

**Rethinking international cooperation  
in criminal matters in the EU**



# **Rethinking international cooperation in criminal matters in the EU**

Moving beyond actors,  
bringing logic back,  
footed in reality.

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Gert Vermeulen  
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(eds.)

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## Abbreviations and Acronyms

Abbreviations and Acronyms	
AT	Austria
BE	Belgium
BU	Bulgaria
CDCJ	European Committee on Legal Cooperation
CDCP	European Committee on Crime Problems
Cfr	<i>Confer</i> compare to
CIS Convention	Convention of 26 July 1995 on the use of information technology for customs purposes
CoE	Council of Europe
CoE Conditional sentence	European Convention of 30 November 1964 on the supervision of conditionally sentenced or conditionally released offenders
CoE Confiscation	European Convention of 8 November 1990 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime
CoE ECMA	European Convention of 20 April 1959 on mutual assistance in criminal matters
CoE Extradition	European Convention of 13 December 1957 on extradition
CoE Transfer Prisoners	European Convention of 21 March 1983 on the Transfer of Prisoners
CoE Transfer Proceedings	European Convention of 15 May 1972 on the transfer of proceedings in criminal matters
CoE Validity	European Convention of 28 May 1970 on the international validity of criminal judgments
CY	Cyprus
CZ	Czech Republic
DE	Germany
DG JLS	Directorate General Freedom, Security and Justice
DG JUSTICE	Directorate General Justice
DK	Denmark
e.g.	<i>Exempli gratia</i> for example
EAW	European Arrest Warrant
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECRIS	European Criminal Records Information System
ECRIS Decision	Council Decision 2009/316/JHA of 6 April 2009 on

Abbreviations and Acronyms	
	the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA
ECtHR	European Court of Human Rights
Eds.	Editors
EDU	Europol Drugs Unit
EE	Estonia
EEW	European Evidence Warrant
EIO	European Investigation Order
EJN	European Judicial Network
EL	Greece
EMS	Executing member state
EPO	European Protection Order
EPP	European Public Prosecutor
EPPO	European Public Prosecutor's Office
EPRIS	European Police Records Information System
ES	Spain
EU	European Union
EU Extradition	Convention drawn up on the basis of Article K.3 of the Treaty on European Union, relating to extradition between the Member States of the European Union
EU MLA	Convention of 29 May 2000 on mutual assistance in criminal matters between the Member states of the European Union
EU MLA Protocol	Protocol of 16 October 2001 to the Convention on mutual assistance in criminal Matters between the Member states of the European Union
Europol Convention	Convention of 26 July 1995 on the establishment of a European Police Office.
Europol Decision	Council Decision of 6 April 2009 establishing the European Police Office
FD Alternative	Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions
FD Confiscation	Council Framework Decision of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders
FD Crim Records	Council Framework Decision 2009/315/JHA of 26

ABBREVIATIONS AND ACRONYMS

Abbreviations and Acronyms	
	February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member states
FD Data Protection	Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters
FD Deprivation of Liberty	Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union
FD EAW	Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member states
FD EEW	Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters
FD Fin Pen	Council Framework Decision of 24 February 2005 on the application of the principle of mutual recognition to financial penalties
FD Freezing	Framework Decision of 22 July 2003 on the execution in the European Union of orders freezing property or evidence
FD In Absentia	Framework Decision of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial
FD Jurisdiction	Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings
FD Money Laundering	Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and

Abbreviations and Acronyms	
	the proceeds of crime
FD Organised Crime	Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime
FD Prior convictions	Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the member states of the European Union in the course of new criminal proceedings
FD Supervision	Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member states of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention
FD Terrorism	Framework Decision of 13 June 2002 on combating terrorism (as amended by Council Framework Decision 2008/919/JHA of 28 November 2008)
FGM	Focus Group Meeting
FI	Finland
FR	France
FRA	Forum regit actum
General Approach EIO	Text agreed as general approach to the initiative for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters on 21 December 2011.
HU	Hungaria
i.e.	<i>Id est</i> it is
IE	Ireland
IMS	Issuing member state
IRCP	Institute for International Research on Criminal Policy
ISISC	International Institute of Higher Studies in Criminal Sciences
IT	Italy
JHA	Justice and Home Affairs
JIT	Joint investigation team
LRA	Locus regit actum
LT	Lithuania
LU	Luxemburg
LV	Latvia
MLA	Mutual legal assistance
MR	Mutual recognition

ABBREVIATIONS AND ACRONYMS

Abbreviations and Acronyms	
MS	Member state(s)
MT	Malta
Naples II	Convention of 18 December 1997 on mutual assistance and cooperation between customs administrations
NL	The Netherlands
OLAF	l'Office européen de lutte antifraud, European Antifraud office
OPCO	Monotoring Centre on Organised Crime
Original Eurojust Decision	Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime
par.	Paragraph
PCOC	Council of Europe's own Committee of Experts on the Operations of the European Conventions on Cooperation in criminal matters
PIF Convention	European Convention of 26 July 1995 on the protection of the financial interests of the European Communities
PL	Poland
Prum Convention	Convention of 27 May 2005 between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross border cooperation, particularly in combating terrorism, cross border crime and illegal migration
Prum Decision	Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime
PT	Portugal
Revised Eurojust Decision	Decision of 16 December 2008 on the strengthening of Eurojust and amending Decision setting up Eurojust with a view to reinforcing the fight against serious crime
RO	Romania
SE	Sweden

INTERNATIONAL COOPERATION IN CRIMINAL MATTERS

Abbreviations and Acronyms	
SIC	Convention Implementing The Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders
SK	Slovakia
SL	Slovenia
SPOC	Single Point of Contact
Swedish FD	Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member states of the European Union
TEU	Treaty on the European Union (as amended by the Lisbon Treaty)
TFEU	Treaty on the Functioning of the European Union (as amended by the Lisbon Treaty)
TREVI	Terrorisme, Radicalisme, Extremisme et Violation International
UK	United Kingdom
US	United States

## **Executive summary**

### **Rethinking international cooperation in criminal matters in the EU**

### **Moving beyond actors, bringing logic back, footed in reality**

*Gert Vermeulen, Wendy De Bondt & Charlotte Ryckman*

#### **Background to the study**

The European Commission requested a study that reviews the entirety of judicial cooperation in criminal matters in the EU and in doing so prepares the future thereof. The purpose of the Study is to provide the Commission with an independent, long-term strategic view of the future legal and institutional framework of judicial cooperation in criminal matters in the EU as well as the legal and practical adaptations necessary at the level of national criminal laws.

The project team was instructed to focus particularly on the following elements:

- Analysing the consistency of the current legal and institutional framework of judicial cooperation in criminal matters in the EU and identify areas which need consolidation and/or revision;
- Anticipating and analysing the possible consequences of future changes in the institutional framework, including the setting up of the EPPO; and
- In light of the above analysis developing recommendations as to the advisability of harmonising certain areas of criminal law and criminal procedure; where appropriate, suggest specific provisions.

A such all-encompassing study requires in-depth understanding of the development of that policy domain and consequently – as a starting point – a conceptual study concerning the entirety of the judicial cooperation in criminal matters. Taking account of the project team’s presumption that the distinction between police and judicial cooperation in criminal matters is far from justifiable, the study was perceived as a study on the future legal and institutional framework of “international cooperation in criminal matters”. In doing so, the strict focus on “judicial cooperation” and cooperation between “judicial authorities” was abandoned whereby possible misconceptions and distortions of the results are avoided.

As a result, this is the first overarching study on international cooperation in criminal matters, covering all players involved, from the judiciary over police and customs to legislator and governments; it is thus expected to be of vital importance for the development of future policy choices at the level of the European Commission.

## Methodology

The project team developed a tailor made methodological framework taking due account of the broad scope of the study and seeking to increase the internal validity of the results through methodological triangulation. Triangulation is often used to indicate that more than two methods are used in a study with a view to double (or triple) checking results. The idea is that one can be more confident with a result if different methods lead to the same result. Triangulation is a powerful technique that facilitates validation of data through cross verification from more than two sources. In particular, it refers to the application and combination of several research methodologies in the study of the same phenomenon. To ensure the best possible result, the project team has combined no less than four research techniques.

Firstly, a *desktop review* was conducted to decide on the inclusion of (1) the cooperation domains, (2) the cooperating authorities, (3) the known legal and policy inconsistencies, (4) the known practical stumbling blocks, and (5) the possible future policy options.

Secondly, the outcome of the desktop review was validated through and extensive *expert consultation* conducted via a *Delphi consultation mechanism*. A set of carefully selected experts with different backgrounds (academics, policy makers and practitioners) was asked to share their opinions both in a qualitative as well as in a quantitative manner.

Thirdly, based on the outcome of those two important methodological steps, a questionnaire was sent to the *member state representatives*. Questionnaires were not filled out by just one individual. By carefully making a distinction not only between legal, practical and political questions but also along the different cooperation domains (MLA, extradition, criminal records, cross-border execution) different national experts contributed to the filling out of the member state questionnaires.

Fourthly, as a final validation mechanism, *focus group meetings* were set up in each of the member states, bringing together national experts to gain more insight in the national situation as well as obtaining reactions on the points of view of other member states and the acceptability and feasibility of policy options.



Finally, the draft results were sent back to a *series of experts* for their final feedback to round out the *Delphi consultation mechanism*.

### **Critical recommendations to rethink the entirety of international cooperation in criminal matters in the EU**

Based on 18 months of research and the input of over 150 individuals (including academics, lawyers, policy makers, police, customs, intelligence services, prosecution, judiciary, correctional authorities, Ministries of Justice and Home Affairs), this final report was drafted and a set of critical recommendations to rethink the entirety of ‘international cooperation in criminal matters’ were formulated. The recommendations are introduced in the same sequence as the topics are dealt with in the report with a view to making it more easy to find the corresponding chapter for a more elaborate argumentation and are numbered to facilitate future referencing.

1. **Use “international cooperation in criminal matters” instead of “judicial cooperation in criminal matters”.**
  - 1.1. Considering that the distinction between police and judicial cooperation in criminal matters is not justifiable nor workable and that judicial cooperation is more than cooperation between judicial authorities, in the future the term ‘international’ rather than ‘judicial’ cooperation in criminal matters should be used;
  - 1.2. When defining the scope of debating/legislating/practicing international cooperation in criminal matters it is recommended to shift the focus from the authority involved to the aim or finality with which these authorities act. Criminal justice finality is the demarcation line which should be used – in the current EU more than ever: boundaries of the domain need to be set based on whether the authorities act with a criminal justice finality or not, meaning that actions are undertaken, aimed (not only directly) at the prevention, detection, tracing, prosecution, punishment etc of offences, execution of sentences, taking account of prior convictions; From a conceptual perspective, intelligence services should not operate with a criminal justice finality. However, in several situations they do operate with a criminal justice finality, or they at least contribute to actions carried out with such finality. Even though *as such* it is considered problematic to attribute tasks with a criminal justice finality to intelligence services, today’s reality clarifies why they cannot be fully excluded from the scope of ‘international’ cooperation in criminal matters;
  - 1.3. A choice should be made to clearly apply the relevant criminal law safeguard provisions to intelligence services when they are acting with a criminal justice finality (be it directly or indirectly);

- 1.4. It is advised to amend Art. 11, d FD Data Protection in order to stop that article from rendering the purpose limitation principle as confirmed in Art. 3, meaningless.
2. **Clarify the concept of a 'judicial authority' and the role thereof.**
  - 2.1. The previous set of recommendations should not be interpreted in a way that the type of authority becomes unimportant in all circumstances; A clear definition of what a judicial authority constitutes for the purpose of international cooperation in criminal matters must be adopted, and a functional distinction between judicial authorities *sensu stricto* and *sensu lato* should be used to delineated the role of judicial authorities in international cooperation in criminal matters. A judicial authority *sensu strict* encompasses the judicial authorities in the classic sense of the word: courts (or investigative magistrates). A judicial authority *sensu lato* can also encompass prosecution authorities;
  - 2.2. At national level there is an obvious need for the involvement of judicial authorities when coercive measures, liberty depriving measures or privacy invading measures are concerned. This does not mean, however, that judicial authorities should receive reservatory competences in a cross-border context every time such measures are concerned. Firstly, regarding the FD EAW, a 'competent authority' from the EAW is sufficient given that crucial safeguards in the process of executing the EAW apply through the national systems (as imposed by a.o. Art. 11 and 14 FD EAW). Secondly, with regards to MLA measures, even those measures involving coercive measures or breaches of privacy can be left to police authorities given that they respect the same safeguards when acting with a criminal justice finality. However, the inclusion of police authorities is only acceptable under one condition: a judicial review for the person involved should be made available. Thirdly, as to the cross-border execution of sentences involving deprivation of liberty, this will in some member states be decided upon by non-judicial authorities which is, given the complex nature of the decisions, not necessarily negative. However, here too, one condition: a legal remedy for the person involved should be made available;
  - 2.3. As to the *nature* of the bodies carrying out the judicial review it should again be stressed that the name tag they are carrying is not essential. Yet, as little as the name tag matters, as much do the procedural safeguards which are applied by those bodies; as long as they abide by criminal procedural safeguards, the nature of the authority is of minor importance;
  - 2.4. As to *in which cases* judicial review needs to be foreseen, it is applaudable that Art. 18 FD EEW contains a legal remedy possibility, which can also be found in the General Approach to the European Investigation Order (EIO). Another useful remedy provision is included in the FD Confiscation. In sharp contrast, judicial review is lacking from the FD Deprivation of Liberty. It is strongly advised to include a judicial review system therein:

the detainee should be granted a right to a judicial review of the transfer decision when he/she wants to contest the issuing member state's final decision on his/her transfer. Necessarily, this goes hand in hand with an extensive motivational obligation for the issuing member state to explain why the transfer to the executing member state is expected to enhance the social rehabilitation of the prisoner.

**3. Assess the need for a refusal ground *ratione auctoritatis***

- 3.1. There is little to no empirical evidence supporting the introduction of a refusal ground *ratione auctoritatis* in the cooperation instruments. Therefore it should be removed from the FD EEW. Rather than introducing such refusal ground throughout the instrumentarium – which involves the risk of slowing down cooperation as a whole – it is more appropriate to try and solve the problems between specific member states. The few problems experienced in relation to the authorities that were declared competent to act, appear mostly in relation to the same member states;
- 3.2. Even though not explicitly stated as a refusal ground, the *ratione auctoritatis* consideration can indirectly be found in the General Approach regarding the EIO: an EIO is to be issued by a judicial authority, or is to be validated by one. Not only is this clause unnecessary, it could even harm cooperation: first, it risks inducing costs, causing loss of time and second, it risks fuelling the distrust between member states. Consequently, it is strongly advised to remove the validation requirement from the General Approach regarding the EIO.

**4. Ensure consistency with respect to the double criminality requirement; Support the practical application thereof**

- 4.1. Double criminality should not be awarded the status of general principle in international cooperation in criminal matters. The use thereof should be carefully considered taking account of the intrusive or coercive nature of the cooperation either for the person or the member state involved;
- 4.2. Because testing the double criminality requirement is quite cumbersome, it is valid to look into alternatives and ways to facilitate the testing mechanism. A consistent EU policy lifts the test for situations for which the double criminality requirement is known to be fulfilled. Member states should not be allowed to refuse cooperation when an approximation obligation exists. Double criminality testing is redundant and counterproductive when double criminality is known to be fulfilled based on obligations originating from the approximation acquis. Therefore, it is important to see to it that member states can distinguish between cases that relate to offences for which double criminality is known to be met and cases for which double criminality may be verified.
- 4.3. To support the idea that member states must refrain from requesting cooperation for futile cases, an issuing member state must be prepared – at least in a limited set of situations – to execute the cooperation order itself.

- 4.4. Once the offence list is transformed to encompass those offence labels for which the double criminality requirement is known to be fulfilled, a debate on the use beyond double criminality issues should be started, including enhanced stringency provisions;
  - 4.5. Even though there is not a right to benefit from the protection of the double criminality shield and the person involved should not be granted the right to act against a member state cooperating beyond double criminality requirement, the opposite situation does raise questions. Member states should consider introducing only optional double criminality based refusal grounds to allow the possibility for the person involved to request not to use double criminality as a refusal ground when he considers cooperation to be in his best interest. It is not unimaginable that where double criminality is used to refuse the transfer of execution to the member state of the persons nationality, the person involved would want to request his member state of nationality not to use the refusal ground and allow transfer to that member state with a view to safeguarding the best possible rehabilitation.
- 5. Further develop horizontalisation and decentralisation**
- 5.1. It is advised to seek international cooperation in criminal matters as much as possible through decentralized channels, whilst reducing the function of central authorities to being facilitators. There is a need for a targeted assessment study in order to clearly identify the practical (financial) obstacles in each member state for which a differentiated and effective support programme could then be developed;
  - 5.2. Of the two exceptions to decentralisation, being in the field of exchange of criminal records and the transfer of sentenced persons, only the latter should remain;
  - 5.3. Awareness needs to be raised that, despite considerable support for the decentralised model, almost half of the member states still have the reflex to point at the importance of central authorities in the development of national criminal policies, meaning that despite the large support for horizontalisation the very reason for the need of such horizontalisation, being the elimination of political influence in the cooperation process, is far from achieved;
- 6. Introduce explicit proportionality clauses**
- 6.1. There is a need for more explicit proportionality clauses. It is important though to clearly regulate proportionality at the issuing end (and effectively prevent disproportionate requests). To do otherwise, would permit the executing/requested state to refuse its cooperation if it considered that the importance of the matter to which the request related did not justify taking the required measure. It is advised to step up proportionality standards by clearly legislating the limits of certain instruments – in other words to legislate proportionality by referring to

concrete offences for which an instrument can be used, rather than to refer in general terms to serious offences. When cooperation is strictly regulated, strict delimitation is necessary. Only member states are invited to cooperation as much as possible (as is done e.g. in some MLA instruments with respect to unregulated forms of cooperation), a general reference to serious offences can be considered;

- 6.2. With respect to the European Investigation Order, it be noted that Art. 5a of the General Approach regarding the EIO, containing a general proportionality clause and relied upon to justify the obligatory character towards “any investigative measure” does not suffice. It is strongly advised to re-assess the obligatory character of the EIO for *any* investigative measure as such instead of relying on the general terms of the proportionality clause to induce the necessary self-restraint;
7. **Pay more attention to the criminal liability of legal persons**
  - 7.1. It is advised to step up the debate about a general introduction of criminal liability for legal persons throughout the EU, as opposed to instrument specific measures such as Art. 9, par. 3 FD Fin Pen;
  - 7.2. In the current EU policy with respect to the liability of legal persons for offences, public legal persons are not included in the scope. Considering that a lot of member states include one or more types of public legal persons within the scope of their national liability approach, the EU can consider extending its scope accordingly;
  - 7.3. The current instrumentarium regulating the mutual recognition of sentences and governing their cross-border execution is largely focused on the sanctions typically imposed against natural persons. A comprehensive and consistent policy with respect to the liability of legal persons would need to contain instruments regulating the mutual recognition of the sanctions typically imposed against legal persons;
  - 7.4. not all member states keep (complete and comprehensive) records in relation to the liability of legal persons for offence. With a view to extending the information exchange with respect to the liability of legal persons for offences in the EU, the first step would be to introduce an obligation to keep records in order to be able to provide information upon request;
  - 7.5. Analogous to the exchange and storage obligations that have been introduced with respect to the criminal records of natural persons, similar exchange and storage obligations should be introduced with respect to the liability (criminal or other) of legal persons for offences. It would significantly facilitate the taking account of prior convictions in the course of criminal or noncriminal procedures.
8. **Carefully consider the political offence exception**

Even though it can be acknowledged that the actual use of a political offence exception would be rare in many contexts, the project team advises

against removing it altogether. It remains deplorable that it was removed from the FD EAW, especially given that 70 to 80% of the member states cling onto the political offence exception in their national legislation. On the other hand, in the context of terrorism, since 1996 it has been part of the *acquis* that political offence exception cannot play. Given that the project team strongly believes that we should resolutely take the route towards a stronger and more flexible cooperation in criminal matters, this prohibition should be maintained.

**9. Reinstall the non-discrimination exception**

A refusal on the basis of serious indications of discriminatory prosecution or treatment of a suspect in the requesting/executing member state must be possible or made possible – even though it is *de facto* being applied in practice, it needs to be reinstated *de jure* as well;

**10. Rephrase the ordre public exception**

It is recommended to narrow down and tailor the ordre public clause in all EU cooperation instruments, modelled after Art. 13, par. 1, g FD EEW. If not, it is suggested to at least consider reducing it in the sense of the Dutch-German ‘Wittem’ Convention of 30 August 1979, concluded to supplement the ECMA;

**11. Expand the ne bis in idem exception**

11.1. The *Gözütok/Brügge* jurisprudence regarding *ne bis* as formulated in Art. 54 SIC must be mirrored in the EU cooperation instruments as a mandatory refusal ground; the jurisprudence can be interpreted broadly in that *every* decision whereby further prosecution is definitively barred, regardless of whether it was made by a judge or not, should be seen as a case which has been finally disposed of or, in other words, as a final judgment;

11.2. Immunity from prosecution as a refusal ground

Granting full immunity from prosecution qualifies as a decision whereby further prosecution is definitively barred, hence in light of the jurisprudence referred to in recommendation 11.1, it is only logical that immunity from prosecution would be an (at least optional) refusal ground in all EU cooperation instruments. Considering the sensitive nature of the topic, scrutiny applied by Eurojust affecting the cross-border application of the refusal ground is recommended;

11.3. Art. 4, par. 5 FD EAW contains an optional refusal ground for final judgments issued in third countries. For reasons of consistency, it is strongly advised to at least introduce an optional refusal ground for final judgments issued in third countries throughout the instrumentarium;

11.4. Regardless of whether or not the above four recommendations are followed, the member states perceive it as an important problem that the application of *ne bis in idem* differs throughout the member states. Hence, agreement on what the principle entails in cross-border situations is long overdue;

**12. Also in the sphere of *ne bis in idem*: provide the possibility for Eurojust to maintain the overview of pending prosecutions and involve Eurojust when regulating the recognition of granted immunities.**

12.1. A first *ne bis in idem* related issue concerns the *barring effect* of a prosecution in one member state, which should entail a restriction for all other member states to start a prosecution for the same facts. In this regard, Eurojust should be given access to a potential future EPRIS (European Police Records Index System), which ideally should include a flagging system to indicate for each of the requests sent through that system, whether or not prosecution has already been started, or alternatively and following an assessment of the administrative burden, to a potential future register of pending investigations;

12.2. A second *ne bis in idem* related issue concerns the mutual recognition of a nationally granted immunity from prosecution, which does *not* entail an introduction of EU-wide immunity from prosecution criteria. Rather, *when* a member state has granted immunity, it is advised to give EU-wide effect to such immunity. Scrutiny is necessary: for those offences which qualify under a ‘strict Eurojust mandate’ it is advised to oblige member states to get the prior consent of Eurojust. Without this consent other member states would not be obliged to recognize the benefits. In turn, absence of consent does not *prohibit* the granting of national immunity from prosecution. Here too Eurojust access to EPRIS or alternatively to a register of pending investigations would be useful.

**13. Remove immunity or privilege as a refusal ground**

As the introduction of this refusal ground in the EU cooperation instrumentarium is a step backwards, removal is advised. International law arguments in its favour have been proven almost fully invalid.

**14. Remove extra-territoriality as a refusal ground in MLA contexts**

This exception has always taken a prominent place in extradition law – and rightly so – but it should not be transposed into mutual legal assistance instruments given the very different nature and purpose of extradition (surrender) and mutual legal assistance law. Hence, it should be deleted from the FD EEW. Consequently, it is deplorable that the refusal ground was retained in the General Approach on the EIO;

**15. Develop a framework for the position of the individual’s opinion with respect to transferring the execution of a sentence involving deprivation of liberty**

Given that under the FD Deprivation of Liberty in most cases the individual’s consent is not necessary for the choice of executing member state and acknowledging that the consent of the sentenced person should not necessarily be the only decisive factor, it is advised to develop clear guidelines in order to truly ensure that – as is demanded by the framework

decision – the purpose of social rehabilitation is served by the choice of member state;

**16. Dismiss suggestion to ‘mutually recognise refusal grounds’**

There is no reason nor a legal base for a refusal ground to sort effect throughout the EU. An EU-wide effect for certain concepts is possible, yet these are based on solid legal arguments and have no relation with a ‘mutual recognition’ of refusal grounds – a concept which is in itself contradictory and incorrect;

**17. Reconsider the mandatory or optional character of certain refusal grounds. Consider the possibility for the person involved to waive the right to benefit from the effect of certain refusal grounds.**

There is a need for a legal possibility to execute cooperation requests despite the existence of a refusal ground when the person concerned so requests; Therefore, it should be considered to introduce the possibility for the person involved to waive the right to benefit from the effect of certain refusal grounds. Flanking safeguards should exist showing that the person involved was well informed when indicating that he considers that invoking a refusal ground would be contrary to his interests. This can be done, for example through requiring that the wish not to invoke a refusal ground be expressed in written form, signed by the person concerned or his legal representative, certifying that the request was made on his request or with his permission and that, when signed by the suspect himself, he has been given the right to legal counsel.

**18. Take due account of the impact of cooperation on the financial capacity of member states; Install additional mechanisms.**

18.1. The basic principle that every member state bears its own costs unless agreed otherwise, should remain. Nevertheless, it is advised to install additional mechanisms.

18.2. Firstly, a cost sharing mechanism analogous to benefits sharing should be introduced; the threshold of 10.000 euro seems high, however, and it seems appropriate to negotiate a lower threshold. Secondly, the current measures for which the costs accrue entirely to the issuing member states should be extended to undercover operations and cross-border surveillance. Thirdly, the mechanism which is already in place allowing the executing member states to suggest less costly alternatives is useful and should obviously be retained.

18.3. In this context it be noted that the system introduced with the General Agreement regarding the EIO, being that investigative measures which used to be dealt with under the mutual legal assistance framework will be brought under a mutual recognition framework without any limits, in the sense that the EIO will “cover any *investigative measure with the exception of the setting up of a joint investigation team*” (emphasis added), is both unrealistic and unworkable and will induce serious capacity problems



when not accompanied by clear rules. Consequently, it is strongly advised to amend this provision.

- 18.4. Pointing to inconsistencies in the current benefit-sharing arrangements, it is mere logic that the benefit-sharing obligation should apply in any other situation as well (e.g. in the context of the FD Fin Pen).

**19. Consider the introduction of ‘*aut exequi, aut tolerare*’ to cope with operational capacity concerns**

It is advised to, in analogy to the *aut dedere aut exequi* principle, introduce an *aut exequi aut tolerare* principle. Tolerating the activity of foreign authorities on your territory is already known and widely accepted in the context of e.g. joint investigation teams. Nevertheless, the replies to the questionnaire reveal that member states are still hesitant to recognise that *acquis* and expand the practice to other forms of cooperation. Be that as it may, the debate on an idea which was put forward as far back as the Treaty of Amsterdam and is now confirmed through Art. 89 TFEU, should urgently be started.

**20. Further develop existing and introduce new correction mechanisms**

- 20.1. Trustbuilding measures are procedural law inspired limits to mutual recognition. They are in order when the scope of the mutual recognition obligation would otherwise be unacceptable for the member states. Member states are not obliged to mutually recognise decisions that do not meet the procedural minimum requirements.
- 20.2. Minimum standards ensure that the result of a member state action is acceptable and admissible in the jurisdiction of other member states.
- 20.3. Flanking measures are necessary to flank other cooperation instruments so as to ensure their good functioning. Flanking measures to ensure the social rehabilitation is an example of a correction to the FD Deprivation of Liberty.
- 20.4. A *lex mitior* principle should apply throughout international cooperation in criminal matters to ensure that the decision on the applicable law never negatively impacts on the position of the persons involved.

**21. Support and monitor the implementation processes**

- 21.1. Given that most of the EU cooperation instruments require more than a legislative adaption in the member states, during the implementation period active support should be provided from the EU to the national level; clear, efficient and swift communication should be established between the member states negotiators and the respective national authorities competent for the implementation, in order to allow thorough understanding and preparation of the required changes to the national legal order;
- 21.2. Blanko implementation should not be stimulated but on the contrary member states should be dissuaded from doing so: such implementation

- methods lead to 'blind' legislation which is not tailored to the national situation and therefore not functional;
- 21.3. Rather than opting for blanco implementation, steps need to be taken to remove any uncertainty or doubt concerning the legal instruments. Following options would prove useful, as confirmed by practitioners: the creation of an extended explanatory memorandum for every instrument; the creation of a knowledge-based department within the EU responsible for monitoring of and assisting in the implementation process, tailored after the PC-OC (Council of Europe's own Committee of Experts on the Operations of the European Conventions on Cooperation in criminal matters); non-binding model documents, tailored after the JIT model, would prove helpful for practitioners using the relevant instruments;
  - 21.4. Concerning the directives which will replace the framework decisions, it is crucial that these do not merely consist of brushed-up copies of the classic framework decisions, but actually contain relevant changes where and if needed. The recommendations done in this Study, which are built on the inconsistencies and gaps throughout the EU cooperation instrumentarium, can serve as a guideline;
  - 21.5. It is advisable to slow down the pace of legislative initiatives and decrease the amount of legislative instruments; the latter particularly with respect to legislative instruments governing the same type of cooperation and dealing with the same subject: overlapping instruments dealing with one single topic should be avoided. In the context of the European Investigation Order it is strongly recommended to include a specific article applying the repeal and replace method, not merely to related conventions as is the case in the current General Approach to the EIO, but also and especially in relation to the FD EEW. When doing so, however, (as should be done in the context of instruments currently applying the repeal and replace method) transitional measures should be included in order to avoid a legal vacuum in case the new instrument has not been implemented by the expiry date;
  - 21.6. To enhance the national operability of the cooperation instruments training efforts at EU-level (e.g. organized by the European Commission) should be stepped up, especially by organising targeted trainings in small groups of member states which cooperate often (resulting in a higher practical relevance of and fewer language problems during the trainings). At national level the awareness of and education in EU criminal law needs to be stepped up;
  - 21.7. Active use of the infringement procedures before the ECJ is recommended (when the transition period set in the TFEU has expired), provided that the member states are given the opportunity to suggest changes to the framework decisions before they are turned into directives;
  - 21.8. Real-time updates of national implementation legislations are necessary; it is unacceptable that – except for four instruments, albeit in an insufficiently

detailed manner – the responsible EU institutions (sometimes Council, sometimes Commission, sometimes both) do not offer an overview of the implementation status throughout the EU of the relevant EU legal instruments. The mere ‘implemented’ or ‘not implemented’ status is the very minimum that those institutions should communicate to the outside world as soon as the information reaches them;

**22. Regulate cross-border witness protection**

22.1. There is no need to introduce a full-on harmonised witness protection program throughout the EU, nor should it be brought within the realm of mutual recognition: member states assisting each other cannot entail member states being forced to take care of the relocation of foreign witnesses or witnesses involved in foreign cases. However, if and when the need for protection exists, a legal framework needs to be in place in order to allow member states to help each other;

22.2. It is advised to include capacity rules in the future legal framework governing witness protection. First, those costs which exist on top of police personnel costs, such as rent, accrue to the requesting state; Second, even the costs of police personnel can rise dramatically, so flexibility is advised in that regard. Different options are a threshold and/or a mechanism whereby states can raise the alarm when certain cases would indeed become unacceptably expensive: a system can be envisaged whereby Eurojust is given a supportive role in the debate as to where a person should be relocated;

**23. Introduce minimum evidence gathering standards to ensure admissibility of evidence**

*Forum regit actum* is an illusion in the quest for admissible evidence; Considering the conceptual flaws and weaknesses and the poor practice developed around it, the only way to adequately tackle admissibility issues is through the introduction of minimum standards with respect to the gathering of evidence;

**24. Fill the gaps with respect to supervision orders**

24.1. The scope of the FD Supervision should be extended to persons who are not present in the investigating member state. The latter would then be able to issue a ‘Supervision Warrant’ to the country of residence regardless of the presence of the person concerned in its territory. The person concerned would then be immediately placed under supervision in his member state of residence instead of in custody in the investigating member state. Only in doing so will the FD Supervision truly attain its objective, being to eliminate the discrimination between own and foreign nationals when it comes to pre-trial detention versus pre-trial supervision;

24.2. Within the FD Supervision as it stands today, the procedural aspects of the physical transfer of the person present in the investigating member state are not regulated. It is not clear whether an EAW should be issued for the

transfer, and if not (and it is indeed unlikely given that the “EAW-issuing state” – being the executing state within the application of the FD Supervision – would in that situation not be the state intending prosecution), which other legal base could serve for it. In order to turn the FD Supervision into a fully functional instrument, this aspect needs urgent regulation;

**25. Regulate the so-called “active transfer” of prosecution**

An ‘active transfer’-mechanism needs to be installed, i.e. a combination between a transfer of prosecution and the surrender of a person in execution of an EAW that would need to be issued by the member state taking over the prosecution. In those cases where both member states wish to keep the steps separate this should remain possible; however, a system which would allow to take both steps in one decision should at least be made available. Unnecessary additional administrative burden and loss of time would thus be avoided;

**26. Expand the scope of MLA instruments to also encompass the possibility to seek post-trial MLA**

Mutual legal assistance between member states, not in the investigative phase but in a phase in which a criminal case has already been brought to trial and has therefore been closed, is entirely unregulated at EU-level. Given the importance of post-trial MLA, for example coordinating the search for escaped prisoners, and the feedback from the member states in this regard, it is advised to step up EU action in this domain;

**27. Use EULOCS as a backbone for EU policy making**

27.1. An EU level offence classification system, visualising the clear distinction between those parts of offence labels for which criminalisation is known to be common and those parts of offence labels that are subject to national variation should be used as the backbone for EU policy making. To that end EULOCS was developed;

27.2. Cooperation can be speed up by lifting redundant double criminality verification because double criminality is known to be met based on the approximation *acquis* and allowing a double criminality based refusal would be inconsistent from an approximation perspective. EULOCS should be used to identify the relevant offences;

27.3. Cooperation could be stepped up if the request to deploy a specific investigative measure would be considered *per se* proportionate with respect to a set of offences identified *as such* in EULOCS (vice versa, it also provides insight into the offences in relation to which a cooperation request can be subject to a proportionality discussion);

27.4. It could be considered to prohibit capacity issues from being raised and/or for which an *aut exequi, aut tolerare* principle could be introduced for a set of offences identified as such in EULOCS;

- 27.5. Minimum standards with respect to the gathering of evidence (be it or not following a cross-border request) should be drawn up to ensure the admissibility of evidence at least for a set of priority offences as identified as such in EULOCS;
- 27.6. EULOCS could be used to identify a set of offences for which criminal records information exchange should be reorganised to ensure inclusion of sufficiently detailed information with a view to facilitating later use of the criminal records information;
- 27.7. The identification of the equivalent sentence could be automated to support the application of the adaptation provisions prior to the start of the execution of a foreign sentence for a set of offences identified in EULOCS;
- 27.8. EULOCS should be used as the basis for the delineation of the mandated offences of the EU level actors and thus clarify the scope of some of their tasks and competences.
- 28. European Public Prosecutor's Office – Eurojust**
- 28.1. The debate on the desirability and feasibility of a possible European Public Prosecutor's Office pursuant to Art. 86 TFEU needs to be linked to the possible elaboration of Eurojust's powers following Art. 85 TFEU. Especially in light of the recently elaborated powers of the latter and the fact that its mandate already covers offences against the financial interests of the European Union, the added value of an EPPO is highly questionable. The costs of creating a new full-on bureaucracy in the form of a European Public Prosecutor's Office are not justifiable, *a fortiori* if its role would be confined to crimes against the financial interests of the Union;
- 28.2. Regarding crimes against the financial interests of the Union, a supranational approach can only be justified in a complementary way: it should be confined to only those crimes which the member states cannot/do not want to prosecute;
- 28.3. In reply to the commonly used argument in favour of the creation of a separate EPPO, namely that a separate institution as envisaged in Art. 86 TFEU would – as opposed to Eurojust – have a hierarchical structure, it be noted that a Eurojust with strong national members and a College 'in charge' is in itself a hierarchical structure: indeed, a clear chain of command would equally be in place, the only difference with the envisaged EPPO would be that instead of one natural person, the top of the hierarchy is a college of several people;
- 28.4. The project team advises against focusing the discussion regarding a possible future EPPO on crimes against the financial interests of the Union. Rather, both for these crimes and for other crimes defined as "EU-worthy" a supranational prosecution approach should be envisaged. Eurojust's mandate should be extended: further powers should be granted for those EU-worthy offences. It be noted that fraud against the EU interests already form part of its mandate: the new description within its mandate following

the revised Eurojust Decision, being the generic term “fraud” instead of “fraud affecting the financial interests of the EU” allows for, when supranational action is taken, a comprehensive, efficient, conclusive approach of the occurring fraud;

- 28.5. Having established that Eurojust is the preferred framework for the creation of a future EPPO than an actual new, separate institution, it is advised to – for the EU-worthy offences – grant Eurojust the following new competences (as foreseen in Art. 85 TFEU): first, the competence of taking binding decisions regarding conflicts of jurisdiction, second, a power to initiate prosecution. *Automatically* granting officials within Eurojust initiating competences (as was the case under the Corpus Juris proposal) does not meet the subsidiarity principle. It is advised to give the new powers following Art. 85 TFEU an “ICC-like” complementary character: for the EU-worthy offences, Eurojust (read Eurojust College) should be able to ask the member states to initiate the prosecution and *only when* the member states would decline to do so, the actual initiating power should lie with Eurojust, more specifically with its national members: Art. 85, par. 2 TFEU states that in case Eurojust (read Eurojust College) is granted the power to initiate prosecution, “*formal acts of judicial procedure shall be carried out by the competent national officials*”;
- 29. Avoid creating new conflicts of jurisdiction; Develop a matrix of criteria and a prosecution policy linked thereto**
- 29.1. Only the jurisdiction to enforce (as opposed to the jurisdiction to prescribe) is dealt with in this Study;
- 29.2. It be remembered that the binding competence of Eurojust should only apply to those ‘EU-worthy’ offences as described in this Study. Naturally, Eurojust can continue to fulfil its advisory role with regard to the ‘non EU-worthy’ offences;
- 29.3. Finding the best place for prosecution should be done in a way that serves the proper administration of justice, meaning that jurisdiction is enforced by a particular State not necessarily because it can justify a strong contact point, but because it is in the best position to do this. In this context, it is recommended to include the concept of ‘reasonableness’ explicitly in any future instrument dealing with jurisdiction conflicts, making it into a concept which is up for interpretation by the ECJ;
- 29.4. An unambiguous and transparent directive containing the criteria which Eurojust will use when deciding needs to be drafted. The criteria should leave room for flexibility: every case should be looked at individually and circumstances of the case may influence the outcome. Without being fully predictable, the directive would need to at least step up the foreseeability of decisions in the future;
- 29.5. Concerning the content of a conflicts of jurisdiction directive, several recommendations are made: it is advised to develop a matrix of criteria, in

which each criterion is scored, for working with a hierarchical list of criteria will not lead to identifying the best place for prosecution. Next to the classical criteria (Art. 8 CoE Transfer of Proceedings), many of which are linked to the position of the perpetrator, victim-related criteria should be added, namely the state of ordinary residence or nationality or origin of the victim. Additionally, the state where the damage has occurred should be added to the list. Apart from these formal criteria, it is recommended that a 'prosecution policy' be developed: due regard should be given to less formal criteria which also impact on finding the best place for prosecution. Indeed, from the prosecution side it is crucial to take all practical and legal consequences of the choice of best place for prosecution, into account. Consequently, the outcome of such a comprehensive matrix might very well be that the member state with the least formal links, yet which scored high in terms of prosecution policy, would be deemed the best place to prosecute. An additional advantage is that it would make the decision more 'verifiable', a necessity for the proper functioning of the motivation obligation and potential judicial review possibilities (cfr. recommendation 29.6);

29.6. Means of judicial review should be installed if Eurojust were to receive a binding competence to decide on the best place for prosecution. The different identified options are: preliminary questions, both by Eurojust (if it would be qualified as a 'court' for the purpose of Art. 267 TFEU) and by national courts, competence for national level courts to rule on actions brought by individuals challenging the latter's decision, and finally remedies before the European Court of Human Rights and the International Court of Justice. Such review possibilities would go hand in hand with an extensive motivation obligation for Eurojust;

**30. Develop instruments governing the EU wide effects of disqualifications as a sanction measure**

30.1. It is advised to step up the debate about a general approach with respect to disqualifications as a sanction measure throughout the EU;

A set of policy options should be explored. First, the possibility should be explored to allow an authority to impose a disqualification that has a territorial application that encompasses the entire European Union. Second, the possibility should be explored to introduce the principle of mutual recognition with respect to disqualifications as a sanction measure. Third, the possibility should be explored to introduce the obligation to at least attach equivalent disqualifying effects to a foreign conviction.





# 1 Introduction and methodology

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## 1.1 Background to the study

The European Commission has requested a study that reviews the entirety of judicial cooperation in criminal matters in the EU and prepares the future thereof. A such study requires in-depth understanding of the development of that policy domain and consequently – as a starting point – a conceptual study concerning the entirety of the judicial cooperation in criminal matters. Judicial cooperation has not always been an EU competence. The following paragraphs aim at contextualizing the origin of judicial cooperation in criminal matters as an EU policy domain and its close relation to police cooperation in criminal matters.

The elimination of borders and the subsequent elimination of border controls sparked member state awareness of the need to work closely together in order to tackle cross-border crime. Flanking measures were needed with regard to police and judicial cooperation in criminal matters.<sup>1</sup> Nevertheless, member states remained reluctant to work together. At the time of the creation of the European Community and its internal market, primary focus went to the economic development of Europe. The possible effects of such an internal market on the prevalence and evolution of crime did not receive much attention, neither did the potential problems caused by the differences in national legislation. In the fields of security, policing and justice, member states continued to work independently.

When the European Community developed into the European Union, this changed. With the 1992 Maastricht Treaty<sup>2</sup>, the member states took an important step by incorporating *Justice and Home Affairs* into the European institutional framework. Art. K.1 of the Maastricht Treaty, clarified what constituted JHA at that time: for the purpose of achieving the objectives of the Union – in particular the free movement of persons – member states regarded the following areas as *matters of common interest*:

- (1) *asylum policy;*
- (2) *rules governing the crossing by persons of the external borders of the member states and the exercise of controls thereon;*
- (3) *immigration policy and policy regarding nationals of third countries;*
- (4) *combating drug addiction in so far as this is not covered by (7) to (9);*

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<sup>1</sup> SWART, A. H. J. Een ware Europese Rechtsruimte. Rede uitgesproken bij de aanvaarding van het ambt van bijzonder hoogleraar in de Europese strafrechtelijke samenwerking aan de Universiteit van Amsterdam op vrijdag 9 maart 2001. Deventer, Gouda Quint, 2001, 34p

<sup>2</sup> OJ C 191 of 29.7.1992

- (5) *combating fraud on an international scale in so far as this is not covered by (7) to (9);*
- (6) *judicial cooperation in civil matters;*
- (7) *judicial cooperation in criminal matters;*
- (8) *customs cooperation;*
- (9) *police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime, including if necessary certain aspects of customs cooperation, in connection with the organization of a Union-wide system for exchanging information within a European Police Office (hereafter Europol).*

This is the first time police and judicial cooperation in criminal matters appear in EU treaties. Even where Art. K1 listed areas of common interests, it constituted only a small step forward, as no clear objectives were set. It was not until the entry into force of the 1997 Amsterdam Treaty,<sup>3</sup> that the pillars were reshuffled and the policy areas concerned elaborated on more in-depth. Some of the JHA policy areas were shifted to the supranational first pillar and the slimmed down version of the third pillar was renamed accordingly into “police and judicial cooperation in criminal matters”. This persistent combination of police and judicial cooperation in criminal matters, turned out to be a decisive element for the scoping of this Study.<sup>4</sup> The Amsterdam Treaty introduced the *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.<sup>5</sup> Police and judicial cooperation in criminal matters are the means to accomplish the goal of creating an area of freedom, security and justice. The development of these policy areas gained momentum after the Tampere European Council, the first European Council entirely dedicated to justice and home affairs at which mutual recognition was presented as the cornerstone of judicial cooperation.<sup>6</sup> Even though it has been cited at countless occasions, the

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<sup>3</sup> EUROPEAN COUNCIL "Treaty of Amsterdam signed on 2 November 1997." OJ C 340 of 10.11.1997 1997.

<sup>4</sup> See also previously in DE BONDT W. and VERMEULEN G. "Appreciating Approximation. Using common offence concepts to facilitate police and judicial cooperation in the EU", in M COOLS et al, *Readings On Criminal Justice, Criminal Law & Policing*, Maklu, Antwerpen-Apeldoorn, 2010, 15-40.

<sup>5</sup> Art. 2 TEU, OJ C 325 of 24.12.2002.

<sup>6</sup> In the past, the project team has pointed several times to the inconsistency that rises from the introduction of mutual recognition as the cornerstone of judicial cooperation only, excluding the application thereof in the field of police cooperation. There is not a single good reason not to introduce mutual recognition in less far reaching forms of cooperation such as police and customs cooperation, when it is accepted in more far reaching forms of cooperation such as judicial cooperation. Even more fundamentally, introducing mutual recognition in judicial cooperation only, presupposes that a clear line can be drawn between police, customs and

importance of paragraph 33 of the Tampere Presidency conclusions, justify it being cited once more:

*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. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities<sup>7</sup>.*

Based on the Tampere Presidency conclusions and The Hague Programme, a significant number of legal instruments on judicial cooperation in criminal matters in the EU, have been adopted over the past 10 years. Many of the recent instruments address judicial cooperation from that mutual recognition perspective, and subsequent cross-border execution of individual judicial decisions related to various aspects of criminal proceedings (taking of evidence, freezing of assets, arresting suspects, executing financial, alternative or custodial sentences). By applying the method of mutual recognition to judicial cooperation and enabling direct judicial contacts, these instruments seek to speed up, and ultimately replace, the traditional regime of intergovernmental cooperation. However, it soon became clear that this new legal framework has far from achieved its objectives. Problems of legal transposition, practical application and consistency have been highlighted at several occasions.

Besides adopting a legal framework for judicial cooperation in criminal matters (to complement the existing CoE framework), the European Union has set up various institutions to facilitate cooperation and coordination, in particular through liaison magistrates, the European Judicial Network in Criminal Matters (EJN) and its contact points, as well as Eurojust. Like the EU's legal framework, these institutions evolve over time, are granted additional powers and are entrusted with ever increasing tasks of coordinating national prosecutions. The recent reform of Eurojust and the EJN clearly show this trend. The new legal framework due to the coming into force of the Lisbon Treaty clarifies what is now understood as judicial cooperation more profoundly. The entire chapter 4 is dedicated to judicial cooperation in criminal matters; these treaty provisions will have a vital place in the project. Further institutional developments are foreseen by the Lisbon Treaty, including additional powers

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judicial cooperation. Analysis revealed that this is currently not the case. This unjustified distinction in the development of police as opposed to judicial cooperation in criminal matters was an important aspect to the decision of the project team to again assess the justifiability of that distinction in the context of this new study.

<sup>7</sup> EUROPEAN COUNCIL, Presidency Conclusions, Tampere, 16-17 October 1999, par. 33.

for Eurojust and the possible setting up of the European Public Prosecutor's Office (EPPO) from Eurojust.

Both the current EU legal framework and the future possibilities of evolution require adaptations of national legislation, without actually seeking to harmonise – although with some exceptions – substantive or procedural criminal law in the member states. While the philosophy of mutual recognition and the currently applicable legislative procedure in the 3rd pillar do not favour extensive harmonisation of laws, debate on further approximation will become necessary in light of the increasing interdependence between national legal systems and future changes in the institutional framework, such as the setting up of an EPPO.

## 1.2 Purpose of the study

The purpose of the Study is to provide the Commission with an independent, long-term strategic view of the future legal and institutional framework of judicial cooperation in criminal matters in the EU as well as the legal and practical adaptations necessary at the level of national criminal laws.<sup>8</sup> Taking account of the project team's presumption that the distinction between police and judicial cooperation in criminal matters is far from justifiable, the study was perceived as a study on the future legal and institutional framework of "international cooperation in criminal matters". In doing so, the strict focus on "judicial cooperation" and cooperation between "judicial authorities" was abandoned whereby possible misconceptions and distortions of the results are avoided.

This is the first *overarching* study on international cooperation in criminal matters, covering all players involved, from the judiciary over police and customs to legislator and governments; it will thus be of vital importance for the development of future policy choices at the level of the European Commission.

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<sup>8</sup> European Commission, Open invitation to tender JLS/2009/JPEN/PR/0028/E4 – Study on the future institutional and legal framework of judicial cooperation in criminal matters in the EU.

The project team was instructed to focus particularly on the following elements:

- Analysing the consistency of the current legal and institutional framework of judicial cooperation in criminal matters in the EU and identify areas which need consolidation and/or revision;
- Anticipating and analysing the possible consequences of future changes in the institutional framework, including the setting up of the EPPO;
- In light of the above analysis developing recommendations as to the advisability of harmonising certain areas of criminal law and criminal procedure; where appropriate, suggest specific provisions.

Considering the vast scope of the project and the considerable amount of work to be done, the project team has phased the project and divided the work into a series of work packages, that were kept as inter-independent as possible.

- WP 1 – Design of the methodological framework
- WP 2 – EU level analysis
- WP 3 – MS level analysis
- WP 4 – Integration of results

The following paragraphs aim at summarising the different steps taken in each of these four work packages.

## **1.3 Design of the methodological framework**

### **1.3.1 *Methodological triangulation***

The first work package consisted of the design of the methodological framework. Legal research is defined as the process of identifying and retrieving information that is required for supporting legal decision-making. There is no standard recipe to conduct legal research. To the contrary, there are many different approaches to doing legal research and there is no hard and fast rule to be followed while doing legal research.

The project team has developed its own general approach seeking to increase the internal validity of the results through methodological triangulation. Triangulation is often used to indicate that more than two methods are used in a study with a view to double (or triple) checking results. The idea is that one can be more confident with a result if different methods lead to the same result. If a researcher uses only one method, the temptation is strong to believe in the findings. If a researcher uses two methods, the results may well clash. By using three methods to get at the answer to one question, the hope is that two of the three will produce similar answers, or if three clashing answers are produced,

the researcher knows that the question needs to be rephrased, methods reconsidered, or both. Triangulation is a powerful technique that facilitates validation of data through cross verification from more than two sources. In particular, it refers to the application and combination of several research methodologies in the study of the same phenomenon. To ensure the best possible result, the project team has combined no less than four research techniques.

A desktop review was combined not only with extensive expert consultation via a Delphi mechanism, but also with both qualitative and quantitative questionnaires sent to the member state representatives. As a final validation mechanism, focus group meetings were set up in each of the member states, bringing together national experts to gain more insight in the national situation as well as obtaining reactions on the points of view of other member states and the acceptability and feasibility of policy options. Finally, the draft results were sent back to a series of experts for their final feedback to round out the expert consultation technique.

### *1.3.2 Combining different perspectives*

The methodological triangulation is further strengthened by the combination of different perspectives in each of the different methodological techniques. There is a two layered structure in the methodological approach to ensure the combination of different perspectives.

First, the designing of the methodology took both the EU level as well as the MS level perspective into account. Before engaging in an in-depth analysis of the member state perspective, it is important to thoroughly assess the entirety of international cooperation in criminal matters from an EU level perspective.

Second, it was deemed important to include, both in the EU level and MS level perspective, the ideas from people with different backgrounds. It is important to not only include academic views into the study, but include practitioners from all stages in the criminal justice chain, both from the law enforcement as well as from the defence side, policy makers and academics.

## **1.4 EU-level Analysis**

The second work package consisted of the EU level analysis and had the objective of providing a high level input to prepare the member state consultation. Within this phase of the study, the project team has identified and carried out following Work Packages:

- Work Package 2.1 – Identification of Experts
- Work Package 2.2 – Desktop review
- Work Package 2.3 – Expert Consultation via Delphi Method
- Work Package 2.4 – Establishment Policy Options for further analysis

The objective of the Expert Consultation round was to provide high level input to prepare the member state consultation, in combination with the previous Desktop Research. This analysis was conducted following the so-called Delphi method, which ensures a systematic, interactive data collection which captures the vision of the members of a divers expert group.

#### ***1.4.1 Diversity of the respondent group***

First, an expert group was composed. The project team was able to draw on an extensive network of contacts and on its experience from several studies conducted in the past. The selection of experts participating in the Delphi rounds was a very important milestone in the study. It was agreed with the European Commission to not only include academics in the group, but also include experts with a practitioner background (national or in EU bodies) participating in personal capacity. Because this consultation round was crucial to provide input for the member state consultation round, it was not required to have a balanced member state representation in the expert group.

#### ***1.4.2 Desktop review***

Second, a preparatory desktop review was conducted with a twofold objective. Firstly, it aimed at updating the existing in-house knowledge and in doing so obtaining a more complete and updated understanding of cooperation in criminal matters in the European Union. Secondly, it served as the basis for the development of the initial position of the project team with respect to possible policy recommendations to be tested throughout the study.

The research team has started by gathering relevant information on judicial cooperation in criminal matters. To do so, the team has combined gathering the existing in-house knowledge on the phenomena, and extensively reviewing the existing instruments, regulations and guidelines at EU level and Council of Europe level, with a thorough study of the literature and the information available on the internet.

It should be noted however, that despite the research team's best efforts, the entirety of the literature cannot in its entirety be filtered for documents that can be relevant for the study. Therefore, a selection of the existing literature to be considered has been made.

The following table shows which legal instruments have been analysed throughout the study. During the desktop research, the legislative evolution was tracked for every instrument, providing the project team with a clear understanding of the ratio legis of every single instrument. Fundamental aspects such as the implementation deadline, entry into force, field of application, the measure of overlap with other instruments etc. were established. To reduce the complexity of the formulation of the questions, the project team decided to use

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abbreviated references to legal instruments. The table inserted below provides an overview of those abbreviations and the full official name of the instruments.

Abbreviations of legal instruments	
CIS Convention	Convention of 26 July 1995 on the use of information technology for customs purposes
CoE Conditional sentence	European Convention of 30 November 1964 on the supervision of conditionally sentenced or conditionally released offenders
CoE ECMA	European Convention of 20 April 1959 on mutual assistance in criminal matters
CoE Extradition	European Convention of 13 December 1957 on extradition
CoE Transfer Proceedings	European Convention of 15 May 1972 on the transfer of proceedings in criminal matters
CoE Validity	European Convention of 28 May 1970 on the international validity of criminal judgments
CoE Transfer Prisoners	European Convention of 21 March 1983 on the Transfer of Prisoners
CoE Confiscation	European Convention of 8 November 1990 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime
ECRIS Decision	Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA
EU MLA	Convention of 29 May 2000 on mutual assistance in criminal matters between the Member states of the European Union
EU MLA Protocol	Protocol of 16 October 2001 to the Convention on mutual assistance in criminal Matters between the Member states of the European Union
Europol Decision	Council Decision of 6 April 2009 establishing the European Police Office
EU Extradition	Convention drawn up on the basis of Article K.3 of the Treaty on European Union, relating to extradition between the Member States of the European Union
FD Alternative	Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation



Abbreviations of legal instruments	
	decisions with a view to the supervision of probation measures and alternative sanctions
FD Confiscation	Council Framework Decision of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders
FD Crim Records	Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member states
FD Data Protection	Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters
FD Deprivation of Liberty	Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union
FD EAW	Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member states
FD EEW	Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters
FD Fin Pen	Council Framework Decision of 24 February 2005 on the application of the principle of mutual recognition to financial penalties
FD Freezing	Framework Decision of 22 July 2003 on the execution in the European Union of orders freezing property or evidence
FD In Absentia	Framework Decision of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial
FD Jurisdiction	Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of

Abbreviations of legal instruments	
	conflicts of exercise of jurisdiction in criminal proceedings
FD Money Laundering	Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime
FD Organised Crime	Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime
FD Prior convictions	Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the member states of the European Union in the course of new criminal proceedings
FD Supervision	Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member states of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention
FD Terrorism	Framework Decision of 13 June 2002 on combating terrorism (as amended by Council Framework Decision 2008/919/JHA of 28 November 2008)
Naples II	Convention of 18 December 1997 on mutual assistance and cooperation between customs administrations
Original Eurojust Decision	Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime
PIF Convention	European Convention of 26 July 1995 on the protection of the financial interests of the European Communities
Prum Convention	Convention of 27 May 2005 between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross border cooperation, particularly in combating terrorism, cross border crime and illegal migration
Prum Decision	Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-

Abbreviations of legal instruments	
	border crime
Revised Eurojust Decision	Decision of 16 December 2008 on the strengthening of Eurojust and amending Decision setting up Eurojust with a view to reinforcing the fight against serious crime
SIC	Convention Implementing The Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders
Swedish FD	Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member states of the European Union

#### 1.4.3 *Delphi method inspired questionnaire*

Third, following the desk top review, the project team deepened its understanding of the difficulties, lacunae and challenges in this policy field through an expert consultation which aimed at helping the project team to determine which future policy options were eligible for further consideration.

After the development of the questionnaires and the selection of experts the so-called Delphi expert rounds started.

Two rounds of online questionnaires have been conducted. The collection of feedback on the first online questionnaire was concluded on 5 November 2010. During the analysis of the results the team has had contact with some of the experts for further clarification. The collection of feedback on the first online questionnaire was concluded on 31 December 2010. During the analysis of the results the team has had contact with some of the experts for further clarification.

In the first Delphi Round, open questions of a general character were presented to the experts, in order to obtain a clear overview of which topics within judicial cooperation that deserved in-depth consideration. Based on the replies of the experts, a first explicit position on the several domains was taken. This position was tested during a follow up meeting with the European Commission. Following the feedback by the European Commission concerning the first Delphi Expert Round, a second questionnaire was developed in which different visions and perspectives which surfaced in Round 1 were tested and elaborated on and in which more tangible and in-depth issues were dealt with. The project team had developed a more detailed argumentation which has been

tested via multiple choice questions. However, considering that in this phase of the study it was still important to maintain an open mind, experts were encouraged to comment on the formulation of the multiple choice questions and the predefined answering categories. Both questionnaires used in the Delphi rounds are annexed to this report.

#### ***1.4.4 Development of initial future policy options***

Fourth, based on the feedback of the experts in the second Delphi Expert Round a Progress Report was drafted and presented to the European Commission. Expert responses referred to valid concerns on how to deal with the differences between the criminal justice systems of the member states, mainly concerning the applicable law, applicable legal principles and capacity issues. Clear delimitation of which cooperation domains need to be distinguished and among those – which cooperation domains should be examined in the framework of this study:

- Domain 1 - Mutual legal assistance
- Domain 2 - Transfer of pre-trial supervision
- Domain 3 - Extradition and surrender
- Domain 4 - Exchange of criminal records
- Domain 5 - Relocation and protection of witnesses
- Domain 6 - Transfer of prosecution
- Domain 7 - International validity of judgements and disqualifications

Based on the initial policy options which were up for consideration following the desktop research and the feedback from both Delphi Experts Rounds, different policy options were established and ready to be tested for acceptability and feasibility during the member states level analysis.

## 1.5 MS level analysis

The third work package and the main part of the study consists of the MS level analysis, which aims at collecting information on the implementation, functioning and future policy options with respect to the current body of judicial cooperation instruments.

Within this phase of the study, the project team has identified and carried out following Work Packages:

- Work Package 3.1 – Building a SPOC Network
- Work Package 3.2 – Building of the Questionnaire
- Work Package 3.3 – Focus Group Meetings

### 1.5.1 *Building a SPOC Network*

Within each of the member states, a single point of contact (SPOC) was nominated. The SPOCs were in charge of making contact with the relevant stakeholders in their country as well as collecting and providing the relevant information for the analysis to the project team.

The input of the SPOCs is crucial to ensure the quality of the outcome of the Study to convince the most qualified individuals in their country to invest time in helping to respond to questionnaires.

The SPOC are familiar with the academic and practical status of and challenges at hand concerning the liability of legal persons for offences in his country of origin. At the kick-off meeting with the European Commission it was agreed to not only include policy makers and academics in the expert group, but also include experts with a practitioner background (national or in EU bodies) participating in personal capacity. This way, the project team can appoint the most appropriate expert in each member state to supplement the already collected information where necessary.

The project team highly appreciates the valuable contributions of the following SPOCs.

Single Points of Contact		
MS	Name	Function
AT	Verena Murschetz	Professor
BE	Erik Verbert	Ministry of Justice
BU	Galina Zaharova	Supreme Judicial Council
CY	Kate Andreou	Ministry of Justice
CZ	Pavel Zeman	Attorney General
DE	Joachim Vogel	Professor
DK	Helga Lund Laursen	Ministry of Justice

Single Points of Contact		
MS	Name	Function
EE	Jaan Ginter	Professor
EL	Gorgios Triantafyllou	Professor
ES	Jose Luis De la Cuesta	Professor
FI	Raimo Lahti	Professor
FR	Henri Labayle	Professor
HU	Andrea Kenez	Judge
IE	John Jackson	Professor
IT	Giovanni Pasqua	PhD – previous director ISISC
LT	Gintaras Svedas	Professor
LU	Jeannot Nies	Advocate General
LV	Elina Gatere	Ministry of Justice
MT	Ivan Sammut	Professor
NL	Marjorie Bonn	Ministry of Justice
PL	Adam Gorski	PhD
PT	Anabela Rodrigues	Professor
RO	Mariana Zainea	Ministry of Justice
SE	Christoffer Wong	Professor
SK	Lydia Tobiasova	JUDr., PhD
SL	Nina Peršak	PhD
UK	Valsamis Mitsilegas	Professor

### 1.5.2 Building of the Questionnaire

Online questionnaires were sent to each of the member states in February 2011 as the preparation for the member state visits carried out in April, May and June 2011. A copy of the questionnaire is annexed to this report.

The building of and the replies to the questionnaire can be considered as the core of the project. The reason for this is twofold:

On the one hand, the questionnaire reflects all the academic and empirical research which has been conducted in the first two work packages of the project. Indeed, as outlined above, the desktop research and the resulting Delphi expert rounds at EU-level, combined with the outcome and analysis of those expert round, formed the foundation for the building of the member states questionnaire.

On the other hand, the questionnaire reflects what has traditionally proven to be the most difficult aspect of EU policy-making. The question arises as to how an efficient policy is to be assured while respecting the different traditions and legal systems of all member states. In order to obtain a conclusive answer to that question, the questionnaire is built following a clear structure, both in terms of the fields covered by the different questions and in terms of types of questions.

The latter runs parallel to the kind of profile of interviewees targeted the particular questions.

Regarding the fields covered by the questions, the project team has systematically specified which of the seven cooperation domains – developed in the previous stages of the desktop research and the Delphi expert rounds – corresponds to the particular questions. This method assured that the respondents could easily identify which questions qualified as their field of expertise; in turn assuring high quality responses. The aim was to cover all relevant domains of cooperation in criminal matters; this reflects the unique character of this study: it aims to obtain an overall yet detailed helicopter review of this entire policy field.

Regarding the types of questions, three different kinds are used throughout the questionnaire:

- The first type concerns implementation questions. The project team has gone through all EU instruments in order to establish where member states have discretionary power and has framed its questions accordingly. Those instruments of which implementation is known to be problematic have also been scrutinized, e.g. constitutional issues regarding the MR-32 offences.
- The second type are practical questions: from both the perspective of the issuing/requesting and the executing/requested member state, it is reviewed how the different EU instruments work in practice in the different member states. The double perspective causes reflection on both sides of the required cooperation and it prevents that the replies are given in a ‘socially acceptable’ manner. Methodology-wise, if you ask an issuing member state for example what its experiences are with execution, a more objective and more neutral result will be achieved than if you would only pose questions about their own execution (and vice versa).
- The third type of questions concerns policy questions. Based on the initial policy options which were up for consideration following the desktop research and the feedback from both Delphi Experts Rounds, different policy options were established. This was reiterated in the member states questionnaire and for every different policy options, the respondents were given the opportunity to, depending on how detailed the policy options were framed:
  - Indicate whether or not they deem the consideration of certain options useful;
  - Comment on why they do not deem the consideration of certain options useful;
  - Indicate whether or not they agree with specific proposed policy options; and
  - Comment on why they disagree with specific proposed policy options.

As indicated above, the different types of questions run parallel with the profile of the targeted interviewees. The project team has thus worked with academics, practitioners and policy makers. Additionally, because of the envisaged helicopter view covering different domains, the different respondents have different backgrounds; it varies from legislators and academics, over members of the police corps, prosecution, customs, ministries of justice to judges and policy makers.

User-friendliness of the questionnaire has been guaranteed by using different icons for the three different types of questions and by the numbers indicating which field was covered by which questions.

The completion of the questionnaire has happened online, after the spocs and through them the respondents were provided with a login-name and password. The online method has several qualities, which brings with it that the replies are as correct and realistic as possible:

- User-friendliness; no postal mail required
- Avoidance of mistakes by including functionalities, guaranteed anonymity of the respondents through the usage of only one login-name, automatic and thus accurate processing of the answers.

Apart from anonymity for the respondents, in this final report there is also no country-specific empirical evidence: along with the processing of the final results of the questionnaires, no country-specific information has been withheld. The only time a particular standpoint from a named member state will be mentioned, is when it concerns a public standpoint, openly issue by the member state before.

### **1.5.3 Focus Group Meetings**

During late Spring – early Summer 2011 the project team has travelled to every single member state for the purpose of the focus group meetings [FGM], consisting of at least one member of the project team, the SPOC (except for in Italy and Spain where only experts were present), the primary (or all) respondents to the questionnaire, sometimes completed by additional field experts. It be noted that in Denmark and France no focus group meeting was held, for the national members were not convinced of the added value thereof, either for the study or for their own national practice.

