentrate on the top issues of common interest, for which it is the most appropriate level and communicate them to the public*. However, in our view communication responsibility does not only fall "on the shoulders" of the European Union institutions: once national parliaments are more involved in the development of a criminal justice area, these should also take part of that responsibility.
Finally, responsibilities foreseen for national parliaments should not obscure the role of national jurisdictions. Although the Lisbon Treaty was approved by parliamentary ratification on 23 May 2008, the German Constitutional Court has recently (30 June 2009) considered that the Lisbon Treaty is compatible with the German Basic Law but has decided that the German Parliament would have to be granted a stronger voice in European affairs before the Treaty can finally be ratified.

3. Should national judicial policies be subject to evaluation?

Enhancing mutual trust and consequently allowing for the principle of mutual recognition to be implemented more systematically by national judicial authorities cannot be achieved without at least knowing to what extent justice is efficient, as well as its level of quality in different Member States. Criteria for evaluating justice should be agreed on by Member States. Although this is not an easy task, it should be stressed that citizens' right to access justice warrants such an evaluation.

Evaluation of justice can be understood in two different ways which are complementary in our point of view: evaluation could merely include statistical data, or evaluations could be carried out on the substance of criminal justice in every Member State. It seems to us that the second option cannot exist without the first, and that in order for the first to be trustworthy, the implementation of the second is an absolute necessity. Currently, there is *no comprehensive, constant and clear monitoring of EU policies in the field of criminal justice, or of the quality and efficiency of justice in the Member States*[188].

The subject of statistical data has been discussed by the Commission in its Communication from August 2006[189]. The Commission has proposed to set up a coherent frame for statistical data at the European Union level in the criminal field and in the field of criminal justice. As stated in the document: *One of the main deficiencies in the area of Justice, Freedom and Security is still the lack of reliable and comparable statistical information*[190]. For this, "similar" definitions and harmonised data collection procedures

[188] European Parliament Recommendation of 7 May 2009 to the Council on the development of an EU criminal justice area (2009/2012(INI)).
[189] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee – Developing a comprehensive and coherent EU strategy to measure criminal justice : an EU Action Plan 2006-2010. COM(2006)437 final, 7.8.2006.
[190] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions Justice, Freedom and Security in Europe since 2005: an evaluation of the Hague Programme and Action Plan General overview of instruments and deadlines provided in the Hague Programme and Action Plan in the fields of justice, freedom and security Institutional scoreboard SEC52009)767 final, 10.6.2009, p.3.

are needed. Obviously, if Member States and the EU agree on these criteria of evaluation and collect the statistics required, the EU institutions should then be able to more easily evaluate – beforehand and after implementation – its future or the adopted criminal justice measures.

According to the Commission, the Action Plan detailed in 2006 is today *being implemented*[191]. Nevertheless, it is not completely clear where the implementation of the Action Plan stands. According to the latest report on the evaluation of the Hague Programme[192], *the Commission is currently funding initiatives and research projects aimed at encouraging convergence in the areas of police and judicial crime statistics, victim surveys, and offence classification benchmark*. However, activities in the field of judicial statistics are not mentioned.

In the 2006 Communication the following areas of interest for an evaluation in the field of justice were listed:
- *criminal justice budget (excluding prison budget) including number of judges, prosecutors and defence lawyers, legal aid (and number of cases in which legal aid was provided by the state) and budget for training (on judicial cooperation and for interpreters and translators);*
- *number of: offences recorded/prosecuted and criminal convictions per year; European arrest warrants issued and executed per year; requests for extradition (granted and refused) per year; letters rogatory sent, received and executed per country per year (EU only); requests for Mutual Legal Assistance, replies, timing for each kind of request (...); joint investigation teams, including an indication of which Member States were involved and the costs incurred; qualified court and police station interpreters and translators and number of cases involved; foreign (EU and third countries) nationals in criminal proceedings in each Member State; persons held in pre-trial detention and in prison;*
- *average: length of proceedings (by type of proceeding); length of prison sentence handed down and served, by type of offence; time spent in pre-trial detention by type of offence*[193].

This list is very detailed: setting up common statistical evaluation of those standards would require active participation of all Member States on sensitive subjects (such as the length of proceedings).

