Study

Analysis of the future of mutual recognition in criminal matters in the European Union

Final Report

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Finalised on 20 November 2008

European Commission – DG Justice, Freedom and Security
This report was written by Gisèle Vernimmen-Van Tiggelen and Laura Surano of the Institute for European Studies, Université Libre de Bruxelles, and was funded by the European Commission, Directorate-General for Justice, Freedom and Security. The views expressed cannot be taken to represent the official position of the European Commission. The report was written in French and translated for the Commission into this English version (only). The French report and this translation will be available on the website of the Commission’s Directorate-General for Justice, Freedom and Security (http://ec.europa.eu/justice_home/index_en.htm).

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*Tender n° JLS/D3/2007/03. The total amount allocated is € 231.250.77.
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## Abbreviations and acronyms

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<th>Description</th>
<th>Country</th>
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<tbody>
<tr>
<td>CATS</td>
<td>Comité Article Trente-six (Article 36 Committee)</td>
<td>AT, Austria</td>
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<tr>
<td>CJFP</td>
<td>Criminal Justice Financial Programme</td>
<td>BE, Belgium</td>
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<tr>
<td>CoE</td>
<td>Council of Europe</td>
<td>BG, Bulgaria</td>
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<tr>
<td>COM</td>
<td>European Commission</td>
<td>CY, Cyprus</td>
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<tr>
<td>CONS</td>
<td>Council of the EU</td>
<td>CZ, Czech Republic</td>
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<tr>
<td>EAW</td>
<td>European Arrest Warrant</td>
<td>DE, Germany</td>
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<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
<td>DK, Denmark</td>
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<tr>
<td>ECJ</td>
<td>European Court of Justice</td>
<td>EE, Estonia</td>
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<tr>
<td>EEW</td>
<td>European Evidence Warrant</td>
<td>EL, Greece</td>
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<tr>
<td>EJN</td>
<td>European Judicial Network</td>
<td>ES, Spain</td>
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<td>EJTN</td>
<td>European Judicial Training Network</td>
<td>FI, Finland</td>
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<td>EP</td>
<td>European Parliament</td>
<td>FR, France</td>
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<td>FD</td>
<td>Framework Decision</td>
<td>HU, Hungary</td>
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<td>JIT</td>
<td>Joint Investigation Team</td>
<td>IE, Ireland</td>
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<td>LIBE</td>
<td>Committee on Civil Liberties, Justice and Home Affairs, EP</td>
<td>IT, Italy</td>
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<tr>
<td>MLA</td>
<td>Mutual Legal Assistance</td>
<td>LT, Lithuania</td>
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<td>MR</td>
<td>Mutual Recognition</td>
<td>LU, Luxembourg</td>
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<tr>
<td>MS</td>
<td>Member State(s)</td>
<td>LV, Latvia</td>
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<tr>
<td>NBII</td>
<td>Ne bis in idem</td>
<td>MT, Malta</td>
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<tr>
<td>NP</td>
<td>National Parliament</td>
<td>NL, Netherlands</td>
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<td>SG</td>
<td>Secretariat-General</td>
<td>PL, Poland</td>
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<tr>
<td>SIS</td>
<td>Schengen Information System</td>
<td>PT, Portugal</td>
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<tr>
<td>TEC</td>
<td>Treaty establishing the European Community</td>
<td>RO, Romania</td>
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<td>TEU</td>
<td>Treaty on European Union</td>
<td>SE, Sweden</td>
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<tr>
<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
<td>SI, Slovenia</td>
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<td>SK, Slovakia</td>
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<td>UK, United Kingdom</td>
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I. **Introduction and methodology**

**Background**

Following the invitation to tender published in summer 2007 the study *Analysis of the future of mutual recognition in criminal matters in the European Union* was awarded by the European Commission to the Institute for European Studies of the Université Libre de Bruxelles. Work on the study, supported in particular by the academic network ECLAN (European Criminal Law Academic Network), which is coordinated by the Institute, commenced at the end of December 2007.

Already mentioned by the Commission in its Communication on the implementation of the Hague Programme in June 2006¹, the purpose of the study is to provide a comprehensive analysis of the horizontal problems encountered in the implementation of the principle of mutual recognition in criminal matters. This analysis of the current difficulties was carried out at three different levels: negotiation of legislative texts within the Council of the EU, transposition of the instrument in national law and, finally, practical implementation by the competent judicial and administrative authorities.

The lines of analysis explored, and the recommendations proposed in order to address the problems and difficulties which have emerged, are presented to the Commission as a tool to help it prepare the new programme which will succeed the Hague Programme in 2009 in order to strengthen the EU’s Area of Freedom, Security and Justice.

**Conduct of the study**

Carried out over a total of eleven months, the study covers the 27 Member States. Two complementary analytical approaches were followed.

On the one hand, a State-by-State approach: this was carried out by correspondents of the ECLAN network who drafted a national report relating to the State in question (see Annex 5), following in-depth research and interviews with experts and practitioners conducted on the basis of an identical questionnaire. That questionnaire, drafted by the coordination team on the basis of the model contained in the study’s terms of reference, includes questions pertaining to the three levels of analysis, namely negotiation, transposition and practical implementation (see Annex 6).

A web site containing the most important documents was also created and made available to the correspondents².

All 27 national reports are published in the annex to the final report (see Volume II).

On the other hand, a horizontal analysis, i.e. an analysis cutting across the Member State analysis to identify common themes, was also undertaken by the coordination team based in Brussels. That team consisted of Gisèle Vernimmen-Van Tiggelen, the coordinator, and Laura Surano, the researcher.

By analysing academic publications and relevant documents of the EU institutions (minutes of meetings, evaluation reports, communications, etc.) and of other bodies (CoE, FATF, etc.), the coordination team identified a number of questions and horizontal problems.

Those issues were examined in greater depth in interviews with more than 170 experts and practitioners, including civil servants of Ministries of Justice responsible for the negotiation

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¹ COM(2006) 331 of 28.06.2006, p.8, point 2.5 : “A study will be presented in 2007 covering the horizontal problems that are encountered in the negotiation and application of mutual recognition principle, and of the gaps in the present system of cooperation in criminal matters that can be addressed by new instruments”.

² <http://www.ulb.ac.be/iee/penal/mutualrecognition>
and transposition of mutual recognition instruments, judges, defence lawyers, liaison magistrates, academics and others (see Annexes 3 and 4). The interviews took place in Brussels and in various capital cities. The Member States visited were selected in the light of specific features identified in the initial analysis. In particular, visits were made to The Hague (including Eurojust and the EJN), Amsterdam, Paris, Prague, Rome, Dublin, London, Luxembourg (ECJ), Madrid, Berlin, Warsaw, Copenhagen, Budapest and Stockholm. In certain cases it was possible to attend (public or non-public) hearings concerning the EAW (in particular in Paris, Rome, Dublin, London and Madrid).

Two informal meetings with MEPs were held in Brussels in June and September 2008, organised by the secretariat of the LIBE Committee.

Finally, a key role was played by the select committee of experts established by the coordination team. That committee, made up of a small number of experts with roots in different legal systems and having different professional backgrounds, met twice in Brussels, in May and September 2008 (see Annex 2). On the basis of working documents specially devised for the purpose, those meetings discussed in greater depth the difficulties encountered in the implementation and application of the mutual recognition principle. The meetings also focused on possible solutions to those problems and their work fed into preparation of the interim and final reports.

Throughout the study there was fruitful collaboration with the European Commission, in particular through the Steering Committee.

The interim report, submitted to the Commission at the beginning of June 2008, was presented and discussed at the first plenary meeting of experts, which took place in Brussels in July 2008 under the auspices of the criminal law sub-group of the recently constituted ‘Justice Forum’4. That meeting, devoted entirely to the discussion of the horizontal themes and the preliminary conclusions of the interim report, brought together a large number of experts, practitioners and MS representatives.

The Commission organised a second plenary meeting of experts, to which all the national rapporteurs who participated in the report were invited, along with MS representatives, in October 2008. The draft final report and the national reports were presented for discussion on that occasion.

**Structure of the final report**

This final report has been drawn up by the coordination team partly on the basis of the national reports and partly on the basis of the general issues concerning mutual recognition raised by the interviews they conducted5.

The first part of the report points out general trends. A distinction is thereby made between what has been achieved by mutual recognition instruments already adopted, and gaps, where no proposal has yet been made. The horizontal problems encountered in the three phases of negotiation, transposition and practical application of the instruments are then analysed. That analysis is followed by a discussion of the practical flanking measures aimed at strengthening mutual trust. This part concludes by recalling the objectives of the EU’s Area of Justice and of mutual recognition in general.

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3 For reasons of confidentiality the persons interviewed are not explicitly mentioned in the footnotes of the final report. The source of information is indicated by referring to missions or meetings in the Member States.


5 During the study, the model for judicial cooperation in civil matters has been thoroughly examined as a source of inspiration for criminal cooperation.
In the second part, future options are considered. The respective advantages and drawbacks of each option are sketched out in tables under each of the topic headings discussed in the first part of the report. Each table is followed by a note containing proposed conclusions.

The expectations with regard to the Lisbon Treaty are then briefly surveyed, complemented by Annex 1 which provides a concise overview of the new legal arrangements laid down in the treaty with regard to judicial cooperation in criminal matters.

The final report also contains two annexes (Annexes 7 and 8), updated to October 2008. Annex 7 contains a review of the most important national case-law; this does not claim to be exhaustive and in fact is limited to the only instrument which is widely used in all MS, i.e. the EAW. Annex 8 lists the national transposition measures for the mutual recognition instruments currently in force.

The coordination team would like to acknowledge the assistance of many persons in the preparation of this study: the national rapporteurs, who carried out work which was often considerable, and responded to numerous questions and requests for additional information; the interviewees, who without exception welcomed us warmly, and contributed to our work with great patience and openness; the experts, who took part in our two meetings and whose contributions were both concrete and creative. Everybody’s expertise and enthusiasm were of tremendous support to us. If the present study achieves anything, that success is attributable to those who participated in it. We hope that we have accurately recounted all their concerns and suggestions. We do however acknowledge that in the course of the vast task of synthesis and analysis we may have omitted some important points or been unclear about others and we of course assume sole responsibility for any gaps or inaccuracies in the text.

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Not all decisions listed in Annex 7 have been assessed and analysed by the coordination team for the purpose of the final report.
II. **State of play: the current mutual recognition instruments**

1. **Haphazard implementation of a coherent policy**

   Since the mutual recognition principle was enshrined as a cornerstone of judicial cooperation in the EU by the Tampere European Council, and despite the apparent logic of the policy programmes and action plans drawn up to give effect to that principle, by identifying priorities and laying down timetables and deadlines, policy blockage and delays have in fact multiplied and the level of ambition reflected by the adopted instruments has diminished. It has not yet been possible to establish the desired Area of Justice in the EU based on mutual recognition of decisions and on the mutual trust which underpins it; attempts to do so appear increasingly chaotic, certainly not smooth. Practitioners can be heard decrying the ever-expanding gulf between rhetoric and reality: declared policy goals are reflected neither in the legal texts themselves nor in their transposition in national law. In other words, ambitions are being thwarted or not followed up; there is certainly a lack of conviction.

2. **A complex array of different instruments**

   Transposition of the instruments raises the problem of measuring their impact on related legislation. The rate of successive legislative changes leads to decreasing enthusiasm and, in the absence of information and accessible training, makes their practical application awkward and somewhat haphazard. Practitioners find it difficult to keep up with the application of instruments that are numerous and sometimes too specific.

3. **Mutual recognition and harmonisation of substantive law**

   The compatibility of the abolition of the dual criminality requirement with constitutional law has been questioned in the Czech Republic, and in Hungary, and abolition is still debated elsewhere as a matter of principle. In practice there have however been few obvious cases of problems linked to differences between the substantive law of the issuing MS and that of the executing MS. In cases falling within one of the 32 categories of offences for which the dual criminality check is abolished by the Framework Decision on the European arrest warrant, it is nonetheless still considered necessary to check the facts against the selected category. Conversely, we noted clear concerns with regard to the issuing of European arrest warrants in relation to facts classified as minor offences in the executing MS. Although the quantitative application criteria (level of sanction or length of the sentence) are not disputed, and although different sensitivities regarding the gravity of certain offences (theft, vandalism, attacks and injuries, etc.) are regarded as normal, there are calls for more moderation and proportionality.

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8 Missions FR, UK, ES. Meetings of 21.01.08, 11.02.08, 15.04.08.
9 National reports LT p.20, DK p.23, AT p.12, DE p.61. Meeting of 25.04.08.
10 National reports LT p.20, LU p.13, BE p.24 and 27. Mission FR. Meetings of 02.04.08, 15.04.08.
11 Constitutional Court CZ, n° Pl. Us. 66/04 of 03.05.2006.
12 Court of Cassation HU, decision 733/A/2007 of 08.03.2008.
13 National report LT p.5 and 6.
15 National Reports FI p.18, NL p.2, ES p.21, LT p.26 (link with legality), PL (idem), AT p.25, DE p.29, 32, 57 and 83.
in the issue of European arrest warrants\textsuperscript{16}. The Handbook on how to issue a European Arrest Warrant also reflects this concern\textsuperscript{17}. At the time of the presentation of the final report\textsuperscript{18}, several speakers suggested that the ‘excessive’ use of the EAW could be remedied in the following ways: by conducting hearings of the person, if necessary by videoconference; by means of \textit{in absentia} judgments, provided that they comply with the terms of the proposed FD\textsuperscript{19}; or by imposing financial penalties to be executed in accordance with the FD of 24 February 2005.

Proceeding with the approximation of substantive law, that is to say drawing up a common definition of offences, is not generally perceived as a precondition to the adoption and implementation of mutual recognition instruments\textsuperscript{20}, even if a number of interlocutors would like such action to be taken\textsuperscript{21}. The majority of those consulted were however sceptical about the utility of a database which would match up national criminal offences with the categories of crime in respect of which dual criminality has been abolished\textsuperscript{22}. On the other hand, differences relating to other aspects of criminal law, such as the age of criminal responsibility\textsuperscript{23}, limitation periods\textsuperscript{24}, and the liability of legal persons\textsuperscript{25}, are sometimes mentioned as obstacles to the successful operation of the instruments.

4. Mutual recognition and approximation of procedural law

The possibility of checking whether fundamental rights have been respected is expressly envisaged in the implementing legislation of a number of MS\textsuperscript{26}. Where not explicitly mentioned, it is often implied\textsuperscript{27}. It seems however that MS authorities make little use of it; cases of refusal are few and far between\textsuperscript{28}.

The relationship between the level of harmonisation (in sense of ‘harmony’) of procedural law and procedural safeguards on the one hand, and the level of mutual trust as a condition for successful mutual recognition on the other, is not in dispute\textsuperscript{29}. Evidence of that is provided by the advanced level of cooperation existing between Nordic countries, acknowledged in the first evaluation reports for Denmark, Finland and Sweden\textsuperscript{30}; their close cooperation is further strengthened by cultural or historical ties and common traditions.

\textsuperscript{16} National reports SE p.13, IT p.38. Missions NL, CZ, IT, UK, ES, PL.
\textsuperscript{17} European handbook on how to issue a European Arrest Warrant (Council of the EU, COPEN 70 rev.2 of 18.06.2008).
\textsuperscript{18} Second plenary meeting of experts of 27.10.2008.
\textsuperscript{19} Initiative of SI, FR, CZ, SE, SK, UK and DE with a view to adopting a Council FD on the enforcement of decisions rendered \textit{in absentia} and amending FD 2002/584, 2005/214, 2006/783 etc. (last version COPEN 120 of 06.06.2008).
\textsuperscript{20} National reports CY p.4, DE p.28, BG p.8.
\textsuperscript{21} National reports SI p.1, EL p.3, ES p.6, HU p.13, LU p.8 and 9. Missions IT and DE. Meetings of 15.04.08, 10.06.08, 24.07.08.
\textsuperscript{23} National report BE p.35. Missions DE, IT. Meeting of 15.05.08.
\textsuperscript{24} National report PT p.32. Mission LU.
\textsuperscript{25} National report CZ p.5. Mission IT.
\textsuperscript{26} Implementing legislation FI (art. 5(1) 6, Extradition Act), IT (art. 2(3), Act 69/2005), BE (art. 4(5), Act of 19.12.03), IE (Part III of 2003 EAW Act, S.37), PL (art.55 of the Constitution and CPC 1997).
\textsuperscript{27} National report SK p.4.
\textsuperscript{28} National reports EE p.1, ES p.6 and 26, HU p.11 and 21, LV p.33, LT p.7 and 16, PT p.13 and 14, RO p.19, PL p.10 and 37, SI p.6 and 10, DE p.49 and 82, SI p.7, BE p.41. Missions NL, FR, CZ, DE, IT, IE, NL (District Court of Amsterdam, 1.7.2005), FR (Court of Appeal of Pau, no 94/2008 of 7.3.2008), BG (Court of Appeal of Sofia, Aff. 205/2007 of 8.3.2007), IT (Court of Cassation, n°17632 of 3.5.2007), IE (Supreme Court, judgment Krasnovas of 24.11.2006), BE (Chambre de mise en accusation de Bruxelles of 8.12.2006), DE (OLG Celle 20.05.2008 – 1 Ars 21/08).
\textsuperscript{29} National reports EL p.3 and 5, FI p.12 and 17, LT p.9, NL p.22, PT p.12, LU p.21, 25 and 27, SE p.5, DE p.54. Missions FR, CZ, ES, DE, UK, HU; on the contrary, mission DK. Meetings of 11.02.08, 02.04.08, 25.04.08, 10.06.08, 23.06.08.
\textsuperscript{30} Quoted by Anne Weyembergh in « L’harmonisation des législations : condition de l’espace pénal européen et révélateur de ses tensions », IEE 2004, p.196. See also national report SE p.6.
Only a minority of interlocutors (minority both of Member States and of practitioners) continue to have reservations about the need for approximation of laws in this field. In the light of the failure to reach agreement on the proposal for a Framework Decision on procedural rights, most experts maintain that work on this matter should now resume. Even in the Member States which were against the adoption of that FD in June 2007, the national reports indicate that several practitioners favour resumption of the work. Whatever the level of ambition, review by the ECJ is clearly regarded as desirable, along with wording which is sufficiently open to enable case-law to develop. But those experts also insist on the fact that work should proceed on an ambitious basis, that is to say, they do not see any real added value in an EU instrument that achieves agreement only on the lowest common denominator.

The approximation should focus on the essential rights, while accepting that the nature or application of those rights will vary according to the legal system concerned. In addition, it must be recognised that the fact that those rights are enshrined in law cannot preclude their possible infringement in a particular case. As already pointed out, there is little evidence of MS courts’ reliance on a failure to observe fundamental rights in order to refuse recognition. The fact nevertheless remains that the vast majority of judges reserve the right to exercise such legal review, in exceptional cases.

Many practitioners expressed a desire for approximation of the rules on evidence-gathering. However, the need to respect the legal traditions and legal systems of the different MS, and in particular the special characteristics of the common law system, would limit the scope of such an exercise.

5. Mutual recognition of final decisions compared to mutual recognition of pre-trial decisions

It is interesting to note that the majority of those interviewed found it is easier to apply the principle of mutual recognition to final decisions because those decisions are surrounded by greater safeguards and are taken by largely equivalent judicial authorities in all the MS, whereas the competent authorities for taking pre-trial decisions do not have the same characteristics everywhere. Conversely, some of those interviewed found it easier to recognise pre-trial decisions because they are of only limited scope and have limited consequences.

This distinction was expressed in different ways in a number of interviews and is sometimes seen in the instruments negotiated. Indeed, the extent to which the executing authority can trust the issuing authority and therefore limit the checks it carries out depends on the extent of its involvement in the proceedings begun in the issuing MS. In some cases it is enough, for example, to recognise a decision, to transmit evidence, or to ensure that a person complies...
with their bail conditions. In others, responsibility for continuing the criminal proceedings or for execution of the sentence passes from the issuing MS to the executing MS.

When it comes to the instruments, however, this analysis is not completely relevant either. Evidence of this can be found by comparing the grounds for refusal in the FD on financial penalties with the outcome of the discussions on the European Evidence Warrant. Conversely, the analysis can help to understand the way in which practitioners understand and apply the instruments.

Moreover, it is worth noting the reluctance of common law MS to execute a European arrest warrant when the requested person has not yet been formally charged, whereas this is not an issue for other MS. Ireland’s declaration on adoption of the Framework Decision, and refusals or requests for further information by executing authorities in the UK, can be explained on this basis.

6. Grounds for refusal (example 1): the absence of dual criminality

The absence of dual criminality has traditionally been a classical ground for refusal to cooperate in extradition matters, whereas in other forms of mutual legal assistance it applies only if the requested measure is a search or seizure. The conditions to which assistance may be made subject in the latter case are, in relations between MS, those contained in Article 51 CISA, which amended the scope of Article 5 of the CoE Convention of 1959, and the reservations made by the MS in respect of that provision.