The FGM served as the validation mechanism of the individual member state replies and created the opportunity to comment on the position of the individual member state with respect to the pther member states. Therefore, the replies to the questionnaire served as a preparation for the FGMs: the replies have been filtered from the online system per member state prior to every meeting, in order to allow the team to conduct an initial analysis. The agenda of the meeting was then constructed based on the apparent need for elaboration and clarification following these analyses.



The meetings have clearly proven to be useful, both for the project and for the member states:

- The FGMs have brought together actors from several (if not all in many cases) different segments of criminal policy within the specific member state. All too often, these people had not yet had any direct deliberation on ways to enhance the efficiency of cooperation (both national and international);
- Both the SPOC and the respondents indicated to feel more involved in the project due to the FGMs;
- The project team became more accessible, became less of a remote abstract research group; this increased the level of actual discussion;
- The FGMs raised awareness of the importance of this project (if less significant less logical to do all the travel and to cover the costs of the latter);
- The FGMs provided the respondents to nuance their standpoints;
- Country-specific concerns were treated;
- The project team was enabled to ask for clarification and to treat those issues it considers vital in more detail;
- The FGMs allowed to provide the spocs and respondents with an early short feedback; and
- Best-practice sharing became possible.

At the request of the SPOCs, answers of the member states were open for amendment during a set period of time after the FGMs.

The project team highly appreciates the valuable contributions of the additional national experts included in the table below. Please note that a number of experts wished to remain anonymous and are therefore not included in the table.

National Experts involved with completion of qst and/or present at the FGM		
MS	Name	Function
AT	Konrad Kmetec	Public Prosecutor's Office – EJN
	Johannes Martetschlaeger	Federal Ministry of Justice – EJN
BE	Erik Verbert	Ministry of Justice
BU	Galina Toneva	Supreme Cassation Prosecutor's Office
	Pavlina Panova	Supreme Court of Cassation
CY	Elli Morfaki	Ministry of Justice
	Maria Mounti	Ministry of Justice
	Panayiotis Kountoureshis	Ministry of Justice
	Loizos Hadjivasiliou	Public Order Sector
	Maria Kyrmizi	MOKAS
	Marios Ayiotis	Police

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National Experts involved with completion of qst and/or present at the FGM		
MS	Name	Function
	E. Koutsofti	Police
	Sylvia Efthymiadou	Police
	Marianna Hadjimichael	Police
	Mari Charalambous Cleriotou	Customs
	Christos Christou	Customs
	Christos Kotziapashi	Customs
	Constantinos Georgiades	Commissioner on data protection
	Noni Avraam	Commissioner on data protection
	Demetris H'Demetriou	Central Intelligence Service
CZ	Premysl Polak	Supreme Public Prosecutor's Office
DE	Oliver Kipper	Judge
	Christoph Kalkschmid	Public Prosecution
	Margrit Brazel	Attorney-at-law
	Christoph Burchard	Phd – Assistant professor
	Till Gut	-
DK	No focus group meeting	-
EE	Astrid Laurendt-Hanioja	Ministry of Justice
	Kristiina Aavik	Ministry of Justice
	Eve Olesk	Public Prosecutor's Office
EL	Spyros Karanikolas	PhD
	Dimitrios Zimianitis	Public Prosecutor's Office
	Ioannis Androulakis	Ministry of Justice
ES	Isidoro Blanco	Professor
	Jorge Espina	General Prosector's Office
	Jose Antonio Puebla	Interpol
	Francisco Ruiz	Interpol
FI	Karri Toltila	PhD Student
	Tuuli Eerolainen	Prosecutor General's Office
	Raija Toiviainen	Prosecutor General's Office
	Taina Neira	National Bureau of Investigation
	Merja Norros	Ministry of Justice
	Katariina Jahkola	Ministry of Justice
FR	No focus group meeting	-
HU	Maria Rahoi	Public Prosecutor's Office
IE	Noel Rubotham	Courts Service
	Dermot Walsch	Professor
	Robert Sheehan	Eurojust
	Dave Fennell	Ministry of Justice

National Experts involved with completion of qst and/or present at the FGM		
MS	Name	Function
	James Mac Guire	Law society
	Fergus Healy	An Garda Siochana
	John Omahony	An Garda Siochana
IT	Lorenzo Salazar	Ministry of Justice
	Alessandro Di Taranto	Ministry of Justice
	Barbara Chiari	Ministry of Justice
LT	Andrada Bavejan	Ministry of Justice
	Rolandas Tilindis	Prosecutor General Office
LU	Jeannot Nies	Advocate General
LV	Kaspars Abolins	Ministry of Interior
	Baiba Jugane	Ministry of Justice
	Sarmite Klementjeva	Ministry of Interior
	Raimonds Kokarevics	Ministry of Interior
	Jurgis Kijoneks	Financ. Police Depart., State Revenue Service
	Edgars Strautmanis	State Police
	Una Brenca	General Prosecutor's Office
MT	Ivan Sammut	Professor
NL	Lisette Vos	Prosecutor's Office
	Derek Lugtenberg	Prosecutor's Office
	Marieke Meinderts	Central collection agency
PL	Aleksandra Soitysin'ska	Judge
PT	Nuno Picarra	Professor
	Francisco Borges	PhD student
RO	Florin Radu	Ministry of Justice
	Simon Raluca	Ministry of Justice
	Gorunesu Mirela	Police Academy
	Sandru Mihai	Romanian Academy
SE	Christoffer Wong	Professor
SK	Dagmar Fillova	Ministry of Justice
	Radovan Blazek	PhD, Assistant Professor
	Marek Kordik	PhD, Attorney, Assistant Professor
SL	Three experts – wishing to remain anonymous	
UK	Sara Khan	Home Office
	Harriet Nowell-Smith	Ministry of Justice

## 1.6 Integration of results

The fourth and final work package consisted of analysing and integrating the results of the Study. As agreed prior to the start of the member state consultation, the project team did not retain any country-specific information from the member states, but drew an analysis on the total of information. Findings and recommendations were listed based on this analysis.

To integrate the results and draw up a structure and table of content for the final report, the project team had to take a step back and reconsider the background and purpose of the study. The task to study the legal and institutional future of judicial cooperation in criminal matters in the EU implies a complex and demanding analysis, yet it provided the unique opportunity to look at the entirety of this field of EU-law, instead of the traditionally fragmented and instrument-specific way of studying it.

First, the study had to give enough attention to the scope of the task, in order to clearly delineate the boundaries of the study. It soon became clear that the concept of “judicial cooperation” is far from self-explanatory. Rephrasing it as “cooperation between judicial authorities” does not adequately capture the current *acquis* in international cooperation, in which non-judicial authorities also have an important role to play. All experts agree that police, customs and central authorities are also involved in specific forms of cooperation. Therefore, the project team rephrased the task to studying ‘international cooperation in criminal matters’, significantly broadening the initial assignment. As a result, the integration of the results first focussed on the scope of the study and the recommendations with respect to the terminological and conceptual approach to the future of policy making in the field of international cooperation in criminal matters.

Second, the comments and recommendations with respect to a series of general cooperation principles were clustered, such as (lack of) double criminality, horizontalisation and the concept ‘stringency of cooperation’. The latter requires the studying of crucial concepts in the cooperation mechanisms, being the concept of consent, all the different refusal grounds and postponement grounds, the application of deadlines and the increasingly important capacity concerns. The last cluster of general principles is the section on correction mechanisms, which have been structured in an academically and practically relevant way.

Third, after discussing those concepts which were defined as general principles, the report goes on to consider several individual cooperation specific issues. They need to be contrasted with the following part of the study: the part on “EU-specific issues”. The first issue dealt with in that part is the issue of a possible European Prosecutor’s Office and, closely intertwined, the need for an elaboration of Eurojust’s powers is discussed. After this, the project team goes on to consider issues with an “EU-wide effect”: besides the possibility of the EU the

regulated the rules and procedures to be followed in a cross-border situation, it is clear that there are always mirroring concerns that are detached from any form of cooperation. Regulating situations with a cross-border element immediately raises questions as to the impact this could or even should have on similar mere domestic situations. Based on the results from a literature review and the concerns raised during the Study, the project team has decided to single out 4 case studies in this respect. First, mirroring the concerns and recommendations raised in the cooperation specific part with respect to the mutual admissibility of evidence gathered abroad following a cooperation request, the project team has reviewed the difficulties linked to cross-border admissibility of evidence gathered in a mere domestic context. The question is raised whether the EU is competent to interfere with evidence gathering that takes place outside a cooperation context. The second issue with “EU-wide effect”, mirroring the concerns and recommendations raised in the part on refusal grounds, examines the need for a an effect given throughout the Union to the immunity from prosecution granted to a person by one member state. Thirdly, again mirroring the concerns and recommendations raised in the part on refusal grounds, the mutual understanding of *ne bis in idem* was considered. In accordance with the Programme of Measures<sup>9</sup> adopted twelve years ago, the project team discusses whether decisions to prosecute taken by one member state should create a barring effect throughout the Union. Fourthly, an EU-wide effect of disqualifications is elaborated on.

The integration exercise ends with an overview of the findings and recommendations, not only based on the theory and questionnaire results discussed throughout, but also based on practical and implementation considerations, voiced by the member states at the end of the questionnaire as well as during the focus group meetings. When presenting the integrated results, the project team has included tables and diagrams as a quantitative reflection of the member state replies. It should be noted that the sequence of the topics as included in the member state questionnaire does not perfectly match the sequence of the topics in this final report. The numbering of the questions from the member state questionnaire are included in the diagrams to allow the reader – where deemed necessary – to revert to the original context of the questions as structured in the member state questionnaire. Additionally, it be noted that sometimes the exact number of a certain reply in the diagrams need to be seen in light of the limited implementation status of the concerned instruments. Therefore, the project team has frequently worked with percentages referring only to the member states for whom the question is relevant to avoid any misunderstanding.

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<sup>9</sup> COUNCIL OF THE EUROPEAN UNION, “Programme of measures of 30 November 2000 to implement the principle of mutual recognition of decisions in criminal matters”, OJ C 12, 15.1.2001.



## 2 Scoping international cooperation in criminal matters in the EU

The first and foremost line of argumentation relates to the conceptual delineation of judicial cooperation in criminal matters: the classic distinction between police and judicial cooperation in criminal matters ought to be abolished, given its confusion-inducing, non-essential, non-workable and in many instances non-existing or when existing often contra-productive character.

The artificial distinction is an anomaly, hindering a coherent criminal law policy. There is a common understanding amongst both academics and practitioners that 'International cooperation in criminal matters' should become the new default concept. The aim or finality with which authorities act is the demarcation which should be used – in the current EU more than ever. Instead, the project team proposes to define the scope based on the aim or finality with which the authorities act. The following table provides with an overview of which finality the actions of the different authorities involved in cooperation can have.

Finality versus nature of authority						
Auth Finality	Judicial	Policy	Custom	Administrative	Central	Intelligence
Criminal justice	x	x	x	x	x	x?
Civil justice	x					
Administrative		x	x	x		x

It is clear that generally, most of the authorities involved operate with a 'mixed' finality: indeed, they do not always operate with the same finality – and they definitely do not only operate with a criminal justice finality.

For the first five types of actors, the criminal justice finality is a specific part of their tasks:

- Judicial authorities have competences related to criminal justice, but also to civil matters;
- Police authorities are involved in criminal justice matters, but also in tasks with an administrative (public order) finality;
- Customs authorities also have criminal justice related and administrative tasks;

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- Some national administrative authorities also have the competence to impose sanctions for offences, next to their competence to sanction other administrative infringements; and
- Additionally, specific central authorities have been installed, with a specific mandate to act in international cooperation in criminal matters. Each MS can choose which authority it appoints as a central authority; administrations within the Ministries of Justice could e.g. take up this role, but also penitentiary administrations (e.g. for prisoner transfer) or witness protection units. Furthermore, more than one central authority can be appointed.

For the sixth type of actor the situation is fundamentally different. Delineating international cooperation in criminal matters based on finality also clarifies that it is not open to actors who do not have a criminal justice finality: e.g. intelligence services. These are not a type of authority that should be involved in this cooperation. As shown in the table, from a conceptual perspective, intelligence services should not operate with a criminal justice finality. However, in several instances they do operate with a criminal justice finality, or they at least contribute to actions carried out with such finality. Even though the project team is strongly opposed to attributing tasks with a criminal justice finality to intelligence services, today's reality clarifies why they will still be discussed in this chapter.

The general approach regarding determining the scope of 'judicial' cooperation in criminal matters can be summarised as follows: fading distinctions: yes in terms of authorities, no in terms of the finality with which they act.

Therefore this section is structured along two main observations. First, it is important to understand that policy development in this domain should approach international cooperation in criminal matters as a more broad policy domain encompassing more than cooperation between judicial authorities only (2.1). Second, instead of focusing on whether or not judicial authorities are involved, the criminal justice finality of cooperation acts as the key decisive element (2.2).



## 2.1 International cooperation in criminal matters: More than cooperation between judicial authorities

*Gert Vermeulen, Charlotte Ryckman & Wendy De Bondt*

First, it is clear that the authorities involved are not a determining factor to decide on the scope of international cooperation in criminal matters. However, simultaneously, it is important to realise that for some forms of cooperation, the involvement of a judicial authority is crucial. Therefore, besides underpinning why the authorities involved should not be a determining factor (2.1.1), the necessity for involving judicial authorities in certain instances (2.1.2) is thoroughly assessed.

### 2.1.1 *Authorities involved are not a determining factor*

#### 2.1.1.1 *Part of the EU acquis*

From the very start of the Study, the project team has consistently 'blurred' the demarcation of the formal initial research assignment (to develop a vision on the future cooperation between judicial authorities). Extensive debate with the European Commission and a thorough analysis of the results of the first Delphi round have led to the decision to use "criminal justice finality" as the distinguishing factor as opposed to the authorities involved. As a result, all authorities which act with a criminal justice finality – rightly or not – are included in the scope of the study. As a consequence, the project team refrains from using the concept of "judicial cooperation" in its scope definition and refers to the study on the legal and institutional future of "international cooperation in criminal matters". Art. 89 TFEU (nearly literal copy of Art. 32 previous TEU): foresees the possibility for the Council to legislate the conditions under which "the competent authorities of the Member states referred to in Articles 82 and 87" can operate on each other's territories. The authorities referred to are 'judicial' resp. police authorities. This is one of the many examples where certain measures apply equally to both types of authorities, again showing the blurred distinction between both.

The following – not even exhaustive – overview speaks for itself. 'Judicial' cooperation is *not* limited to cooperation between judicial authorities.

- Art. 15,3 j.° Art. 13 ECMA: requests for exchange of criminal records information can be met by administrative authorities;
- Art. 1, b j.° Annex II CoE Validity: for administrative authorities are competent to deal with the administrative offences listed in Annex II, the decisions of those authorities should be subject to an appeal before a court;
- Art. 37 j.° Art. 40 CoE Validity: sanctions imposed in the requesting state shall in principle only be enforced by a court of the requested state. However,

States may empower other authorities to take such decisions when the sanction is a fine or confiscation and provided that the decisions are susceptible of appeal before a court;

- Art. 1, a j.° Appendix III CoE Transfer of Proceedings: offences comprise acts dealt with under criminal law and those dealt with under Annex III provisions, provided that where an administrative authority is competent, those decisions are susceptible of appeal before a court.
- Art. 51, a SIC: admissibility of letters rogatory for search or seizure: one of the conditions it can be made dependent on is that it is punishable by virtue of being an infringement of the rules of law which is being prosecuted by the administrative authorities, when that decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters;
- Art. 3 j.° Art. 27 EU MLA: administrative authorities can be involved in mutual legal assistance;
- Art. 12 EU MLA, regarding controlled deliveries: ‘competent’ authorities without further clarification;
- Art. 13 EU MLA, regarding JITs: ‘competent’ authorities without further clarification;
- Art. 14 EU MLA, regarding infiltration: ‘competent’ authorities without further clarification;
- Art. 17 EU MLA, regarding interception of telecommunication: a judicial “or equivalent” authority. The nature of the authority is not clarified; the only criterium is the finality with which it acts (*infra*);
- Art. 2, par. 1 2002 Eurojust Decision: “Eurojust shall be composed of one national member seconded by each Member state in accordance with its legal system, being a prosecutor, judge or police officer of equivalent competence”. The nature of the national member can vary.
- Art. 2, par. 1 2009 Eurojust Decision: “Eurojust shall have one national member seconded by each Member state in accordance with its legal system, who is a prosecutor, judge or police officer of equivalent competence”. The nature of the national member can vary.
- Art. 1, a, i and ii FD Fin Pen: competent authority may be different from a court, provided that the person concerned has had an opportunity to have the case tried by a court having jurisdiction in particular in criminal matters;
- Art. 3, 1 FD Crim Rec: the member states should appoint central authorities. Judicial authorities überhaupt have no role to play in this context;
- Art. 2 FD Swedish: a competent law enforcement authority is defined according to the purpose with which it acts, not according to the nature of the authority, with the exception agencies or units dealing specifically with national security;
- Art. 3, par. 2 FD Alternative: de member states have the freedom to appoint “other authorities than judicial authorities” as competent to take decisions pursuant to the framework decision;

- Art. 2, h FD Data Protection: competent authorities are described as “*agencies or bodies established by legal acts adopted by the Council pursuant to Title VI of the Treaty on European Union, as well as police, customs, judicial and other competent authorities of the Member states that are authorised by national law to process personal data within the scope of this Framework Decision*”. In other words, the framework decision has a scope which is determined through a functional criterium. The split between data protection rules applicable to police and those applicable to judicial authorities is no longer valid. The position of the project team is to consequently apply this evolution: there is a need for an overarching, uniform, functional data protection regime for acts done with a criminal justice finality, regardless of the nametag authorities have;
- Art. 2 FD Deprivation of Liberty: member states are free to appoint the “competent authorities”. In practice it seems that certain member states here choose penitentiary entities.<sup>10</sup> Here too, there is a clear trend to attribute a role to other, in this case administrative, authorities in the cooperation process;
- Art. 5, b FD EEW: the EEW may be issued in proceedings brought by administrative authorities in respect of acts which are punishable under the national law of the IMS by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters;
- Art. 1, 1 j.° Art. 2a, ii j.° Art. 5a, par. 3 General approach EIO: the EIO is a judicial decision “*issued or validated by a judicial authority of a member state or validated by a judicial authority of a member state*”. Art. 2a, ii adds that a judicial authority can also be any other competent authority as defined by the issuing State and, in the specific case, acting in its capacity as an investigating authority in criminal proceedings with competence to order the gathering of evidence in accordance with national law. Art. 5a, par. 3 specifies that in that case, the EIO shall be validated, after examination of its conformity with the conditions for issuing an EIO under this Directive, by a judge, court, public prosecutor or investigating magistrate before it is transmitted to the executing authority.
- Art. 10, 1a, d General Approach EIO concerns a specific instance in which the recourse to other investigative measures than the requested measure is *not* possible. Art. 9, par. 1 foresees that, when a requested measure is not available under the law of the member state or when it would not be available in a similar domestic case, the executing member state can have recourse to other, similar measures. This is not possible when the measure in the EIO is one of the ones listed in Art. 10, 1a, amongst which point d: “*the obtaining of information contained in databases held by police or judicial authorities and directly accessible by the executing authority in the framework of criminal*”

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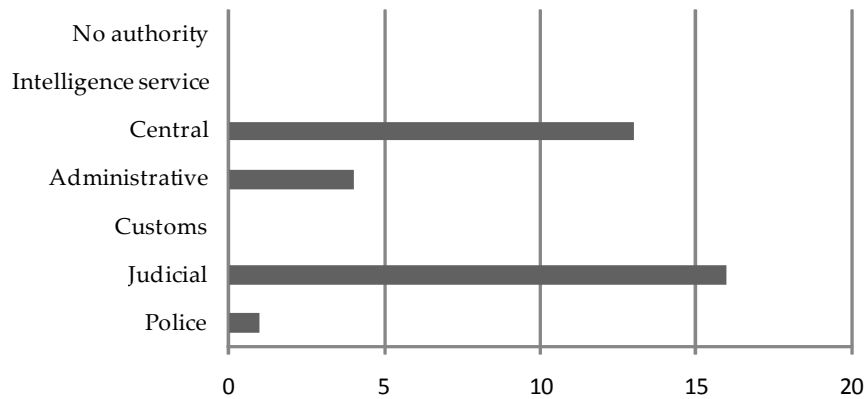
<sup>10</sup> *Infra* 2.1.2.2.

*proceedings*". This provision again makes no distinction between police or judicial databases and is therefore another indication that the split between the two is not workable. It will be interesting to see how the final version of the FD EIO will link provisions like this to the FD Swedish. It is crucial that this relationship is sufficiently clarified: indeed, the blurring of boundaries between authorities is a positive and necessary evolution in the field of international cooperation in criminal matters, *but* in order for this evolution to come to its full potential, and truly accomplish a more consistent and coherent policy approach the traditional fields of 'police' and 'judicial' cooperation, it is of course absolutely crucial to be unambiguous about the relationship of provisions such as Art. 10, 1a, d General Approach EIO and other, related instruments. Not doing so, would only increase the confusion and fragmented regulation of closely interlinked topics.

Given that in cooperation instruments (not only the recent instruments based on the principle of mutual recognition, but even the 1959 ECMA for example, the 'mother treaty' in terms of mutual legal assistance) the member states are given considerable freedom to indicate which authority they deem to be judicial, there was no other sensible choice but to abandon the involved authority as demarcation line. Indeed, in practice member states assign central, governmental or even police authorities as competent authority. Art. 6 EU MLA for example deals with the sending and receiving of procedural documents. Even though the first paragraph foresees that this happens between judicial authorities, the second paragraph allows member states to appoint a central authority.

The results from the member state questionnaire show that such provisions result in a very different, non-coherent authorities landscape, which is not restricted to judicial authorities or central authorities, but the appointment of administrative or even police authorities in some member states.

**Art 6.2 (a) EU MLA – transmission of requests for mutual assistance**



Additionally, several member states have raised that it is difficult or even not possible to distinguish and characterise the authorities as being judicial or non-judicial following Art. 6.2 (a) EUMLA. In many member states, there is an overlap, meaning either that both types are competent or that the central authority is perceived to be a judicial authority.

The opening question did not only aim to map the names but more importantly the *nature* of the different authorities involved in the field of the *so-called* judicial cooperation throughout the Union. The results offer sufficient evidence that the demarcation between judicial and non-judicial does not exist anymore at the member state level. The table inserted below gives an overview of a selection of the provisions presented to the member states. The table only contains those results which will not be discussed more in-depth later on in this report.<sup>11</sup>

<sup>11</sup> Below in the part on the necessary involvement of judicial authorities (2.1.2) the special investigative measures from the EU MLA are discussed for example, where again a considerable variety of authorities is made competent throughout the EU. The same goes for the FD EAW, FD Confiscation and FD Deprivation of Liberty.

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Type of authorities involved in cooperation							
Legislative reference	Classification of the authority						
	Police	Judicial	Customs	Administrative	Central	Intelligence service	No authority
Art. 1.2 and 4.7 Naples II – other authorities than customs authorities	8	5	6	4	4	0	4
Art 5 Naples II – central coordinating unit	1	0	14	3	9	0	0
Art 3.1 EU MLA – dealing with infringements of the rule of law	7	11	3	8	6	0	2
Art 5.2 EU MLA – sending and serving procedural documents	2	18	0	5	8	0	0
Art 1 and 24 CoE ECMA – judicial authority	3	21	1	2	7	1	0
Art 13 CoE ECMA – requesting criminal records	4	14	0	2	10	1	0
Art 2 Eurojust Decision – the person seconded as the national member	1	19	0	3	3	0	0
Art 7 FD EAW – assisting the competent authorities	3	5	0	3	15	0	2
Art 6.2 CoE Extradition – competent prosecute offences	1	21	0	3	3	0	0
Art 1 FD Fin Pen – issuing a financial penalty	0	19	1	6	0	0	0
Art 2 FD Fin Pen – assisting the competent authorities	0	4	1	4	6	0	7
Art 3.2 FD Confiscation – assisting the competent authorities	3	3	1	3	7	0	6
Art 2 a) Swedish FD – competent law enforcement authorities	14	4	5	2	2	1	2
Art 3 FD Crim records – exchange data	5	5	0	3	5	0	3
Art 2.5 FD Alternative – issue a probation decision	0	5	0	1	1	0	5
Art 2.6 FD Alternative – decide on conditional release	0	5	0	1	1	0	5
Art 2.7 FD Alternative – decide on probation measures	0	6	0	0	0	0	5

MORE THAN JUDICIAL AUTHORITIES

Type of authorities involved in cooperation							
Legislative reference	Classification of the authority						
	Police	Judicial	Customs	Administrative	Central	Intelligence service	No authority
Art 14.1 (b) FD Alternative – the court-like body that revokes suspension of execution or decides on conditional release	0	6	0	0	0	0	5
Art 14.1 (c) FD Alternative – the court-like body that imposes a custodial sentence or measure involving deprivation of liberty	0	7	0	1	1	0	3
Art 7.2.a CoE Conditionally sentenced – decide not to take proceedings or to drop proceedings	1	5	0	3	1	0	4
Art 12.2 CoE Conditionally sentenced – supervision of and assistance of offenders	3	1	3	2	1	0	5
Art 2 (c) ii FD EEW – the other judicial authority that can issue an EEW	0	3	1	1	0	0	6
Art 4 FD Supervision – issuing or adapting a decision on a supervision measure	1	1	2	1	2	0	7
Art 7 FD Supervision – assist the competent authorities	1	4	1	2	1	0	5
Art 4 FD Jurisdiction – competent to initiate prosecution	1	9	0	3	7	0	3
Art 9.1 CoE Transfer Proceedings – examine a request	2	2	1	3	2	0	8
Art 1.b CoE Validity – administrative authority dealing with offences	2	11	1	2	0	0	4
Art 16 CoE Validity – certifying the enforceable sanction	1	9	0	2	0	0	5

Based on those results, it cannot but be concluded that not only the member states, but also the Council of Europe and the EU have abandoned the demarcation line based on authorities decades ago – be it fragmentary and far from consistent.

Considering the particular importance of data protection in this respect, the project team deems it important to elaborate thereupon. In this field the project team does not deem the involvement of judicial authorities necessary – or stronger, it submits that a focus on judicial authorities might be counterproductive. The project team argues that the involvement of a judicial authority is not required for adequate data protection with regard to the exchange of data that have already been gathered. Information exchange, does not necessarily require the involvement of a judicial authority, as privacy concerns can adequately be dealt with even though judicial authorities are not involved. Data protection rules should therefore be linked to the finality of data handling, regardless of the authorities involved.

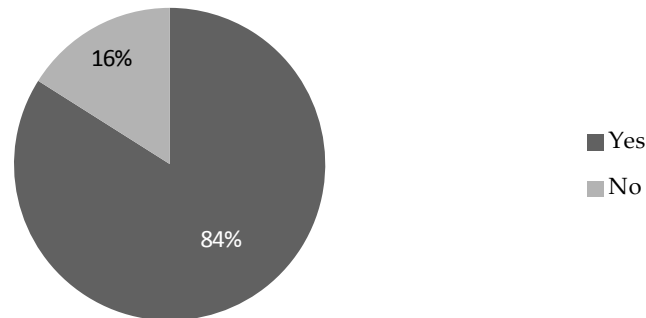
Therefore, it is self-evident that data protection should be as stringent for all cooperation types in criminal matters, regardless of whether judicial, police, customs or administrative authorities are involved. One single data protection regime should bind all these actors when they are involved in cooperation in criminal matters.

This is indeed reflected in the relevant European legislation as it stands today. After all, currently often more attention is paid to data protection in instruments concerning law enforcement (cooperation) (e.g. data protection regulations in Prüm, or with respect to the functioning of Europol) than in instruments in which cooperation between judicial authorities *strictu sensu* is regulated (e.g. the EU MLA convention only holds one single article on data protection applicable to judicial authorities). Additionally, the distinction between data protection rules applicable to police cooperation and data protection rules applicable to police cooperation is no longer made. The 2008 FD Data Protection is applicable to both. If it is accepted and assured that a stringent data protection regime applies to all these actors, the involvement of the aforementioned non-judicial authorities could even be extended beyond the limits of today, e.g. by allowing the criminal records exchange by police actors (and Europol, which is actually already competent to hold data on convicted persons).

An overwhelming majority of the member states seem to support this vision. No less than 84% of the member states indicated to agree with the position that adequate data protection is possible for actions of police and customs, without the involvement of a judicial authority.



**1.2.1 Do you agree that adequate data protection is possible for actions of police and customs, without the involvement of a judicial authority?**



This and the above examples show that indeed, both at CoE and EU level, both in decades old conventions and in recent framework decisions, the demarcation between different types of authorities based on their nature/name, is blurred. Yet, inexplicably, in other instances the EU tries to keep a clear distinction between police and judicial authorities alive, not only through treating police and judicial cooperation as two separate fields (thus preventing both to reach their full potential), but also through other artificial distinctions at various level. The following paragraphs lists a few examples of such ill-founded practices.

*2.1.1.2 Contradicted by the EU acquis*

Despite the numerous illustrations that even at the level of the CoE/EU instrumentarium the resolute distinction based on the nature of involved authorities is not kept, the very opposite evolution takes place on crucial domains, an evolution which is alarmingly detrimental to the coherence and consistency of the judicial and police criminal policy.

The most distressing example is undoubtedly the parallel yet separated existence and further development of Europol and Eurojust. It is commendable that the Eurojust Decision refers to the Europol Decision for its mandate (Art. 4 Eurojust Decision, making their mandate *ratione materiae grosso modo* the same. This makes perfect sense given that the support of police investigations can simply not be clearly distinguished from the pre-investigation stage as conducted by the public prosecution in most member states. However, the ongoing discussions regarding the mutual accessibility to each other's data

systems, which, besides, diverge entirely *ratione materiae* in terms of classification are exemplary for a criminal law policy which is bound to fail.<sup>12</sup>

Many problems which will be up for EU negotiation in the near future (not in the least the adoption of a regulation as legal base for both bodies) require a helicopter view, as opposed to an approach built on the nature of authorities involved. As to Europol and Eurojust, as opposed to their mandates, their structure differs significantly: simultaneously, and with great flexibility and autonomy, the Eurojust College assumes the different roles which at Europol level are scattered around the director, the management board and the ELO Network. Furthermore, Europol, which over time has become a supranational body, is increasingly subject to political control by the European Commission. On top of that the members of the Eurojust College are allowed to form part of joint investigation teams, either in the name of Eurojust or following their own operational capacity. It should be hoped that the future Eurojust Regulation, based on Art. 85 TFEU, will not end its flexibility and versatility; and that the future Europol Regulation would alleviate the structure of this agency.

*Idealiter* both bodies should merge into one. This seems idle hope in light of the (politically explainable) split of the former directorate-general Freedom, Security and Justice in separate directorates-general Justice (Commissioner Reding) and Home Affairs (Commissioner Malmström). Notwithstanding the grouping of all justice and home affairs matters in the Lisbon Treaty (for ten years, under the Amsterdam regime, asylum, migration and external affairs were treated from a community perspective whereas justice and police policy remained predominantly intergovernmental but were led in a certain direction by the Commission), the split into two directorates-general has definitively separated the policy-oriented approach concerning justice and police. Both Commissioners now have 'their' body to further develop: one has Eurojust, the other has Europol. Given the different nature of both policies (put bluntly and oversimplified: freedoms and rights vs. security) a logical, consistent, functional and integrative future approach for Eurojust and Europol becomes less likely in the short term, unless the alarm is vehemently raised.

The same goes for the development of judicial and police cooperation as a whole, of which it is obvious that it has led to a system of inequalities<sup>13</sup>. Some illustrations: with the US there is only a Europol-US agreement yet no EU-US agreement regarding police cooperation, while there is a Eurojust-US agreement and already in 2003 two EU-US agreements concerning the so-called judicial cooperation were concluded – one for surrender and one for mutual legal

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<sup>12</sup> *Infra* 1.1.

<sup>13</sup> G. VERMEULEN, "Justitiële en politieke samenwerking in strafzaken in de Europese Unie: bilan en toekomstopties", in: *Strafrechtshandhaving België-Nederland. Uitgave ter gelegenheid van het eredoctoraat toegekend door de universiteit Gent aan prof. dr. Cyrille Fijnaut*, B. DE RUYVER, G. VERMEULEN, T. VANDER BEKEN en P. PONSAERS (ed.), 2011, Antwerpen-Apeldoorn, Maklu, 101-123.

assistance, with the inclusion of the exchange of so-called judicial information (which is obviously often the same information used by (or aspired to be used by) the police. On the judicial level important efforts were made to improve the day-to-day cooperation practice through practical tools and mechanisms (EJN, the fiches belges, the European judicial atlas etc.), while the police practice would benefit just as much from this. The EU chose not to do this and consequently practitioners need to help themselves.

In the 'judicial' cooperation scheme the EU categorically chose for horizontalisation of the cooperation, the first steps taken through SIC, then further elaborated in the EU MLA and developed virtually completely following the introduction of mutual recognition.<sup>14</sup> The interstate (and political) character of cooperation has been abandoned; the obligatory and unique transfer and execution of requests through ministries and central authority is in the past. Locally competent authorities cooperate with each other as much as possible, in an ever more real European area of justice. Regarding police level cooperation it is striking that for too long (leaving the availability principle aside) the attention was almost exclusively focused on central models/databases which work with national units (*Europol National Units, NSIS, Sirene bureaux, Interpol NCB* etc.)

In conclusion, despite the many examples of the opposite (see the above, non-exhaustive list), regarding crucial points a strict policy distinction is kept (if not stirred through the split in directorates-general) between the so-called judicial and police cooperation in criminal matters, which in turn fundamentally hinders the development of an efficient police and justice policy.

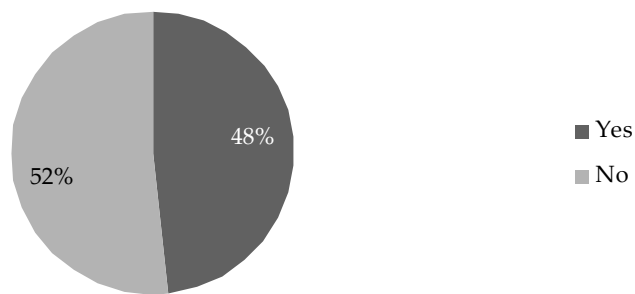
In other words, the member states and the EU acknowledge more and more how artificial and relative the traditional police-justice demarcation is, yet parallel with those acknowledgments both are increasingly being wedged.

The member states seems very divided on this issue: the results were almost spot on 50/50: 48% (i.e. 13) member states agreed that 'judicial' cooperation in their country is more than cooperation between judicial authorities and that therefore a reference to judicial authorities to explain the scope of 'judicial' cooperation is non-functional and even misleading. 52% (i.e. 14) member states however, did not. When reading the comments this result needs to be relativized: seven out of the fourteen member who did not agree with the position of the project team indicate that this is because in their member state what is now labelled as 'judicial' cooperation is indeed nearly exclusively carried out by judicial authorities. They thus see – from their member states' perspective – no need for an elaboration of the concept. However, those countries where more authorities are indeed included in the 'judicial' cooperation (which is the majority), a state of affairs directly resulting from the applicable EU legislation, do agree with the artificial and unworkable distinction based on involved authorities.

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<sup>14</sup> *Infra* 3.2.

**1.1.2 [...] do you agree that judicial cooperation is more than cooperation between judicial authorities [...] a reference to judicial authorities to explain the scope of judicial cooperation is non-functional and even misleading?**



**2.1.2 Necessity of the involvement of judicial authority**

Regardless of the undeniable diversity in the cooperation landscape, it is equally undeniable that some forms of cooperation required the involvement of a judicial authority in the strict sense of the word.

On the one hand, the EU is inconsistent in keeping a clear distinction between administrative and criminal justice finalities: as shown in the previous paragraphs the EU very often stresses the demarcation, only to entirely disregard it on other occasions.

On the other hand, the EU omits to clearly indicate when the distinction between judicial and non-judicial *does* matter. Whereas traditionally judicial prerogatives were assumed (without necessitating explicit reasons or motivation), lately (and in particular the last decade), when drafting the so-called judicial cooperation instruments, the EU has almost systematically given the member states *carte blanche* by allowing them to appoint the 'competent' authorities themselves. The accompanying risks are not to be underestimated: the disruption of essential balances of our modern democracies, balances between classic freedoms of the citizens (as there are the right to liberty, the right to property, the right to privacy) and the possible limitation of such rights for the sake of treating conceivably punishable behaviour.

The main line of argument will be that the flexibility in appointing competent authorities is not necessarily a bad thing, quite the contrary: it supports the shifting focus from authorities involved to the finality with which they act. However, in a few instances, judicial safeguards are necessary: not necessarily in the form of appointing judicial authorities as competent authorities, yet through a right to a legal remedy for the person involved (below 2.1.2.3).

When assessing the need for involvement of a judicial authority, two different situations should be distinguished: first the initial national decision (the imposing of the sentence etc.) and secondly the decision on cooperation regarding that decision. Even though the Study naturally only deals with the latter, it is important to stress the considerable difference with the former. This in turn, requires a brief description of the national situations. In light of ECtHR jurisprudence and the EU Charter of Fundamental Rights there seems to be little to no doubt that the involvement of judicial authorities is an absolute necessity when taking sanctions involving deprivation of liberty, coercive measures or measures which are intrusive to the right to privacy. This is indeed supported by the replies to the corresponding questions in the member state questionnaire. Almost<sup>15</sup> 100% of the member states confirmed this position for these types of measures (regardless of who would execute the measure on the ground, although there too a surprisingly high percentage ticked the box indicating that the execution too, was reserved for judicial authorities).

From the replies to question 1.1.3. it is clear that with respect to sanctions involving deprivation of Liberty there is a string support for the position that the initial decision whereby the person is convicted to a sentence in prison, should be taken by a judicial authority. This is indeed recognized by the EU in that the purpose of the FD Deprivation of Liberty is to recognise a *judgment* and enforce the sentence<sup>16</sup>.

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<sup>15</sup> In fact, when the box was not ticked this was because the question was not answered as a whole. It is thus safe to say, that throughout the EU, the national laws foresee a necessary involvement of judicial authorities in these cases.

<sup>16</sup> Art. 3, par. 1.

### 1.1.3 For which acts/measures is the intervention of a judicial authority required according to your national law?



A thorough and in-depth debate as to the reservatory competences for judicial authorities in the cooperation process and the building of a solid framework in this respect is far from self-evident. In order to thoroughly assess this perceived need for reservatory competences, the project team used a four-step approach. First, the concept of a judicial authority itself needs further consideration. Second, the needs for reservatory competences should be assessed from a neutral and practical needs-based perspective, as opposed to a instinctive and protectionist defensive perspective. Third, in parallel to limiting the required involvement of judicial authorities it is important to consider the necessity of the installation of a form of legal remedy. Fourth and final, having taken the previous three steps, the project team reflects on *ratione auctoritatis* as a refusal ground. The following paragraphs reflect this four-step approach.

#### 2.1.2.1 Defining a judicial authority

The first step consisted of reflecting on the definition of a judicial authority. Crucial to the entire discussion on the involvement of judicial authorities is of course the question as to what is conceived as 'a judicial authority'. The provisions of the General Approach EIO might serve as a guideline in order to interpret the meaning of 'judicial authority': from Art. 2 it follows that not only judges, courts and investigative magistrates, but also prosecutors are seen as judicial authorities. The project team recommends to introduce a clear definition of what a judicial authority is for the purpose of international cooperation in criminal matters, and to make a distinction between judicial authorities *sensu stricto* and *sensu lato*. The former would encompass the judicial authorities in the

'classic' sense of the word: courts (or investigative magistrates). The latter would be those authorities *plus* prosecution authorities. It cannot be denied that the procedural safeguards applied by prosecution offices more often than not are very different than those applied by courts. This being said, the project team does not want to exaggerate in applying this distinction: only in very exceptional cases cooperation should be reserved to judicial authorities *sensu stricto*.

#### 2.1.2.2 *Need for reservatory competences revised*

The second step, having determined the scope of a judicial authority, is the reflection on the need to identify reservatory competences. It is important to start a debate on the necessity to identify competences or forms of cooperation for which the involvement of a judicial authority is necessary. Because of the risk of a reply that is inspired by the political sensitivity of this topic and the all-encompassing scope of the study, the project team decided not to include a specific and straightforward question to obtain the opinion of the member states on involvement of judicial authorities within the cooperation process. Rather the project team preferred to interpret other more general and politically neutral questions in this respect.<sup>17</sup> The following will examine those measures and the question whether reservatory competences are indeed required in those cases, and if so whether the reservatory competences would accrue to judicial authorities *sensu stricto* or *sensu lato*.

#### – The domain of surrender

At first sight Art. 6 EAW seems straightforward in appointing a judicial authority as competent. It reads:

*"1. The issuing judicial authority shall be the judicial authority of the issuing Member state which is competent to issue a European arrest warrant by virtue of the law of that State.*

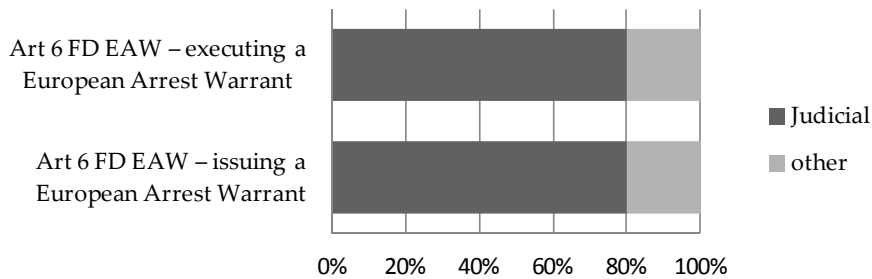
*2. The executing judicial authority shall be the judicial authority of the executing Member state which is competent to execute the European arrest warrant by virtue of the law of that State".*

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<sup>17</sup> However, in the context of another recent study conducted for the European Commission, this topic was dealt with explicitly. The member states indicated to deem such competences necessary in the domain of surrender, for – within the domain of mutual legal assistance – those measures which have an effect on privacy or which imply coercion regarding property, and the execution sentences involving deprivation of liberty which the person concerned deems burdensome to his legal rights or social rehabilitation. See VERMEULEN, G., DE BONDT, W. en VAN DAMME, Y., *EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence?*, in IRCP-series, 37, Antwerp-Apeldoorn-Portland, Maklu, 2010.

From the replies to question 1.1.1. it follows that in spite of Art. 6 FD EAW, two countries have appointed police bodies as competent authorities; in two member states administrative authorities are competent to take the decision on execution of the EAW. Even within the (prominent) majority of member states who have appointed judicial authorities, four states indicated to have courts and prosecutors dealing with executions of EAW's, and in one case *only* the prosecutor was competent.

**1.1.1 Which type of authorities is competent according to your national law?**



Before analysing these results, it be reminded that the very fact that the surrender decisions were depoliticised needs to be applauded: whereas before such decisions were taken at a political level, they are now ‘judicialised’ and taken (in the majority of the cases) by a judicial authority *sensu lato*.

The fact that prosecutors and not only courts are competent is not problematic. This is because the EAW decisions ‘only’ deal with the decision whether or not to surrender. Indeed, for example whether or not a person will remain in detention after his/her arrest will be decided according to the national rules (Art. 12 FD EAW). Other rights too, are trusted to be met in accordance with national law. Art. 11 FD EAW for example, clearly states that “when a requested person is arrested, the executing competent judicial authority shall, in accordance with its national law, inform that person of the European arrest warrant and of its contents, and also of the possibility of consenting to surrender to the issuing judicial authority”. The second paragraph of Art. 11 FD EAW provides for the right to legal assistance and an interpreter, again “in accordance with national law”. Given that the necessary safeguards can be trusted to be in place at the national level, the project team submits that the fact that also prosecutors can decide is not necessarily problematic. There is no problem whatsoever with the involvement of judicial authorities *sensu lato*. This is no different for those cases in which police authorities were appointed as a ‘judicial authority’. After all, it should be trusted that when



member states take the conscious decision to appoint police bodies as judicial authorities in this context, those authorities can be trusted to operate through similar safeguards as judicial authorities *sensu lato*<sup>18</sup>. Indeed, it should not be forgotten that “domestic courts are the ultimate guardians of the fairness of proceedings”.<sup>19</sup> Again, the project team submits not to take the involved authority as a benchmark, but to focus on the finality with which they act and the safeguards which (should) apply in such cases. Besides, this fits the current climate in which many cooperation instruments make judicial “or equivalent” authorities competent. This necessarily implies an assumption that, if other authorities than judicial authorities are made competent, they operate by equivalent safeguards, again showing how the safeguards outweigh the label of the authority.

- Mutual legal assistance measures involving coercive measures or intrusive of privacy rights

The project team applies a reasoning similar to the reasoning regarding surrender procedures: not the type of authority is determining, but the procedures by which they act. Indeed, in many countries the practice of involving police bodies as deciding authorities regarding for example covert operations is well established. The project team submits that making this exclusive to judicial authorities does not answer to the practical reality – and again, the focus should be put on the procedures by which the police acts and the safeguards which accompany them.

Art. 12, 13 and 14 EU MLA all speak of ‘competent authorities’ without specifying what is understood to be a competent authority. In Art. 6 EU MLA it is said explicitly (par. 5) that for those measures a police or customs authority can also be made competent. The articles read:

Art. 12, par. 2: *“The decision to carry out controlled deliveries shall be taken in each individual case by the competent authorities of the requested member state, with due regard for the national law of that member state”.*

Art. 13, par. 1: *“By mutual agreement, the competent authorities of two or more Member states may set up a joint investigation team for a specific purpose and a limited period [...]”*

Art. 14, par. 2: *“The decision on the request is taken in each individual case by the competent authorities of the requested Member state with due re-gard to its national law and procedures.”*

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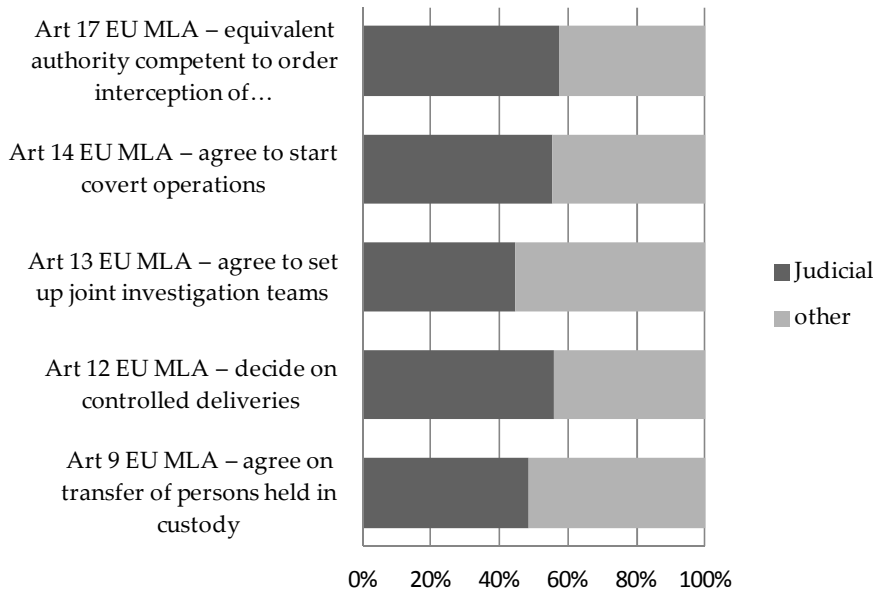
<sup>18</sup> The results regarding the legal remedies as postponement ground, provided below in 3.3.5.2 support this statement: without being foreseen in the FD EAW, over half of the member states apparently call on postponement grounds linked to pending legal remedies.

<sup>19</sup> ECHR, *Hermi v. Italy*, par. 72.

Art. 17 EU MLA speaks of ‘judicial’ authorities ‘or equivalent’ authorities: for the purpose of the application of the rules dealing with interception of telecommunication “competent authority” “shall mean a judicial authority, or, where judicial authorities have no competence in the area covered by those provisions, an equivalent competent authority, specified pursuant to Article 24(1)(e) and acting for the purpose of a criminal investigation.”

When looking at the competent authorities throughout the European Union, it becomes apparent that the situation is very different from country to country and that the different wording in Art. 17 EU MLA on the one hand and Art. 12 to 14 EU MLA on the other do not resort much effect in practice. This underlines the need to focus on how the authorities operate, rather than on the label the competent authorities should get: after all, despite the fact that Art. 17 clearly speaks of ‘judicial’ or equivalent to judicial, almost as many member states decided to appoint non-judicial authorities in the context of telecommunications (Art. 17) and the other measures (Art. 12-14).

**1.1.1 Which type of authorities is competent according to your national law?**



- Cross-border execution of sanctions involving deprivation of liberty

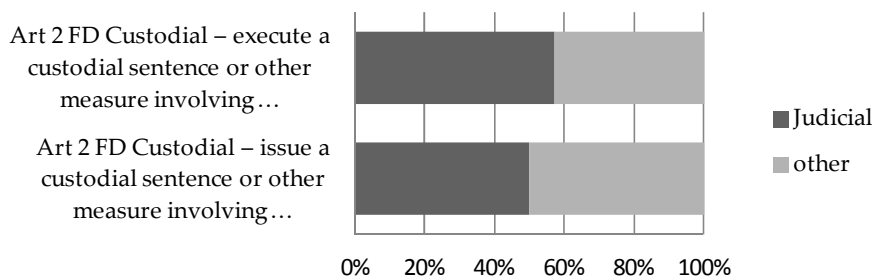
Art. 2 FD Deprivation of Liberty permits member states a degree of discretion in relation to the competent authority which will be designated to execute its provisions. It reads: *“Each Member state shall inform the General Secretariat of the Council which authority or authorities, under its national law, are competent in accordance with this Framework Decision, when that Member state is the issuing State or the executing State”*.

As such cross-border execution of sanctions involving deprivation of liberty are more intrusive than for example surrender as such. As explained above, the decision to surrender in itself is separate from any measure involving deprivation of liberty: the latter is taken in accordance with the national law, of which it can be assumed that the necessary safeguards are in place. With cross-border execution of measures involving deprivation of liberty however, the person involved will find him/herself in a prison in another country as a direct consequence of the decision taken within the cooperation process. Therefore, it is crucial that the FD Deprivation of Liberty contains provisions assuring that the concerned authorities will indeed decide in a way that they believe is most likely to guarantee the very aim of the framework decision, being the optimal social rehabilitation of the person involved. One of the ways to assure this is to give a judicial authority *sensu stricto* the competence to do so. However, the recommendation of the project team does not entail putting judicial authorities in charge of the decision on cross-border execution of such sentences. On the contrary, the project team submits that depending on the internal prison system, prison administrations or occasional central authorities might be necessary in order to deal with the transfer, often comprising many technical, practical and legal complexities.

The questionnaire explicitly asked the member states to indicate which authority is competent for both the issuing and execution of cross-border liberty depriving sentences. Even though only ten countries have replied, a considerable variety is already becoming apparent. From the issuing perspective, one country identified the competent authority as being a police authority, two countries said their competent authority to be administrative. The designated authorities are judicial in seven countries. Closer scrutiny of the names the respondents listed as competent authorities reveals that at least two out of those seven are no judicial authorities *stricto sensu*, given that the judicial authority is the public prosecutor in one instance, and the ministry of justice in another. From the executing perspective, the authorities landscape is similar: one country indicates a police authority to be competent, one and administrative and eight, judicial. Yet again, two out of those eight are prosecutors and one the ministry of justice. Consequently, even though only ten replies were given, it is clear that the competent authorities indeed vary. It will be a matter of some interest to further see the

extent to which member states differ or converge in their choice of competent authority, whether states choose to designate a judicial or administrative authority for the purposes of taking decisions under the terms of the framework decision and whether the choice of authority impacts on the interpretation of the framework decision’s operational provisions.

**1.1.1 Which type of authorities is competent according to your national law?**



For other domains the involvement of judicial authorities does not seem necessary at any stage. The exchange of criminal records information can easily be dealt with by administrative or police authorities (the central records information is embedded in the police in many member states) and in the context of transfer of prosecution, in which Eurojust needs to play a (n even more) central role,<sup>20</sup> it has already become clear that this is no longer a domain of international cooperation *sensu stricto*. Previous research has revealed that the domain of relocation and protection of witnesses and collaborators with justice will never become the exclusive prerogative of judicial authorities *stricto sensu*<sup>21</sup>.

As said above (2.1.1), an area in which the project team does not deem the involvement of judicial authorities necessary – or stronger, where a strong focus on judicial authorities might be counterproductive – is data protection.

This variety is not necessarily negative and might on the contrary be necessary due to the complexity and often technical/practical considerations which form part of a decision whether or not to transnationally execute a custodial sentence. However, as will be explained below, the varied nature of authorities deciding on the execution is only acceptable under the condition

<sup>20</sup> Cfr. *infra* 5.1.

<sup>21</sup> G. VERMEULEN, *EU standards in witness protection and collaboration with justice*, in *IRCP-series*, 25, Antwerp-Apeldoorn, Maklu, 2005, 280p.

that the person concerned has recourse to a legal remedy in case he would not agree that the cross-border execution would serve his social rehabilitation.

Summarizing, the ‘competent authority’ from the EAW is sufficient given that crucial safeguards in the process of executing the EAW apply through the national systems.

With regards to mutual legal assistance measures, even those measures involving coercive measures or breaches of privacy, can be left to police authorities given that they can be trusted to employ the same safeguards when acting with a criminal justice finality. As to the cross-border execution of sentences involving deprivation of liberty will in some member states be decided upon by non-judicial authorities and this is, given the complex nature of the decisions, not necessarily negative. However, both with regards to the mentioned MLA measures and regarding the execution of measures involving deprivation of liberty there is one important condition: a legal remedy for the person involved should be made available.

#### 2.1.2.3 *Role of legal remedies in debate on reservatory competences*

The third step, in parallel to limiting the required involvement of judicial authorities, consisted of scrutinising the necessity of the installation of a form of legal remedy. Currently, the relevant EU legislation does not foresee a sufficient possibility of judicial review.

- The cross-border execution of sentences involving deprivation of liberty

There appears to be no grounds at present for legally challenging this procedure and demanding for the right to a judicial review<sup>22</sup>. In the case of *Szabó v Sweden* (ECtHR 2006), the Court rejected the applicant’s claims that Art. 6§1 ECHR was applicable to the impugned decisions relating to the transfer of Mr. Szabó under the CoE Convention on Transfer of Sentenced Prisoners and the Additional Protocol.

Art. 6§1 ECHR: “*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law [...]*”

The Court’s conclusion was supported by several provisions of the Convention and its Additional Protocol, which indicate that a transfer has to be seen as a sentence enforcement measure, and under the Court’s case-law,

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<sup>22</sup> G. VERMEULEN, A. van KALMTHOUT, N. MATTERSON, M. KNAPEN, P. VERBEKE en W. DE BONDT, Cross-border execution of judgments involving deprivation of liberty in the EU. Overcoming legal and practical problems through flanking measures, Antwerpen-Apeldoorn-Portland, Maklu, 2010, 82.

proceedings concerning the execution of a sentence are not covered by Art. 6§1 of the Convention (see, among other authorities, *Aydin v Turkey*).

This lack of legal basis for judicial review leads the project team to recommend the urgent inclusion of a judicial review system in the FD Deprivation of Liberty: the detained person should be granted a right to a judicial review of the transfer decision when he/she wants to contest the issuing state's competent authority's final decision on his/her transfer. The right to be heard by a judge reflects the European Commission's course of action to enhance procedural rights within the EU and should therefore be encouraged. It should be noted that this right to a judicial review is a mere possibility for the prisoner and should not be considered an automatism<sup>23</sup>. The objective of the framework decision is to facilitate the prisoner's social rehabilitation by transferring him/her to that Member state where he/she has family, linguistic, cultural, social or economic links, so that transfer decisions - in the majority of cases - can be expected to be applauded by sentenced persons. On the other hand, it is precisely this important goal of the framework decision, imposed on the member states through Art. 4, par. 2, Art. 4, par. 3, Art. 4, par. 4 and Art. 4, par. 6 FD Deprivation of Liberty which should be safeguarded carefully. Indeed, it is not because the provisions impose an obligation on the competent authorities to decide in a way which best guarantees the social rehabilitation of the sentenced person, that this will indeed be the case (or that the detainee would agree with it). Therefore, the introduction of a judicial remedy system has become urgent. When this recommendation would be met, there are no satisfactory arguments to oblige member states to appoint only judicial bodies as competent authorities. The need for an introduction of a judicial review system in the FD Deprivation of Liberty is supported by a comparison between this FD and Framework Decisions dealing with property instead of the physical transfer of people: the latter *do* include a judicial review mechanism.

- The cross-border execution of confiscation orders

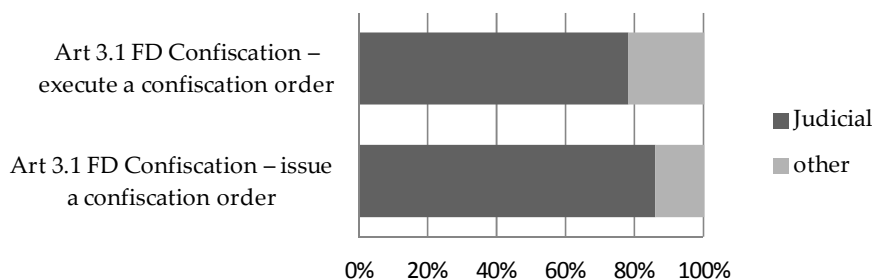
Art. 9 FD Confiscation obliges member states to "*put in place the necessary arrangements to ensure that any interested party, including bona fide third parties, has legal remedies against the recognition and execution of a confiscation order pursuant to Article 7, in order to preserve his or her rights.*" The referral to third parties is of course instrument specific and it is only logical that such a provision does not feature in the FD Deprivation of Liberty. Yet, *any*

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<sup>23</sup> G. VERMEULEN, A. van KALMTHOUT, N. MATTERSON, M. KNAPEN, P. VERBEKE en W. DE BONDT, Cross-border execution of judgments involving deprivation of liberty in the EU. Overcoming legal and practical problems through flanking measures, Antwerpen-Apeldoorn-Portland, Maklu, 2010, p. 104.

*interested party* has a legal remedy, which means that the person concerned has a right appeal as well. This is undoubtedly positive; one could for example think of the situation in which a certain object with high emotional value were to be confiscated by the executing authority. Without being able to challenge the initial decision that implies confiscation, the person concerned should indeed be given a say in how that cross-border confiscation takes place. The legal remedies can be viewed as ‘a safety net’, compensating the fact that the competent authority is not necessarily a judicial authority. Indeed, within the sphere of confiscation, collection agencies are often better placed than courts to deal with cross-border confiscation orders, given their degree of specialty and the fact that they are involved in the actual execution. However, it is remarkable that 18 countries indicated to have assigned a judicial and only 2 an administrative as competent authority for the issuing of confiscation orders. For the execution, the amount of judicial authorities is the same, there are 3 countries using an administrative authority, and 2 police authorities.

**1.1.1 Which type of authorities is competent according to your national law?**



Another Framework Decision containing judicial review obligations is the FD Freezing (Art. 11). The provisions are analogous to those from the FD Deprivation of Liberty.

– Mutual legal assistance

In the field of mutual legal assistance, the FD EEW introduced an obligation for the member states to foresee in judicial remedies: Art. 18 FD EEW. Yet, the obligation only stands for those measures involving coercive measures. This is logical, given the scope of the instrument: given that it only deals with existing evidence (thus implying that the evidence has already been

gathered). Unfortunately, the EEW is only applicable to existing evidence.<sup>24</sup> Therefore, a similar system was considered during the EIO negotiations. Art. 13 of the General Approach EIO states that “*Member states shall ensure that any interested party shall be entitled to legal remedies, which are equivalent to those, which would be available in a similar domestic case to challenge the investigative measure in question*”. It is commendable that this provision was included in the partial agreement..

As to the *nature* of the bodies carrying out the judicial review it should again be stressed that the name tag they are carrying is not of essence: in the context of the EEW for example, it is perfectly conceivable that an administrative authority would take on this task. Yet, as stated above, as little as the name tag matters, as much do the procedural safeguards which are applied by those bodies; as long as they abide by criminal procedural safeguards and grant the subject a fair ‘judicial’ review of the decision, the nature of the authority is of minor importance.

#### 2.1.2.4 Refusal ground *ratione auctoritatis*?

As a fourth and final step, having elaborated on the definition of a judicial authority, the need to identify reservatory competences and the need to look into complementing legal remedies, the project team has reflected on the position of *ratione auctoritatis* as a refusal ground.

Since the Tampere European Council, international cooperation has been developed on the basis of mutual recognition – implying more stringent cooperation and a principle obligation for member states to execute orders received from others, with only a limited set of reasons which can be given to refuse to cooperate. Not agreeing with the type of authority which issued the cooperation order however, is not foreseen in the cooperation instrumentarium, except in the FD EEW. Art. 11,4 FD EEW foresees that a member state may decide that the requested search or seizure may not be carried out if the order was issued by another authority than a judicial authority *sensu lato* and when it has not been validated by the latter.

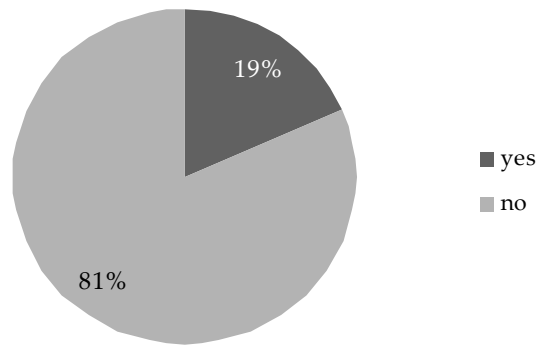
The replies to question 4.1.26. support that such a provision is outdated. Only a small minority of the member states (not even a fifth) still indicate to experience problems in cooperation with regards to the authorities that they have declared competent to act.

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<sup>24</sup> *Infra* 5.3.1.

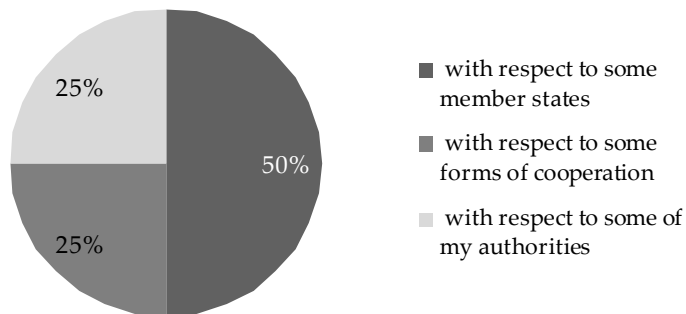


**4.1.26 Do you experience problems with the acceptability of the authorities you have declared competent to act?**



Additionally, in the unlikely event that member states experience problems, half of those problems reoccur in relation with the same member states.

**4.1.26 If you experience problems with the acceptability of the authorities you have declared competent to act, what is the type thereof?**



The project team submits that there is little to no empirical evidence to support an introduction of a refusal ground *ratione auctoritatis* in the cooperation instruments, and advises to remove it from the FD EEW. Instead of introducing a new refusal ground in the instrumentarium, risking to slow down cooperation between many member states, it seems more appropriate to try and solve the problems between specific member states.

Naturally, the FD EEW has lost almost all importance in light of the EIO negotiations, given that the latter will repeal and replace the former (even though – unfortunately – this is not explicitly stated in the Partial Agreement) and that as a result, only one member state has implemented the FD EEW. Even though not explicitly stated as a refusal ground, the *ratione auctoritatis* refusal ground can also be found in the General Approach EIO. It contains a set of new provisions regarding the competent authorities, emerging as a compromise after ongoing debates about this topic. Art. 1, par. 1 states that the EIO is a judicial decision “*issued or validated by a judicial authority of a member state or validated by a judicial authority of a member state*”. Art. 5a, par. 3 adds that, when the issuing authority is not a judge, court, public prosecutor or investigative magistrate, the decision shall be validated by one of the latter. The above, showing how not the label of the authority should be determining, but rather finality with which is being acted, combined with the low level of problems related to involved authorities, logically implies that this “validation clause” is not only unnecessary, it could even harm cooperation: it risks inducing costs, causing loss of time and an extra source of distrust between member states. Consequently, it is strongly advised to remove the validation requirement from the General Approach EIO.

## 2.2 Criminal justice finality: A decisive element in the development of international cooperation in criminal matters

Gert Vermeulen & Charlotte Ryckman

Having agreed that international cooperation is more than cooperation between judicial authorities, be it that a number of caveats are in order in terms of reservatory competences, an alternative approach should be suggested. Notwithstanding the reservatory competences of judicial authorities, the finality with which authorities act – as opposed to their *nature* – is the real demarcation line which can and should consistently delineate the field of cooperation in criminal matters. The EU has recognised this fact for decades; unfortunately only indirectly and on an *ad hoc* basis (2.2.1). Lack of respect for this demarcation line is problematic in light of the separation of powers, the procedural guarantees in criminal matters and data protection regulation (2.2.2). In the context of administrative offences the finality demarcation within the EU has been made explicit since the SIC, by recognizing that administrative authorities too can act with a criminal justice finality and that they can thus be brought within the scope of cooperation in criminal matters, under the condition that their decisions are subject to an appeal before a judge also competent in criminal matters. There is only one legitimate nuance to the strict separation between criminal justice and administrative finality: criminal justice information can and should, whenever it is useful in preventing an immediate and serious threat to public security, be shared with the competent (administrative) authorities (2.2.3).