Evaluating the substance of judicial policies in the different Member States could be even more difficult. It should be mentioned that the Commission is already regularly evaluating the implementation of EU instruments. Additionally, peer reviews are also conducted to control the national implementation of the European arrest warrant. The Commission considers that *there has to be evaluation* of the effectiveness of the legal and

[191] Ibid.
[192] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions Justice, Freedom and Security in Europe since 2005: An evaluation report of the Hague Programme and Action Plan. An extended report on the evaluation of the Hague Programme, SEC(2009)766final, 10.6.2009, p.78.
[193] Footnote 36 of the August 2006 Communication, p. 27.

political instruments adopted at Community level and that *evaluation is also necessary to determine any obstacles to the proper functioning of the European judicial area*[194].

An evaluation combining mixed approaches – both statistical and substantive (or "legislative" according to the words of the European Parliament) and the *assessment of the application of EU instruments on the ground* – has been requested by the European Parliament in a recent Recommendation[195]. This monitoring should, according to this institution, result in a comprehensive report issued on a regular basis in cooperation with the Council of Europe (see below) and "European networks operating in criminal matters". In order to be implemented, the proposal of the European Parliament would in our view certainly have to be more detailed and propose a proper *evaluation mechanism*.

The European Commission for the Efficiency of Justice (CEPEJ) was created in September 2002 by the Committee of Ministers of the Council of Europe. It consists of experts from its 47 Member States, and is tasked with evaluating the efficiency and functioning of justice systems and with proposing practical tools to improve their efficiency of service to benefit citizens. [196]

The CEPEJ's most seminal work is undoubtedly its biannual report (the third was filed in October 2008[197]) on the evaluation of Member States' judicial systems. It is based on the answers that Member States gave to a comprehensive questionnaire prepared by the CEPEJ, and provides an analysis of such data as:

- States' spending on justice: budget for the courts and prosecution services, and legal aid; number of judges, prosecutors, salaries etc. As this work provides for some comparisons between States and therefore league tables, it has often attracted strong media interest.
- The mechanisms established for instance in relation to access to justice and for the users of the courts.
- Measures relating to court activities, in particular controls to ensure reasonable time-limits are respected to guarantee fair trials as defined in the Convention on Human Rights and Fundamental Freedoms.

The CEPEJ' s work therefore constitutes a most valuable tool for comparing judicial systems, even if data is not always easily comparable owing to differences between the systems of the Member States, in particular in terms of organisation and mandates. If the European Union is to launch an evaluation procedure, as provided in the Hague programme, it should complement the work of the CEPEJ, perhaps on a different basis, as the principle of mutual recognition implies higher common standards used in the context of the Council of Europe.

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[194] Communication from the Commission to the European Parliament and the Council An area of freedom, security and justice serving the citizen, COM(2009)262final, 10.06.2009, p. 10.
[195] European Parliament Recommendation of 7 May 2009 to the Council on development of an EU criminal justice area (2009/2012(INI)).
[196] In 2007, CEPEJ has set up the Saturn Centre collecting judicial information.
http://www.coe.int/t/dghl/cooperation/cepej/Delais/default_en.asp
[197] CEPEJ(2008) Evaluation

Finally, let us recall that the development of professional networks also contributes, to a certain extent, to the "evaluation" of the different national judicial systems. In November 2008, the JHA Council agreed to establish a new network: the ***Network for legislative cooperation between the Ministries of Justice of the Member States of the European Union***. The purpose of this network is to exchange information *on the national legislation, on judicial and legal systems and on major legal reform projects*[198]. The national correspondents will be able to submit requests to each other through this network. The creation of a new European network in the judicial field shows the active involvement of practitioners in the development of an EU criminal justice area (see IV.B.).

B. Civil initiatives, the example of the European Criminal Law Academic Network (ECLAN)

The initiative to create ECLAN (European Criminal Law Academic Network) echoed the evolution of cooperation in criminal matters in the European Union, which in the last decade has undergone incredible development. The teaching and the scientific research in this field needed to match those changes; the time had come to reconsider the traditional way of comparing, analysing and teaching material and procedural criminal law.