Only three MS (HU, EE and LT) have made a declaration in respect of Article 2 of the 1959 Convention under which they make the grant of any form of assistance conditional on the existence of dual criminality. Those reservations remain applicable between MS and are not affected by the 2000 MLA Convention. Following the judgment of its Constitutional Court, Hungary amended Article 57(4) of its Constitution in order to be able to waive a dual criminality check. The entry into force of that amendment is however in turn dependent on the entry into force of the Lisbon Treaty, so the current situation is uncertain. In Lithuania, the possibility that the abolition of the dual criminality requirement may infringe the constitutional principle of equality of individuals before the law is, according to those interviewed, still open, but it has not been referred to the Constitutional Court. In Estonia, the Article 2 reservation would appear to be strictly interpreted, but the abolition of any dual criminality check between MS for the purposes of the list offences is not precluded by constitutional law.

The mutual recognition instruments which concern all forms of assistance except surrender of persons, that is the FDs on freezing and the EEW, adopted the EAW’s distinction between the categories of ‘listed’ offences, in respect of which a dual criminality check is not permitted, and others, for which it is. This represents progress, as far as measures of search or seizure are concerned, even if Germany has reserved the right to maintain the dual criminality requirement in relation to terrorism, cybercrime, racism and xenophobia, sabotage, racketeering, extortion of funds and swindling, a derogation which the Council will have to re-examine during the period of five years following entry into force of the FD.

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42 For example Supreme Court EL (CS 924/2005). See also Court of Cass. IT, Sez. VI, n° 15970 of 19.04.2007, Piras. Missions UK, IE. Meeting of 23.06.08.
43 National report IE p.13 (the text of this declaration is laid down in the Dail Debates of 05.12.2003 Col. 893). See also High Court, Mc Ardle 27.05.2005 and Ostrovskij 26.06.2006.
45 National report HU p.2 and 3.
46 National report LT p.5 and 6.
47 National report EE p.2.
It is however necessary to qualify this relatively optimistic assessment, since a dual criminality check is permitted for ‘non-list’ offences, meaning that any MS may carry out such a check, even with regard to the execution of measures which, in contrast to searches or seizures, are not normally subject to such a check. Those two instruments in fact do not build upon or facilitate the application of existing Conventions but replace them (subject to the transitional arrangements provided for in the EEW) by an independent regime with its own rules and method of functioning. Far from constituting progress, this result is dismissed as a step backwards in judicial cooperation between MS.

On the other hand, the nature of the dual criminality requirement is such that it can limit the scope of an instrument which could benefit the individual, such as the execution of a sentence or pre-trial judicial control in the MS of origin or of residence. That is why certain MS do not propose to apply the requirement or at least doubt whether it would be appropriate where reliance on the dual criminality ground would be contrary to the interests of the person concerned, whereas for others the execution of a sentence on their territory necessarily presupposes that the acts complained of are subject to penal sanction there.

7. **Grounds for refusal (example 2): the territoriality clause**

All mutual recognition instruments, whether formally adopted or only politically agreed, except the FD of 22 July 2003 on the freezing of property or evidence, admit a territoriality clause as an optional ground for refusal.

Where the EAW is concerned, and in particular concerning the first indent of Article 4(7) of the FD (that is, the fact that the offence concerned was committed in whole or in part in the territory of the executing MS), that provision has been transposed, and is applied in practice, in a astonishing multitude of different ways. In a certain number of MS, that ground for refusal is mandatory. Sometimes, the Public Prosecutor must make a reasoned application if he wishes the ground not to apply. In other cases, after first being mandatory, it has changed to an optional ground. In CZ, it has not been explicitly included in the implementing legislation, but is applied on the basis of an interpretation of the provisions of the Code of Criminal Procedure (paragraphs 377 and 393). In some MS, the fact that the act was committed in whole or in part on the territory of the executing MS is only a ground for refusal when combined with other factors: nationality, residence, the lack of dual criminality, or even the fact that the prosecution was started or time-barred in the executing MS. The number of cases in which it is used obviously depends on whether it is mandatory or not, but on the whole its use appears rare. The national reports refer to only few cases. It is nevertheless still thought important in some MS to retain it. In BE it is seen as a means of circumventing the abolition of the dual criminality check. Equally, in the NL, it allows surrender of the person.

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48 National reports HU p.7, BE p.28. Missions FR, CZ, DE.
49 National reports DK p.7, PT p.9, DE p.36.
50 National report NL p.4.
51 National reports FI p.7, HU p.5, EL p.9, AT p.6 and 36.
54 National report CZ p.10.
55 National report NL p.26 (Supreme Court AY 6631 of 28.11.2006).
to be refused if the act concerned is not liable to punishment or not usually prosecuted. Finally, the territoriality clause is sometimes used in order to favour nationals of the executing MS, in relation to whom the ground is obligatory, whereas it is optional or subject to conditions with regard to residents. That is the case in PL and in DE. Even if the law does not make a formal distinction, in practice the territoriality clause may be used in order not to surrender a national of the executing MS to the issuing MS and to begin proceedings against that person in his own MS, whereas it would not usually be applied if the person concerned was a non-national.

The ground for refusal based on the territoriality clause is not incorporated in a systematic way in the legislation which implements other mutual recognition instruments. By contrast, whereas in the EAW context the application of the clause may be somewhat restricted, in relation to the FD on confiscation orders or financial penalties it may sometimes receive wider application. Moreover, the experts interviewed frequently expressed criticism of the insertion of this ground for refusal in the MR instruments concerning pre-trial decisions as that was not usual or traditional in mutual legal assistance, where a letter of request relating to the same matter would have been executed. Therefore in the context of pre-trial cooperation the reproduction of the EAW approach would appear to be counter-productive.

8. Treatment of nationals

One of the major advances held out by the EAW was the elimination of the refusal to extradite nationals, which was the rule in the majority of MS. That innovation was debated vigorously in the light of the constitutional requirements of several MS, sometimes resulting in constitutional amendments, or in changes to the implementing legislation. The question of the constitutionality of a difference between surrender for prosecution and surrender following a judgment in absentia is also raised, where the person is entitled to a retrial, if the condition of return applies only in the first case.

The current situation certainly indicates that there are numerous differences of treatment, including some significant ones, between nationals and residents, either in law or in practice. That is the case, as we saw above, in the context of implementation of the territoriality clause. Indirectly, it can also result from the application of Article 4(4) of the FD on the EAW, the ground for refusal concerning a limitation period, where the executing MS relies on that ground on the basis of jurisdiction founded on the nationality of the offender.

Although this is unlikely to be raised before the European Court of Human Rights, it has been the subject of references to the ECJ for a preliminary ruling. The first decision did not address

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63 Amendment of art.50 of the Constitution and art.607§1 of CPC.
64 Art. 80 and 83b of Gesetz über die internationale Rechtshilfe in Strafsachen « IRG », national report DE p.43-46.
67 National report AT p.20.
68 National reports BG p.9, CY p.5, ES p.6. Meeting of 11.02.08. Mission FR.
70 Constitutional Court RO (judgment 445 of 10.5.2007); Court of Appeal LT (n° 1N-11/2006; Supreme Court EL, n° 591/2005); Constitutional Court CZ (Pl. Us 66/04 of 3.5.2006); Constitutional Court PL (P 1/05 of 27.04.2005); Supreme Court CY (judgment of 7.11.2005, case Attorney General v. Konstantinou); Constitutional Court DE (B verfG 2 BvR 2236/04 of 18.7.2005).
71 National reports SK p.11, CY p.1, PL p.18. Meeting PL.
72 Following the judgment of the Constitutional Court of DE (B verfG 2 BvR 2236/04 of 18.07.2005).
73 National report BE p.22.
75 National report BG p.24. Mission LU.
76 National report DK p.21.
77 Meeting of 06.03.08.
78 C-123/08 Wolfzenburg; C-66/08 Kozlowski.
the discrimination issue. Developments in the case-law may of course lead to further changes. These very sensitive problems may call for a response beyond the specific facts of these cases, in other words an overall legislative response at Union level.

9. **Evolving case-law: position of the Supreme Courts**

Without always expressly quoting the ECJ’s judgment in *Pupino*, Supreme Courts in all MS have shown themselves anxious to respect the letter and the spirit of the EU instrument as faithfully as possible.

The interviews and national reports alike showed support for constructing a European Area of Justice. This attitude can probably be explained by the fact that the primary concern of these courts is with law not facts and by their responsibility for establishing binding case-law.

When Constitutional Courts have been called upon to rule they have also expressed a generally positive attitude towards mutual recognition. They have sometimes concluded that constitutional amendments were needed to comply with the EU instrument.

10. **Who benefits from mutual recognition? The defence lawyers’ position**

All lawyers report that at present the principle of mutual recognition does not benefit the defence and that there is no real balancing of interests between prosecution and defence.

This feeling can be explained because the only instrument in force so far and being used Union-wide is the EAW. The only advantage - and it is not always perceived as such - for the person who is the subject of an EAW, is that the procedure is faster. Since the time-limits are very short and the grounds for refusal limited (with variations between MS) defence lawyers play a minor role in the hearing and surrender procedures for the EAW. In addition, they do not have access to the file or any contact in the issuing MS.

Added to that is the fact that the legal profession does not have sufficient access to information and training on the new instruments, and lacks the means to ensure continuity and a fully effective defence in cross-border situations.

III. **Gaps: areas in which no proposal has been made**

11. **Exercising the rights of the defence**

So far, the focus has been on improving judicial cooperation, which is understandable given the point of departure of mutual recognition. Where attempts were made to take into account individual rights, the provisions aiming to protect rights were sometimes lost during

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80 Pupino C-105/03 of 16.06.2005.
81 National reports LT p.22, LV p.32, Missions IE, IT.
82 IE (Supreme Court, Altaravicius of 05.04.2006 and Brennan of 04.05.2007); UK (House of Lords, Hilali case [2008] UKHL 3 of 30.01.2008, see opinion of Baroness Hale of Richmond).
83 CZ (Constitutional Court n° PI.US 66/04 of 03.05.2005).
84 HU (Constitutional Court, judgment of 08.03.2008), PL (Constitutional Court, judgment P 1/05 of 27.4.2005), CY (Civil Appeal 29.04.2005, Full Bench of the Supreme Court 07.11.2005).
86 National reports AT p.38, DK p.19, LT p.28.
negotiations\textsuperscript{87}, resulting in a lack of balance between the interests of the prosecution and those of the defence.

Two points in particular should be pointed out.

First, with regard to the legal remedies of the person affected by the mutual recognition measure, two elements should be considered. The position concerning possible legal remedies against the decision to recognise the decision of another MS varies widely from one MS to another\textsuperscript{88}, as do the time-limits imposed on judicial authorities to decide\textsuperscript{89}. Additionally, the legal remedies against the decision to be recognised and executed are dealt with in a logical way, but not in a way that is easily understandable for those who wish to make use of them\textsuperscript{90}. Improvements could certainly be made in this respect. A matter for discussion in that regard would be the issue of compensation for wrongful detention\textsuperscript{91}, or a false alert in the SIS\textsuperscript{92}.

The second aspect concerns how defence lawyers organise themselves. The EU should endeavour to support lawyers’ efforts to organise themselves in order better to understand measures taken by prosecuting authorities and to improve their knowledge of what measures their clients can initiate themselves. Support, financial or otherwise, should be given to training for lawyers who wish to specialise in this type of work; they should be helped to establish networks to safeguard defence rights, from the point of investigation right up to the execution phase in cross-border cases\textsuperscript{93}.

12. Should the EEW be extended or replaced?

With regard to the post-trial phase, there has been a logical sequence of mutual recognition instruments concerning the execution of sanctions in a MS other than the sentencing MS: extradition has been replaced by surrender on the basis of an EAW; the FDs of 24 February 2005 and 6 October 2006 will enable financial penalties and confiscation measures to be executed; FDs which apply mutual recognition to custodial decisions and to suspended sentences, alternative sanctions and conditional sentences, both of which were the subject of political agreement in 2007, will guarantee that the execution of sentences reconciles the goals of effective punishment on the one hand with reintegration of the person concerned into society on the other. Naturally it is essential that these instruments complement one another and do not allow the convicted person a hiding place or ‘safe haven’.

The recognition of disqualifications is a particularly thorny issue and one which has been kicked into the long grass following the Commission’s Communication\textsuperscript{94}. Quite correctly, the first work undertaken on this topic concerned the exchange of information on convictions\textsuperscript{95}. This study scarcely touches on the subject, which requires a much more searching analysis.

With regard to the pre-trial phase, the replacement of classical cooperation by mutual recognition instruments peculiar to the EU can be said to be making progress, but in a somewhat chaotic fashion. Here too, surrender on the basis of an EAW has replaced extradition. The future FD on the European Supervision Order aims to allow persons to comply in their Member State of residence with a non-custodial supervision measure which has been

\textsuperscript{87} Articles 13 and 34 of the proposal for the FD on the EAW (COM(2001) 522).

\textsuperscript{88} Mission NL. Meeting of 25.04.08.

\textsuperscript{89} See for remarkably short deadlines national report SI p.15.

\textsuperscript{90} National reports LV p.35, DK p.19, DE p.53, SK p.20. Missions IT, DE. Meeting of 25.04.08.

\textsuperscript{91} National reports BE p.39, LT p.36.

\textsuperscript{92} National report EE p.9 pt 32.


\textsuperscript{95} FD on taking account of criminal convictions (JO L 220/32 of 15.08.2008) and FD on the organisation and content of the exchange of information extracted from criminal records (political agreement of 13.06.2007, last version COPEN 21/2008).
imposed in another Member State. But there has been little progress with regard to mutual recognition regarding the collection of evidence. To date, there is only one instrument in force, the FD of 22 July 2007 on freezing; another measure, on which there was political agreement in 2006, has still not been formally adopted.

This cautious, step-by-step, approach to mutual recognition is perceived, particularly where pre-trial measures are concerned, as a strategic error. The effort required in order to familiarise oneself with a new instrument is regarded as disproportionate given the limited efficiency gain promised by it, in the light of the need for a number of complementary MLA measures. The FD on the EEW is frequently referred to as the example not to follow. Nor is the FD on freezing measures seen as a great success.

For many of the persons interviewed, it is not the right time for a codification, but there is a general feeling that a broader instrument combining a number of measures would be appropriate, even if that means incorporating measure on which there has already been EU action. The risks inherent in reformatting or repackaging of this kind should not however be neglected.

13. **Coordination of prosecutions**

Apart from the creation of Eurojust and the Framework Decision on joint investigation teams, no tools exist at Union level for coordinating proceedings and in particular there is no EU instrument on transfer of proceedings.

Eurojust is not aimed at resolving all conflicts of jurisdiction and its decisions are not binding. However, its persuasive authority is growing and it is increasingly used and enjoys growing success in judicial cooperation cases.

Experiences with joint investigation teams are extremely limited. Yet the results are very encouraging where they have been set up.

The way in which the principle of legality (i.e. the obligation to prosecute) is interpreted in MS where it applies, and the way in which the territorial clause has been transposed and applied in practice show that the criteria for allocation of the jurisdiction to prosecute, and the waiving of that jurisdiction in favour of another MS on grounds of overriding public interest in effective prosecution, raise a number of difficulties which have not yet been tackled seriously.

The interviews we conducted and the national reports confirm that this issue is regarded as a priority for future action. Several experts pointed out however that negative conflicts of jurisdiction were more common in their view and more difficult to solve.
Most of the experts interviewed in any case opposed binding solutions. They expressed a preference for dialogue and flexibility.\textsuperscript{109}

At this stage the approach preferred by the contributors to our study is to use existing mechanisms - Eurojust and/or joint investigation teams – and, on the basis of systematic analysis of their performance, to seek to overcome the possible obstacles to the transfer and the centralisation of prosecutions. Moreover, developments in other fields, such as approximation of rules on evidence-gathering, may have a positive effect on the possibilities of coordinating proceedings.

14. Towards an EU criminal justice policy?

There is currently neither the political will nor a legal basis to agree on a common criminal justice policy in the sense of common EU rules on what conduct should be criminalised, how coercive and police powers should be regulated, what level of sanctions should apply to different offences and how to address the goal of rehabilitation of offenders in the EU.

The EU therefore faces the challenge of setting up a legal framework in which MS are required to render assistance to each other and to recognise each other’s decisions, without forcing the most tolerant to accept the more repressive approach of others but instead enabling the ethical choices and social policies of all MS to coexist.

Nevertheless one would expect there to be an EU-wide body in which national criminal policies could be discussed, at least in those areas that are subject to approximation of substantive law.\textsuperscript{110}

IV Methodology: horizontal problems

15. Negotiations

Our contacts and interviews clearly showed that the civil law-common law divide makes itself felt in all discussions on criminal justice in the EU, whether negotiating a particular instrument\textsuperscript{111} or more generally in policy debates. The provisions of the Lisbon Treaty and its Protocols serve only to confirm this. Moreover, negotiations sometimes appear to take place more in a climate of suspicion than of mutual trust.\textsuperscript{112}

Since practitioners are only rarely involved in the process that leads to a mutual recognition instrument\textsuperscript{113}, results often appear too theoretical, abstract or even arbitrary to be of practical value.

The depth of mutual confidence necessary to inspire success in the preparation and discussion of instruments is lacking. The last enlargement of the EU took many people by surprise. They were not ready for it in the sense that it was not preceded by a familiarisation process either in the old MS where certain prejudices remain strong, sometimes reinforced by bad

\textsuperscript{108} National reports LV p.30, LT p.33. Missions NL, UK, DK. Meeting of 15.04.08.

\textsuperscript{109} National reports BG p.9, 33 and 34, BE p.11, SE p.16, DE p.84 and 88. Missions UK, DE, NL, IT. Meeting of 15.05.08.

\textsuperscript{110} National report HU p.14. Missions NL (Eurojust), FR, IT, DE; on the contrary, missions CZ, DK. Meetings of 15.04.08, 15.05.08.

\textsuperscript{111} Missions UK, ES.

\textsuperscript{112} Mission CZ. Meetings of 21.01.08, 22.01.08, 15.04.08, 15.05.08, 24.07.08.

\textsuperscript{113} National reports FI p.10, 13 and 20, PT p.18, SI p.3 and 4, SK p.22, AT p.6, BE p.3 and 30, CY p.1 and 9, BG p.6 and 25 (with reservation of the creation of a ministerial group on criminal cooperation); on the contrary, see national report SE p.9. Missions NL, HU. Meeting of 15.04.08.
experiences\textsuperscript{114}, or in the new MS themselves, faced with the massive burden of assimilating a voluminous and complex acquis\textsuperscript{115}, which threatened to overwhelm the sensitivities, interests and values of their young democracies.

16. Transposition

The current legal framework, in particular the fact that the European Commission is not empowered to initiate infringement proceedings before the Court of Justice against MS which do not implement Framework Decisions, means that transposition does not necessarily receive the priority to which the Union aspires\textsuperscript{116}.

The instruments to be transposed are numerous and complex. Their transposition into national law requires both a good overview and excellent technical drafting skills, especially where the mutual recognition instruments are to be incorporated in existing legislation\textsuperscript{117}. Studies to measure the impact of such incorporation are often lacking.

The necessary expertise is limited: persons who negotiate the instruments are often the only experts who could ensure that they are properly transposed\textsuperscript{118}. Factors such as the absence of an explanatory report, the sometimes mediocre quality of certain language versions\textsuperscript{119} or the lack of follow-up after adoption of the law by the Council of the EU\textsuperscript{120}, contribute to delays and to divergences in the quality of the implementing measures. For the new MS, not having taken part in the negotiations of the instruments makes it difficult for them to understand the compromises that were necessary to achieve the end result\textsuperscript{121}, and this misperception leads to successive adjustments\textsuperscript{122}.

Constitutional amendments, required inter alia to allow the surrender of nationals, also naturally slowed down the transposition process in certain countries\textsuperscript{123}.

17. Application of mutual recognition in practice

The need for information and training varies according to whether the MS has opted for a centralised or decentralised system. Some instruments are less suitable for centralisation, and the dual goal of short deadlines and direct contact between judicial authorities favours decentralisation. However decentralisation requires effective resources\textsuperscript{124}, a good command of languages\textsuperscript{125}, uncomplicated personal contacts and networks and effective IT tools. All this represents a particular challenge for new Member States, where the professionals in charge of applying the instruments have not always had the opportunity to acquire the reflexes necessary for effective direct cooperation.

Feedback from all quarters should be insisted upon\textsuperscript{126}, so that a review can be carried out of the implementation of each instrument to detect incorrect application and gaps, and to identify where improvement is needed.

\textsuperscript{114} National reports LU p.11, UK p.29. Missions FR, DE, NL, IT, UK. Meetings of 15.04.08, 25.04.08, 22.07.08.
\textsuperscript{115} National report SK p.8. Missions CZ, HU.
\textsuperscript{116} National report LT p.13, Mission LU.
\textsuperscript{117} National reports HU p.15, SK p.8.
\textsuperscript{118} National reports IE p.61, LT p.13, SK p.8, AT p.15, BE p.17.
\textsuperscript{119} National report LT p.32.
\textsuperscript{120} National report BE p.17.
\textsuperscript{121} National reports LV p.23, SI p.4.
\textsuperscript{122} National reports BG p.15, 17 and 28, MT p.2, EE p.4, LV p.23.
\textsuperscript{123} National reports SK p.11, CY p.1.
\textsuperscript{124} Mission NL.
\textsuperscript{125} National reports BG p.30, LV p.28, NL p.23, SK p.23, 24 and 26, FR p.18.
\textsuperscript{126} National report BG p.27 and 28.
More fundamentally, practitioners must reflect on the choice of the most appropriate instrument and on its appropriate use. As soon as the EU has a full range of mutual recognition and MLA instruments at its disposal, it is to be hoped that what is currently perceived as the rather excessive use of the EAW will cease\(^{127}\), to be replaced by tools more proportionate to the desired outcome, such as the future FDs concerning the execution of custodial sentences or the European Supervision Order.