### 2.2.1 Criminal justice finality as a decisive element in the EU *acquis*

A criminal justice finality can be described as the aim of the actions taken “*in the course of criminal investigations which present the characteristics of being an investigation following the commission of a specific criminal offence [...] in order to identify and arrest, charge, prosecute or deliver judgment on those responsible.*” (definition based on Art. 20 EU MLA)

The following paragraphs explain in detail why a separation between criminal justice and administrative finality is so crucial (separation of powers, inclusion of procedural guarantees, data protection) and the dangers of blurring those boundaries will be discussed through examples.

It is surprising, however, that such extensive argumentation is necessary to begin with: just like the default position of this chapter – being that ‘judicial’ cooperation is more than cooperation between judicial authorities – is supported through the very legislation of the EU itself (*supra*), this is equally true for the existence of the distinction between a criminal justice and an administrative finality. In countless cooperation instruments, for the past few decades, it is

recognised that cooperation in criminal matters is a matter of cooperation between authorities, *aimed at the prevention, detection, tracing, prosecution, punishment etc of punishable offences*. It is a pity that this has only been the case in a fragmented and ad hoc fashion. The project team recommends to explicitly mark the finality with which is being acted as a decisive factor. This would allow the EU to finally abandon the out-dated reasoning from an authority-perspective, in order to allow the introduction of a new, clear, unambiguous focus on the integrity and coherence within the field of cooperation with a criminal justice finality. The following list provides an overview of those provisions in the cooperation acquis which contain a clear reference to the criminal justice finality.

- Art. 1 ECMA. The mutual legal assistance is clearly limited to procedures concerning criminal offences. The Convention is only applicable to those authorities which are competent to act in those procedures. The mother treaty is thus only applicable for actions which have been carried out with a criminal justice finality;
- Art. 15, 3 ECMA confirms that is barely matters which of which nature the authorities are in the context of exchange of criminal records information: several authorities, in particular also administrative authorities can be involved in the process. This entails that the mother treaty is applicable regardless of the type of authority, as long as the criminal records information is used for the purpose of a criminal procedure;
- According to Art. 2 FD Swedish every type of authority (except for those with a specific focus on national security) can be deemed a law enforcement authority, as long as they have the competence to detect, prevent or investigate criminal offences or activities, and to exercise authority and coercive measures in this context. Again finality is put above authority;
- In the same token the competent national authorities within Europol are *all* existing public bodies in the member states, provided that they are competent under national law regarding preventing and combating criminal offences;
- Art. 17 EU MLA: concerning interception of telecommunication the type of authority does not matter as long as they act “for the purpose of a criminal investigation”;
- Art. 19, 2 EU MLA: a competent authority of a member state is allowed to intercept telecommunication without the involvement of a service provider on the territory of that member state without the permission of the member state where the gateway is located “for the purpose of a criminal investigation”;
- Art. 20,1 EU MLA specifies what – in the context of interception of telecommunication – is to be understood as a “criminal investigation”. It operationalizes the criminal justice finality at hand. The obligations following from Art. 20 EU MLA are applicable to “*interception orders made or authorised*

*by the competent authority of one Member state in the course of criminal investigations which present the characteristics of being an investigation following the commission of a specific criminal offence [...] in order to identify and arrest, charge, prosecute or deliver judgment on those responsible.*" Supra it was criticised how the British declaration regarding this article left some room for manoeuvre in order for the information gathered by intelligence services to be transferred indirectly to the criminal justice sphere. More importantly however, is the article which the declaration accompanies (Art. 20 EU MLA), for it defines the criminal justice limitation with an unprecedented clarity;

- The FD Data Protection equally leaves little doubt as to the importance of the finality with which authorities act: it moves the focus from the nature of the involved authorities to the aim their actions have. The FD is applicable to personal details collected by authorities *"for the purpose of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties"* (Art. 1,2 FD Data Protection). In light of the purpose limitation principle this is undoubtedly a remarkable progress. If the framework decision had not used the finality but a list of involved authorities – as was the case with the Hague programme<sup>25</sup> – then all tasks of the concerned authorities would have formed part of the framework decision, also those which are not carried out with a criminal justice finality, as there are purely administrative inspection functions.<sup>26</sup> Fortunately, it was consciously chosen *not* to do so in this framework decision.

The list of examples shows that criminal justice finality *exists*, it is a reality, and a reality acknowledged by the EU itself. However, it is still only included in the applicable legislation in a fragmented way. Yet, the protection of the integrity of (cross-border) actions with a criminal justice finality deserves to be made explicit in a normative way. The time has come to do so.

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<sup>25</sup> European Council, The Hague Programme – strengthening the area of freedom, security and justice in the European Union, OJ C 53 of 3.3.2005, 1-14.

<sup>26</sup> G. VERMEULEN, T. VANDER BEKEN, L. VAN PUYENBROECK, S. VAN MALDEREN, *Availability of law enforcement information in the European Union. Between mutual recognition and equivalent access*, Antwerp-Apeldoorn, Maklu, 110p.

## 2.2.2 *Problematic character of the lacking finality demarcation*

### 2.2.2.1 *Separation of powers*

Despite the fact that the demarcation line between the judiciary and the executive keeps fading and the grip of the latter on the former tightens, the separation of powers remains the cornerstone of modern and democratic public law. Criminal law constitutes a social contract between government and civil society and consequently the fight against criminality is a prerogative of the government, yet not every segment of government. The task to fight criminality is reserved to the judiciary and the police '*judiciaire*' (= police when they are acting with a criminal justice finality), customs or inspection authorities (= inspection authorities when acting with a criminal justice finality). These authorities are kept in check by the rules of play which protect civil society against disproportionate or arbitrary investigative behaviour. Following the principle of the separation of powers those rules of play are set by the legislator. The role of government, of the executive, and of the administrations, administrative authorities or other actors which resort under the latter's power carries a fundamentally different finality. In essence, the executive has a fundamentally different function than fighting crime: it monitors public order and security (and steers the *administrative* police in that regard), and that aim usually disposes of a civil and military intelligence service, is responsible for the shaping and implementing of the criminal justice *policy* and carries the administrative responsibility for the adequate functioning of justice and police. In other words, the executive acts with an administrative as opposed to a justice finality – a distinction stemming from the very principle of separation of powers.<sup>27</sup>

### 2.2.2.2 *Procedural guarantees applicable in criminal matters*

The fight against criminality carried out by justice and law enforcement authorities acting with a criminal justice finality can policy-wise be broadened somewhat through involving administrative or other actors.<sup>28</sup> However, it is crucial that such broadening does not breach the above mentioned social contract, which is only compatible with a limited 'governmental' enforcement of criminal justice norms. This is logical given that fighting criminality is limited by the procedural guarantees applicable in criminal matters, guarantees which have been subject to a delicate and gradually evolving balancing exercise between the interests of the individual and the public interest. This balance is alien to acts

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<sup>27</sup> G. VERMEULEN, "Gewapend bestuur. Kan het bestuur zich wapenen" in: *Het strafrechtssysteem in de Laatmoderniteit*, T. BALTHAZAR, J. CHRISTIAENS, M. COOLS, G. VERMEULEN e.a., Mechelen, 2004, Gandaius/Kluwer, 169-172.

<sup>28</sup> *Infra* 2.2.3.1.

done with an administrative finality, and rightly so: whereas criminal law has an intrinsically punitive character, the administration's aim is to assess and eliminate threats against the government, the society and the security, without affecting individuals in a punitive manner. The administration is not designed to punish the individuals which caused the threat and consequently operates under a fundamentally different regime. Indeed, not the rights of the individuals but the rights of the *apparatus* are the primary concern.

In those cases where the administration does step in the criminal law terrain, it has to acknowledge the criminal justice logics of acting in that context, and doing so brings about consequences. The latter is precisely where things go wrong. All too often administrative detours are sought in order to avoid the 'burdens' which go hand in hand with acting with a criminal justice finality. Procedural guarantees applicable in criminal matters are considered to be hindering the full coming into being of the novel 'right to security' which has so successfully been sold to the citizens. A few examples.

The declaration of the UK regarding Art. 20 EU MLA (containing the rules of play for the cross-border interception of telecommunication in criminal matters) is a good case-study. It was already clear that in the UK governmental entities can give orders of interception to police and custom authorities. When the official aim of such orders is to trace severe offences, the UK accepts the applicability of Art. 20 EU MLA. This also applies when such orders are given to intelligence services, when they act in support of a criminal investigation as determined in Art. 20. Leaving aside how peculiar the resolute and direct involvement of intelligence services in criminal investigations may be, the good news is that in such cases the criminal justice safeguards applies. In other words, even intelligence services can form part of the judicial process, as long as they behave as actors within the criminal law system. Authorities do not matter, finalities do. So far this example subscribes the proposed key notion of 'international cooperation with a criminal justice finality'.

The explanation for this mechanism however, has a downside. Naturally, the real intention behind the declaration to Art. 20 EU MLA was to secure the practice whereby interception orders are given to intelligence or security services when they do *not* formally act in support of a criminal investigations and would thus stay *outside* of the scope of Art. 20 EU MLA. As such this does not seem problematic: acting without criminal justice finality does indeed not require the application of criminal justice safeguards. What is problematic, however, is this: intercepted information which is collected with a primarily administrative aim can without hindrance be re-channelled to investigations with a criminal justice finality, with the creative justification that the criminal justice finality is only secondary. *Echelon* activities for example, had to be continued and to remain out of range of official reproach, even when they produce useful information for the dealing with terrorism or organised crime.

Another example concerns another provision of the EU MLA, namely the cross-border execution of undercover operations in criminal matters. Before this arrangement justice and police were conducting such operations in a legal vacuum (if not illegally), facilitated through the *International Working Group on Undercover Policing*. As such it is positive that a 'regulated' alternative to this practice was created. However, considering the criminal justice scope of application of the EU MLA, the new provisions did not produce any impact on the cross-border activities of intelligence services, which kept using the *International Working Group* as a tool for their activities and could and still can channel the acquired information into the criminal justice sphere.<sup>29</sup>

Interestingly enough though, three member states have indicated that Art. 14 until 22 EU MLA Convention do apply to their intelligence services.

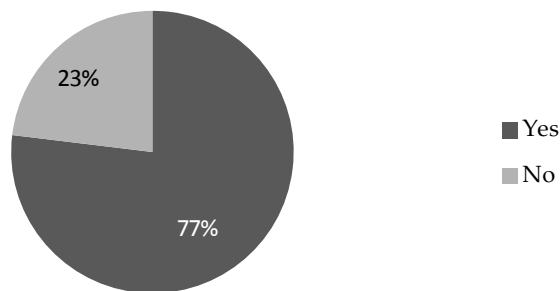
Based on these results, in combination with the fact that the UK applies Art. 20 EU MLA to its intelligence services in certain (much too rare, see above) instances, again shows that the situation is blurred. Clear EU action in this regard is long overdue: a choice should be made to either clearly apply the relevant provisions to intelligence services when they are acting with a criminal justice finality (be it directly or indirectly) or to clearly delineate the limits of competences of intelligence services (and thus bar them from gathering information/acting when these acts would have a direct or indirect criminal justice finality). The latter seems politically unrealistic since it entails a direct intervention in the national law of the member states. Therefore, the former is the only solution at EU level: instead of defining the scope of instruments dealing with international cooperation in criminal matters based on the authorities involved, it should be defined based on the finality with which they act. That way, if intelligence services are (directly or indirectly) acting with a criminal justice finality, it would be guaranteed that the necessary accompanying safeguard would apply. This course of action received overwhelming support in the survey.

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<sup>29</sup> G. VERMEULEN, "Gewapend bestuur. Kan het bestuur zich wapenen" in: *Het strafrechtssysteem in de Laatmoderniteit*, T. BALTHAZAR, J. CHRISTIAENS, M. COOLS, G. VERMEULEN e.a., Mechelen, 2004, Gandaius/Kluwer, 191.

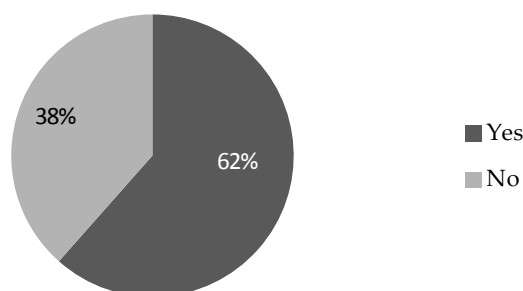


**1.2.9 Do you agree that if intelligence services are allowed to gather information/carry out actions with a criminal justice finality, they should be bound by the relevant legislation on cooperation in criminal matters?**



It be noted that even the second option, being the clear delineation of competences of intelligence services in that they would be barred from gathering information/acting when these acts would have a direct or indirect criminal justice finality, gained broad support in the survey.

**1.2.8 Do you agree that intelligence services should be barred from gathering any information/carrying out any action with a criminal justice character given that they [...] escape the procedural safeguards?**



Practices such as the previously discussed UK declaration to Art. 20 EU MLA or the involvement of intelligence services in cross-border surveillance matters qualify as painfully clear examples of purpose deviation, whether you label them finality deviation, forgery or violation of the separation of powers.

Unfortunately, this evolution fits the current political climate: when the safety of us, citizens, is at stake, everything else becomes secondary. Indeed, who would not support an efficient approach to terrorism or organised crime? Such thinking is dangerous, however, and the EU could counter it by clearly delineating the boundaries of the different finalities. When other authorities than the traditional ones want to take part in the enforcement of criminal law, they need to be bound by the same – instead of less – rules of play.<sup>30</sup>

#### 2.2.2.3 *Data protection and the purpose limitation principle*

The purpose limitation or finality principle forms an important part of the law on data protection,<sup>31</sup> and is recognized as such by the EU. This principle does not exclude the possibility for entities to gather private information with a criminal justice character, but it prevents those entities to use such information for purposes which do not have a criminal justice character. It thus contests the practice of entities providing such information to other entities, unless the use of that information has a purely criminal justice finality.

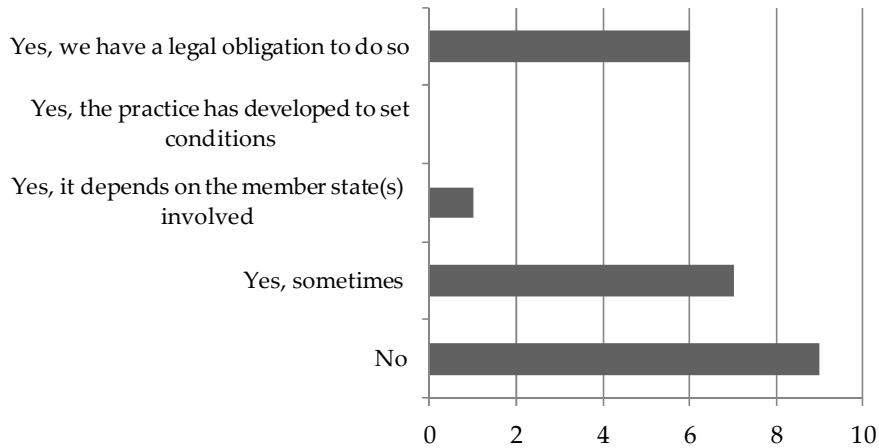
The replies to question 3.4.5 show that the member states are still insufficiently aware or pay insufficient attention to what happens with their information, once they have shared it. This need to be nuanced however, given that the following table shows that more than twenty member states indeed use the purpose limitation principle as a main motivation to attach conditions to the use of information. Still, 3.4.5 again subscribes the need for clear EU action in this regard.

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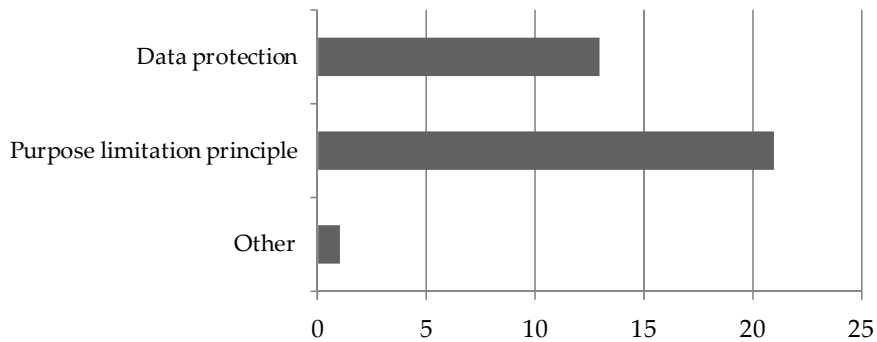
<sup>30</sup> B. DE RUYVER, T. VANDER BEKEN and G. VERMEULEN, "The desirability of legally regulating the proactive phase", in: *Undercover policing and accountability from an international perspective*, M. den Boer (ed.), Maastricht, European Institute of Public Administration, 1997, 109-112.

<sup>31</sup> P. DE HERT, "Trends in de politie en justitie informatie samenwerking" (2004) Panopticon, 26.

**3.4.5 Do you attach conditions to the use of information?**



**3.4.7 What is the main motivation to attach conditions to the use of information?**



Unfortunately, there are countless examples within EU law threatening the purpose limitation principle. The project team chose to list two very prominent examples. The first example can be found in the FD Data Protection: even though Art. 3 FD Data Protection stresses the purpose limitation principle, it is being put up for grabs later on in the framework decision (Art. 11 FD Data Protection)<sup>32</sup>. The default position outlined in Art. 3 FD Data Protection is that personal details can only be processed for the purpose for which they have been collected. The second paragraph specifies under which conditions they can be passed on for different purposes and Art. 11 FD Data Protection contains an

<sup>32</sup> E. DE BUSSE, *Data protection in the EU and EU criminal cooperation. A substantive law approach to the EU internal and transatlantic cooperation in criminal matters between judicial and law enforcement authorities*, Maklu, 2009, 104-106.

enumeration of those other purposes. A close reading of Art. 11 FD Data Protection reveals a breach of the purpose limitation principle. While provisions a) and b) can be justified,<sup>33</sup> provision d) renders the purpose limitation meaningless: the information can be used for *any other purpose* than for which it was originally collected, if the member state or the person concerned consent to this. The consent of the person concerned (who can freely dispose of his/her own privacy) might indeed be a viable exception, but only if that consent – and with it, the purpose limitation principle – could not be circumvented when the member state consents instead. The second example concerns the second Schengen Information System (SIS II): breaches of the finality principle were legally anchored at EU level: information gathered by security services can smoothly be channelled to the criminal justice sphere, without the application of the procedural safeguards which should normally accompany the latter.

The previous examples underpin the importance of the guarding of finalities in the context of information fluxes from the criminal justice to the administrative sphere and vice versa. This can also be applied to administrations which, in the context of their certificates or public procurement policy, need access to information regarding the implication of the persons involved with certain criminal offences. As with the access of private employers to criminal records information of potential future employees, here too the finality separation should be guarded scrupulously. This matter is closely intertwined with the policy recommendation of the project team to open up negotiations on the European certificate of non-prior conviction.

### **2.2.3 Extension and limits of the finality demarcation**

#### **2.2.3.1 Administrative sanctions: an extension**

The separation of finality forms a – silent – part of the EU *acquis*, this follows from the analysis of several provisions in the previous subsection. Through the analysis it became apparent that the EU traditionally focuses on the aim of the actions in the sense that they need to be taken in the context of a criminal investigation, or on the nature of the offences, or on both. Reiterating Art. 20 EU MLA concerning the interception of telecommunication, a criminal justice finality can be described as the aim of the actions taken “*in the course of criminal investigations which present the characteristics of being an investigation following the commission of a specific criminal offence [...] in order to identify and arrest, charge, prosecute or deliver judgment on those responsible.*” In this subsection the focus lies with the terms “a specific criminal offence”. The cooperation in criminal matters

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<sup>33</sup> Article 11, b refers to administrative offences; it should indeed be possible – provided that the access to a court also competent in criminal matters is guaranteed – to bring those under the umbrella of criminal justice finality (*infra*).

at EU-level has traditionally been limited to the context of criminal offences. The fact that within the EU there is a considerable diversity in naming certain ‘small’ offences as being of a criminal justice or administrative nature, threatened to hinder cooperation considerably. Indeed, member states where ‘small’ offences were not labelled as criminal could not obtain cooperation for those offences, given that they did not fall within the realm of cooperation instrumentarium. Hence, this constituted a break on cooperation, but a break which was perfectly justifiable in light of the criminal justice finality: administrative offences are traditionally placed outside the criminal justice sphere and they are consequently treated in a very different framework, without containing the procedural safeguards applicable in criminal matters. This means that in general the detection, prosecution etc. of administrative offences usually happens with an administrative – as opposed to criminal justice – finality.

As is well known the EU has extended the cooperation in criminal matters under certain conditions to the category of administrative offences. This is understandable, given the relatively large number of offences which is initially solved via the administrative route in several member states. Examples are the *ordnungswidrigkeiten* in Germany or the Dutch traffic offences under the Law Mulder. Crucial is that the EU added a condition which guarantees that the member states will indeed apply the procedural guarantees which form part of criminal procedures when detecting and/or prosecuting such administrative offence. In concrete terms the condition is that – if member states wish to bring the detection and prosecution of administrative offences within the realm of the EU cooperation instrumentarium – there is an appeal possibility before courts which are (also) competent in criminal matters. Building on the SIC acquis, Art. 3,1 EU MLA states that mutual legal assistance is also provided for procedures which according to the law of one (or both) of the member states “*in respect of acts which are punishable [...] by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters.*” A similar provision features in mutual recognition instruments, namely in Art. 1,a,i and ii FD Fin Pen.

This system extends the concept of criminal justice finality, but it is not in violation of it, quite the contrary. The baseline of the reasoning, namely that when the purpose of the acts is the detection or prosecution of criminal offences the procedural safeguards from criminal procedures should apply, still stands – if anything, it is strengthened. Through imposing the condition of an appeal before a court competent in criminal matters the prosecution of those administrative offences is brought inside the criminal justice system and consequently under the application of the necessary procedural safeguards. In other words, the extension confirms the default position.

Therefore, it is crucial not to deviate from the criminal justice appeal condition. The only nuance – it is more of a clarification – can be that the competent appeal judge would have an administrative ‘name tag’, but could

treat certain administrative offences in accordance with the procedural safeguards applicable in criminal matters. In those cases the philosophy that the finality of the authority's actions outweighs its name-tag needs to apply consistently: as long as the authorities involved answer to the criteria imposed by the ECtHR<sup>34</sup> (and only then), it should be possible to bring administrative offences within the realm of the extended criminal justice finality. A translation of this position in the applicable legislation could speed up the mentality change from focus on authority to finality, and could avoid useless or illogical bans from international cooperation in criminal matters. This being said, given the importance of the appeal condition a restrictive interpretation remains necessary.

*2.2.3.2 Prevention of immediate and serious threat to public security: a legitimate link*

To favour a distinction between criminal justice and administrative finality is one thing. To loose touch with reality another. Sence of reality indeed leads to the recognition of a legitimate link between both finalities, namely when there is "an immediate and serious threat to public security". In this case it should indeed remain possible to exchange certain information or to take actions in disregard of the demarcation of finalities.

Throughout the EU-instrumentarium many exceptions related to public security considerations can be found. Examples are Art. 8,3 FD Swedish, Art. 10,1 EEW, Art. 9,3 FD Crim Rec. They all contain the limited exception on the finality principle: where the information can normally only be transmitted for the same (or a closely related) aim as for which it was originally collected, the information can also be transmitted for other purposes, under the condition that there is an immediate and serious threat to public security. This public order exception is not only acceptable but even necessary in those instances where a strict finality separation would be an impediment to the prevention of a threat to public security. However, it needs to be stressed that this link between administrative and criminal justice finality has to be applied restrictively. The previously mentioned Art. 11, d FD Data Protection for example creates a much too loose link between both finalities: it is sufficient that the original member state consents (without necessarily the individual's consent) in order to justify the usage of the information for any purpose thinkable. This entails an unacceptable broadening of the public security exception in Art. 11,c. If the EU is indeed as serious about the finality principle as it claims in several instruments, limits need to be set consistently to the allowed deviations. Information needs to be able to flow from criminal justice to administrative sphere when there is an imminent threat to public security, but only then. Regrettably, 'creative'

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<sup>34</sup> ECtHR, Nr. 8544/79, Öztürk v. Germany, 21 February 1984.

deviations are gaining increasing popularity in several member states and also in the EU regulations, in particular where terrorism or serious crime are concerned. This evolution threatens to do away with the very pillar on which the EU legal space was built, being the respect for the integrity of procedural guarantees. This in itself might very well represent an even bigger threat to the public interest – a threat more immediate and serious than many (want to) see.

The price which the EU pays for institutionally and legally maintaining the distinction between judicial and police cooperation in criminal matters is high: incoherence and suboptimal efficiency in the criminal cooperation sphere. The price paid by the EU citizen is even higher: a blurring of the separation of powers, his procedural guarantees and his right to data protection – fundamental pillars of our democracies and thus also of the European Union.





### **3 General principles and concerns related to international cooperation**

The second line of argumentation relates to the importance to build a solid theoretical and conceptual framework for the principles that form the baseline of such international cooperation in criminal matters. A distinction is made between general cooperation principles, that apply regardless of the cooperation mechanism and cooperation specific principles for which application is linked to a specific form of cooperation.

Based on a thorough analysis of the current legal framework and taking account of the development of future policy options, the project team has singled out a series of general cooperation principles, clustered underneath this chapter 3. Problems related to unregulated or inadequately regulated forms of cooperation will be dealt with in chapter 4.

Additionally, it is important to underline that both these types of cooperation principles are fundamentally linked to actual situations of cooperation between different member states. They should therefore be understood in a cooperation context. These cooperation principles are not intended to interfere with the applicable law in a mere domestic situation. However, besides these cooperation principles, the project team has also looked into more intrusive policy options that intend to assess the feasibility of attaching EU-wide effects to acts and decisions that were taken in a mere domestic situation. These policy options will be dealt with underneath heading 6.

Four general cooperation principles have been identified by the project team and will be elaborated in the sections below:

- Double criminality and the future of the 32 MR offence list;
- Horizontalisation and decentral communication and decision making;
- Enhanced stringency in cooperation which includes discussions related to consent, consistency issues, refusal grounds, deadlines and capacity; and
- Correction mechanisms such as trustbuilding measures, minimum standards, flanking measures and the application of the *lex mitior* principle.

### 3.1 Double criminality in international cooperation in criminal matters

Wendy De Bondt

One of the first questions member states are confronted with in relation to international cooperation in criminal matters is what to do with a request that relates to behaviour that would not constitute an offence if committed in their jurisdiction. Because there is no such thing as an EU criminal code and the 27 member states have their own distinct criminal codes, differences in substantive criminal law are still widespread.<sup>35</sup> Situations may occur in which a member state receives a cooperation request/order with respect to behaviour that is not equally criminalised in its national law and therefore does not pass the so-called double criminality test. This chapter will demonstrate that the answer to the question whether cooperation is still allowed, required or prohibited in absence of double criminality is far from straight forward.

#### 3.1.1 Introduction

##### 3.1.1.1 Double criminality: what's in a name?

As an important preliminary note, it must be stressed that there is no definition of the concept of double criminality and in literature various "*related concepts*" can be found.<sup>36</sup> Analysis reveals that defining the concept is challenging because double criminality appears in almost as many shapes and sizes as the instruments it is used in. Because it is not clear which requirements can or should be brought under the concept of double criminality, describing it

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<sup>35</sup> Even though there are a lot of similarities in the behaviour that is criminalised throughout the criminal codes of the 27 member states, there are a lot of differences. Reference is traditionally made to the sensitivity surrounding the inclusion of abortion and euthanasia within the scope of murder See e.g. CADOPPI, A. (1996). Towards a European Criminal Code. *European Journal of Crime, Criminal Law and Criminal Justice*, 1, 2.. Furthermore, it is incorrect to think that EU intervention through the adoption of minimum rules in approximation instruments rules out further existence of difference. EU approximation only consists of the introduction of minimum standards with respect to offences and leaves it up to the member states to introduce a more strict legal regime.

<sup>36</sup> See also PLACHTA, M. "The role of double criminality in international cooperation in penal matters", in JAREBORG, N., *Double Criminality*, Uppsala, Iustus Förlag, 1989, p 84-134, who refers to the terminological chaos caused by the (distinct) use of double criminality, double punishability, double penalization, dual (criminal) liability, dual incrimination, double prosecutability, double culpability, equivalency of offences and even reciprocity of offences. See also WILLIAMS, S. A. "The Double Criminality Rule and Extradition: A Comparative Analysis." *Nora Law Review* 1991, 3, p 581-623, who also refers to dual criminality or duality of offences.

as requiring that the behaviour constitutes an offence in both states, may not suffice<sup>37</sup>, when taking account of the diversity illustrated by the following examples.

- The European Union Conventions on Transfer of Proceedings and the Enforcement of sanctions require that *the underlying act be an offence in the requested state if committed on its territory*;
- In the Framework decision on the European Arrest Warrant, it is required that the act constitutes *an offence under the law of the executing member state, whatever the constituent elements or however it is described*; This formulation does not include a specific reference to territoriality and points to the irrelevance of the labelling of the offence;
- The Council of Europe Conventions on the Transfer of Proceedings and International Validity of Judgements require *the act to be an offence if committed on the territory of the requested state and the person on whom the sanction was imposed liable to punishment if he had committed the act there*. This formulation does not only require that the act involved constitutes an offence, but also that the person involved can be held liable for that offence;
- In the Framework decision on the mutual recognition of confiscation orders, it is required that *the act constitutes an offence which permits confiscation under the law of the executing state, whatever the constituent elements or however it is described under the law of the issuing state*. This formulation indicates that mere double criminality of the act is not enough; even if the act in relation to which confiscation is requested constitutes an offence in the requested member state, cooperation can still be refused based on the fact that – according to the national law of the requested member state – confiscation is only possible in relation to a limited set of offences; and
- In the Council of European Extradition Convention it is stipulated that *extradition shall be granted in respect of offences punishable under the laws of the requesting state and of the requested state by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty. Where a conviction and prison sentence have occurred or a detention order has been made in the territory of the requesting state, the punishment awarded must have been for a period of at least four months*; This formulation adds sanction thresholds to the mere double criminality of the act.

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<sup>37</sup> ALEGRE, S. and LEAF, M. "Chapter 3: Double Criminality", in ALEGRE, S. and LEAF, M., European Arrest Warrant - A solution ahead of its time?, JUSTICE - advancing justice, human rights and the rule of law, 2003, p 34-52; THOMAS, F. De Europese rechtshulpverdragen in strafzaken. Gent, Rijksuniversiteit te Gent, 1980, 520p; VAN DEN WYNGAERT, C. Kennismaking met het Internationaal en Europees strafrecht. Antwerp - Apeldoorn, Maklu, 2003, 138p;

As a result, in literature various attempts have been made to catalogue the differences and classify the different types of double criminality. The combination between the requirement that the *behaviour* is punishable in both member states and the requirement that the *sanction* meets a certain threshold, is sometimes referred to as a type of *qualified double criminality*<sup>38</sup>. However, the concept of qualified double criminality is also used to describe the situation where the double criminality should not only be assessed from an abstract perspective (i.e. whether the *behaviour* is punishable in both states), but should also be assessed from a more concrete perspective (i.e. whether the *person* would have been punishable if the behaviour was committed in the territory of the other member state), pointing to the possible influence of differences in justification grounds (e.g. self defence, force majeure).<sup>39</sup> This latter (less frequent) interpretation of qualified double criminality, is more commonly referred to as the *in concreto* double criminality test. Additionally, a distinction is made between double criminality *in abstracto*, referring to the criminalisation of the type of the act (be it or not linked to a certain sanction threshold) and the double criminality *in concreto*, looking also into the punishability or prosecutability of the perpetrator.<sup>40</sup> To avoid confusion, neither the concept of *qualified* double criminality, nor *in abstracto* or *in concreto* double criminality are used.

More important though than the terminological discussions and the attempts to classify the different types of double criminality, is an argumentation that can either justify or preclude recourse to a double criminality requirement in whatever configuration. This discussion is never reflected let alone thoroughly analysed in literature.

### 3.1.1.2 *Two-party talk between the member states involved*

First and foremost, the position of the double criminality requirement is the result of a talk between the member states involved. The metaphor of a two-party talk is used to reflect the distinction between the position of the member states as issuing/requesting member states and as executing/requested member states.

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<sup>38</sup> See e.g. CLEIREN, C. P. M. and NIJBOER, J. F. *Tekst en Commentaar: Internationaal Strafrecht*. Deventer, Kluwer, 2011, 2366p.

<sup>39</sup> PLACHTA, M. "The role of double criminality in international cooperation in penal matters", in JAREBORG, N., *Double Criminality*, Uppsala, Iustus Förlag, 1989, p 84-134.

<sup>40</sup> See e.g. FICHERA, M. *The implementation of the European Arrest Warrant in the European Union: Law, Policy and Practice*. Cambridge-Antwerp-Portland, Intersentia, 2011, 253p. or VAN DEN WYNGAERT, C. "Double criminality as a requirement to jurisdiction", in JAREBORG, N., *Double criminality*, Uppsala, Iustus Förlag, 1989, p 43-56.

Where double criminality is said to have been originally developed as a mechanism to avoid that member states were obliged to cooperate with respect to behaviour they did not consider criminally actionable<sup>41</sup>, there is an important recent trend of abandoning the double criminality requirement in favour of efficient rendering of justice. Apparently, member states no longer consider it *a fortiori* problematic to cooperate in the event the behaviour underlying the cooperation request is not considered to be criminal not even for forms of cooperation that were traditionally strongly linked to double criminality.<sup>42</sup>

The position of the member states to either or not want to cooperate is centred around two main arguments that often though not necessarily coincide: the type of cooperation and the capacity implications.

First, it is important to appreciate that there is an entire spectrum comprising different forms of cooperation for which the answer to the double criminality question is likely to differ. Double criminality has never been and should never become a general requirement throughout cooperation instruments. Though for some forms of cooperation double criminality was never an issue, it is understandable that member states wanted – and still want – to limit some other forms of cooperation based on a double criminality requirement with a view to remaining master in their own territory and decide how to deal with certain behaviour.<sup>43</sup> To be able to provide an overview of the position of double criminality in international cooperation in criminal matters that sufficiently differentiates between the different forms of international cooperation, a distinction was made between 7 domains of cooperation.<sup>44</sup> These domains mirror

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<sup>41</sup> PLACHTA, M. "The role of double criminality in international cooperation in penal matters", in JAREBORG, N., *Double Criminality*, Uppsala, Iustus Förlag, 1989, p 107.

<sup>42</sup> See e.g. current surrender scene whereas in the context of the traditional extradition scene double criminality is said to be a principle of customary international law.

<sup>43</sup> This position is not shared by all academics. See e.g. KLIP, A. "European integration and harmonisation and criminal law", in CURTIN, D. M., SMITS, J. M., KLIP, A. and MCCAHERY, J. A., *European Integration and Law*, Antwerp - Oxford, Intersentia, 2006, p147. He has elaborated on a proposal that involves complementing the abandonment of the double criminality requirement with the introduction of a strict territoriality based jurisdiction.

<sup>44</sup> Older overviews of the position of double criminality in international criminal law make a distinction between 5 cooperation types, being extradition, judicial assistance, recognition of foreign penal judgments, transfer of criminal proceedings and enforcement of foreign penal judgements. See e.g. PLACHTA, M. "The role of double criminality in international cooperation in penal matters", in JAREBORG, N., *Double Criminality*, Uppsala, Iustus Förlag, 1989, p 84-134. Considering the evolution in European criminal law, it was decided to join *recognition and enforcement* and add three domains, being the transfer of pre-trial supervision, the exchange of criminal records and the relocation and protection of witnesses as separate domains for the analysis. Additionally, the scope of the joint 'recognition and enforcement of foreign penal judgements' was extended to 'international validity and effect of decisions', to encompass the taking account of prior convictions in new (criminal) proceedings and similar forms of making sure that foreign decisions have effects equivalent to national decisions in a member state's legal order.

the clusters developed when outlining the methodology for this study, designed around 7 domains of cooperation, being: (1) mutual legal assistance, (2) transfer of pre-trial supervision, (3) extradition and surrender, (4) exchange of criminal records, (5) relocation and protection of witnesses, (6) transfer of prosecution, (7) international validity and effect of decisions. For each of these domains the position of the double criminality requirement will be assessed consecutively. Considering the appearance of the concept of 'extraditable offences' in various cooperation instruments beyond the extradition domain, extradition needs to be thoroughly assessed first. Thereafter, the domains will be dealt with in the above indicated consecutive order.

Second, empirical data gathered in a previous study demonstrated – especially now the cooperation scene is changing from request-based into order-based – that capacity issues increasingly gain attention.<sup>45</sup> It will be looked into to what extent member states should be allowed to engage in a debate on the acceptability of upholding a double criminality requirement with respect to forms of cooperation that would have a significant operational or financial capacity impact. It is a valid concern of member states to want to retain the power to decide when a situation is serious enough to justify the use of certain investigative capacity. Especially when double criminality is not met, member states may deem that the investigative capacity does not weigh up to the relative seriousness of the case.<sup>46</sup> In parallel it is interesting to assess to what extent it is feasible to overcome (double criminality related) capacity concerns by allowing the requesting or issuing member state to use its own capacity to complete the request or order. From the perspective of the issuing or requesting member state it can be reviewed to what extent it may be expected that responsibility is taken to execute own requests or orders when a (double criminality related) capacity concern leads to refusal. From the perspective of the requested member state, it can be reviewed to what extent moving ahead in a criminal procedure is deemed to be so important that they ought to accept the presence of another member state on their territory. This policy option can be summarised in the feasibility of the introduction of an *aut exequi aut tolerare* principle.

Based on the (possible) conflict of interest between on the one hand the member state that seeks cooperation and on the other hand the member state that wishes to retain the power to decide to either or not take up that request/order, the current position of double criminality in international cooperation in criminal matters can be reviewed. However, the double criminality question is not confined to a two-party talk between the two (cooperating) member states. The issue is more complex and requires a four-

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<sup>45</sup> See VERMEULEN, G., DE BONDT, W. and VAN DAMME, Y. EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence? Antwerp-Apeldoorn-Portland, Maklu, 2010.

<sup>46</sup> Even though capacity objections are linked to double criminality issues in this paragraph, capacity can also be a concern in relation to situations where double criminality is met.

party talk. Besides the (cooperating) member states, both the European Union in its capacity of a policy maker and the person involved deserve a seat at the reflection table.

### 3.1.1.3 *The European Union as the third party*

In addition to the member states involved, it would make sense that the EU joins as a third party in the discussions on the position of the double criminality requirement. Even though the member states *are* the EU, especially when it comes to criminal policy making, the added value of the EU as a third party consists of its role to strive for consistency in EU policy making and to that end safeguard the approximation acquis.

The answer to the question to what extent double criminality can/should/may limit international cooperation in criminal matters, is closely intertwined with the development of an EU criminal policy with respect to a limited number of offence labels. Ever since the Amsterdam Treaty introduced the possibility to approximate the constituent elements of offences<sup>47</sup>, the EU has adopted several instruments in which it requires member states to ensure that the included behaviour constitutes a criminal offence. This obligation inevitably also has its influence on the position of double criminality limits to international cooperation in criminal matters in relation to those offences. It would be inconsistent to require member states to ensure that behaviour constitutes an offence and at the same time allow member states to refuse cooperation in relation to that behaviour for double criminality reasons.

To reinforce the approximation obligations and reinforce its policy with respect to those offences, the EU has a legitimate reason to prohibit the use double criminality as a refusal ground with respect to approximated parts of offences. Member states that have complied with the criminalisation obligation will not have a double criminality issue and member states that have not complied with the criminalisation obligation will not have the right to use their lagging behind as an argument to refuse cooperation.

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<sup>47</sup> See old Art. 31 (e) TEU.

INTERNATIONAL COOPERATION IN CRIMINAL MATTERS

In order to conduct such an assessment, it is important to know which offences have been subject to approximation and thus for which offences the EU is building an EU criminal policy. To visualise the current so-called *approximation acquis*<sup>48</sup>, a table is inserted below providing an overview of the offence labels and the instruments in which a definition thereto is included.

Offence label	as it has been defined in
Euro counterfeiting	Council Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro <i>as amended by</i> the Council Framework Decision 2001/888/JHA of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro
Fraud and counterfeiting non-cash means of payment	Council Framework Decision 2001/413/JHA of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment
Money laundering	Joint Action 98/699/JHA of 3 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime <i>repealed and replaced by</i> the Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime

<sup>48</sup> The possibility to approximate offences and sanctions was formally introduced at EU level in Artt. 29 and 31(e) TEU as amended by the Amsterdam Treaty. They allowed for the adoption of measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking. To that end Art. 34 TEU introduced the framework decision. With the entry into force of the Lisbon Treaty, the framework decision has been replaced by the directive. Therefore, this table also includes the post-Lisbon directives. For reasons of completeness the table also includes the references to the relevant joint actions, that can be characterized as the predecessors to the framework decisions. As argued elsewhere, it is important to note that the actual approximation *acquis* extends beyond this traditional *framework decision only*-view even when it is complemented with joint actions and directives. See e.g. DE BONDT, W. and VERMEULEN, G. "Esperanto for EU Crime Statistics. Towards Common EU offences in an EU level offence classification system", in COOLS, M., Readings On Criminal Justice, Criminal Law & Policing, Antwerp - Apeldoorn - Portland, Maklu, 2009, 2, p 87-124; DE BONDT, W. and VERMEULEN, G. "Appreciating Approximation. Using common offence concepts to facilitate police and judicial cooperation in the EU", in COOLS, M., Readings On Criminal Justice, Criminal Law & Policing, Antwerp-Apeldoorn-Portland, Maklu, 2010, 4, p 15-40



DOUBLE CRIMINALITY

Offence label	as it has been defined in
Terrorism	Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism <i>as amended by</i> Council Framework Decision 2008/919/JHA amending Framework Decision 2002/475/JHA on combating terrorism
Trafficking in human beings	Joint Action 97/154/JHA of 24 February 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning action to combat trafficking in human beings and sexual exploitation of children <i>repealed and replaced by</i> Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings <i>repealed and replaced by</i> Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA
Illegal (im)migration	Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the legal framework to prevent the facilitation of unauthorised entry, transit and residence, <i>as complemented by</i> the Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence
Environmental offences	Council Framework Decision 2003/80/JHA on the protection of the environment through criminal law and Council Framework Decision 2005/667/JHA to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution <i>annulled and replaced by</i> Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law
Corruption	Joint Action 98/742/JHA of 22 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on corruption in the private sector <i>repealed and replaced by</i> the Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector

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Offence label	as it has been defined in
Sexual exploitation of a child and child pornography	Joint Action 97/154/JHA of 24 February 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning action to combat trafficking in human beings and sexual exploitation of children <i>repealed and replaced by</i> the Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography <i>repealed and replaced by</i> Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA.
Drug trafficking	Joint Action 96/750/JHA of 17 December 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning the approximation of the laws and practices of the Member States of the European Union to combat drug addiction and to prevent and combat illegal drug trafficking <i>replaced by</i> the Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking
Offences against information systems	Council Framework Decision 2005/222/JHA of 21 February 2005 on attacks against information systems
Participation in a criminal organisation	Joint action 98/733/JHA of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union <i>repealed and replaced by</i> the Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime
Racism and xenophobia	Joint Action 96/443/JHA of 15 July 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia <i>repealed and replaced by</i> the Council Framework Decision 2008/913/JHA of 29 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law

Additionally, because capacity concerns increasingly gain attention – especially now cooperation is changing from request-based into order-based – it is valid to look into the link between those capacity concerns as refusal grounds and the approximation acquis. If member states link (and thus limit) the use of capacity concerns to situations in which double criminality is not fulfilled and those member states have also unanimously agreed to approximate certain offences, it is only logical to formulate the capacity based refusal ground in a way that clarifies that it is unacceptable to use double criminality as a refusal ground in relation to offences that have been subject to approximation. Hence,

this means that cooperation for cases in relation to offences that have been subject to approximation can never be hindered by capacity concerns. However, member states may also decide that it is acceptable to use capacity as a refusal ground even when double criminality is met, which means that also cases in relation to offences that have been subject to approximation can be hindered by capacity concerns. In this scenario it would be interesting for the European Union in its capacity of a policy maker to bring the acceptability of the *aut exequi aut tolerare* principle to the table, which would attach consequences to using capacity as a refusal grounds in relation to (all or some of the) offences that have been subject to approximation. For the issuing or requesting member state, this would entail the commitment to use its own capacity to complete the order or request; for the requested member state this would entail the obligation to accept the presence of and execution by another member state.

#### 3.1.1.4 *The person involved as the fourth-party*

The fourth party that deserves a seat at the reflection table is the person involved. The answer to the question to what extent double criminality can limit international cooperation in criminal matters has a direct impact on the position of the person involved; a direct impact on whether or not she will be subject to e.g. extradition, investigative measures, cross-border execution of a sentence. Obviously, whereas the reservation to cooperate in absence of double criminality may form a relatively strong shield<sup>49</sup> from being subjected to any kind of criminal procedural measure for the person involved, this shield is significantly losing its strength with the negotiation and adoption of each instrument in which member states agree to cooperate in spite of lack of double criminality. This trend is not problematic as a person can never claim the right to benefit from the protection of the double criminality shield. The double criminality limit to international cooperation is not a vested right.<sup>50</sup>

On the other hand, calling upon a double criminality requirement can also run counter the interests of the person involved. The rehabilitation interest that is now strongly emphasized in the context of transfer of execution of custodial sentences<sup>51</sup>, can serve as an example here.

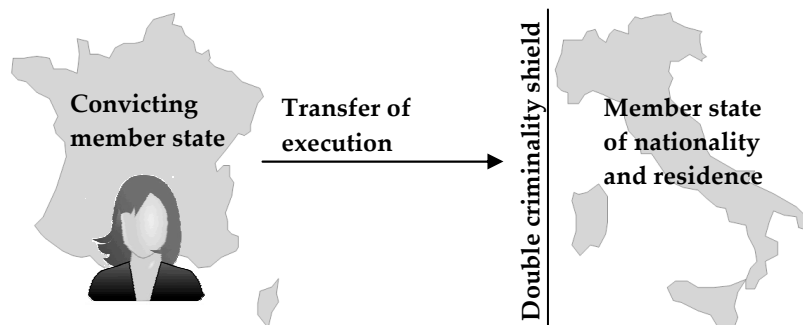
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<sup>49</sup> "Relatively strong" because double criminality has never been a general requirement shielding the persons involved from any kind of cooperation in criminal matters. As will become clear in the overview provided some forms of cooperation have never been subject to a double criminality requirement.

<sup>50</sup> Analysis will reveal that there is no existing international (human rights based) obligation to retain double criminality as a refusal ground in any of the forms of international cooperation in criminal matters.

<sup>51</sup> With the coming into office of Ms. Reding as the Commissioner for Justice, rehabilitation has assumed a high place on the political agenda. See also: VERMEULEN, G., VAN KALMTHOUT, A., PATERSON, N., KNAPEN, M., VERBEKE, P. and DE BONDT, W. Cross-border execution of

A conflict may rise between the double criminality requirement and the rehabilitation interest. If the person involved is found in the convicting member state, that member state – though it does not need the cooperation from any other member state to ensure execution of its sentence – may wish to call upon e.g. the member state of the person’s nationality and residence for the execution of the sentence, as is visualised in the figure inserted below. This would fit perfectly to the recent focus on the principle of rehabilitation the application of which may lead to the conclusion that the person involved would be better off – in terms of rehabilitation opportunities – in the member state of her nationality and residence.



In this particular scenario, the use of double criminality as a refusal ground is not linked to either or not executing the sentence, but is linked to the *location* of the execution. Refusal will mean that execution in the country of nationality and residence is impossible and will “*condemn*” the person to execute her sentence in the convicting member state, in spite of (potentially) better rehabilitation opportunities in the member state of nationality and residence. In this scenario it would go against the – rehabilitation inspired – interests of a convicted person to refuse the transfer of execution to her member state of nationality and residence purely based on the lack of double criminality.

Either or not seeking recourse to double criminality as a limit to international cooperation in criminal matters can significantly impact on the position of the person involved, both to its advantage as well as to its disadvantage. The question arises what the right balance would be between the ability for a member state to seek recourse to the double criminality requirement to limit international cooperation and the rehabilitation objectives underlying the transfer of execution.

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judgements involving deprivation of liberty in the EU. Overcoming legal and practical problems through flanking measures. Antwerp-Apeldoorn-Portland, Maklu, 2011, 310p

### 3.1.1.5 *Four-party talks*

Against the background of those basic considerations with respect to the concept of double criminality (i.e. the lack of a proper definition and the variety in its formulation and requirements) and in light of the interests of the four parties involved, the actual position of double criminality in each of the different forms of cooperation will be critically reviewed.

### 3.1.2 *Extradition and surrender*

The first domain under review consists of extradition and surrender. After detailing the position of the double criminality requirement in this domain, it will be argued that (1) the evolution from extradition to surrender has not consistently dealt with the fate of the outdated concept of '*extraditable offences*', (2) the abandonment of the double criminality requirement for a set of offence labels for which the definition is left to the discretion of the issuing member states might have been too much too soon for the executing member states to handle, (3) the absence of a link between the double criminality requirement and the approximation *acquis* runs the risk of undermining the *acquis* if member states have not correctly implemented their approximation obligations and (4) that there is no vested right for the person involved to benefit from a double criminality shield in an extradition or surrender context.

#### 3.1.2.1 *Extraditable offences: double criminality as a rule of customary law*

Extradition is a form of cooperation through which one member state hands over a person that is either a suspected or convicted criminal in another member state. Because handing a person over to another member state constitutes a significant contribution to a criminal procedure held in another member state, this cooperation form has always been dependent on the condition that the offence was punishable in both the issuing and the executing member state.<sup>52</sup> As a result, double criminality is sometimes even referred to as a customary rule of international law with respect to extradition.<sup>53</sup>

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<sup>52</sup> VERMEULEN, G. VANDER BEKEN, TOM "Extradition in the European Union: State of the Art and Perspectives." *European Journal of Crime, Criminal Law and Criminal Justice* 1996, p 200-225; KONSTANDINIDES, T. "The Europeanisation of extraditions: how many light years away to mutual confidence?", in ECKES, C. and KONSTANDINIDES, T., *Crime within the Area of Freedom Security and Justice. A European Public Order*, Cambridge, Cambridge University Press, 2011, p 192-223

<sup>53</sup> See e.g. PLACHTA, M. "The role of double criminality in international cooperation in penal matters", in JAREBORG, N., *Double Criminality*, Uppsala, Iustus Förlag, 1989, p 84-134. However, considering the exceptions that exists for example between the Nordic Countries, where extradition is possible without a double criminality verification (see more in detail: TRÅSKMAN, P. O. "Should be take the condition of double criminality seriously?", in

Furthermore, member states have always complemented this double criminality requirement with sanction thresholds. CoE Extradition is the first relevant multilateral European extradition instrument scrutinized. Art. 2.1. CoE Extradition elaborates on the concept of extraditable offences. It explains that extradition shall be granted in respect of offences punishable under the laws of the requesting state and of the requested state by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty. Where a conviction and prison sentence have occurred or a detention order has been made in the territory of the requesting state, the punishment awarded must have been for a period of at least four months. In sum, the *in abstracto* threshold was set at 1 year and the *in concreto* threshold was set at 4 months.<sup>54</sup> If the request for extradition includes several separate offences each of which is punishable under the laws of the requesting state and the requested state by deprivation of liberty or under a detention order, but of which some do not fulfil the condition with regard to the aforementioned sanction threshold, the requested state will have the discretion to decide whether or not to grant extradition.<sup>55</sup>

Within the EU the concept of extraditable offences was slightly adjusted with the introduction of the 1996 Convention relating to extradition between the member states of the European Union.<sup>56</sup> Art. 2.1. EU Extradition elaborates on the concept of extraditable offences and explains that extradition shall be granted in respect of offences which are punishable under the law of the requesting member state by deprivation of liberty or a detention order for a maximum period of at least 12 months and under the law of the requested member state by deprivation of liberty or a detention order for a maximum period of at least six months.

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JAREBORG, N., Double criminality, Uppsala, Iustus Förlag, 1989, p 135-155) this connotation is deemed to be too strong.

<sup>54</sup> Even though the concepts of *in abstracto* double criminality (i.e. looking only at the criminalisation of the underlying behaviour and where applicable the sanction threshold) and *in concreto* double criminality (i.e. looking also at the punishability and prosecutability of the person in the concrete case), the terms *in abstracto* and *in concreto* will be used in the context of the interpretation of the threshold. The provisions regulating the double criminality requirement distinguish between on the one hand the situation where the person still has the status of a suspect in which case the threshold in the issuing/requesting member state is assessed in an abstract way, looking into the sanction that might be imposed and on the other hand the situation where the person has already been convicted in which case the threshold in the issuing/requesting member state is assessed in a concrete way, looking at the sanction that was imposed.

<sup>55</sup> For reasons of completeness, it should also be mentioned that political, military and fiscal offences are also excluded from the scope of extraditable offences.

<sup>56</sup> Hereafter abbreviated as EU Extradition.

This means that – as shown from the table below – the *in concreto* threshold was raised from four (in Art. 2.1. CoE Extradition) up to six months (in Art. 2.1. EU Extradition), without any form of justification, not even when compared to existing regional instruments. The Benelux Extradition Treaty for example lowered the *in abstracto* CoE threshold by rendering offences extraditable as soon as they are punishable with a deprivation of liberty of at least six months or punished with a detention order if a maximum period of at least four months.

	In abstracto in the IMS	In abstracto in the EMS	In concreto in the IMS
CoE Extradition	1 year	1 year	4 months
Benelux Extradition	6 months	6 months	4 months
EU Extradition	12 months	12 months	6 months

The coexistence of these instruments created the rather complex situation in which the sanction threshold and therefore the scope of the extraditable offences was dependent on the ratification process in each of the individual member states.

### 3.1.2.2 *Surrenderable offences: double criminality for non-listed offences*

Nowadays, within the EU, the concept of extraditable offences has lost its meaning following the introduction of the FD EAW and the associated evolution from *extraditing* to *surrendering*. This evolution has important implications for the double criminality requirement that was traditionally included as a limit to this type of cooperation. The FD EAW introduces a two track approach in that the double criminality requirement is maintained for some situations and lifted for other situations.

As a first track, Art. 2.4 FD EAW maintains the double criminality requirement in that in general surrender may be subject to the condition that the acts for which the European arrest warrant has been issued also constitute an offence under the law of the executing member state. The introduction of the FD EAW again changed the sanction thresholds. The sanction thresholds that were always included in previous instruments have been limited to the perspective of the issuing member state. As shown in the table below, Art. 2.1 FD EAW stipulates that a European arrest warrant may be issued for acts punishable by the law of the issuing member state by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.

Despite the existence of EU sanction thresholds, those thresholds were not copied into the FD EAW. The *in abstracto* threshold in the issuing member state corresponds to the threshold included in EU Extradition, whereas the *in concreto*

threshold in the issuing member states corresponds to the threshold included in a Council of Europe instrument.<sup>57</sup>

	In abstracto in the IMS	In abstracto in the EMS	In concreto in the IMS
CoE Extradition	1 year	1 year	4 months
Benelux Extradition	6 months	6 months	4 months
EU Extradition	12 months	12 months	6 months
FD EAW	12 months	--	4 months

As a second track, a significant reduction of the double criminality requirement is introduced in the clause in between. Notwithstanding the impact of surrender and therefore the importance of the double criminality requirement, double criminality tests were considered time consuming and therefore obstacles to smooth and timely cooperation.<sup>58</sup> Member states looked into alternative approaches that could facilitate and speed up cooperation. An alternative was found by means of the introduction of the so-called 32 offence list.<sup>59</sup> Art. 2.2 FD EAW is often characterised as the most radical or revolutionary change<sup>60</sup>

<sup>57</sup> It is not correct to say that the CoE thresholds were copied into the FD EAW, because in many member states 1 year is considered to be longer than 12 months (e.g. in Belgian law, 1 month is considered to be 30 days, as a result of which 12 months is only 360 days, 5 days short of a year).

<sup>58</sup> This position was chiefly voiced by the European Commission, though never supported with convincing empirical evidence. Communication from the Commission to the Council and the European Parliament on Mutual Recognition of Final Decisions in Criminal Matters, COM(2000) 495 final of 26.07.2000.

<sup>59</sup> Several authors have commented on the compilation of the list. The offences are characterised here as semi-ad random, because no clear policy-consistency-rationale was used as a basis for their selection. The list started off with 24 crimes, being eleven crimes considered during the discussions of the freezing orders proposal, twelve crimes taken from the Annex to the Europol Convention and one additional crime that appeared in the Tampere Presidency Conclusions. Later on, the list was complemented with two more so-called Europol offences, an offence that had been subject to approximation and one offence following a specific member state request. The compilation of the list was finalised by including a final set of four crimes See more detailed; PEERS, S. "Mutual recognition and criminal law in the European Union: Has the Council got it wrong?" *Common Market Law Review* 2004, 41, p 35-36; KEIJZER, N. "The Fate of the Double Criminality Requirement", in GUILD, E. and MARIN, L., *Still not resolved?: Constitutional issues of the European arrest warrant*, Brussels, Wolf Legal Publishers, 2008, p 61-75; AMBOS, K. "Is the development of a common substantive criminal law for Europe possible? Some preliminary reflections." *Maastricht Journal of European and Comparative Law* 2005, 12 (2), p 173-191

<sup>60</sup> The European Commission itself stated that the Amsterdam Treaty opened the door to a radical change of perspective: European Commission, Proposal for a Council framework Decision on the European arrest warrant and the surrender procedures between the Member States, 24 September 2001, COPEN 51, 12102/01. See also ALEGRE, S. and LEAF, M. "Chapter 3: Double Criminality", in ALEGRE, S. and LEAF, M., *European Arrest Warrant - A solution*



brought about by the FD EAW as it reduces the possibility of the executing member state to refuse because of not meeting the double criminality requirement, in that a list of 32 offences is introduced for which double criminality verification is abandoned. In as far as the offences are punishable by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing member state, the listed offences are no longer subject to a double criminality verification.

### 3.1.2.3 *Viability of 'surrenderable offences' as a substitute for the 'extraditable offences'*

From the perspective of the issuing member state, the evolution from extradition to surrender can be criticised for not having dealt with the references to the concept of extraditable offence in other cooperation instruments.

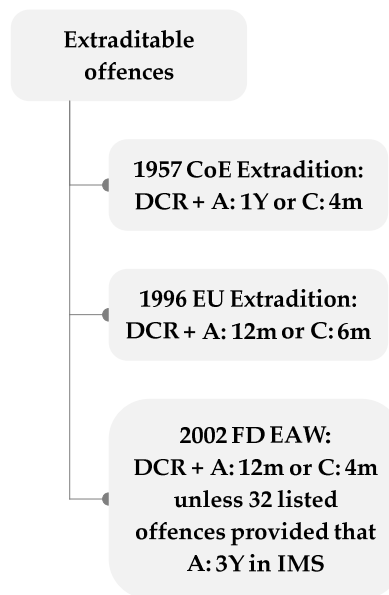
When elaborating on the structure of this chapter, it was clarified that due to frequent references to the concept of 'extraditable offences' in other legal instruments, it was deemed important to first discuss the position of double criminality in the context of extradition/surrender and pay attention to the evolution from the concept of 'extraditable offences' into 'surrenderable offences'.

It is unclear whether the concept of 'extraditable offence' should be reinterpreted in light of the development of the 'extraditable offences' into 'surrenderable offences' following the introduction of the FD EAW. Art. 31 FD EAW that intends to clarify the relation to other legal instruments, remains silent on this topic. Considering that all extradition related instruments and provisions are (to be) reinterpreted in light of the characteristics of surrender, it seems logical to reinterpret 'extraditable offences' into 'surrenderable offences' in light of the scope demarcation in Art. 2 FD EAW. This would mean that within the EU an extraditable offence is no longer subject to a double criminality requirement complemented with sanction thresholds, but is only subject to a double criminality requirement in as far as the offence is not listed amongst the 32 (provided that the behaviour is punishable with at least 3 years in the issuing member state).

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ahead of its time?, JUSTICE - advancing justice, human rights and the rule of law, 2003, p 34-52; KEIJZER, N. "The Fate of the Double Criminality Requirement", in GUILD, E. and MARIN, L., Still not resolved?: Constitutional issues of the European arrest warrant, Brussels, Wolf Legal Publishers, 2008, p 61-75; KLIP, A. European Criminal Law. An integrative Approach. Antwerp - Oxford - Portland, Intersentia, 2009, 531p.

The figure inserted below provides an overview of the evolution of 'extraditable offence' as a concept for the European states.



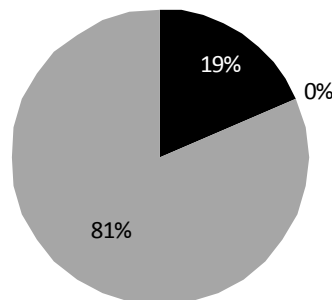
DCR: double criminality requirement | A: threshold in abstracto |  
C: threshold in concreto | Y: years | M: months | IMS: Issuing member state

In sum, the concept of extraditable offence was introduced in CoE Extradition and referred to offences for which the underlying behaviour was criminalised in both member states and the sanction threshold was either 1 year in abstracto or 4 months in concreto. With the EU Extradition, the concept was redefined and the thresholds changed into 12 months in abstracto and 6 months in concreto. With the FD EAW a two track approach was introduced. In general, the double criminality requirement was maintained, combined with either an in abstracto threshold of 12 months or an in concreto threshold of 4 months. With respect of the 32 listed offences, the threshold requirement was limited to an in abstracto threshold of 3 years in the issuing member state. The question arises whether this last set of requirements defines the new concept of 'surrenderable offences' and can/should be used as a substitute for the existing references to 'extraditable offences'. Because – in absence of a clear provision in Art. 31 FD EAW – there is no hard legal basis to reinterpret 'extraditable offence' in light of the boundaries of the new concept of 'surrenderable offence', it is deemed necessary to test the member state perspectives with respect to the faith of the 'extraditable offence' and the acceptability of a reinterpretation into

'surrenderable offences'. The explanatory guide to the member state questionnaire briefly situated the outdated character of the concept of 'extraditable offences' as a lead up to a question on the current interpretation thereof. The insight into the current situation based on the replies to question 2.4.1. is reassuring in that none of the member state use a strict historic interpretation that would limit the scope of extraditable/surrenderable offences to what was extraditable at the time of the adoption of the instrument that refers to it. Still 19% of the member states indicate to seek recourse to the original meaning of Art. 2 CoE Extradition which is somewhat outdated, but an interesting 81% of the member states links the interpretation of the extraditable offences to the legal framework foreseen by the FD EAW.

**2.4.1 Considering that the concept of extradition has seized to exist among the member states of the European Union, how do you currently interpret that scope limitation?**

- We use the definition of Art 2 CoE Extradition to decide what is an extraditable offence
- Historic interpretation: we look at the status of what used to be extraditable offences at the time, because the instrument was intended to be limited in that way.
- Evolutionary interpretation: we look at the current status and thus the current body of instruments, which means that we use the rules in the EAW

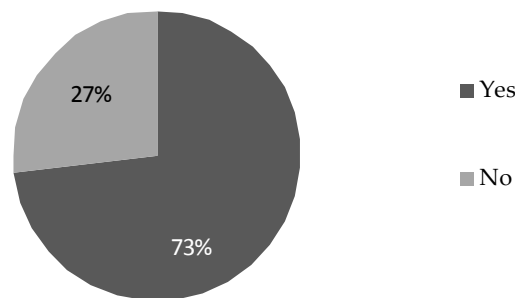


Because the replies to question 2.4.1. reveal that for 81% of the member states the concept of extraditable offences has changed in light of Art. 2 FD EAW this means that surrender can only be requested for offences that meet the thresholds in Art. 2.1 FD EAW in the issuing member state for which a double criminality test is still allowed. This double criminality test is however no longer allowed for the offences listed in Art. 2.2 FD EAW to the extent they are punishable in the issuing member state with at least three years. In light thereof it becomes interesting to test to what extent it would be acceptable to amend Art. 31 FD

EAW and in doing so formally reinterpret the scope of ‘extraditable offence’ in such a way. One would expect that at least those 81% of the member states would be in favour, maybe even more.

When testing the acceptability of the future policy option to formalise the reinterpretation of extraditable offences into a surrenderable offence in all cooperation instruments, it is surprising that – when analysing the replies to question 2.4.2 – the number of opponents to an evolutionary interpretation has increased from 19% up to 27% (which corresponds to two member states who have changed their position). Nevertheless, still 73% of the member states is in favour of introducing a solid legal basis for the interpretation of the concept of ‘extraditable offence’ in light of the evolution from extradition to surrender.

**2.4.2 Is it an acceptable future policy option for you to amend all remaining provisions that refer to extraditable offences?**



The high percentage of member states already reinterpreting this concept in light of the introduction of the surrender procedure via the FD EAW and the amount of member states considering it an acceptable future policy option to amend the remaining references to extraditable offences is not without meaning. Taking account of the new legislative procedure that would govern the amendment of e.g. Art. 31 FD EAW in such a way, this would mean that the qualified majority would be reached<sup>61</sup> and an amendment is possible.<sup>62</sup>

<sup>61</sup> In absolute numbers 20 member states use an evolutionary interpretation, 5 member states uphold a CoE interpretation and 2 member states indicated to use another interpretation in reply to question 2.4.1. With respect to question 2.4.2 19 member states indicated to be in favour, 7 member states indicated to be against a such reinterpretation and 1 member state abstained.

<sup>62</sup> Even against the will of opposing member states.