1. The network

On the basis of its numerous established contacts and on the basis of its experience in the field of EU Criminal Law, the *Institute for European Studies* of the "*Université Libre de Bruxelles* (ULB)" launched in December 2004 the setting up of the academic network ECLAN, thanks to co-financing from the EU (Agis Programme) and from the Ministry of Justice of Luxembourg. Each country is represented by a "contact point" who acts as an intermediary in relation to the academic sphere of their own country. The network is further integrated by "members" having a specific expertise in the field, and is in constant development. ECLAN constitutes a scientific forum for intensifying contacts between academics and researchers throughout the European Union and a place for debate on the development of the European Union as an "Area of Freedom, Security and Justice". Furthermore, the network spreads relevant information on the topic through its website (www.eclan.eu) and a quarterly newsletter. The newsletter contains in particular concise information on new legislative instruments and on recent proposals, as well as short summaries of relevant case law of the Court of Justice.
Today the network constitutes a "pool" of more than 100 academics coming from the 27 Member States of the European Union as well as from five non-EU States (Bosnia-Herzegovina, Croatia, Iceland, Norway and Switzerland) with whom the EU has relevant contacts in the field. The EU institutions, and particularly the European Commission, can rely upon the network and its members, either when drafting new legal instruments or when evaluating and monitoring them.

2. Research carried out by ECLAN

[198] Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council (27-28 November 2008) on the establishment of a Network for legislative cooperation between Ministries of Justice of the Member States of the European Union, 16533/08.

Since its creation, the network has developed several projects which often combine research with the organisation of seminars and conferences and the publication of books related to EU criminal law and cooperation. The following sections give some examples of activities carried out, together with the achievements resulting from these different projects.

a) Development of the Standard training programme on judicial cooperation in criminal matters within the European Union[199].

This training tool is the result of a project aimed at facilitating the training of judges and magistrates in judicial cooperation in criminal matters. The new focus on judicial training is the consequence of the growing specificity of the EU legal framework and of the increasing number of cross-border investigations being carried out. Providing adequate and high-level training for the practitioners of justice, in particular judges and prosecutors in the EU, has been highlighted by the European Commission[200] as *a vital issue for the establishment of the European judicial area*.

The training programme developed by ECLAN is an attempt to respond to that need to rationalise and improve judicial training throughout the European Union. The training tool is divided into eight thematic modules containing a *Word document* and a *Power Point presentation* for each module[201].

They are devised to cover the various aspects of judicial cooperation between EU Member States in a consistent way, whilst at the same time allowing enough flexibility for trainers and users to concentrate on certain modules, adapt their sequence or extend the programme over several training sessions. Areas to be filled in by the organiser have been foreseen in order to take into account national specificities. Moreover, the programme contains a *user guide* for the trainer with recommendations on how to lead the training session as well as a code of the European and international legal instruments that are necessary for the work of practitioners. The methodology approach ensures academic quality of the information whilst taking into account the necessities of the daily work of the practitioner. Therefore, although a rather "theoretical" introduction is given, the emphasis is put on practical issues of judicial cooperation and the programme is currently available online in French[202] to any authority tasked with judicial training, to

[199] Developed in 2005-2006 thanks to co-financing from the European Union (AGIS programme) and the Ministry of Justice of Luxembourg.

[200] Communication from the Commission to the European Parliament and the Council on judicial training in the European Union, 29 June 2006, COM(2006), 356 final

[201] These modules consist of (1) General introduction: judicial cooperation in criminal matters within the European Union, (2) General framework of European judicial cooperation: from judicial cooperation to mutual recognition of judicial penal decisions, (3) The actors of judicial cooperation in criminal matters, (4) Police cooperation, (5) Pre-trial stage and gathering of evidence (I): horizontal issues, (6) Pre-trial stage and gathering of evidence (II): specific regimes for various investigative measures, (7) The European arrest warrant and the surrender procedure, and (8) Conflicts of jurisdiction and the trial and post-trial cooperation. The programme is currently being updated and developed Thanks to co-financing from the European Union (Criminal Justice programme) and the "*Institut Universitaire International Luxembourg-IUIL*"and a second version will be available in 2009.

[202] For more information, please visit the website: *www.copen-training.eu*. Only two "modules" have been translated into English.

any actor of judicial cooperation, or indeed to any person interested in the matter. It is envisaged to test some of the modules "online" so as to assess the feasibility of developing them in the context of a common future system of e-learning in the field, as supported by the Council[203].

b) Developing a Standard model for evaluation of the implementation and the impact of EU criminal law in Member States of the EU[204].