V Mutual trust: practical flanking measures

18. Mutual trust: myth or reality?

The decision to confer on the principle of mutual recognition the role of engine of judicial cooperation in criminal matters was not a natural outcome of a process of evolution or the logical consequence of a high level of mutual trust.

Rather, mutual trust was simply assumed to exist by the European Council of Cardiff, and equally presupposed by the Council of Tampere. In reality, this trust is still not spontaneously felt and is by no means always evident in practice\(^{128}\), even if mutual confidence between Member States’ judicial and prosecution authorities appears to be growing\(^{129}\).

All those interviewed agree that mutual confidence is a learning process; it really does have to evolve and grow, and this requires nurturing and a positive frame of mind of the two parties: confidence is given, but it is also earned.

19. Information

Unsurprisingly, all those interviewed agreed that it was necessary to improve access to relevant information for professionals who will apply the new instruments. The objective is to make them feel comfortable with these measures. They should therefore have access to any tools that would assist them (manuals, guidelines, models, web sites referring to the case-law of relevant courts in all MS etc\(^{130}\)).

In that regard, opinions are divided on the respective advantages and disadvantages of decentralisation\(^{131}\). For some, decentralisation would be to the detriment of specialisation, which is necessary to safeguard correct and consistent application\(^{132}\) and that is one of the reasons why optional grounds for refusal were made compulsory in the implementing legislation of some MS\(^{133}\); for others, decentralisation, even partial, allows a genuine common culture of judicial cooperation to develop\(^{134}\), or ensure that decisions are taken closer to the place where the person concerned is living\(^{135}\).

\(^{127}\) National report BE p.13. Missions NL, FR, CZ, DE, IT, IE, UK. Meeting of 25.04.08.

\(^{128}\) National reports HU p.13, NL p.21, PT p.7. Missions NL (+ Eurojust), IE, UK, LU. Meetings of 25.04.08, 07.05.08, 15.05.08.

\(^{129}\) National reports IE p.60, CZ p.17.

\(^{130}\) National reports FR p.18, IT p.6. Missions NL, IT.

\(^{131}\) Re advantages, see national reports BG p.27, ES p.13, PT p.24, RO p.25. Mission IE.

\(^{132}\) National reports HU p.18, LT p.23 and 28, NL p.30, LV p.25.

\(^{133}\) National report ES p.10 and 13.

\(^{134}\) National reports EL p.12, FR p.13.

\(^{135}\) National report SI p.12.
20. Training

The need to develop language skills\textsuperscript{136} and to promote knowledge of the legal systems of other MS and of the instruments of cooperation and mutual recognition, as part of practitioners’ initial and continuing education, was strongly emphasised in the national reports and in our meetings\textsuperscript{137}. While the efforts already made were regarded as welcome, they remain insufficient.

Among the initiatives singled out for support were the following: developing common training modules, setting up internships in other MS for future practitioners, and also giving this opportunity to existing practitioners\textsuperscript{138}, inviting experts from other MS to participate in national education and training courses\textsuperscript{139}, possibly the creation of a European academy for judicial training\textsuperscript{140}, etc.

21. Feedback

Mutual recognition mechanisms are set up in a wide variety of ways, and that explains, in part, why the feedback either does not exist or is very badly organised\textsuperscript{141}. For a start, assessment of implementation is fragmented and random, and ex post evaluation, where it is possible, lacks rigour, in that personal evidence and survey-based appraisal is not supported by reliable statistical data.

Apart from information on the actual application of the EU instruments it should be possible to assess the impact of cooperation mechanisms on the effectiveness of the criminal justice system, the reduction in crime, the prison population and the general feeling of justice and fairness. Suitable statistical tools and surveys of public opinion should be put in place, tailored as necessary for these purposes.

22. Networks

Professionals would also like to meet and to get to know each other\textsuperscript{142}. The quality and the simplicity of the instruments, important though they are, are not enough. Successful experiences in the field of mutual recognition are based on the positive attitude of participants and on dialogue, both foundations for mutual trust.

Defence lawyers are particularly aggrieved about developments over which they appear to have no control\textsuperscript{143}.

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\textsuperscript{136} National reports BG p.30, LV p.28, NL p.23, SK p.5, 23, 24 and 26. Meeting of 15.07.08. Mission PL.
\textsuperscript{137} National reports BG p.11 and 34, LT p.12, BE p.5 and 31, EE p.3, SE p.19. Meetings of 15.05.08, 24.07.08. Missions NL, IT, ES.
\textsuperscript{138} Meetings of 15.07.08, 24.07.08.
\textsuperscript{139} Meeting of 15.07.08.
\textsuperscript{140} National report LU p.14, however, meeting of 15.07.08.
\textsuperscript{141} National reports BG p.27, CZ p.15, EL p.12, ES p.23, AT p.30, CY p.9.
\textsuperscript{142} National report FI p.16. Missions NL, IT. PL.
\textsuperscript{143} National report PT p.18. Missions NL, IT, ES. Sub-group on Criminal Justice of the Justice Forum, meeting of 10.07.2008.
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VI Objectives

23. European Area of Justice

The fundamental objective of EU policy in this field, as provided in Article 2 TEU, is as follows:

‘The Union shall set itself the following objectives:
- to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.’

The action prescribed to achieve this objective, under Article 61(e) ECT, is at first sight rather weighed in favour of repression of crime:

‘In order to establish progressively an area of freedom, security and justice, the Council shall adopt:
- measures in the field of police and judicial cooperation in criminal matters aimed at a high level of security by preventing and combating crime within the Union in accordance with the provisions of the Treaty on European Union.’

Nevertheless it must be conceded that the three key concepts in this field are intrinsically linked: there can be no freedom without security, no security without justice, and equally no justice without liberty. Moreover, as Article 2 TEU makes clear, the link between freedom, security and justice and the free movement of persons is very strong. The fight against crime should not be at the expense of the free movement of persons. For that freedom to be exercised, individuals must also however be able to rely on a judicial and legal system which is not only effective but also protects their fundamental rights, avoiding discrimination. As one can read in the Hague Programme:

‘In an enlarged European Union, mutual confidence shall be based on the certainty that all European citizens have access to a judicial system meeting high standards of quality.’

24. Mutual recognition

Does mutual recognition really constitute an entirely new or even revolutionary approach to cooperation in criminal matters? Or is it just one further element in the simplification of existing policy?

In answering that question, the following elements, which can be found in national implementing legislation, are significant: the insertion of the principle of mutual recognition as a rule of interpretation\(^ {144}\), the assimilation of the foreign decision to a national decision\(^ {145}\), or even the ‘automatic’ nature of recognition and execution\(^ {146}\).

The Tampere European Council of October 1999 famously declared that mutual recognition is the ‘cornerstone of judicial cooperation in both civil and criminal matters within the Union’\(^ {147}\), an assertion repeated often enough to have become a slogan. The preceding sentence is almost as often forgotten; it states:

\(^{144}\) Implementing legislation RO (art. 77 (2), Act 302/2004).
\(^{146}\) National report IE p.3.
‘Enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights.’

In its goal of facilitating cooperation, mutual recognition therefore does not rule out approximation of legislation, should that be necessary to achieve effective cooperation between Member State authorities and the protection of individual rights. As the European Commission stated in its Communication on mutual recognition of final decisions, mutual recognition ‘should ensure not only that sentences are enforced but also that they will be served in a way that protects individual rights.’

In its judgment in Joined Cases C-187/01 and C-385/01 Gözütok and Brügge, which marked the beginning of a rich seam of case-law on the application of Article 54 of the CISA concerning ne bis in idem, the Court of Justice stated, in paragraph 33, that

‘...whether the ne bis in idem principle enshrined in Article 54 of the CISA is applied to procedures whereby further prosecution is barred (regardless of whether a court is involved) or to judicial decisions, there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied.’

In similar vein, in a circular on the EAW, the Belgian Minister of Justice explained:

‘The principle of mutual recognition derives from the idea of a common area of justice, encompassing the territory of the Member States of the Union, within which there would be free movement of judgments. More concretely, it means that when a decision has been handed down by a judicial authority which has competence under the law of the Member State in which it is situated, in accordance with the law of that State, the decision becomes fully and directly effective throughout the territory of the Union and that the competent authorities in the Member States in the territory of which the decision may be enforced assist in the enforcement of the decision as if it were a decision handed down by a competent authority in that State.’

In the light of those quotations, rather than now trying to define the principle, we would like to suggest what its principal parameters are, as follows:

✓ mutual recognition must improve judicial cooperation;

✓ while ensuring that individual rights are protected;

✓ while accepting the differences between the MS;

✓ but without forgoing the approximation of laws necessary for cooperation and individual protection;

✓ it is based on mutual trust,

✓ which is the corollary of a shared Area of Justice.

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150 Circulaire ministérielle of 08.08.2005.
Those are the parameters which in our view should guide the negotiation, transposition and application of mutual recognition instruments.
**VII Possible options and solutions**

*(Table 1) Procedural guarantees: harmonisation and control*

<table>
<thead>
<tr>
<th>Options</th>
<th>Solutions, reasons, advantages</th>
<th>Risks, obstacles and limits</th>
</tr>
</thead>
<tbody>
<tr>
<td>EU instrument going beyond ECHR</td>
<td>Raising standards. Enhance common sense of justice in the EU. Facilitate free movement of persons. Increase mutual trust thanks to higher standards within the EU. Compliance with fundamental rights under ECJ control: speedier review and uniform interpretation.</td>
<td>No unanimity among MS, respecting various legal traditions. Enhanced cooperation? Risk of blocking minority: Art. 11 TEC. Conceived for cooperation but also suitable for approximation. What consequences: would different degree of protection imply different degree of trust? Limited competence, not all MS have made Art. 35 TEU declaration.</td>
</tr>
<tr>
<td>EU instrument explaining existing rights</td>
<td>Consolidate ECtHR case-law. No need for higher standards: enhanced trust among MS because less serious violations of ECHR by MS. Increase effectiveness of protection of fundamental rights. Compliance with fundamental rights under ECJ control: speedier control and homogeneous interpretation. Which rights?</td>
<td>Lack of unanimity, possibly enhanced cooperation (see above). Minimum rules risk reducing existing standards. Binding principles: better integration in domestic law, development of further case-law and good practices. Limited competence, not all MS have made Art. 35 TEU declaration. According to DROIPEN 56 of 5 June 2007(^{151}) (i.e. no control of effectiveness and accuracy of translations, no specific attention, no communication with consular authorities, no letter of rights, no recording, but examination of witnesses)? Close to agreement in June 2007 and approved by CoE. Beyond COM proposal: presumption of innocence? A more up-to-date and comprehensive instrument.</td>
</tr>
<tr>
<td>Increase compatibility of rules</td>
<td>Where necessary for improving judicial cooperation (Art. 31(1)(c) TEU): facilitating mutual recognition, addressing established specific problems?</td>
<td>Coherence and length of approximation process?</td>
</tr>
</tbody>
</table>

\(^{151}\) Proposal for a Council FD on certain procedural rights in criminal proceedings throughout the EU (last version, DROIPEN 56 of 05.06.2007).
### Analysis of the future of mutual recognition in criminal matters in the European Union

<table>
<thead>
<tr>
<th><strong>Soft law</strong></th>
<th>Harmonising where cross-border element (e.g. option contained in Annex 3 of DROIPEN 56)? Limiting ground for optional refusal if harmonised conditions not met (as in ‘in absentia’ FD)(^ {152}), amounts to indirect harmonised procedural guarantees. Compliance with fundamental rights under ECJ control: speedier review and uniform interpretation.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Art 7 TEU</strong></td>
<td>Cross-border element: EAW proceedings and proceedings following EAW execution not relevant for mutual recognition of confiscation orders or fines: add residence criterion? If refusal optional, no guarantee of compliance with conditions, risk of no equal treatment? Limited competence, not all MS have made Art.35 TEU declaration.</td>
</tr>
<tr>
<td><strong>Review of compliance with fundamental rights by executing MS</strong></td>
<td>Development of best practices (e.g. letter of rights), pilot projects, recommendations building on experience.</td>
</tr>
<tr>
<td></td>
<td>Lack of control. Risk of low priority in terms of training and resources. No reply to lack of trust. More suitable for further developments of standards or preparation of future initiatives.</td>
</tr>
<tr>
<td></td>
<td>In case of systematic breaches, repeated determinations of infringement of fundamental principles, with no remedial action being taken. Also Art. 38 of Protocol to Accession Treaties.</td>
</tr>
<tr>
<td></td>
<td>Last resort political issue. Rather on the basis of a global evaluation of quality of judiciary. Only applicable to RO and BG, up to end of 2009.</td>
</tr>
<tr>
<td></td>
<td>Still the case in civil matters (Art 34(1) Reg. 44/01)(^ {153}). Enhance individual protection, preventive effect. In individual cases. Review of compliance with fundamental rights, OR of existence of remedies against potential deficiencies or breaches in issuing MS. Corresponds to situation in most MS, but few refusals of execution. Executing MS responsible before ECtHR.</td>
</tr>
<tr>
<td></td>
<td>Excessive judicial review, beyond the form? No ex officio control. Presumption of compliance with fundamental rights in issuing MS, review based on clear indications of breach. Imposing dialogue (e.g. Art. 15 EAW FD could also refer to questions regarding Art.1)? Protection of fundamental rights should be seen globally: only issuing authority can assess overall fairness of the trial. Review by issuing authority not suitable for mutual recognition of pre-trial decisions? Standards of the EU or Art. 6 ECHR?</td>
</tr>
</tbody>
</table>

\(^ {152}\) Initiative of SI, FR, CZ, SE, SK, UK and DE with a view to adopting a Council FD on the enforcement of decisions rendered in absentia and amending FD 2002/584, 2005/214, 2006/783 etc. (last version COPEN 120 of 06.06.2008).

Commentary on Table 1

The options expressed above are not necessarily mutually exclusive.

With regard to what is feasible and to achieving a balance between advantages and risks, the following approach is recommended:

- reintroduction of the draft Framework Decision on procedural rights, in its June 2007 version, supplemented perhaps by basic rules on the presumption of innocence, and without restricting its scope to cross-border situations;

- to accept ultima ratio control by national courts of compliance with fundamental rights in individual cases – which would remain clearly exceptional – where an infringement is claimed and proved by evidence. With regard to the right to a fair trial (Art 6 ECHR), the possible infringement could refer back to the FD in the sense that failure to respect its provisions would constitute a presumption of such an infringement. The competence of the executing authority would be limited to finding that the rights had not been infringed or, if they had been or risked being infringed, to refer the litigant to the remedies available in the issuing MS.

Under this option:

- the ECJ would enjoy jurisdiction to review compliance with procedural rights, in the context of references for a preliminary ruling (to which 17 MS have subscribed), in the absence of any possibility for the European Commission to bring enforcement proceedings;

- the limited control which an executing judicial authority could exercise would be confined to cases where a serious infringement of fundamental rights was claimed in relation to the application of an mutual recognition instrument;

- a link could be established between the application of the FD on procedural rights by the issuing MS and the recognition of its decisions by the authorities of the executing MS; the conclusions of enhanced cooperation, as the case may be, would be drawn;

- over-precise provisions would be avoided, so as not to handicap the project from the beginning and to accommodate those MS for whom a detailed FD would go too far, and the approach would be to encourage the development of best practice; MS practice would be evaluated by an impact study before future initiatives were proposed.
(Table 2) *Exercising rights: remedies, legal advice and interpretation*

<table>
<thead>
<tr>
<th>Options</th>
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</tr>
</thead>
<tbody>
<tr>
<td><strong>Approximate conditions for bringing an action</strong></td>
<td><strong>Action against a procedural decision</strong> by defendant or bona fide third party (warrant or order) (Art. 13 ECHR)? Time-limits? Provisional measures?</td>
<td>Too many differences in the actions available against decision to recognise and execute: set standards (e.g. one appeal only): rationalise, prevent mistakes and avoid compensation, meet deadlines.</td>
</tr>
<tr>
<td></td>
<td><strong>Approximate conditions for compensation</strong></td>
<td><strong>Facilitating the bringing of actions</strong></td>
</tr>
<tr>
<td></td>
<td>Action by defendant or bona fide third party. Extent of right to compensation and procedure to follow (e.g. erroneous SIS alert, freezing order followed by acquittal).</td>
<td><strong>Action by defendant or bona fide third party.</strong> Approximation: Review e.g. Art. 11 (4) of FD on freezing orders of 22 July 2003 and confirm assimilation principle (as in EEW). Introduce rules similar to Arts 11 and 12 of FD on freezing orders.</td>
</tr>
</tbody>
</table>

- Difficult to interfere with procedural rights under national law.
- A single instrument covering the various procedural measures?
- Perhaps not efficient given different and complex situations.
- Difficulty of allocating competences. Further study desirable.
- Risk of prolonging criminal proceedings beyond deadlines laid down in legislation.

- Limit to cross-border situations?
- A single instrument covering the various procedural measures?
- Many different situations: error of identity, lack of evidence, mistake by executing authority, expiry of deadline ... Many different interests (victims, defendant, bona fide third party). Many possible responses: compensation for damage, repayment (with interest?) Appointment of person to administer property subject to freezing orders. Important step first requiring further examination. Analysed inter alia in CARIN network and in PCOC ('Committee of Experts on the Operation of European Conventions in the penal field'). Identify respective competences of MS before possible approximation of compensation mechanisms.
in other mutual recognition instruments (e.g. mutual recognition on financial penalties, for actions concerning conditions of Art.1(a)(ii) or (iii))? Suspensive effect (as in Art. 9 of FD on confiscation orders)?

**Coordination:** Offer possibility to submit request in executing MS, even concerning substantive grounds?

- Dual competence also in civil matters (e.g. Reg. 1896/06 on payment orders\(^{154}\), but consumers are protected (Art.6).
- Competence of issuing authority to determine substantive grounds. Would mere ‘channelling’ through executing MS bring any real advantage? Compliance with Art. 13 ECHR? Need to identify competences before coordinating compensation.

| Approximate the rules on legal advice | Enhance fair administration of justice, hence mutual trust.  
Develop Arts 2 to 5 of COM proposal (COM (2004)328\(^{155}\)) in a separate instrument (on hypothesis that no more approximation in first instrument than in DROIPEN 56, see above Table 1). | Delicate discussion about time when legal advice must be available: compare Art. 1(2) in original proposal and in DROIPEN 56\(^{156}\) (reference to ECtHR case-law).  
Review of quality and effectiveness (compare Art. 4 with civil matters - Directive 2002/8/EC)\(^{157}\).  
Assessment of needs regarding free legal advice (compare Art. 5 with said Directive). |
|---|---|---|
| Approximate rules on translation and interpretation | Foster sound administration of justice and strengthen mutual trust.  
Develop Arts 6 to 8 of COM proposal (COM(2004) 328\(^{158}\)) in a separate instrument (under hypothesis that no more approximation in first instrument than in DROIPEN 56, see above Table 1). | Criteria to assess quality and accuracy of interpretation, competence for checking and deciding upon relevance of documents for translation. |
| Soft law for legal aid and interpretation | Development of best practices, pilot projects, recommendations building on experience. | No legal review. Risk of low priority in terms of training and resources. No reply to lack of trust.  
More suitable for further development of standards or preparation of future initiatives. |


\(^{156}\) Proposal for a Council FD on certain procedural rights in criminal proceedings throughout the EU (last version, DROIPEN 56 of 05.06.2007).


<table>
<thead>
<tr>
<th><strong>Address practical difficulties faced by defence in cross-border cases</strong></th>
<th>Compensate for inequality of arms. Facilitate comprehensive information, reduce linguistic barriers and costs. Practical tools: registers, ‘on duty’ systems, training (see COM(2008) 329, pp. 6 and 9)(^\text{159}). Ensure continuity of defence, set up cross-border defence team (e.g. when legal assistance is available in executing MS, it should also be available in issuing MS). Support networking and training. Disseminate best practices. Would also benefit victims.</th>
<th>Definition of cross-border character: residence criterion? EU funding for supportive measures, but not in order to complement national financial schemes (outside JPEN(^\text{160}))? Who is to designate defence lawyer in issuing MS? What can this lawyer do during procedure in executing MS? Too many competing projects? Rationalisation and financing at EU level? Compatibility with independence of legal profession?</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Review victim’s rights</strong></td>
<td>Evaluate and report on implementation of FD of 15 March 2001 on victims’ rights(^\text{161}). Compare report with assessment of implementation of Directive 2004/80/CE on compensation for victims(^\text{162}). Address issue of multiplicity of victims in transnational cases.</td>
<td>Legal basis for potential follow-up? Launch study on class action type redress for large-scale transnational EU crimes with multiplicity of victims (pollution, fraud, etc.)? Linked with conflicts of jurisdiction. Use of confiscated assets?</td>
</tr>
</tbody>
</table>


\(^{161}\) FD of 15 March 2001 on the standing of victims in criminal proceedings (OJ L 82/1 of 22.03.2001).