### 3.1.2.4 *Too much too soon?*

From the perspective of the executing member state, it can be questioned whether it was a good choice to accept the introduction of such a wide list of offences for which the decision on the exact scope is left to each of the 27 individual member states. In spite of the fact that the member states had unanimously agreed to abandon the double criminality requirement for those offences, it is not clear whether member states were sufficiently aware of the impact of such a decision. Problems could have been expected not only with respect to the implementation of the list but also with respect to the use of the list afterwards. Even a very strong presumption that there will most likely not be any significant double criminality issues<sup>63</sup> will not preclude double criminality issues from occurring, which was incompatible with the national laws of some member states considering the nature of surrender.

At the time of the adoption of the FD EAW the JHA Council had recognised the lack of common definitions for the listed offences and anticipated to the problems it may cause trying to formulate guidelines for the member states with respect to the interpretation of the 32 offence list by clarifying the meaning of some of the offence labels.<sup>64</sup>

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<sup>63</sup> ALEGRE, S. and LEAF, M. "Chapter 3: Double Criminality", in ALEGRE, S. and LEAF, M., *European Arrest Warrant - A solution ahead of its time?*, JUSTICE - advancing justice, human rights and the rule of law, 2003, p 34-52; KEIJZER, N. "The Fate of the Double Criminality Requirement", in GUILD, E. and MARIN, L., *Still not resolved?: Constitutional issues of the European arrest warrant*, Brussels, Wolf Legal Publishers, 2008, p 61-75; VERMEULEN, G. "Mutual recognition, harmonisation and fundamental (procedural) rights protection", in MARTIN, M., *Crime, Rights and the EU. The future of police and judicial cooperation*, London, JUSTICE - advancing access to justice, human rights and the rule of law, 2008, p 89-104

<sup>64</sup> See 2436th meeting of the Council (Justice and Home Affairs and Civil Protection) held in Luxembourg on 13 June 2002, JAI 138, CONS 33, 9958/02, ADD 1 REV 1 – The Council states that in particular for the following offences, listed in Article 2(2), there is no completely approximated definition at Union level. For the purposes of applying the European arrest warrant, the act as defined by the law governing issue prevails. Without prejudice to the decisions which might be taken by the Council in the context of implementing Article 31(e) TEU, member states are requested to be guided by the following definitions of acts in order to make the arrest warrant operational throughout the Union for offences involving racism and xenophobia, sabotage and racketeering and extortion. *Racism and xenophobia* as defined in the Joint Action of 15 July 1996 (96/443/JAI) *Sabotage*: "Any person who unlawfully and intentionally causes large-scale damage to a government installation, another public installation, a public transport system or other infrastructure which entails or is likely to entail considerable economic loss." *Racketeering and extortion*: "Demanding by threats, use of force or by any other form of intimidation goods, promises, receipts or the signing of any document containing or resulting in an obligation, alienation or discharge." *Swindling* encompasses inter alia inter alia: using false names or claiming a false position or using fraudulent means to abuse people's confidence or credulity with the aim of appropriating something belonging to another person. Only with respect to racism and xenophobia a reference is made to an approximation instrument, even though at the time of the declaration not only 4 more joint actions existed with

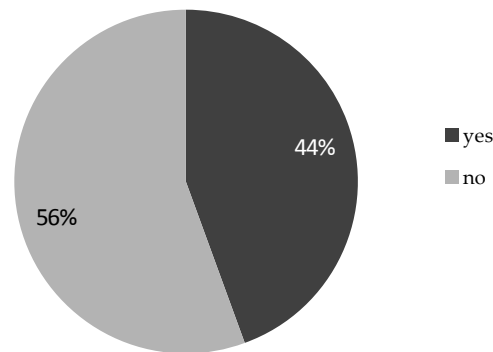
In spite of the good intentions in the Council the fact that some member states would experience problems with the implementation of the list of 32 MR offences was unavoidable.<sup>65</sup> This is corroborated by the replies to question 2.2.1 from which it becomes clear that half of the member states indicate to have experienced difficulties with the implementation of the 32 MR offence list. The explanatory guide to the questionnaire pointed to the controversial character of the 32 MR offence list and more specifically the abandonment of the double criminality requirement before asking whether the member states had experienced difficulties with the implementation of the 32 MR offence list in relation thereto.

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respect to trafficking in human beings and sexual exploitation of children, corruption in the private sector, drug trafficking and participation in a criminal organisation but also three more approximation instruments existed for euro counterfeiting, money laundering and fraud and counterfeiting of non-cash means of payment. Furthermore, the FD terrorism was adopted on the same day as the FD EAW, so that at least a reference to that instrument should have been included in the interpretation guide as well. Additionally, a partial political agreement was reached with respect to FD trafficking in human beings and proposals had been launched for framework decisions related to illegal migration, environmental crime, sexual exploitation of children, drug trafficking, offences against information systems and racism and xenophobia.

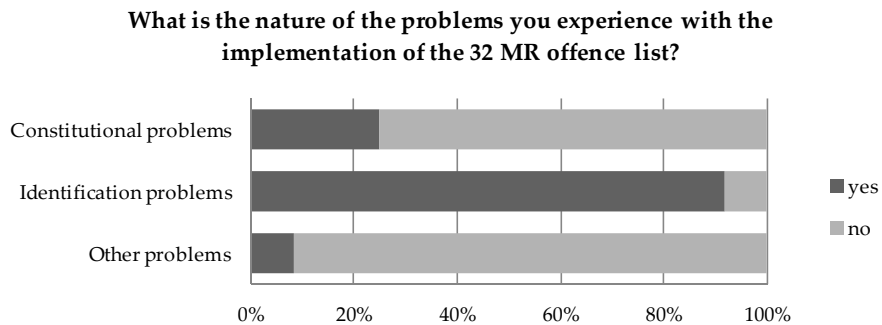
<sup>65</sup> E.g. in the Czech Republic *arson* is not a separate offence. Even though the behaviour falls within the scope of *endangering the public safety*, the scope of that offence exceeds the scope of arson. See also ZEMAN, P. "The European Arrest Warrant - Practical Problems and Constitutional Challenges", in GUILD, E. and MARIN, L., *Still not Resolved? Constitutional Issues of the European Arrest Warrant*, Nijmegen, Wolf Legal Publishers, 2009, p 107-113; See e.g. also the Belgian implementation act which excludes both abortion and euthanasia from the scope of the listed offence category 'murder'. Art.5 §4 Loi du 19 Décembre 2003 relative au mandat d'arrêt européen, B.S. 22 Décembre 2003; BAPULY, B. "The European Arrest Warrant under Constitutional Attack." *International Criminal Law Journal* 2009, 3, p 1-23; KOMÁREK, J. "European constitutionalism and the European Arrest warrant: In search of the limits of contrapunctual principles." *Common Market Law Review* 2007, 44, p 9-40; LECZYKIEWICZ, D. "Constitutional Conflicts in the Third Pillar." *European Law Review* 2008, 33, p 230-242;

### 2.2.1 Have you experienced difficulties with the implementation of the 32 MR offence list?



Striving for a consistent and well balanced EU policy, the fact that 44% of the member states expressly indicate that they have difficulties with the implementation of the 32 MR offence list, cannot be ignored. Furthermore, follow-up questions to member states that had indicated not to experience problems with the implementation revealed that this is partially due to working with so-called blank implementation legislation (i.e. simply referring to the EU instrument without any form of national interpretation of the provisions therein). As a result thereof, interpretation problems will not rise at the time of the implementation but will rise only in a later stage in the context of a specific case.

When further elaborating on the nature of the difficulties experienced, member states had the opportunity to chose one or more of the following reasons: constitutional problems (in the questionnaire formulated as *we experienced problems because our constitution does not allow us to cooperate for acts that do not constitute an offence in our criminal law*), identification problems (in the questionnaire formulated as *we experienced problems because for some offence labels it was not sure which offences of our criminal code would fall under the scope of that offence label*) or other problems which respondents could then elaborate on.



The replies to question 2.2.1 indicate that for 25% of the member states experiencing problems with the implementation this has a constitutional reason. Especially the number of member states that indicate to have had problems with the identification of offences in the national criminal codes that should fall within the scope of the 32 listed offences is extremely high. No less than 92% of the member states that had indicated to experience problems do so in relation to the identification of the offences for which double criminality in the other member states is no longer relevant. Because so many member states struggle with the identification of the offences illustrates that discussions on the scope of the abandonment of the double criminality requirement are unavoidable.

### 3.1.2.5 *Safeguarding the approximation acquis*

From the perspective of consistent EU policy making and the development of EU priority offences, it was already argued that in as far as the EU has introduced a criminalisation obligation in an approximation instrument, the EU has a legitimate reason to also strengthen those criminalisation obligations through prohibiting member states to call upon a double criminality based refusal ground with respect to those offences.

An evaluation requires cross-checking the then existing approximation acquis with the scope of the abandonment of the double criminality requirement. At the time of the adoption of the EAW, a series of approximating instruments had been adopted, and more were on the way. 5 Joint actions existed with respect to racism and xenophobia, trafficking in human beings and sexual exploitation of children, corruption in the private sector, drug trafficking and participation in a criminal organisation but also three more approximation instruments existed for euro counterfeiting, money laundering and fraud and counterfeiting of non-cash means of payment. Furthermore, the FD terrorism was adopted on the same day as the FD EAW, which justifies this instrument being included in the comparative analysis. Additionally, a partial political agreement was reached with respect to FD trafficking in human beings and



proposals had been launched for framework decisions related to illegal migration, environmental crime, sexual exploitation of children, drug trafficking, offences against information systems and racism and xenophobia.

The wide scope of the list of 32 MR offences is much broader than the approximation *acquis*, which means that, at the time, from an EU policy perspective, the choice to abandon the possibility to call upon a double criminality issue with respect to an offence that had been subject to approximation, ruled out the use of the refusal ground for member states lagging behind with their implementation obligations.<sup>66</sup>

Even though the evaluation is positive at the time of the adoption of the EAW, this approach will not be able to stand the test of time. The approximation *acquis* is developing rapidly and therefore the choice for a list of offences included *ad nominem* cannot guarantee that it will never be possible to use double criminality as a refusal ground in relation to the approximation *acquis*. It is not unimaginable that new approximation instruments are adopted in relation to offences that are not included in the list.<sup>67</sup> From that perspective, it would have been a better policy option for the EU as a policy maker to include an explicit provision that prohibits the use of double criminality as a refusal ground in relation to offences that have been subject to approximation, at any given time. In doing so, both the approximation instruments adopted at the time as well as the new instruments that will be adopted in a later stage are included in the provision prohibiting the use of double criminality as a refusal ground.

To ensure the user friendliness of such a provision and to avoid that practitioners need to scan the EU instrumentarium to compile the approximation *acquis* at any given time, it is advised to draw up a separate instrument that brings together the approximation *acquis* (e.g. under the auspice of the European Commission) and is permanently updated and accessible for anyone to consult. The elaboration of such instrument has been prepared in the context

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<sup>66</sup> This position has to be nuanced in light of the translation issues that have arisen with respect to the offence labels included in the 32 MR offence list. This is elaborated on in GUILD, E. Constitutional challenges to the European Arrest Warrant. Nijmegen, Wolf Legal Publishing, 2006, 272p. It is clarified that the English version of the 32 offence list for which double criminality is abandoned refers to computer-related crime. Similarly, the Dutch version refers to *informatiecrimineel*. The French version however refers to *cybercriminalité*, which is similar to the German version which refers to *Cyberkriminalität*. It has been argued that computer-related crime is a larger concept when compared to *cybercriminalité*. A similar argumentation is developed for racketeering and extortion, which is translated to *racket et extorsion de fonds* in French and *Erpressung und Schutzgelderpressung* in German which seems to mean that extortion of other than financial products is not included in the French nor German versions where such delineation cannot be substantiated looking only at the English version.

<sup>67</sup> The preparations for the adoption of a post-Lisbon directive on market abuse and market manipulation can support that concern. Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation, COM(2011) 654 final, of 20.10.2011.

of a previous study in which EULOCS (short for EU level offence classification system) was developed.<sup>68</sup> One of the objectives is precisely to visualise the status of the approximation acquis by separating the jointly identified parts of offences from other parts of offences. When referring to the approximated parts of offences, it can be stipulated in surrender (and other cooperation) instruments that member states ought to (1) recognise the classification of the case in either or not relating to a jointly identified and approximated part of an offences and (2) accept that no double criminality verification is allowed when classified as a case for which the underlying behaviour had been subject to approximation. For those member states that have implemented the approximation instruments and have criminalised the included behaviour, this prohibition to test double criminality will constitute a significant time saving measure. Those member states that have not (yet) (correctly) implemented the approximation instrument and (possibly) have a double criminality issue cannot use their lagging behind as a reason to refuse cooperation. Interestingly, the abandonment of the double criminality verification based on a list of offences is not as revolutionary as it may seem for it can already be found in the old Benelux convention on the transfer of criminal proceedings.<sup>69</sup> Its Art. 2.1 states that facts can only be prosecuted in another state if the double criminality requirement is met, or if it is one of the facts included in the list annexed to the convention.<sup>70</sup> The annex consists of a conversion table providing the offence label and the corresponding criminalisation provisions in each of the three cooperating member states. In doing so, the double criminality verification is lifted in those situations where the criminalisation provision is known in each of the member states, which is exactly what is intended with the use of EULOCS as a tool to support the abandonment of double criminality verifications.

### 3.1.2.6 *No obligation to maintain a double criminality-based limit*

Finally, from the perspective of the person involved it is valid to question whether a member state is allowed to grant unlimited cooperation to a surrender request if the underlying behaviour does not constitute an offence according to its national law. To that end, it is useful to look into Art. 5 ECHR and the case law elaborating on its interpretation. Art. 5 ECHR stipulates that “*everyone has*

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<sup>68</sup> VERMEULEN, G. and DE BONDT, W. EULOCS. The EU level offence classification system : a bench-mark for enhanced internal coherence of the EU's criminal policy. Antwerp - Apeldoorn - Portland, Maklu, 2009, 212p.

<sup>69</sup> Traité entre le Royaume de Belgique, le Grand-Duché de Luxembourg et le Royaume des Pays-Bas sur la transmission des poursuites, 11 May 1974, Benelux Official Journal, Tome 4-III. Even though it is yet to enter into force, this convention is worth mentioning considering the ideas underlying the content of its annex.

<sup>70</sup> Original text: la personne qui a commis un fait [...] ne peut être poursuivie dans un autre état contractant que si, selon la loi pénale de cet état, une peine ou mesure peut lui être appliquée pour se fait ou pour le fait correspondant mentionné sur la liste annexée au présent traité.

*the right to liberty and security of person. No one shall be deprived of his liberty save [...] in accordance with a procedure prescribed by law.*" Undeniably, surrender entails a form of deprivation of liberty which can be difficult in relation to behaviour that is not considered to be criminal. Amongst the exceptions foreseen by Art. 5 ECHR reference is made in point (f) to *"the lawful arrest or detention of a person against whom action is being taken with a view to deportation or extradition"*. The case law interpreting Art. 5 ECHR for example is clear and stipulates that a lawful deprivation of liberty for the purpose of Art. 5. 1 (f) ECHR only requires that action is being taken with a view to extradition making it immaterial whether the underlying decision can be justified under national law.<sup>71</sup> This can be interpreted to mean that questions related to the double criminality of the underlying decision are immaterial to decide on the lawfulness of the arrest and the subsequent extradition.

In the context of extradition/surrender, there are no situations in which the use of double criminality as a refusal ground could run counter the interests of the person involved. Hence there is no need for a discussion on the introduction of possible legal remedies.

### 3.1.3 *Mutual legal assistance*

Secondly, having developed a benchmark for the interpretation of the concept of extraditable/surrenderable offence and a template to evaluate the double criminality approach introduced in the legal instruments, the same analysis was conducted for mutual legal assistance instruments. After detailing the position of double criminality in mutual legal assistance, it will be argued that (1) due to the fragmented legal framework which does not govern all investigative measures, the position of double criminality is not always clear, (2) the unlimited possibility to issue a declaration not to accept the abandonment of the double criminality requirement effectively undermines the approximation policy to the extent that double criminality verification is possible in relation to offences that have been subject to approximation and (3) there are no supranational or international obstacles to cooperate beyond double criminality.

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<sup>71</sup> ECtHR, Case of *Chahal v. The United Kingdom*, application No 22414/93, 15 November 1996, §112; ECtHR, Case of *Conka v. Belgium*, application No 51564/99, 5 February 2002, §38; ECtHR, Case of *Liu v. Russia*, application No 42086/05, 6 December 2007, §78.

3.1.3.1 *No general double criminality requirement in MLA*

In a mutual legal assistance context the double criminality requirement has never assumed a prominent position<sup>72</sup>. The wording of Art.1.1 ECMA supports this baseline as it requires member states to afford each other the widest possible measure of assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting state. This corroborates with the idea formulated in the ECMA's explanatory report that mere legal assistance should not necessarily be dependent on a double criminality requirement.<sup>73</sup> Double criminality is therefore not listed among the refusal grounds included in Art. 2 ECMA.<sup>74</sup> However, some states have issued a reservation with respect to these refusal grounds and have added the double criminality requirement thereto.<sup>75</sup> Whereas mutual legal assistance as an *umbrella* covering different cooperation measures is not necessarily limited along a double criminality requirement, the extent to which double criminality can be justified will require an assessment of each individual cooperation measure brought under that umbrella.

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<sup>72</sup> See also VERMEULEN, G. *Wederzijdse rechtshulp in strafzaken in de Europese Unie: naar een volwaardige eigen rechtshulpverdragen voor de Lid-Staten?* Antwerp-Apeldoorn, Maklu, 1999, 632p; PLACHTA, M. "The role of double criminality in international cooperation in penal matters", in JAREBORG, N., *Double Criminality*, Uppsala, Iustus Förlag, 1989, p 84-134.

<sup>73</sup> Council of Europe, Explanatory Report on the European Convention on Mutual Assistance in Criminal Matters, Strasbourg 1969, p 14.

<sup>74</sup> Other texts go even further and explicitly say that countries may wish, where feasible, to render assistance, even if the act on which the request is based is not an offence in the requested State (absence of dual criminality). See e.g. footnote added to Art.4.1 Model Treaty on Mutual Assistance in Criminal Matters, Adopted by General Assembly resolution 45/117, subsequently amended by General Assembly resolution 53/112.

<sup>75</sup> It concerns: *Austria* (Austria will only grant assistance in proceedings in respect of offences also punishable under Austrian law and the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities), *Hungary* (Hungary reserves the right to afford assistance only in procedures instituted in respect of such offences, which are also punishable under Hungarian law) and *Lithuania* (Lithuania reserves the right not to comply with a request insofar as it concerns an offence which is not qualified as a "crime" and punishable as such under Lithuanian law), and previously also *Bulgaria* (Bulgaria declares that it will refuse assistance where the committed act is not incriminated as an offence according to the Bulgarian criminal law) but this reservation was withdrawn.

### 3.1.3.2 *The search and seizure exception*

The only exception to the general rejection of double criminality limits the member states deemed necessary in 1959 is included in Art. 5.1. ECMA and relates to search and seizure of property. States may make the execution of letters rogatory for search or seizure of property dependent on either a basic double criminality requirement or even a more far reaching double criminality requirement by limiting it to extraditable offences. This latter option meant at the time that the double criminality requirement is linked to a sanction threshold as explained above.<sup>76</sup>

The intrusive nature of search and seizure as an investigative measure justifies retaining double criminality as an optional refusal ground.<sup>77</sup> The impact of search and seizure is essentially different from the impact of e.g. a reconstruction or the hearing of a witness for which a double criminality requirement is not necessarily justified. This consideration can also be explicitly found in Art. 18(1)f of the 1990 CoE Confiscation. It stipulates that *'cooperation may be refused if the offence to which the request relates would not be an offence under the law of the requested state if committed within its jurisdiction. However, this ground for refusal applies only in so far as the assistance sought involves coercive action'*.

### 3.1.3.3 *Extension to other investigative measures*

This double criminality justification also appears in relation to other coercive or intrusive measures. Two different approaches can be distinguished. First, in analogy with the approach developed with respect to search and seizure, a series of other investigative measures use a references to 'extraditable offences' as a way to limit the scope of cooperation. Second, some investigative measures use a reference to 'search and seizure offences' as a way to limit the scope of cooperation. As will be explained, the distinction between those two approaches

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<sup>76</sup> It should be noted that even though at the time, a reference to extraditable offences would constitute a more far reaching form of double criminality (i.e. for all offences without exception and including sanction thresholds), the analysis of the concept of extraditable offence elaborated on above has clarified that ever since the introduction of the EAW, this is no longer the case. Not only because the EAW abandons double criminality for the listed offences, but also because the rules regulating the sanction thresholds have been redesigned. In doing so, a reference to extraditable offences is both more strict and more lenient. It is more strict because of sanction requirements for general cases; it is more lenient because of the abandonment of the double criminality requirement for the listed offences.

<sup>77</sup> See also: KLIP, A. *European Criminal Law. An integrative Approach*. Antwerp - Oxford - Portland, Intersentia, 2009, 531p, 320-321; TRÅSKMAN, P. O. "Should we take the condition of double criminality seriously?", in JAREBORG, N., *Double criminality*, Uppsala, Iustus Förlag, 1989, p 135-155.

is important for the timing of the abandonment of the possibility to call upon double criminality with respect to the list of 32 MR offences.

First, a number of examples of investigative measures can be listed for which reference is made to ‘extraditable offences’ as a way to limit the scope. The ECMA and the 2000 EU MLA Convention are the most interesting instruments. When seeking to supplement the ECMA provisions and facilitate mutual legal assistance between member states of the European Union, the 2000 EU MLA Convention was introduced. Reinforcing the position assumed at CoE level, member states upheld the baseline not to limit cooperation along the double criminality requirement.<sup>78</sup> Additionally mirroring the reasoning underlying the introduction of the double criminality requirement with respect to search and seizure, double criminality was scarcely introduced with respect to a limited set of investigative measures that were now explicitly regulated in the EU MLA Convention. As a result, Art. 12 EU MLA with respect to *controlled deliveries* (that was in fact copied from Art. 22 Naples II) stipulates that member states are to ensure that at the request of another member state controlled deliveries may be permitted in its territory in the context of criminal investigations into *extraditable offences*. Considering the meaning of extraditable offences, this means that – at the time<sup>79</sup> – permitting controlled deliveries was dependent, not only on the double criminality requirement but also on meeting the sanction threshold that comes with the concept of extraditable offences. When complementing the ECMA based on the developments in EU cooperation instruments – by copying the EU MLA acquis into the second ECMA protocol – this double criminality requirement for controlled deliveries was copied into Art. 18 Second ECMA Protocol.

Similarly, the reference to extraditable offences included in Art. 40.1 CISA with respect to *cross-border observations* was later copied into Art. 17 Second ECMA Protocol. Police officers are allowed to continue their observation crossing the border into another state only when the person involved is suspected of having committed or having been involved in committing an *extraditable offence*. This means that – at the time<sup>80</sup> – cross-border observations were dependent on a double criminality requirement that was linked to sanction thresholds.

Similarly, the reference to extraditable offences included in Art. 41.4. CISA with respect to *cross-border hot pursuit* was later copied into Art. 20 Naples II. Member states may make the acceptance of police officers continuing their hot

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<sup>78</sup> In the context of a previous study 90% of the member states indicated to be willing to provide cooperation for non-coercive or intrusive measures. See VERMEULEN, G., DE BONDT, W. and VAN DAMME, Y. EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence? Antwerp-Apeldoorn-Portland, Maklu, 2010.

<sup>79</sup> See *supra* – comment with respect to the interpretation of ‘extraditable offence’.

<sup>80</sup> See *supra* – comment with respect to the interpretation of ‘extraditable offence’.

pursuit across the border into their member state dependent on the fact that the person involved is suspected of having committed or having been involved in committing an *extraditable offence*.

Subsequently, this duality in the appearance and justifiability of the double criminality requirement linked to the intrusive or coercive character of the investigative measure, is mirrored in the existing mutual recognition instruments. Art. 3.4. FD Freezing stipulates that the executing member state may either make cooperation dependent on the condition that the acts for which the order was issued constitute an offence under its laws, when the cooperation request relates to securing evidence, or make cooperation dependent on the condition the acts for which the order was issued constitute an offence which, under the laws of that state, allows for such freezing, when the request relates to subsequent confiscation. Similarly, Art. 14.4 FD EEW stipulates that the executing member state may make search and seizure dependent on the condition of double criminality.

Second, besides investigative measures that include a reference to extraditable offences to regulate the possibility to call upon double criminality issues, there are also investigative measures for which a reference to the provisions with respect to *search and seizure* themselves is made. An example can be found in the EU MLA Protocol. The link between on the one hand data protection concerns and on the other hand requests for information on bank accounts, requests for information on banking transactions and requests for the monitoring of banking transactions, justifies making legal assistance dependent on a type of double criminality requirement. With respect to information on the existence of bank accounts, Art. 1 EU MLA Protocol makes a distinction between Europol offences and other offences. For Europol offences, a traditional 'not further specified'<sup>81</sup> double criminality requirement is introduced, whereas for other offences, a new type of double criminality requirement is introduced: cooperation may be made dependent on it being related to an offence that is punishable with at least 4 years in the requesting member state and 2 years in the requested member state.<sup>82</sup> Additionally, Art. 1 EU MLA Protocol refers to the offences included in the PIF convention, for which it is obvious that the double criminality requirement will be met as a result of the approximation obligations included in that instrument. It is Art. 2 EU MLA Protocol related to information on bank transactions with respect to a known and identified bank account that refers to the double criminality rules linked to *offences that can be subject to search and seizure*. At the time of the adoption of the protocol in 2001, double criminality with respect to search and seizure was governed by Art. 51 CISA and

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<sup>81</sup> Meaning that the act should be punishable but no sanction thresholds are introduced.

<sup>82</sup> This augmentation of the sanction thresholds that are linked to the double criminality requirement can of course be explained by the nature of the cooperation and the sensitivity that surrounds bank account information.

stipulated that cooperation may be made dependent on being related to an offence punishable with at least 6 months. As a result thereof the double criminality requirement with respect to sharing information on the existence of bank accounts is more strict than the double criminality requirement that governs cooperation with respect to sharing information on bank transactions of known and specified bank accounts. This makes sense considering that once a member state is aware of the existence of a bank account, the issues related to information exchange are no longer as sensitive.

*3.1.3.4 Limitation by the 32 MR offence list*

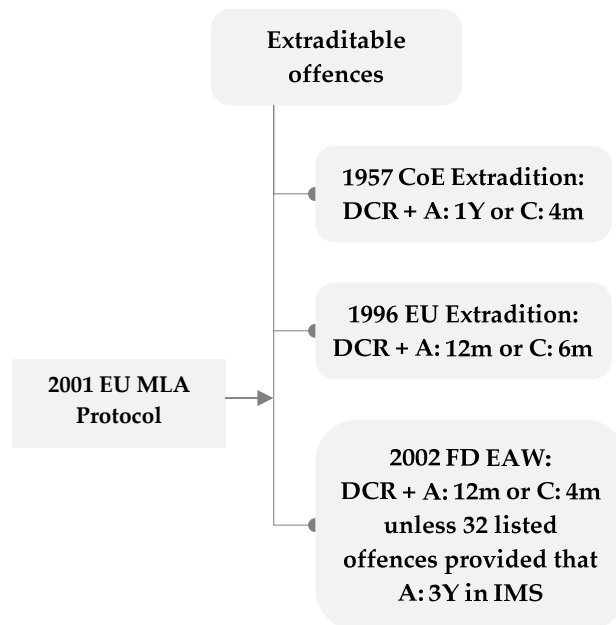
The practice of allowing member states to call upon double criminality as a limit to cooperation for coercive or intrusive measures was eroded<sup>83</sup> by the introduction of the 32 MR offences that limit that possibility. As a result of the intertwined character of MLA instruments with extradition/surrender instruments today's limits to call upon double criminality issues in the context of surrender are also applicable to or copied into mutual legal assistance. For that list of offences double criminality can no longer be verified provided that the offence is punishable with a custodial sentence of at least three years in the issuing member state. The limitation by the introduction of the 32 MR offence list for which double criminality can no longer be tested entered the MLA scene via two doors. First, there is the introduction of the list in the FD EAW which is important for MLA to the extent that a reference to extraditable offences should be reinterpreted to surrenderable offences (which also tones down the revolutionary character of abandoning double criminality as a refusal ground with respect to some investigative measures and clarifies that curing double criminality concerns in an MLA context also requires an intervention in either the 'mother documents' to which MLA provisions refer or the redrafting of the MLA provisions altogether). Second, there is the adoption of the FD Freezing and the FD EEW, which are applicable specifically with respect to search and seizure.

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<sup>83</sup> This was required for the parts of offences that had been subject to approximation and was the additional will of the member states for (those parts of- offences beyond the approximation acquis.



First, as explained above, the concept of extraditable offences was significantly reshaped with the introduction of the FD EAW. The figure visualising the evolution of the concept in the European states is copied below.



DCR: double criminality requirement | A: threshold in abstracto |  
C: threshold in concreto | Y: years | M: months | IMS: Issuing member state

From the figure, it is clear that when the 2001 EU MLA Protocol refers to extraditable offences (e.g. with respect to controlled delivery, cross-border observation and cross-border hot pursuit) this meant at the time that these investigative measures would be subject to a double criminality test complemented with a sanction threshold set at 12 months for penalties in abstracto and 6 months for penalties in concreto.<sup>84</sup> However, the introduction of the FD EAW in the following year significantly reduced the scope of the double criminality requirement in that it lifted the possibility to call upon a double criminality issue for 32 listed offences provided that the offence is punishable with a maximum penalty of at least 3 years in the issuing member state. Recalling the replies to question 2.4.2. this position is supported by 73% of the member states despite the absence of a supporting legal framework.

<sup>84</sup> Art.2.1 CoE Extradition reinterpreted in light of Art.2.1 EU Extradition.

Second, this list of offences is also included in Art.3.2. FD Freezing and Art. 14.2 FD EEW, as a result of which a search or seizure of a listed offence can no longer be made dependent on double criminality which means that – in light of the absence of clear definitions of the listed offences that will guarantee double criminality<sup>85</sup> – search and seizure should now be allowed for acts that do not constitute an offence in the executing member state. The evolutionary character of the limitation through the introduction of the 32 MR offence list to call upon the double criminality requirement as a ground for refusal specifically with respect to search or seizure, should be assessed taking account of the implications the evolution from extraditable to surrenderable offences brought about.

It was already explained that the possibility to refuse a request for search or seizure was *initially* linked to the concept of extraditable offences. However, the 1990 CISA cut the link between search and seizure on the one hand and extraditable offences on the other hand, because its Art. 50 stipulates that states may not make the admissibility of letters rogatory for search or seizure dependent on conditions other than a double criminality requirement (linked to a sanction threshold of 6 months in abstracto) and issues of consistency with the law of the requested member state. This means that the link with extraditable offences and the conditions related to sanction thresholds and offence types is no longer maintained for member states that participate to Schengen.

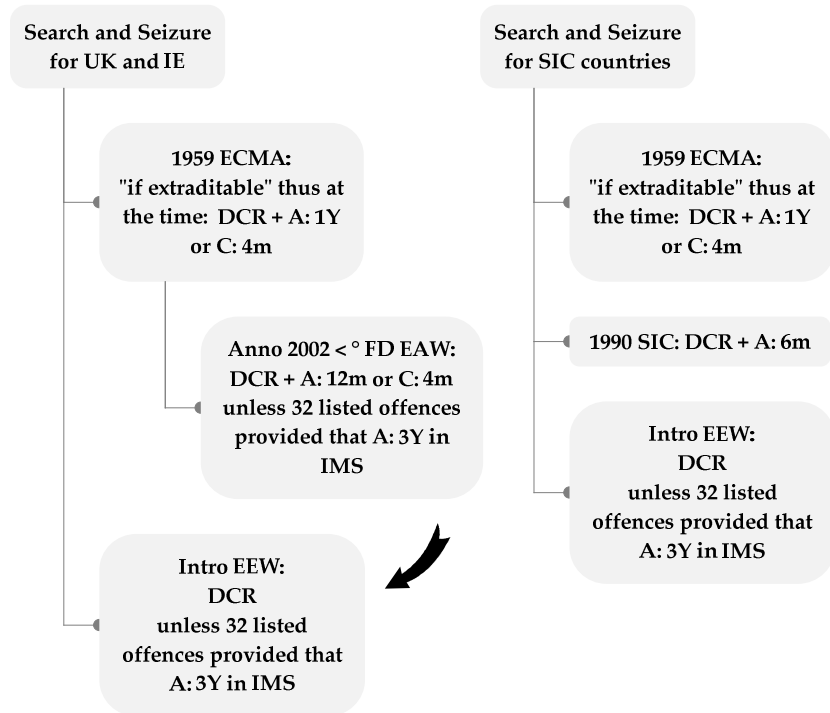
To the contrary, for member states that are not party to CISA, the link with extraditable offences remains and is as of 2002 – following the introduction of the FD EAW – could be reinterpreted as surrenderable offence. This would mean that e.g. for the UK and Ireland, search and seizure may be made dependent on double criminality requirements in accordance to the limits of the FD EAW. Ironically therefore, the UK and Ireland, traditionally two member states that are very reluctant with respect to the influences of European (criminal) law, where the first two member states that could no longer call upon the double criminality requirement for the 32 MR offences in the context of a request for search or seizure<sup>86</sup>, whereas member states that fell within the scope of the CISA were still able to do so in accordance with Art. 50 CISA. This distinction between Schengen and non-Schengen member states was lifted with the introduction of the FD EEW, which, in analogy to the FD EAW limited the possibility to call upon the double criminality requirement along the 32 MR offence list.

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<sup>85</sup> If the list of offences for which double criminality was abandoned was limited along the scope of the offences that are included in approximation instruments, the list would have – in its effect – not abandoned the double criminality *requirement* but would have abandoned the double criminality *test* with respect to the offences for which the double criminality requirement is known to be met.

<sup>86</sup> It should be stressed though that in reply to question 2.4.2. neither the UK nor Ireland were in favour of reinterpreting the concept of extraditable offence into surrenderable offence following the introduction of the FD EAW.

The figure inserted visualises this reasoning.



DCR: double criminality requirement | A: threshold in abstracto | C: threshold in concreto | Y: years | M: months | IMS: Issuing member state

3.1.3.5 *Drawing parallels for other investigative measures*

From the perspective of the cooperating member states, analysis reveals that for the time being, not all investigative measures have an explicit legal basis in a cooperation instrument.<sup>87</sup> This means that for a number of investigative measures the legal texts do not provide an explicit and immediate answer to questions relating to the position of the double criminality requirement. Therefore it is important to try and complement the overview of explicitly regulated investigative measures – for which it is stipulated that double criminality requirements are accepted as an exception to the general rule to afford cooperation based on criminalisation in the requesting member state – with an overview of investigative measures for which the acceptability of double criminality inspired refusal grounds is uncertain.

First, interpreting the acceptability for member states to attach conditions to cooperation as the acceptability for member states to limit cooperation based on double criminality requirements, a set of investigative measures can be identified for which double criminality is most likely allowed as a limit to cooperation.<sup>88</sup>

The following investigative measures were identified in the context of the previous study as being – most likely – dependent on the double criminality requirement.

- Covert investigations (by officials) – this investigative measure is regulated in Art. 23, 3 Naples II and 14, 2-3 EU MLA Convention, stipulating respectively that both the conditions under which a covert investigation is allowed and under which it is carried out ‘shall be determined by the requested authority in accordance with its national law’, and that the decision on a request for assistance in the conduct of covert investigations is taken by the competent authorities of the requested member state ‘with due regard to its national law and procedures’, the covert investigations themselves having to ‘take place in accordance with the national law and procedures’ of the member state on the territory of which they take place;

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<sup>87</sup> It is highly questionable whether it is desirable even feasible to introduce an explicit legal basis for any possible investigative measure. See more elaborately in VERMEULEN, G., DE BONDT, W. and VAN DAMME, Y. *EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence?* Antwerp-Apeldoorn-Portland, Maklu, 2010.

<sup>88</sup> VERMEULEN, G., DE BONDT, W. en VAN DAMME, Y., *EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence?*, in IRCP-series, 37, Antwerp-Apeldoorn-Portland, Maklu, 2010.

- Interception of telecommunications if the subject of the interception is present in the requested/executing member state and his or her communications can be intercepted in that member state, with immediate transmission – this investigative measure is regulated in Art. 18, 1, a) in conjunction with 18, 2, b) and 18, 5, b) EU MLA Convention, the latter paragraph stipulating that the requested member state shall undertake to comply with an interception request ‘where the requested measure would be taken by it in a similar national case’, being allowed to ‘make its consent subject to any conditions which would have to be observed in a similar national case’;
- Interception of telecommunications requiring the technical assistance of the requested member state (irrespective of whether the subject of the interception is present in the territory of the requesting, requested or a third member state), without transmission and without transcription of the recordings – this investigative measure is regulated in Art. 18, 1, b) in conjunction with 18, 2, a), b) or c) and 18, 6 EU MLA Convention, the latter paragraph stipulating that the requested member state shall undertake to comply with an interception request ‘where the requested measure would be taken by it in a similar national case’, being allowed to ‘make its consent subject to any conditions which would have to be observed in a similar national case’; interception of telecommunications requiring the technical assistance of the requested member state (irrespective of whether the subject of the interception is present in the territory of the requesting, requested or a third member state), without transmission and with transcription of the recordings – this investigative measure is regulated in Art. 18, 1, b) in conjunction with 18, 2, a), b) or c), 18, 6 and 18, 7 EU MLA Convention, the latter two paragraphs stipulating that the requested member state shall undertake to comply with an interception request ‘where the requested measure would be taken by it in a similar national case’, being allowed to ‘make its consent subject to any conditions which would have to be observed in a similar national case’, and that it will consider the request for a transcription of the recording ‘in accordance with its national law and procedures’;
- Allowing an interception of telecommunications to be carried out or continued if the telecommunication address of the subject of the interception is being used on the territory of the requested/executing member state (‘notified’ member state) in case where no technical assistance from the latter is needed to carry out the interception – this investigative measure is regulated in Art. 20, 2 in conjunction with 20, 4, a) EU MLA Convention, the latter paragraph stipulating under i)-iv) that the notified member state ‘may make its consent subject to any conditions which would have to be observed in a similar national case’, may require the interception not to be carried out or to be terminated ‘where [it] would not be permissible pursuant to [its]

national law', may in such cases require that any material already intercepted may not be used, or 'may only be used under conditions which it shall specify', or may require a short extension 'in order to carry out internal procedures under its national law';

- Collecting and examining cellular material and supplying the DNA profile obtained – this form of legal assistance is regulated in Art. 7 Prüm, stipulating under (3) that it can only be provided if, inter alia, 'under the requested contracting party's law, the requirements for collecting and examining cellular material and for supplying the DNA profile obtained are fulfilled';

Furthermore, there are also investigative measures for which it is expressly (and rightly) stipulated that no formalities whatsoever may be attached to them. This means that there is no way for member states to deviate from the general rule that mutual legal assistance must be afforded regardless of double criminality. Therefore, the following investigative measures were identified in the context of the previous study as being – most likely – not dependent on the double criminality requirement.

- Interception of telecommunications where the technical assistance of the requested/executing member state is needed to intercept the telecommunications of the subject of the interception (irrespective of whether the latter is present in the territory of the requesting/issuing member state or of a third member state) with immediate transmission – this investigative measure is regulated in Art. 18, 1, a) in conjunction with 18, 2, a) or c) and 18, 5, a) EU MLA Convention, the latter paragraph stipulating that 'the requested member state may allow the interception to proceed without further formality';
- Transfer of detainees from the requested/executing to the requesting/issuing member state (provided the requested/executing member state may make such transfer dependent on the consent of the person involved) – this investigative measure is regulated in Art. 11 ECMA, which does not allow for refusal of transfer referring to national law;
- Transfer of detainees from the requesting/issuing to the requested/executing member state (provided the requested/executing member state may make such transfer dependent on the consent of the person involved) – this investigative measure is regulated in Art. 9 EU MLA Convention, which neither foresees possible refusal of transfer referring to national law nor allows for entering reservations, to be read in conjunction with Art. 25 of the same Convention, according to which member states may not enter reservations in respect of the Convention, other than those for which it makes express provision;

- Hearing under oath (of witnesses and experts) – this investigative measure is regulated in Art. 12 ECMA, prescribing mandatory compliance by the requested party with such request unless its law prohibits it;
- Hearing by videoconference – this investigative measure is regulated in Art. 10, 2 EU MLA Convention, pointing out that the requested member state shall agree to the hearing where this is not contrary to the fundamental principles of its law and on the condition that it has the technical means to carry out the hearing;
- Hearing by telephone conference (of witnesses or experts, only if these agree that the hearing takes place by that method) – this investigative measure is regulated in Art. 11, 3 EU MLA Convention, pointing out that the requested member state shall agree to the hearing where this is not contrary to fundamental principles of its law.

Considering that the abovementioned investigative measures are not coercive or intrusive in nature, it is consistent to agree that it is not justified to limit the possibility to cooperate based on a double criminality issue.

The measures listed above are explicitly regulated and can therefore be explicitly found in cooperation instruments. However, there are a lot of investigative measures for which no explicit regulation is foreseen. Cooperation for those kind of unregulated types of investigative measures has a legal basis in the general baseline that member states are to afford each other the widest measure of assistance.

Nevertheless, it remains interesting to review the unregulated measures to cluster them in those for which a double criminality requirement would be justified and those for which a double criminality requirement would not be justified. This exercise was conducted in the context of a previous research project<sup>89</sup> and resulted in the following overview:

A double criminality requirement will be justified for the following investigative measures:

- registration of incoming and outgoing telecommunication numbers
- interception of so-called direct communications
- obtaining communications data retained by providers of a publicly available electronic communications service or a public communications network
- withholding/intercepting of mail (and reading it)
- cooperation with regard to electronic communications (other than tele-communications) (registration of incoming and outgoing communications, interception etc)

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<sup>89</sup> VERMEULEN, G., DE BONDT, W. en VAN DAMME, Y., *EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence?*, in IRCP-series, 37, Antwerp-Apeldoorn-Portland, Maklu, 2010.

- controlled delivery through the territory of the requested/executing member state (i.e. across its territory, the territory of destination of the delivery or where intervention is envisaged being another member state or a third state)  
The inclusion of this investigative measure in this cluster might not be self-explanatory, as it may seem that it is regulated in the EU MLA Convention. Unlike in the corresponding provision of the 1997 Naples II Convention, however, the provision relating to controlled deliveries in the EU MLA Convention does not relate to transit controlled deliveries also, and is limited to controlled deliveries 'on' the territory of the requested member state.
- (cross-border) use of (police) informers and civilian infiltrators
- (cross-border) use of technical devices (camera, electronic/GPS tracking) for the purposes of observation
- entry of premises without consent in view of discrete visual control or search
- confidence buy (either or not including flash-roll)
- establishing front business
- (discrete) photo and video registration
- assistance in non-procedural protection of protected witnesses and their family members (direct and physical protection; placement of a detainee in a specialised and protected section of the prison; relocation for a short period;
- relocation for a longer or indefinite period; change of identity, including the concealment of certain personal data by the administrative authorities; lesser measures, techno-preventative in nature)
- carrying out bodily examinations or obtaining bodily material or biometric data directly from the body of any person, including the taking of fingerprints (other than collecting and examining cellular material and supplying the DNA profile obtained: supra)
- exhumation and transfer of the corpse
- (exhumation and) forensic anatomist investigation
- lie detection test (of a non-consenting witness or suspect)
- line-up (including of a suspect, not consenting to appear)
- A double criminality requirement will not be justified for the following investigative measures:
  - conducting analysis of existing objects, documents or data
  - conducting interviews or taking statements (other than from persons present during the execution of a European Evidence Warrant (EEW) and directly related to the subject thereof, in which case the relevant rules of the executing state applicable to national cases shall also be applicable in respect of the taking of such statements) or initiating other types of hearings involving suspects, witnesses, experts or any other party, other than under oath or by video or telephone conference (supra)
- reconstruction
- making of video or audio recordings of statements delivered in the requested/executing member state



- video conference hearing of accused persons
- video conference hearing of suspects

This exercise is of course important in light of the ongoing debates with respect to the European Investigation Order because that instrument has the ambition to replace the existing MLA framework and to expressly regulate a series of investigative measures.

#### 3.1.3.6 *Threat of the declaration*

From the perspective of the EU in its capacity of a policy maker who seeks to ensure consistency and safeguard the approximation *acquis*, the possibility to issue a declaration to the offence list is an important novelty. What is new in the FD EEW compared to the FD EAW<sup>90</sup> and could offer relief to the double criminality concerns raised from a member state perspective, is the possibility to issue a declaration with respect to the double criminality aspects of Art.14.2 FD EEW. That possibility was introduced upon the request of – and solely with respect to – Germany out of concerns of being forced to cooperate in relation to cases that fail the double criminality test.<sup>91</sup> It is a striking illustration of the false presumption of criminalisation of the listed offences and the abandonment of the double criminality requirement. Germany had made the lack of clear and common definitions and the possibility of having obligations with regard to behaviour not criminalised under German legislation, one of their key issues during negotiations. The compromise reached is included in Art. 23 (4) EEW and allows Germany – and only Germany – a derogation from the provisions relating to double criminality in the FD EEW. The derogation is not applicable to the entire list of offences but allows Germany to make execution of an EEW subject to verification of double criminality in the case of the offences relating to terrorism, computer-related crime, racism and xenophobia, sabotage, racketeering and extortion and swindling. This German demarche would not have been necessary, if the abandonment of the double criminality test was limited to the approximation *acquis* (or at most in relation to the behaviour that is known to be commonly criminalised even beyond the minimum that is included in the approximation instruments). This becomes especially apparent

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<sup>90</sup> The possibility to issue a declaration is new compared to the FD EAW, but was meanwhile also included in FD Deprivation of Liberty and FD Alternatives.

<sup>91</sup> See for more detail: NOHLEN, N. "Germany: The European Arrest Warrant Case." *International Journal of Constitutional Law* 2008, 6, p 153-161; POLLICINO, O. "European Arrest Warrant and the Constitutional Principles of the Member States: A Case law-based outline in the attempt to strike the right balance between interacting legal systems." *German Law Journal* 2008, 9, p 1313-1355; VERMEULEN, G. "Mutual recognition, harmonisation and fundamental (procedural) rights protection", in MARTIN, M., *Crime, Rights and the EU. The future of police and judicial cooperation*, London, JUSTICE - advancing access to justice, human rights and the rule of law, 2008, p 89-104.

when analysing the content of the German declaration. For terrorism, computer-related crimes and racism and xenophobia a reference is made to existing approximation instruments. Interestingly, the definitions of sabotage, racketeering and extortion and swindling are copied from the explanation the JHA Council had provided in 2002 recognising the concerns related to the lack of a harmonised definition.<sup>92</sup>

Undeniably however such an individual member state declaration opens the door to a full on return to nationally defined offences that may or may not be in line with the approximation *acquis*. Whereas the use of declarations can be perceived as the solution from a member state perspective, the reintroduction of the traditional double criminality requirement is an important setback for the EU policy maker to the extent that the national declaration would reintroduce a double criminality requirement also with respect to behaviour that has been subject to approximation for that would undermine the possibility for the European policy maker to reinforce its approximation obligations via the prohibition to test double criminality in relation to those approximated parts of offences. Even though the German declaration did not affect the effect of the approximation *acquis*, the unlimited possibility to issue a declaration in the first place was a bad choice. The European policy maker should have seen to it that a declaration affecting the approximation *acquis* was legally prohibited by allowing the declaration only with respect to the faith of double criminality verification in relation to offences beyond the approximation *acquis*.

### 3.1.3.7 *Impact of capacity as a refusal ground*

Additionally, it can be interesting for the EU policy maker to follow the debate on the use of capacity as a refusal ground. Capacity concerns increasingly gain attention, especially now cooperation is changing from request-based into order-based.

If member states link (and thus limit) the use of capacity concerns to situations in which double criminality is not fulfilled, this means that – in light of the line of argumentation developed with respect to the issuing of declarations – it can be important to stipulate that it is unacceptable to use double criminality as a refusal ground in relation to offences that have been subject to approximation. Hence, this means that cooperation for cases in relation to offences that have been subject to approximation can never be hindered by capacity concerns.

However, member states may also decide that it is acceptable to use capacity as a refusal ground even when double criminality is met, which means that also cases in relation to offences that have been subject to approximation can be

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<sup>92</sup> See 2436th meeting of the Council (Justice and Home Affairs and Civil Protection) held in Luxembourg on 13 June 2002, JAI 138, CONS 33, 9958/02, ADD 1 REV 1.

hindered by capacity concerns. In this scenario it would be interesting for the European Union in its capacity of a policy maker to bring the acceptability of the *aut exequi aut tolerare* principle to the table.<sup>93</sup> This new principle would attach consequences to using capacity as a refusal grounds in relation to (all or some of the) offences that have been subject to approximation. For the issuing or requesting member state, this would entail a commitment to use its own capacity to complete the order or request; for the requested member state this would entail the obligation to accept the presence of and execution by another member state. If capacity is introduced as a refusal ground with respect to one or more investigative measures in the European investigation order, a discussion on the parallel introduction of *aut exequi, aut tolerare* can be considered.

### 3.1.3.8 Requirements for the formulation of national provisions

From the perspective of the person involved, the use of double criminality as a refusal ground can never be against her best interests. If cooperation is refused for double criminality reasons she will not be subject to the requested or ordered investigative measure. To the contrary, it is important to assess to what extent member states can offer their cooperation in absence of double criminality, which would constitute a breach in the double criminality shield.

As argued above, mutual legal assistance is an umbrella that covers a wide range of investigative measures amongst which there are measures that are intrusive or coercive in nature. Because of the diversity, some measures have been subject to specific regulations in the member states. Certain investigative measures are reserved for serious situations, that are defined either by a reference to (a selection of) offences or an indication of the sanction threshold.

The question arises whether these specific provisions preclude the use of those investigative measures in absence of double criminality. The answer thereto is strongly dependent on the formulation of the national provision. If the national provision refers to the article numbers of the national criminal code to delineate the situation in which the use of the investigative measure is allowed, double criminality is indisputably a requirement. The investigative measure will only be possible in relation to behaviour that perfectly matches the behaviour described in the selected articles of the national criminal code. If however, the national provisions refer to either an offence label (without a reference to a specific article in the national criminal code) or a sanction threshold, it can be argued that the provision can be interpreted widely to also encompass situations

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<sup>93</sup> A parallel is drawn from the existing *aut dedere aut iudicare* in extradition instruments. See also: BASSIOUNI, M. C. and WISE, E. M. *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*. Dordrecht, Martinus Nijhoff Publishers, 1995, 340p; VAN STEENBERGHE, R. "The Obligation to Extradite or Prosecute: Clarifying its Nature." *Journal of International Criminal Justice* 2011, 9 (5), p 1089-1116.

where double criminality is not met. The question is then however, whether such wide interpretation is acceptable.

When looking into the case law of the European Court of Human Rights it is acknowledged that some investigative measures cannot be deployed for just any offence. More importantly, the court sets out rules with respect to the quality of the legal basis of those coercive and intrusive investigative measures. Qualitative law refers to *accessibility* and *foreseeability* of the law and the compatibility with the *rule of law*.<sup>94</sup> Whereas a simple reference to using the investigative techniques to “fight serious offences” is not specific enough and therefore fails to meet the quality criteria<sup>95</sup>, it is made explicit that the criteria cannot mean that an individual must be able to have “a limitative list of offences”.<sup>96</sup> The nature of the offences for which a specific investigative technique can be used must be laid down with “reasonable precision”.<sup>97</sup> Though court’s case law does not specifically deal with the double criminality issue and is therefore inconclusive on whether that reasonable precision can also extend beyond the national double criminality test, there are two cumulative reasons why it can be expected that the court would except an interpretation that includes cases beyond the national double criminality test in the scope of the provision regulating the use of the said investigative measure. First, the court has accepted as reasonably precise and thus sufficiently detailed, national provisions stipulating that investigative measures were possible with respect offences which could reasonably be expected to be sentenced to imprisonment for a term of three years or more.<sup>98</sup> Similarly, reference to offence labels and families is considered to be sufficiently detailed. Second, in the current EU philosophy it is not desirable that national law is interpreted in a way that allows criminals to enjoy the comfort of safe havens. From that perspective much can be said for the argumentation that if a person commits an offence punishable with a sentence involving deprivation of liberty for at least three years in one member state and thereafter travels to a member state in which specific investigative techniques are possible for offences which could reasonably be expected to be sentenced to imprisonment for a term of three years or more, the person should know that investigative measures are possible for the acts he committed in the first member state, even if they are not considered criminal in the second. After all, the situation relates to offences of which the person involved cannot but reasonably expect that they can be sentenced to imprisonment for a term of three years or more.

To make the text of the national provision regulating the use of investigative measures even more clear on this point, it can be recommended to use a

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<sup>94</sup> ECtHR, Case of Weber and Saravia v. Germany, application no. 54934/00, 29 June 2006, §84.

<sup>95</sup> ECtHR, Case of Iordachi and Others V. Malta, application no. 25198/02, 10 February 2009, §44.

<sup>96</sup> ECtHR, Case of Kennedy v. The United Kingdom, application 26839/05, 18 May 2010, § 159.

<sup>97</sup> ECtHR, Case of Malone v. The United Kingdom, application 8691/79, 2 August 1984, §70.

<sup>98</sup> ECtHR, Case of Kennedy v. The United Kingdom, application 26839/05, 18 May 2010, § 34 *juncto* 159.

formulation that leaves no room for interpretation. The provision could e.g. read that an investigative measure can be used in situations where the acts could reasonably be expected to be sentenced to imprisonment for a term of three years or more, in any of the member states of the European Union.

### 3.1.4 *Transfer of pre-trial supervision*

Thirdly, the mechanism of transfer of pre-trial supervision is assessed. It will be argued – in addition to the conclusions deduced from the analysis of the position of double criminality in the previous cooperation domains – that (1) the introduction of the possibility to issue a declaration with respect to the 32 MR offence list with respect to some instruments whereas such option is not foreseen in other instruments runs the risk of undermining the order of preference that can be read into the objectives of the instruments and (2) the position of the person involved is very complex and could have been elaborated on more to avoid discussions.

#### 3.1.4.1 *Variation on the same theme: a partial double criminality limit*

As spelt out in Art. 2.1. b FD Supervision, the very objective of the supervision consists of promoting non-custodial measures for persons who are not resident in the investigating or prosecuting member state. Two different scenarios can occur. First the person involved can be found in the member state of residence in which case the investigating or prosecuting member state seeks assistance from another member state in order to ensure that the person is supervised awaiting her trial; Second the person involved can be found in the investigating or prosecuting member state which is seeking her transfer to the member state of residence, in which case the investigating or prosecuting member state seeks assistance from the member state of residence to supervise the person awaiting her trial in order to avoid that she is held in pre-trial detention.

The legal instrument makes transfer of pre-trial supervision (partially) dependent on the application of the double criminality requirement.<sup>99</sup> This requirement is included in Art. 14 FD Supervision. Similar to the design of the double criminality requirement in the other mutual recognition instruments, it is stipulated that the listed offences cannot be subject to a double criminality verification if they are punishable in the issuing state by a custodial sentence or a measure involving deprivation of liberty for a maximum period of at least three years, and as they are defined by the law of the issuing member state. For

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<sup>99</sup> Pre-trial supervision was unregulated prior to the adoption of the framework decision. The type of supervision referred to in the Council of Europe convention on the international validity of criminal judgements relates to supervision as a conditional sentence whereas the type of supervision dealt with underneath this heading is not a sentence.

offences other than those listed, the executing member state may make the recognition of the decision on supervision measures subject to the condition that the decision relates to acts which also constitute an offence under the law of the executing member state.

Different from the other mutual recognition instruments, the double criminality requirement is not linked to sanction thresholds to be met in the issuing nor executing member state. When comparing the provisions of the FD Supervision to the FD EAW the difference is apparent. Art.2.1 FD EAW reads that [...] *A European arrest warrant may be issued for acts punishable by the law of the issuing member state by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.* Thereafter the article continues with the explanation that a list of offences is introduced for which double criminality cannot be tested as soon as the act is punishable in the issuing member state with a detention order for a maximum period of at least three years. The abovementioned scope limitation included in Art. 21.1 FD EAW is not included in the FD Supervision. Art. 14 FD Supervision on the double criminality requirement immediately refers to the listed offences. Because there is no reason to limit the access to supervision in the home state<sup>100</sup> (to avoid pre-trial supervision in the investigating or prosecuting member state) should not be limited according to the severity of the offence (because especially for minor offences pre-trial detention may be disproportionate), it makes sense not to include sanction thresholds to limit cooperation possibilities.

Finally, here too execution of the orders can have a significant impact on the capacity of the executing member state, depending on the type of supervision measure and the number of persons a member state must supervise at any given time. Therefore, member states can have a good reason to uphold a (partial) double criminality requirement in relation to the transfer of pre-trial supervision orders. Should the member states decide that – in the future – the practical experience with this instrument points to serious capacity issues and therefore it should be considered to include capacity as an additional refusal ground, the argumentation developed above applies *mutatis mutandis*, meaning that the EU as a policy maker should try and safeguard the approximation *acquis* from cooperation limits following the use of capacity as a refusal ground.

#### 3.1.4.2 *Threat of the declarations*

The member states' concerns raised with respect to having to cooperate in relation to behaviour that would not constitute an offence if committed in their territory and the exception granted to Germany in relation thereto in the FD

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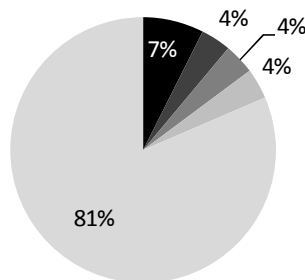
<sup>100</sup> Following Art. 9.1. FD Supervision, the home state should be interpreted as the member state in which the person is lawfully and ordinarily residing.

EEW, lead to the introduction of the general possibility for all member states to issue a declaration with respect to the provisions regulating the double criminality limits to pre-trial supervision. Therefore the threat of this possibility foreseen in the FD Supervision is larger than the threat of the possibility foreseen in the FD EEW because there it relates to all member states.

Because FD Supervision is a relatively young instrument and the implementation deadline does not pass until 1 December 2012, no final picture can be drawn with respect to the impact of the declarations. Nevertheless, the questionnaire included a question with respect to the intention of member states to issue a declaration. In reply to question 2.2.2 only 11% of the member states indicated that they have issued a such declaration, and another 8% have indicated that they are planning to do so in the coming months.

**2.2.2 Have you issued a declaration setting out the guidelines for the interpretation of the 32 MR offence list (cfr. Art 14.4 FD Supervision)?**

- Yes, because our constitution does not allow us to cooperation for acts that do not constitute an offence in our criminal law
- Yes, because for some of the offence labels it was not sure which offences of our criminal code would fall under the scope of that offence label
- Not yet, but we intend to do so because for some of the offence labels it was not sure which offences of our criminal code would fall under the scope of that offence label
- Not yet, but we intend to do so for another reason
- No



Even though 81% of the member states does not intent to issue a declaration and therefore the threat for the EU policy maker of the possibility created in Art. 23.4 FD EEW is not likely to be significant, this does not mean that from a policy

perspective this was the best approach. The EU policy maker should not have introduced the unlimited possibility for member states to issue a declaration and decide individually on the scope of the abandonment of the double criminality requirement. The declarations issued by the member states should only be allowed to relate to the acceptability of the abandonment of the double criminality requirement beyond the approximation *acquis*, "*existing at any time*". The latter nuance is important to ensure that declarations can stand the test of time. It indicates that declarations must always be read in light of (and will be overruled by) the existing approximation *acquis*. Only in doing so the progress made through approximation can be safeguarded.<sup>101</sup>

It must be observed that the currently existing approximation *acquis* does not match the 32 MR offence list. No approximation instrument exists for each of the 32 offence labels. Therefore, the question arises what to do with the *excess* offences.<sup>102</sup> Two options can be considered. Either, the declaration would limit the scope of the offence list to match the current approximation *acquis*, or the scope of the current approximation *acquis* should be further elaborated on to match the offences that are currently included in the offence list.

Even though the ad hoc and semi-ad random compilation of the list is highly criticized<sup>103</sup> and it is not advisable to use the list as a basis to decide for which offences the EU criminal policy should be further developed (encompassing also approximation efforts), the replies to question 2.2.5. reveal that 71% of the member states are inclined to retain the content of the current offence list and use it to support the argumentation that *where no common definition exists, one should be elaborated*.

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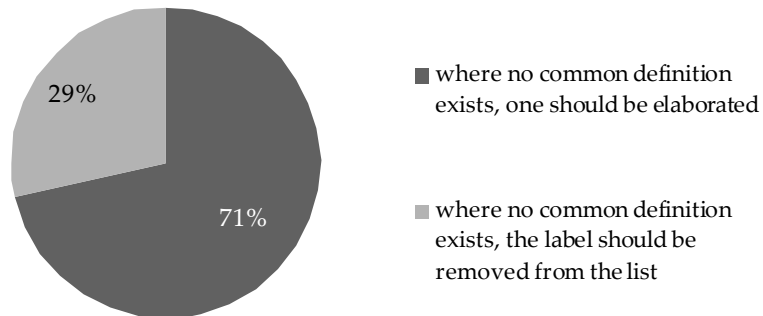
<sup>101</sup> Because it is to be expected that a member state either accepts the partial abandonment of the double criminality requirement based on the 32 offence list or rejects the abandonment of the double criminality requirement and issues a declaration, it would have altogether been more easy to allow a member state to issue a declaration stipulating that double criminality testing will only be abandoned to the extent that approximation obligations exist. In doing so, mutual trust consists of trusting that the other member state has correctly labelled the underlying behaviour as a type of behaviour that falls within the scope of the approximation *acquis*.

<sup>102</sup> For the 32 listed offences, 16 have been subject to approximation (including the *crimes within the jurisdiction of the International Criminal Court*) and 16 have not received any kind of internationally agreed definition.

<sup>103</sup> See e.g. PEERS, S. "Mutual recognition and criminal law in the European Union: Has the Council got it wrong?" *Common Market Law Review* 2004, 41, p 35-36.



**2.2.5 Would it be an acceptable future policy option to clearly define the scope of the 32 MR offence list with common definitions?**



For the offence labels that are included both in the 32 MR offence list as well as in the list in Art. 83(1) TFEU, definitions can be further developed, with a two-thirds majority. However, for each of those offence labels an approximation instrument already exists. Technically, it can be considered whether it is appropriate to interpret the offence labels in a broad fashion so that they encompass more of the labels in the 32 offence list.<sup>104</sup> Though not advisable, the replies to question 2.2.5 indicate that the necessary two-thirds majority can be reached. Technically, to the extent that the excess offences in the 32 MR offence list match the offences included in Art. 83(1) TFEU, an approximation instrument can be adopted. Additionally, to the extent that the excess offence is not included therein, but meets the requirement for it to fall within the approximation competence (i.e. that it is a serious offence with a cross-border dimension), the Council can identify it as another area of crime for which approximation is desirable. Finally however, some of those excess offences will not meet the approximation requirement and cannot be subject to approximation. In this scenario, though technically *approximation* is not possible, nothing should prevent the existing *common criminalisation acquis* from being identified to scope the redundancy of the double criminality verification.

<sup>104</sup> It is not unimaginable that the broad *organised crime* label included in Art. 83(1)2 is used to approximate e.g. the *organised and armed robbery* label included in the 32 MR offence list.

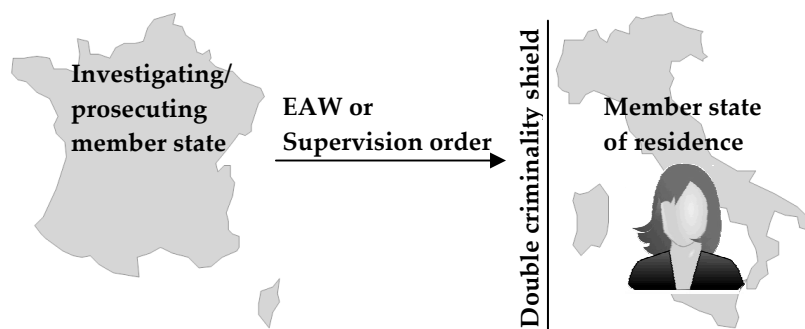
The replies to question 2.2.5. suggest that the necessary unanimity will not be reached, which means that declarations limiting the scope of the abandonment of the double criminality requirement to match the approximation *acquis* will always have as an effect that the list of offence labels for which double criminality is abandoned is significantly reduced.

3.1.4.3 *Possible perverse effect of double criminality as a refusal ground*

From the perspective of the person involved, it be noted that – different than in the previous cooperation contexts – the use of double criminality in a supervision context can run counter her interests. As explained above, two scenarios can be distinguished.

*Person involved is in the member state of nationality or residence*

In this first scenario, the member state in which proceedings will take place might already in the investigating phase want to ensure that the person involved will be present at her trial. When that person is found outside its territory, a member state has two options: either an EAW can be sent seeking the immediate surrender of the person or a supervision order can be sent seeking the assistance of another member state to supervise the person involved awaiting a ‘just-in-time’ surrender with a view to being present at her trial.