The core objective of such a project was to contribute to the improvement of the existing mechanisms of evaluation currently carried out by the European Commission and by the Council of the EU (evaluations by the peers). As already underlined by the European institutions themselves[205] and also highlighted in the Treaty of Lisbon, evaluation appears to be an important element for the development of an Area of Freedom, Justice and Security (see IV.A.3). The choice of this topic translated the will of the academic sphere to approach the area of EU criminal law from a new angle where academics could bring an added value, given both their impartial position, and their comprehensive knowledge and understanding of the national criminal systems.

The network had already devoted its first international conference in 2005 to the theme of evaluation[206]. Amongst topics discussed were the mechanism of peer evaluation, the Schengen evaluation process, and evaluation in the context of enlargement. Several experiences in other forums, such as the Council of Europe and the UN Committee against terrorism, were further analysed. The outcome of the conference resulted in the publication of a collective book: *Comment évaluer le droit pénal européen?*, Brussels, Ed. de l'Université de Bruxelles, 2006.

After the conference and the publication of the first collective book, the network focused on the need for an adequate methodology tailored to criminal matters, taking into account the positive implementation of EU legislation in Member States, but also the impact on national systems and on Human Rights and Civil Liberties.
An evaluation model was drawn up by academics; it is composed of a general scheme, common to all types of instruments, together with a second scheme aimed more specifically at measuring compliance with, and impact of, legal instruments approximating criminal substantive law. Both the general and the more specific schemes are accompanied by a methodological orientation notice. The main feature of the model is that it adopts a global approach, in the sense that its aim is not only to assess whether the

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[203] See the Multi-annual European e-Justice Action Plan 2009─2013 adopted by the Council on 27 November 2008 (JAI 612 COPEN 216)
[204] Developed in 2006-2007 thanks to co-financing from the European Union (AGIS programme) and the Ministries of Justice of Belgium and Luxembourg.
[205] The Hague Programme adopted by the European Council of 5 November 2004 considers (par. 3.2) evaluation as vital for the future (OJ n° C 53 of 3 March 2005, p.1). The Commission published a communication on the subject "Evaluation of EU Policies on Freedom, Security and Justice" (COM (2006)332) of 28 June 2006).
[206] "Implementation of EU Criminal Law: which methodology for evaluation?", Brussels, 21-22 October 2005.

instrument concerned has been correctly transposed in domestic law, but also to evaluate its practical implementation, its impact on national judicial systems and the level of achievement of its intended goals. This impact is to be measured in terms of effectiveness, adequacy and proportionality with regard to the objectives pursued by the specified legal instruments. The model was tested on the Framework Decision on combating trafficking in Human Beings[207]. The outcomes of the process have been published partly on the ECLAN website and in another collective book: *The evaluation of European criminal law: The example of the Framework Decision on combating trafficking in human beings*, Brussels, Ed. de l'Université de Bruxelles, 2009.

c) The study on The future of mutual recognition in criminal matters in the European Union

The purpose of the study, allocated by the Commission following an invitation to tender, was to provide a comprehensive analysis of the horizontal problems encountered in the implementation of the principle of mutual recognition in criminal matters, at the three levels of negotiation of legislative texts: within the Council, transposition in national law, and practical implementation.

The study followed a twofold approach. Firstly, a State by State analysis by ECLAN correspondents, based on academic research but also on interviews with experts and practitioners, according to a standard list of questions. In parallel, a horizontal analysis was conducted by the coordination team based in Brussels, starting from identifying common topics and problems through academic publications and relevant reports; this was followed by further visits, discussion and deeper examination in numerous interviews with more than 150 experts and practitioners in several Member States, as well as key EU actors in the field, and meetings with a small committee of selected experts. This second approach, more prospective and future-oriented, was constantly nourished by the findings from the national reports.

The final report reflects the result of these combined proceedings. It points to general trends and reports on a series of difficulties in more detail, before considering possible future options, sketching their respective advantages and disadvantages and offering conclusions. The final report can be found on the Commission website[208] (in French and English). The analysis is already extensively referred to in the context of reflection on the eve of the Stockholm Programme, which should map the EU activities in the field of freedom, security and justice for the next five years. The study, completed and updated, will result in a collective book to be published in 2009: *The future of mutual recognition in criminal matters in the European Union* Brussels, Ed. de l'Université de Bruxelles.

c) Collaboration with other activities

ECLAN is involved in the activities of the Justice Forum which was set up by the Commission in 2008[209] (see V.B.2).