Commentary on Table 2

The information collected in the course of the present study does not justify recommending specific legislation on remedies against procedural decisions subject to mutual recognition.

Like the question of reparation for the harm which a person who was wrongly subject to such a measure may have suffered, this question would require more far-reaching analysis, on the basis of systematic scrutiny of the situations of that kind which arise in the context of mutual legal assistance or application of mutual recognition measures.

Prima facie, only issues arising from such cooperation could be addressed under Article 31(c) TEU, given the necessity criterion laid down in that paragraph. However, an approximation measure which applied only to cross-border situations would undoubtedly jeopardise equal treatment of persons.

For all those reasons, a proposal to approximate remedies does not currently appear desirable.

A review of the actual cases which have arisen would on the other hand enable any problems concerning the allocation of responsibilities between the issuing MS and the executing MS to be revealed and, in the light of that analysis, to clarify and render more uniform the rules on remedies contained in the different mutual recognition instruments.

Moreover, the concentration of remedies in the executing MS, according for example to the model used for the compensation of the victims of crime, would not really be appropriate for criminal proceedings. More to the point, it would probably not bring about any significant improvement.

The response probably lies in looking rather to the specific support which could be afforded to the defence, thanks to the establishment of contact points and correspondents. That supposes not only the mobilisation of funds, but also a minimum of coordination and supervision to optimise resources.

Progress should also be sought in the approximation of procedural rights in this general context. In the first instance, best practice, in the sense of certain MS models in applying the FD, once it has been adopted, should be emphasised. Thereafter, one could envisage adding to that measure one or two further instruments with the same scope of application, which would clarify the conditions for the grant of legal aid and of assistance for interpretation and translation (Art. 6(3)(b)(c) and (e) of the ECHR).

The impact of mutual recognition on victims has to date hardly been studied. That aspect should be kept in mind when reflecting on the range of possible options. In particular, prior thought should be given to the reconciliation of interests of the persons who have suffered damage and the effective administration of criminal justice, in particular with regard to cross-border crimes which cause multiple victims.
### (Table 3) Evidence-gathering: mutual legal assistance and admissibility

<table>
<thead>
<tr>
<th>Options</th>
<th>Solutions, reasons, advantages</th>
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</tr>
</thead>
<tbody>
<tr>
<td>Complementing the EEW</td>
<td>Follow approach of COM proposal ((2003) 688)(^{163}), i.e. deal first with evidence which does not exist, but is directly available (hearings, monitoring of bank accounts (replacing Art.3 of Protocol 2001(^{164}), interception of communications), then with evidence which exists, but is not directly available (body samples, expert opinions). Or first address measures most frequently requested? Electronic evidence, hearing by video conference? Step-by-step approach easier. Example of judicial cooperation in civil matters (uncontested claims, payment orders, small claims, etc.).</td>
<td>EEW not formally adopted yet, practical implementation doubtful. Multiplicity and fragmentation: global and coherent approach is needed. Although politically understandable, disastrous for practitioners. In-depth discussions involving much repetition for each new instrument proposed.</td>
</tr>
<tr>
<td>“Testing” the 2000 Convention</td>
<td>Regulates particular methods of MLA. No weakening of or retreat from cooperation compared with CISA and 1959 Conventions. Already contains some aspects of MR (Art. 4(1), 6(1), etc.). Advantage of having explanatory report. No need for transposition: more homogeneous application.</td>
<td>Four ratifications still missing. Traditional MLA would continue to exist alongside MR instruments. Insert a ‘rendezvous clause’? Develop certain specific mechanisms, e.g. JITs (possibly by Community funding(^{165}), video/tele-hearings (e-justice tools to be exploited(^{166})).</td>
</tr>
<tr>
<td>A global evidence warrant</td>
<td>Ensure compatibility and complementary nature of measures within a single EU instrument of mutual recognition of orders for obtaining evidence. Facilitate training, accelerate familiarisation, standardise forms.</td>
<td>Risk of backward step if discussion on delicate compromises reopened. Risk of reproducing restrictions on cooperation: should global instrument include all grounds for refusal contained in COPEN 132(^{167})?</td>
</tr>
</tbody>
</table>

\(^{166}\) Commission Communication Towards a European e-Justice Strategy (COM(2008) 329 of 30.05.2008).
**Analysis of the future of mutual recognition in criminal matters in the European Union**

<table>
<thead>
<tr>
<th><strong>A flexible comprehensive mutual recognition approach to collecting evidence</strong></th>
<th><strong>Replace multiple orders of limited scope by a single instrument, global tailor-made request based on principle of mutual recognition of needs of the issuing authority.</strong></th>
<th>Extensive piece of legislation, likely to engender lengthy discussions. Risk of maintaining fragmentation for long time. Retention of specific individual orders for each individual measure, lack of flexibility.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Replace FD on freezing orders with regard to freezing of evidence, EEW, provisions on obtaining evidence in the 2000 Conv.(^{168}) and 2001 Protocol. Draft general MLA instrument, based on simple mutual recognition principle, Art. 4(1) of 2000 Conv, and “no step backward” principle (see e.g. Art. 51 CISA(^{169}) limiting declarations to Art. 5 of the 1959 CoE Convention(^{170})).</strong></td>
<td>Fresh assessment and global consistency. Instrument should not include all grounds for refusal (in particular dual criminality and territoriality clause). Implies reopening discussion on delicate compromises. See EE, HU and LT reservations to Art.2 of 1959 Conv. Risk of different executing authorities for different measures. Ambitious instrument, probably involving lengthy negotiations. Risk of enhanced cooperation.</td>
<td></td>
</tr>
<tr>
<td><strong>Rules on issuing conditions for evidence warrants</strong></td>
<td><strong>Extend principles of Art. 7 COPEN 132(^{171}) to other types of evidence. Additional conditions in issuing MS in order to obtain mutual recognition in executing MS, e.g. in sensitive matters such as body samples or interception of telecommunications (seriousness of offence, consent or not, etc.). Either definition of scope of mutual recognition instrument, or model of FD on <em>in absentia</em> decisions(^{172}). Indirect approximation.</strong></td>
<td>No control in executing MS, not a ground for refusal. Difficult to interfere with national law of procedure. If refusal optional, no guarantee that conditions will be satisfied, risk of discrimination?</td>
</tr>
</tbody>
</table>

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\(^{169}\) Convention applying the Schengen Agreement of 14.06.1985 between the Governments of the States of the BENELUX, DE and FR on the gradual abolition of checks at their common borders (OJ L 239/19 of 22.09.2000).

\(^{170}\) European Convention on mutual assistance in criminal matters (ETS N° 030).


\(^{172}\) Initiative of SI, FR, CZ, SE, SK, UK and DE with a view to adopting a Council FD on the enforcement of decisions rendered *in absentia* and amending FD 2002/584, 2005/214, 2006/783 etc. (last version COPEN 120 of 06.06.2008).
| **Facilitate direct taking of evidence in another MS** | In particular where no coercive measures are needed (e.g. hearings), by video conference or telephone (see Arts 10 and 11 of 2000 Convention and COM (2008) 329, p. 8\(^ {173} \)), or directly by competent authority of the other MS (see Art. 17 of Reg. 1206/01 in civil matters\(^ {174} \)). Extend to other situations where issuing authorities could be involved in the collecting of evidence. Adequately cover issues of admissibility in issuing MS. | Case for updating existing rules (e.g. Art. 10(9) al.3 of 2000 Conv.)? Risk of making existing practices more rigid. |
| **Approximate standards for collecting evidence** | Facilitate coordination of investigations, transfer; concentrating of prosecution in one MS (see Hague Programme point 3.3 of Part III). Foster the use of JITs. Increase protection of individuals, including witnesses. | Risk of lack of unanimity. Need to respect different legal traditions (e.g. restrictive approach of common law to evidence). Risk of restricting use of evidence in MS in which substantial discretion is left to courts. Is admissibility of evidence collected in proceedings conducted in other MS purely a matter for national law? Evidential value not per se an issue of fundamental rights, subject to fairness of trial as a whole (ECHR, Schenk v. Switzerland\(^ {175} \)). |
| **Assimilation principle** | Already an objective of European Council Tampere Conclusions (paragraph 36). Model of Art. 9 of Reg. 1073/99\(^ {176} \) concerning powers of OLAF. Limit possible lack of efficiency, duplication of work, risk of destruction of evidence or inability to submit evidence, in Better knowledge of extent of problem: how much concrete experience is there of cases where evidence gathered in one MS cannot be received in proceedings conducted in another one? Analogy with national situations: use of evidence collected in other proceedings? Protection of personal data (Art. 23 of 2000 Conv.). |


\(^{175}\) Case Schenk vs. Switzerland (ECHR, request nr. 10862/84, judgment of 12.07.1988).

particular in case of transfer of proceedings. 
Locus regit actum principle and common rule that evidence only excluded if it would undermine fairness of proceedings to admit it (model of Art. 33(1) and (2) Corpus Juris\textsuperscript{177})? 

\textsuperscript{177} M. Delmas-Marty – J.A.E. Vervaele (eds), \textit{The implementation of the Corpus Iuris in the Member States (Volume I)}, Intersentia, 2000, p.209.
Analysis of the future of mutual recognition in criminal matters in the European Union

Commentary on Table 3

Even though the transposition of the FD on the EAW is not always correct, and is far from uniform, there is general agreement that the replacement of the mechanisms of extradition by the EAW surrender procedures has been an overall success.

It follows from the consultations and interviews conducted during the study that the ‘mechanical’ application of the same mutual recognition provisions in relation to pre-trial cooperation, in particular assistance in evidence-gathering, does not constitute a real improvement. On the one hand, the fragmentation of the instruments, targeted at specific measures, does not usually correspond to the reality of daily practice of prosecutors or judges. On the other hand, the more or less faithful reproduction of the grounds for refusal contained in the FD on the EAW even constitutes a backwards step in many respects compared to traditional mutual legal assistance.

Of course, the actual experience in using these instruments remains limited. But the lack of enthusiasm for putting them into daily practice is a clear indication of the cleavage between the spirit in which the texts were negotiated and the expectations of practitioners. The latter will only feel comfortable to use mutual recognition mechanisms if they represent progress, are easy and flexible to use, comprehensive and easily understandable.

In addition, the May 2000 Convention and its October 2001 Protocol represent in some respects an intermediate stage between traditional MLA and MR. The practical experience in using these instruments remains very limited to date, and in at least four MS they are not in force yet. A first, realistic, option would be to apply these instruments in practice as soon as possible and then, in five years, re-evaluate the progress to be made with regard to MR.

It may be also time to adopt another approach, on the following lines:

- the scope of the mutual recognition instrument would be global in the sense that it would encompass all methods of obtaining evidence and apply uniformly to the conditions of issue and execution;
- no diminution would be allowed in the current level of judicial cooperation provided;
- the formalities of the issuing MS would be observed, except where that infringed fundamental principles of the MS of execution;
- the maximum possible direct participation of the authorities of the issuing MS would be allowed in the collection of evidence;
- consideration should be given to linking certain forms of evidence-gathering, and their recognition and execution, to improved protection of individual rights.

As a second step, and on the basis of an examination of the difficulties encountered in practice, an instrument could be introduced in order to respond to the objective of mutual recognition and admissibility of evidence, based on the following two principles:

- application of mutual recognition rules in the place of execution (where the evidence is gathered);
- acceptance of the validity of the evidence obtained in another MS according to the latter’s rules, except where that would impinge upon the overall fairness of proceedings.
(Table 4) **Conflicts of jurisdiction, ne bis in idem and transfer of proceedings**

<table>
<thead>
<tr>
<th>Options</th>
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<tbody>
<tr>
<td>Establish priority criteria</td>
<td>Art. 31 TEU aims to <em>prevent</em> conflicts of jurisdiction. Inspired by the model of Reg. 44/01 for civil matters. Limit grounds for jurisdiction (e.g. extraterritorial competence, at least for acts committed within the EU). Primacy of place of commission of crime rather than place of harmful effect owing to predictability (see criticism of Case C-68/93 <em>Shevill</em> case of 7 March 1995, and ‘mosaic theory’ in civil matters). Consider main acts? And punishment in MS of their commission (as in COPEN 72 of 25 May 2007)?</td>
<td>All EU instruments harmonising substantive criminal law provide for multiple criteria of jurisdiction (at least territoriality and active personality). Take into account interests of victims, with regard to compensation and in general their participation in trial, especially as a witness. Only 2 FDs suggest priority in case of multiple jurisdiction (terrorism Art. 9 of FD of 13 June 2002, cybercrime Art. 10 of FD of 24 February 2005). Criteria subject to excessively rigid hierarchy; see also annex to Eurojust Annual Report 2003. Not necessarily single place of commission. Risk of inciting criminal conduct (‘forum shopping’ for most lenient penalty?). Level of punishment should not be criterion behind choice of jurisdiction.</td>
</tr>
<tr>
<td>Define rules on <em>lis pendens</em></td>
<td>Same facts, same person: priority to jurisdiction before which case is first brought. Consistency with <em>nbii</em> rules, prevention of <em>nbii</em> cases.</td>
<td>Definition of moment when proceedings are instituted: bringing of charges or opening of trial? See COM(2005) 696; see also Art. 31(2) of 1972 Conv. Incidence of legality principle. Crimes for which complaint by victim is prerequisite for prosecution.</td>
</tr>
</tbody>
</table>

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184 European Convention on the transfer of proceedings in criminal matters of 15.05.1972 (ETS N° 073).
### Analysis of the future of mutual recognition in criminal matters in the European Union

| **Duty to consult other MS authorities as soon as there is a risk of conflicting decisions. Set up system of reporting or registration to identify these cases.** | **Risk of rush to impose more serious sanctions, or to take a more lenient decision, or to close the file because of lack of evidence.**  
**Role of Eurojust.**  
**Set up registration system accessible by all EU MS? First for particular crimes? (See also COM(2008) 329, p. 8)** |
| --- | --- |
| **Centralising connected cases** | **Role of Eurojust.**  
**Possible negative impact of centralisation (witnesses and victims, time-limits). Advantages in some cases of sharing jurisdiction (e.g. in international corruption cases, etc.).**  
**No obligation under Art. 32 of 1972 Conv. to notify cases where there is conflict of jurisdiction.**  
**Set up registration system accessible by all EU MS? First for particular crimes? (See also COM (2008) 329, p. 8).** |
| **Duty to consult other MS authorities when risk of connected cases.**  
**Set up system of reporting or registration to identify those cases.** | |
| **Solving conflicts of jurisdiction** | **Risk of ‘forum shopping’ by prosecuting authorities.**  
**Risk of lack of agreement. First decision would pre-empt other proceedings. Duty to take interests of individuals (victims and suspects) into account: principle of reasonableness? Risk of exporting the most restrictive legal system v. risk of inciting criminal behaviour in place where punishment is most lenient.**  
**Powers of Eurojust recently amended (Art. 7(1)(a)(ii) and Art.7(2) COPEN 122)**\(^{186}\): political agreement in April 2008.  
**Legal review of binding decisions taken by Eurojust?** |
| **Consultation mechanism.**  
**Arbitration mechanism. Possibly binding decision by Eurojust.** | |

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### Establish rules for transfer of proceedings

Starting from Art. 21 of 1959 Conv. (laying of information) and from subpara 2 of Art. 6(1) of 2000 Conv\(^\text{187}\). Use the model of 1972 CoE Conv.

Develop in particular Arts 6(1) and 30: duty to consider transfer; Art.8: combine criteria with place of commission, insert arbitration; review Art.11; provide time-limits in Art.16; develop Art.17 (informing of suspect); and Art.24 (victim’s interests); review Art. 26 (value of evidence).

Need to study cases where transfer or centralisation could not be agreed upon: circumstances, obstacles, consequences, etc.

19 MS have signed, but only 9 have ratified 1972 Convention.

### Build on ECJ case-law on nbii

Decisions on same acts, final disposal of case by settlement ('transaction'); acquittal because of lack of evidence or time-bar etc.

ECJ jurisprudence very much being developed.

Replace Art.35 of 1972 Conv. and art. 54 of CISA\(^\text{188}\) by art.50 of Charter: no enforcement condition of the decision. Means enforcement would be possible. Charter refers to infringements, not to same facts.

### Address problem of negative conflicts

Detection of individual cases: how?

Discussion of criminal policies at EU level.

A role for Eurojust or Europol?

Which forum? How frequently? For which offences? (see below Table 6).

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188 Convention applying the Schengen Agreement of 14.06.1985 between the Governments of the States of the BENELUX, DE and FR on the gradual abolition of checks at their common borders (OJ L 239/19 of 22.09.2000).
Commentary on Table 4

In the field of civil cooperation, the Regulation known as ‘Brussels 1’ is an extremely important instrument, which functions well and the success of which is largely attributable, according to its users, to its dual character, in the sense that it lays down both jurisdiction criteria and the conditions for recognition and execution.

In criminal matters, the first mutual recognition Programme mentioned the standards relating to the competence of the courts among the parameters determining the effectiveness of mutual recognition. The proposal intended both to prevent and resolve conflicts of jurisdiction announced in the Action Plan of 2005 has however not seen the light of day. The difficulty of the enterprise should not however result in giving up on the idea.

One may sketch a possible solution according to a combination of different initiatives:

- develop the mechanisms and, if necessary, create the IT tools which would enable those cases to be identified which risk leading to conflicts of jurisdiction and/or which deserve to be coordinated or even centralised;
- evaluate the obstacles to or prerequisites for the laying down of a simple, functional and non-controversial principle of lis pendens;
- put in place the framework of a consultation mechanism which is capable, when a transfer or centralisation of proceedings appears desirable, of facilitating consensus on the exercise of jurisdiction, on the basis of a list of criteria which would take into account, in particular:
  o the foreseeability for the person who commits the crime that his conduct is punishable (balance to be found between the place where the act was committed and that of the intended effects),
  o the sound administration of justice, the existence and the impact of use of mutual recognition instruments (e.g. the availability of proof and possibility to enforce the sanction later on, as the case may be),
  o the interests of victims;
This mechanism would complement the powers of Eurojust, subject of course to any limits on its competence laid down by EU law.
- organise the transfer of proceedings and the transmission of evidence subject to what is said above with regard to the admissibility of evidence.

At the appropriate time, an analysis should be made of ECJ case-law concerning the ne bis in idem principle. This could provide the basis for provisions clarifying the extent of the principle in the various mutual recognition instruments; account would of course also be taken in this context of Article 50 of the Charter of Fundamental Rights.

With regard to negative conflicts, the objective should be to guarantee, by means of clear and comprehensive rules based on mutual recognition, the effective and loyal cooperation on the part of MS who do not themselves have an interest in prosecution. That outcome can however be achieved only to the extent that the jurisdiction criteria are not weighed too heavily in favour of the prosecution interest.
### (Table 5) Consolidation and revision

<table>
<thead>
<tr>
<th>Options</th>
<th>Solutions, reasons, advantages</th>
<th>Risks, obstacles and limits</th>
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</thead>
<tbody>
<tr>
<td><strong>Consolidate existing instruments, whether or not based on mutual recognition principle</strong></td>
<td>Undertake a full re-reading, remove inconsistencies. Facilitate accessibility.</td>
<td>Break in development of mutual recognition programme. Interpretation difficulties. Significant work, disproportionate with (temporary) benefit. Consolidation at EU level does not avoid discrepancies in transposing legislation.</td>
</tr>
<tr>
<td><strong>Codification</strong></td>
<td>Set up a single, comprehensive set of rules on MR. Cover all mechanisms and measures, harmonise conditions, fill in the gaps, repeal existing instruments.</td>
<td>Not yet enough concrete experience of functioning mutual recognition instruments. Premature, overambitious at this stage. Codification at EU level does not avoid discrepancies in transposing legislation.</td>
</tr>
<tr>
<td><strong>Consolidate ‘packages of measures’</strong></td>
<td>For example: -freezing of evidence, EEW, with other updated measures regarding evidence-gathering (see above Table 3). -freezing of assets, confiscation, handing over of goods and restitution. Logical and progressive implementation of mutual recognition principle. Satisfy needs of practitioners.</td>
<td>Some FDs remain ‘stand alone’ instruments. Still need for consistency among those instruments (e.g. pre-trial detention FD, EAW and alternative sanctions FD) and between them and the ‘packages’. Danger of taking backward steps if discussion reopened on some issues.</td>
</tr>
<tr>
<td><strong>Standardise forms</strong></td>
<td>Consider ‘multipurpose form’ (see above Table 3). User-friendly electronic mechanisms for filling and sending forms (see COM(2008) 329, p. 10)(^{189}). Conduct survey about use and adequacy of forms.</td>
<td>Pilot projects supported by JPEN(^{190}).</td>
</tr>
</tbody>
</table>

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## Review instruments in view of experience

For example amending, supplementing or clarifying **FD on EAW** in relation to:
- moment of issuing EAW
- proportionality
- accessory surrender
- EAW covering multiple offences
- circumstance that pursued person escaped justice
- territoriality clause
- prior prosecutions in executing MS (art.4(2))
- categories of art. 2(2) (see below *Table 6*)

- validity in time of EAW
- respect of fundamental rights
- consolidation with FDs “in absentia”, on mutual recognition of deprivation of liberty, on ESO.