Because it is likely that – as a result of an immediate surrender – the person involved will end up in pre-trial detention in the prosecuting member state, member states have adopted a legal instrument that allows the issuing of a supervision order to seek assistance from the member state of residence where the person was found. If in this scenario a double criminality issue would rise and the member state of the person’s residence would refuse cooperation, the double criminality requirement would shield the person involved from a measure being taken. However, because the double criminality shield applicable to the supervision order may differ from the double criminality shield applicable

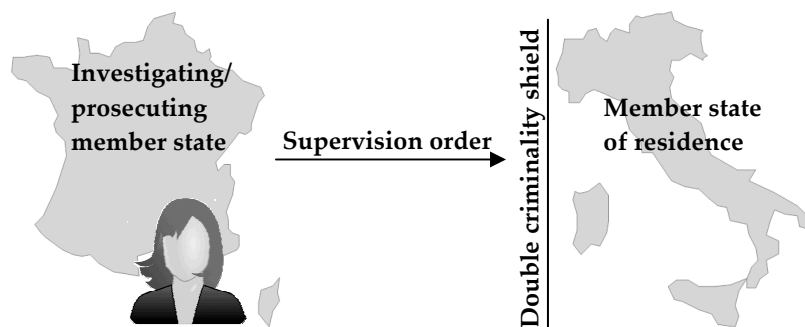
to the EAW, following a future member state declaration pursuant to Art. 14.4. FD Supervision, this decision is not necessarily in the best interest of the person involved. Seeking recourse to an EAW upon refused supervision may be successful for the prosecuting member state, depending on the nature of the double criminality issue underlying the refused supervision.

If the double criminality issue is not related to any of the listed offences, the refusal ground will remain valid with respect to the EAW and will be able to shield the person involved from any measure being enforced against her.

If however the double criminality issue is related to any of the listed offences read in combination with a declaration of the member state of residence stating that even for the listed offences double criminality is required, this declaration will not be valid in a surrender context which means that refusal of an EAW would not be possible. This means that refusing to cooperate following the supervision order will have as an effect that the person involved will not be subject to a supervision measure in her member state of residence, but will have to be surrendered to the prosecuting member state following an EAW, where she will probably be subject to a pre-trial detention. In this situation it is clear that calling upon a double criminality requirement to enforce a supervision order is not always in the best interest of the person involved, not even when she is located on the territory of the executing member state. Furthermore, it illustrates the consequences of the introduction of the possibility to issue a declaration with respect to the double criminality requirement only with respect to some of the cooperation instruments. It will result in a landscape in which double criminality verification is not consistently abandoned throughout the legal framework in that it interferes with the intended order of preference between the different legal instruments.

*Person involved is in the investigating or prosecuting member state*

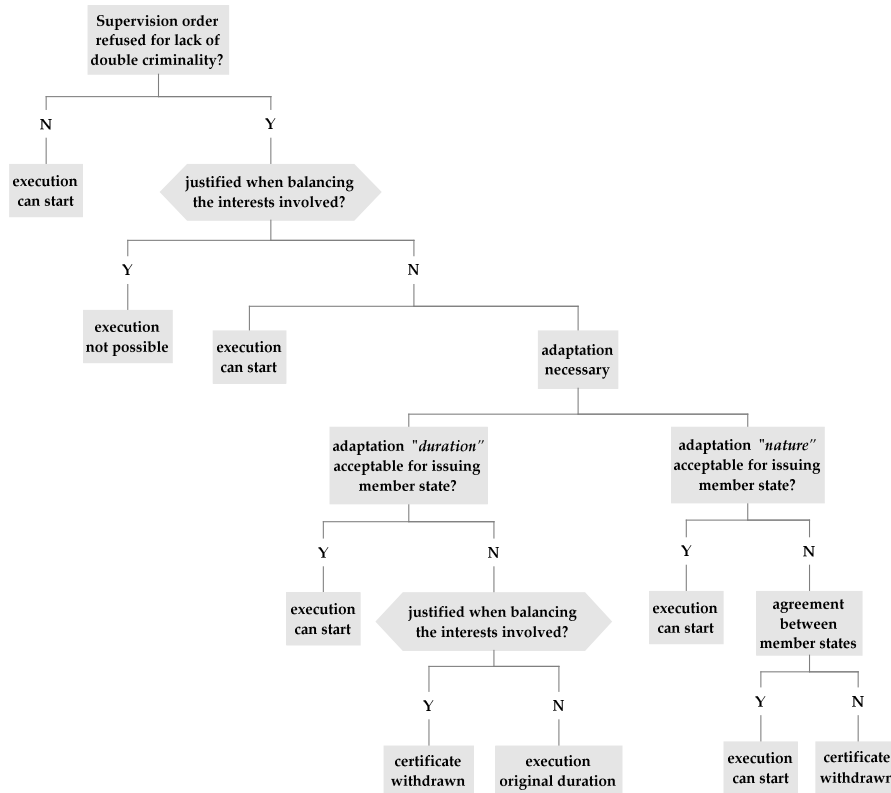
In this second scenario, the investigating or prosecuting member state will seek cooperation from the member state of nationality or residence to supervise the person involved pending her trial, in order to avoid a pre-trial detention.



If the member state of residence refuses cooperation based on a double criminality issue<sup>105</sup> it is clear that the person involved will be deprived from the possibility to enjoy a supervision measure in her member state of residence as opposed to likely pre-trial detention in the investigating or prosecuting member state. Here too it is clear that seeking recourse to double criminality as a limit to cooperation will clearly not always be in the best interest of the person involved. Therefore, it could be considered to look into ways to balance the interests of the person involved and the member state of residence and into the feasibility of introducing a mandatory dialogue either or not followed legal remedy against the use of double criminality as a refusal ground. Though a person involved should not have the right to choose the location of execution, a dialogue between the parties involved should not be ruled out, for some member states may be willing to execute in spite of lack of double criminality. A more far-reaching option would make the member state's decision subject to a judicial review. The following paragraphs will elaborate on the decision making scheme inserted below.<sup>106</sup> The hexagonal shapes point to moments where dialogue can take place either or not followed by a judicial review.

<sup>105</sup> Either with respect to any of the 32 MR offences for which a declaration has been issued or with respect to any other offence.

<sup>106</sup> The scheme starts from the assumption that double criminality is the only refusal ground. Obviously there are various other ground that can lead to refusal, but for the purpose of this line of argumentation, double criminality is the only refusal ground taken into account.



*Balancing the interest of the member state and the interest of the person involved*

It is legitimate for a member state to be opposed to executing supervision measures in relation to behaviour that is not considered to be an offence when committed on its territory. Execution of such supervision measures runs the risk of creating inconsistencies and disrupting the balance in the national criminal policy. However, it is important to balance that interest of the member state with the interest of the person involved. In light thereof it is recommended to consider the introduction of a number of safeguards in the form of dialogues and possible judicial reviews.

Whenever the execution of a supervision order is *refused based on a double criminality concern*, the person involved might be given the right to enter into a dialogue with the member state and present her argumentations in favour of execution in her member state of residence. When the member state of residence upholds double criminality as a refusal ground, the person involved might be given the right to start a procedure in front of a judge in the refusing member

state to seek an exception to the use of that refusal ground.<sup>107</sup> In a such scenario, the person involved will have the opportunity to elaborate on her arguments in favour of execution of the supervision order in spite of lacking double criminality. The member state in its turn will have the opportunity to convince the judge of the reasons why execution would disproportionately disrupt the balance of and consistency within the national criminal justice system. Ultimately it will be a judge who will rule on the conflicting interests. If the judge decides that the refusal ground is justified when balancing the interests involved, execution in the member state of residence is not possible. If the person involved successfully challenged the used of double criminality as a refusal ground, the member state of nationality or residence might be obliged to initiate the execution of the supervision order.

*Ensuring an acceptable execution*

Execution in a situation where there is a lack of double criminality is far from evident and will inevitably cause problems. Following the standard procedure foreseen in the FD Supervision, the executing member state may adapt either the duration or the nature of the supervision order to ensure compatibility with its national law. Because of the lack of detail in the adaptation provisions, it is technically possible following lack of double criminality to 'adapt' the duration of the measure to nothing, or to drastically change the nature of the supervision measure in a way that supervision loses its added value. In both scenarios it is possible that the issuing member state deems the adaptation unacceptable and withdraws the certificate ordering the supervision.

In the event such a withdrawal is solely linked to the adaptation of the *duration* of the supervision measure, the person involved might again have the right to present her argumentation firstly in a dialogue with the executing member state and secondly, if that fails to be successful, also to a judge with a view to waiving *her right*<sup>108</sup> to a reduced duration and seeking to have the

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<sup>107</sup> In the above described first scenario this could be to anticipate an EAW, but the possibility for judicial review will most likely be used more frequent in the second scenario, in which the person involved is situated on the territory of the investigating/prosecuting member state.

<sup>108</sup> The wording of the adaptation provisions do not provide the person involved with a right to have the measure adapted. The provisions are drafted from the perspective of the executing member state and *allow* for an adaptation as soon as the measure is incompatible with the law of the executing member state, either with respect to the nature or the duration of the measure. However, in a previous study on the FD Deprivation of Liberty, a general concern was raised with respect to the formulation of these adaptation provisions. It is felt that a strict *lex mitior* should apply, meaning that measures need to be automatically adopted, leaving the executing member state no discretionary power. See G. VERMEULEN, A. VAN KALMTHOUT, N. PATERSON, M. KNAPEN, P. VERBEKE and W. DE BONDT, "Cross-border execution of judgements involving deprivation of liberty in the EU. Overcoming legal and practical problems through flanking measures", Antwerp-Apeldoorn-Portland, Maklu, 2011, 310, p 96.

supervision executed as foreseen in the original order. Completely similar to the review procedure described above, the member state will have the possibility to convince the judge of the reasons why execution of the original duration would disproportionately disrupt the balance of and consistency within the national criminal justice system. Ultimately it will be a judge who will rule on the conflicting interests. If the person involved successfully challenged the adaptation of the duration of the supervision measure, the member state of nationality or residence will have to execute of the supervision measure as originally foreseen. If the person involved is not successful, the adaptation of the duration will stand and the certificate will most likely be withdrawn.

In the event such a withdrawal is solely linked to the adaptation of the *nature* of the supervision measure, the situation is more complicated. Obviously, it is impossible to require the member state of nationality or residence to execute a type of measure that is unknown in the national criminal justice system. In this type of situations a dialogue could be considered with the issuing member state as to which type of supervision measure described in the national criminal justice system of the executing member state would be acceptable.

From the above argumentation it is clear that balancing the double criminality related interests of the executing member state with the interests of the persons concerned is very complex and could have been elaborated on more in the current legislative instruments. A thorough debate is required in which due account is given to the feasibility of strengthening the position of the person involved. At least member states should consider not to introduce double criminality as a mandatory refusal ground, but to include it as an optional refusal ground to allow execution in absence of double criminality.

### ***3.1.5 Relocation and protection of witnesses***

Fourthly, relocation and protection of witnesses is analysed, which entails both a execution component (e.g. executing protective measures such as organising a new identity or physical protection for a witness) and a mutual recognition component (i.e. recognising the immunity from prosecution granted to a collaborator with justice). It will be argued that double criminality can play role in the execution of protection measures and in the recognition of granted benefits.

#### ***3.1.5.1 Execution of protective measures***

First, when the relocation and protection of witnesses is related to granting the protection that is included in a cooperation request of another member state, discussions with respect to the position of double criminality are parallel to the

discussions held in relation to awarding each other mutual legal assistance.<sup>109</sup> As a baseline, no double criminality requirement is introduced in a mutual legal assistance sphere, though it has been observed that member states tend to hold on to a double criminality requirement with respect to either intrusive or coercive investigative measures or with respect to investigative measures that have a significant impact on the capacity of the requested member state. In relation to relocation and protection of witnesses, not so much the character of the investigative measure as opposed to the capacity implications will give rise to the introduction of double criminality as a refusal ground.

If capacity concerns lead to the introduction of a double criminality based refusal ground, this refusal ground will have no impact on the offences that have been subject to approximation, provided that it is clearly stipulated that no double criminality issues are accepted with respect to cases for which the underlying behaviour has been subject to approximation. If however, the member states decide to allow the use of capacity as a refusal ground even where double criminality is met, a discussion can be opened with respect to the acceptability of using that refusal ground in relation of (all or some) offences that have been subject to approximation.

Furthermore, the question arises what the position of the person involved should be. When elaborating on the transfer of pre-trial supervision, it was argued that it can be considered to allow the person involved to enter into a dialogue with her member state of residence with a view to execution in that member state, in spite of double criminality concerns. In the event the dialogue does not have the desired result, it can even be considered to allow the person involved a judicial review in front of a judge in the member state of residence. In that scenario, there is a clear link between the person and the member state involved through the residence criterion. Here, in the context of relocation and protection of witnesses, the situation is more complex, because at least in a relocation scenario, the requested member state will not be the member state of residence. Therefore, the line of argumentation developed in the context of transfer of pre-trial supervision, cannot be transferred automatically to relocation and protection of witnesses without further consideration.

To the extent that a person has been granted a protection measure in a member state other than the member state of residence and execution in the member state of residence can be meaningful, a scenario such as the one developed in the context of transfer of pre-trial supervision can be considered.

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<sup>109</sup> Relocation and protection of witnesses is currently not regulated which means that it is open for discussion to introduce either a request-based (MLA) or an order-based (MR) instrument. Besides the fact that it is very unlikely that member states will be willing to make this form of cooperation subject to the more stringent MR regime, the objective here is to look into the position of the double criminality requirement, regardless of the choice for an MLA or MR type of cooperation. See more detailedly in the chapter on stringency in international cooperation in criminal matters.



Just like it can be argued that a person should have the opportunity to enter into a dialogue with a member state with a view to seeking execution of pre-trial supervision in her member state of residence, it makes sense to allow a person to try and convince her member state of residence to execute the protection measure, in absence of double criminality even in spite of a capacity burden. In a more far-reaching scenario it can be considered to allow the person involved to subject the outcome of that dialogue to a judicial review in front of a judge in the requested member state.

If however, execution of the protection measure is only effective outside the member state of residence, the possibility to enter into a dialogue and possibly submit the outcome thereof to a judicial review is far less evident.

### 3.1.5.2 *Recognition of granted benefits*

Second, protection of witnesses can also refer to the situation where a person has been granted the status of collaborator with justice and therefore enjoys the benefit of immunity from prosecution. Though not all member states have a legal framework for this status, it is most commonly used for persons that have a history in participating in a criminal organisation and have decided to collaborate with justice in return for immunity from prosecution for their crimes. Obviously, mutual recognition of the status of collaborator with justice is essential for its success. The status of collaborator with justice and the immunity from prosecution that comes along with it, loses a lot (if not all) of its persuasive strength if it is not recognised throughout the EU. In other words, if the status of a collaborator with justice is not mutually recognised by all member states, the value thereof is significantly eroded. The question arise how to ensure the acceptability of a mutual recognition requirement. Even though the concept of a *collaborator with justice* is not included in the criminal justice systems of all the member states, analysis did reveal that already in the current instrumentarium<sup>110</sup> traces can be found of the possibility to reduce the sentence. Art. 6 FD Terrorism stipulates that member states ought to take the necessary measures to ensure that penalties may be reduced if the offender provides the administrative or judicial authorities with information which they would not otherwise have been able to obtain.

Taking account of the feedback received with respect to the future of the 32 MR offence list<sup>111</sup>, it can be considered to introduce an obligation to mutually

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<sup>110</sup> VERMEULEN, G. EU standards in witness protection and collaboration with justice. Antwerp-Apeldoorn, Maklu, 2005, 280p.

<sup>111</sup> In the context of a previous study, member states had indicated to be open to a discussion that aims at lifting the possibility to call upon refusal grounds with respect to a limited set of offence labels, provided that they are clearly defined. See VERMEULEN, G., DE BONDT, W. and VAN DAMME, Y. EU cross-border gathering and use of evidence in criminal matters.

recognise immunities from prosecution granted to persons providing the authorities with information that could not have been otherwise obtained, with respect to the EU's priority offences. Formalising the status of collaborator with justice could be part of the EU's policy with respect to the approximated offences for which it has been agreed that European cooperation need to be stepped up. Introducing the status of collaborator with justice in relation to those offences could have a significant impact on the information that is available for prosecutorial services and in doing so would be beneficial for the effective fight against these offence types, which is the ultimate goal of the development of an EU policy for those offences in the first place.

Should the member states feel that this obligation is too far reaching to begin with, the possibility could be considered to introduce an intervention by Eurojust in the sense that it could advise member states prior to granting the status of collaborator with justice and the immunity from prosecution linked thereto. In this scenario, mutual recognition could be limited to cases that received a positive Eurojust advice.

In parallel thereto, it could also be looked into whether a set of minimum rules with respect to granting immunity from prosecution should be introduced. These minimum rules would in turn also limit the obligation for member states to mutually recognise the decision to grant a person the status of collaborator with justice.

Even though nothing has been explicitly regulated with respect to the relocation and protection of witnesses, the considerations above illustrate that here too the double criminality requirement comes into play and the approximation *acquis* can possibly be used to limit the scope of a mutual recognition obligation.

### **3.1.6 *Transfer of prosecution***

Fifthly, transfer of prosecution is analysed. Within this domain two entirely different situations can be distinguished. First, a transfer of prosecution can take place between two member states that were originally competent to initiate proceedings. In those cases, transfer of prosecution is characterised as a form of legal assistance between member states that have decided amongst them which of them is going to initiate proceedings.<sup>112</sup> Obviously, this would mean that no double criminality concerns can ever exist because a member state can never be competent to initiate a proceeding for behaviour that does not constitute an

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Towards mutual recognition of investigative measures and free movement of evidence? Antwerp-Apeldoorn-Portland, Maklu, 2010.

<sup>112</sup> Previous studies have looked into the criteria that can and cannot support the search for the best place for prosecution. See e.g.: VANDER BEKEN T. , VERMEULEN G , STEVERLYNCK S. and THOMAES S., Finding the best place for prosecution, Antwerp-Apeldoorn, Maklu, 2002, p. 118.

offence in its national legal order. Second, transfer of prosecution can take place from a member state that is originally competent to a member state that has no original competence. It is in this second context that the double criminality requirement comes into play.<sup>113</sup> It will be argued that it is only logical to introduce a double criminality requirement, though an exception thereto can be found in the Benelux treaty.

Considering the impact of a transfer of prosecution both for the person involved as well as for the requested member state, it is only logical that this technique would be limited along the double criminality requirement. Art. 7 CoE Transfer Proceedings justly stipulates that proceedings may not be accepted by the requested state unless the offence in respect of which the proceedings are requested would be an offence if committed in its territory and when, under these circumstances, the offender would be liable to sanction under its own law also. The corresponding EU instrument is still in a draft phase. The latest version dates from November 2009<sup>114</sup> and maintains the double criminality requirement. Art.11.1 of the Draft stipulates that '*a request for transfer of proceedings shall not be accepted if the act underlying the request for transfer does not constitute an offence under the law of the member state of the receiving authority*'.

Consistent EU policy making<sup>115</sup> requires that a specific provision is included stipulating that it is unacceptable to use double criminality as a refusal ground in relation to cases for which the underlying behaviour has been subject to approximation. Member states that have correctly implemented the approximation instruments will have no double criminality issues in relation to those offences; member states that have not (yet) (correctly) implemented the criminalisation obligations included in approximation instruments cannot use their lagging behind as a justification to seek recourse to double criminality as a refusal ground. Interestingly, the abandonment of the double criminality verification based on a list of offences can be found in the old Benelux convention on the transfer of criminal proceedings.<sup>116</sup> Its Art.2.1 states that facts

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<sup>113</sup> This explains why in literature often only this second situation is described. See e.g. PLACHTA, M. "The role of double criminality in international cooperation in penal matters", in JAREBORG, N., *Double Criminality*, Uppsala, Iustus Förlag, 1989, p 84-134.

<sup>114</sup> Council of the European Union, Draft [...] on the transfer of proceedings in criminal matters, COPEN 231, 16437/09 REV 1 of 24.11.2009.

<sup>115</sup> In this section on the transfer of prosecution only the perspective of the EU in its capacity of a policy maker safeguarding its approximation acquis is dealt with. The perspective of the person involved is not dealt with because a dialogue-construction as elaborated on in the sections on transfer of pre-trial supervision and relocation and protection of witnesses (and *supra* also in relation to transfer of execution of sentences) to do away with the use of double criminality as a refusal ground by any of the member states is not opportune, not even with respect to the member state of nationality and/or residence.

<sup>116</sup> *Traité entre le Royaume de Belgique, le Grand-Duché de Luxembourg et le Royaume des Pays-Bas sur la transmission des poursuites*, 11 May 1974, Benelux Official Journal, Tome 4-III.

can only be prosecuted in another state if the double criminality requirement is met, or if it is one of the facts included in the list annexed to the convention.<sup>117</sup> The annex consists of a conversion table providing the offence label and the corresponding criminalisation provisions in each of the three cooperating member states. It could be recommended to mirror this approach in the EU instrument on transfer of prosecution, with respect to the offences that have been subject to approximation.

### 3.1.7 *International validity and effect of decisions*

Sixthly, the international validity and effect of decisions is analysed. This category comprises two subcategories, first cross-border execution and second cross-border effect of prior convictions in the context of a new (criminal) proceeding. It will be argued – in addition to the comments made with respect to the previous domains – that (1) with respect to the cross-border execution of convictions, the position of the person involved is complex and has not been sufficiently dealt with when drawing up the cooperation instruments and (2) with respect to the cross-border effect of convictions the position of the double criminality requirement has not been dealt with thoroughly and follow-up research is necessary.

#### 3.1.7.1 *Cross-border execution of convictions*

##### *Double criminality limits & the approximation acquis*

Cross-border execution of convictions entails taking over an significant part of the criminal procedure as a result of which it is traditionally linked to the double criminality requirement.<sup>118</sup> Art. 4 CoE Conditional Sentence stipulates that the offence on which any supervision request is based shall be one punishable under the legislation of both the requesting and the requested state. Art.40.1 (b) CoE Validity refers back to Art. 4 that stipulates that a sanction shall not be enforced by another contracting state unless under its law the act for which the sanction was imposed would be an offence if committed on its territory and the person on whom the sanction was imposed liable to

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Even though it is yet to enter into force, this convention is worth mentioning considering the ideas underlying the content of its annex.

<sup>117</sup> Original text: la personne qui a commis un fait [...] ne peut être poursuivie dans un autre état contractant que si, selon la loi pénale de cet état, une peine ou mesure peut lui être appliquée pour se fait ou pour le fait correspondant mentionné sur la liste annexée au présent traité.

<sup>118</sup> This link was also expressed in the resolution on the IXth International Congress on Penal Law, stating that [...] la reconnaissance de la sentence étrangère exige en règle générale la double incrimination in concreto de l'infraction donnant lieu à la sentence. See DE LA CUESTA, J. L. Résolutions des congrès de l'Association International de Droit Pénal (1926 – 2004). Toulouse, Éditions érès, 2009, 232p.

punishment if she had committed the act there. Similarly Art.3.1. e CoE Transfer Prisoners stipulates that a sentenced person may be transferred only if the acts or omissions on account of which the sentence has been imposed, constitute a criminal offence according to the law of the administering state or would constitute a criminal offence if committed on its territory. Finally, Art. 18(1)f CoE Confiscation of proceeds of crime stipulates that *“the offence to which the request relates would not be an offence under the law of the requested party if committed within its jurisdiction. However, this ground for refusal applies to cooperation only in so far as the assistance sought involves coercive action”*.

The current EU instruments are adopted in the mutual recognition philosophy and partially abandon the double criminality requirement for a list of offences. Cross-border execution of convictions is currently governed by four mutual recognition instruments with respect to (1) financial penalties, (2) confiscations, (3) sentences involving deprivation of liberty and (4) probation measures and alternative sanctions.

Though above reference was always made to a list of 32 MR offences for which the double criminality requirement is abandoned, there is one instrument that includes a more extended list of offences. Art. 5 FD financial penalties holds a list of 39 offences, adding to the list found in the other MR instruments (1) conduct which infringes road traffic regulations, including breaches of regulations pertaining to driving hours and rest periods and regulations on hazardous goods, (2) smuggling of goods, (3) infringements of intellectual property rights, (4) threats and acts of violence against persons, including violence during sport events, (5) criminal damage, (6) theft and (7) offences established by the issuing state and serving the purpose of implementing obligations arising from instruments adopted under the EC Treaty or under Title VI of the EU Treaty. Ultimately it is up to the member states to decide for which offences they see it fit and acceptable to abandon the double criminality requirement.

Taking account of the commitments made when developing the approximation acquis, consistency in EU policy making requires that it is seen to that the member states do not accept the possibility to use double criminality as a refusal ground in relation to offences that have been subject to approximation. In parallel to the comments made with respect to the other instruments that include a list of offences for which double criminality is abandoned, it can be argued that – even though the current approximation acquis is covered by the 32(39) MR Offences, this approach does not guarantee that this will remain to be the case in the future. Considering the rapidly changing nature of the approximation acquis it would have been better to expressly include a provision that precludes the use of double criminality as a refusal ground with respect to offences that have been subject to approximation at any given time, complementing that provision with the compilation of a EULOCs like instrument that is accessible for anyone to consult and brings together the

existing approximation *acquis*. Furthermore, the comments with respect to the possibility to issue a declaration with respect to the abandonment of the double criminality requirement are *mutatis mutandis* also valid with respect to the instruments regulating the cross-border execution of convictions. Though not all instruments governing the cross-border execution of convictions include a provision that allows member states to issue a declaration, the inclusion thereof in Art. 7 §4 FD Deprivation of Liberty and Art. 10 §4 FD Alternatives constitute a threat for the approximation *acquis* to the extent that it is allowed to declare that double criminality will be tested in relation to cases of which the underlying behaviour has been subject to approximation. Therefore consistency requires that it is stipulated that member states are only allowed to issue a declaration with respect to the abandonment of the double criminality requirement beyond the existing approximation *acquis* at any given time. The further development of the approximation *acquis* will always overrule the content of a member state's declaration. It can only be hoped for that the upcoming instrument on disqualifications amends the provision governing the possibility to issue a declaration accordingly.<sup>119</sup>

*Position of the persons involved*

Similar to the discussion in the context of pre-trial supervision orders, the interests of the persons concerned can conflict with the interests of the executing member state. To further elaborate on that complexity, again a distinction needs to be made between the situation in which – without cooperation – no execution can take place altogether because the person involved is not in the convicting member state and the situation in which – without cooperation – execution would take place in another member state, because the person involved is in the convicting member state.

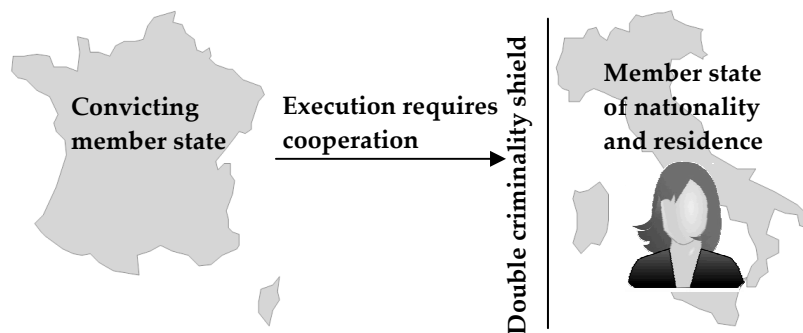
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<sup>119</sup> The main gap in this field is the cross-border execution of disqualifications. Even though it was mentioned as a priority in the Programme of Measures implementing the principle of mutual recognition, so far that has not been an instrument regulating the entirety of cross-border execution of disqualifications, though some of the other instruments briefly touch upon it. This gap is subject of a study currently conducted by the project team of which the final report is due by the end of February. To the extent a mutual recognition instrument is recommended to fill in the current gap in the current EU instruments governing cross-border execution, the approach to double criminality suggested, is similar to the approach in the other instruments, though takes the main comments thereto into account. See more elaborately: VERMEULEN, G., DE BONDT, W., RYCKMAN, C. and PERSAK, N. The disqualification triad. Approximating legislation. Executing requests. Ensuring equivalence. Antwerp-Apeldoorn-Portland, Maklu, 2012, 365p.

*Person involved is not in the convicting member state*

Firstly, if the person involved is not located in the convicted member state and thus cooperation with another member state is necessary to ensure execution of the sentence, cooperation is a means to ensure that *execution in itself* can take place.

If the member state of nationality and residence refuses cooperation and thus execution of the sentence imposed in the convicting member state, the person involved is protected by a double criminality shield.



However, the use of that shield will not necessarily have the best result for the person involved, depending on the reaction of the convicting member state. If the use of double criminality as a refusal ground relates to an offence that is not included in the list of offences, that refusal ground will also stand when the convicting member state seeks recourse to the EAW to have the person transferred to it in order to execute the sentence itself. If however, the refusal ground relates to any of the offences included in the 32 MR offence list for which a declaration has been issued to complement either the FD Deprivation of Liberty or FD Alternatives, that refusal ground will not stand when the convicting member state seeks recourse to the EAW. After all, the exceptions to the abandonment of the double criminality requirement in relation to the 32 MR offence list is not valid in relation to an EAW. This means that the use of the double criminality shield in reply to an execution request relating to an offence that is included in the 32 MR offence list, can have as an effect that the person will not be subject to execution in its member state of nationality or residence (where traditionally the prospects for rehabilitation are deemed to be the best)<sup>120</sup> but is transferred to the convicting member state following an EAW. Here too

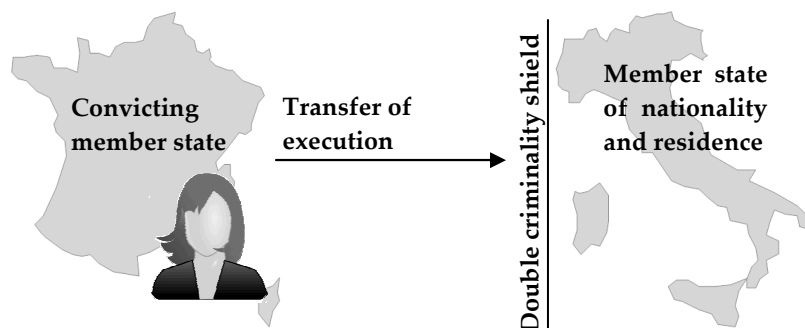
<sup>120</sup> This position is dealt with more elaborately in the context of a study on detention in the EU. See: VERMEULEN, G., VAN KALMTHOUT, A., PATERSON, N., KNAPEN, M., VERBEKE, P. and DE BONDT, W. Cross-border execution of judgements involving deprivation of liberty in the EU. Overcoming legal and practical problems through flanking measures. Antwerp-Apeldoorn-Portland, Maklu, 2011, 310p.

the question arises to what extent it should be possible for the person involved to argue in favour of execution in its member state of nationality or residence in spite of absence of double criminality. Although it remains controversial, already in 1968 a provision making such execution possible was introduced in the Benelux cooperation sphere. Art. 40 Benelux Execution stipulated that execution would still take place even if the underlying behaviour did not constitute an offence in the executing state but was included in the list drawn up on the basis of Art. 57.<sup>121</sup> A similar approach could be considered at EU level.

*Person involved is in the convicting member state*

Secondly, it must also be recognised that situations can exist in which execution *in itself* is not dependent on cooperation, but only the *location* of execution is dependent on cooperation. In a second scenario, the convicted person is found in the convicting member state, which means that execution is possible without any form of cooperation. In this scenario cooperation will not influence the execution *itself* but will influence the *location* of execution. It runs counter the best interests of the person involved and especially her rehabilitation prospects if her country of nationality and residence would refuse cooperation.

Upholding a strict double criminality requirement would then mean that execution in the member state of nationality is not possible.



<sup>121</sup> Art.40 Benelux Execution: Si la condamnation dont l'exécution est demandée se rapport à un fait qui ne constitue pas une infraction selon la législation de l'état requis, mais est mentionné à la liste établie conformément à l'article 57, le juge substitute à la peine ou à la mesure prononcée une des peines ou mesures qu'il prononcerait en vertu de sa propre législation pour un fait correspondant selon la liste. Traité Benelux sur l'exécution des décisions judiciaires rendues en matière pénale, 29 September 1968, Benelux Official Journal, Tome 4-III. Even though it has never entered into force, this convention is worth mentioning considering the ideas underlying the abandonment of the double criminality requirement for some offence categories.



Mirroring the conflict described when discussing the transfer of pre-trial supervision, here too there is a conflict between the interest of the executing member state (who wishes to maintain the internal consistency and balance in its criminal justice system and therefore opposes to execution of sentences for which the underlying behaviour would not constitute an offence in its jurisdiction) and the interests of the person involved (who may wish to see her sentence executed in her member state of nationality and residence).

*Balancing the interest of the member state and the interest of the person involved*

It is legitimate for a member state to be opposed to executing sentences in relation to behaviour that is not considered to be an offence in its criminal justice system. Execution of such sentences runs the risk of creating inconsistencies and disrupting the balance in the national criminal policy. However, it is important to balance that interest of the member state with the interest of the person involved. In light thereof it is recommended to introduce a number of safeguards in the form of the possibility to start a dialogue between the person and member state involved, the outcome of which can even be subject to a judicial review.

Whenever the execution of a sentence is *refused based on a double criminality concern*, the person involved might be given the right to enter into a dialogue with the member state and present her argumentations in favour of execution in her member state of residence. When the member state of residence upholds double criminality as a refusal ground, the person involved might be given the right to start a procedure in front of a judge in the refusing member state to seek an exception to the use of that refusal ground.<sup>122</sup> The person involved will have the opportunity to elaborate on her arguments in favour of execution of the sentence in spite of lacking double criminality. The member state in its turn will have the opportunity to convince the judge of the reasons why execution would disproportionately disrupt the balance of and consistency within the national criminal justice system. Ultimately it will be a judge who will rule on the conflicting interests. If the judge decides that the refusal ground is justified when balancing the interests involved, execution in the member state of residence is not possible. If the person involved successfully challenged the used of double criminality as a refusal ground, the member state of nationality or residence will have to initiate the execution of the sentence.

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<sup>122</sup> In the above described first scenario this could be to anticipate an EAW, but the possibility for judicial review will most likely be used more frequent in the second scenario, in which the person involved is situated on the territory of the investigating/prosecuting member state.

*Ensuring an acceptable execution*

Execution in a situation where there is a lack of double criminality is far from evident and will be challenging. Following the standard procedure foreseen in the both FD Deprivation of Liberty and FD Alternatives, the executing member state may adapt either the duration or the nature of the sentence to ensure compatibility with its national law. Because of the lack of detail in the adaptation provisions, it is technically possible following lack of double criminality to 'adapt' the duration of the measure to nothing, or to drastically change the nature of the sentence in a way that it loses its meaning. In both scenarios it is possible that the issuing member state deems the adaptation unacceptable and withdraws the certificate ordering the execution of the sentence.

In the event such a withdrawal is solely linked to the adaptation of the *duration* of the sentence, it can be considered to give the person involved will again have the right to present her argumentation firstly in a dialogue with the executing member state and secondly, if that fails to be successful, also to a judge with a view to waiving *her right*<sup>123</sup> to a reduced duration and seeking to have the sentence executed as foreseen in the original order. Completely similar to the review procedure described above, the member state will have the possibility to convince the judge of the reasons why execution of the original duration would disproportionately disrupt the balance of and consistency within the national criminal justice system. Ultimately it will be a judge who will rule on the conflicting interests. If the person involved successfully challenged the adaptation of the duration of the sentence, the member state of nationality or residence will have to execute of the sentence as originally foreseen. If the person involved is not successful, the adaptation of the duration will stand and the certificate will most likely be withdrawn.

In the event such a withdrawal is solely linked to the adaptation of the *nature* of the sentence, the situation is more complicated. Obviously, it is impossible to require the member state of nationality or residence to execute a type of sentence that is unknown in the national criminal justice system. In this type of situations a dialogue is necessary with the issuing member state as to which type of

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<sup>123</sup> The wording of the adaptation provisions do not provide the person involved with a right to have the measure adapted. The provisions are drafted from the perspective of the executing member state and *allow* for an adaptation as soon as the measure is incompatible with the law of the executing member state, either with respect to the nature or the duration of the measure. However, in a previous study on the FD Deprivation of Liberty, a general concern was raised with respect to the formulation of these adaptation provisions. It is felt that a strict *lex mitior* should apply, meaning that measures need to be automatically adopted, leaving the executing member state no discretionary power. See G. VERMEULEN, A. VAN KALMTHOUT, N. PATERSON, M. KNAPEN, P. VERBEKE and W. DE BONDT, "Cross-border execution of judgements involving deprivation of liberty in the EU. Overcoming legal and practical problems through flanking measures", Antwerp-Apeldoorn-Portland, Maklu, 2011, 310, p 96.

sentence described in the national criminal justice system of the executing member state would be acceptable.

From the above argumentation it is clear that balancing the interests of the executing member state with the interests of the persons concerned is very complex and was insufficiently developed in the current legislative instruments. A thorough debate is required in which due account is given to the position of the person involved. At least member states should consider not to introduce double criminality as a mandatory refusal ground, but to include it as an optional refusal ground to allow execution in absence of double criminality.

### 3.1.7.2 *Cross-border effect of convictions*

Second, taking account of prior convictions is the other subcategory within the domain of international validity and effect of decisions. It is regulated somewhat differently. At CoE level double criminality limits were never explicitly included in the international instruments. In Art. 56 CoE Validity it is clarified that states should legislate to enable their courts to take account of prior convictions handed down in another state with a view to include in the judgment "*all or some of the effects*" which its law attaches to judgments rendered in its territory. It is difficult to draw a double criminality-conclusion based on the wording that "*all or some effects*" can be attached to it. It is easy to say that the national effects would have been zero if the underlying behaviour is not criminal under national law, but the legal framework surrounding the effect of prior convictions is usually more complex than that. States in which the effect of a prior conviction is based solely on the sanction thresholds in prior convictions, might not have a solid legal basis to ignore foreign convictions for double criminality reasons.

The current EU instrument further complicates this matter. The FD Prior Convictions – similar to the CoE instrument and different to the other framework decisions – holds no specific provision on double criminality as a refusal ground. Its Art. 3.1 stipulates that the legal effects that are attached to foreign convictions are equivalent to the effects attached to previous national convictions, in accordance with national law. Recital 6 clarifies however that the framework decision cannot entail the obligation to attach legal effects to a conviction if the underlying behaviour could not have led to a conviction in the member state that is conducting the new criminal proceeding. Through this provision the Council has opened the door for the introduction of a double criminality test at national level. From the perspective of the further development of the EU criminal policy with respect to the priority offences that have been subject to approximation, this is a missed opportunity to reinforce the approximation obligations of the member states and to stipulate that in relation

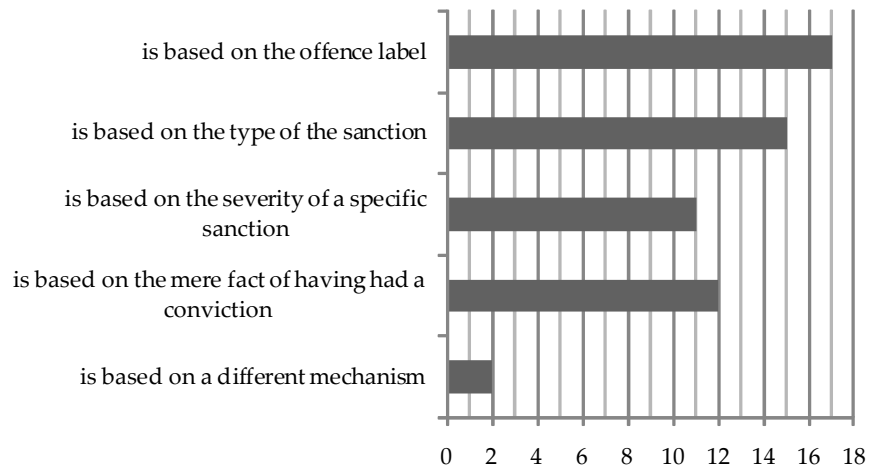
to convictions for which the underlying behaviour has been subject to approximation, double criminality verification is not allowed.

The position of double criminality beyond the list of approximated offences is strongly dependent on the technicality of the legal provisions regulating the effect that is attached to prior convictions in the domestic legal order of each of the individual member states. Member states that have introduced significant discretion for a judge to take account of a person's prior offending history whilst navigating between the minimum and maximum penalty foreseen for the isolated commission of an offence will not be confronted with double criminality restraints to taking account of foreign prior convictions that are based on the protection of the position of the person involved; Member states that have introduced a very technical set of rules that require a certain degree of similarity between the offences may need to conduct a double criminality test to allow proper application of their national provisions. However, especially with respect to member states that use prior convictions as a *true* aggravating circumstance in the sense that the judge can/must impose a penalty that exceeds the maximum foreseen for the isolated commission of the offence, double criminality restraints may emerge.

In light of the diversity in the national prior conviction related provisions, consistent EU policy making requires insight into the characteristics used as a basis for determining the effect a prior conviction will receive in the course of a new criminal proceeding. It will provide insight into the likeliness double criminality is an issue in relation to those national prior conviction related provisions

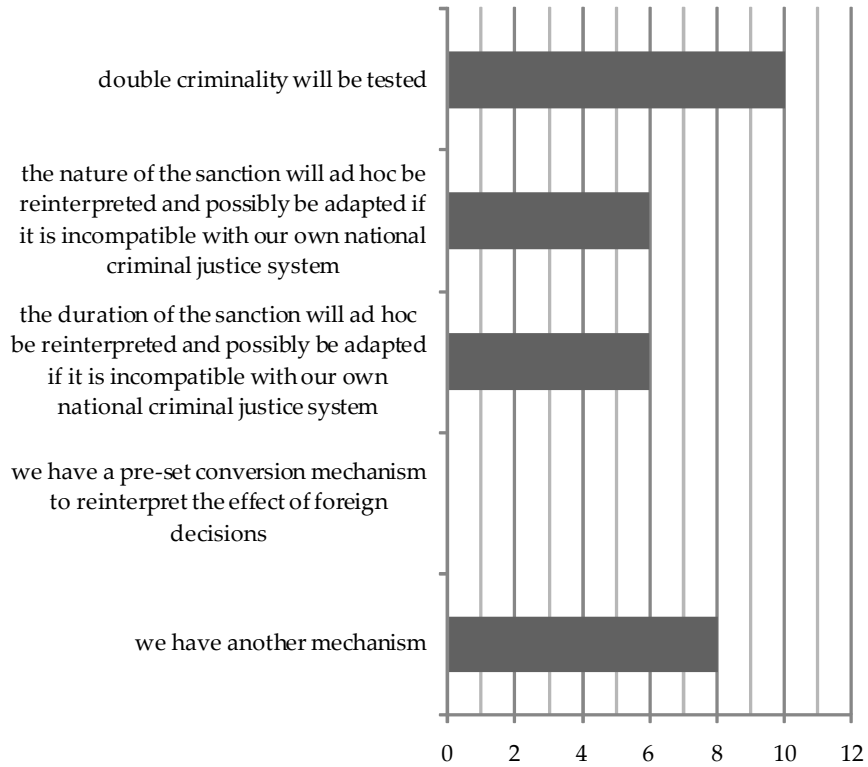
From the replies to question 4.2.11. it is clear that not all member states have the possibility to call upon double criminality issues simply because their national legal system does not use the offence label as an element when determining the effect of a prior conviction. With 17 member states indicating that the influence of a prior conviction in a new criminal proceedings is based on the label of the offence, at least 10 member states are left without the possibility to draw the double criminality card, based on the needs to properly apply their national provisions.

**4.2.11 What characteristic of a prior conviction is used as a basis to determine its influence in new criminal proceedings?**



When analysing the replies to question 4.2.12. it becomes clear that when implementing the obligation to attach equivalent legal effects to previous foreign convictions as to previous national convictions, the double criminality issue seems not to have been a top priority. From the 17 member states that had indicated in reply to the previous question that the effect of a prior conviction is linked to the offence label, only 10 actually test double criminality within that label.

**4.2.12 How does your national law regulate the equivalent national effect foreign convictions ought to receive in the course of new criminal proceedings? (Art 3.1 FD Prior Convictions)**



In order to properly assess the extent to which double criminality should be an issue in the context of taking account of foreign prior convictions, an in-depth follow-up research is necessary with respect to the general approach member states take with respect to prior convictions and more specifically with respect to the technicality of their prior conviction provisions and the possible legality inspired double criminality issues that may arise.

### 3.1.8 Exchange of criminal records information

Seventh and final, exchange of criminal records is analysed. The use of criminal records information is largely limited to two applications. First, there is the effect of prior convictions in the course of new criminal proceedings and second, there is the effect of prior convictions on the access to certain professions, which is regulated via so-called certificates of non-prior convictions. The importance of prior convictions in those two applications and the double criminality limits found therein, warrant the review of the double criminality issue in the exchange of criminal records information. It will be argued that problems identified here are not so much related to double criminality limitations to information *exchange*<sup>124</sup> but to the requirement to anticipate to double criminality issues that may rise at a later stage when criminal records information is *used* outside the convicting member state.

#### 3.1.8.1 Diversity in the storage practice

The exchange of criminal records information too finds its origin in CoE instruments. Originally, the exchange of criminal records was regulated by Art. 13 and 22 ECMA. Based on Art. 13 ECMA a requested state had to communicate extracts from and other information relating to judicial records, requested by the judicial authorities of another state and needed in a criminal matter, to the same extent that these may be made available to its own judicial authorities in a similar case. Art. 22 ECMA introduced the obligation for a convicting state to inform any other state at least annually of all criminal convictions and subsequent measures, included in the judicial records of its nationals. It is important to underline that these provisions do not entail a storage obligation. It should come as no surprise that in absence of storage obligations member states had developed different practices with respect to the handling and storing of foreign criminal records information. Some member states did not store any foreign information in their national criminal records database whereas others only stored foreign criminal records information to the extent the underlying behaviour would also constitute an offence in their member state and in doing so limited the storing of foreign criminal records information along the double criminality requirement.<sup>125</sup> Few member states stored all foreign criminal records information.

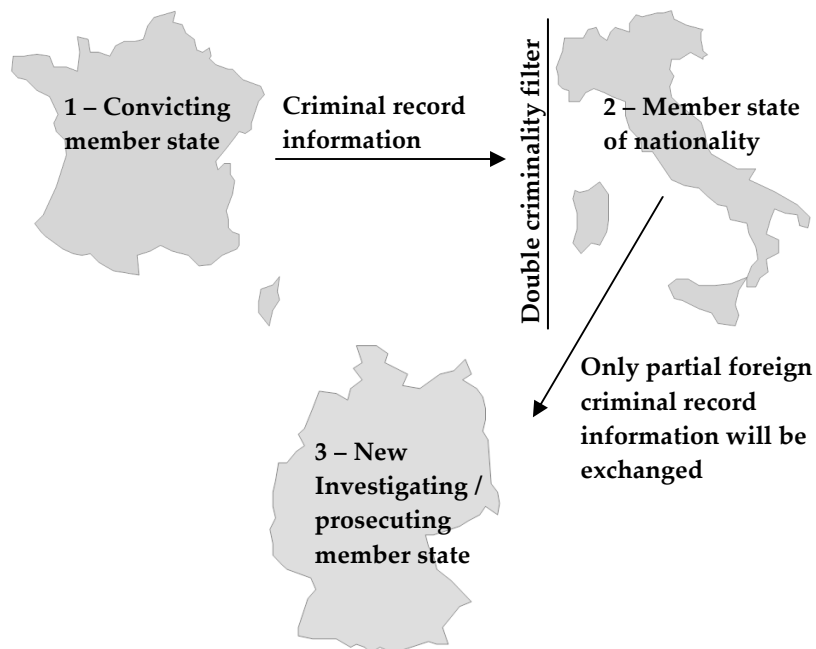
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<sup>124</sup> Though exchange of information is inextricably bound to the storing of information and reportedly in the past, strong foreign conviction information was limited along a double criminality requirement (see *infra*).

<sup>125</sup> Reportedly, in the past Hungary did not store foreign criminal record information on its nationals (see LIGETI, K. (2008). The European Criminal Record in Hungaria. In C. Stefanou & H. Xanthaki (Eds.), *Towards a European Criminal Record* (pp. 181-196). Cambridge: Cambridge University Press, p. 188), neither did the UK (See WEBLY, L. (2008). The European Criminal

An important side-effect of this limited storing of foreign criminal records information is the analogous limited availability thereof in a later stage as shown in the figure inserted below. Even where a first convicting member state sends the criminal records information to a second member state (the member state of nationality of the person involved), a double criminality filter will prevent the information being stored in the persons' criminal record as compiled in the member state of the person's nationality.

If a third member state requests all available criminal records information from the member state of nationality of the person accused of having committed a new criminal offence in its jurisdiction, the information it receives will be far from complete.



In light thereof, significant progress has been made at EU level, for the EU has introduced a storage obligation that is not limited along the double criminality requirement. A double criminality filter is not allowed. In contrast to the older CoE provisions, Art. 1.2.b FD Crim Records does specify that the objective of the framework decision consists of defining storage obligations for the member state of the person's nationality. Looking at the purpose of information exchange (i.e. ensuring that information can be used in a later stage

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Record in England and Wales. In C. Stefanou & H. Xanthaki (Eds.), *Towards a European Criminal Record* (pp. 291-307). Cambridge: Cambridge University Press, p. 296).



either in the member state of the persons nationality or in any of the other member states), it is only logical for Art. 5 FD Crim Records not to limit the storage obligations along the double criminality requirement. Information is stored for the purpose of later transmission to another member state. The member state of the person's nationality involved is only a go-between. It acts as the facilitator of the compilation and exchange of information relating to a person's criminal record.

### 3.1.8.2 *Anticipating to future double criminality issues*

However, double criminality issues may come into play in a later stage, when it is to be decided what the effect of a foreign conviction should be. Taking account of a foreign prior conviction in the course of a new criminal proceeding or when assessing the access to a profession are examples thereof. Because some member states have made the application thereof dependent on being prosecuted for the behaviour that falls within the scope of the same criminalisation provision, double criminality is important. In light thereof it must be recommended that – even though the exchange of information in itself is not linked to or limited in light of the double criminality requirement<sup>126</sup> – already at the stage of criminal records information exchange, double criminality issues that can rise in a later stage are avoided and accommodated as much as possible.

The use of an EU level offence classification system that was promoted above to limit double criminality *testing* (as opposed to abandoning the double criminality requirement in *itself*), can have an added value in this context too. Using the knowledge on whether or not the behaviour underlying the conviction is known to be criminalised throughout the EU to classify, exchange and store criminal records information will significantly facilitate the use thereof in a later stage.

The table inserted below visualises how double criminality distinctions could be made. If a convicting member state indicates whether or not the underlying behaviour is known to be criminal in all other member states, this would significantly facilitate the inclusion thereof in the criminal records database of the member state of the person's nationality.

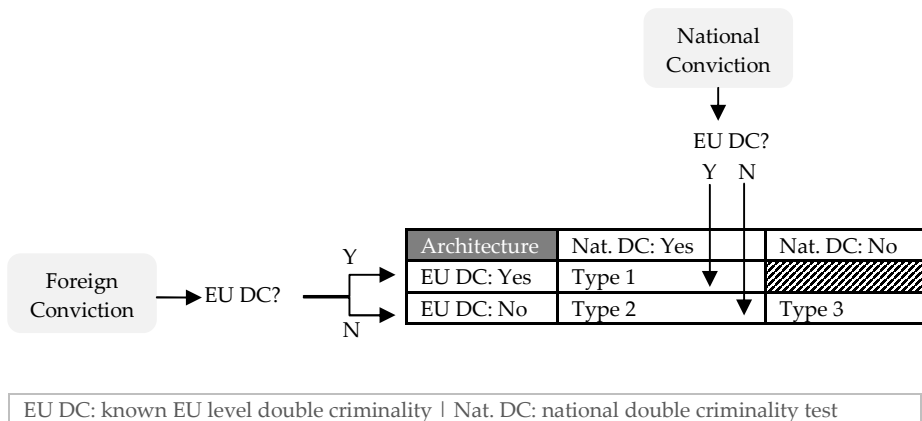
If the EU level double criminality requirement is met (i.e. EU DC: Yes), then the conviction can be included as a *type 1* conviction in the criminal records database in the member state of the person's nationality. If EU level double criminality is fulfilled national double criminality is also known to be fulfilled. Only for convictions for which the convicting member state is not sure that the underlying behaviour would constitute an offence in all 27 member states (i.e.

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<sup>126</sup> KLIP, A. *European Criminal Law. An integrative Approach*. Antwerp - Oxford - Portland, Intersentia, 2009, 531p, 321.

EU DC: No), a double criminality verification would need to be conducted by the authorities in the member state of the person’s nationality to allow a distinction between *type 2* convictions (i.e. foreign convictions that pass the national double criminality test – Nat. DC: Yes) and *type 3* convictions (i.e. foreign convictions that do not pass the national double criminality test – Nat. DC: No).

In parallel thereto, also national convictions should be entered into the national criminal records database, distinguishing between *type 1* convictions (i.e. national convictions for which the underlying behaviour is known to be criminalised in all 27 member states – EU DC: Yes) and *type 2* convictions (i.e. national convictions for which it is not sure that the underlying behaviour is criminalised in all 27 member states – EU DC: No).



A such architecture would facilitate later exchange and use of criminal records data. In the context of a new criminal proceeding, all convictions entered as a *type 1* can be clustered and sent to any requesting member state with the connotation that the underlying behaviour is known to be criminalised in all member states (i.e. EU DC: Yes), therefore also in the requesting member state. Similarly, all convictions entered as *type 2* and *type 3* can be clustered together with the connotation that it is unclear whether the underlying behaviour will be considered criminal in all 27 member states (i.e. EU DC: No). A requesting member state – should it wish to do so – must conduct a double criminality verification only for type 2 and 3 convictions.

With respect to assessing the access to a certain profession, the inclusion of a such double criminality typology in the architecture of the criminal records database could overcome the currently reported difficulties with related applications such as the compilation of the certificate of non-prior-conviction.<sup>127</sup>

<sup>127</sup> This difficulty was already identified in a previous study on criminal records databases (i.e. VERMEULEN, G., VANDER BEKEN, T., DE BUSSER, E. and DORMAELS, A. Blueprint for an EU Criminal Records Database. Legal, politico-institutional and practical feasibility. Antwerp -

Including *type 3* convictions (i.e. convictions for which the underlying behaviour does not constitute an offence according to the national legal order) into the national criminal records database without adequate identification of that double criminality issue, will inevitably cause problems with the issuing of national certificates of non-prior-convictions. It is said that those certificates are not intended to include *type 3* convictions when the certificate is intended to be used for national purposes only. Introducing a typology based architecture will allow for an easy technical solution to this problem.

Therefore, even though at first sight double criminality has no role in the exchange of criminal records exchange, there are a number of double criminality issues that are inherent to the later use of criminal records information. In light thereof it must be recommended that already when exchanging and storing criminal records information these problems are anticipated as much as possible. Though the EU has made progress through introducing storage obligations that (correctly) extend beyond double criminality limitations, not anticipating double criminality issues in light of later use of criminal records information is an important gap in the current approach to exchange criminal records information.

### ***3.1.9 Rethinking double criminality in international cooperation***

#### *3.1.9.1 Perspective of the issuing member state*

First, when double criminality is lifted with respect to some offence ensuring the practical feasibility thereof requires that it is seen to it that an issuing member state is able to distinguish between cases that relate to offences for which double criminality has been lifted and cases for which the underlying behaviour is still subject to a double criminality verification. Whereas initially the provisions governing the abandonment of the double criminality requirement leave the scope demarcation of the offence labels to the discretion of the issuing member state, the newly introduced possibility for the executing member states to issue a declaration to the double criminality provisions clarifying the scope of the abandonment of the double criminality requirement, make that distinction is far from self-evident. Because at least with respect to the offences that have been subject to approximation, consistent EU policy making requires that no double criminality verification is allowed, an issuing member state should – as a minimum – be able to distinguish between cases that relate to behaviour that has been subject to approximation and cases that relate to any other type of behaviour.

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Apeldoorn, Maklu, 2002, 91p) and was confirmed in the discussions during the member state visits.

Second, when it is agreed that double criminality is abandoned with respect to a specific form of international cooperation in criminal matters, it is important – especially from the perspective of the issuing member state – that this is done consistently. At least with respect to the abandonment of double criminality in the extradition context as a result of the evolution from extradition to surrender, it was argued that the EAW insufficiently dealt with the faith of the references to extraditable offences in some other cooperation instruments.

Third, abandoning the double criminality requirement may require an intervention as far as into the national provisions regulating e.g. the use of certain investigative measures. Analysis has revealed that the use of some investigative measures is reserved for serious situations which can be defined either referring to offences or referring to sanction thresholds. Especially from the perspective of the issuing member states, consistency in EU policy making requires that it is seen to it that the national provisions governing the use of those investigative measures are formulated in a way that allows their use even in absence of double criminality.

Fourth and final, if cooperation is truly important for an issuing member state, and refusal based on double criminality results in a deadlock, the issuing member state must be prepared – at least in a limited set of situations – to execute the cooperation order itself. In doing so, the issuing member state takes the responsibility for its cooperation order and uses its own capacity to ensure the execution thereof. This mechanism represents the effect of the new principle *aut exequi aut tolerare* for the issuing member state.

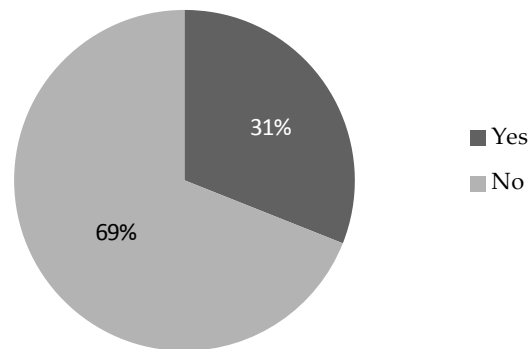
### 3.1.9.2 *Perspective of the executing member state*

First, there is nothing against allowing member states to limit cooperation based on double criminality requirement if cooperation entails the taking over of a significant part of the criminal procedure, if it relates to intrusive or coercive measures and/or if it would have a significant impact on the national capacity. From that perspective, it can be questioned whether the current willingness to abandon the double criminality requirement for a list of offences defined by the law of the issuing member state was not a step too far too soon.

Second however, consistent EU policy making does require that it is stipulated that under no circumstance can it be acceptable to call upon double criminality as a refusal ground in relation to a case for which the underlying behaviour has been subject to approximation. In that same line of argumentation, member states ought to accept the classification of the issuing member state in a case that relates to behaviour that has been subject to approximation or a case that relates to behaviour that has not been subject to approximation.

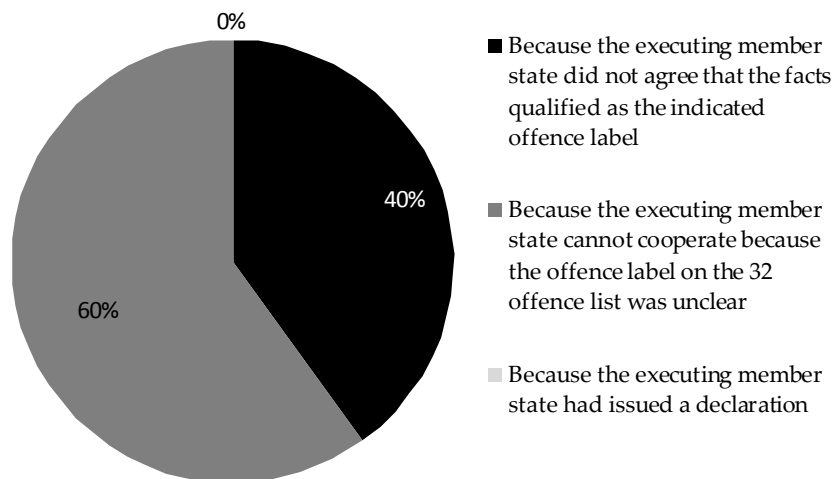
From that perspective it is interesting to look into the current trust in the classification of the cases as either or not relating to an offence that is included in the 32 MR offence list. The replies to question 2.2.4. show that 31% of the member states indicate to sometimes challenge the current classification in the 32 offence list and the accompanying abandonment of the double criminality requirement.

**2.2.4 Have you ever challenged a classification in the 32 offence list as presented by the issuing member state?**



Interestingly from the replies to 2.2.3. it is clear that from the issuing member state perspective, in the event that the classification in the 32 offence list is not accepted by the executing member state, this is due to a deficient scope demarcation of the listed offences. In no less than 60% of the cases this is due to uncertainty surrounding the listed offence, which is an indication that the current approach is problematic because it starts from the false presumption that no double criminality concerns will rise with respect to those 32 offences.

**2.2.3 Why was your classification in the 32 offence list not accepted by the executing member state?**



Third and final, as a counterweight to the possibility to call upon double criminality as a refusal ground, it can be considered to introduce – at least for some forms of cooperation – the obligation for a member state to accept the *aut exequi aut tolerare* principle which entails that a member state tolerates the presence and execution of the cooperation order by the issuing member state in its territory.

*3.1.9.3 Perspective of the EU in its capacity of a criminal policy maker*

First, in light of the further development of an EU criminal policy with respect to a set of offences that have been subject to approximation, the prohibition to refuse cooperation based on double criminality grounds has a significant symbolic value in light of reinforcing the criminalisation obligations of the member states. Approximation can be reinforced by abandoning the double criminality test in relation to cases for which the underlying behaviour has been subject to approximation.

Two recommendations should be made. Firstly, the list abandoning the double criminality requirement can be interpreted broadly to cover all the offences that have been subject to approximation.<sup>128</sup> Additionally though a

<sup>128</sup> As clarified above, this position has to be nuanced in light of the translation issues that have arisen with respect to the offence labels included in the 32 MR offence list. This is elaborated on

consistent EU approximation policy makes sure that the list of offences for which the double criminality is abandoned is able to stand the test of time. Anticipating to the adoption of new approximation initiatives, it is advisable to draft the provisions abandoning the double criminality in a way that will ensure that those new approximation initiatives are included without requiring that the provision is amended. The fact that Art. 83(1)2 TFEU holds a list of offences which can be subject to approximation may create the false presumption that inclusion of those offences will sufficiently anticipate to any new approximation initiatives. However, Art. 83(1)3 TFEU also foresees the possibility for the Council – acting unanimously after obtaining the consent of the European Parliament – to adopt a decision identifying other areas of crime.<sup>129</sup> Furthermore, approximation can also be pursued via other instruments, the adoption of which is not necessarily limited along the offence type.<sup>130</sup> Therefore it is advised not to include *ad nominem* the offence labels and definitions for which double criminality can no longer be tested, but rather introduce a reference to a separate instrument that provides a systematic overview of the approximation *acquis* and can be updated in light of new developments. The EU level offence classification system that was developed in the context of a previous study can serve this purpose and will be elaborated on extensively in one of the following chapters.

Secondly, to the extent member states wish to be allowed to issue declarations, it is important for the EU as a policy maker safeguarding its approximation *acquis* to see to it that the possibility to issue a declaration is drafted in a way that precludes member states from reintroducing double criminality requirements with respect to offences that have been subject to approximation.

Second, to the extent capacity as a refusal ground is accepted in relation to cases that do meet the double criminality test and it therefore constitutes a threat for cooperation in relation to cases for which the underlying behaviour has been subject to approximation, it can be considered to introduce a new cooperation principle: *aut exequi, aut tolerare*. That principle entails a commitment for the issuing member state in that it will execute the order using its own capacity as well as a commitment for the requested member state in that it will accept the presence and execution in its territory by another member state.

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in GUILD, E. *Constitutional challenges to the European Arrest Warrant*. Nijmegen, Wolf Legal Publishing, 2006, 272p.

<sup>129</sup> The initiative taken with respect to insider trading and market abuse supports this point. Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation, COM(2011) 654 final, of 20.10.2011.

<sup>130</sup> See more elaborately: "Approximation: what's in a name" in the chapter on the ability of EULOCS to support international cooperation in criminal matters and previously also in: DE BOND, W. and VERMEULEN, G. "Appreciating Approximation. Using common offence concepts to facilitate police and judicial cooperation in the EU", in COOLS, M., *Readings On Criminal Justice, Criminal Law & Policing*, Antwerp-Apeldoorn-Portland, Maklu, 2010, 4, p 15-40.

Third and final, in parallel to the reinforcement of the approximation *acquis* and the abandonment of double criminality testing with respect to cases for which the underlying behaviour has been subject to approximation a solid European criminal policy also requires that related policies and information exchange mechanisms are tailored to support that policy. This means that the architecture of the mechanisms developed to exchange criminal records information must reflect the *acquis* to allow e.g. convicting member states to indicate whether or not a particular entry in the criminal records data base is linked to the approximation *acquis* as a result of which double criminality with respect to that entry is not allowed for example in the context of taking account of prior foreign convictions in the course of a new criminal proceeding. The consistent development and mutual reinforcement of the policies outlined by the European Union can be significantly improved.

#### *3.1.9.4 Perspective of the person involved*

First, there is no such thing as a vested right to enjoy the protection of a double criminality shield. In an ever developing European Union it is not desirable to maintain the existence of safe havens in which persons can escape the effects of a criminal procedure.

Second, it should be considered to introduce a mechanism to ensure a balancing of the interests of the person involved with the interests of the member state involved if raising double criminality manifestly runs counter to the best interests of the person involved. Analysis has pointed to the usefulness to consider the introduction of the possibility to engage in a dialogue with the member state involved with a view to accept execution of the order/request in absence of double criminality, at least in the context of transfer of pre-trial supervision measures and the transfer of execution of sentences. Additionally, it can be considered to what extent it is opportune to introduce a similar mechanism in the context of relocation and protection of witnesses.

Concluding, double criminality as a limit to cooperation in criminal matters is a very complex mechanism in which the interests of the persons involved, the EU criminal policy maker and the individual cooperating member states come together. From the analysis conducted the has become clear that the use of double criminality is insufficiently thought through and requires various adjustments in order to correctly balance the diversity of interests it represents and ensure consistency in EU policy making.



## 3.2 Horizontalisation and decentralisation: Future perspectives on communication and decision making

*Wendy De Bondt, Charlotte Ryckman & Gert Vermeulen*

### 3.2.1 *Depolitisation and simplification*

The second general cooperation principle that is found throughout the current international cooperation instrumentarium, is the evolution towards more horizontalisation. In essence, horizontalization entails decision making and cooperation at a decentral instead of central level. With the introduction of the mutual recognition instruments the principle of horizontalisation, being a shift in communication/decision making from the central to the decentral level, became more and more apparent in international cooperation, to the extent that it has now become the rule rather than the exception in the cooperation instrumentarium.