[207] Council Framework Decision of 19 July 2002 on combating trafficking in human beings (OJ n° L 203 of 1 August 2002, p.1)
[208] http://ec.europa.eu/justice_home/doc_centre/criminal/recognition/docs/mutual_recognition_en.pdf
[209] Communication from the Commission on the creation of a Forum for discussing EU justice policies and practice, 4 February 2008, COM(2008), 38 final.

ECLAN provided academic support to the conference organised in Vienna in 2006 by Eurojust with the European Commission and the General Secretariat of the Council on *the role of Eurojust and the EJN in the future EU judicial architecture in criminal matters*. The network also collaborated with the Legal Section of the IEE (ULB) and the Pôle Bernheim in the Conference on *the Treaty of Prüm*, which was held in Brussels on 5 June 2007.
Finally some ECLAN members have participated in the Code of EU criminal law which is a reasoned compilation of all relevant texts (instruments and programmes) concerning criminal matters which are applicable between EU Member States[210].

[210] *Code of criminal law of the European Union*, Brussels, éd. Bruylants, 2005. The current version of the Code, dated from 2005, exists in English, French and Dutch (2007). A revised version is under preparation and should be available later this year.

Annex I
Recommendations

I. Concerning the corpus of the European Union

- To consider recasting all or some of the texts already adopted by the Council, i.e. proceed with the transformation authorised under the Lisbon Treaty of third pillar instruments into Community instruments, in order to promote CJEC oversight of European law implementation via the oversight of the European Commission.
- To support and promote the unification of European Union Law on collecting evidence, to provide European magistrates with a single corpus of applicable rules based on the principle of mutual recognition, thereby replacing the series of texts from the Council of Europe (conventions) and European Union (Convention of 29 May 2000 and Protocol and Framework Decisions on the "European Evidence Warrant" and on "freezing property and evidence").

II. European Criminal Record/ECRIS

To create a European index of sentences of third country nationals containing biometric data, in compliance with data protection rules, to complement the ECRIS system.

III. European arrest warrant, European judicial review

- To remedy the shortcomings of the European arrest warrant as outlined in the 2009 mutual evaluation report and convert the text into a directive, to allow for effective CJEC oversight of transposition processes.
- To align the European arrest warrant and European Judicial Review systems, in particular the rules on dual criminal liability.

IV. Enforcement of sentences

- To align conditions pertaining to double criminality on the European arrest warrant in all instruments involving a sentence.
- To adopt an instrument allowing for mutual recognition of decisions on disqualification.
- To consider merging some texts on mutual recognition of sentencing decisions to facilitate their use by courts and tribunals.

V. Integrated co-operation

- To define relations between European agencies (Europol, Eurojust) and possibly OLAF in an act of the Council and European Parliament.
- To recast the Decision establishing Eurojust to make full use of the provisions of the Lisbon Treaty pertaining to it.
- To support the creation of a European Public Prosecutor's Office to combat fraud affecting the European Communities' financial interests, and extend its powers to other types of crime.

VI. The approximation of laws

- To consider whether it wouldn't be possible or desirable to include a degree of decriminalisation of certain acts in the approximation of substantive criminal law. This could entail recasting some framework decisions already adopted by Council.
- To adopt an instrument unifying minimal guarantees given to accused persons or victims forthwith, applying at least to cross-border proceedings and if possible also to European criminal proceedings.
- To re-examine the Framework Decision concerning the standing of victims in criminal proceedings, in order to develop victim law and ensure that the existing text is transposed by Member States.
- To place a special emphasis on implementing the provisions of the Lisbon Treaty which allow for the approximation of evidence admissibility rules between Member States.

VII. Data protection

To adopt harmonised data protection rules for the field of justice at the level of the European Union.

VIII. Training of magistrates

To achieve a level of convergence in the different areas of training, using existing national schools and European structures.

IX. Professional co-operation

To use existing professionals networks and fora to increase the exchange of experience and good practice, and identify desirable future judicial developments.