<p>| | |</p>
<table>
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<tbody>
<tr>
<td>Link to mutual recognition of hearing orders.</td>
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<tr>
<td>No common understanding of proportionality. Link to legality principle. Risk of no enforcement of sentence. Consistency with FD on European Supervision Order.</td>
<td></td>
</tr>
<tr>
<td>Answer in European Supervision Order? Risk of no enforcement of sentence. Combination with other criteria. Risk of discrimination based on nationality. Risk of no enforcement of sentence.</td>
<td></td>
</tr>
<tr>
<td>Link with legality principle. DE Declaration to EEW(^{\text{191}}). Limited interest in data base. Prevent review of adequacy of facts in relation to the selected category.</td>
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</tbody>
</table>

Commentary on Table 5

Certain MS have created a general framework in their domestic law intended to integrate the various mutual recognition instruments as they are adopted. This approach is to be commended. It can facilitate the transposition process and actual application of the texts in practice.
That does not however mean that the EU should delay in devising its own similar scheme.
The first question to be asked is moreover whether to consolidate or codify?
Were a consolidation of existing instruments, whatever their nature, context or scope, to be carried out, it should go beyond a simple compilation; the mutual impact of the measures should be emphasised with the view to achieving a ‘final result’ which would be immediately readable and usable, in particular in order to points out where there were gaps or ambiguities.
Such a process, one might fear, would use the resources, in time and persons, which would otherwise be devoted to the mutual recognition programme.
On the other hand, a perfectly uniform codification of all the mutual recognition instruments, would presuppose that they had either all been adopted or that the codification itself would ‘legislate’ for further mutual recognition in place of (further) individual instruments. The first scenario would be extremely long-term and large-scale, running the risk that no Presidency would be prepared to embrace it. Moreover, if the Commission embraced the project, it might find its efforts being undercut by MS initiatives focusing on specific, usually topical, problems.
In either case, what one would have would be a framework for reference, to be filled out only by national transposition measures. MS are in any case often prone to a broad interpretation of their discretion, if they do not even go beyond it. To that extent the consolidation or codification would be of little direct value to practitioners.
The consolidation of existing measures, updated and extended in so far as necessary and lent coherent by being centered around a defined topic, would constitute a more convincing initiative, capable of improving transposition and of receiving the support of practitioners.
To this could be added the simplification and rationalisation of forms, thus avoiding duplication of too many specific forms and making the diffusion and use of mutual recognition instruments more practical.
In parallel, and in the light of their use, the mutual recognition instruments de RM, and in particular the EAW which is best known and applied most widely, could be ‘revisited’, either for the purposes of clarification, to correct certain interpretations or ‘side effects’ or to fill gaps. The complementary nature of the EAW and other mutual recognition instruments should also thereby be ensured.
### (Table 6) EU criminal policy and approximation of substantive criminal law

<table>
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<tr>
<th>Options</th>
<th>Solutions, reasons, advantages</th>
<th>Risks, obstacles and limits</th>
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</table>
| Possible approximation with regard to some issues of substantive criminal law | Open dialogue on:  
- Age of criminal responsibility (still a ground for refusal in FDs on mutual recognition of deprivation of liberty, alternative sanctions and draft ESO, but would not benefit the suspect).  
- Treatment of juvenile offenders (prosecution, trial, execution of sentence).  
- Criminal liability of legal persons (problem for MS which do not recognise concept).  
- Prohibitions and disqualifications in certain areas.  
- Alternative sanctions (problem for MS which do not recognise concept).  
- Some offences, appearing in list of 32 categories for which double criminality requirement is abolished, have not been harmonised (e.g. swindling, racketeering and extortion, and sabotage: see draft Council Declaration to EEW).  
- Level of sanctions: review Council conclusions of 25 and 26 April 2002. | Legal basis for possible action?  
Problem of conformity of national law with EU instruments?  
Obligation to cooperate and execute requests already in EU instruments (e.g. Art. 1(a) FD on financial penalties).  
First resolve questions concerning availability of information on convictions, penalties and automatic consequences.  
See above Table 5. |

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193 Harmonisation of sanctions: Council Conclusions (7991/2 (Presse 104)).
| **Consistency of criminal policies** | Where EU harmonising instruments exist. Create a body in which national criminal policies can be discussed and compared. Facilitate common understanding, create favourable climate for approximation. | Define adequate framework and forum: Justice Council? CATS Committee? Other? Involve relevant actors at national and European level (CONS, COM, EP)? Persons involved in negotiations, national Parliaments, practitioners? See also COM(2006) 332\textsuperscript{194}. Need to make adequate statistics and coherent data available. Relevance of Eurobarometer surveys? |

**Commentary on Table 6**

The process of approximation of substantive law carried out to date has neither followed a set course nor corresponded to an overall strategy. While the number of EU instruments on this matters is relatively impressive, their relationship to the crime they are intended to combat has been somewhat haphazard.

The starting point, it can be noted in passing, is always repressive. There has been no approximation in the sense of decriminalisation. The legal bases do not provide that possibility. All the substantive criminal law harmonisation conducted so far lays down minimum rules, though nothing prevents further criminalisation. Minimum rules are also applied to the level of penalties, pursuant to the Council conclusions of April 2002.

Inevitably, the actual effect of these instruments is dependent on the certain number of circumstances which are not subject to approximation. That is the case, in particular, with regard to prosecution policy. The result of the application of a particular EU instrument will vary depending on whether the MS concerned operates according to the ‘principle of legality’ of prosecution or if there is a certain practice not to prosecute so-called ‘minor’ offences. The effects will also vary in the light of the decision of the judge in the individual case: mitigating or aggravating circumstances are usually not subject to approximation and even if they are, considerable discretion is left to the judge. The same point can also be made with regard to the rules and practices concerning the execution of sentence. While one can say that all sentences aim to punish, but at the same time also to re-educate and reintegrate the individual in society, the methods used will be specific to the individual concerned and subject to particular types of monitoring and support. All these matters fall within MS competence and it is not anyway certain that there are or will in the near future be legal bases which would allow approximation to take place, even if one were to regard it as desirable.

The point of impact of the measures nevertheless requires to be addressed, as the Council’s decision to adopt a FD criminalising a particular type of criminal conduct necessarily implies the existence of a will to fight such phenomena together, in the interest of common EU values or policies. Consequently, the Council must take steps to reflect on this issue. One way of going about this process would be to organise an open debate or to prepare an impact report as part of an evaluation procedure.

Moreover, a number of horizontal issues should be analysed in this context. While not necessitating always harmonisation, such topics require to be studied in order to facilitate better mutual understanding and enhance effective application of mutual recognition instruments.
## Negotiation methodology

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<tr>
<th>Options</th>
<th>Solutions, reasons, advantages</th>
<th>Risks, obstacles, limits</th>
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</table>
| Involvement of practitioners | **At EU level** during preparation of each EU proposal and general EU criminal policy programmes.  
Involving all relevant persons/institutions in negotiations (MS, CONS, COM + EP, NPs) + interested parties (i.e. practitioners).  
and  
**At national level** by each MS before defining negotiation position and at stage of drafting transposition law.  
Representatives from all relevant categories (judges, prosecutors, defence lawyers, NGOs + members of Eurojust, EJN, liaison magistrates).  
By means of Green Papers, inquiries, hearings, EU and national fora, EP hearings, Justice Forum\(^\text{195}\), electronic consultation.  
In order to evaluate practical needs of justice system; discuss practical effect of instruments already in force; identify potential barriers and gaps; discuss new instruments to be adopted.  
More coherent policy oriented to practical needs, taking advantage of empirical solutions implemented in concrete cases. Need for greater focus on protection of fundamental rights. | Difficult to involve a greater number of practitioners and reach out to grassroots level (e.g. by using Justice Forum).  
Lack of knowledge of foreign languages among practitioners.  
No homogenous way of opinion-gathering at national level.  
Financial shortages mean no coverage of travel costs or translation of draft texts.  
Short time in which to prepare comments.  
Risk that negotiators do not take opinions gathered into account. |
| In-depth orientation debate and follow-up | Involve all actors who participate in negotiations.  
Identify at early stage specific problems or issues for MS in order to prevent blockages/failures; foresee transposition problems.  
Understand and be aware of other MS’ legal systems in order to find a better common solution and to improve mutual trust between MS at negotiation stage.  
Agree on guiding principles of mutual recognition (definitions, limits, implications); redefine clear objectives and EU strategy for a long-term vision and coherent policy. | MS reluctant to disclose their positions at early stage; lack of transparency and few open or frank discussions.  
Lack of trust and ambition makes it difficult to agree on ‘European approach’.  
Lack of satisfactory knowledge of each other’s legal systems and legislation (e.g. between common law and civil law countries), and of comparative law. |

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<table>
<thead>
<tr>
<th><strong>Step-by-step approach</strong></th>
<th><strong>Enhanced cooperation (Title VII TEU)</strong></th>
<th><strong>“Passerelle” (Bridge to Community jurisdiction)</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Homogeneous application of standards and solutions to horizontal issues – include in all instruments. Focus on protection of fundamental rights. For each instrument, clearly circumscribe aims. Working Groups to observe principles laid down in Council declarations and programmes. Meetings to be better prepared, less frequent as appropriate. Improve role of the COM together with Presidency and CONS SG during negotiations in order to achieve a more coherent approach.</td>
<td>Overcome institutional problems: unanimity among 27 MS blocks any improvement and lead to adoption of bad instruments. Push ahead with EU cooperation in criminal matters and with EU integration in general. Examples in Treaties of Prüm and Schengen.</td>
<td>Use of Art.42 TEU in order to transfer certain provisions of Title VI TEU to Community jurisdiction (‘Communitarisation’). Which provisions?</td>
</tr>
<tr>
<td>Multiplicity and fragmentation: need on the contrary for global and coherent approach. Although politically understandable, disastrous for practitioners. In-depth and repetitive discussions of every new proposal.</td>
<td>Opposition to use in order to harmonise substantive or procedural law. MS reluctant towards “multi-speed Europe”. Risk of blocking minority: Art.11 TEC. Possible adverse consequences of enhanced cooperation: different degree of protection implies different degree of trust? Risk of confusion for practitioners and lack of coherence in criminal cooperation. Lack of transparency.</td>
<td>Decision must be adopted by Council unanimously + ratification by each MS (‘mini-Treaty’). Application of UK, IE, DK Protocols to new ECT provisions added by passerelle unavoidable?</td>
</tr>
</tbody>
</table>
Commentary on Table 7

If one wants the EU instruments to be widely used and to achieve their objective, it is essential to associate their users with the process of drafting and transposition.

There are already mechanisms to do this. The Commission makes wide use of consultation documents such as green papers. Translation requirements have regrettably led, over the past years to a reduction in the scale and accessibility of such documents. It is therefore important that prior impact studies rely on other sources of information.

It would be indispensable furthermore to undertake systematic analysis of this kind also before MS initiatives were lodged.

In that regard, the recently created Justice Forum could play an important role, including as a ‘sounding board’. It could help in making sure that the proposals presented passed the ‘practitioner test’. Its added value would seem to be self-explanatory in the light of the wide range of opinion represented by its members. One would however have to ensure that such opinion were truly representative of the bodies concerned, which would require effective internal consultation mechanisms. To derive maximum benefit, rules and procedures should be put in place with regard to the planning of future work and the organisations represented should be invited to organise their “in-house” consultations in advance and of course to observe any deadlines imposed.

The negotiations themselves should be carried out with greater discipline and transparency. The negotiators should make clearer what is their opening standpoint and room for manoeuvre. Political orientations should be more faithfully adhered to. Those orientations should not be merely declaratory, but specific and geared to the achievement of good results. The Council working group should in particular work to ensure compliance with such goals and to promote the essential requirements of mutual recognition instruments.

In the absence of agreement, enhanced cooperation should not be regarded as a threat nor a sanction but as an alternative which requires courage and modesty at the same time. It should permit the 27 MS to experiment in smaller configurations, to show that a measure is well-founded and to convince themselves of its feasibility, but also, as the case may be, to correct the deficiencies of their proposals before they are submitted to wider consideration.

The ‘passerelle’ for its part does not appear to be an attractive option given that the future of the Lisbon Treaty hangs in the balance. Its operation requires unanimity and it is subject to ratification procedures which can be cumbersome. Were resort to be had to it, it would be necessary to take steps to ensure that the acquis is protected and applied by all MS.
### (Table 8) **Transposition methodology**

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<tr>
<th>Options</th>
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<tbody>
<tr>
<td><strong>Formal reproduction</strong></td>
<td>Wordings of national law closer to the original EU text: more homogeneity and fewer interpretation problems; faster transposition; facilitation in practical implementation.</td>
<td>Affects negotiating positions: risk of adopting less ambitious or less comprehensive EU instruments in order to be transposed as such by all MS. suitability of EU text for integration in national judicial systems? Risk of problems in practical application. Need to amend national constitutions, criminal codes and codes of criminal procedure (which can cause long delays in transposition).</td>
</tr>
<tr>
<td><strong>Consolidation at national level of specific EU instruments (cf. Table 5)</strong></td>
<td>A unique and consolidated national instrument to implement all EU instruments: make introduction of specific EU instruments into domestic law more coherent with national systems; easier for practitioners.</td>
<td>A later consolidation into a comprehensive body of EU rules would avoid discrepancies between MS. Need of improving existing instruments on the basis of practical problems before any kind of consolidation. Risk of further delays in transposition. Step-by-step approach to be maintained also at national level.</td>
</tr>
<tr>
<td><strong>Interpretation</strong></td>
<td>Explanatory memorandum for every COM proposal and MS initiative. Explanatory manual adopted at EU level on finalised text to explain the scope, to provide orientation and guidance for transposition, prevent different interpretations. Guidelines provided by COM during transposition phase (cf. First Pillar). Steering Group at EU level to facilitate transposition, analyse problems linked to FD implementation, exchange information (cf. for EAW).</td>
<td>Risk of being insufficient and outdated after adoption of final text. Instruments too complex and numerous, sometimes general and ambiguous provisions, terms meaning different things in different legal systems. EU instrument not directly applicable as such. Very large discretion left with MS in transposition. Not the same experts involved in negotiating process as in taking charge of drafting transposition law (limited transfer of knowledge).</td>
</tr>
<tr>
<td><strong>Organisation – Transposition mechanisms</strong></td>
<td>Defined internally by each MS (centralised or not) but in accordance with deadlines. Need to be transparent and make known ‘who does what’.</td>
<td>Lack of effective and up-to-date information on transposition status in other MS.</td>
</tr>
</tbody>
</table>
### Review of national transposition legislation

| by COM: | ‘Classical’ COM task. 
Verify whether EU instruments have been correctly transposed within time-limits. 
More coherent and comprehensive control. 
MS encouraged to do their best. |
|--------------------------|----------------------------------------------------------------------------------|
| by ECJ: | Fundamental guide for interpretation. 
Review of conformity of national implementing legislation with the FD + on functioning of instruments in practice. |
| by Constitutional Courts | Absence of infringement procedure under the current legal framework. Art. 35(7) TEU never used by MS and COM has no general power of review. 
Lack of dialogue between COM and MS during the review process. 
Lack of in-depth discussions on COM reports within Council Working Groups. |
| by peer evaluation method and reports: | Absence of proceedings for failure to fulfil an obligation. |
| by Justice Forum\(^{196}\): | Limited to compliance with national constitutional law. |
| Positions of networks and citizens represented. 
Useful for spreading knowledge of other MS’ implementation laws and mechanisms among practitioners. | The entire cycle of evaluations is too long and targeted only on specific instruments or matters (not necessarily related to mutual recognition). 
Review of implementation is a classical COM task. 
Supplementary evaluation made by COM to ensure MS follow-up on peer evaluation. |

Commentary on Table 8

The FDs on mutual recognition are only relatively binding and the implementing legislation is not uniform. That is all the more the case where the MS have retained their own terminology, introducing combinations or deletions which are different from the EU text. That does not always mean that the EU text is being infringed in a serious way but it certainly does not advance the readability of the text nor a common approach to implementing legislation across the EU. Ideally MS should remain true to the wording of the EU text as far as possible.

The difficulties of incorporating EU instruments in a legislative framework in which they are a ‘foreign body’ would certainly be reduced if those instruments were less fragmentary. Consolidation at national level can address this difficulty, but only partially.

It is not customary to produce an explanatory report, except in relation to Conventions. That should not however preclude other forms of assistance being given to support MS in the transposition process, inspired where possible by the approach followed in relation to Community law measures.

With regard to mutual recognition, and therefore to MS cooperation, it is absolutely key that the information on transposition and the methods of application be communicated without delay to the other MS, with all the necessary explanations on operational questions which are required.

With regard to evaluation, the drafting by the Commission of a report on the application of FDs is now the accepted approach in all texts. Given the Commission’s lack of competence to bring infringement proceedings, those reports form an essential point of reference and are a valuable source of information, and they can also occasionally prompt Member States to review their legislation.

As for the ECJ, it can be observed that, while its competence is currently limited, it has tended to follow a ‘progressive’ approach in its case-law to date.

The experiences in peer evaluation have proved rather fruitful, both for those carrying out the evaluations as much as for the persons or institutions evaluated. To dismiss such procedures without further consideration would be a mistake, even if one can criticise the cumbersome nature of certain evaluation processes and the fact that they do not suit all instruments.

Finally, at the current stage of mutual recognition, when it is still developing, the evaluation of the effects of the instruments adopted, i.e. the acquis, and the assessment of future needs, are inextricably intertwined. There is a need for a multidisciplinary dialogue which would enable all the actors concerned to express their views on future needs in the light of the instruments which have been adopted.
(Table 9) *Practical application of specific instruments*

<table>
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<tr>
<th>Options</th>
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<tr>
<td><strong>Training on EU instruments</strong></td>
<td>Organised by judicial training bodies (in association with EJTN). At EU as well as national level. Addressed to (young or more experienced) practitioners already involved in international cooperation matters. Tailored according to respective needs of defence lawyers, judges, prosecutors. Focus on specific EU instruments, application of legislation transposing those instruments in national law of own and other MS. Develop common standard training modules for judicial cooperation (cf. ECLAN project Copen Training [197] to foster coherence. Emphasis on procedures and forms. See also COM(2006) 356 [198].</td>
<td>Need for training and information varies according to centralised or decentralised system adopted by each MS. Decentralisation of judicial cooperation: makes it more difficult to ensure that all practitioners are at ease with mutual recognition instruments. Difficult to coordinate and fully improve the potential of EJTN (see below Table 10). How should new measures be financed? Modules should be translated, regularly updated and disseminated to all practitioners’ organisations, including those representing defence lawyers (e-justice tools to be exploited). Lack of knowledge of existing training tools.</td>
</tr>
<tr>
<td><strong>Reciprocal information</strong></td>
<td>EU database/website with information on relevant case-law of all MS (limited to the most significant decisions) and at least a summary in EN and FR: national courts should take inspiration from decisions of courts in other MS and strengthen a common judicial culture. E-justice tools to be exploited.</td>
<td>How should new measures be financed? Who should keep database up-to-date?</td>
</tr>
<tr>
<td><strong>Assistance in MLA</strong></td>
<td>Extend and update information on EJN website more frequently, improve ‘user-friendliness’ and interactivity with users. Instruments of general application and value, going beyond individual cases. Extend access to lawyers and other interested parties.</td>
<td>Human and financial resources. Language problem. Need for sufficient financing at EU level.</td>
</tr>
</tbody>
</table>

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### Tools

| **Handbooks**: substantive practical guide disseminated widely (website, cd-rom, etc) to provide practitioners with guidelines for adoption of good practices, indicating how to deal with cases by reference to experiences to date. Issued by EU (i.e. by CONS on EAW) or by national authorities but with a common structure. To be revised and updated every year.  
**Guidelines**: to facilitate consistent implementation of mutual recognition instruments. Explain basic procedural requirements, how to fill the forms, etc.  
**Models** (of forms, etc.); EJN *compendium* on MLA multilingual forms to be developed and updated.  
**Seminars, meetings** at EU level of magistrates who apply the instruments in practice; *e-learning*.  
**Contacts** between concerned authorities (including via Eurojust and EJN). *Liaison magistrates*: to be developed in all MSs.  
Establish a mechanism of *targeted visits* enabling expert practitioners to get local information and understanding of EU cooperation framework, formalities, procedural requirements and judicial organisation of a different legal system. Need for legal framework taking into account extent and needs of cooperation between MS, language requirements and standardised assessments of each visit. The mechanism should not duplicate EJTN activities. |
|---|---|
| **Guidance** | Mutual recognition instruments are not applied on a daily basis.  
Funding problems: very expensive tools (e.g. liaison magistrates).  
Lack of knowledge of other MS’ legislation and systems; difficult to gather information on foreign law.  
Language barrier. |

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### Evaluation mechanisms and feedback

| Establish common methodology to obtain information from practitioners and judicial authorities for onward transmission to central authorities; detect incorrect applications and gaps; identify where improvements are needed.  
Forum for follow-up of application of mutual recognition instruments, to discuss experiences and good practices, problems arising in practice.  
Regular exchange of views on the use of available forms (either produced by EJN or annexed to mutual recognition instruments).  
Frequency of feedback: on a regular basis or *ad hoc*?  
Assessment: follow-up of feedback in order to amend national or EU legislation subsequently. |
|---|---|
| Lack of rigorous and reliable statistical data to support *ex post* evaluation.  
Assessment of application in practice is fragmented and random. |
### Statistics (cf. COM(2006) 437)\(^{199}\)

| Essential component for evaluation mechanisms in order to determine impact of mutual recognition on legal cooperation and to assess need for EU action. Data on mutual recognition would increase its visibility and might encourage better application. E-justice tools to be exploited. | Need to develop suitable statistical tools and surveys, collection/reporting mechanisms; common methods and standards to collect valid and secure data for all MSs. Eurostat to assume responsibility with support from Eurojust, EU Agency for Fundamental Rights, networks, specific studies, etc. Challenge to centralise data coming from local and regional courts. Cost and funding. |

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Commentary on Table 9

Whatever the quality of the EU instruments adopted, their effective application in practice will always depend on the level of preparation and motivation of the persons who use them. If they have poor knowledge of them or do not show any interest, application will of course not be good.