The project team recommends that in general<sup>131</sup> international cooperation in criminal matters should be handled as much as possible through decentralized channels. There are two main reasons for this position. Firstly, decentralisation allows for political and interstate dimensions to be cut out of cooperation as much as possible, and no detours in cooperation through funnels and buffers hinder cooperation. This fits the spirit behind the introduction of mutual recognition, being that in the European legal sphere a climate of trust exists between all member states. Secondly, apart from the depolitisation of cooperation, horizontalisation carries several other advantages: direct communication between the authorities involved, has a significant influence on the speediness and ease of cooperation. In contrast, communication via central authorities can be complex and cumbersome.

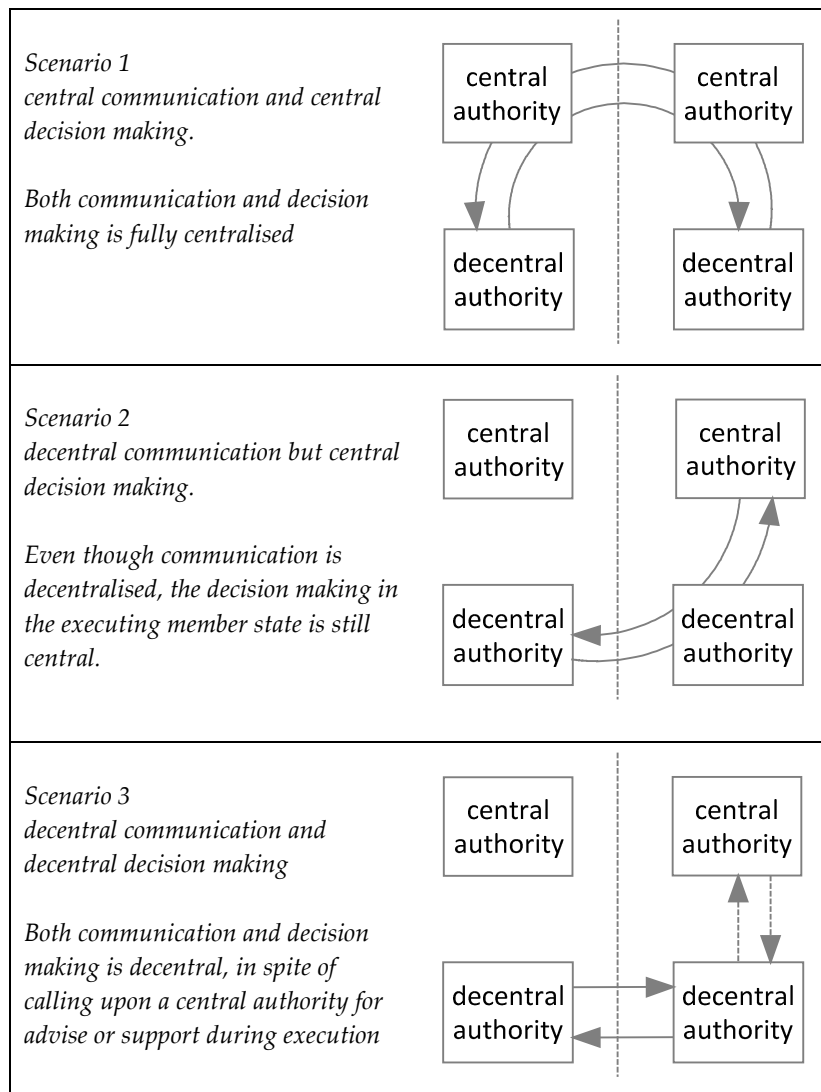
Horizontalisation is indeed the main way of communication and decision making in the current cooperation acquis (it is the leading principle in all mutual recognition instruments). It be noted that the principle of horizontalisation could already be found in the cooperation treaties and legislation, even before the introduction of mutual recognition. An example from the sphere of mutual legal assistance was the possibility for direct criminal records information exchange between judicial authorities (Art. 13 ECMA, an example which does not stand within the EU today, see below 3.2.2). This was an isolated example, however, and the real shift from communication/decision making at the central level to communication/decision making at the decentral level came with the introduction of Art. 6,1 EU MLA: in this article it is said that requests *shall be*

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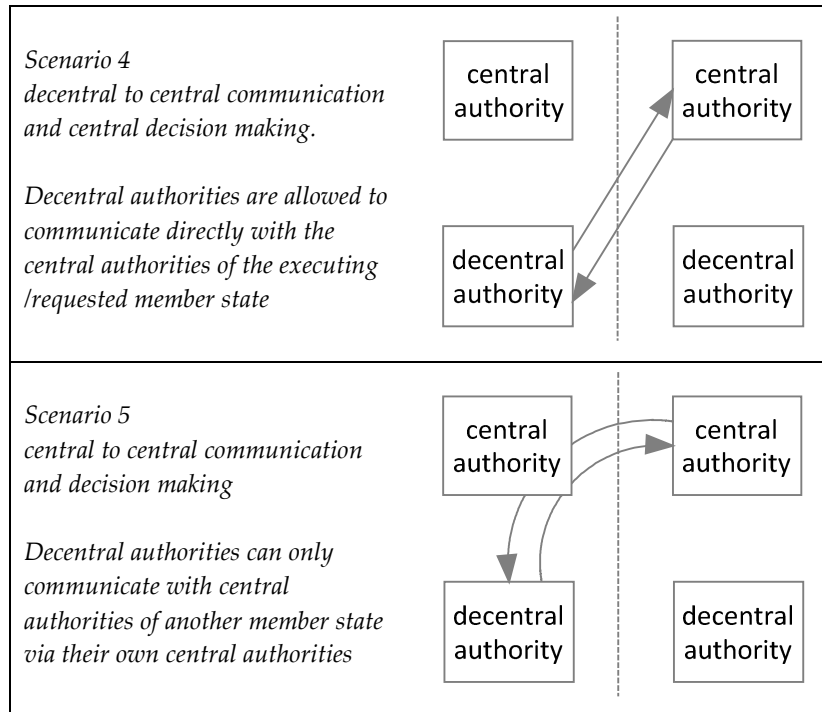
<sup>131</sup> In spite of this general position, some exceptions do exist. The project team will elaborate on two exceptions, nl. criminal records exchange and the transfer of sentenced persons.

*made directly between judicial authorities.* Since then, the EU has steadily expedited the possibility for direct communication on a decentralised level between the competent authorities in the field of cooperation in criminal matters, and it can now be considered as one of the pillars of the mutual recognition policy within international cooperation in criminal matters.

The analysis of the communication flow and decision making in the current instrumentarium can be summarized along five scenarios. They visualise the different options and to thus clarify the extent to which horizontalisation has a place within those different options.

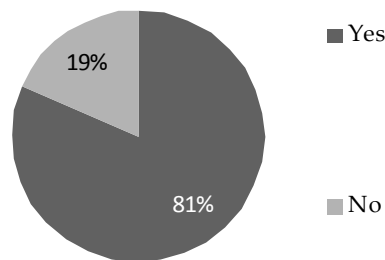


HORIZONTALISATION AND DECENTRALISATION



From the review of these scenarios and taking account of the evolution towards more direct communication and decision making, scenario 3 should get preference. The preferences for direct communication does not mean that central authorities could not have a valuable function in the framework of international cooperation (also in other matters than enforcement of sentences). Although the ordinary channels used would be direct channels, central authorities could have an important added value and should be regarded as a plus in relation to direct communication. The replies to question 1.3.11 clearly indicated that this position is shared by a large majority of member states.

**1.3.11 Do you agree that scenario 3 is the preferred future scenario and that decision making should as much as possible be decentralised? Do you agree that the central authority should have a supporting rather than a decision making role, [...] ?**



To be able to assess the practical feasibility of scenario 3, it is necessary to look into the relevant obstacles which may hinder smooth and direct cooperation in criminal matters. To do so, the project team looked into 3 possible obstacles, nl. first, identifying competent counterparts, second, language and translation issues and third, technical capacity issues.

*3.2.1.1 Identifying competent counterparts on a decentralised level*

One of the main difficulties concerning direct communication, as was indicated by the member states both in their comments in the written questionnaires and at the focus group meetings, is defining the relevant decentralised authorities for direct communication, as well as defining their competences. This is not necessarily an argument against horizontalisation: as argued above, central authorities can have a facilitating role – and helping to find the competent foreign counterpart is precisely one of the examples of such a facilitating function. *Idealiter* however, even this phase would be reduced to a minimum, and tools available at EU level would allow practitioners to find their relevant counterpart quickly. Some channels designed to do just that do not function as well as they could/should. At the focus group meetings it became clear that depending on which field they are active in, the practitioners were either very pleased with the functioning of the EJN – or precisely the opposite. In those cases where the EJN (or other similar efforts such as fiches belges, judicial atlas, coordination efforts by Eurojust) does not function as it should and practitioners thus experience problems with the location of and communication with their counterparts in other member states, the right reflex is not to advocate a reintroduction of centralised communication (let alone decision making).

Rather, the reflex should be to get to work to improve the EU facilitating mechanisms, in order to work towards an actual decentral communication/decision making whereby the decentral authorities are supported by such mechanisms (and – as long as necessary – facilitated through national central authorities).

### 3.2.1.2 *Institutional capacity: Language and translation*

Language and translation issues were raised as a second obstacle. In a Union which consists of 27 member states and as much as 23 different languages, direct communication risks becoming an empty concept when member states do not have the institutional capacity and/or knowledge to make sure that all orders/requests are comprehensible for all parties involved. Therefore, linguistic and translation facilities and staff are of undeniable importance. Indeed, it cannot be reasonably expected of the member states (even when a central authority structure is applied) to be able to provide with the interpretation and translation facilities for 23 languages. Therefore, the debate about one or more working languages in the field of international cooperation in criminal matters should be re-opened. After all, the reality is that currently, at EU level, English has indeed become the *de facto* working language; one example being Europol. An example of a limited number of working languages is the EJM website: the information is only available in English and in French. In a previous study<sup>132</sup> the questionnaire assessed member states' general willingness to accept requests and orders they receive from other member states, written in one of three aforementioned languages. The results of this assessment are clear; Up to 90% of the member states accept requests and orders in English, while requests and orders in French and German are only acceptable for 30% of the member states. This conclusion strengthens the position to make acceptance of incoming requests/orders in English an obligation.

Additionally, it is highly recommendable that all member states invest time, effort and resources into making at least partial translations of the most relevant provisions of their criminal codes, their codes of criminal procedure or (other) international cooperation legislation into English available.

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<sup>132</sup> G. VERMEULEN, W. DE BONDT en Y. VAN DAMME, *EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence?*, in *IRCP-series*, 37, Antwerp-Apeldoorn-Portland, Maklu, 2010, p. 113-114.

### 3.2.1.3 *Technical capacity: Staff, Training and Equipment*

Horizontalisation and direct communication of the cooperation environment have a considerable impact on the institutional capacity of the relevant authorities in the member states.

Instead of the central authority communication, direct communication is undertaken between smaller, more locally or regionally orientated authorities. These authorities often struggle with the amount of requests/demands for a number of reasons: firstly, there is the very concrete issue of staff-availability; secondly, there is the need for staff training as it is necessary for the staff of a relevant local authority to be fully competent to utilise direct communication for requests/orders; thirdly, there is the actual technical limitation that may exist on a decentralised authority's level. Former studies have indicated technical incapacities in some member states, on a decentralised level. Limited or restricted access to ICT equipment such as telephones, faxes, modem lines, e-mail, fast internet connectivity diminish direct communication and affect cooperation in criminal matters. This aspect too should not be omitted if the EU is indeed serious about creating a full decentralised system within cooperation in criminal matters. The project team recommends to organise a targeted assessment study in order to clearly identify the obstacles in each of the member states based on which a differentiated and effective support programme can be developed. It should be remembered again, however, that the project team recognises the value of a central authority in a facilitating role. Consequently, the support programme should only provide support to the extent necessary *next to* the involvement of facilitating central authorities.

Despite the above mentioned difficulties which (are perceived to) accompany decentralisation, when the question whether decentralisation is the preferred option or not was repeated for several individual domains, here too broad support existed for scenario 3. This is hardly surprising, given that this scenario does not exclude the involvement of central authorities. As aforementioned, central authorities offer valuable opportunities for better direct cooperation in criminal matters. Their centralised intelligence both on a practical, theoretical and even political level renders them in an excellent position for monitoring, managing and evaluating international cooperation in criminal matters. Rather than completely eliminating them from the direct cooperation process, it is therefore advisable (and even necessary) to put them in charge of an overall contemplative function. Besides an evident operational supporting task, central authorities could and should take up tasks related to monitoring, managing and evaluation of international cooperation in criminal matters. Essential is, however, that the actual decision making powers stay with the decentral authorities in order to eliminate the political influence in the field of cooperation in criminal matters. This is the only logical solution in the context of the

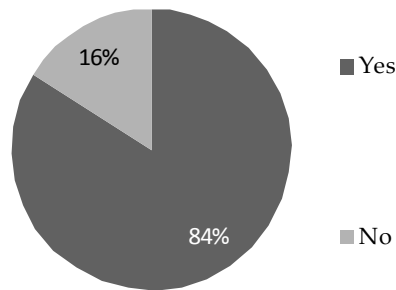
development of one area of freedom, security and justice and is the only option which will allow such an area to come to its full potential.

To round out the assessment of the member state perspectives on the acceptability of the introduction of scenario 3-like communication and decision making structures as a baseline for future cooperation instruments, the question was explicitly included for a selection of the cooperation domains.

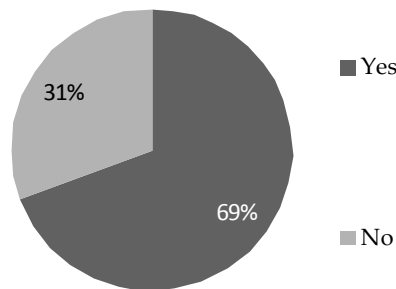
- Domain 1 - Mutual legal assistance: for this domain there is a general understanding about the introduction of scenario 3-like structures what makes an explicit question with this respect redundant. The only question that was withheld for the questionnaire relates to the exception of transfer of persons held in custody.
- Domain 2 - Transfer of pre-trial supervision: for this domain the question related to scenario 3 was explicitly included.
- Domain 3 - Extradition and surrender: for this domain the question related to scenario 3 was explicitly included.
- Domain 4 - Exchange of criminal records: for this domain a specified communication mechanisms has only recently been introduced with the adoption of the ECRIS-mechanisms. Therefore a, explicit question with respect to the preferred scenario was deemed redundant.
- Domain 5 - Relocation and protection of witnesses: for this domain the question related to scenario 3 was explicitly included.
- Domain 6 - Transfer of prosecution: for this domain the question related to scenario 3 was explicitly included.
- Domain 7 - International validity of judgements and disqualifications: for this domain the question related to scenario 3 was explicitly included, again pointing to the exception of transfer of persons held in custody

From the replies to questions 1.3.5. (domain 2), 1.3.6 (domain 3), 1.3.8 (domain 5), 1.3.9 (domain 6) and 1.3.10 (domain 7) it is clear that overall, a large majority of member states ranging from 65% upto 85% considers the use of scenario 3 as a future baseline and acceptable future policy option.

**1.3.5 Do you agree that decision making on supervision orders can be fully decentralised and thus follow scenario 3 (even though actual execution of supervision orders might need the involvement of a central body)?**

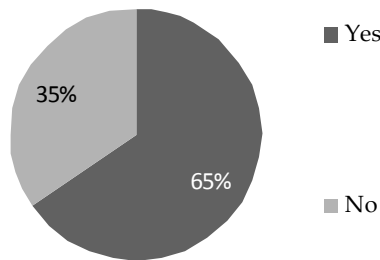


**1.3.6 Do you agree that decision making on extradition and surrender can be fully decentralised and thus follow scenario 3 (even though actual execution of extradition or surrender orders might need the involvement of a central body)?**





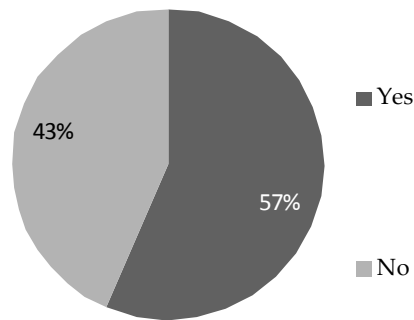
**1.3.8 Do you agree that decision making on witness protection and relocation can be fully decentralised and thus follow scenario 3 (even though actual execution of witness protection and relocation might need the involvement of a central body)?**



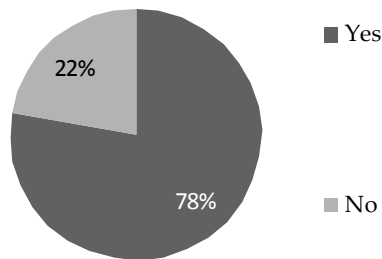
In the context of the question whether decentralisation would be a good option in the context of transfer of prosecution the project team examined whether problems could occur regarding the positive injunction right from the Ministry of Justice. Transfer of prosecution has consequences for the competence of the other member states to prosecute for the offences. If transfer of prosecution takes place via so-called “denunciation”, i.e. an agreement on the best place for prosecution between different member states competent to prosecute, non of the member states loose that competence to prosecute. There is a simple agreement to refrain from prosecution without losing the right or competence to prosecute yourself. The situation is different when member states competent to prosecute seek cooperation from a member state that did not originally have competence to prosecute. In a such situation, the member state competent to prosecute will transfer that competence to another member state. This operation is governed by the “transitivity principle”, pointing to a transfer of competence. This transitivity is an important element to take into account when assessing the necessity to involve central national authorities in this form of cooperation. After all, transitivity impacts on the positive injunction right the Ministry of Justice may have. In many member states, the ministry of justice has the right to make prosecution in an individual case mandatory. If national decentral authorities are competent to decide on transfer of prosecution involving the transitivity principle, this would mean the decentral authorities could undermine the positive injunction right of the ministry of justice. Especially now the negotiations on an EU instrument on transfer of prosecution are experimenting with the introduction of the transitivity principle in relation to transfer of prosecution between competent authorities, it is important to re-assess the necessity to involve central authorities in the decision process. From

the replies of the member states it is clear that close to half of the member states have indeed already dropped the positive injunction right for the Ministry of Justice.

**1.3.9 Do you agree that transitivity in transfer of prosecution may create problems with respect to the positive injunction right of the Ministry of Justice?**



**1.3.10 Do you agree that decision making with respect to the international validity of decisions can be fully decentralised and thus follow scenario 3 (even though actual execution of a foreign decision might need the involvement of a central body)?**



### 3.2.2 *Exceptions*

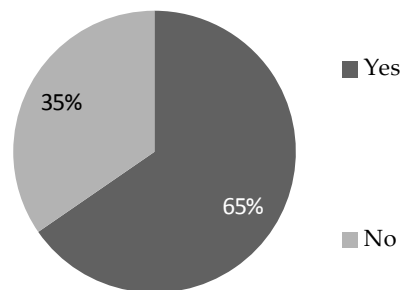
Even though the project team is strongly in favour of using a scenario 3-like communication and decision making structure as a baseline for future cooperation instruments, a number of exceptions do exist. Two exceptions will be dealt with more in detail in the paragraphs below, nl criminal records exchange and transfer of sentenced persons.

#### 3.2.2.1 *Criminal records exchange*

First, several evolutions have taken place regarding the central or decentral character from the exchange of criminal records information. Art. 13 ECMA foresaw the direct exchange of criminal records information between judicial authorities. Additionally, Art. 22 ECMA obliges the Ministries of Justice of the contracting parties to exchange criminal records information in respect of their nationals at least once a year. This mechanism was changed with the introduction of Art. 6,1 EU MLA. This article clearly introduced horizontalisation of cooperation in that it explicitly stipulates that requests shall be made directly between judicial authorities. Art. 6,8 EU MLA however, added that for two kinds of cooperation requests shall be made through central authorities: transfer of persons held in custody (below 4.2.2.2) and the exchange of criminal records information. The latter thus became a scenario 1 situation. This was then broadened to the entire EU international cooperation in criminal matters with Art. 3 and 6 FD Crim Rec. This can be considered a step back, given that before individual magistrates did not have to go via the route of central authorities since – under the ECMA regime – they could get the information directly of each other. A considerable majority of the member states agreed to indeed consider this to be a step back. This ‘step back’ needs to be nuanced though, in light of the recent development of ECRIS, in execution of the FD Crim Rec. Indeed, some of the member states which did not agree with the position that the centralization is a step back, indicated to be very pleased with the ECRIS system. Even though ECRIS also qualifies under the scenario 1, it be admitted that through ECRIS the situation has now at least become the same for all the actors involved, whereas under the ECMA regime a dual-track scenario applied: direct communication for the judicial authorities (Art. 13 ECMA), central for other authorities (Art. 22 ECMA). This dual-track was maintained with the entry into force of the EU MLA: Art. 6,8 EU MLA which imposed central communication only referred to Art. 22 ECMA, Art. 13 ECMA thus remained in effect. Summarizing, the move away from decentral criminal records information exchange with Art. 6,8 EU MLA and then – in the broader cooperation context – through Art. 6 FD Crim Records – was a step back rather than forward. Even though the situation is now the same for all actors involved, and ECRIS finally puts one overarching and effective mechanism in place, it still

would have been preferable to maintain the possibility for decentral actors to consult ECRIS, without having to go through the central authorities.

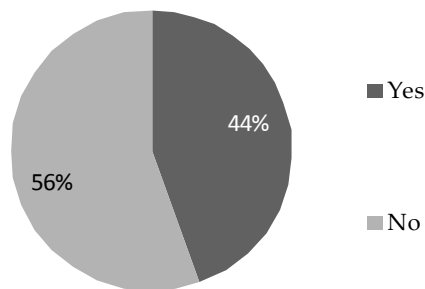
**1.3.7 Do you agree that the EU took a step back in that decision making on the exchange of criminal records is now fully centralised and thus following scenario 1 (whereas before, Art 15.3 ECMA followed scenario 4)?**



*3.2.2.2 Transfer of sentenced persons*

Second, in the EU MLA convention, in Art. 6,8 EU MLA one of the exceptions allowed to horizontalisation is the transfer of sentenced persons. The project team submits that this remains a valid exception. The very nature of a custodial sanction validates central authority communication. Implementation of direct communication due to horizontalisation is not preferable in this context because the act of transfer itself requires thorough analysis and critical assessment; the reintegration-idea that is (or should be) the main pillar for the transfer of persons under custody from one member state to another, the assessment of compliance of the transfer with national (constitutional), EU and international obligations, and the practical, technical and legal competence requirements all indicate the need for proper central authority communication. The fast paced, 'face-to-face' cooperation envisioned in current and future international cooperation instruments is a valuable tool when immediate cooperation is demanded, but it is not sustainable for the transfer of persons under custody. The above mentioned specificities clearly require a central authority based communication, allowing for a number of relevant stakeholders to be involved and to estimate and evaluate the envisaged transfer.

**1.3.4 Do you agree that transfer of persons held in custody is the only form of mutual legal assistance that essentially requires the involvement of a central authority as the decision making body?**



It be noted that Art. 6,2 EU MLA allows for a derogation of the general rule in *special cases*, unfortunately without clarifying however, what constitutes a special case. The general and even vague character of this exception can only lead to uncertainty and doubt, not to mention the possibility of arbitrariness. Since no clarification is provided on what should be estimated as a 'special case', it is open to (mis)interpretation, which can only undermine adequate cooperation and mutual trust.

In sum, the project team has a twofold recommendation with regard to the further horizontalisation. First, horizontalisation should be pursued throughout international cooperation in criminal matters and therefore it is advisable to eliminate the possibility to derogate from the general rule. Second, only one exception should be maintained namely for the transfer of persons held in custody. The exception for the exchange of criminal records (Art. 6,8 EU MLA – Art. 6 FD Crim Rec) is no longer truly valid following the introduction of one overarching system - the ECRIS system. However, in the latter too it would have been preferable to decentral actors the possibility to consult such information, without having to go through their respective central authorities every time.

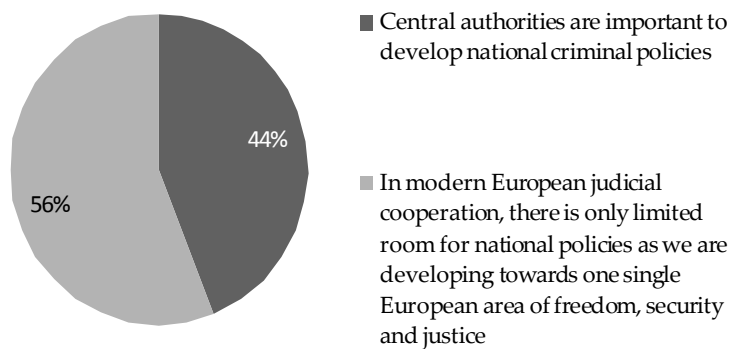
It be noted that, even though many member states agree that scenario 3 is the preferred option, when the question is phrased differently (read in a more politically relevant way), almost half of the member states still have the reflex to indicate the importance for central authorities in the development of national criminal policies. The project team warns that this result indicates that despite the large support for horizontalisation the very reason for the need of such horizontalisation, being the elimination of political influence in the cooperation process, is far from achieved.

3.2.2.3 *Current state of play*

Taking account of the member state position with respect to the proposed policy options and more specifically the support for scenario 3 (entailing direct and decentral communication with decentral decision making powers), it becomes interesting to test the correspondence with the current state of play, i.e. the current position central authorities assume in international cooperation in criminal matters.

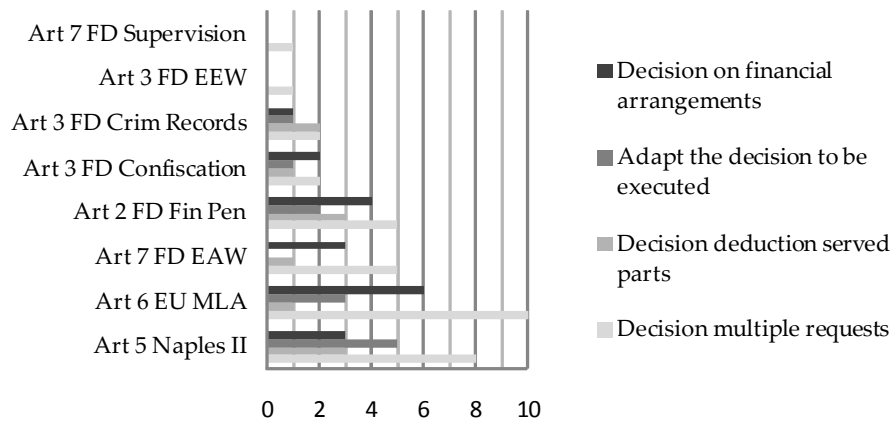
Based on the support for scenario 3, it is important to reflect on the exact scope of the competence of a central authority. Considering the general approach to make decision making a decentralised competence, the question arises to what extent it is necessary to have a central decision making authority to develop and maintain consistent national criminal policies. The replies to question 1.3.3 are interesting in that central authorities are deemed important for the development of consistent national policies what does not however exclude that the practical application and execution of such policies is seen to be by decentral decisions.

**1.3.3 To what extent is the installation of a central authority contrary to the idea of developing one area of freedom, security and justice?**



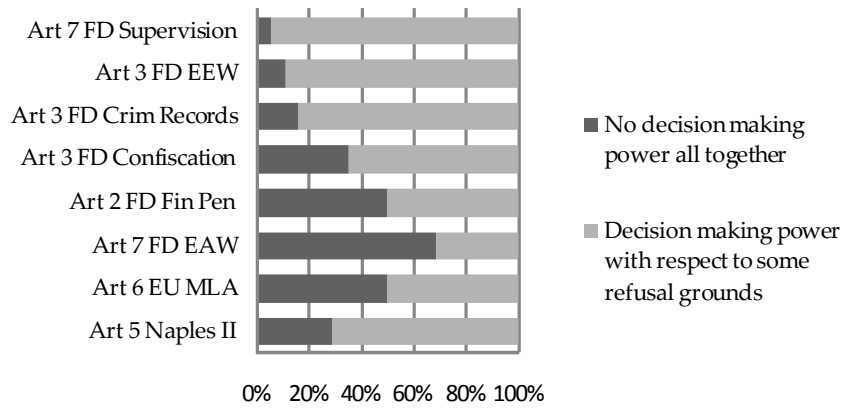
It would be interesting to move towards a situation in which the central authorities are a true support mechanism to develop national policies but leave the application thereof to decentral authorities. In that respect the replies to (another part of) question 1.3.1 are encouraging in that only very little decision making powers are attributed to central authorities. Furthermore, looking at the different instruments from a chronological perspective, it becomes clear that the decision making powers of central authorities decline over time.

**1.3.1 What is the competence / task of the central authorities?**



Looking at the replies to question 1.3.2 on the division of tasks between central authorities and decentral authorities with respect to refusal or postponement grounds, it becomes clear that in general, central authorities have a strong position here. 40 up to 70% of the member states have indicated that the central authorities are the decision makers when it comes to all or some refusal grounds.<sup>133</sup>

**1.3.2 With regard to which grounds for refusal/postponement can your central authorities take binding decisions?**



<sup>133</sup> To make the results as comprehensible as possible, the choice was made to present the results in percentages rather than raw numbers of member states that have indicated the individual refusal grounds. In doing so, the reader does not need to combine the raw numbers of the following table with the number of member states that had indicated to have a central authority. After all, the number of member states that attribute decision making powers to their central authorities can only be understood correctly if assessed against the background of the number of member states that have (decision making) central authorities in the first place.



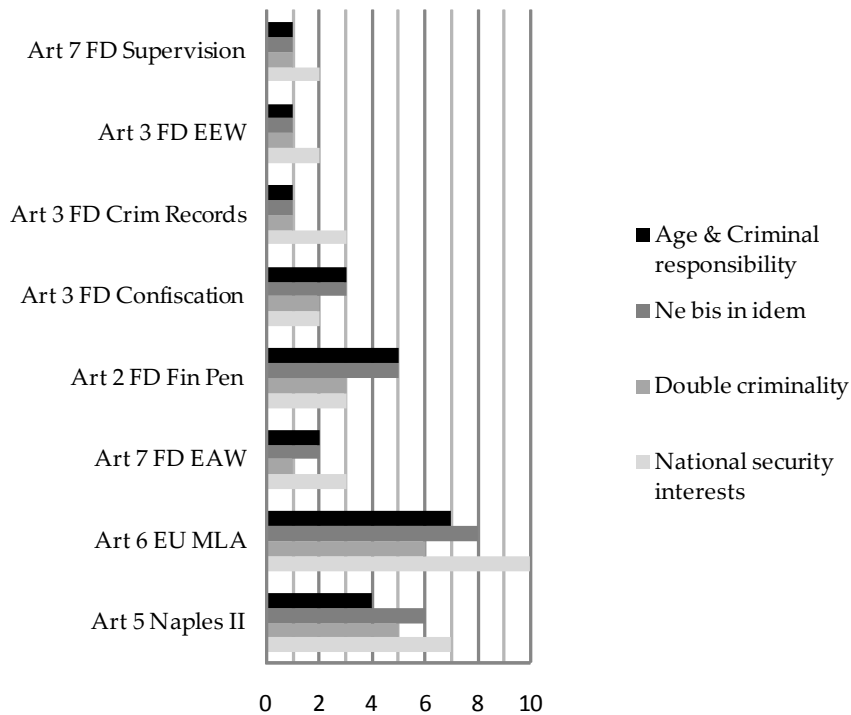
The project team had anticipated this result and designed the questions in a way that allowed for a detailed overview to be made and a more detailed analysis performed. From the tables below, three conclusions can be drawn.

First, the decision making power of central authorities is more prominent in the old mutual legal assistance instruments and clearly declines with the adoption of more recent mutual recognition based instruments.

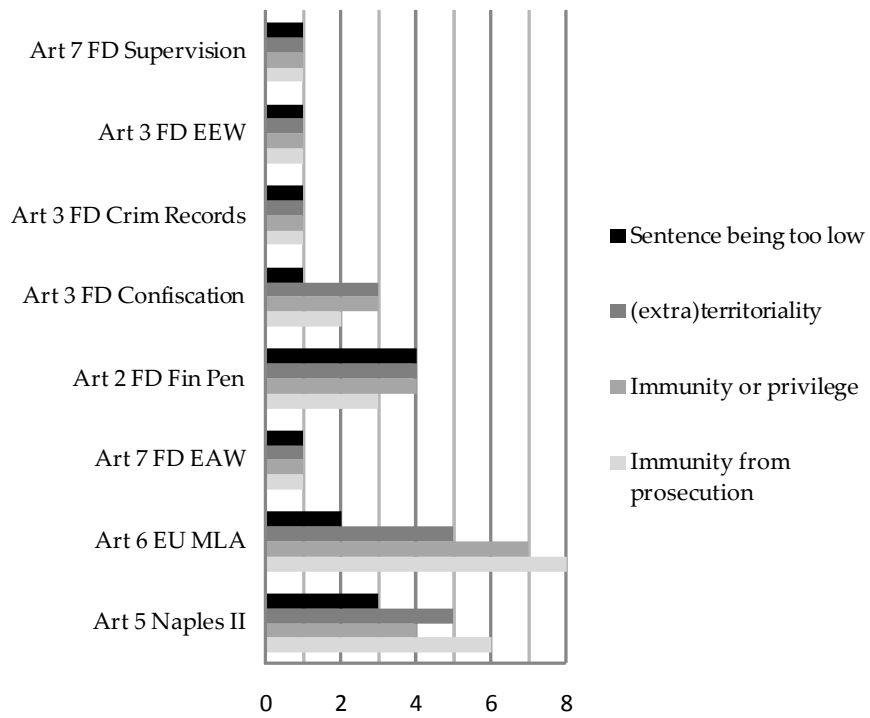
Second, the number of refusal grounds that are decided on at central level are very low in the more recent mutual recognition instruments. With respect to mutual recognition instruments an average of only 2 member states indicate that decision making is done at central level.

Third, it is interesting to see that even for those refusal grounds are more prone to decision at central level (e.g. national security interests), decision making power is not attributed to central authorities.

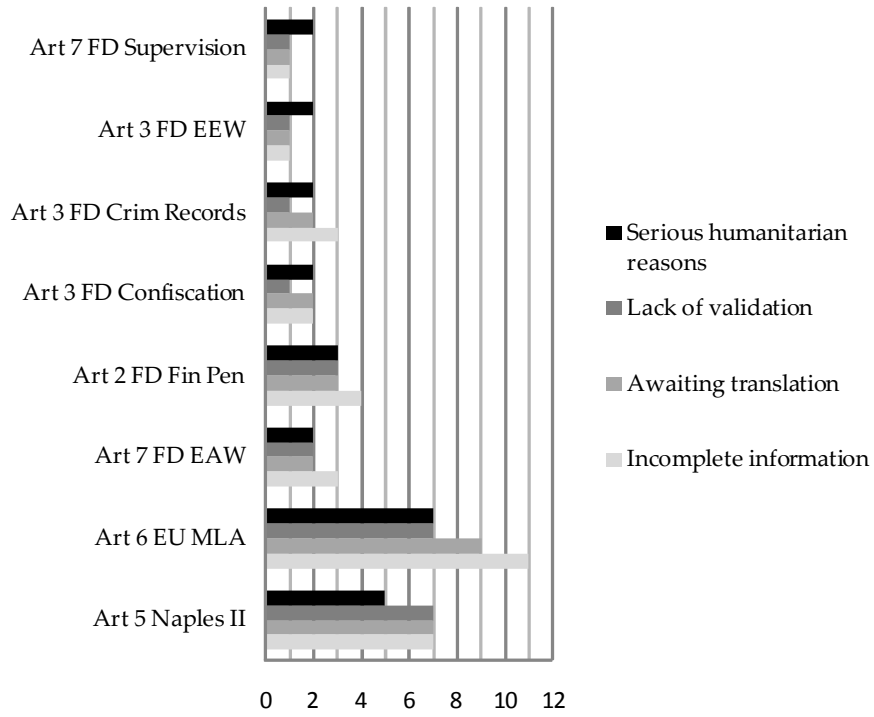
**1.3.2 With regard to which grounds for refusal /postponement can your central authorities take binding decisions?**



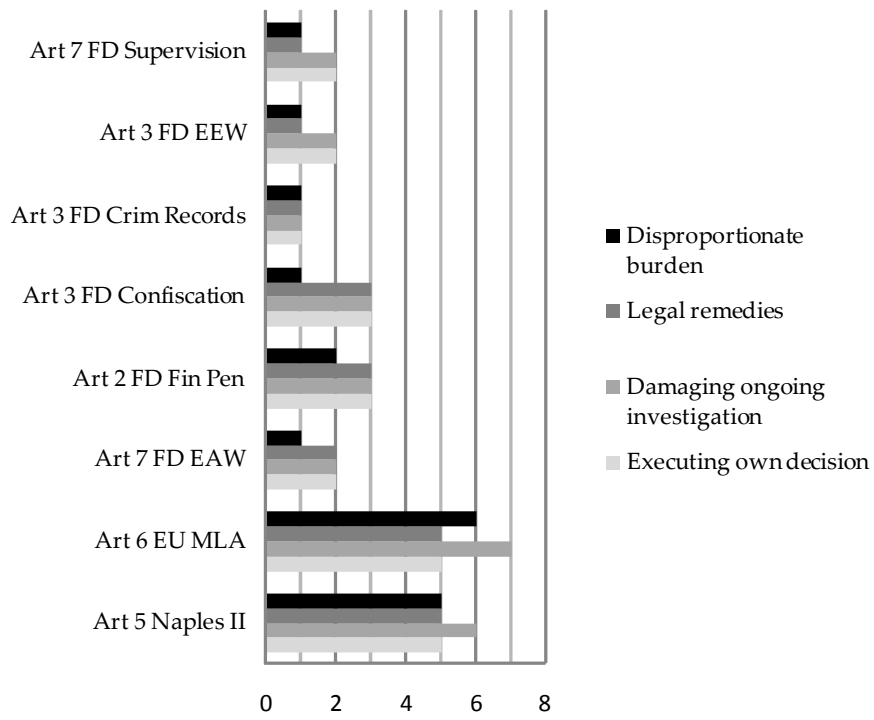
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### 3.3 Enhanced stringency in cooperation

*Gert Vermeulen, Wendy De Bondt & Charlotte Ryckman*

The third general cooperation principle that is found throughout the current international cooperation instrumentarium, is the evolution towards enhanced stringency. The enhanced stringency in the current cooperation mechanisms can be linked to the characteristics of mutual recognition. The concept of mutual recognition in criminal matters itself hardly needs any introduction. It is well known that in the context of cooperation in the European Union, the principle of mutual recognition in criminal matters was first brought up by Jack Straw at the 1998 Cardiff European Council. With the formal introduction thereof at the 1999 Tampere European Council, it was labelled the 'future cornerstone' of judicial cooperation.<sup>134</sup> Even though it has been cited at countless occasions, the importance of paragraph 33 of the Tampere Presidency conclusions, justify it being cited once more:

*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. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities (European Council, 15-16 October 1999).*

Because mutual recognition is now enshrined in the Lisbon Treaty as a basic principle for 'judicial' cooperation in criminal matters, a consistent interpretation and application becomes all the more important. Nevertheless, no legally binding definition of mutual recognition is provided and a quick scan of the relevant instruments cannot but lead to the conclusion that mutual recognition appears in as many shapes and sizes as there are instruments referring to it. There seems to be no common understanding of what mutual recognition is, can and cannot be and how consistency is to be guaranteed.

Mutual recognition is often characterised as the principle that made international cooperation in criminal matters more stringent because it replaced 'requesting' with 'ordering'. It is no longer one member state requesting another to cooperate, but one member state ordering another to cooperate. The main reason for this change lies in the difficulties experienced with the cumbersome exequatur procedures. The purpose was to eliminate whatever type of exequatur procedures were applicable between the EU member states. This choice was made believing in the (future increase of) mutual trust between the member

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<sup>134</sup> EUROPEAN COUNCIL, Presidency Conclusions, Tampere, 15-16 October 1999.

states in that member states felt (would feel) confident relying on each other's decisions in criminal matters. This confidence would make it possible to execute them without any further requirements.<sup>135</sup>

To fully understand the complexity surrounding the enhancement of stringency in cooperation, it is important to review the characteristics thereof and the evolution cooperation instruments have known. Enhanced stringency in cooperation is characterised by:

- The reduced need for consent of the executing member state combined with the reduction of the need for the issuing member state to clarify the reasons for cooperation;
- The limitation of the possibility to raise consistency issues;
- The limitations in the possibility to raise grounds for refusal and postponement;
- The requirement to respect deadlines; and
- The impact on both financial and operational capacity of the member states.

Before elaborating on those characteristics it should be remembered that enhanced stringency can also be linked to the abolishment of the double criminality requirement. Considering the complexity of that topic, and the links with more high level issues of consistency in international cooperation issues, it was treated separately.

### ***3.3.1 Consent reduction & built-in proportionality***

#### *3.3.1.1 Reducing the need for consent from the executing member state*

A first characteristic of enhanced stringency is the reduced need for consent of the executing member state. The appropriate term here is indeed 'executing' state: in the mutual recognition instruments, the issuing member states issue an order instead of a request and the requested state becomes the executing state, implying that its consent is not necessary: when an order comes, the state needs to execute. This was different in the traditional cooperation *acquis* prior to mutual recognition in the sense that in the those, the terminology<sup>136</sup> is 'requesting' and 'requested' member state, indicating that the consent of the requested member is not implied. However, even the cooperation instruments prior to the introduction of mutual recognition cannot be called purely 'consent-based': indeed, despite the fact that the requesting member state can merely

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<sup>135</sup> G. VERMEULEN, "How far can we go in applying the principle of mutual recognition?", in C. FIJNAUT en J. OUWERKERK (ed.), *The Future of Police and Judicial Cooperation in the European Union*, Leiden, Koninklijke Brill, 2010, p. 241-257, 241.

<sup>136</sup> The introduction of the FD EEW and the EIO which is currently being negotiated have changed this.

request and not order another member state to assist does not change the fact that in essence, when a state is requested to provide assistance, it falls under the obligation of for example Art. 1 ECMA, which entails an obligation of result: member states have undertaken to afford each other “the widest measure of mutual assistance”.

The necessity for consent lies in a gray zone, going from ‘consent needed yet in principle under an obligation to cooperate’ (traditional cooperation in criminal matters) to ‘in principle no consent needed yet (limited) possibility to refuse to cooperate’ (mutual recognition based cooperation in criminal matters). Indeed, in the same way that mutual assistance does not fully depend on the mere good will of the requested member state, so does mutual recognition based cooperation naturally not fully exclude the role of the executing member state: they still have the possibility to refuse recognition and execution (see section 3.3.3. below), as long as they are based on prescribed grounds for refusal. The fact that possibilities to refuse exist entails that an absence of consent might have the consequence of non-cooperation, thus implying a silent need for (at least some sort of) consent. Additionally, there are a number of investigative measures that can be requested in the context of mutual legal assistance, which need consent (e.g. the setting up of a joint investigation team, the setting up of a covert operation). One example of limitations to the obligatory character in mutual recognition based instruments is situated in the context of transfer of execution of probation measures and alternative sanctions: the obligation to cooperate is limited to the member state of the person’s nationality and the member state of the person’s residence. Another example can be cited in the context of the transfer of execution of a custodial sentence, a similar limitation can be found. The member state to which the person would have been deported after the execution of the sentence, is added to the list of member state that do not need to consent to cooperation. Those instances of required explicit consent are dealt with below because they are closely intertwined with refusal grounds, and with the role of the person concerned in the cooperation instruments.<sup>137</sup>

### 3.3.1.2 *Reducing the need for the issuing member state to state the reasons for the order/request*

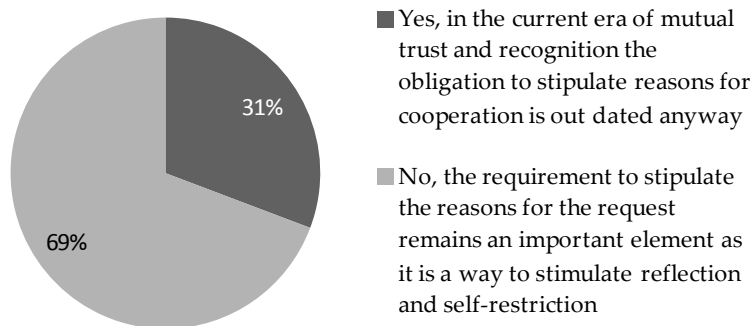
The reduction of the need to consent is intensified by the reduction of the obligation for the issuing member state to state reasons for a request/order for cooperation. The obligation to state reasons can be found for example in Art. 26, par. 1, c CoE conditionally sentenced, Art. 40. 1 SIC, Art. 5.2 d EU MLA, Art. 20 EU MLA, Art. 1.4 EU MLA Protocol, Art. 2.3 and Art. 3.2 EU MLA Protocol, Art. 5 Swedish FD, Art. 23 Naples II.

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<sup>137</sup> *Infra* 3.3.3.12.

The replies to question 4.1.2. are clearly negative: two thirds of the member states indicated that the obligation to state reasons as outlined in those instruments should remain.

**4.1.2 Case influence: Do you agree that stipulation of reasons for the request has no added value if most member states use a standard set of reasons?**



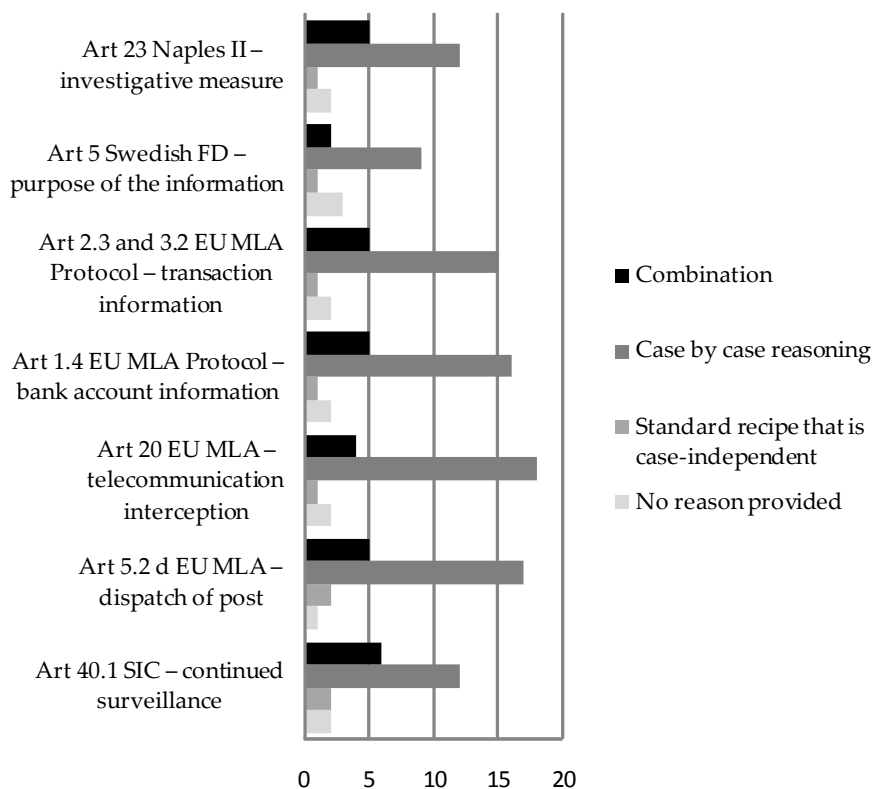
At the focus group meetings it became apparent that the practice of elaborating on the reasons why a certain request for cooperation is made, is vital. This can partially be explained by the fact that the mutual trust which theoretically underpins mutual recognition is illusionary to a large extent. The obligation to state reasons is perceived as a necessary tool for self-restraint and reflection, and a necessary tool for the requested/executing MS to be able to assess the reasons behind the request. This being said, the evaluation of reasons and requests for additional explanations should have a limit, being that the requested/executing MS should limit itself to assess the reasons as have been given to them, without wanting to judge the entire pre-trial or trial phase.

The question arises whether the need felt to oblige the issuing member state to state reasons can be accommodated by making sure that the instrument can only be used under the circumstances that now appear in the reasons listed by the issuing member states. Therefore it is important to understand the nature of the reasons currently used.

From the replies to question 4.1.2. it is clear that working with a standard recipe to state reasons is rare. For most instruments only one country indicates to work solely with standard sets of reasons; the number of countries using a combination between case by case and standard reasons is also limited, with a maximum of six member states indicating to do so.

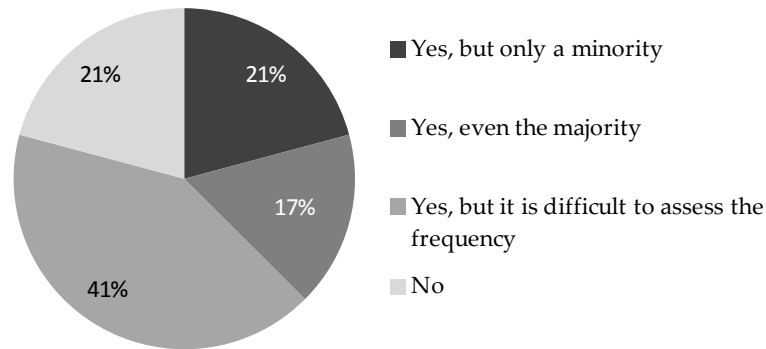


**4.1.1 Case influence: do you have a standard recipe for stating the reasons for a cooperation request, to facilitate and speed up cooperation?**



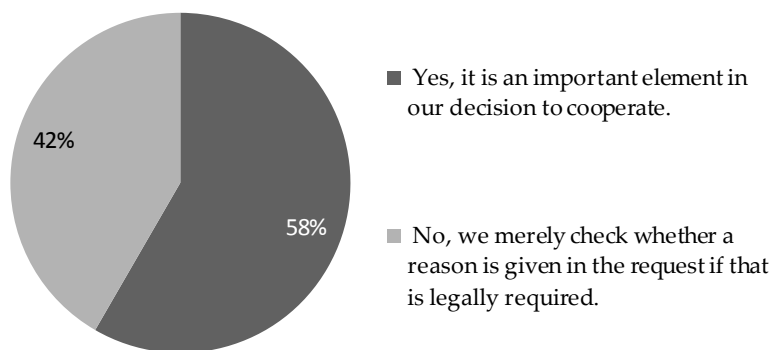
Interesting is that when the question is asked from the perspective of the executing member states, the picture changes considerably. The perception that can be read into the replies to question 4.1.5. with respect to the use of standard recipes to state reasons is somewhat different. 79% of the member states indicate that they have the feeling that standard recipes are used, of which 17% state that this is the case in the majority of cases.

**4.1.5 Case influence: do you have the feeling that member states use standard recipes for the giving of reasons?**



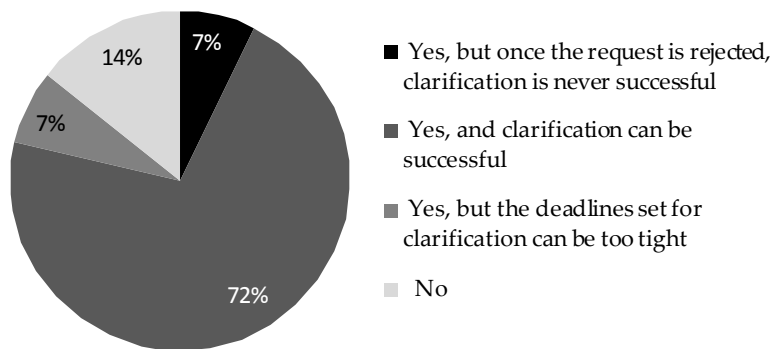
Regardless of the reasons being standard or not, it is safe to say that it is considered a matter of courtesy not to 'order each other around' but on the contrary to justify why the efforts of the executing/requesting member state are needed. To do the contrary would lead to an even further decrease in mutual trust and the member states do not seem to be ready to view the Union literally as one area of freedom, security and justice in which there is no need anymore to justify why you ask for each other's help. This is supported by the fact that not a single country indicated not to check the reasons given. The level of scrutiny differs, however. The replies to question 4.1.6. reveal that 58% of the member states indicate to thoroughly examine the reasons, while 42% merely check whether a reason is given in the request if that is legally required.

**4.1.6 Evaluation of reasons: Do you evaluate the reasons given by the requesting/issuing member state?**



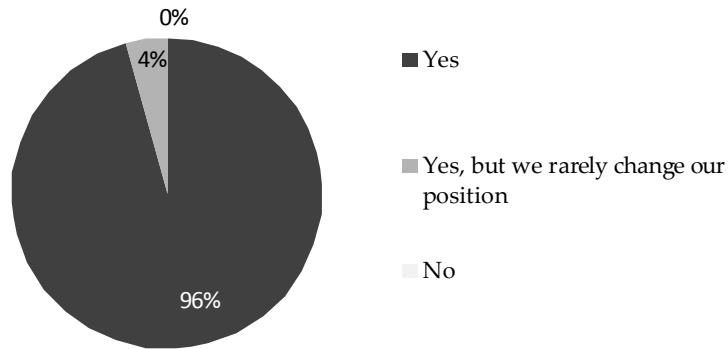
Similarly, the possibility to question those reasons and ask for more details/information is deemed equally important. The replies to question 4.1.4. reveal that 72% of the member state indicate that they are allowed to clarify their reasons and that such clarification can be successful.

**4.1.4 Supplementing reasons: Are you allowed to supplement or clarify your reasons if they were not accepted?**



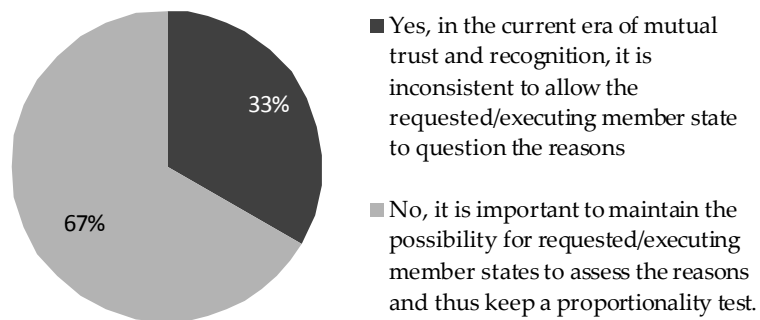
Bottom line is that a smooth interaction regarding the reasons given seems to take place, evidenced by the fact that in reply to question 4.1.7. no less then 96% of the member states indicate to allow requesting states to supplement or clarify their reasons; only one indicating that its authorities will rarely change their mind. Not a single member state said it did not allow clarification.

**4.1.7 Supplementing reasons: Do you allow requesting member states to supplement or clarify the reasons they stipulate?**



A large majority of member states wants to keep the possibility the requested/executing member state to assess the reasons for the request. It is regrettable that in reply to question 4.1.8, 67% of the member states have indicated to want to maintain the possibility of the requested or executing member state to assess the reasons and thus keep a proportionality test.

**4.1.8 Evaluation of reasons: Is it an acceptable future policy option to reduce the possibility of the requested/executing member state to assess the reasons for the request?**



Several countries have hinted during the focus group meetings that this is a practice which significantly hinders cooperation.

In sum, at the moment the rules regarding giving each other reasons for requests for cooperation should not be changed: they would theoretically make cooperation more stringent but in practice it would not be workable. On the other hand, the rules regarding the possibilities to question those reasons should be up for scrutiny: currently, cooperation is sometimes needlessly slowed down by infinite requests for clarification, resulting in a full re-assessment of the case. Legislative initiatives to prevent such practices need to be considered.

The absence of this obligation in the mutual recognition instruments is only logical: when the instruments are drafted in such a way that proportionality is secured, in other words, when through the scope, conditions etc as laid out in an instruments, the issuing member state will not be *able* to issue disproportionate orders, the executing member state should not be allowed to single handedly verify the reasons why the issuing member state orders the measure.

Another motive for the absence of an obligation to state (and question) reasons for the executing of an order, is the fact that unlike mutual legal assistance, mutual recognition is not consent-based: the creation of mutual recognition indeed entailed a transition from requesting (MLA) to ordering (MR).

As a result of the combination between the obligation to state (and question) reasons in several MLA provisions and the evolution from requesting to ordering resulting in MR provisions, is that MR orders are executed more swiftly and easily than MLA requests. Even though this seems logical (ordering versus requesting), it is important to remember that the MR orders often entail far more intrusive measures than MLA requests (cfr. EAW vs. hearing a witness). This is not to say that the swift execution of MR orders is pejorative (that is precisely why MR was created), but it does say, first, that the difficult acceptance of MLA requests should be questioned, and, secondly, that the lack of obligation to state reasons supports the pressing need for a decent inclusion of proportionality guarantees in the MR instruments.

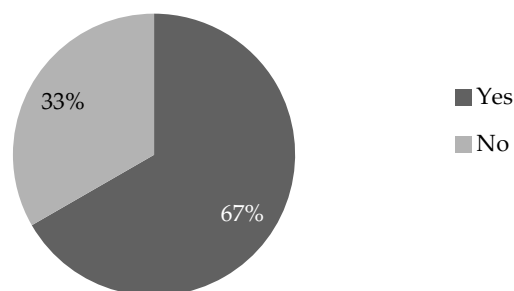
Consequently, a vital question is whether the mutual recognition instruments are indeed drafted in way which guarantees the application of proportionality, in other words whether proportionality is indeed sufficiently built-in in the several instruments.

### 3.3.1.3 *Built-in proportionality as counterweight*

As a counterweight for the reduction of the need for member states to consent to cooperation and the reduction of the need for the issuing member state to state the reasons for cooperation, it is important to make sure that proportionate use will be made of the cooperation instruments. When member states ask each other for mutual legal assistance or order each other to recognize

and execute their decisions, it is of utmost importance that such requests be proportionate in relation to the (alleged) offence for which the cooperation is needed and taking due account of the capacity problems the cooperation might entail. Consequently, the proportionality principle undoubtedly needs to be thoroughly reflected throughout the international cooperation in criminal matters. From the replies to question 2.1.1 it becomes apparent that proportionality is a significant concern in the cooperation instruments, and a large majority of member states feels that more attention should be paid to safeguarding proportionate use through pursuing a so-called built-in proportionality which prevents that the instrument is used in a disproportionate way.

**2.1.1 Do you agree that limits should be sufficiently built into the scope of the cooperation instrument [...] as opposed to introducing a general proportionality based refusal ground [...]?**



Some of those who did not agree, base their disagreement on the fact that built-in proportionality will not be able to be agreed upon; their argument does therefore not deny the usefulness of having a built-in proportionality. Others argue that proportionality is already enshrined in Art. 49 Charter of Fundamental Rights – thus giving executing member states the right to refuse cooperation when ‘manifestly’ disproportionate. The problem here however, is that the concept ‘manifestly disproportionate’ is subjective and would be left to the assessment of the executing member state, which would in turn entail the above-mentioned problem of giving the executing member state too much discretion in deciding whether or not to execute an order for cooperation. Additionally, Art. 49 EU Charter only concerns human rights based concerns of proportionality. Capacity issues for example, are not covered.

At the same time it is equally important that proportionality is well considered, so that the functioning of international cooperation in criminal matters is not jeopardized. There is no common understanding as to how

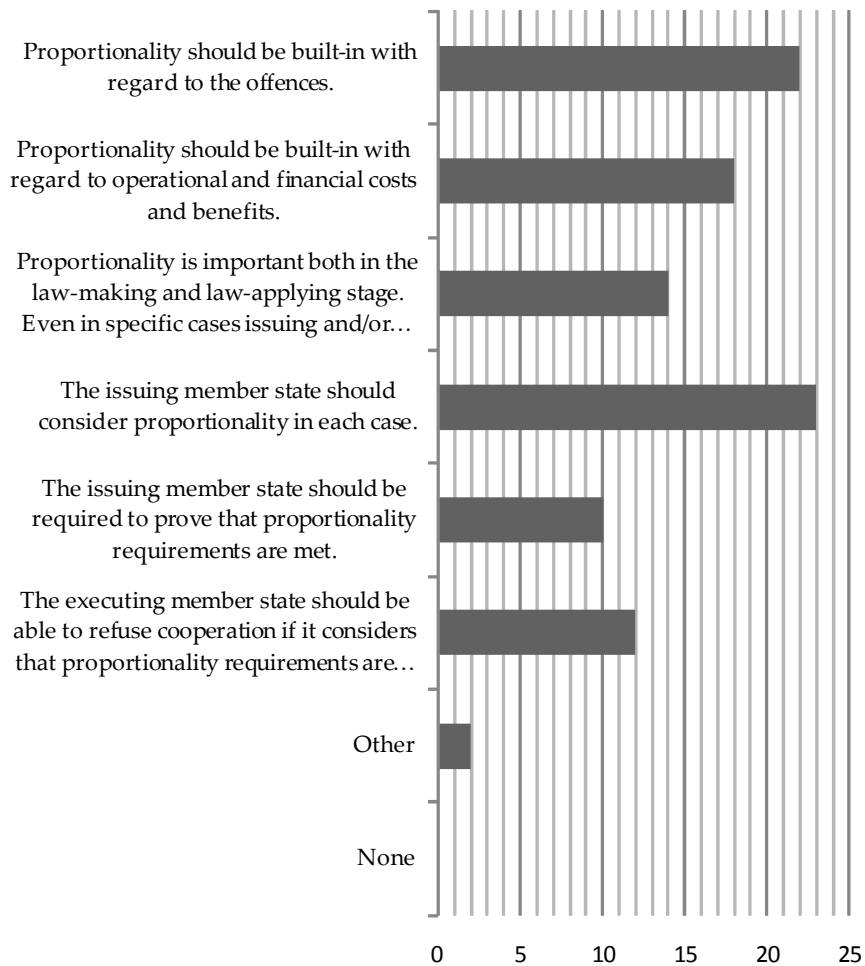
European cooperation instruments should deal with this. Likewise, there is no common position on the option to include a general proportionality clause in the relevant instruments. Such a clause could either be directed at the issuing/requesting state or at the executing/requested state: the former possibility might be hoped to induce a certain level of self-restraint for the issuing member state: the project team submits that this can indeed prove useful, but should be restricted to the mutual legal assistance instruments given that in the mutual recognition instruments, the idea should be to build the instrument as such that proportionality is ensured already via the legislative phase, meaning that the instrument does not leave any room for disproportionate use and thus takes away the need for a proportionality clause at the side of the issuing member state. This is indeed foreseen: both the FD EEW (Art. 7 FD EEW) and the General Approach EIO contain such clauses (Art. 5a). In the latter case, it be noted the General Approach EIO essentially aims at introducing a mutual recognition instrument; therefore Art. 5a does not fit the context of the instrument. The clause, which is relied upon to justify the obligatory character of the instrument towards “any investigative measure” does not suffice. It is strongly advised to re-assess the obligatory character of the EIO as such instead of relying on the general terms of the proportionality clause to induce the necessary self-restraint. A clause like Art. 5a is not per se harmful: it can possibly be retained, but only as a supporting measure: even if it does no good, it is unlikely to do harm, provided that the entire tone of the instrument is re-assessed: ideally by questioning its very tone (obligatory for “any investigative measure”), at least by legislating the limits of the investigative measures which can be asked specifically rather than relying on a general proportionality clause. After all, in the latter case, when it becomes a sophistry to purport that the instrument will stay between boundaries of reasonableness and proportionality and thus to support the fact that no alterations are necessary to the proposal as it stands today, the clause *does* become dangerous.

At the side of the executing member state however, a proportionality clause would permit the executing/requested state to refuse legal assistance if it considered that the importance of the matter to which the request related did not justify taking the required measure for the execution of the required investigation. It is important to underline that such a general proportionality clause that allows the *executing* member state to seek recourse to a wide and largely undefined proportionality refusal ground would not be of much use. Stronger, it would undermine the functioning of international cooperation in criminal matters. First, it would give the requested/executing state too great a margin for assessment: allowing the executing member state to conduct a proportionality check upon the application of the instrument in a specific case will undermine good faith in cooperation and good functioning of the instrument. Fortunately, from the replies to question 2.1.1 it is clear that this position is supported by the majority of the member states. Second, it would risk

being vague as to the content of the proportionality test on the one hand and the concept of proportionality consists of too many different aspects on the other: whether proportionality should only take states into account or also the persons concerned, proportionality through thresholds, capacity related proportionality etc. Therefore, proportionality checks should be sufficiently built-in in each of the cooperation instruments in a concrete and concise formulation.

To gain insight into the member state positions with respect to the implementation of a proportionality principle into the cooperation instruments, it was reviewed in which fields and with respect to which aspects proportionality limits should be considered.

**2.1.2 In which fields of judicial cooperation in criminal matters should proportionality built-in?**





From the results of the replies to question 2.1.2 it becomes clear that there is a wide support to accommodate proportionality concerns by looking into limitations with respect to the offences and with respect to the impact on both financial and operational capacity.