X. Inter-parliamentary cooperation

- After the entry into force of the Lisbon Treaty, to establish clear co-operation structures between national parliaments and between national parliaments and the European Parliament.
- To encourage national parliaments to fully take these new responsibilities in criminal matters into account.

XI. Assessment of criminal policies

To adopt common evaluation criteria in all Member States of the European Union.

Annex II
Table outlining the main European Union instruments for the criminal justice area

Facilitating trials

			Instruments not based on mutual recognition	Instruments based on mutual recognition
Preparation for trial	Obtaining Evidence	Direct relations between judicial authorities	Convention implementing the Schengen Agreement[i] EU Convention of 29 May 2000[ii]	
		Application of requesting State' s procedure	EU Convention of 29 May 2000	
		Testimony	Council of Europe Conventions [iii] [iv] Convention implementing the Schengen Agreement EU Convention of 29 May 2000	Framework Decision on the European Evidence Warrant (EEW) of 18.12.2008[v] (transposition 19.01.2011)
		Further evidence (objects, documents, if necessary through searches)	Conventions of the Council of Europe Convention implementing the Schengen Agreement EU Convention of 29 May 2000 Protocol to the EU Convention of 29 May 2000 (for financial matters)	Framework Decision on freezing property or evidence[vi] (22 July 2003)(transposition: 02.08.2005) Framework Decision on the European Evidence Warrant
		Telephone interceptions	EU Convention of 29 May 2000	
		Joint investigation teams	EU Convention of 29 May 2000 Framework Decision of 13 June 2002[vii]	
		Teleconferencing and videoconferencing	EU Convention of 29 May 2000	
		Controlled delivery and undercover investigations	EU Convention of 29 May 2000	
	Seizure for the purpose of Confiscation			Framework Decision on the freezing property or evidence

	Obtaining information on a person 's criminal background		ECRIS (Framework Decisions of 26.02.2009[211] and Decision of 6.04.2009[212] (transposition on 27.04.2012)
	Arrest and surrender of persons for prosecution or to ensure their appearance in court		European Arrest Warrant[viii] (13 June 2002) (transposition on 01.04.2004) Framework Decision of 6 March 2008[ix] on mutual recognition of decisions on supervision measures as an alternative to provisional detention (transposition date not yet decided)
Trial stage	Settlement of conflicts of jurisdiction between the courts of two or more different countries (ne bis in idem)	Convention implementing the Schengen Agreement Framework Decision on conflicts of jurisdiction	
	Criminal precedents in other Member States		Framework Decision of 24 July 2008 on taking account of convictions in the Member States in the course of new criminal proceedings[x] (transposition on 15.10.2010) ECRIS
Post sentencing stage (enforcement of sentences)	Enforcement of custodial sentences		European Arrest Warrant Framework Decision of 27 November 2008 on mutual recognition of judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty[xi] (transposition on 05.12.2011)
	Enforcement of confiscation orders		Framework Decision of 6 October 2006[xii] (transposition on 24.11.2008)
	Enforcement of orders on financial penalties		Framework Decision of 24 February 2005[xiii](transposition 22.02.2007)
	Enforcement of probation and alternative sanctions		Framework Decision of 27 November 2008[xiv](transposition on 06.11.2011)

[211] OJ L 93/23, 7.4.2009
[212] OJ L 93/33, 7.4.2009

Annex III The approximation of laws

Substantive criminal law

Subject	Title	Date	Reference	Observations
Terrorism	Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism	28-Nov-08	OJ L 330/21, 9.12.2008	
	Council Framework Decision on combating terrorism (2002/475/JHA)	13-Jun-02	JO L 164 du 22/06/2002	
Racism and Xenophobia	Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law	28-Nov-08	OJ L328/55, 6.12.2008	
Organised Crime	Council Framework Decision on the fight against organised crime	24-Oct-08	OJ L 300/42, 11.11.2008	
	Joint Action adopted by the Council on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union (98/733/JHA)	21-Dec-98	OJ L 351, 29.12.98	Repealed by Framework Decision of 24 October 2008.
Attacks against information systems	Council Framework Decision on attacks against information systems	24-Feb-05	OJ L69, 16.03.2005	
Drug trafficking	Council Framework Decision laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking	25-Oct-04	OJ L 335/8, 11.11.2004	