The training of practitioners on the aim and the content of instruments should be as extensive and up-to-date as possible. As much as being a practical exercise in the use of the legal tools and procedures, the training should also aim to make them conscious of the thinking behind mutual recognition and how it has developed.

Everything should be done to facilitate and make automatic and straightforward the resort to mutual recognition instruments. The information and model or sample forms available on the EJN website could be improved and developed further in order to create:

- software which would allow forms to be processed directly online in a user-friendly way;
- up-to-date information on the state of transposition of each instrument by each MS;
- regularly updated list of the issuing and executing authorities and their competences;
- instructions and recommendations regarding the situations frequently encountered and the questions posed most often;
- links to the various sites where to find national implementing legislation and the relevant case-law.

Most of the information concern is also of interest to lawyers (for example, for evidence-gathering with the aim of exculpating their client) and steps should be taken to ensure that they retain access to this information.

Information and training should be complemented by directs contacts between practitioners, in their daily work, but also and even more important, by means of visits and meetings which enable them to see directly, face-to-face with their counterparts the different ways of working, thus enabling them where appropriate to rethink their own approach to the issues and to understand why these differences may exist. Such meetings of course also serve the purpose of exchange of best practices and can help establish networks of trusted persons who could also help resolve individual cases.

Finally, the correct evaluation of the application of the instruments requires the collection, holding and processing where appropriate of relevant data, which is a matter for each MS according to the choice of centralised or decentralised system.
## Confidence-building and practical flanking measures

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<tbody>
<tr>
<td><strong>General training and training on comparative law</strong></td>
<td>Addressed to junior and/or senior practitioners. Differentiated for judges, prosecutors (according to type of court?), defence lawyers. By means of seminars, online training modules, exchanges and twinning programs, Erasmus-type programmes for judges/lawyers; traineeships in other MS and EU bodies (e.g. Eurojust); e-justice tools to be exploited. Input to both initial and post-qualifying (continuous) training. Targeted on EU cooperation in criminal matters (including functioning of Eurojust, EJN, liaison magistrates, JITs), comparative criminal law and criminal proceedings, and also covering general EU law framework. Develop language skills of practitioners to improve mutual understanding and trust through direct contacts. Improve quality of court interpretation services and translation of legal documents. European dimension to be integrated in all training programmes: creation of a Judicial Training School at EU level for judges/prosecutors and defence lawyers, where they could spend part of their national training. Develop common European education modules for national trainers (already done by EJTN): useful and less expensive than harmonising different training methods on EU matters. Participation of practitioners from other MS in national training sessions. See also COM(2006) 356^{200}.</td>
<td>Difficult to determine target groups because MS may have different training systems. Discrepancies between MS because training is responsibility of national entities which organise and determine their content. MS still ‘jealous’ of their sovereignty. Competition between European training organisations. Need for cooperation and clear division of tasks. Hurdles of funding and interpretation. Need for a political commitment to mobilise necessary resources at national and EU levels. Lack of knowledge about existing training tools (handbooks, websites, networks, etc.).</td>
</tr>
<tr>
<td><strong>Networking among practitioners</strong></td>
<td>Develop and rationalise existing networks. Improve direct contacts between judicial authorities; ‘enhanced networking’ in some European regions involving close and regular contacts between judges or prosecutors of particular MS. Such networking already exists in some MS. Defence lawyers’ networks: provide legal support to foreign colleagues; European association of national bars?</td>
<td>Lack of language skills makes direct contacts between practitioners difficult. Lack of dialogue and everyday contact between legal professionals. How should new measures be financed?</td>
</tr>
</tbody>
</table>

### Quality assessment (cf. COM(2006) 332)<sup>201</sup>

| ‘Learning by doing’ approach: practitioners would share best practices and establish a continuous dialogue. E-justice tools to be exploited. |
| Quality of statistical systems as a first stage. Qualitative analyses of administration of justice (cf. European Commission for the Efficiency of Justice – CEPEJ-CoE, Eurojustice, etc): overall assessment of quality management of criminal justice and efficiency of judicial systems; e.g. assess impact of cooperation mechanisms on effectiveness of justice, crime reduction, prison population, general feeling of justice and fairness. Define quality standards for national systems of criminal justice and establish quality management systems at national level – to be supported and scrutinised at European level (see Hague Programme, point 3.2). Surveys with practitioners followed by free discussion: cross-checking of results and identification of problems. Improve full confidence of citizens and authorities towards other MS, examine on a yearly basis developments in the MS concerning observance of rule of law principles; discussing the results. |
| Independence of judiciary and subsidiarity and proportionality principles must be observed. MS reluctant to be assessed. Who should conduct evaluations? How should new measures be financed? Competence of EU to set standards on how the judiciary deliver justice? |

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**Commentary on Table 10**

Mutual recognition makes of every national judge or prosecutor a European actor. That status requires greater familiarity with the reality of European integration. It is necessary that future judges and prosecutors, and for that matter defence lawyers, feel part of the Area of Justice which the EU is trying to create. It is only early education and continuing training which can secure this position as stakeholders.

The potential of the European Judicial Training Network must be exploited to the full, and the work of the national judicial training schools expanded – their interaction is also crucial. The other actors in the criminal justice system – be they judges, prosecutors or defence lawyers, or the interpreters and translators who assist them, together with the court officials who manage court business – all these can profit in their daily work from the expanded educational provision in this field which can be led by the EJTN along with its national interlocutors.

Mutual recognition also implies the establishment of a ‘web’ of legal professionals, who can transmit the values of the common Area of Justice to counterparts and act as leading proponents of improvements in the quality of the administration of justice in the EU.
VIII Expectations with regard to the Lisbon Treaty

Many of the persons interviewed anticipate a major boost for the development of European criminal law when the Lisbon Treaty enters into force, albeit that is now rather hypothetical\textsuperscript{202}. The so-called ‘Community’ method would enable work to be resumed, inter alia in so far as procedural rights are concerned, and to overcome certain blockages. Review by the Court of Justice of Member States’ compliance would accelerate implementation and ensure greater coherence in transposition\textsuperscript{203}. In the areas listed in Article 82(1) of the Treaty on the Functioning of the European Union (TFEU), that is in particular mutual recognition of judgments and judicial decisions, the prevention and settlement of conflicts of jurisdiction, and cooperation between the authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions, the desired coherence would be even more easily ensured by use of regulations.

It should not however be forgotten that there are a number of constraints, where approximation is concerned, which may make the adoption of legislation more difficult; these include the necessity criterion – the measures must be necessary to facilitate mutual recognition – the requirement that there be a cross-border dimension, and the obligation to take into account the differences between the legal traditions and systems of the MS.

Finally, the possibility that not all MS will associate themselves fully with the development of the Union’s legal framework in these fields, either by not participating or by claiming that fundamental aspects of their criminal justice system would be affected by a proposed measure, with other MS then deciding to proceed with the measure on the basis of enhanced cooperation, is certainly a cause of solicitude in some circles\textsuperscript{204}. For example, concern is expressed by practitioners, who risk being confronted by even greater complexity. Politicians are concerned about the possible anomalies that may follow from a two-speed Area of Justice in the EU. And last but not least the diversity which such solutions would engender would frustrate individuals hoping to be part of a frontier-free Area of Justice subject to uniform and coherent rules.

Taking into account the current state of ratification of the Lisbon Treaty\textsuperscript{205}, the present study puts forward a number of options, with their advantages and disadvantages, in the light of the present state of EU law. Nevertheless, in order to aid comparison and a better understanding of the legal situation should the Lisbon Treaty enter into force, in Annex 1 we present an overview of the main elements of the new legal framework which would apply to the field of judicial cooperation in criminal matters under that treaty.

\textsuperscript{202} Meetings of 11.02.08, 06.03.08, 11.03.08, 15.04.08.
\textsuperscript{203} However, see national report PL p.7.
\textsuperscript{204} Missions FR, CZ, IE, LU, ES. Meetings of 01.04.08, 02.04.08, 15.04.08, 25.04.08, 15.05.08.
\textsuperscript{205} On 13 June 2008, the Irish population rejected the Lisbon Treaty by referendum. At the time of writing, the position regarding the other MS was as follows: two further MS have still to ratify it (SE and CZ); two MS have approved, but not yet signed it (DE, PL); four MS have signed it, but not yet submitted the ratification instruments (BE, ES, EE, FI); the remaining eighteen MS have submitted the ratification instruments.
Annex 1

Lisbon Treaty legal framework

General
- Review by the ECJ (Arts 258 to 267 TFEU), but see Title VII of the Protocol on Transitional Provisions.
- Co-decision and qualified majority voting (Arts 16 TEU and 238 TFEU) and calculation of the blocking minority: 91 votes, 14 or 10 MS depending on whether or not the proposal was made by the Commission. Possibility until 31 October 2014 for any MS to request that a check be made to ensure that the MS comprising the qualified majority represent at least 62% of the total population of the EU (Art. 3 of the Protocol on transitional provisions). As from 1 November 2014, see Art. 238 TFEU.

Art. 82(1) TFEU (mutual recognition and cooperation)
- Assertion of principle of mutual recognition.
- Areas listed:
  - Mutual recognition of judgments and judicial decisions
  - Prevention and settlement of conflicts of jurisdiction
  - Training of the judiciary and judicial staff
  - Cooperation between authorities in relation to criminal proceedings and the enforcement of decisions
- Possibility to use regulations.

Art. 82(2) and (3) TFEU (approximation of law on criminal procedure)
- Necessity criterion with regard to MR alone.
- Cross-border dimension.
- Compliance with legal traditions.
- Approximation by means of minimum rules.
- Use of directives.
- Area confined to:
  - Admissibility of evidence
  - Individual rights
- Possibility of applying the ‘emergency brake’, reference to the European Council and authorisation to proceed with enhanced cooperation if at least nine MS are in favour.
Art. 83 TFEU (approximation of substantive law)

- List of areas of particularly serious crime with a cross-border dimension, or approximation of criminal law where essential to implement another Union policy.
- Approximation by means of minimum rules.
- Use of directives.
- Concerns:
  - Definition of criminal offences
  - Sanctions
- Possibility of applying the ‘emergency brake’, reference to the European Council and authorisation to proceed with enhanced cooperation if at least nine MS are in favour.

Art. 85 (Eurojust)

- Definition of its mission:
  - Support and strengthen coordination and cooperation
  - Between national investigating and prosecuting authorities
  - In relation to serious crime affecting two or more MS, or
  - Requiring a prosecution on common bases
  - On the basis of operations and information supplied by the MS and by Europol
- Use of regulations to determine structure, operation, field of action and tasks.
- Possible tasks:
  - Initiation of criminal investigations or proposal of initiation of prosecutions (particularly relating to offences against the financial interests of the Union)
  - Coordination of investigations
  - Strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction
- Possible evaluation by the European Parliament and the national parliaments.
- Review by the ECJ of whether measures adopted by Eurojust are capable of having legal effects with regard to third parties.

Art. 86 (European Public Prosecutor)

- Establishment ‘from Eurojust’.
- Use of Council regulations adopted in accordance with a special legislative procedure; the Council to act unanimously after obtaining the consent of the EP.
- In the absence of unanimity, reference to the European Council and authorisation to proceed with enhanced cooperation if nine MS are in favour.
- Competence to combat crimes affecting the financial interests of the Union.
- Possible extension of powers to include serious crime having a cross-frontier dimension, by unanimous decision of the European Council after obtaining the consent of the EP and after consulting the Commission.
Annex 2

Select Committee of Experts
(Two meetings organised on 23 May and 12 September 2008)

Julia Bateman – Head of Brussels Office, Law Society of England and Wales (United Kingdom) – meeting of 12th September
Daniel Flore – Conseiller Général au Ministère de la Justice, Bruxelles (Belgium) – meeting of 23rd May
Světlana Kloučková – Public Prosecutor at the Supreme Court of Brno (Czech Republic)
Samuli Miettinen – Senior Lecturer in Law, Edge Hill University (United Kingdom) – meeting of 23rd May
Fernando Piernavieja Niembro – Lawyer, Member of CCBE, Criminal Law Committee, Malaga (Spain)
Eric Ruelle – Chef du Pôle de négociation et de transposition des normes pénales internationales au Ministère de la Justice, Paris (France)
Veronica Santamaria – ECLAN Researcher (Belgium) – meeting of 23rd May
Eugenio Selvaggi – Deputy of the Prosecutor General at the Court of Cassation, Rome (Italy)
Joachim Vogel – Professor and Magistrate at the Oberlandesgericht, Stuttgart (Germany)
Anne Weyembergh – Professeur à l’Institut d’Etudes Européennes de l’Université Libre de Bruxelles, Coordinatrice d’ECLAN (Belgium)
Gisèle Vernimmen-Van Tiggelen – Project Coordinator
Laura Surano – Project Assistant
Annex 3

List of persons interviewed by the coordination team during missions to the Member States

The Hague – Amsterdam (NL) - 28/31 January 2008

Eurojust:
José Luis Lopes da Mota – President and PT Member
Michèle Coninsx – Vice-President and BE Member
Aled Williams – acting UK Member
Michaël Grotz – DE Member
Anne Delahaie – Assistant to FR Member

EJN – European Judicial Network:
Fatima Martins – EJN Secretary
Praticia Rosochowicz – Assistant

Liaison Magistrate:
David Touvet – French Liaison Magistrate to the NL

Ministry of Justice:
Marjorie Bonn – Senior Legal Adviser
Marlène Dane – Senior Policy Adviser, Deputy Head EU Section

Magistrates:
Geert Corstens – Vice-President Supreme Court
Hanneke Festen – Public Prosecutor at the District Court in Amsterdam

Lawyer:
Han Jahae – Avocat, Président ECBA (Volendam)

Paris (FR) – 26/28 February 2008

Ministry of Justice:
Eric Ruelle – Chef du Pôle de négociation et de transposition des normes pénales internationale
Emmanuel Barbe – Directeur du Service des Affaires Européennes et internationales (SAEI)

Magistrates:
Daniel Fontanaud – Conseiller à la Cour d’Appel de Paris
Norbert Gurtner – Président de la Chambre de l'instruction à la Cour d’Appel de Paris
Fabienne Goget - Substitut Général à la Cour d'Appel de Paris

Lawyer:
Bertrand Favreau – Avocat
Analysis of the future of mutual recognition in criminal matters in the European Union

Hearing on EAW and extradition at the Chambre de l’Instruction de la Cour d’Appel de Paris:

Norbert Gurtner (Président)

Prague (CZ) – 12/14 March 2008

Ministry of Justice:
Petra Otevřelová – Directress International Department for Criminal Matters
Denisa Fikarová – CZ member at DROIPEN

Magistrate:
Světlana Kloučková – Supreme Prosecutor Office

Parliament:
Martin Hrabálek – Parliamentary Institute, EU Unit, Senate

Academics:
Zdenek Kühn – Professor at Charles University of Prague
Ivo Slosarcik – Professor at Charles University of Prague, CZ ECLAN Correspondent

Rome (IT) – 26/28 March 2008

Ministry of Justice:
Alberto Pioletti – Magistrate, Director of the Judicial Cooperation Office, Criminal Affairs Division
Alessandro Di Taranto – Magistrate, Responsible EAW, Judicial Cooperation Office, Criminal Affairs Division
Gabriele Iuzzolino – Magistrate, Director of the Legal and International Affairs Office, Criminal Affairs Division

Supreme Court of Cassation:
Mario Delli Priscoli – Prosecutor General
Eugenio Selvaggi – Vice Prosecutor General
Gaetano De Amicis – Magistrate, Ufficio del Massimario, IT ECLAN Correspondent
Ersilia Calvanese – Magistrate, Ufficio del Massimario
Giorgio Lattanzi – Judge, President VI Sezione Penale
Giovanni Conti – Judge (rapporteur of many EAW cases)
Domenico Carcano – Judge (rapporteur of many EAW cases)
Giovanni Grasso – Professor of Criminal Law at University of Catania, Lawyer

Hearing ‘in camera’ on EAW at the Court of Cassation:
Giovanni De Roberto (President)
Luigi Lanza (Judge rapporteur)

Lawyers:
Giuseppe Frigo – Unione Camere Penali Italiane
Domenico Battista – Unione Camere Penali Italiane
Vania Cirese
Maria Mercedes Pisani
Rosalba Turco

Magistrates:
Roberto Amorosi – Prosecutor, Rome
Mario Almerighi – President of Tribunale di Civitavecchia

Verona (IT) – 14 April 2008
Lorenzo Picotti – Lawyer and Professor of Criminal Law at University of Verona

Dublin (IE) – 7/9 April 2008

Ministry of Justice:
Brian Lucas – Head of Mutual assistance & Extradition Division
Jim Clerkin – Mutual assistance & Extradition Division
Anne Farrell – Mutual assistance & Extradition Division
Richard Ryan – International Policy Division
Fergus O’Callaghan – International Policy Division
Hugh Boyle – Criminal Law Division
David Brennan – Criminal Law Division
Valerie Fallon – Director Criminal Law Codification

Supreme Court:
Susan Denham – Judge
Nial Fennelly – Judge

Hearing on EAW and extradition at the High Court (Four Courts)

Lawyers:
James MacGuill – President of the Law Society of Ireland
Helen Dewhurst – Law Society
Barry Donoghue – Deputy Director of Public Prosecutions
Dara Robinson – Solicitor
Keneth Ruane – Solicitor for Department of Justice

Academic:
Gerard Conway – Lecturer in Law at Brunel University, IE ECLAN Correspondent

London (UK) – 28/30 April 2008

Royal Court of Justice:
Adrian Fulford – Judge, Royal Courts of Justice and ICC
Ministry of Justice & Home Office:
Emma Gibbons – Head of EU Section, International Directorate, Home Office
Edwin Kilby – Head of European Policy, Ministry of Justice

Prosecutions Office:
Ian Welch – Crown Prosecutor
Francesca Ball – International Policy & Advisory Division – Revenue and Customs
Prosecutions Office

Lawyer:
Adam Gersch – Barrister (ECBA)

Liaison Magistrate:
Sylvie Petit-Leclair – French Liaison Magistrate to the UK

Academics:
John Spencer – Professor at University of Cambridge, UK ECLAN Correspondent
Valsamis Mitsilegas – Reader in Law at Queen Mary University, EL ECLAN Rapporteur

Hearing on EAW at Westminster District Court

Luxemburg (LU) – 5/6 May 2008

European Court of Justice:
Koen Lenaerts – Judge, BE
Lars Bay Larsen – Judge, DK
Eleanor Sharpston – Advocate General, UK

Madrid (ES) – 12/14 May 2008

Consejo General del Poder Judicial:
Luis Francesco de Jorge Mesas – Senior Judge, Director of International Relations

Ministry of Justice:
Aurora Mejia – Director General for International Legal Cooperation
Francisco Alvarez – Head of Unit for EU relations
Ana Peyro – Advisor of International Affairs at the Cabinet of the Secretary of State
Elsa García-Maltrás – Advisor to the DG for International Legal Cooperation
Ana Gallejo – Cooperation and Institutional Affairs

Audiencia Nacional:
Fernando Grande-Marlaska – Investigative Judge
Javier Gomez Bermudez – President of the Criminal Chamber
Javier Zaragoza – Head of the Prosecution Service
Ignacio de Lucas Martín – Prosecutor, Fiscalia Especial Antidroga

Hearing « in camera » on EAW at the Audiencia Nacional
General Prosecutor’s Office:
Rosa Ana Moran – Prosecutor, International Cooperation Section
Isabel Guajardo Pérez - Prosecutor, International Cooperation Section

Lawyers:
Fernando Piernavieja Niembro – Member of CCBE, Criminal Law Committee, Malaga
Gracíela Miralles Murciego – Head of International, Consejo General de la Abogacía Española

Liaison Magistrate:
Dominic Barry – UK Liaison Magistrate to ES

Academic:
Angeles Gutierrez Zarza – Professor at University of Castilla la Mancha, ES ECLAN Correspondent