It is important to note that proportionality should be considered in the law-making phase and should not be a general refusal ground in the law-applying phase. In other words, proportionality should be operationalized in concrete terms instead of included in the instrumentarium through general wordings. The most obvious example of proportionality problems lies with the EAW: this study – and especially the interviews with practitioners – shows that the EAW has been widely used – particularly by some member states – to seek the return of individuals for petty crimes. The costs to the administering states have become prohibitive and the number of EAW's issued has increased exponentially.<sup>138</sup> Many argue that it is disproportionate to issue EAW's for offences such as conspiracy to steal a single mobile phone or shoplifting a few goods from a supermarket. In this case, the use of cooperation instruments for petty offences being a concern, instruments should be designed in such a way that the scope definition *ratione materiae* does not allow the instrument to be used in such petty cases. Sanction thresholds are indeed in place, and are listed in the following section on refusal grounds (sentence too low). However, the EAW issuing for petty crimes is a problem despite those thresholds being in place. It should thus be examined whether they need to be changed or not. Additionally, regardless of the level of thresholds, inconsistency between different instruments and their thresholds is also discussed in the following subsection. Which offences could give rise to surrender is a vital question, not only affecting EAW matters; for example, the principle of the obligation for the requested member state to permit controlled deliveries in its territory, as contained in Art. 12 EU MLA, applies only with regard to offences which could give rise to extradition. Therefore a certain minimum degree of importance is required.

Another 'safeguard' which can be seen as an expression of proportionality concerns is the required consent of the person involved. Even though not always listed as a refusal ground, because of the way consent is often intertwined with refusal grounds, it will also be treated in the following subsection.

Apart from thresholds and consent, clear regulation is also needed concerning capacity. In the FD financial penalties the proportionality concerns are mostly related to the costs being too high in comparison to the revenues of the financial penalties. This concern was raised – amongst others – by the United Kingdom, which would like to see the refusal ground based on which

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<sup>138</sup> See also CHRISTOU, T., 'European Cross Border justice: A case study of the EAW', published by AIRE Centre.

execution can be refused when the revenue is lower than 70 euros (Art. 7, par. 2, h) be augmented to 100 euros.

This example is only one example of how capacity problems . The matter becomes far more complicated when confronted with special investigative measures or other disproportionately costly forms of cooperation.<sup>139</sup> However, there too, operationalization of proportionality is the most efficient way to move forward. This does not fully exclude the possibility to introduce a general proportionality clause for those matters, but only as a transitional measure until the concrete way of operationalizing would be agreed upon .

Apart from proportionality within instruments which can be qualified as vertical proportionality, proportionality should also be a concern regarding the relationship between different instruments: member states should refrain from issuing a certain order for cooperation, when the same result can be obtained by using a less costly or less intrusive measure. Indeed, also horizontal proportionality should be aimed at. In the *Assange* case<sup>140</sup> for example, the defense argued that there was no need for Sweden to issue a prosecution EAW in that Mr. Assange could have been questioned through a videoconference. Granted, the main argument of the defense was that the conditions for a prosecution EAW were not fulfilled given that the case had not yet reached the phase of prosecution, but a considerable part of the argumentation also dealt with the choosing of a prosecution EAW instead of a videoconference was disproportionate. Another example one could think of concerns the option of surveillance instead of a prosecution EAW. Some experts suggested to develop a less 'heavy' instrument than the prosecution EAW in order to get someone to appear in court, based on the fact that the prosecution EAW is currently being abused.<sup>141</sup>

### 3.3.2 *Transforming consistency issues into refusal grounds*

The second characteristic of enhanced stringency is the limitation of the possibility to raise consistency issues, which should be linked to the operationalisation in refusal grounds.

Consistency issues, whereby the requested state was entitled not to cooperate when the request was inconsistent with their internal law, were dealt with through a rather 'hollow' clause in the ECMA. Art 5.1.c. stipulates that state parties may make cooperation dependent on the condition that execution is consistent with their law. A similar clause can be found in Art. 51 SIC, which stipulates that contracting parties may make cooperation dependent on the

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<sup>139</sup> *Infra* 3.3.6.1.

<sup>140</sup> City of Westminster Magistrate's Court, 24 February 2011, *Sweden v. Assange*.

<sup>141</sup> Suggested terminology for such an instrument was – amongst others – a “European subpoena order”.

condition that execution of letters rogatory is consistent with the law of the requested contracting party. It is most regrettable that none of the legal instruments that refer to this possibility clarify what this consistency test should look like. As a result, it remains unclear which inconsistencies can qualify under this notion.

Compared to the previous subsection, where the way to introduce concrete proportionality guarantees in the instruments was discussed, both the problem and the solution are similar, the problem being the vagueness of concepts resulting in unpredictable breaks on cooperation, the solution being to abolish such vague concepts and make way for the introduction of clearly operationalized provisions. Therefore, in the context of a previous study, inconsistencies were operationalised along the following typology: inconsistency *ratione auctoritatis, materiae, poenae, personae, loci and temporis*. Hence, a broad range of considerations could serve as reasons not to cooperate, all the more so because they were not defined and could thus easily cover a wide range of situations.

### 3.3.2.1 *Ratione auctoritatis*

Execution can be inconsistent with the law of the executing member state in that it surpasses the scope *ratione auctoritatis* because the requesting/issuing authority (or the authority having validated the request/order/warrant) is not a judge, a court, an investigating magistrate or a public prosecutor, whereas in a similar national case the measure(s) would need to be ordered or supervised by such an authority. Earlier in this Study, inconsistencies *ratione auctoritatis*<sup>142</sup> were treated and it is apparent that this problem is dealt with throughout the instrumentarium, either by making member states formally declare which authority they deem competent to act, by broadening the competent authorities in a way to include certain administrative authorities etc. Only in one specific instance, a true refusal ground *ratione auctoritatis* was retained. As explained in 2.1.2.4 it concerns Art. 11 FD EEW.

### 3.3.2.2 *Ratione materiae*

Inconsistencies *ratione materiae* refer to those situations where offences in the requesting/issuing member state are not punishable in the requested/executing state, cfr. supra on double criminality: the less the double criminality requirement can hinder cooperation, the more stringent the latter is.<sup>143</sup>

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<sup>142</sup> *Supra* 2.1.2.4.

<sup>143</sup> *Supra* 3.1.

### 3.3.2.3 *Ratione poenae, loci and temporis*

Inconsistencies *ratione poenae* are covered through sanction thresholds and the possibility to adapt the sanction imposed by the issuing member state if it is inconsistent either in nature or duration with the law of the executing member state, *loci* through extra-territoriality and *temporis* through lapse of time. In any event, it is clear that instead of just including a general clause giving member states a variety of 'ways out' of cooperating the instrumentarium now deals with virtually all possible considerations which could qualify as inconsistencies. As is shown above regarding double criminality and will become apparent below regarding refusal grounds, the way this is done is not always flawless, there is still room for improvement in the sense that the rationale of certain refusal grounds are not always clear or different instruments show little differences in the relevant provisions without an apparent reason. However, the essence is that at least there are rules concerning these inconsistencies with the law of the requested/executing member states, and some refusal grounds can simply not be relied upon in the context of certain instrument, changes which have undoubtedly led to more stringent cooperation throughout the EU.

### 3.3.2.4 *Ratione personae*

As to inconsistencies *ratione personae* the situation within mutual legal assistance is as follows. Analysis in a previous study revealed that member states are very reluctant to proceed with the execution of an investigative measure if it surpasses the national scope *ratione personae*.<sup>144</sup> 70% indicated that execution would not be possible in such cases. Only 30% is prepared to go ahead with this investigative measure (although this percentage varied slightly when other measures were concerned). In the mutual recognition sphere the subsection on refusal grounds (below) shows that several *ratione personae* aspects are dealt with in the current EU instrumentarium: immunities were no ground for refusal under the CoE conventions, but have become in the EU Framework Decisions, age is dealt with in most of the instruments. Another aspect of inconsistencies *ratione personae* concerns the issue of the criminal liability of legal persons.<sup>145</sup>

Working in a mutual recognition context does not exclude that legal principles in the member states can be different. The liability of legal persons for

<sup>144</sup> G. VERMEULEN, W. DE BONDT en Y. VAN DAMME, *EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence?*, in *IRCP-series*, 37, Antwerp-Apeldoorn-Portland, Maklu, 2010, 149.

<sup>145</sup> Even though the term 'legal persons' in several English speaking countries is to be understood as both natural persons and legal entities, the terminology 'legal persons' is used in the EU cooperation instruments, being legal entities, as opposed to natural persons, in the broad sense of the term. It is not specified whether it concerns private law artificial persons, public law artificial persons or both.

criminal offences is an example of such differences in legal principles between the member states. After all, legal persons liability is dealt with in various ways in the legislation of the member states, including the presence of a basic split between member states that do and member states that do not recognize liability of legal persons.<sup>146</sup> Because of this, liability of legal persons is a tangible issue nowadays which, in light of an increasingly globalizing market, confronts both practitioners as legal persons with an increasing legal uncertainty.

Despite a tendency towards the introduction of criminal liability of legal persons for offences, significant differences still exist in the approach developed in the member states. Differences *ratione auctoritatis*, *ratione personae*, *ratione attribution*, *ratione materiae* and *ratione poenae* were identified. Another study conducted by the project team thoroughly assessed these differences throughout the EU.<sup>147</sup> The main conclusions are listed here.

Firstly, with respect to the differences *ratione auctoritatis*, the analysis presented an overview of the choice for either criminal, administrative and/or civil liability of legal persons. The mapping exercise lead to the conclusion that 5 member states have not introduced a form of criminal liability in their national law and 8 member states have not introduced a form of administrative liability in their national law. This diversity is also relevant in relation to the other diversities regarding liability of legal persons in that the varieties *ratione personae*, *attributio*, *materiae* and *poenae* differ depending on the liability regime *ratione auctoritatis*.

Secondly, with respect to the differences *ratione personae*, it must be noted that the concept of a legal person is sometimes used as an umbrella concept to include both natural and fictitious persons. For a proper analysis and comparison, it is important to clearly define a legal person as an entity (as opposed to a human being) recognised by the law as having legal personality, without excluding States and other public bodies and organisations from its scope. The latter nuance was added because the legal person concept is rarely limited to private legal persons. Nonetheless, awareness of the (rare) limitation is necessary, especially when examined in light of differences *ratione auctoritatis*: in relation to criminal liability of legal persons there tends to be more limits on liability of public legal persons than is the case for administrative liability of legal persons.

Thirdly, with respect to the differences *ratione attributio*, three theoretical schools were used as a basis to map the attribution techniques introduced in the member states. A distinction can be made between (i) the vicarious liability/*respondeat superior* theory, (ii) the *alter ego*/identification model and

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<sup>146</sup> For more details, see VERMEULEN, G., DE BONDT, W. and RYCKMAN, C., *Study on the liability of legal persons for offences*, Antwerp, Maklu, 2012, forthcoming.

<sup>147</sup> VERMEULEN, G., DE BONDT, W. and RYCKMAN, C., *Study on the liability of legal persons for offences*, Antwerp, Maklu, 2012, forthcoming.

(iii) the aggregation model theory. The organisational model/self-identity doctrine was also discussed. The identification model is the model used in the EU's approximation instruments. Different elements of the several attribution models apply in many MS, but in relation to criminal liability, an overwhelming majority applies elements of both the vicarious liability and the identification model. Parallel prosecution of natural and legal persons is possible in a wide majority of the member states; whereas concurrent liability occurs in – on average – 55% of the member states.

Fourthly, with respect to the differences *ratione materiae*, analysis revealed that only few member states have introduced an all inclusive liability for legal persons. Most member states have opted for an enumeration strategy selecting either families of offences or single offences for which a legal person can be held liable.

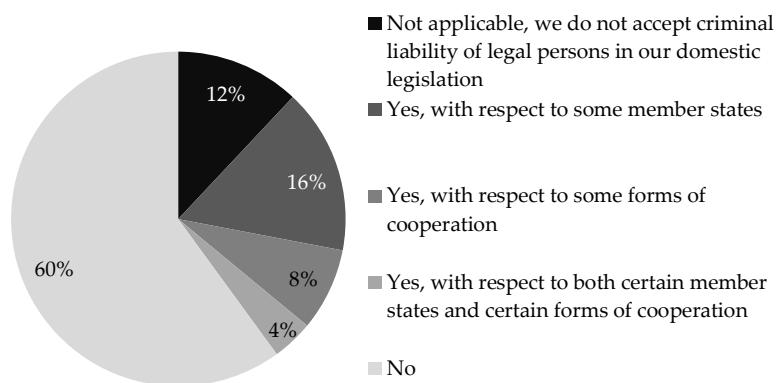
Fifthly and finally, with respect to the differences *ratione poenae*, analysis revealed that the sanction arsenal is very diverse, though some member states have not included separate sanctions in their legal system and/or included a conversion mechanism to convert inoperable sanction types to a financial sanction.

*Experiences in the context of mutual legal assistance*

The empirical results come to testify that opinions on the current practice are diverse. It may be expected that few problems are experienced regarding mutual legal assistance. After all, in this secondary form of cooperation, the 'ownership' of the procedure stays entirely with the requesting member state given that mere assistance (rather than cross-border execution) is requested. The intervention requested from the cooperating member state is thus less intrusive on its own legal system in the context of mutual legal assistance than in the context of cross-border execution.

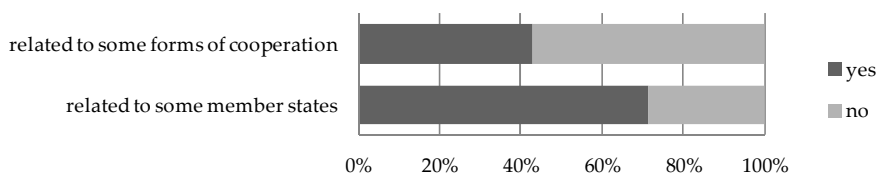
Member states were asked to share their experiences, both acting as the issuing as well as acting as the executing member state. The replies to question 4.1.20 reveal that 32% of the member states experience problems with respect to the mutual legal assistance requests it sends as an issuing member state.

**4.1.20 Do you experience problems with your mutual legal assistance requests due to (un)acceptability of criminal liability of legal persons when you are the issuing member state?**



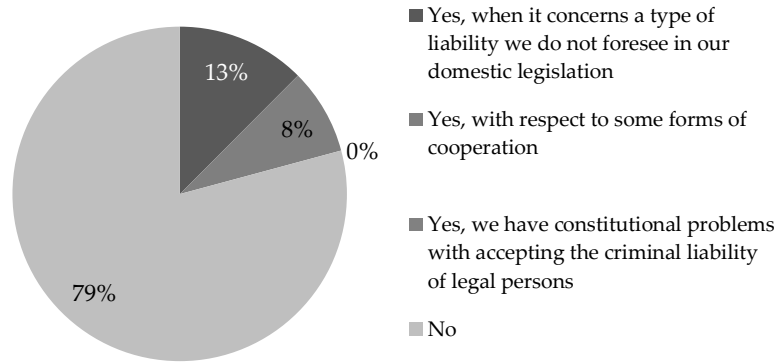
When asked to elaborate on the nature of the problems experienced, 42% of the member states refer to the type of cooperation and no less than 71% of the member states to the requested member state.

**What is the nature/type of the problems you experience with your mutual legal assistance requests due to (in)acceptability of criminal liability of legal persons when you are the issuing member state?**



When asked the same question when being at the receiving end and being approached as the executing member state, 30% of the member states indicate to experience problems. This number is relatively high.

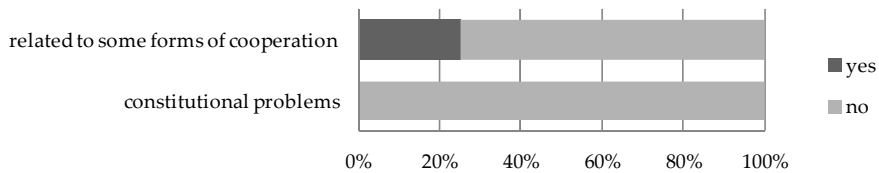
**4.1.22 Do you experience problems with mutual legal assistance requests due to (un)acceptability of criminal liability of legal persons when you are the executing member state?**



One would have expected at least 18% of the member states to indicate that they experience problems, considering that 18% of the member states have not introduced criminal liability of legal persons in their national law. However, an additional 12% of the member state also indicate to experience problems with the execution of mutual legal assistance requests relating to the criminal liability of legal persons. This means that the difficulties in cooperation find their origin not solely in the fact that liability is criminal, but have an origin in one or more of the other differences identified above (*ratione personae, ratione attributio ratione materiae, and ratione poenae*).

What is interesting though, is the nature of the problems. None of the member states indicate that they have constitutional issues rendering cooperation impossible, which is important to assess to feasibility of mutual recognition in this sphere.

**What is the nature/type of the problems you experience with your mutual legal assistance requests due to (in)acceptability of criminal liability of legal persons when you are the executing member state?**

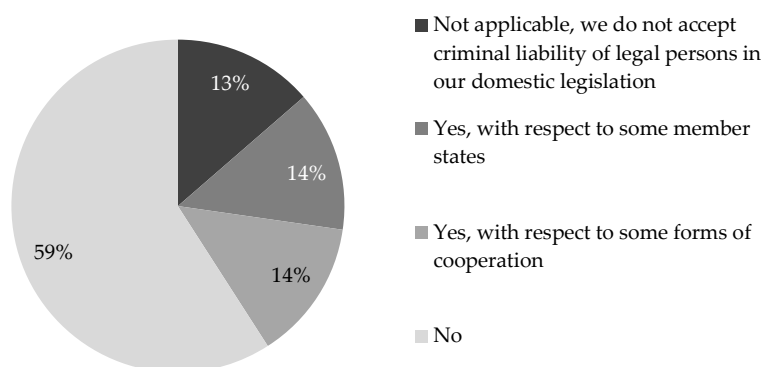




*Experiences in the context of execution of foreign sentences*

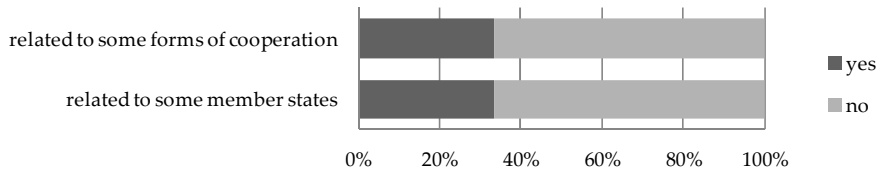
Because execution of a foreign sentence entails the taking over of an essential part of the criminal procedure, it can be expected that member states are more reluctant to cooperate with respect to the legal persons. Here too, the empirical data gathered is used as a basis to provide insight into the experiences of the member states. The replies to question 4.1.21 show a slight increase of the member states that indicate to have experience problems, when compared to the problems identified with respect to mutual legal assistance. 41% of the member states have indicated to have experienced problems with respect to the international validity of their decisions due to the unacceptability of criminal liability of legal persons when they were the issuing member state.

**4.1.21 Do you experience problems with the international validity of your decisions due to (un)acceptability of criminal liability of legal persons when you are the issuing member state?**



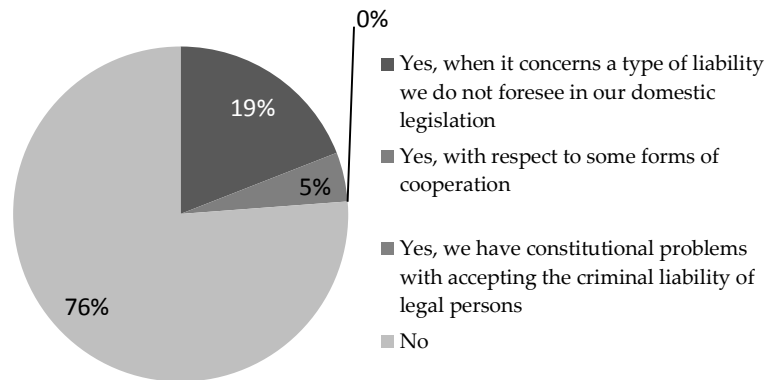
When encouraging the member states that have indicated to experience problems to further elaborate on the nature of those problems, reference is made to the forms of cooperation and the member state of which cooperation is requested, though neither can be very significant and no specific form of cooperation or member state is identified as the main problem.

**What is the nature of the problems you experience with the international validity of your decisions due to (in)acceptability of criminal liability of legal persons when you are the issuing member state?**



When acting as an executing member state, a similar trend can be found. A slight increase can be identified in the member states that indicate to experience problems with respect to the criminal liability of legal persons when they are at the receiving/executing end of the cooperation. 41% of the member states indicate to experience problems with the execution of a foreign conviction related to the criminal liability of legal persons.

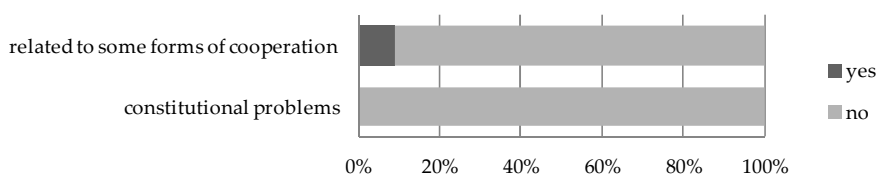
**4.1.23 Do you experience problems with the international validity of foreign decisions due to (un)acceptability of criminal liability of legal persons when you are the executing member state?**



Again, this number is relatively high. One would have expected at least 18% of the member states to indicate that they experience problems, considering that 18% of the member states have not introduced criminal liability of legal persons in their national law. However, 23% of the member state also indicate to experience problems, which means that the difficulties find their origin not solely in the fact that liability is criminal, but have an origin in any of the other differences identified in the second chapter of this report. This means that the difficulties in cooperation find their origin not solely in the fact that liability is

criminal, but have an origin in one or more of the other differences identified above (*ratione personae*, *ratione attributio ratione materiae*, and *ratione poenae*). What is interesting though, is the nature of the problems. None of the member states indicate that they have constitutional issues rendering cooperation impossible.

**What is the nature of the problems you experience with the international validity of your decisions due to (in)acceptability of criminal liability of legal persons when you are the executing member state?**



When compared to the experiences drawn up with respect to mutual legal assistance requests, even less member states indicate that the difficulties relate to the form of cooperation, which supports the presumption that cooperation is difficult due to one or more of the other differences identified in the second chapter of this report.

The main conclusions and recommendations drawn from these results will be discussed below in 3.5.

**3.3.3 Limiting the number of refusal grounds**

The problem of vagueness of the inconsistencies can be solved through operationalizing them in concrete refusal grounds. This does not mean however that the project team wishes to promote the use of refusal grounds all together. Considering whether some refusal grounds should be abolished is logical in light of the evolution towards more stringent cooperation through the introduction of mutual recognition: achieving a true European area of freedom, security and justice, with a smooth cooperation based on mutual recognition will be easier with a decreasing number of refusal grounds, to the extent that the mutual trust between member states allows. This goal will not necessarily be achieved through consistently abolishing them, however: there might be good reasons to keep or even extend certain refusal grounds. Indeed, on the one hand reality is such that for some topics the mutual trust between member states is manifestly insufficient, and acknowledging this through the introduction of new (or extension of existing) refusal grounds might actually achieve more results than taking them away. On the other hand, regardless of the trust level between member states, considerations from the perspective of the

individual might reveal a need to introduce some additional limits to cooperation; regardless of whether they are explicitly listed as a refusal ground or not. Indeed, many limitations regarding cooperation will be treated under the heading of refusal grounds, even though they are not always explicitly labeled as such in the relevant instruments.

All refusal grounds appearing in the different instruments have been subjected to an analysis in order to verify their usefulness, to map any possible problems and to test to what extent it would be acceptable to alter or delete them. In those cases where additional refusal grounds are deemed useful the hypothetical situations in which this would be the case are also included.

The overview of the analysed refusal grounds is structured as follows:

- Fundamental rights, fundamental principles, general principles
  - o Political offences
  - o Non discrimination principle
  - o General fundamental rights clause
  - o General fundamental rights principles
- Specific offences
  - o Military offences
  - o Fiscal offences
- Ordre public
  - o A general ordre public clause
  - o A reduced ordre public clause
- Lapse of time
  - o Lacking in MLA
  - o Inconsistent in other instruments
- Age/health
- Amnesty and pardon
- Immunity
  - o Immunities and privileges
  - o Immunity from prosecution
- In absentia
- Extra-territoriality
- Ne bis in idem
- Sentence too low
- Specific to measures involving deprivation or limitation of liberty

A distinction between mandatory and optional refusal grounds is made, in the tables, the use of italics indicates which refusal grounds are included as mandatory in the cooperation instruments.

### 3.3.3.1 *Fundamental rights, fundamental principles, general principles*

The first cluster of refusal grounds are those that are related to fundamental rights, fundamental principles and general principles. Throughout the cooperation instrumentarium, references are made to considerations based on fundamental rights which could or have to prevent cooperation. They are often used to alleviate constitutional concerns arising from mutual recognition instruments<sup>148</sup>; however, this happens in many different forms: sometimes general clauses are inserted, sometimes an explicit refusal ground is foreseen. The fact that – in the context of the European Arrest Warrant for example – the fundamental rights concerns were not stated as an explicit refusal ground reflects the tension in the debate between the proponents of a paramount position for human rights concerns and those who consider a reference to human rights protection to be superfluous.<sup>149</sup> The difference between being stated as an explicit refusal ground or not does not result in a difference in practice and are therefore treated here as one cluster: indeed, in both cases the provisions do not provide any subjective rights for the individual involved. Even if explicit reference to fundamental rights is made, the provisions merely aim at putting limits to the executing member states' obligations. In other words, the provisions merely provide the executing member states with a reason not to cooperate; they do not give the person involved any right to rely on in court. Apart from the place the fundamental rights/principles concerns occupy in the instruments, the content varies as well: sometimes fundamental rights are stated explicitly, other times the applicable articles speak of 'general principles' of law amongst which fundamental rights, other times reference is made to the non-discrimination principle or to whether or not danger for prosecution for political offences is included. Because of this at times chaotic manner of including considerations of fundamental rights and/or principles, this subsection includes all those different notions.

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<sup>148</sup> V. MITSILEGAS, "The constitutional implications of mutual recognition in criminal matters in the EU", *Common Market Law Review* 2006, 43, (1277), p. 1291.

<sup>149</sup> V. MITSILEGAS, "The constitutional implications of mutual recognition in criminal matters in the EU", *Common Market Law Review* 2006, 43, (1277), p. 1291.

A thorough analysis of the legal instrumentarium leads to the overview included in the following table.

Political and non-discrimination exceptions, general fundamental rights considerations and general/fundamental principles considerations <sup>150</sup>	
CoE Extradition	<p><i>Article 3, 1. The offence is regarded by the requested Party as a political offence or as an offence connected with a political offence.</i></p> <p><i>Article 3, 2. Substantial grounds for believing that the request was made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons.</i></p>
CoE ECMA	<p>Article 2, 2, a. The request concerns an offence which the requested Party considers (an offence connected with) a political offence.</p>
CoE Cond Sentenced	<p><i>Article 7, 1, c. The offence is considered by the requested State as either a political offence or an offence related to a political offence.</i></p> <p>Article 7, 2, d. The requested State deems the sentence incompatible with the principles governing the application of its own penal law, in particular, if on account of his age the offender could not have been sentenced in the requested State.</p>
CoE Transfer Proceedings	<p>Article 11, 1, d. The offence for which proceedings are requested is an offence of a political nature.</p> <p>Article 11, 1, e. When state has substantial grounds for believing that the request for proceedings was motivated by considerations of race, religion, nationality or political opinion.</p> <p>Article 11, 1, f. j) if proceedings would be contrary to the State's fundamental principles of the legal system.</p>
CoE Transfer Sentenced Persons	<p>None.</p>
CoE Validity	<p>Article 6, a. Where enforcement would run counter to the fundamental principles of the legal system of the requested State.</p> <p>Article 6, b. Where the requested State considers the offence for which the sentence was passed to be of a political nature.</p>

<sup>150</sup> When italics are used, this indicates that the refusal ground is mandatory.

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	Article 6, c. Where the requested State considers that there are substantial grounds for believing that the sentence was brought about or aggravated by considerations of race, religion, nationality or political opinion.
SIC	None.
EU MLA	Article 10, 2: against fundamental principles of law, but only in the context of videoconferences. Article 11, 3: against fundamental principles of law, but only in the context of the interception of telecommunication. Article 4: shall comply with formalities and procedures imposed by requesting state, provided that such formalities and procedures are not contrary to the fundamental principles of law in the requested Member state.
EU MLA <sup>151</sup> Protocol	<i>Article 9, par.1. For the purposes of mutual legal assistance between MS, no offence may be regarded by the requested MS as a political offence, an offence connected with a political offence or an offence inspired by political motives.</i>
FD EAW	<i>Article 1, 3. FD EAW does not modify the obligation to respect FR and fundamental legal principles as enshrined in Article 6 TEU.</i>
FD Freezing	<i>Article 1, second sentence. The FD It shall not have the effect of amending the obligation to respect the FR and fundamental legal principles as enshrined in Article 6 TEU.</i>
FD Fin Pen	<i>Article 3. This Framework Decision shall not have the effect of amending the obligation to respect FR and fundamental legal principles as enshrined in Article 6 TEU.</i>
FD Confiscation	<i>Article 1, par. 2. This FD shall not have the effect of modifying the obligation to respect FR and fundamental legal principles as enshrined in Article 6 TEU.</i> Article 8, 2, d. The rights of any interested party, including bona fide third parties, EMS make it impossible to execute the confiscation order, including where this is a consequence of the application of legal remedies in accordance with Article 9.
FD Prior convictions	<i>Article 1, 2. This FD shall not have the effect of amending the obligation to respect the FR and fundamental legal principles as enshrined in Article 6 TEU.</i>

<sup>151</sup> Banking secrecy no refusal ground: Art. 7 Prot. EU MLA.

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FD Deprivation of Liberty	<i>Article 3, 4. This FD shall not have the effect of modifying the obligation to respect FR and fundamental legal principles as enshrined in Article 6 TEU.</i>
FD EEW	<i>Article 1,3. This FD shall not have the effect of modifying the obligation to respect FR and fundamental legal principles as enshrined in Article 6 of the TEU.</i>
FD Alternative	<i>Article 1, 4. This FD shall not have the effect of modifying the obligation to respect FR and fundamental legal principles as enshrined in Article 6 TEU.</i>
FD Supervision	<i>Article 5. This FD shall not have the effect of modifying the obligation to respect FR and fundamental legal principles as enshrined in Article 6 of the TEU.</i>
General Approach EIO	<p><i>Article 1, par. 3. This Directive shall not have the effect of modifying the obligation to respect the fundamental rights and legal principles as enshrined in Article 6 of the Treaty on European Union, and any obligations incumbent on judicial authorities in this respect shall remain unaffected.</i></p> <p>Article 8, par. 2. The executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority unless otherwise provided in this Directive and provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing State.</p> <p>Article 10, par. 1 a. May be refused when there are rules on determination and limitation of criminal liability relating to freedom of the press and freedom of expression in other media, which make it impossible to execute the EIO.</p> <p>Art. 21, 1a, b. May be refused when the execution of such a measure in a particular case would be contrary to the fundamental principles of the law of the executing State.</p>

Based on the compilation of this table, the following refusal grounds are included in this first cluster:

- Political offences;
- Non discrimination principle;
- General fundamental rights clauses;
- General fundamental rights principles.



– Political offences

The first refusal ground in this cluster is the political offence exception. According to Art. 2(a) of the ECMA, in EU MLA context retained through Art. 9 EU MLA Protocol 2001, legal assistance can be refused, if the request relates to criminal acts which are considered by the requested party to be a political offence, or an act related to such an offence. In the course of the third pillar negotiations on the improvement and simplification of mutual legal assistance, the restriction or abolition of the optional exception for political offences was not raised at any time.

It seems relevant to examine whether the exception really obstructs the granting of mutual legal assistance in the EU in practice. After all, there is a possibility that the exception for political offences is not appealed to in the legal assistance between the member states (as a rule), and that the suppression of the possibility of appealing to the exception would therefore have been superfluous. In the context of mutual legal assistance it seems certain that decisions on refusing legal assistance would have to be taken significantly less often than in surrender law. In contrast with surrenders, where the person for whom a request has been made would be able to indicate the political character of the acts for which surrender was requested himself during the proceedings in the country where the request is sent, in the context of mutual legal assistance the defense usually takes place in the requesting state, and will therefore - certainly not generally - have a say in the decision on whether or not the requested assistance is given. The chance that, to the extent that the nature of the facts themselves do not indicate that they were politically inspired, the requesting state would indicate itself that legal assistance was requested in a politically sensitive case, actually seems slight if not inexistent.<sup>152</sup>

It be noted that the possibility to call on the political exception was restrained through Art. 9 EU MLA Protocol: the exception was only retained for a few exceptions, this being in line with the 1996 Extradition Convention. Later on however, with the introduction of the FD EAW, it was abolished all together. Granted, one might consider the political exception to be outdated in the European Union and that consequently there is less need for maintaining it in the cooperation instrumentarium. Indeed, the chance that in the EU - in which all the states have ratified the ECHR - a member state would refuse cooperation based on the political offence-exception is minimal. However, if the European Union is indeed serious about its assumption that political offences would not hinder cooperation because they simply do not occur anymore in the EU legal space, it is even more difficult to see why it had to

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<sup>152</sup> G. VERMEULEN, *Wederzijdse rechtshulp in strafzaken in de Europese Unie: naar een volwaardige eigen rechtshulpverdragen voor de Lid-Staten?*, Antwerp-Apeldoorn, Maklu, 1999, p. 77.

be abolished in the FD EAW: as a matter of principle, such crucial considerations not to surrender a person to another country should feature in the EU instrumentarium, despite the small chance that they would not occur (or one could reason: all the more so because it is not expected to hinder cooperation). Additionally, in its rather queer reasoning to abolish the exception (it will most probably not occur hence the eventuality that it might is not foreseen), the EU is not consistent: if it is serious about its reasons to abolish the exception in the context of the FD EAW, it should at least be consistent: it is not clear why the (limited) exception was retained in the field of mutual legal assistance whilst it was abolished in the mutual recognition based instruments.

The project team thus submits that it is far from logical that the political exception was removed in the FD EAW, yet is prepared to acknowledge that the actual use of such an exception would be rare if not non-occurring. Interestingly, the member states perceive this differently. The project team relies on data gathered in the 2009 Evidence study to conclude that between 70 to 80% of the member states cling onto the political offence exception. Because it is unlikely that member states have significantly changed their positions in this respect, no specific questions on the political offence exception were included in the questionnaire.

In the context of terrorism, since 1996 it has been part of the *acquis* that political offence exception cannot play. Given that the project team strongly believes that we should resolutely take the route towards a stronger and more flexible cooperation in criminal matters, this prohibition should be maintained.

– Non-discrimination

The second refusal ground in this cluster is the non-discrimination principle. The non-discrimination principle entails that no cooperation takes place if the requested state has serious reasons to assume that the request for legal assistance was made for a non-political crime with the intention of prosecuting or punishing a person on the grounds of his race, religion, nationality or political beliefs, or that the position of that person in the requesting state could be prejudiced for any one of these reasons. Even if the concrete usefulness of the non-discrimination rule can be doubted in the relations between member states, considering that it is politically rather loaded to accuse the requesting/issuing member state of discriminatory prosecution and is thus politically sensitive, a refusal on the basis of serious indications of discriminatory prosecution or treatment of a suspect in the requesting member state must be possible or made possible – at least *de jure*. Especially now fundamental rights concerns take up a very prominent

position at the top of the political agenda and the emphasis place on the role of the European Union in safeguarding the position of the individuals in criminal proceedings, it would only be logical for the EU to include this to mirror the importance attached to it. If member states consider it not useful in practice because of the high non-discrimination standards already applied by all member states, surely there is nothing to be afraid of when it is included as a refusal ground.

In any case, it is desirable that a direct appeal can be made to the non-discrimination principle, rather than having to call upon other fundamental rights related exceptions which would actually entail an implicit assessment of the non-discrimination principle. The draft of the European convention on legal assistance drawn up in the 1980s in the context of the Council of Europe is one useful point of reference in this respect. The draft, which been replaced by an amended draft drawn up in 1994, introduced imperative (Art. 1.8) and optional (Art. 1.9) grounds for refusal which would have become generally applicable for each of the four forms of legal cooperation (extradition, mutual legal assistance, the transfer of proceedings and the transfer of sanctions). According to Art. 1.8.2 of the initial draft, cooperation had to be refused in every case, i.e. also for a request for mutual legal assistance, if there were substantial grounds to believe that a request for legal assistance had been made for a crime of common law, with the intention of prosecuting a person on the basis of his race, gender, religion, nationality or political convictions, or that the position of that person could be prejudiced for any one of these reasons. In other words, it was proposed to give the non-discrimination principle a general and imperative character in the 'judicial' cooperation in criminal matters.<sup>153</sup>

In the 1994 version of the draft of the umbrella European convention on legal assistance, both the non-discrimination principle and the exception for political offences were recognised as an optional exception, applicable to all types of legal assistance.

The UN model convention on mutual legal assistance in criminal matters also introduces the non-discrimination principle in mutual legal assistance. Legal assistance may not only be refused when the offence is considered by the requested state as being of a political nature (Art. 4.1 (b), but also when there are 'grounds to believe that the request for legal assistance was made with the intention of prosecuting a person on the basis of race, gender, religion, nationality, ethnic origin or political convictions, or that the position of that person could be prejudiced for any one of those reasons' (Art. 4.1 (c)).<sup>154</sup>

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<sup>153</sup> G. VERMEULEN, *Wederzijdse rechtshulp in strafzaken in de Europese Unie: naar een volwaardige eigen rechtshulpverdragen voor de Lid-Staten?*, Antwerp-Apeldoorn, Maklu, 1999, p. 79.

<sup>154</sup> G. VERMEULEN, *Wederzijdse rechtshulp in strafzaken in de Europese Unie: naar een volwaardige eigen rechtshulpverdragen voor de Lid-Staten?*, Antwerp-Apeldoorn, Maklu, 1999, p. 80.

Yet, within the EU, none of the EU cooperation in criminal matters instruments contain a non-discrimination clause. The FD EAW suffices with a general fundamental rights clause (Art. 1,3 FD EAW), which is not only not an explicit refusal ground, it also fails to target the specific discriminatory motives for prosecution. The non-discrimination clause is included in the preamble of the FD EAW: recital 12 states that the surrender of a person can be refused “when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons”. The presumption that the mutual trust in each other's legal systems was a sufficient guarantee that certain safeguards were no longer necessary, led to a justified scrapping of the political exception (see above).

However, regarding the non-discrimination exception, the presumption is insufficiently objective, and does not justify the abolition of this essential refusal ground. It does not seem logical that stronger fundamental rights safeguards apply in the relationship between the EU and third countries than in the relationship amongst member states. It is essential that recital 12 Preamble would be moved into the FD, to become a real refusal ground.

Considering that the non-discrimination principle is so essential and fits perfectly into today's political discourse, it was decided not to question this in the questionnaire.

It is noteworthy that three Framework Decisions (FD 2006 Confiscation, FD 2005 Financial Penalties and FD 2008 Custodial) contain similar provisions as Art. 1,3 FD EAW; yet only FD 2008 Custodial contains a provision similar to recital 12 of the EAW Preamble .

– General fundamental rights clauses

The third refusal ground in this cluster are the general fundamental rights clauses. As said above, Art. 1,3 FD EAW does contain a fundamental rights clause, namely the general clause stating that the Framework Decision does not modify the obligation to respect FR and fundamental legal principles as enshrined in Art. 6 TEU. This clause can be found in many of the Framework Decisions issued in the field of ‘judicial’ cooperation in criminal matters: Art. 1, second sentence FD Freezing, Art. 3 FD Fin Pen, Art. 1, par. 2 FD Confiscation, Art. 1, par. 2 FD Prior Convictions, Art. 3, par. 4 FD Deprivation of Liberty, Art. 1, par. 3 FD EEW, Art. 1, par. 4 FD Alternative, Art. 5 FD Supervision, Art. 1, par. 3 Partial Agreement EIO. Somewhat surprisingly, the General Approach EIO specifies a few rights in particular

(Art. 10, par. 1, a General Approach EIO): freedom of association, press and of expression in other media. This reminds of recital 13 of the preamble FD EAW: "This Framework Decision does not prevent a Member state from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media." Here too, as with the non-discrimination clause, despite creating some uniformity throughout the Framework Decisions, the EU's approach is still far from consistent.

Firstly, there are no apparent reasons why recital 13 features in the FD EAW to begin with, but on the other hand no explanation was given why it was "hidden" in the preamble. By the same token, it will be interesting to see whether the final EIO will indeed now 'suddenly' make these particular rights explicit or not.

Secondly, it is striking that no reference whatsoever to fundamental rights appears in the EU MLA Convention, apart from one specific article in a specific context (namely Art. 11, 3 in the context of teleconferences – even this provision does not mention fundamental rights specifically, see *infra*). Instead, the preamble of the convention specifically emphasises the fact that the member states have a joint interest in ensuring that the legal assistance takes place quickly and effectively in a way which can be reconciled with the fundamental principles of their internal legal order, including the principles in the ECHR. Subsequently, the Member states confirm in more general terms - with the same self-satisfaction - that they 'express their confidence in the structure and the operation of their legal systems and in the capacity of all the Member states to guarantee a fair system of justice'.

Thirdly, a clear change compared to the Council of Europe instruments occur: only a 'general' fundamental rights clause was retained, instead of the more detailed non-discrimination and/or political offence clauses. As argued above, it is necessary that the non-discrimination clause be reintroduced on the one hand. On the other, it is commendable that the EU instruments now mention a much broader range of fundamental rights which need to be taken into account. Problematic however is that they do not feature as an explicit refusal ground. As indicated in the tables, the respective articles should be interpreted as mandatory refusal grounds given that they employ clear language ("shall" not have the effect of).

The use of clear language is undermined by the fact that is not an explicit refusal ground anymore. Regarding the implementation of in particular the EAW, it is apparent that many are indeed of the opinion that in order to give this clause the weight it deserves, it should be stated amongst the refusal grounds. Indeed, Art. 1,3 FD EAW and its potential to justify refusals of execution which has stirred the debate in the implementation of the FD

EAW<sup>155</sup>. Several countries included an explicit fundamental rights refusal ground, others used a general clause such as Art. 1,3 FD EAW which is however *used as* a refusal ground (e.g. section 73 of the German Mutual legal Assistance and Extradition Act, even though this is only used for rather evident cases of human rights abuse), others rarely apply the fundamental rights clause (but all have included it in their legislation in one way or another). What is certain, is that a significant number of member states would interpret the EAW as permitting refusal to execute on human rights grounds.<sup>156</sup>

The need to move the relevant provision manifests itself even more clearly in the EU MLA Convention, where the only specific reference to fundamental rights can be found in the preamble, in a strikingly soft manner<sup>157</sup>.

The absence of a fundamental rights refusal ground is even more surprising in the light of the *Soering* judgment: according to the European Court on Human Rights, because of a certain future violation of human rights in the state to which Mr. Soering would be executed (death row in the US), the execution in itself violated Art. 3 ECHR. The fact that the Court rules that an extradition can entail a violation of human rights following practices in the country to which is being extradited necessarily entails that human rights considerations are a reason for refusing extraditions.

The reason why it was not stated as an explicit refusal ground any more is the same for abolishing the non-discrimination considerations all together: in a EU based on fundamental rights, such refusal ground is not necessary, says the reasoning. Indeed, it was considered satisfactory to have a presumption of the observance of the ECHR in the various member states – a presumption which is obviously of no use at all *de jure* for the legal person whose rights are (potentially) under threat. Furthermore, the many cases before the European Court of Human Rights and many violations established by that court (as with the European Court of Justice), prove otherwise.

The mere realization that it is important to achieve a balance between maintaining the law and protecting rights, or that all the EU member states have signed the ECHR, does not guarantee that the required balance in the proceedings will always exist in practice, and that human or other

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<sup>155</sup> V. MITSILEGAS, "The constitutional implications of mutual recognition in criminal matters in the EU", *Common Market Law Review* 2006, 43, (1277), p. 1292.

<sup>156</sup> V. MITSILEGAS, "The constitutional implications of mutual recognition in criminal matters in the EU", *Common Market Law Review* 2006, 43, (1277), p. 1293.

<sup>157</sup> "POINTING OUT the Member states' common interest in ensuring that mutual assistance between the Member states is provided in a fast and efficient manner compatible with the basic principles of their national law, and in compliance with the individual rights and principles of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950".

fundamental rights will be respected. Naturally, to refuse based on fundamental rights considerations is a politically sensitive issue and can indeed be expected to only be used in extreme cases. This only support the suggestion of moving the clause to the refusal grounds list, however: given the presumption of sufficient mutual trust it can be expected that the refusal grounds would not readily be called upon in practice and would consequently have a small effect the cooperation between member states. However, as a matter of principle, precisely because of the firm belief that we live in a European Union based on respect for fundamental rights, as a safeguard against those few situations where cooperation would have to be refused based on such considerations, the 'general' fundamental rights clause should (additionally to the more precise non-discrimination clause, see above) be made an explicit refusal ground. A person who knows that his legal position has been violated is able to appeal to the possible violation of the ECHR and in this light, the introduction of an exception which could be appealed to by the states concerned would have been particularly logical.

In this context, it is worth noting that during the course of the negotiations on MLA, the extension of the Soering doctrine to the field of mutual legal assistance – which is what the introduction of grounds for refusal would have amounted to – was briefly mentioned during the course of the negotiations. This concerned the monitoring and interception of telecommunications. In concrete terms, it was proposed that the requested Member state should have been able to refuse to grant legal assistance in all cases in which the requested act (of investigation) could have been refused in a national context, and the interference of the right to privacy would therefore not have proved to be justified according to the internal law of the requested Member state. In other words, the idea was that Member states should be able to retain the freedom not to facilitate or pave the way for interference by another Member state, with the subjective rights guaranteed by the ECHR by granting legal assistance (Soering theory). It was proposed that the draft convention should provide that requested Member state can only be obliged to provide legal assistance, if it is its perception that the requested measure regarding the monitoring or interception would meet the requirement of the ECHR. It is unfortunate that this line of argument did not go one step further and propose incorporating a more general optional exception in the draft which would permit a refusal to grant legal assistance in the case of the threatened violation of human or other fundamental rights, even outside the field of monitoring and interception of telecommunications. Even though a reference was indeed included, is it not a reference to fundamental rights as such. The next subsection deals with such clauses.

– General/fundamental principles of a legal system

The fourth refusal ground in this cluster are the general and fundamental principles of the legal systems. As said above, within the MLA context (as later with the mutual recognition instruments) no explicit refusal ground based on fundamental rights was included. The negotiations to include such a clause were limited to one specific context: the interception of telecommunications. Even for this investigative measure, no real reference to fundamental rights was made; the text reads “The requested Member state shall agree to the hearing by telephone conference where this is not contrary to fundamental principles of its law”. In the table, similar provisions were listed throughout the instrumentarium. Despite not being refusal grounds as such, Art. 4 EU MLA and the similar provision from Art. 8, par. 2 of the general approach on the EIO agreement also deals with ‘fundamental principles’: when the requesting/issuing member state asks the requested/executing to take certain formalities and procedures into account, the latter can decline to do so if the formalities and procedures are contrary to fundamental principles of the law of the requested/executing member state. Art. 21, 1a, b General Approach EIO also refers to the general principles: when the IMS asks that its authorities would assist the EMS authorities in executing the EIO, a reason for the EMS to not grant that request could be that such assistance would be contrary to the fundamental principles of the law of the EMS.

The most significant concern related to this type of refusal ground is the total lack of a common understanding of what principles are to be labeled as fundamental principles. Within an MLA context, the *forum regit actum* principle requires member states to take account of requested formalities and procedures to the extent not contrary to their fundamental principles, without clarifying which principles qualify as fundamental principles. Considering the finality of *forum regit actum* and thus the idea to render evidence admissible, it can be suggested that the fundamental principles that can qualify in this context are those who would render the evidence inadmissible for not taking account of a formality or principle would lead to absolute nullity. On the other hand, other references to fundamental principles link the scope thereof to Art 6. ECHR and are thus related to fair trial rights without clarifying whether this would mean a different scope than the fundamental principles referred to in MLA instruments.

Furthermore, even at the level of the EU instrumentarium there is a total absence of consistency. In the context of the emergency brake procedure too reference is made to a proposal being contrary to the fundamental principles of a member state. Again it is unclear what the relation is between this type



of fundamental principles and the fundamental principles that appear elsewhere in cooperation instruments.

3.3.3.2 *Specific offences*

Second, having discussed the concerns related to fundamental rights and principles, the second cluster of refusal grounds relates to specific offences.

There are three types of specific offences referred to in cooperation instruments: military offences, political offences and fiscal offences. Considering that political offences has already be elaborated on above, this section will only deal with military offences and fiscal offences.

– Military offences

The first type of refusal ground that relates to a specific offences are the military offence exceptions. A thorough analysis of the legal instrumentarium leads to the overview included in the following table.

Military offences <sup>158</sup>	
CoE Extradition	<i>Article 4. Military offences: excluded from the Convention.</i>
CoE ECMA	<i>Article 1, 2<sup>nd</sup> al. "This convention does not apply to arrests, the enforcements of verdicts or under military law which are not offences under ordinary criminal law."</i>
CoE Cond Sentenced	<i>Article 7, par. 1, c. Purely military offence according to requesting state.</i>
CoE Transfer Proceedings	Article 11, 1. The offence for which proceedings are requested a purely military or fiscal one.
CoE Validity	Article 6, b. Where the requested State considers the offence for which the sentence was passed to be a purely military one.
CoE Transfer Sentenced Persons	None.
SIC	None.
EU MLA, EU MLA Protocol, FD EAW, FD Freezing, FD Fin Pen, FD Confiscation, FD Deprivation of Liberty, FD EEW, FD Alternative, FD Supervision, FD Jurisdiction	None.

<sup>158</sup> When italics are used, this indicates that the refusal ground is mandatory.

The Council of Europe Conventions are, as can be seen in the table, relatively consistent in excluding a specific type of offences, namely military offences. However, the character of the refusal ground (mandatory of optional) does differ.

– Fiscal offences

The second type of refusal ground that relates to a specific offences are the fiscal offence exceptions. A thorough analysis of the legal instrumentarium leads to the overview included in the following table.

Fiscal offences <sup>159</sup>	
CoE Extradition	Article 5. Tax offences: extradition shall be granted, only if the the state has decided so.
CoE ECMA	Optional. Article 2, par. 2, a: if it concerns a fiscal offence.
CoE Cond Sentenced	Article 7, par. 3. Fiscal: supervision or enforcement only if the States have so decided in respect of each such (category of) offence.
CoE Transfer Proceedings	Article 11, 1. The offence for which proceedings are requested a purely military or fiscal one.
CoE Validity	None.
CoE Transfer Sentenced Persons	None.
SIC	Article 50. Was a breakthrough: no refusal ground for indirect taxes. This article was repealed by article 8, par. 3 EU MLA Protocol.
EU MLA	None.
EU MLA Protocol	Optional. Article 8, par. 1. Fiscal offence: not a refusal ground as such. Refusal only possible on ground that the offence does not correspond to an offence of the same nature under its law; not on the base that this law does not impose the same kind of tax, duty or customs.
FD EAW, FD Freezing, FD Fin Pen, FD Confiscation, FD Deprivation of Liberty, FD EEW, FD Alternative, FD Supervision, FD Jurisdiction	None.

<sup>159</sup> When italics are used, this indicates that the refusal ground is mandatory.

FD EEW	Optional. Article 14, par. 3: Outside of the 32 list and when the execution of the EEW would require a search or seizure: in relation to offences in connection with taxes or duties, customs and exchange, recognition or execution may not be opposed on the ground that the law of the executing State does not impose the same kind of tax or duty or does not contain a tax, duty, customs and exchange regulation of the same kind as the law of the issuing State.
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Originally, in the CoE instruments, the fiscal offence was almost a standard – optional – refusal ground. The Additional Protocol to the ECMA is of interest in this respect as regards the Council of Europe itself. In accordance with Art. 1 of that Protocol, the right to refuse legal assistance in fiscal matters in pursuance of Art. 2(a) of the ECMA may not be exercised simply because the request relates to a criminal act which is considered as a fiscal offence by the requested state. This means that in principle, the Additional Protocol makes the refusal of legal assistance impossible for fiscal offences, unless it is made indirectly, and the requested state submits that granting the request for legal assistance could result in jeopardising its essential interests. Art. 2 of the Protocol responds to the problem that the parties often make the execution of letters rogatory for searches or seizures dependent - in accordance with Art. 5 of the ECMA - on the condition of double incrimination, when the elements constituting the fiscal offence can/could differ quite a lot from country to country. In particular, paragraph 1 of Art. 2 provides that, as regards fiscal fraud, the condition of double incrimination has been met if the act is a criminal act according to the legislation of the requesting state and corresponds to a criminal act of 'the same nature', according to the legislation of the requested state. This means that in terms of the elements constituting the offence, there does not have to be complete agreement<sup>160</sup>.

The fiscal exception was also tackled in the context of the Schengen agreement. In Art. 50 of the SIC, in particular, an obligation was introduced for the parties to provide mutual legal assistance with regard to the violation of regulations in the field of customs and excise, and VAT (i.e., not for direct taxation), at least in so far as the amount presumed to have been evaded or reduced, was of a certain size. This was a breakthrough at the time: the fiscal exception was abolished for indirect taxation. With the 2001 EU MLA Protocol the fiscal exception has been drastically reduced in scope: its Art. 8, par. 3 entails that the fiscal exception is not a refusal ground as such: only refusal based on the fact that the offence does not correspond to an offence of

<sup>160</sup> G. VERMEULEN, *Wederzijdse rechtshulp in strafzaken in de Europese Unie: naar een volwaardige eigen rechtshulprijmte voor de Lid-Staten?*, Antwerp-Apeldoorn, Maklu, 1999, p. 83.

the same nature under its law; not on the base that this law does not impose the same kind of tax, duty or customs. This article abolishes Art. 50 SIC.

The scope of the exception was limited even more with the introduction of the European Evidence Warrant: Art. 14, par. EEW entails that recognition or execution may not be opposed on the ground that the law of the executing State does not impose the same kind of tax or duty or does not contain a tax, duty, customs and exchange regulation of the same kind as the law of the issuing State. This rule only stands outside of the 32 list and when the purpose of the execution of the EEW is different than search or seizure. In other words, when the fiscal offence can be qualified as fraud, it fall under the 32 list, double incrimination does not need to be tested anymore, implying that refusal for lack of double incrimination is impossible. Even for those offences falling outside of the 32 list refusal is only possible when the purpose of the measure is not search or seizure. Even when that is the case there is virtually no room for refusal left: this will only be possible when an offence is simple not a fiscal offence (indeed, being a different kind of tax is no ground for refusal), on the basis of double incrimination.

As followed from the 2009 Evidence Study<sup>161</sup>, between 60 and 70% of the member states (depending on which investigative measure it concerns), indeed do not longer insist on the existence of a fiscal exception. Considering the unlikelyhood that this position will have significantly changed over the past two years, fiscal offences where not included in the questionnaire. The mutual recognition instruments rightly took note of this evolution: none of the adopted Framework Decisions have retained the fiscal exception. In the mutual legal assistance field, its reduction along the lines of the EEW can be recommended throughout future MLA between the member states . Indeed, in order to combat organised fiscal fraud efficiently, this exception must be resolutely curbed.

### 3.3.3.3 *Ordre Public*

Third, having discussed both the refusal grounds related to fundamental rights and principles and the refusal grounds related to specific offences, the third type of refusal grounds is related to the ordre public exception and this the ground for refusal or non-execution related to the essential national security, classified information and ordre public.

Two different types of the ordre public exception can be found in the current body of instruments regulating international cooperation in criminal matters. First, there is the general catch all formulation as can be found in sphere of mutual legal assistance (based on Art. 2, b ECMA). The refusal ground refers to a

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<sup>161</sup> G. VERMEULEN, W. DE BONDT en Y. VAN DAMME, *EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence?*, in *IRCP-series*, 37, Antwerp-Apeldoorn-Portland, Maklu, 2010.

request that is likely to prejudice the sovereignty, security, ordre public or other essential interests of the country. Secondly, there is a more narrow and specified version of this refusal ground in the FD EEW which refers to a request that would harm essential national security interests, jeopardise the source of information or relating to specific intelligence activities.

- A general ordre public clause

A thorough analysis of the legal instrumentarium leads to the overview included in the following table.

Catch all Ordre Public <sup>162</sup>	
CoE Extradition	None.
CoE ECMA	Article 2, par. 2, b. The requested Party considers that execution of the request is likely to prejudice the sovereignty, security, ordre public or other essential interests of its country.
CoE Cond Sentenced	<i>Article 7, 1, a. The request is regarded by the requested State as likely to prejudice its sovereignty, security, the fundamentals of its legal system, or other essential interests.</i>
CoE Transfer Proceedings	None.
CoE Validity	None.
CoE Transfer Sentenced Persons	None.
SIC	Article 96, 2. Decisions may be based on a threat to public policy or public security or to national security which the presence of an alien in national territory may pose. The article further gives a few explicit examples.
Naples II	Article 28, par. 1. No obligation when likely to harm the public policy or other essential interests of the State (particularly data protection)
EU MLA	None. (but cfr. ECMA)
FD EAW, FD Freezing, FD Fin Pen, FD Confiscation, FD Deprivation of Liberty	None.
FD EEW	None.

<sup>162</sup> When italics are used, this indicates that the refusal ground is mandatory.

Catch all Ordre Public <sup>162</sup>	
FD Alternative	None.
FD Supervision	None.
FD Jurisdiction	Article 10. Negotiations when parallel proceedings: info which could harm essential national security interests or jeopardise the safety of individuals shall not be required to be provided.
General approach EIO	Article 8, par. 3. The issuing authority may request that one or several authorities of the IMS assist in the execution of the EIO in support to the competent authorities of the EMS to the extent that the designated authorities of the IMS would be able to assist in the execution of the investigative measure(s) mentioned in the EIO in a similar national case. The executing authority shall comply with this request provided that such assistance is not contrary to the fundamental principles of law of the EMS or does not harm its essential national security interests.

A general ordre public clause such as the ones listed in the table can quite easily be abused: because of their broad scope member states might be tempted to readily use the provisions in order to avoid having to cooperate. An example could be the following: in the famous case *De Hakkelaar* the Netherlands had given the person immunity from prosecution for certain facts. Belgium asked the extradition of the person for different facts. The Netherlands refused, based on ordre public, alledging that surrendering him would harm essential interests of the Netherlands. Granted, it is not inconceivable that surrendering somebody for the same facts could harm essential interests of the country (on a side-note, this would provide an interesting application of immunity from prosecution). However, given that it considered different facts, the project team submits that this is a case in which it becomes clear that detailed and tailored definitions of the ordre public clause could prevent such abuses.

- A reduced ordre public clause

A thorough analysis of the legal instrumentarium leads to the overview included in the following table.

Reduced Ordre Public <sup>163</sup>	
CoE Extradition	None.
CoE ECMA	None.
CoE Cond Sentenced	None.
CoE Transfer Proceedings	None.
CoE Validity	None.
CoE Transfer Sentenced Persons	None.
SIC	Article 96, 2. Decisions may be based on a threat to public policy or public security or to national security which the presence of an alien in national territory may pose. The article further gives a few explicit examples.
EU MLA	None.
FD EAW, FD Freezing, FD Fin Pen, FD Confiscation, FD Deprivation of Liberty	None.
FD EEW	Art. 13, par. 1, g. Execution would harm essential national security interests, jeopardise the source of the information or involve the use of classified information relating to specific intelligence activities.
FD Alternative	None.
FD Supervision	Article 3. FD without prejudice to the exercise of the responsibilities incumbent upon MS regarding protection of victims, the general public and the safeguarding of internal security, in accordance with Article 33 TEU.
FD Jurisdiction	None.
General Approach EIO	Article 10, par. 1, b. If, in a specific case, its execution would harm essential national security interests, jeopardise the source of the information or involve the use of classified information relating to specific intelligence activities;

<sup>163</sup> When italics are used, this indicates that the refusal ground is mandatory.

The scope reduction from “likely to prejudice the sovereignty, security, ordre public or other essential interests of the country” to “harm essential national security interests” is recommendable as it avoids member states from using this exception all too often. Additionally, just as proportionality from the side from the issuing member state can only be truly accomplished through operationalized, concrete, tailored provisions in the instruments, executing member states should also behave ‘proportionately’ when they are deciding whether or not to cooperate. The more precisely the public order exception is drafted, the more likely this becomes. According to the preamble to the EEW, it is accepted that such ground for non-execution may be invoked only where, and to the extent that, the objects, documents or data would for those reasons neither be used as evidence in a similar domestic case. This scope reduction makes that the traditional ordre public exception has lost the traditional inter-state dimension it has always had in ‘judicial’ cooperation in criminal matters. The new rationale seems to lay in the protection of national security interests and (classified) (state) intelligence against interference or unwanted disclosure through criminal investigations (irrespective whether these are domestic or foreign investigations), and no longer against other member states as such. The project team considers this as genuine progress, and theoretically supports extending such reduction throughout future cooperation in criminal matters. It be noted that two other instruments employ a precise, targeted ‘ordre public-like’ clause: Art. 3 FD Supervision and the FD Jurisdiction (the latter in the context of sharing information in the course of negotiations).

The project team thus sees no reason for keeping the traditional ordre public exception in place as apparently the member states have already generically agreed to a more limited approach along the lines of it’s EEW formulation.

From the results to question 3.3.15 (statistics below) various conclusions can be drawn. When comparing the results of the question whether the refusal ground is foreseen or not to the tables above indicating whether or not the refusal ground features in the EU instruments, a striking discrepancy surfaces. Six framework decisions do not contain a catch all ordre public exception nor a more specific one, yet for all those instruments at least 60% of the member states did include an ordre public refusal ground. The concerned framework decisions are the FD EAW, the FD Freezing, the FD Fin Pen, the FD Deprivation of Liberty, the FD Confiscation and the FD Alternative. Reassuring however is that there is a clear trend in time from mandatory to optional.

It be noted that the percentages listed in the first two statistics below need to be seen in light of de limited implementation status of the concerned

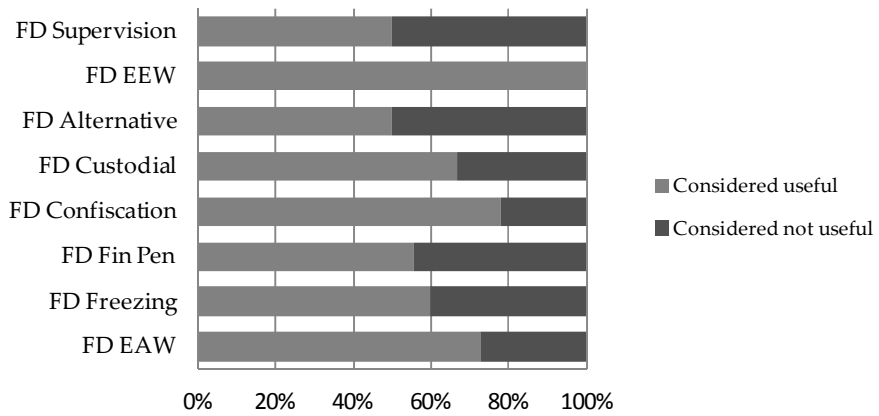
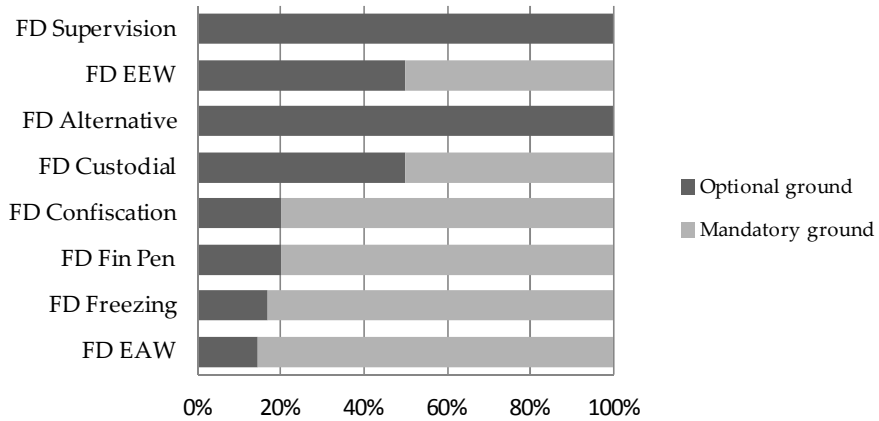
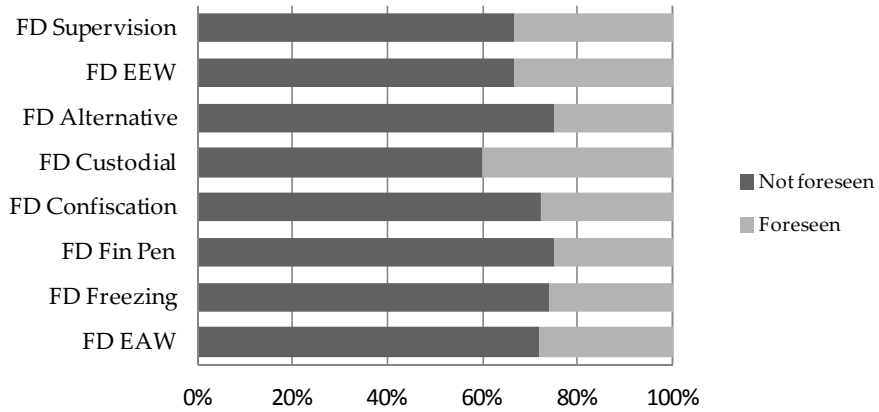


instruments.<sup>164</sup> The third one however, considering the usefulness of the concerned refusal ground, does allow to answer from a national law perspective, based on practical experiences. It gives an overview of the policy views regarding the (un)useful character of ordre public as a refusal ground, regardless of the implementation status.

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<sup>164</sup> *Infra* 3.6.2.