Sexual exploitation of children and child pornography	Council Framework Decision on combating the sexual exploitation of children and child pornography	22-Dec-03	OJ L 13/44, 20.1.2004	
Corruption	Council Framework Decision on combating corruption in the private sector	22-Jul-03	OJ L 192, 31.07.2003	
	Joint Action adopted by the Council on the basis of article K3 of the Treaty on European Union, on corruption in the private sector	22-Dec-98	OJ L 358, 31.12.1998	Repealed by Framework Decision of 23 July 2003.
	Council Convention (Article K3 of the Maastricht Treaty) on the fight against corruption involving officials of the European Communities or officials of the Member States of the European Union	26-May-97	OJ C 195, 25.06.1997	
"Sanctions against smugglers"	Council Directive defining the facilitation of unauthorised entry, transit and residence	28-Nov-02	OJ L 328, 5.12.2002	
	Council Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (2002/946/JHA)	26-Nov-02	OJ L 328/1, 5.12.2002	
Trafficking in human beings	Council Framework Decision on combating trafficking in human beings (2002/629/JHA)	19-Jul-02	OJ L 203, 01.08.2002	

Means of payment	Council Framework Decision amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro (2001/888/JHA)	06-Dec-01	OJ L 329, 14.12.2001	
	Council Framework Decision combating fraud and counterfeiting of non-cash means of payment (2001/413/JHA)	28-May-01	OJ L 149/1, 2.06.2001	
Protection of the European Communities' financial interests	Council Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests	26-Jul-95	OJ C 316, 27.11.1995	
protection of the environment	Directive of the European Parliament and of the Council on the protection of the environment through criminal law	12-Aug-08	OJ L328/28, 6.12.2008	
	Directive of the European Parliament and of the Council on ship-source pollution and the introduction of penalties for infringements	07-Sep-05	OJ L 255, 30.09.05	
	Council Framework Decision on the protection of the environment through criminal law	27-Jan-03	OJ L 29, 5.02.2003	Framework Decision annulled by the CJEC in its judgement of 13 September 2005 (C-176/03)

	Council Framework Decision to strengthen the criminal law framework for the enforcement of the law against ship-source pollution	12-Jul-05	OJ L 255, 30.09.05	Framework Decision annulled by the CJEC in its judgement of 23 October 2007 (C-440/05)

The approximation of Member States' criminal procedure

Subject	Title	Date	Reference	Observations
Standing of victims	Framework Decision on the standing of victims in criminal proceedings (2001/220/JHA)	15-Mar-01	OJ L 82, 22.3.2001	

The approximation of rules of general criminal law

Subject	Title	date	reference	Observations
Confiscation	Council Framework Decision on confiscation of crime related proceeds, instrumentalities and property	24-Feb-2005	OJ L 68, 15.03.2005	

[i] OJ, 22.09.2000

[ii] OJ 197/1, 12.07.2000

[iii] STE - n°30

[iv] Ste 99

[v] OJ L 350/72, 30.12.2008

[vi] OJ L 196/45, 2.8.2003

[vii] OJ L162, 20.06.2002

[viii] OJ L.190/1, 18.07.2002

[ix] 17506/08, not published in the OJ

[x] OJ L 220, 15.08.2008

[xi] OJ L 327/27, 5.12.2008

[xii] OJ L328, 24.11.2006

[xiii] OJ L 76, 22.03.2005

[xiv] OJ 337/102, 16.12.2008

EUROPEAN PARLIAMENT

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

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- Constitutional Affairs
- Justice, Freedom and Security
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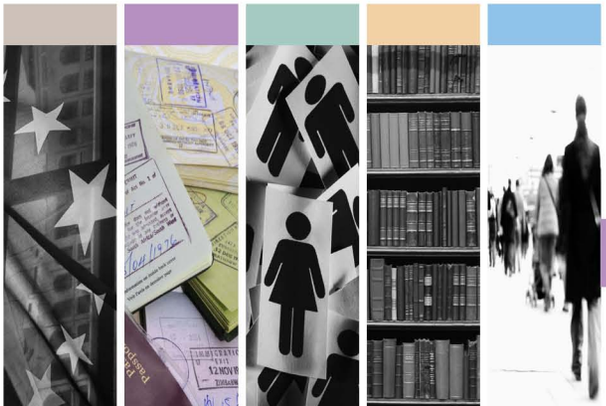

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