Berlin (DE) – 26/28 May 2008

Federal Ministry of Justice:
Hans-Holger Herrnfeld – Head of Division for Judicial Cooperation in Criminal Matters
Pamela Knauss – Desk Officer, European and Multilateral Horizontal Questions
Ralf Riegel – Desk Officer Extradition, Transfer of Prisoners, Mutual Legal Assistance, Bonn
Thomas Blöink, Head of Task Force EU Coordination
Thomas Voss – Desk Officer

Kammergericht – Court of Appeal of Berlin:
Rikg Hanschke – Judge, Criminal Division
Katrin-Elena Schönberg – Judge

Lawyers:
Anke Müller-Jacobsen – Lawyer, Member of the BRAK Criminal Law Committee and of the ECBA
Andreas Wattenberg
Natalie Von Wistinghausen

Academic:
Thomas Wahl – Researcher at Max Planck Institut, DE ECLAN Correspondent

Warsaw (PL) – 12/13 June 2008

Ministry of Justice:
Dariusz Sielicki – Judge
Katarzyna Kowalska – Judge, Human Rights Unit

National Prosecutor’s Office:
Cezary Michalczuk – Public Prosecutor, Bureau of International Legal Cooperation
Konrad Golebiowski – Prosecutors, Organised Crime Bureau
Jacek Lazarowicz – Prosecutors, Organised Crime Bureau
Constitutional Court:
Wojciech Hermelinski – Judge at the Constitutional Court, former defense lawyer

Copenhagen (DK) – 18/19 June 2008

Ministry of Justice:
Jens-Christian Bülow – Head of International Division
Morten N. Jakobsen – Legal Adviser

Public Prosecutions Office:
Jesper Hjortenberg – Deputy Prosecutor General, Responsible for International Co-operation

Academics:
Jørn Vestergaard – Professor and Deputy Dean at the University of Copenhagen, DK
ECLAN Correspondent
Silvia Adamo – Research Fellow at the University of Copenhagen, DK ECLAN Correspondent

Budapest (HU) – 25/26 June 2008

Ministry of Justice and Law Enforcement:
Petra Jeney – Head of the JHA Department
Adrienne Szabó – Legal Expert, JHA Department, Cooperation in Criminal Justice
Szilvia Király – Legal Expert, Department of International Criminal Law
Borbála Garai – Legal Expert, Department of Criminal Law Codification

Office of the Prosecutor General:
Edina Egyed – Public Prosecutor, EJN and Eurojust contact point

Non-Governmental Organisation:
Zaza Namoradze – Director Budapest Office, Justice Initiative

Stockholm (SE) – 28/31 October 2008

Ministry of Justice:
Ulf Wallentheim – Director, Division for Criminal Cases and International Judicial Cooperation
Per Hedvall – Director, Division for Criminal Cases and International Judicial Cooperation
Cecilia Riddselius – Desk Officer, Division for Criminal Cases and International Judicial Cooperation

Office of the Prosecutor-General:
Ola Löfgren – Chief Public Prosecutor, Head of International Unit
Annette von Sydow – International Unit, and Deputy National Member of Eurojust for Sweden

District Court of Stockholm:
Ida Kärnström – Junior Judge
Swedish Bar Association:

Johan Sangborn – Acting General Counsel, Head of International Department

Thomas Olsson – Defence Lawyer, Advokatfirman Silbersky
Annex 4

List of other persons interviewed by the coordination team

Council of the European Union:
Hans Nilsson – Head of Division, Judicial Cooperation, Secretariat General

European Parliament:
Kathalijne Maria Buitenweg - MEP
Panayiotis Demetriou – MEP
Sylvia-Yvonne Kaufmann – MEP
Sarah Ludford – MEP
Nicolae Vlad Popa – MEP
Renate Weber – MEP
Wouter van Ballegooij – MEP Assistant, ECLAN Correspondent for NL
Emilio De Capitani – Head of Unit, LIBE Secretariat
Claudia Gualtieri – LIBE Secretariat

European Commission:
Lorenzo Salazar – former Member of the Cabinet of Commissioner Franco Frattini
Paolo Ponzano – Principal Adviser Institutional Issues, Secretariat General
Sabine Gruenheid – Secretariat General
Florika Fink Hooijer – Secretariat General
Clemens Ladenburger – Legal Service
Rudi Trooster – Legal Service
Denise Sorasio – former Director of Internal Security and Criminal Justice, Directorate General Justice, Freedom and Security
Salla Saastamoinen – Head of Unit, Civil Justice, Directorate General Justice, Freedom and Security
Olivier Tell – Civil Justice, Directorate General Justice, Freedom and Security
Karen Vandekerckhove – Civil Justice, Directorate General Justice, Freedom and Security
Peter-Jozsef Csonka – Head of Unit, Criminal Justice, Directorate General Justice, Freedom and Security
Caroline Morgan – Criminal Justice, Directorate General Justice, Freedom and Security
Adrienne Boerwinkel – Criminal Justice, Directorate General Justice, Freedom and Security
Isabelle Jegouzo – Criminal Justice, Directorate General Justice, Freedom and Security
Peter-Carel Kortenhorst – Criminal Justice, Directorate General Justice, Freedom and Security
Anders Aagaard – Criminal Justice, Directorate General Justice, Freedom and Security
Adrianna Miekina – Criminal Justice, Directorate General Justice, Freedom and Security
Helge Zeitler – Criminal Justice, Directorate General Justice, Freedom and Security

European Judicial Training Network (EJTN):
Victor Hall – Secretary General
Benedetta Vermiglio - Coordinator of exchanges for trainers and between training institutions, Exchange Programme Department
Analysis of the future of mutual recognition in criminal matters in the European Union

**European Court of Human Rights:**
Françoise Tulkens – Judge, Section President

**Austria:**
Wolfgang Bogensberger – Representative at CATS (Council of the EU), Ministry of Justice
Irene Gartner – Ministry of Justice
Ingrid Maschl-Clausen – Permanent Representation of Austria to the EU

**Belgium:**
Daniel Flore – Conseiller Général au Ministère de la Justice
Pierre Monville – Avocat

**France:**
Daniel Lecrubier – Conseiller JAI, Représentant au CATS (Conseil de l’UE), Représentation Permanente de la France auprès de l’UE
Frédéric Baab – Conseiller JAI (ancien Magistrat de Liaison français en Allemagne), Représentation Permanente de la France auprès de l’UE

**Italy:**
Biagio Roberto Cimini – JAI Counselor, Permanent Representation of Italy to the EU

**Portugal:**
Joana Ferreira – General Attorney Office, Lisbon

**Sweden:**
Lars Werkstrom – Representative at CATS (Council of the EU)
Marie Skåninger, Legal Adviser, Division for Criminal Cases and International Judicial Cooperation, Ministry of Justice
Katarina Johansson Welin – Deputy Chief Public Prosecutor, International Public Prosecution Office in Stockholm
Joakim Zetterstedt – Judge of Appeal, Svea Court of Appeal (by email)

**United Kingdom:**
David Dickson – Deputy Head of International Cooperation Unit, Crown Office, Edinburgh, Scotland
Sally Cullen – UK Liaison Magistrate to IT [phone interview]

**Academics:**
Laurent Scheeck – Researcher at the Institute for European Studies (Université Libre de Bruxelles)
Amaya Ubeda – Researcher at the Institute for European Studies (Université Libre de Bruxelles)

**Total number of persons interviewed during the study: 170**
Annex 5

List of national reports and ECLAN correspondents

(The date refers to the final version of the national report)

1. Austria (18.11.08): Robert Kert (Professor assistant, University of Vienna)
2. Belgium (01.10.08): Anne Weyembergh (Professor, Université Libre de Bruxelles), Veronica Santamaria (Researcher, Université Libre de Bruxelles)
3. Bulgaria (16.05.08): Mila Assenova (Researcher and officer at the Ministry of Justice), Margarita Chinova (Professor, University of Sofia)
4. Cyprus (09.07.08): Helen Xanthaki (Professor, University of London)
5. Czech Republic (16.05.08): Ivo Slosarcik (Professor, Charles University of Prague)
6. Germany (15.10.08): Thomas Wahl (Researcher, Max Planck Institut)
7. Denmark (19.09.08): Jørn Vestergaard (Professor, University of Copenhagen), Silvia Adamo (Research fellow)
8. Estonia (18.07.08): Jaan Ginter (Professor, University of Tartu)
9. Greece (30.04.08): Valsamis Mitsilegas (Professor, University of London), Spyros Karanikolas (Researcher)
10. Spain (21.06.08): Maria Angeles Gutierrez Zarza (Professor, University Castilla la Mancha)
11. Finland (05.05.08): Annika Suominen (PhD Student, University of Bergen), Dan Frände (Professor, University of Helsinki)
12. France (15.05.08): Maiténa Poelemans (Researcher, Université de Bayonne), Emilie Darjo (Student, European Master)
13. Hungary (20.05.08): Katalin Ligeti (Associate Professor, Lorand Eotvos University of Budapest), Nyitrai Péter (Chair of Criminal Law, Szechenyi Istvan University)
14. Ireland (05.05.08): Gerard Conway (Lecturer in public law, Brunel University of London)
15. Italy (29.04.08): Gaetano De Amicis (Judge, Corte di Cassazione), Rosaria Sicurella (Professor, University of Catania)
16. Lithuania (27.04.08): Gintaras Švedas (Professor, Vilnius University)
17. Luxembourg (05.06.08): Stefan Braun (Professor, Université de Luxembourg)
18. Latvia (29.04.08): Kristine Strada-Rozenberga (Professor, University of Latvia), Elita Nimande (Assistant Professor, University of Latvia)
19. Malta (30.04.08): Stefano Filletti (Criminal Lawyer and Assistant, University of Malta)
20. The Netherlands (13.05.08): Wouter van Ballegooij (PhD Graduate and MEP Assistant)
21. Poland (10.11.08): Adam Łazowski (Senior Lecturer, University of Westminster)
22. Portugal (13.05.08): Sónia Fidalgo (Assistant Professor and Researcher, University of Coimbra)
23. Romania (04.05.08): Florin Streteanu (Professor, University of Cluj-Napoca), Diana Ionescu (Assistant, University of Cluj-Napoca)
24. Sweden (17.11.08): Laura Surano (Researcher, Université Libre de Bruxelles)
25. **Slovenia** (26.04.08): *Katja Sugman Stubbs* (Professor, University of Ljubljana), *Mojca Mihelj Plesnicar* (Researcher, University of Ljubljana)

26. **Slovakia** (30.04.08): *Anna Ondrejova* (Head of the EU Relations Unit, General Prosecutor’s Office)

27. **United Kingdom** (30.05.08): *John Spencer* (Professor, University of Cambridge)
Annex 6

Questionnaire

(Sent to ECLAN correspondents responsible for national reports)

A. Negotiations

Information should be gathered from policymakers involved in and/or responsible for the negotiations and policymaking concerning mutual recognition instruments and civil servants responsible for drafting implementation legislation.

The national report should assess the following questions:

1. What in general is their perception of the principle of mutual recognition in criminal matters? What would be their definition (see e.g. COM (2000) 495, the Council mutual recognition programme (OJC 12 of 15-1-2001 p.10, the evaluation report on the implementation of the EAW in Belgium, COPEN 128 REV2 p.21)?

2. Are practitioners involved or consulted in the negotiations phase?

3. Is the principle of mutual recognition absolute or does it have limits (i.e. grounds for refusal)? If so, what is the justification for the limits? What kind of limits would be justified?

4. Is mutual recognition of final judgments considered different from mutual recognition of pre-trial decisions? If so, why? What are the differences?

5. Should differences in substantive law be a reason not to recognise and execute a decision? Is mutual recognition considered compatible with dual criminality requirement? Could a database containing national definitions of offences listed with respect to the abolition of dual criminality be helpful to ensure equivalence? Would a list of offences excluded from mutual recognition (e.g. because they are not criminalized in certain MSs, i.e. a negative list) be a feasible alternative?

6. Should differences in procedural law be a reason not to recognise and execute a decision? If so, should these differences be substantial in nature (e.g. a measure, a sanction does not exist) or would it suffice that the measure is not available under the same circumstances?

7. Is it felt that the reference to the fundamental rights in the mutual recognition instruments (e.g. Art.1(3) of FD 13-6-2002, Art.1 of FD 22-7-2003, Art.3 of FD of 24-2-2005) implies that a control should or could be exercised by the executing authority on the procedural safeguards and the respect of the rights of defence in the issuing MS?

8. Is the principle of mutual recognition compatible with the territoriality clause (which enables a MS to refuse to recognise and execute a decision issued for an offence wholly or partly committed on its territory)? How could possibly conflicting interests of the issuing and executing MSs be reconciled?

9. Is approximation of laws (substantive or procedural) a condition to further developing cooperation based on mutual recognition? If so, which areas or provisions should be approximated (e.g. conditions for investigative measures, procedural rules concerning
default judgments, jurisdictions’ criteria or rules on coordination of the exercise of jurisdiction…)?

10. Is there a (risk of) lack of consistency between available existing instruments, either based on the mutual recognition principle or not? Should the European Union address the issue of transfer of proceedings, or return of nationals to the issuing MS, for instance?

11. Would it be commendable to codify, or at least consolidate the various instruments based on the mutual recognition principle? Would that facilitate the implementation and improve the consistency?

12. Is there a need for flanking measures to support and facilitate mutual recognition? Of what kind? Which ones would be the most important?

**B. Transposition of mutual recognition instruments**

Information should be gathered from civil servants responsible for drafting implementation legislation and policymakers in the Member States, who were directly involved in preparing and drafting the legislation transposing the mutual recognition instruments as well as from the implementation reports with respect to the EAW.

The national report should assess the following questions:

1. Is the Framework Decision on the application of the principle of mutual recognition to confiscation orders (OJL 328/59 of 24-11-2006) already transposed? And the Framework Decision on the application of the principle of mutual recognition to financial penalties (OJL 76/16 of 22-03-2005)?

2. Why was it not possible to implement the different mutual recognition instruments within the set time limits?

3. Which difficulties were encountered during the transposition process? Were they of a legal, practical or political nature?

4. How are the provisions on dual criminality transposed?

5. How are the provisions on the territoriality clause transposed?

6. Do nationals (and residents?) receive a particular status?

7. What additional measure, if any, was considered needed in order to avoid the risk of reintroducing a ground for refusal which is abolished by the European instrument, or of impunity, when making use of an authorised ground for refusal such as the territoriality clause, or of lack of guarantee that a condition (for instance, the return of nationals or residents) would operate in practice?

8. Was reciprocity between MSs an issue?

9. Is the general provision on fundamental rights which refers to Article 6 TEU transposed in national legislation? What does it imply?
10. Were there other grounds for refusal added in national implementation law? How could this be avoided in the future?

11. Was it preferred to have a centralized procedure for executing a decision issuing in another MS? Which are the respective advantages of a centralized or decentralized procedure?

12. Is it expected that problems may, or will, be encountered with respect to the transposition of other framework decisions?

13. With respect to the European Evidence Warrant, will Member States choose a dual system of coercive measures (system for domestic proceedings and system for mutual recognition of foreign decisions) or will they adapt their legislation for domestic proceedings to the minimum standard provided for in the EEW? Does this cause problem?

14. With respect to the recognition of confiscation orders, how is it expected to implement Art.8(3) of FD of 6-10-2006? How will the order be converted if it has been issued in circumstances where the confiscation was ordered under extended powers of confiscation specified in FD 2005/212/JHA and falls outside the scope of the option adopted by the executing MS?

C. Application of mutual recognition and other judicial cooperation instruments

Information should be gathered from practitioners, such as judges, investigating magistrates, public prosecutors and defence lawyers, who have experience in the field of judicial cooperation in criminal matters and work in this area on a daily basis. Reports on the first mutual evaluation exercise on mutual legal assistance and the application of the EAW will provide information on the problems that have been identified in the (recent) past.

The national report should assess at least the following questions:

1. What in general is their perception of the principle of mutual recognition in criminal matters? What would be their definition (see e.g. COM (2000) 495, the Council mutual recognition programme (OJC 12 of 15-1-2001 p.10, the evaluation report on the implementation of the EAW in Belgium, COPEN 128 REV2 p.21)?

2. How is cooperation functioning on the basis of the current mutual recognition instruments (i.a. EAW)? How are the provisions on dual criminality and territoriality applied in practice? Is there jurisprudence on these matters?

3. Are practitioners well informed of new mutual recognition instruments? Have guidelines been issued? Are practitioners involved at the stage of negotiations? At the stage of drafting implementing legislation?

4. Is there a feedback mechanism on the results in practice afterwards? Do have good practices developed? Is there a forum for discussion of experiences, problems encountered and suggested ways out? Is there a view about the respective advantages of centralised or decentralised procedures for executing decisions issued in another MS on the basis of a mutual recognition instrument?
5. Is there a record of individual cases decided upon on the basis of mutual recognition? Are statistics available?

6. Is the Framework Decision on Mutual Recognition of Freezing Orders applied in practice? If so, what are the experiences so far? Are some difficulties encountered? If it is not being applied, why not? Are other cooperation instruments used?

7. In general, what instruments are currently used most in judicial cooperation in criminal matters? In case practitioners prefer treaty-based solutions (bilateral or multilateral) to mutual recognition procedures, why (what are the advantages)? Is there already some thinking about the way the European Evidence Warrant (still to be formally adopted) will be put into force, in particular given its coexistence with existing legal instruments, and the possibility left to issuing authorities to use mutual legal assistance mechanism instead of the EEW when the request forms part of a wider request for assistance?

8. What problems or difficulties are typically encountered in judicial cooperation? How could they be solved in the view of practitioners?

9. Does the verification of dual criminality hamper cooperation in criminal matters in practice? Could a database containing national definitions of offences listed in the instrument with respect to the abolition of dual criminality be helpful to provide equivalence and transparency?

10. Do the differences in Member States' legislation with respect to the use of coercive / investigative measures hamper cooperation in criminal matters?

11. Is it felt that the reference to the fundamental rights in the mutual recognition instruments (e.g. Art.1(3) of FD 13-6-2002, Art.1 of FD 22-7-2003, Art.3 of 24-2-2005), and should it be the case, in the implementing legislation, implies that a control should be exercised by the executing authority on the procedural safeguards and the respect of the rights of defence in the issuing MS?

12. What are the criteria, if any, to decide on grounds of refusal which are optional for the executing judicial authority? How could possibly conflicting interests of the issuing and executing MSs be reconciled (e.g. where the offence was partly committed in both MSs)?

13. When making use of an authorised ground for refusal such as the territoriality clause, is there a risk of reintroducing a ground for refusal which is abolished by the European instrument? Is there a risk that a condition, for instance, the return of nationals or residents, would not operate in practice? If so, how could it be avoided?

14. Is there a (risk of) lack of consistency between available existing instruments, either based on the mutual recognition principle or not? Should the European Union address the issue of transfer of proceedings, or return of nationals to the issuing MS, for instance?

15. Would it be commendable to codify, or at least consolidate the various instruments based on the mutual recognition principle? Would that facilitate the implementation and improve the consistency?

16. Is there a need for flanking measures to support and facilitate mutual recognition? Of what kind? Which ones would be the more important?
Annex 7

Select case-law

Deriving from the national reports and other documents submitted by the persons interviewed

Unless otherwise stated, this case-law concerns the application of national laws implementing the FD of 13 June 2002 on the European Arrest Warrant

AT – Autriche

Supreme Court (Oberster Gerichtshof)
- 22-06-2005, 13 Os 56/05t (no time limit for surrender arrest according to section 18 (2) EU-JZG, if the surrender is admissible).
- 07-11-2007, 13 Os 109/07t, 13 Os 110/07m (speciality of surrender, section 31 EU-JZG).

BE – Belgique

Cour d’Arbitrage (Cour Constitutionnelle)
- 22-07-2008, n° de rôle 4503 : preliminary question from Chambre du Conseil de Nivelles (surrender of nationals or residents, return condition, possible breach of constitutional rules).

Cour de Cassation
- 04-10-2006, P.06.1050.F (speciality rule).
- 18-10-2006, P.06.1316.F (enforcement in BE of sentence pronounced in issuing MS).
- 07-11-2007, P.07.1516.F (refusal to execute a sentence in BE because of statutory limits).

BG – Bulgarie

Court of Appeal

CY – Chypre

Supreme Court

CZ – Republike Tchèque

Constitutional Court
- 03-05-2006, N° Pl.ÚS 66/04 (conditions for surrendering nationals, abolition of dual criminality control; in general, abstract review of the constitutionality of the transposition of the EAW FD in CZ).
- 21-2-2007, N° I.ÚS 601/04 (recognition of a judgement of Thai court for Czech citizen after his transfer to Czech penitentiary, recognition of higher criminal in foreign jurisdictions, right to fair trial, loyalty to international obligations).
- 7-2-2008, N° III.ÚS 2388/07 (negative prescription of crimes, double criminality).
DE – Allemagne

Note: A detailed overview of German case-law concerning the EAW is available via the following Internet website: http://www.strafrecht.de/de/euhb/ (last visited 10/2008)

Federal Constitutional Court
- 18-07-2005, BVerfG- 2 BVR 2236/04 (extradition of nationals, recourse to legal action relating to procedure of approval; unconstitutionality of the first EAW Act; necessity for amendment of DE implementation law).

Federal High Court, Criminal Division
- 15-04-2008, 4 ARs 22/07 (extradition of nationals, relationship between EAW and national implementation law on the one hand, and bilateral treaty on the other hand as regards limitation of criminal act; inapplicability of bilateral treaty, inadmissibility of extradition because of limitation of time).

Higher Regional Courts
- 26-10-2004, OLG Karlsruhe (1 AK 20/04) (SIS entry to be accepted as EAW).
- 18-11-2004, OLG Hamburg (Ausl. 33/04) (misuse of EAW that was issued to arrest a defendant).
- 17-12-2004, Thüringisches OLG (Ausl. 7/04) (no review of suspicion).
- 28-01-2005, OLG Stuttgart (3 Ausl 76/04) (in absentia trial; conditions for writ of summons/personal invitation).
- 28-01-2005, OLG Stuttgart (3 Ausl 1/05) (specific conditions necessary, so that return of nationals can be assured).
- 10-2-2005, OLG Karlsruhe (1 AK 4/05) (SIS entry and EAW, waiver of double criminality check in the terms of Art. 2 para. 2 FD only if allegations are sufficiently described).
- 16-02-2005, OLG Celle (1 ARs 1/05) (return of nationals, assurance of remand of person sufficient – difference to OLG Stuttgart, 28-01-2005).
- 23-02-2005, OLG Karlsruhe (1 AK 24/04) (lifting of extradition arrest warrant if issuing state does not deliver supplementing documents within 60 days; principle of proportionality).
- 14-03-2005, OLG Düsseldorf (4 Ausl 68/03) (review of double criminality, production of counterfeit documents – error in marking list of offences in EAW form).
- 07-02-2006, OLG Düsseldorf (4 Ausl(A) 16/05) (ordre public; inadmissibility of extradition if issuing state is not able to sufficiently protect life or body of defendant; Art 3 ECHR).
- 10-08-2006, OLG Karlsruhe (1 AK 30/06) (even if the requesting state points out that the respective offence constitutes a criminal act listed in Art. 2 para. 2 of the FD, it is necessary a control whether this is plausible and conclusive).
- 14-08-2006, OLG Koblenz ((1) Ausl.-III-53/05) (relationship between EAW/German implementation law and CoE Convention on Extradition as to limitation of time. Art. 10 CoE Convention inapplicable since entry into force of German EAW implementation law).
- 14-08-2006, Kammergericht Berlin ((4) AuslA 378/06 (149/06)) (procedure of approval, notification of decision of State Attorney (procureur général), conditions for exercising power of discretion (awareness and conclusive reasoning)).
- 31-08-2006, OLG Karlsruhe (1 AK 39/06) (SIS entry and EAW, waiver of double criminality check in the terms of Art. 2 para. 2 FD only if allegations are sufficiently described [continuation of OLG Karlsruhe, 10-02-2005]; no provisional extradition arrest order).
- 24-10-2006, OLG Köln (6 AuslA 84/06) (((indefinite) statement on detention situation in prison of issuing state not sufficient for violation of ordre public.
- 26-10-2006, OLG Stuttgart (3 Ausl. 52/06) (plausibility and conclusiveness of EAW; possibility of own proceedings does not lead to the conclusion that extradition cannot be approved; principal obligation of court of the executing state to order extradition request as a result of interpretation in conformity with the FD EAW).
- 02-11-2006, OLG Braunschweig (Ausl. 8/06) (application of Art. 8 para. 1 of the 1995 Convention in relation to extradition of the EU Member States and declaration that Polish law applicable as to the assessment of statute-barred crime, although the Convention had not been ratified by Poland at that time).
- 03-11-2006, OLG Köln (6 AuslA 57/06) (simple contestation of accusation not sufficient for review by court).
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- 06-11-2006, OLG Düsseldorf (AuslA 80/06) (relationship between EAW and multi-/bi-lateral treaties as to limitation of time; CoE Convention on Extradition and supplementing bilateral treaty remains applicable; statute of limitations of requesting state decisive).
- 15-11-2006, OLG Braunschweig (Ausl 5/06) (extradition admissible; criteria of (family) connections to execute state in view of execution of sentence instead of surrender).
- 01-12-2006, Saarländisches OLG (Ausl 48/06 (29/06) (no review of suspicion, significant connecting factor to foreign territory because of typical cross-border crime, possibility of own proceedings does not lead to the conclusion that extradiction cannot be approved).
- 04-12-2006, OLG Braunschweig (Ausl 9/05) (definition of “usual place of residence”).
- 20-12-2006, OLG Karlsruhe (1 AK 46/06) (conditions for exercising power of discretion of State Attorney [see also Kammergericht Berlin, decision of 14-08-2006]; extradition of nationals could also be denied if there is a significant connecting factor to the foreign territory if interests of prosecution in the domestic state (Germany) or social concerns of the individual predominate).
- 22-01-2007, OLG Hamburg (Ausl 70/06) (possible life-long imprisonment for negligent homicide pas de violation de l’OP; no refusal of extradiction because of initiation of proceedings in Germany).
- 23-01-2007, Saarländisches OLG (Ausl 49/06) (no violation of ordre public; substantiated claims necessary for alleged torture or inhuman treatment in issuing state).
- 05-02-2007, OLG Köln (6 Ausl.A 94/06) (double criminality; EAW request must contain information which allows assessment of special elements of German criminal law (here: violations of maintenance obligations)).
- 06-03-2007, OLG Stuttgart (3 Ausl. 52/06) (limits for discretionary power of State Attorney; general criteria for possible non-approval of EAW request; obligation for State Attorney to examine all aspect of case in decision for approval; possibility for prosecution in own jurisdiction not necessarily ground for refusal of surrender).
- 11-03-2007, OLG Naumburg (1 Ausl 2/07) (extradition of nationals, territoriality clause; determination of significant connecting factor, predominating interests of national not to be extradited, « mixed cases »).
- 11-05-2007, OLG Karlsruhe (1 AK 3/07) (denial of surrender possible even if own prosecution has not been initiated at the time of EAW request; assessment between significant connecting factor to foreign or domestic territory, on the one hand, and mixed cases on the other hand in cases of complicity).
- 01-06-2007, OLG Nürnberg (1 OLG Ausl. 169/06) (relationship between EAW and multilateral treaties as to limitation of time; CoE Convention on Extradition remains applicable; statute of limitations of requesting state decisive).
- 05-02-2007, OLG Köln (6 Ausl.A 94/06) (double criminality; EAW request must contain information which allows assessment of special elements of German criminal law (here: violations of maintenance obligations)).
- 18-06-2007, OLG Karlsruhe (AK 72/06) (no plausible and conclusive description of facts in EAW; review of the allegation of the requesting state is required in exceptional cases, such as when the alleged person brings forward testimony for alibi).
- 20-05-2008, OLG Celle (1 ARs 21/08) (surrender refused; violation of ordre public if life-long imprisonment is foreseen for minor drug offence [see in this context also OLG Stuttgart, 07-09-2004]).
DK – Danemark

Supreme Court

Western High Court

Copenhagen Municipal Court
- 17-05-2004, Kobenhavns Byrets 1.afdeling, sag nr 1.10512/04 (pas de condition de réciprocité).
- 12-09-2005, Kobenhavns Byrets, SS 23.18776/05 (pas d’examen au fond).
- 31-01-2007, Oberlandesgericht München, Beschluss, OLGAusl. 179/06.

EE – Estonie

Circuit Court (Court of Appeal)
- 10-11-2006, n° 1 – 06 – 12976 (Court denied appeal of arrest for surrender on the grounds that the Estonian Code of Criminal Procedure allows only an appeal against a ruling on surrender and in this case the appeal did not contest the surrender but only arrest for surrender).

Tartu Circuit Court
- 28-03-2006, n° 1-05-675 (period of time when a person is arrested for surrender should be considered as a period of custodial sentence and deducted from the eventually sentenced term of imprisonment, but if during the period of time when a person waits his surrender the requested member state has employed other grounds for arrest the period of time is not deducted from eventually sentenced term of imprisonment).

EL – Grèce

Supreme Court
- 08-03-2005, 591/2005 (nationals, retroactivity, preliminary examination in EL not a ground for refusal).
- 09-09-2005, 1735/2005 (no refusal, even if EAW not issued by a judicial authority but by DK Ministry of Justice).

Appeal Courts

ES – Espagne

Constitutional Court
- 20-12-2005, Sentencia 339/2005 (hearing of the arrested person with the presence of a lawyer of his choice: when the arrested person requests he presence of a lawyer of his choice, the court cannot appoint a lawyer under the legal-aid rota system).
- 13-03-2006, Sentencia 83/2006 (surrender of a suspect whose extradition was previously refused taking in mind Spanish nationality of the suspect: not « res iudicata » effect).
- 09-10-2006, Sentencia 293/2006 (surrender of a suspect whose extradition was previously refused taking in mind Spanish nationality of the suspect: not « res iudicata » effect).
- 10-10-2006, Sentencia 293/2006 (surrender of a suspect whose extradition was previously refused taking in mind Spanish nationality of the suspect: not « res iudicata » effect; deadlines contained in article 19 Loede).

**Audiencia Nacional**
- 10-11-2004, Auto 90/04 File Nr 177/04 (previous refusal to extradite, no refusal to execute the EAW).
- 10-01-2005, Auto 2/05 File Nr 218/04 (no refusal, territorial clause, no proceedings initiated yet).
- 13-01-2005, Auto 8/05 File Nr 202/04 (refusal, outside categories’list, lack of dual criminality).
- 24-01-2005, Auto 8/05 File Nr 195/04 (previous refusal to extradite, no refusal to execute the EAW).
- 31-01-2005, Auto 7/05 File Nr 238/04 (refusal, outside categories’list, lack of dual criminality).
- 01-03-2005, Auto 42/05 File Nr 32/05 (no refusal, territorial clause, nationality of suspect and victims).
- 31-05-2005, Auto 65/05 File Nr 98/05 (no refusal, territorial clause, no proceedings initiated yet).

**FI – Finlande**

**Supreme Court**

**FR – France**

**Cour de Cassation**
- 08-07-2004, N° pourvoi 04-83662 (refusal, territorial clause).
- 05-08-2004, N° 4540 (refusal, dual criminality, no ex officio assessment of possibility to enforce in FR).
- 05-08-2004, N° pourvoi 04-84529 (retroactivity).
- 21-09-2004, N° pourvoi 04-84575 (retroactivity).
- 26-10-2005, N° 5879 (duty to consider request for enforcement in FR).
- 25-01-2006, N° pourvoi 691 (surrender and no enforcement in FR).
- 26-04-2006, N° pourvoi 06-82164 (control of nbii and statutory limits).
- 29-11-2006, N° 7519 (no refusal, single sentence for multiple offences, both within and outside the list).
- 08-07-2007, N° 4303 (no refusal, fundamental rights).
- 21-11-2007, N°6597 (no control of qualification).
- 18-03-2008, N° pourvoi Y 08-81.266 F-D (nor refusal, no control of qualification).
- 27-03-2008, N° pourvoi 08-81570 (discretionary use of facultative grounds).
- 01-04-2008, N° R 08-81.650 F-D (defence lawyer in executing MS).

**Cours d’Appel**
- Pau 07-03-2008, 94/2008 (control on respect of fundamental rights).

**HU – Hongrie**

**Constitutional Court**
- 08-03-2008 (N° 733/A/2007) (dual criminality).

**Supreme Court**
- 07-03-2005, Resolution N°1 of 2005 (statutory limits).

**Metropolitan Court**
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IE – Irlande

Supreme Court
- 13-05-2004, Re Article 40.4.2 of the Constitution, Thomas James O’Rourke v. The Governor of Cloverhill Prison [Denham, Fennelly, McCracken JJ.] (transitional provisions and statutory interpretation).
- 16-03-2005, In the matter of Kenneth Dundon and in the matter of a European Arrest Warrant [Murray CJ., Denham, McGuinness, Hardiman, Geoghegan JJ.] (procedural requirements as to receipt of EAW, statutory interpretation and implementing legislation).
- 12-03-2008, Butenas v. Governor Cloverhill Prison [Murray CJ., Denham, Hardiman, Geoghegan, Fennelly JJ.] (granting of bail to requested person).

High Court
- 14-05-2004, In the matter of Kenneth Dundon and in the matter of a EAW [Ó Caoimh J.] (purposive interpretation of the EAW).
- 14-10-2005, Minister for Justice, Equality & Law Reform v. Michael Fallon aka Michéal Ó Fallúin [Finlay Geoghegan J.] (whether domestic requirements of issuing Member State had been satisfied and whether issue to be determined by Irish court, conflict of laws).
- 26-06-2006, Minister for Justice, Equality & Law Reform v. Ostrovskij [Peart J.] (weight of the presumption that a decision on prosecution has been made).
to rebut the presumption in s. 4 of the 2003 Act, as to the intention of the issuing Member State to
prosecute, would need to be ‘clear, cogent and material’).
- 24-11-2006, Minister for Justice Equality and Law Reform v. Krasnovas [Peart J.] (delay and
requirement to establish prejudice)
- 20-12-2006, Minister for Justice v. Betancourt [Peart J.] (proof of identity of requested person)

**IT – Italie**

**Constitutional Court**
- 18-04-2008, Ordonnance n° 109 (reminding extensive interpretation of the norm by Court of Cassation
in case n° 4614 du 30-01-2007, Ramoci – see below).
- 16-05-2008, Arrêt n° 143 (implementing law violates constitution as it does not take into account period
of detention abroad, pending proceeding on EAW).

**Court of Cassation**
- 05-06-2006, Cass., Sez. VI, n° 20550, Volanti (police arrest is compulsory).
- 30-01-2007, Cass., Sezioni Unite (Grande Chambre), n° 4614, Ramoci (extensive interpretation of
maximum period of pre-trial detention ; serious indications of guilt only acknowledgeable by IT
judicial authority; fair trial ex Art. 6ECHR).
- 03-05-2007, Cass., Sez. VI, n° 17632, Melina (surrender even where lower guarantees in issuing MS).
- 10-12-2007, Cass., Sez. VI, n° 46845, Pano (no challenge of proceeding in issuing MS safe for
minimum guarantees under Art.6 ECHR).
- 12-02-2008, Cass., Sez. VI, n° 7812, Tavano (modalities for enforcing sentence).
- 15-09-2008, Cass., Sez. F., n° 35286 (different treatment for nationals and residents with regard to
enforcement of sentence).

**LT – Lithuanie**

**Court of Appeal of Lithuania**
- 27-03-2006, Ruling n° 1N-11/2006 (surrender of national possible because EAW based on
international Treaty).
- 30-08-2007, Ruling n° 1N-36/2007 (importance of mutual trust).
- 03.01.2008, Ruling n° 1N-4/2008 (interpretation of principle of territoriality).
- 08-01-2008, Ruling n° 1N-4/2008 (importance of mutual trust).

**LU – Luxembourg**

Aucune référence (voir cependant rapport national pp. 12 et 23 sur le principe de territorialité).

**LV – Lettonie**

**Supreme Court**
- 21-04-2006, Judicial Panel in Criminal Cases, decision in the case n° PAK-IP-2 (effectiveness of EAW
form issued by fax).
- 06-12-2006, Judicial Panel in Criminal Cases, decision in the case n° PAK-IP-6 (citizenship not
sufficient basis to refuse surrender).
- 12-03-2007, Judicial Panel in Criminal Cases, decision in the case n° PAK-IP-1 (existence of another
court procedure not obstacle for surrender of national).
- 15-05-2007, Judicial Panel in Criminal Cases, decision in the case n° PAK-IP-2LR (existence of
another court procedure not obstacle for surrender of national).
MT – Malte

Court of Magistrates (Court of Committal)
- 07-09-2007, Police v. Emanuel Borg, Case n° 700/2007 (principle of territoriality: sufficient that effects of conduct in issuing MS; surrender of national without return clause to serve the sentence).
- 12-09-2007, Police v. Anthony Muscat, Case n° 701/2007 (principle of territoriality: sufficient that effects of conduct in issuing MS; surrender of national without return clause to serve the sentence).

NL – Pays-Bas

Supreme Court
- 28-11-2006, AY6631 + District Court of Amsterdam: 02-07-2004, AQ6068; 01-04-2005, AT3380; 02-12-2005, AU8399 (territoriality exception, humanitarian concerns).
- 08-07-2008, BD2447 (obligation to send legal provisions together with EAW rejected) + District Court of Amsterdam 29-07-2005, AU0326 (also affects District Court of Amsterdam, 06-07-2007, LJN BB2690).

District Court of Amsterdam
- 23-01-2007, AZ7032 (not surrender of nationals/residents for execution of sentence).
- 06-07-2007, LJN BB2690 (standard form + request of legal provisions translated; nationality and refuse of surrender).

PL – Pologne

Constitutional Tribunal

Supreme Court
- 20-01-2005, I KZP 29/04 (judicial review of decisions on issuing EAW).
- 20-07-2006, I KZP 21/06 (meaning of the term 'criminal procedure' used in the EAW; grounds for refusal to surrender).

Courts of Appeal
- 23-08-2006, II AKz 518/06 (principle of mutual recognition, power of a domestic court to verify the legality of a surrender request).
- 11-10-2006, II AKz 382/06 (legal effects of the CT judgment in case P 1/05; surrender of Polish nationals).
- 11-10-2006, II AKz 661/06 (grounds for refusal to surrender).

PT – Portugal

Court of Appeal of Évora
- 03-05-2005, Case n° 29/05-1 (pending proceedings delegated to the issuing MS).

Supreme Court of Justice
- 13-01-2005 Case n° 04P4738 (surrender of nationals even in absence of reciprocity).
- 03-03-2005, Case n° 773/05, 3rd (MR and removal of reciprocity principle).
- 27-04-2006, Case n° 06P1429 (obligation to motivate refusal to execute EAW; enforcement of sentence in PT).
- 04-01-2007, Case n° 06P4707 (importance of principles of mutual recognition and mutual trust; obligation to motivate refusal to execute EAW; double criminality; criteria to decide on optional grounds for refusal).
- 21-02-2007, Case n° 250/07 (acceptance and respect of foreign conviction).
- 18-04-2007, Case n° 07P1432 (territoriality clause and plurality of proceedings).
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RO – Roumanie
Constitutional Court

High Court of Cassation and Justice
- 19-03-2007, Chambre Criminelle, arrêt n° 1517 + plenary, decision in the interest of the law, 21-01-2007 , arrêt n°3 (execution of a EAW issued before 01.01.2007 possible).
- 12-06-2007, Chambre Criminelle, arrêt n° 3141 (careful use of facultative grounds for refusal).
- 19-02-2008, Chambre Criminelle, arrêt n° 535 (rights of defence in executing MS).

Court of Appeal
- 23-07-2007, Cour d’Appel du Târgu Mureş (RO executing authority must check whether surrender on basis of EAW does not violate Art.6§3b) and c) of ECHR; refusal to surrender against MR principle (legal assistance in issuing MS)).

SE – Suède
Supreme Court
- 22-12-2005, NJA 2005 s. 897, Pesämies Case (requirement of a four months imprisonment minimum (art. 2(1) FD EAW) is fulfilled if a cumulative sentence of that length is imposed for several crimes).
- 21-03-2007, NJA 2007 s. 168, Biszczak Case (mutual recognition rests on a high level of trust and space for refusal is so limited that there is an obligation to surrender unless where fundamental rights are seriously and continuously set aside).

District Court
- 10-11-2004, Case B 3177-04, Prosecutor v. Jonsson (Södra Roslags tingsrätt) (a previous request for extradition would not bar a subsequent request to surrender in accordance with a EAW for the same alleged conducts).

SI – Slovénie
Constitutional Court
- 22-06-2006, U-I-14/06 (rejected by the Court because the parties showed no legal interest).
- 11-04-2006, Up-261/06 (rejected by the Court because the parties showed no legal interest).

Supreme Court

SK – Slovaquie
Supreme Court of Justice
- 18-07-2007, Case n°1 Tost 30/2007 (surrender of requested person, importance of double criminality).
- 20-01-2008, Case n°6 Tost 1/2008 (surrender of requested person for execution of sentence).
- 21-12-2007, Case n°2 Tost 2/2008 (interpretation national law procedural provisions in conformity with EAW).
- 22-11-2006, Case n°3 Tost 108/200 (refuse of surrender, lapse of time and humanitarian concerns).
- 05-06-2007, Case n°2 Tost 13/2007 (interpretation national legal provisions with requirements of ECHR).
UK – Royaume-Uni

House of Lords
- Dabas v. High Court of Justice, Madrid [2007] UKHL 6 [2007] 2 AC 31 (requirement of “certificate” met by statement contained within the EAW itself).
- R (Hilali) v. Governor or Whitemoor Prison [2008] UKHL 3, [2008] 2 WLR 299 (EU MSs legal systems assumed conform to requirements of ECHR).

Administrative Court
- Boudhiba v. Central Examining Court n° 5 of Madrid [2006] EWHC 167 (Admin) (EU MSs legal systems assumed conform to requirements of ECHR).
- Vey v. The Office of the Public Prosecutor of Montluon [2006] EWHC 760 (status in relation to the UK implementing legislation of a person who is ‘mise en examen’ in France).
- Governor of HM Prison Wandsworth v. Kindernis [2007] EWHC 998 (Admin) (voluntary surrender and power to detain the accused).
## Transposition laws

(Updated to September 2008)

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