**3.3.15 What is the position of “ordre public” as a ground for refusal in your national implementation law?**



If during political negotiations it would be felt that the suggestion of using reduced instead of general ordre public clauses would not be feasible after all (which the project team would find illogical), it is suggested to at least consider reducing it in the sense of the Dutch-German 'Wittem' Convention of 30 August 1979, concluded to supplement the ECMA . According to Art. III. 2 of this Convention<sup>165</sup>, MLA in the cases of Art. 2, (b) of the ECMA, is granted 'if possible, imposing conditions, if this can avoid affecting the interests of the requested state'. Such provision entails an obligation to make this effort with regard to the requested/executing member state, to try and find a solution, which also complies with the wishes of the requesting/issuing member state, even in those cases in which guaranteeing its essential interests is at stake. It would definitely render MLA between the member states more effective.

#### 3.3.3.4 Lapse of time

The fourth type of refusal grounds are the ones related to the lapse of time. A thorough analysis of the legal instrumentarium leads to the overview included in the following table.

Lapse of time <sup>166</sup>	
CoE Extradition	<i>Article 10. No extradition when lapse of time following law of requested or requesting Party.</i>
CoE ECMA	None.
CoE Cond Sentenced	<i>Article 7, par. 1, d. lapse of time, under the legislation of either the requesting or the requested State.</i>
CoE Transfer Proceedings	<i>Article 10, par. 1, c. In requesting State.</i> Article 11, par. 11, f and g. In requested State (taking extra 6m into account when only competent following transfer).
CoE Validity	Article 6, 1. Where under the law of the requested State the sanction imposed can no longer be enforced because of the lapse of time.
CoE Transfer Sentenced Persons	None.
SIC	None.
EU MLA	None.
FD EAW	Article 4, 4. The criminal prosecution or punishment of the

<sup>165</sup> "Overeenkomst tussen het Koninkrijk der Nederlanden en de Bondsrepubliek Duitsland betreffende de aanvulling en het vergemakkelijken van de toepassing van het Europees Verdrag betreffende uitlevering van 13 december 1957." [Agreement between the Netherlands and Germany concerning the supplementation and simplification of the application of the European Extradition Convention of 13 December 1957] Wittem 30.8.1979.

<sup>166</sup> When italics are used, this indicates that the refusal ground is mandatory.

Lapse of time <sup>166</sup>	
	requested person is statute-barred according to the EMS law and the acts fall within its jurisdiction under its own criminal law.
FD Freezing	None.
FD Fin Pen	Article 7, par. 2, c. Execution is statute-barred according to EMS law and decision relates to acts which fall within the jurisdiction of that State under its own law.
FD Confiscation	Optional. Article 8, par. 2, h. Execution barred by statutory time limitations in the EMS, if the acts fall within the jurisdiction of that State under its own criminal law.
FD Deprivation of Liberty	Article 9, par. 1, e. The enforcement of the sentence is statute-barred according to the law of the EMS.
FD EEW	None.
FD Alternative	Article 11, par. 1, e. The enforcement of the sentence is statute-barred according to the law of the EMS and act falls within its competence.
FD Supervision	Article 15, par. 1, e. The criminal prosecution is statute-barred under the law of the EMS and relates to an act which falls within the competence of the EMS under its national law.
FD Jurisdiction	None.
General Approach EIO	None.

Two main conclusions can be drawn from the table. First, the refusal ground is missing in the MLA context; Second the refusal ground is not consistently dealt with in the other instruments.

– Lacking in MLA

Regarding mutual legal assistance, it be noted that none of the CoE conventions applicable between the member states with regard to mutual legal assistance, nor the EU MLA, give any significance to the lapsing of the proceedings or of the sanction in the requested (or requesting) state. This does not mean however, that lapse of time in MLA was never the subject of debate.

The JHA Council suggested in the autumn of 1994 that the possibility be examined of not/no longer imposing any consequences, in the context of mutual legal assistance between member states, on the possible lapsing of the

proceedings or the sanction in the requested state, with regard to acts for which legal assistance was requested<sup>167</sup>. In that case, the lapsing would be assessed only according to the law of the requesting state. However, shortly afterwards, it was no longer clear whether the various rules related to lapse of time really did form an obstacle to the efficient and effective legal assistance between the member states, and for the sake of convenience, it was decided that all the questions in connection with lapse of time could be better explored in the Extradition Group, particularly as the issue would be of particular importance with regard to extraditions (as explained above, the solution found in the context of extraditions was the right one, yet it was never transposed to the MLA domain).

The fact that it is not possible to impose any consequences on an expiry of the proceedings or the sanction in the requested state in terms of treaty law, does not mean that the conventions - in particular, the ECMA - exclude the possibility that parties (can) reserve the right nevertheless to refuse the requested legal assistance in certain cases. In this sense, the problem is analogous to that in connection with the refusal of mutual legal assistance in the absence of double incrimination. As regards the EU, only few member states have made such reservations. In a reservation to Art. 2 of the ECMA, they indicate that they reserve the right not to grant legal assistance in the case that the proceedings or the sanction has lapsed according to their own internal law. As such, an initiative to deny the applicability of possible reservations in this sense in the context of the draft agreement relating to mutual legal assistance between the Member states, to (future) member states, would therefore have been appropriate.

– Logical application in other instruments

Traditionally, in the Council of Europe conventions relevant to ‘judicial’ cooperation in criminal matters, the lapse of time was included as a mandatory refusal ground, for example in the CoE Convention on Extradition. This changed over time, however: in 1970, with the conclusion of the Transfer of proceedings convention, the refusal ground became partially optional: when lapse of time occurs according to the law of the requesting member state, the transfer of proceedings must be refused. However, if there is a lapse of time following the law of the requested member state, refusal is only optional. Additionally, the refusal in the latter case is only possible when 6 extra months are taken into account.

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<sup>167</sup> G. VERMEULEN, *Wederzijdse rechtshulp in strafzaken in de Europese Unie: naar een volwaardige eigen rechtshulpverdragen voor de Lid-Staten?*, Antwerp-Apeldoorn, Maklu, 1999, p. 99.

The trend to make this into an optional refusal ground started with the CoE Validity and (partially) with the CoE Transfer of proceedings, continued with the introduction of the mutual recognition instruments. A closer look at which 'instances' of lapse of time were included in those instruments reveals a logical and necessary evolution from the way the lapse of time refusal ground was applied under the Council of Europe regimes. A clear policy choice was made to, first of all, remove the lapse of time in the issuing member state as a refusal ground. This is only logical: lapse of time in the issuing member state will of course and automatically make any request for cooperation practically impossible, but there was absolutely no need to include this instance of lapse of time in the refusal grounds in cooperation instruments. Secondly, lapse of time in the executing member state was only retained as a refusal ground in one very specific instance, namely when "*the acts fall within its jurisdiction under its own criminal law*" (Art. 4, par. 4 FD EAW). This evolution too needs to be applauded: it did not make sense that states could refuse to recognize decisions merely because the offence *in abstracto* would have been subject to lapse of time in their state. What is imaginable though, is the situation where a country had been competent to prosecute, but consciously decided not to: in that case, allowing that state to not recognize and/or execute an order issued by another member states makes sense, given that its refusal becomes meaningful in this case: indeed, when the acts fall within its jurisdiction under its own criminal law, the very fact that the offence falls under lapse of time according to its law is far more important and weighty than it would be if the country would not have been competent for those facts. Therefore, under this specific condition, it is good to give states the possibility to refuse recognition/execution.

The EU has been consistent in making this refusal ground optional and limited to those situations where the acts fall within the EMS's jurisdiction. With one noticeable exception. Art. 9, par. 1, e FD Deprivation of Liberty contains the optional refusal ground, yet does not attach any conditions to it. This too, is consistent in that it fits the particularities of the different instruments: indeed, the cross-border execution of custodial sentences is primary international cooperation and is quite intrusive in the sense that the executing country simply takes on the obligation to provide for the logistics and organisation of the custodial sentence of a detainee, the latter having been convicted by a foreign court. In these circumstances it indeed makes sense to allow the executing authority to verify whether the execution of that particular sentence would not have been statute-barred in his country, regardless of whether he would have had jurisdiction in the case or not.

3.3.3.5 *Age/Health*

The fifth type of refusal grounds are those related to age and health concerns. A thorough analysis of the legal instrumentarium leads to the overview included in the following table.

Age/Health <sup>168</sup>	
CoE Extradition	None.
CoE ECMA	None explicitly. However, in the context of temporary transfer of prisoners, refusal is possible under certain conditions. Article 11, par. 1, d is one of those conditions, stating that refusal is possible if there are overriding grounds for not transferring him to the territory of the requesting Party.
CoE Cond Sentenced	Article 7, par. 2, d. The requested State deems the sentence incompatible with the principles of own penal law, in particular, if on account of his age the offender could not have been sentenced in the requested State.
CoE Transfer Proceedings	None.
CoE Validity	Article 6, k. Where the age of the person sentenced at the time of the offence was such that he could not have been prosecuted in the requested State.
CoE Transfer Sentenced Persons	None.
SIC	None.
EU MLA	None.
EU MLA Protocol	None.
FD EAW	<i>Article 3, par. 3. Under law of EMS person concerned may not be held criminally responsible due to his age.</i>
FD Freezing	None.
FD Fin Pen	Article 7, par. 2, f. The decision has been imposed on a natural person who under the law of the EMS due to his or her age could not yet have been held criminally liable for the acts in respect of which the decision was passed.
FD Confiscation	None.

<sup>168</sup> When italics are used, this indicates that the refusal ground is mandatory.

Age/Health <sup>168</sup>	
FD Deprivation of Liberty	Article 9, par. 1, g. Not criminally liable under EMS law, owing to age. Article 9, par. 1, k. The EMS cannot execute (a) measure(s) from sentence in accordance with its legal or health care system.
FD EEW	None.
FD Alternative	Article 11, par. 1, g. Under EMS law, the sentenced person cannot, owing to age, be held criminally liable for the acts involved. Article 11, par. 1, i. The sentence provides for medical/therapeutic treatment incompatible with the EMS' legal or healthcare system.
FD Supervision	Article 15, par. 1, g. Under the law of the EMS, the person cannot, because of his age, be held criminally responsible for the act.
FD Jurisdiction	None.
General Approach EIO	None.

In the EU cooperation instruments it is not always clear from the phrasing of the relevant refusal grounds whether they are intended to form humanitarian exceptions (due to old age or poor health of the person involved) or whether the refusal grounds are age-related, merely covering young people who cannot yet be held criminally liable. Regarding considerations of age, a distinction needs to be made between minors who simply cannot be held criminally liable according to the law of the executing member state, and elderly. The latter exception is a far more policy-oriented than a 'hard' legal measure. Indeed, some countries will make the policy choice not to prosecute or not to execute the penalty when the person involved is deemed too old. This practice will of course not be found in countries with a prosecution and execution obligation (legality principle). Because of the inherently different character of the exception related to the criminal liability of minors and the protection of the elderly (hard law vs. policy) it is safe to assume that those instruments which do not literally confirm which of the two is meant, actually concern the former. To do otherwise would go against traditional extradition law, where the extreme old age or poor health of the person concerned is not recognised as a real exception by treaty law. According to the applicable multilateral conventions, the actual transfer and extradition of the person concerned can only be postponed for reasons of health. It be noted that the CoE Convention on Extradition contains age nor health considerations. It is advisable to make this very clear however, in order to avoid any possible confusion. This could be done by explicitly introducing the word 'yet', as now only features in the FD Fin Pen.



The mutual recognition instruments are rather consistent, in that sense that any measure which could involve sanctions depriving or limiting liberty, include the age exception. There are a few apparent inconsistencies, but again, as with the lapse of time exception, the differences fit the particularities of the instruments. First, the refusal ground is mandatory in the context of the EAW, yet optional in the context of the FD Deprivation of Liberty. This is logical: whereas the EAW is a form of secondary cooperation, whereby the member state can reason that he does not want to surrender the person given that he would not have sentenced him or would not have had the person sit his sentence, in the context of the FD Deprivation of Liberty which is a measure of primary cooperation, the person has already been sentenced and will sit his sentence. This will not change if the executing authority refuses the cross-border execution: in that case the person will sit his sentence in the issuing member state or (in the event that the latter would ask another country) in another member state. This situation is not necessarily better for the person concerned than the situation where the executing authority would have executed the order, so it makes sense that the age/health exception is only optional. Secondly, the FD EAW does not contain a refusal ground based on health, yet in Art. 23, par. 4 it contains a postponement ground, whereas the FD Deprivation of Liberty and FD Alternative do. This discrepancy is logical, given the nature of the FD EAW: when a prosecution EAW is refused, that implies that the impunity. Therefore, it makes sense to only include a postponement ground. This is different for the FD Deprivation of Liberty: if a person cannot be transferred because of his health this will imply that he will stay in the issuing country for the (further) execution of his sentence. Given that there is no risk of impunity, it is logical that the refusal ground based on health is granted more readily.

For those instruments not dealing with deprivation or limitation of liberty, only one of them includes an 'age-related' exception covering the situation where a person is too young to be held liable, not a humanitarian exception, namely the FD Fin Pen. The fact that the exception is not humanitarian is acceptable and logical: given that only one's property is involved, and not one's physical integrity entails that the humanitarian exception is not necessary. This being said, it does not make sense that the age exception covering people who are too young, does not apply to the FD Confiscation nor FD Freezing, where it does to the FD Fin Pen.

The above dealt with the mutual recognition instruments. In the field of mutual legal assistance, there is simply no humanitarian exception, nor an age-exception covering youth. In the ECMA Art. 11 provides a way to possibly invoke such grounds, as will be discussed in more detail below. The question whether the humanitarian exception also deserves a place in the context of this domain, did not arise in the negotiations on the EU convention on legal assistance. However, from the point of view of legal protection, there might

have been something to say for extending the exception to cases of requests for the temporary transfer of detained persons – without their consent – from the requesting member state.

Nonetheless, a general extension of the humanitarian exception to the field of mutual legal assistance would be exaggerated and unnecessary. After all, as said above, even in traditional extradition law, the extreme old age or poor health of the person concerned is not recognised as a real exception by treaty law.

Furthermore, it is not clear whether a possible humanitarian exception could (only) be appealed to with regard to a person who is being prosecuted or standing trial in the requesting state, or (also) with regard to a person whose freedom has been removed in the requested state, and whose temporary transfer to the requesting state is requested.

As regards a person who is prosecuted or standing trial in the requesting state, the refusal of legal assistance for humanitarian reasons seems pointless. Regardless of the question whether his health can reliably be assessed by the requested state, this would still not prevent the prosecution or trial of the person concerned. At most, the failure to provide legal assistance could hinder the investigation or the proceedings in the requesting state. However, an evaluation of the appropriateness of the prosecution or trial of the person concerned always remains the prerogative of the requesting state. In other words, the introduction of the possibility of appealing to a humanitarian exception with regard to a person who is prosecuted or standing trial in the requesting member state seems unnecessary.

It is only with regard to a person whose freedom has been removed, and whose transfer to the requesting or requested member state has been requested, that it seems that there might be a point in being able to appeal to a possible humanitarian exception. After all, the requested member state could then prevent a sick or elderly person from being subjected to a transfer which it considers medically or physically irresponsible, by refusing to grant legal assistance (at least temporarily). As regards the traditional hypothesis in which there has been a request for the transfer to the requesting state, the existing conventions do, however, provide a satisfactory solution. In particular, art. 11.1, (d) of the ECMA allows a party to refuse a temporary transfer of detained persons if there are 'special grounds', or 'overriding grounds' respectively opposing this. An explicit possibility of assessing the age or health of the person concerned would obviously have been more comfortable from the legal point of view, but the requested member state can probably also obtain that result with the present rules. The provision was not retained in the EU MLA Convention: on the contrary, Art. 9, par. 5 EU MLA explicitly states that Art. 11 (2) (and thus not 1) ECMA remains applicable .

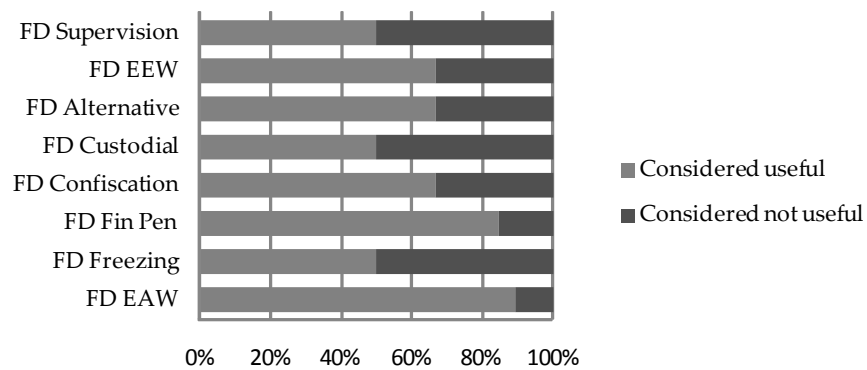
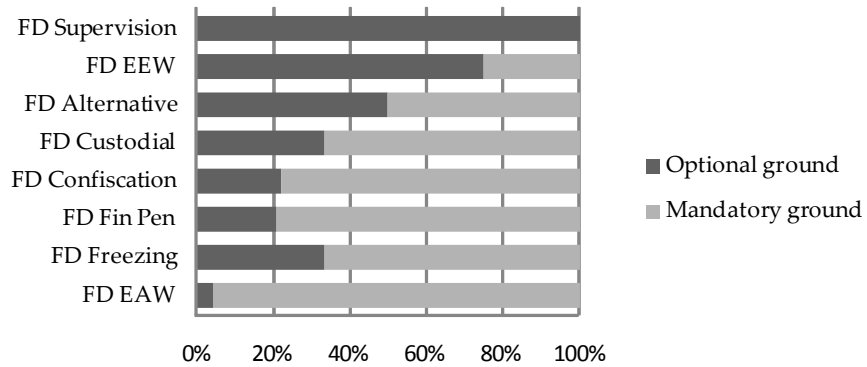
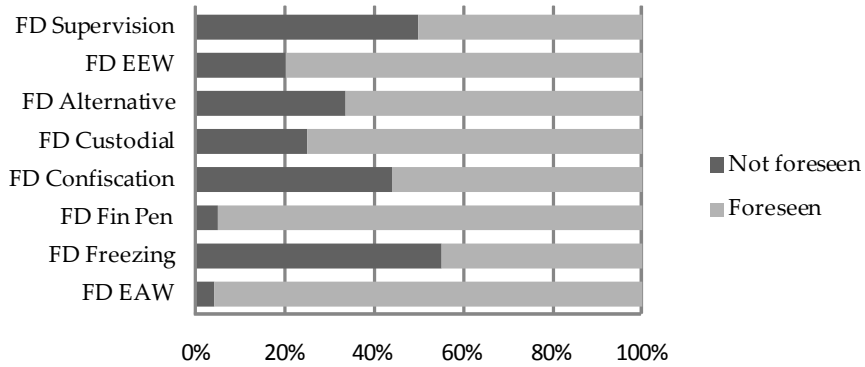
Given that the health exception is straightforward the questions in the survey only covered the age-exception and more particularly only the age-exception in the form of the 'hard' legal exception concerning minors. From the results several rather surprising findings were made. First of all, at EU level, the exception is not foreseen in the FD Freezing or FD EEW, yet regarding the former over 50% and regarding the latter 20% of the member states indicate to employ the age exception. Second, notwithstanding that only the FD EAW makes the refusal ground mandatory, national transpositions of several other instruments also indicate the exception to be mandatory. Indeed, even though the age refusal ground is optional in the FD Confiscation, FD Fin Pen and the FD Deprivation of Liberty, 60 to 80% of the member states have opted for a mandatory character. In terms of usefulness, it is clear that the refusal ground is considered necessary in the context of the EAW, as is the case with most other instruments, although it should be noted that only half of the answers regarding the FD Freezing, FD Deprivation of Liberty and FD Supervision indicate to consider the age exception useful.

It be noted that the percentages listed in the first two statistics below need to be seen in light of the limited implementation status of the concerned instruments.<sup>169</sup> The third one however, considering the usefulness of the concerned refusal ground, does allow answers from a national law perspective, based on practical experiences. It gives an overview of the policy views regarding the (un)useful character of age as a refusal ground throughout the instruments, regardless of their implementation status.

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<sup>169</sup> *Infra* 3.6.2.

**3.3.11 What is the position of “age as a condition for criminal responsibility” as a ground for refusal in your national implementation law?**



3.3.3.6 *Ne bis in idem*

The sixth type of refusal grounds are those related to the application of the *ne bis in idem* principle.<sup>170</sup> A thorough analysis of the legal instrumentarium leads to the overview included in the following table.

<b>Ne bis in idem<sup>171</sup></b>	
CoE Extradition	In protocol – yet replaced by FD EAW.
CoE ECMA	None.
CoE Cond Sentenced	None.
CoE Transfer Proceedings	<p>Article 35. 1. <i>A person in respect of whom a final and enforceable criminal judgment has been rendered may for the same act neither be prosecuted nor sentenced nor subjected to enforcement of a sanction in another Contracting State: a) if he was acquitted; b) if the sanction imposed: i) has been completely enforced or is being enforced, or ii) has been wholly, or with respect to the part not enforced, the subject of a pardon or an amnesty, or iii) can no longer be enforced because of lapse of time; c) if the court convicted the offender without imposing a sanction.</i></p> <p>2. Nevertheless, a Contracting State shall not, unless it has itself requested the proceedings, be obliged to recognise the effect of <i>ne bis in idem</i> if the act which gave rise to the judgment was directed against either a person or an institution or any thing having public status in that State, or if the subject of the judgment had himself a public status in that State. 3. Furthermore, a Contracting State where the act was committed or considered as such according to the law of that State shall not be obliged to recognise the effect of <i>ne bis in idem</i> unless that State has itself requested the proceedings.</p>
CoE Validity	<p>Article 53. 1. <i>A person in respect of whom a European criminal judgment has been rendered may for the same act neither be prosecuted nor sentenced nor subjected to enforcement of a sanction in another Contracting State: a) if he was acquitted; b) if the sanction imposed: (i) has been completely enforced or is being enforced, or (ii) has been wholly, or with respect to the part not enforced, the subject of a pardon or an amnesty, or (iii) can no longer be enforced because of lapse of time; c) if the</i></p>

<sup>170</sup> The analysis of this part was prepared by Laurens van Puyenbroeck

<sup>171</sup> When italics are used, this indicates that the refusal ground is mandatory.

Ne bis in idem <sup>171</sup>	
	<p><i>court convicted the offender without imposing a sanction.</i></p> <p>2. Nevertheless, a Contracting State shall not, unless it has itself requested the proceedings, be obliged to recognise the effect of ne bis in idem if the act which gave rise to the judgment was directed against either a person or an institution or any thing having public status in that State, of if the subject of the judgment had himself a public status in that State. 3. Furthermore, any Contracting State where the act was committed or considered as such according to the law of that State shall not be obliged to recognise the effect of ne bis in idem unless that State has itself requested the proceedings.</p>
CoE Transfer Sentenced Persons	None.
SIC	<p><i>Article 54. A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.</i></p> <p>Article 58. The above provisions shall not preclude the application of broader national provisions on the ne bis in idem principle with regard to judicial decisions taken abroad.</p>
EU MLA	None.
EU MLA Protocol	None.
FD EAW	<p><i>Article 3, par. 2. If the executing judicial authority is informed that the requested person has been finally judged by a Member state in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member state.</i></p> <p>Article 4, par. 2. Where the person who is the subject of the EAW is being prosecuted in the EMS for the same act as that on which the EAW is based;</p> <p>Article 4, par. 3. Where the judicial authorities of the EMS have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings, or where a final judgment has been passed</p>

Ne bis in idem <sup>171</sup>	
	upon the requested person in a MS, in respect of the same acts, which prevents further proceedings. Article 4, par. 5. If the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country.
FD Freezing	Article 7, par. 1, c. It is instantly clear from the information provided in the certificate that rendering judicial assistance pursuant to Article 10 for the offence in respect of which the freezing order has been made, would infringe the ne bis in idem principle.
FD Fin Pen	Article 7, par. 2, a. Decision against the sentenced person in respect of the same acts has been delivered in the executing State or in any State other than the issuing or the executing State, and, in the latter case, that decision has been executed.
FD Confiscation	Article 8, par. 2, a. Execution of the confiscation order would be contrary to the principle of ne bis in idem.
FD Deprivation of Liberty	Article 9, par. 1, c. Enforcement of the sentence would be contrary to the principle of ne bis in idem.
FD EEW	Art. 13, par. 1, a. if its execution would infringe the ne bis in idem principle.
FD Alternative	Article 11, par. 1, c. Recognition of the judgment and assumption of responsibility for supervising probation measures or alternative sanctions would be contrary to the principle of ne bis in idem.
FD Supervision	Article 15, par. 1, c. Recognition of the decision on supervision measures would contravene the ne bis in idem principle.
FD Jurisdiction	Article 1, par. 2, a. Avoiding parallel proceedings in two member states which might lead to to the final disposal of the proceedings in two or more member states thereby constituting an infringement of the principle of ' <i>ne bis in idem</i> ' is explicitly listed as one of the aims of the framework decision.
General Approach EIO	Article 10, par. 1, e. The execution of the EIO would be contrary to the principle of ne bis in idem, unless the IMS provides an assurance that the evidence transferred as a

Ne bis in idem <sup>171</sup>	
	result of an execution of an EIO shall not be used to prosecute a person whose case has been finally disposed of in another MS for the same facts, in accordance with the conditions set out under Art. 54 SIC.

– Background and different meanings

The sixth substantive ground for refusal or non-execution is the *ne bis in idem* principle.<sup>172</sup> *Ne bis in idem* is a fundamental legal principle which is enshrined in most legal systems, according to which a person cannot be punished more than once for the same act (or facts). It can also be found in regional and international instruments, particularly in Art. 4 of the 7th Protocol to the ECHR of 22 November 1984 and in Art. 14(7) of the International Covenant on Civil and Political Rights of 19 December 1966. However, under these international provisions the principle only applies on the national level, i.e. prohibits a new punishment under the jurisdiction of a single state. These instruments make the principle binding in the state where a final judgment has been passed, but do not prevent other states from judging/punishing for the same facts/offence

The table shows that the *ne bis in idem* principle was mentioned in CoE conventions Validity and Transfer of proceedings, as well as in Art. 54 SIC. The wordings differ between Art. 53 CoE Validity and Art. 35 CoE Transfer of Proceedings on the one hand and Art. 54 SIC on the other in the sense that the former two exclude the initiation of a prosecution *and* the issuing of a judgment, whereas the latter in principle only excludes the initiating of a prosecution. This is only a matter of language however, given that it should obviously be assumed that when prosecution is not possible, sentencing is *a fortiori* excluded. Furthermore, Art. 54 SIC does not explicitly grant a *ne bis in idem* effect to a final acquittal or a conviction without an imposed sanction. Those situations, however, should be implicitly read in this article. Other situations, however, did not form part of the *ne bis in idem* principle, until the ECJ jurisprudence *Gözütok/Brügge*.<sup>173</sup>

In this judgment the ECJ developed important guidelines for the interpretation of the SIC. Beforehand, it be noted that Art. 54 SIC does not deal with *cooperation* as such. Indeed, the article goes further in that it prevents the contracting parties from prosecuting a person in their own state when the *ne bis in idem* principle was triggered through a final foreign decision. Therefore, this jurisprudence will also be relied upon in the final part of this Study, namely the

<sup>172</sup> Based partly on the IRCP study *EU cross-border gathering and use of evidence in criminal matters*, G. VERMEULEN, W. DE BONDT en Y. VAN DAMME, 2010.

<sup>173</sup> ECJ, 11 February 2003, Joined Cases C-187/01 and C-385/01.



part discussing the need for EU action regardless of specific cooperation situations (*infra* 6.2.3). However, during the focus group meetings it became apparent that the member states also use this jurisprudence to interpret the principle of *ne bis in idem* in the EU cooperation context. This is only logical: if a country is precluded from prosecuting a person because a decision regarding the same facts was already taken by other contracting parties, then it only makes sense that they would also refrain from granting cooperation regarding a person who has been subject to such decisions. Therefore, the project team will mention the jurisprudence also in this part, as a tool for interpretation of the *ne bis in idem* provisions in the EU cooperation instruments. Where needed, it will of course mention and take into account differences between those provisions and Art. 54 SIC. It be noted that the recent Partial Agreement EIO explicitly applies the interpretation method based on Art. 54 SIC: Art. 10, par. 1, e Partial Agreement EIO refers to the conditions set by Art. 54 SIC to determine whether the foregoing decision is capable of triggering *ne bis in idem*.

The court's ruling in *Gözütok/Brügge* has the merit of interpreting and, thus, clarifying the meaning of the expression 'finally disposed of' (for the application of the *ne bis in idem principle*), contained in Art. 54 SIC. While making it obvious that proceedings in which a court/judicial decision is involved satisfy the requirements of the expression, the court clearly stated that this is also the case where criminal proceedings have been discontinued by a decision of an authority required to play a part in the administration of criminal justice in the national legal system concerned. It was said that where further prosecution is definitively barred, even if the decision causing this is not taken after a trial, this should also be seen as a case which has been finally disposed of. In the case at hand it concerned a decision to discontinue the criminal proceedings after the person involved had accepted offers made by the Public Prosecutor's Office to pay certain amounts of money. The project team submits that this should be interpreted broadly, and not only apply to that specific example: whenever a decision, regardless of whether it was made by a judge or not, has been definitively ended, it should be seen as a case which has been finally disposed of, or, in other words as a final judgment.

– *Ne bis in idem* within the EU cooperation instruments

In many EU cooperation framework decisions, the *ne bis in idem* principle is merely mentioned in name without specifying which form of *ne bis* is meant. (Art. 7, par. 1, c FD Freezing, Art. 8, par. 2, a FD Confiscation, Art. 9, par. 1, c FD Deprivation of Liberty, Art. 13, par. 1, c FD Deprivation of Liberty, Art. 13, par. 1, a FD EEW, Art. 11, par. 1, c FD Alternative, Art. 15, par. 1, c FD Supervision) Despite being slightly more specific, Art. 7, par. 2, a FD Fin Pen is also far from clear, given that it merely speaks of “*a decision against the sentenced person*” which has been rendered about the same facts, without specifying the type of decision.

This causes confusion, given that the *ne bis in idem* principle can be applied in three ways. In the strictest sense, it will entail that cooperation will not be granted in the context of an investigation, prosecution or conviction of *a person who has already been the subject of a final judgement* in his own country (or in a third state<sup>174</sup>). Traditionally, there is the additional condition that the person concerned was acquitted in the judgement that was passed, or that, in the case of a conviction, no sanction was imposed, the sanction had been executed, is still being executed, or can no longer be executed, according to the law of the convicting state (because it has lapsed, a pardon has been granted, or there has been an amnesty). In a wider sense, the principle can also be invoked as an obstacle to granting cooperation *with regard to acts for which the proceedings have already been instituted*. Finally, the *ne bis in idem* effect can also be triggered by *decisions to stop the proceedings or even decisions not to institute proceedings* with regard to the acts for which the legal assistance has been requested (no grounds for proceedings or dismissal of the case).

These different meanings are reflected rather clearly in the FD EAW, which makes a distinction between several different applications of *ne bis in idem*. The only mandatory refusal ground is provided in Art. 3, par. 2: it says that, if the executing judicial authority is informed that the requested person has been finally judged by a member state in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing member state, the execution of the EAW shall be refused. Further, when prosecution for the same act is ongoing in the executing member state, the executing may be refused (Art. 4, par. 2 FD EAW). Art. 4, par. 3 FD EAW treats two different situations. On the one hand, it entails that where the judicial authorities of the EMS have decided either not to prosecute or to halt proceedings for the same offence, they may refuse the execution. On the other hand, refusal is also possible a final judgment has been passed upon the requested person in another member state, in respect of the same acts, which prevents further proceedings. Art. 4, par. 5 deals with final conviction in third

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<sup>174</sup> This aspect of *ne bis in idem* will also be discussed in this subsection.

states (see below). The wordings to describe the final character of the decisions is different in the FD EAW compared to the SIC: in the former the words ‘person that has been finally judged’ are used whereas the latter speaks of a ‘a person whose trial has been finally disposed of’. The project team submits that this is a mere language difference however. Therefore, the explanation given to the wordings ‘finally disposed of’ in *Gözütok/Brügge* can also be applied to explain ‘final judgments’ as meant in the FD EAW. In this judgement it was said that where further prosecution is definitively barred, even if the decision causing this is not taken after a trial, this should also be seen as a case which has been finally disposed of. In the case at hand it concerned a decision to discontinue the criminal proceedings after the person involved had accepted offers made by the Public Prosecutor's Office to pay certain amounts of money. The project team submits that this should be interpreted broadly, and not only apply to that specific example: whenever a decision, regardless of whether it was made by a judge or not, has been definitively ended, it should be seen as a case which has been finally disposed of, or, in other words as a final judgment in the meaning of Art. 3, par. 2 FD EAW. Consequently, this situation qualifies as a mandatory refusal ground in the context of the EAW.

Looking back at Art. 4, par. 3 FD EAW, it becomes apparent that the second situation described in that refusal ground, precisely deals with how *Gözütok/Brügge* should be read: indeed, it refers to a final judgment which has been passed upon the requested person in another member state, in respect of the same acts, which prevents further proceedings. Granted, the context of the EAW and the SIC is different, so arguments in favour to keep the refusal ground optional, are thinkable. However, for the sake of consistency the project team recommends the EU to bring its legislation in line with the ECJ jurisprudence and turn this refusal ground in a mandatory refusal ground. Another situation which should be brought under the said jurisprudence is the immunity from prosecution<sup>175</sup>.

The other situations from Art. 4 FD EAW described above are yet other variations of the *ne bis in idem* principle, showing that its application throughout the Union is far from clear. This is only worsened by the other framework decisions listed above which suffice in merely mentioning the *ne bis in idem* principle, without giving any explanation as to which meaning of the principle is envisaged. Therefore, first, the project team recommends to make explicit which *ne bis* situation is envisaged. This policy option was also voiced in a 2005 Green Paper of the European Commission.<sup>176</sup> Additionally, all those refusal grounds

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<sup>175</sup> *Infra* 3.3.3.7.

<sup>176</sup> EUROPEAN COMMISSION, COM(2005) 696 final, 23.12.2005 “Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings”, p.8.

are optional, implying that even the strictest meanings of *ne bis* (= the 'classic' final convictions in court) do not form a mandatory refusal ground.

For the sake of completeness it be noted that within the field of mutual legal assistance, traditionally, no referral was made to the principle of *ne bis in idem*. Indeed, the CoE ECMA itself does not recognise the principle. Therefore it does not come as a surprise that quite some contracting parties have taken the initiative themselves, and have reserved the right, in a reservation to Art. 2 ECMA, not to meet a request for legal assistance with regard to a prosecution or proceedings which is irreconcilable with the *ne bis in idem* principle. Still, notwithstanding the international connotation these reservations attach to the *ne bis in idem* principle, this approach does not anticipate problems caused by the fact that the interpretation of the principle differs significantly from country to country. Here too, clarity and legislative guidance from the EU level is needed. The EU legislator indeed seems to be realising this: on the one hand, Art. 13, par. 1 FD EEW refers to *ne bis* principle, unfortunately without specifying the exact meaning of *ne bis*, but at least it is mentioned which is positive; on the other hand Art. 10, par. 1, e Partial Agreement EIO states that if the execution of the EIO would be contrary to the principle of *ne bis in idem* cooperation can be refused. It refers to Art. 54 SIC for the meaning of the principle and add a surprising exception: the refusal ground does not stand when the IMS provides an assurance that the evidence transferred as a result of an execution of an EIO shall not be used to prosecute the person.

Apart from the uncertainty regarding which type of decision can give rise to *ne bis in idem*, the instrumentarium is also inconsistent regarding which countries' decisions can trigger the principle. The only EU instrument in which decisions from a third country are listed, is the FD EAW: Art. 4, par. 5 contains an optional refusal ground for final judgments issued in third countries. The project team strongly recommends to at least introduce an optional refusal ground for final judgments issued in third countries throughout the instrumentarium. After all, the *ne bis in idem* principle is not a mere EU concept, as listed in the introductory part to this subsection it also features in international treaties. Member states must at least have the option not to provide cooperation on the request of another member state, if they were to conclude that the person has already been finally convicted for the same facts in other member states.

After this analysis of the applicable CoE and EU legislation, it is necessary to look at the current application of the *ne bis* principle in the national legislation of member states. The results of the survey show that the principle is at least applied in its strictest sense in all but one member state, meaning following a final conviction of the person concerned by the national authorities. Only a few member states indicate that they do not apply the principle as regards final convictions issued by other (member state or third country) authorities.

With respect to the application of the *ne bis* principle as a result of an ongoing prosecution, the picture is more divided. Only a small minority of member states applies *ne bis* in this sense with regard to its own authorities and less than a third of the member states applies it with regard to ongoing prosecutions by other (member state or third country) authorities<sup>177</sup>.

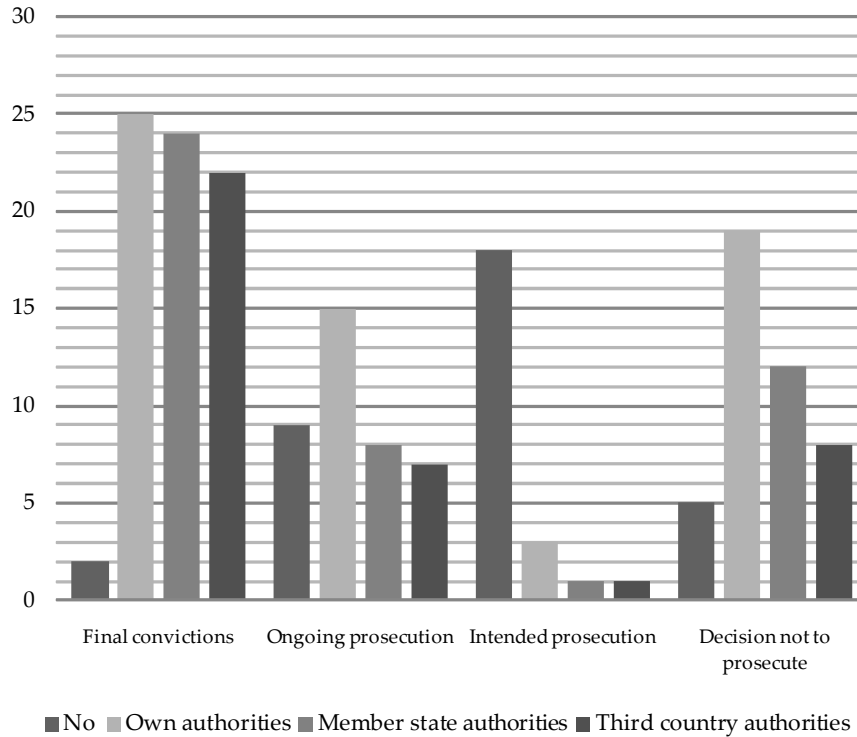
An even smaller amount of member states applies the *ne bis* principle with regard to intended prosecutions and even then only if it concerns a prosecution intended by its own authorities (with the only exception of Cyprus).

A significant majority of member states apply the *ne bis in idem* principle with regard to decisions not to prosecute. However, this usually applies to decisions made by those member states' own authorities and to a much lesser extent to similar decisions made by other (member state and in even fewer cases third country) authorities. Caution is warranted in this regard: after all, a 'decision not to prosecute' can take many different forms and does not always imply that the case becomes definitively impossible to prosecute. Several of the member states which ticked this box for such decisions made by other authorities indicated at the focus group meetings that, when they ticked this box, it was in the idea that the decision not to prosecute would indeed have a definitive effect. It thus seems that the replies can indeed be interpreted as meaning final decisions not to prosecute, in other words, those decisions to which *Gözütok/Brügge* applies according to the project team. This, however, is due to lack of data or replies during the focus group meetings, no absolute certainty so the results should be interpreted as being an indicator for final decisions not to prosecute, yet not exclusively.

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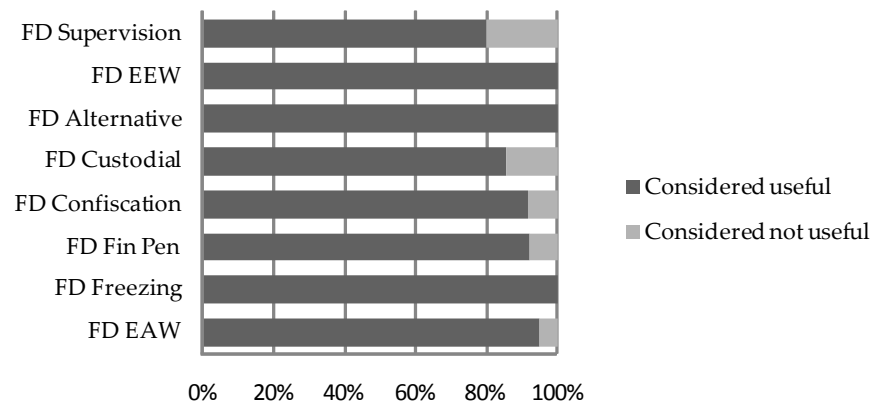
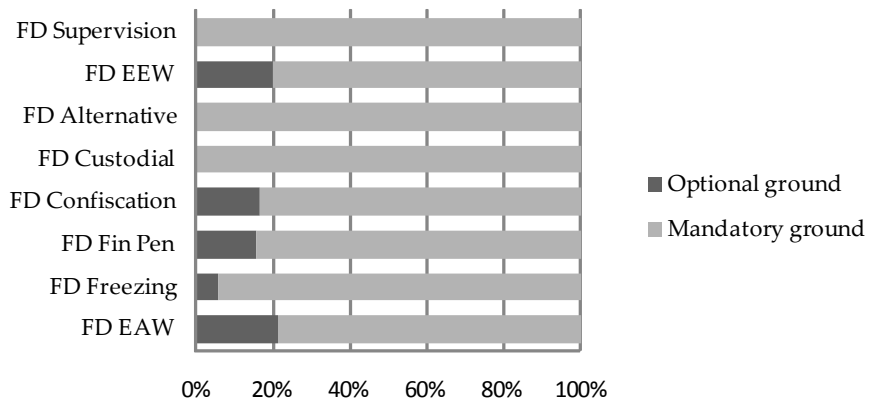
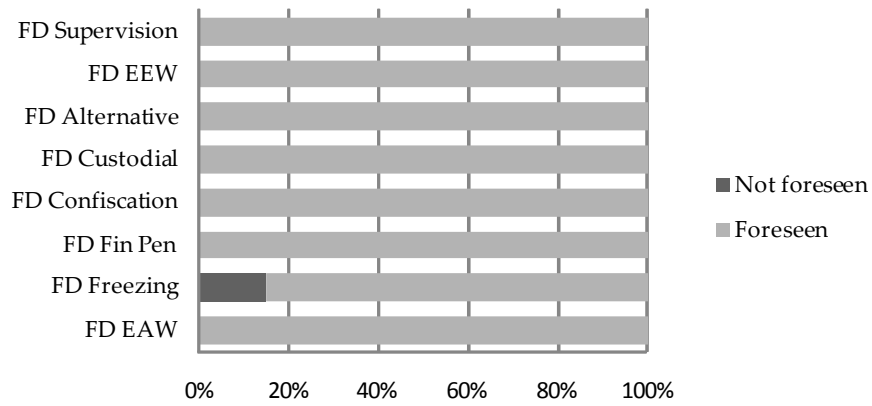
<sup>177</sup> See also 5.3.3.

**3.3.1 What type of situations can give rise to the application of the *ne bis in idem* principle according to your national law?**



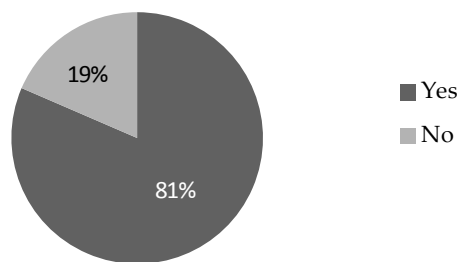
With regard to the position of *ne bis in idem* as a ground for refusal in the cooperation context, the survey results are very clear. With the only exception of the FD on the orders of freezing property or evidence (FD Freezing), the *ne bis in idem* principle is included as a ground for refusal in all national laws implementing the EU cooperation instruments. Additionally, the *ne bis in idem* principle is generally considered *useful* by the overall majority of member states and with respect to all instruments (including the FD Freezing). Finally, the *ne bis in idem* principle is generally applied as a mandatory refusal ground with the exception of a small number of member states that have implemented it as an optional ground for refusal (e.g. with regard to the EAW or EEW). Regarding the mandatory/optional character however, it is important to relativise the results shown in the table below. After all, the member states were asked whether *ne bis in idem* was optional or mandatory as a refusal ground in their national legislation. Several member states attribute a different character (mandatory or optional) to the refusal ground, depending on which meaning (see table above: final convictions, ongoing prosecutions, decisions not to prosecute etc) of *ne bis in idem* concerns.

**3.3.2 What is the position of “ne bis in idem” as a ground for refusal in your national implementation law?**



When asked about a possible wider application of the *ne bis in idem* principle (in the sense that it would already play in a pre-trial investigation stage and that it would not be limited to actual prosecution for acts that already have a final decision), a clear majority of member states agree that this should be considered. Linked to the results mentioned above (figure 3.3.1), this means that, although member states generally do not apply the principle with regard to the pre-trial investigation stage and intended prosecutions, they nevertheless favour an application of *ne bis* in this context, at least as an optional ground for refusal. Those member states that do not agree with this proposal indicate that a wider *ne bis in idem* interpretation would be unfeasible in practice or that the *ne bis* principle should not be allowed to restrict MLA in the pre-trial stage and thus hinder a national investigation.

**3.3.3 Do you agree that *ne bis in idem* should be a(n optional) refusal ground that can play already in a pre-trial investigative stage [...] and that calling upon it is not limited to actual prosecution for acts that already have a final decision?**



The combination of the above three tables show that the landscape of *ne bis in idem* principle is still too varied:

- The first table shows that the meaning member states attribute to the principle is still very different throughout the Union.
- The second table, even though it looks relatively consistent, needs to be interpreted in light of the fact that even though the strict *ne bis* application (for final convictions) is indeed almost always a mandatory refusal ground, the other meanings of *ne bis* often have an optional character. This is only logical, given that they also are optional in the EU instruments and not rarely the member states merely copy refusal grounds lists in their legislation. As stated above, the project team considers it inconsistent that the FD EAW contains a mandatory refusal ground for the strict meaning of *ne bis*, and the

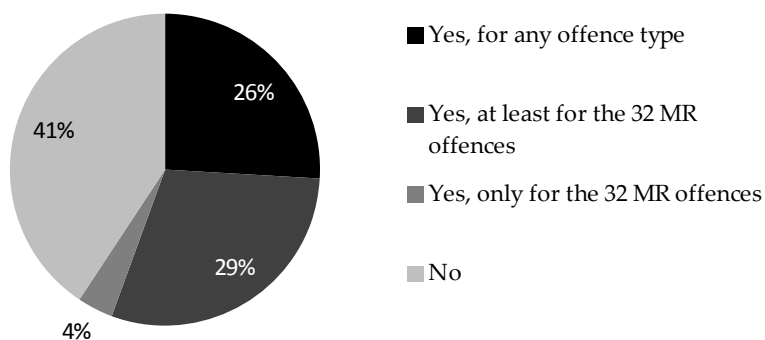


other instruments only an optional one for an undefined meaning of *ne bis*. This is not only inconsistent vis a vis the FD EAW, but also vis a vis the international instrumentarium in which the strict meaning of *ne bis* is a source for refusal.

- The third table shows that the *ne bis in idem* principle has the potential to play already at the pre-trial phase. A surprising majority of the member states subscribes this. However, the opinions are still divided and it needs to be verified whether the support for this kind of broadening of the principle also covers cross-border application of the principle.

In terms of practical application of the *ne bis in idem* principle member states were asked to give their view on the need to install a register for pending and ongoing prosecutions to be able to (better) apply the *ne bis in idem* principle, and more in particular for which type of offences such a register would be necessary. There is considerable support for such a suggestion: fifteen member states agree that this would be helpful. Several concerns are raised, however, the main ones relating to issues such as data protection, proportionality, reliability and practical feasibility of the suggested register.<sup>178</sup>

**3.3.4 Is there a need to install a register for pending and ongoing prosecutions to be able to (better) apply the *ne bis in idem* principle?**

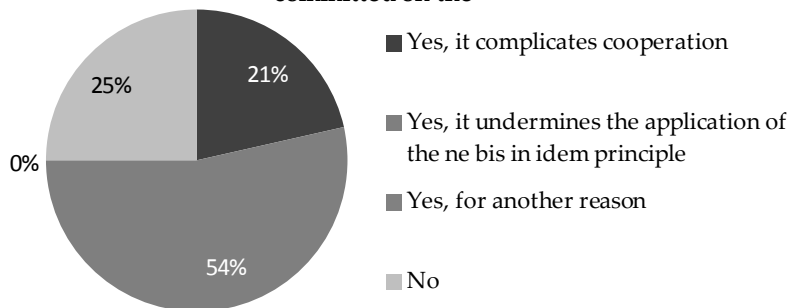


Finally, member states were asked to give their view on the fact that member states can formulate exceptions with respect to the application of the *ne bis in idem* principle (e.g. that it will not apply to foreign decisions that relate to acts that were partially committed on the territory of that member state). The survey results clearly show that the great majority of member states do not favour such

<sup>178</sup> *Infra* 5.3.3.

exceptions. More than 20 member states do not see grounds for allowing exceptions to the *ne bis in idem* principle formulated by a specific member state, for this would complicate cooperation or would undermine the application of the *ne bis* principle. Consequently, the elimination of such exceptions is recommended.

**3.3.5 Do you consider it a problem that member states can formulate the exceptions with respect to the application of the *ne bis in idem* principle (e.g. that it will not apply to foreign decisions that relate to acts that were (partially) committed on the**



**3.3.3.7 Immunity**

The seventh type of refusal grounds are those related to the application of immunity principles. This concept clusters two distinct types of immunities, namely those commonly referred to as ‘immunities and privileges’ and the new one introduced by the project team and referred to as ‘immunity from prosecution’. Because the latter does not yet exist in any of the cooperation instruments, it is important to clearly distinguish between the two.

## – Immunities and privileges

First, a thorough analysis of the legal instrumentarium leads to the overview included in the following table.

Immunities and Privileges <sup>179</sup>	
CoE Extradition	None.
CoE ECMA	None.
CoE Cond Sentenced	None.
CoE Transfer Proceedings	None.
CoE Validity	None.
CoE Transfer Sentenced Persons	None.
SIC	None.
EU MLA	None.
FD EAW	Article 20, 1. Priv/imm in EMS? Time limits (Article 17) shall not start running until the EMS waives the immunity.
FD Freezing	Article 7, 1, b. Immunity or privilege EMS law, making execution impossible.
FD Fin Pen	Article 7, par. 2, e. Immunity or privilege EMS law, making execution impossible.
FD Confiscation	Article 8, 2, c. There is immunity or privilege under the law of the EMS which would prevent the execution of a domestic confiscation order.
FD Deprivation of Liberty	Article 9, par. 1, f. There is immunity under the law of the executing State, which makes it impossible to enforce the sentence.
FD EEW	Art. 13, par. 1, d. If there is an immunity or privilege under the law of the executing State which makes it impossible to execute the EEW.
FD Alternative	Article 11, par. 1, f. there is immunity under the EMS law, making execution impossible.
FD Supervision	Article 15, par. 1, f. There is immunity under the law of the EMS, which makes it impossible to monitor supervision

<sup>179</sup> When italics are used, this indicates that the refusal ground is mandatory.

Immunities and Privileges <sup>179</sup>	
	measures.
FD Jurisdiction	None.
General Approach EIO	Article 10, par. 1, a. Recognition may be refused if there is an immunity or a privilege under the law of the executing State which makes it impossible to execute the EIO.

The ground for non-execution concerned has been inserted in the EAW (it was inexistent in former extradition law) during the December 2001 negotiations on the instrument for the sole reason of convincing Italy (which did not want to run the risk that Italians under a national (political) immunity or privilege would become surrenderable under the EAW, Italy not having ratified the 1996 EU Extradition Convention<sup>180</sup>, which, in the relationship between the other then member states had already introduced the principle of extradition of own nationals) and thus reaching unanimous support for adoption of the EAW.

Whilst it should already be pitied that this was the price to be paid for reaching consensus at the level of the JHA Council on the EAW, there was clearly no good reason to simply copy the ground for non-execution into the sphere of MLA by introducing it in the EEW or the Freezing Order: indeed, the insertion in the EEW and the 2003 Freezing Order of 'immunity or privilege under national law' as a ground for non-execution is the mere result of mainstream copying through of non-execution grounds from the EAW, erroneously considered to be the archetypical standard to which all later MR instruments must be modeled: the effect of execution would not come close to surrender, as in the case of the EAW. The EU is persistent in its mistakes: the General Approach EIO also includes this refusal ground.

The introduction of this ground for refusal or non-execution (originally in the FD EAW) is thus a step backwards, compared to traditional mutual legal assistance in which this refusal ground was traditionally not included.

It is most regrettable that the situation between member states is more stringent than the situation between non-EU member states: in the relevant Council of Europe conventions the possibility to call upon immunity or privilege under national law to refuse cooperation is not foreseen.

At EU level the refusal ground is foreseen in all listed framework decisions. At member states level the 50% of the member states indicate to use the refusal ground, interestingly enough more in the context of confiscation than in EAW (while the latter is obviously far more intrusive). While in the EU instruments the refusal ground is consistently optional, minimum half of those member

<sup>180</sup> "Convention drawn up on the basis of article K.3 of the Treaty on European Union, of 27 September 1996 relating to Extradition between the Member states of the European Union." *OJ C* 313 of 23.10.1996.

states who introduced it made it into a mandatory ground (up to 80% in case of the EAW). When asked about the perceived usefulness, the refusal ground is deemed the least useful in the context of custodial sentences, which is a logical evolution.<sup>181</sup>

In the survey the position of the project team, being that the introduction of immunity as a refusal ground in the EU cooperation instrumentarium is a step back, was tested. Striking is that a majority of the member states (fourteen) indicated not to agree with this. Four out of the fourteen indicated that immunities that the introduction in the EU instrumentarium was only a formal change since it was already applied based on international law. It was also suggested that the immunity exception can be brought under *ordre public*, hence the practice already existed which means that the formal introduction cannot be considered a step back.

The argument that the refusal ground follows from international public law cannot be accepted, for the simple reason that the immunity as formulated in the EU cooperation instruments is vague and all too often interpreted to also encompass purely national immunities. Looking at the international law, it is true that diplomatic immunity flows from customary international law.<sup>182</sup> However, it is regulated strictly in the Vienna Convention on Diplomatic relations and applies only to clearly defined persons.<sup>183</sup> Naturally, it does not, for example, cover parliamentarians. State officials as defined in the Convention performing in their official capacity are exempt from foreign law when the acts and transactions being carried out are directly correlated to their official function. This immunity can be circumvented; regarding core crimes, it should be noted that modern state practice and *opinio juris* deny immunities for core crimes to all former and incumbent state officials with the sole exception of the highest state representatives such as Heads of State or ministers for foreign affairs; and even those persons are protected only while in office.<sup>184</sup> The above shows that international law only provides with immunity for clearly defined 'State officials', under the condition that they acted in their official capacity and that the actions have been carried out in direct correlation with their official function. There is thus no international law basis protecting any official which a state wishes to name such, and additionally, even for those who answer to the

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<sup>181</sup> After all, in this instrument member states are required to give their consent in almost all instances. This is only different for the country of nationality: naturally, the country of nationality will generally prefer that the prison sentence is executed in its own territory, rather than in the territory of another member state. Consequently, it will not be inclined to rely on an immunity related refusal ground for the purposes of the FD Deprivation of Liberty.

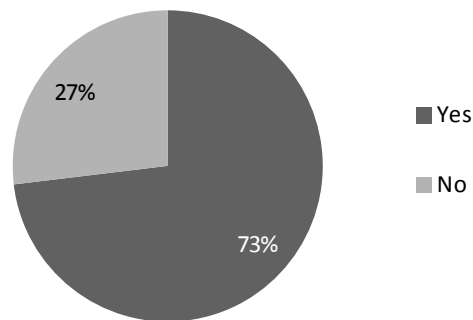
<sup>182</sup> Report of the International Law Commission on the work of its thirty-second session, UN GAOR, 35th Sess, Supp. No. 10, UN Doc. A/35/10 (1980) at 344.

<sup>183</sup> Art. 2, Vienna convention on diplomatic relations, 1961.

<sup>184</sup> WIRTH, S., "Immunity for core crimes? The ICJ's Judgment in the *Congo v. Belgium* case", *EJIL* 2002, vol. 13 no. 4, 877-893; ICJ, 14th February 2000, *The Arrest Warrant (Democratic Republic of Congo v. Belgium)*.

definition of 'state official' there are conditions to the immunity and it can be circumvented when core crimes are involved. Consequently, the vague formulation in the EU instruments poses difficult problems given that there is no common understanding throughout the Union of what constitutes an immunity or privilege, nor what the conditions are for such immunity/privilege to apply. When asked about this, nineteen member states agreed that this was indeed problematic.

**3.3.7 Do you consider it problematic that there is no common EU level understanding of what constitute immunities or privileges?**



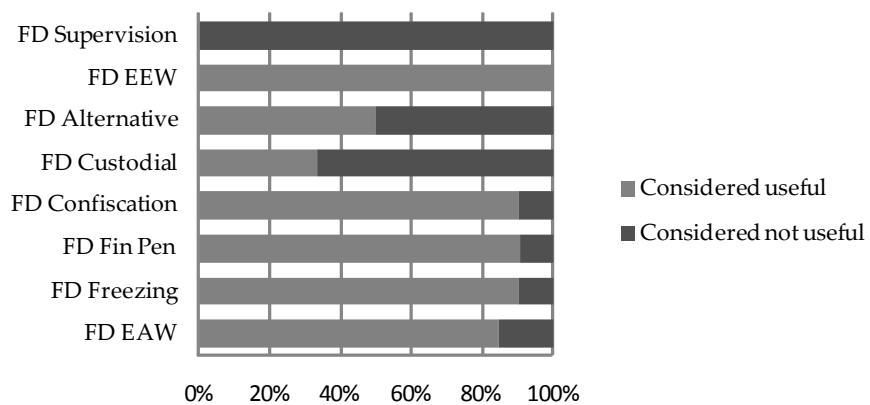
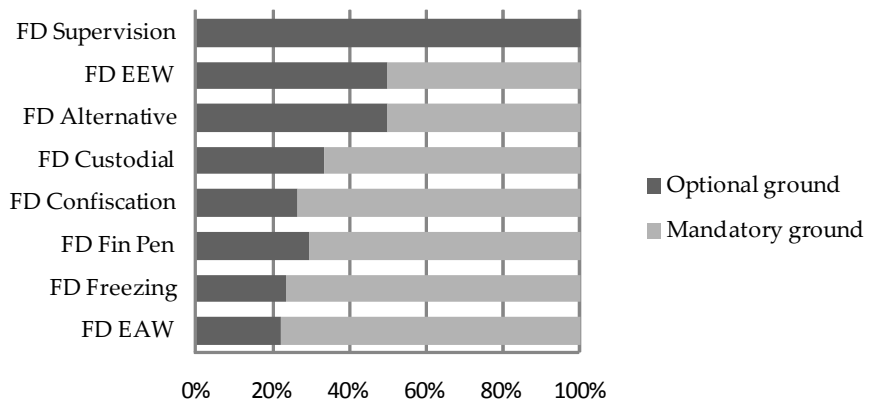
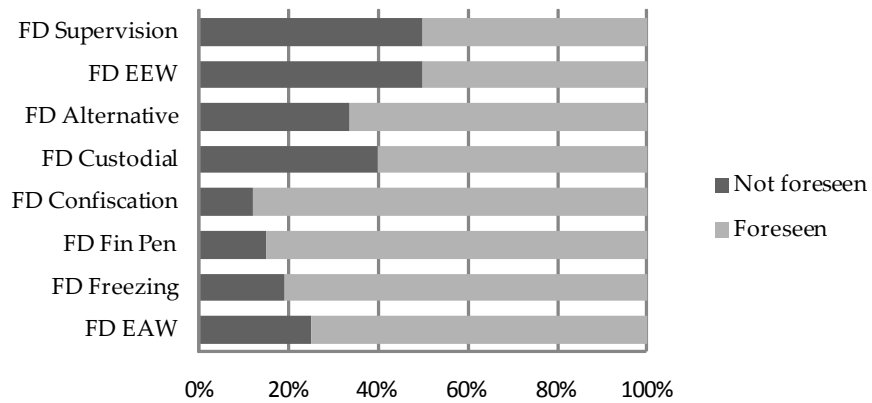
Therefore, in order to discuss the existence of the refusal ground both in light of the international law argument and in the context of EU law specifically it is indispensable to define what is meant by "immunities and privileges" in the EU instrumentarium.

It be noted that the percentages listed in the first two statistics below need to be seen in light of de limited implementation status of the concerned instruments.<sup>185</sup> The third one however, considering the usefulness of the concerned refusal ground, does allow to answer from a national law perspective, based on practical experiences. It gives an overview of the policy views regarding the (un)useful character of immunity/privilege as a refusal ground, regardless of the implementation status.

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<sup>185</sup> *Infra*, 3.6.2.

**3.3.8 What is the position of “immunity or privilege” as a ground for refusal in your national implementation law?**



– Immunity from prosecution

The second immunity related ground for refusal or non-execution is *immunity from prosecution for the same facts*. Linked to the *ne bis in idem* principle, the project team considers it vital to discuss the *immunity from prosecution for the same facts*. This entails the situation where the proceedings in the issuing member state relate to a person who the executing member state has granted immunity from prosecution for the same facts as a benefit for his or her collaboration with justice. The project team considers it crucial that when immunity from prosecution is granted in a member state, and this member state is asked to – for example – execute an order for execution of a sentence or to execute a EAW concerning the same facts, it refuses that cooperation. This would be a mere logical complement or extension of the *ne bis in idem philosophy* underlying the *Gözütok/Brügge* ECJ jurisprudence referred to above. In the chapter below on EU-issues the project team takes that reasoning even one step further<sup>186</sup>: instead of only being applied as a refusal ground, the project team advocates a system of mutual recognition of immunity from prosecution.

In that decision the ECJ developed important guidelines for the interpretation of *ne bis in idem* in the context of the SIC. The court's ruling has the merit of interpreting and, thus, clarifying the meaning of the expression 'finally disposed of' (for the application of the *ne bis in idem principle*), contained in Art. 54 SIC. The interpretation of the words 'finally disposed of' can and should also be applied to the wordings 'final judgments' from Art. 3, par. 2 FD EAW: this article contains a mandatory refusal ground when the person concerned has been finally judged in another member state. The project team refers to this article, because all the other *ne bis* articles in the EU cooperation instruments merely refer to the concept without elaborating on its meaning<sup>187</sup>. The point is that the interpretation of 'finally disposed of' from Art. 54 SIC can and should be applied to the strict concept of *ne bis* as defined in Art. 3, par. 2 FD EAW as implied in the referral to the principle in virtually all cooperation instruments, meaning to final decisions regarding the same facts. While making it obvious that proceedings in which a court/judicial decision is involved satisfy the requirements of the expression, the court clearly stated that this is also the case where criminal proceedings have been discontinued by a decision of an authority required to play a part in the administration of criminal justice in the national legal system concerned. In other words, it was said that where further prosecution is definitively barred, even if the decision causing this is not taken after a trial, this should also be seen as a case which has been finally disposed of. In the case at hand it concerned a decision to discontinue the criminal proceedings after the person involved had accepted offers made by the Public

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<sup>186</sup> *Infra* 5.3.2.

<sup>187</sup> *Supra* 3.3.3.6.



Prosecutor's Office to pay certain amounts of money. The project team submits that this should be interpreted broadly, and not only apply to that specific example: whenever a decision, regardless of whether it was made by a judge or not, has been definitively ended, it should be seen as a case which has been finally disposed. In other words, the jurisprudence should not only be applied to that one example situation it treats, but to any decision putting a definitive end to the prosecution in another member states, obviously on the condition that it concerns the same facts. Granting immunity from prosecution is such a decision. It should be noted that following *ne bis*-related jurisprudence indicates that discussion can be possible regarding the final character of the involved decisions; the *bis*-aspect of a judgment is depends on the national legislation, as opposed to the *idem*-aspect, which is granted an autonomous meaning in a cross-border context.<sup>188</sup> Therefore, the project team advocates, first, to also agree upon a clear description of what is to be regarded as 'final' on the one hand, and to for those decisions where the definitive character is undisputable, apply the *Gözütok/Brügge* jurisprudence and thus install an – at least optional – refusal ground for this type of decision.

A significant majority of member states apply the *ne bis in idem* principle with regard to decisions not to prosecute. This mostly applies to decisions made by those member states' own authorities but also to a considerable extent to similar decisions made by other member state authorities. Caution is warranted in this regard: after all, a 'decision not to prosecute' can take many different forms and does not always imply that the case becomes definitively impossible to prosecute. However, several of the member states which ticked this box for such decisions made by other authorities indicated at the focus group meetings that, when they ticked this box, they indeed had the situation in mind where the decision not to prosecute would indeed have a definitive effect. It thus seems that the replies can indeed be interpreted as meaning final decisions not to prosecute, in other words, those decisions to which *Gözütok/Brügge* applies according to the project team. However, the results should be interpreted as being an indicator for final decisions not to prosecute, yet not exclusively. Be that as it may, those member states who had a non-definitive decision not to prosecute in mind when ticking the decision not to prosecute box, can *a fortiori* be assumed to attach a *ne bis in idem* effect to decisions granting immunity from prosecution, given that this puts a final end to the prosecution. Additionally, in a previously conducted study<sup>189</sup> roughly  $\frac{3}{4}$  of the interviewees indicated that they

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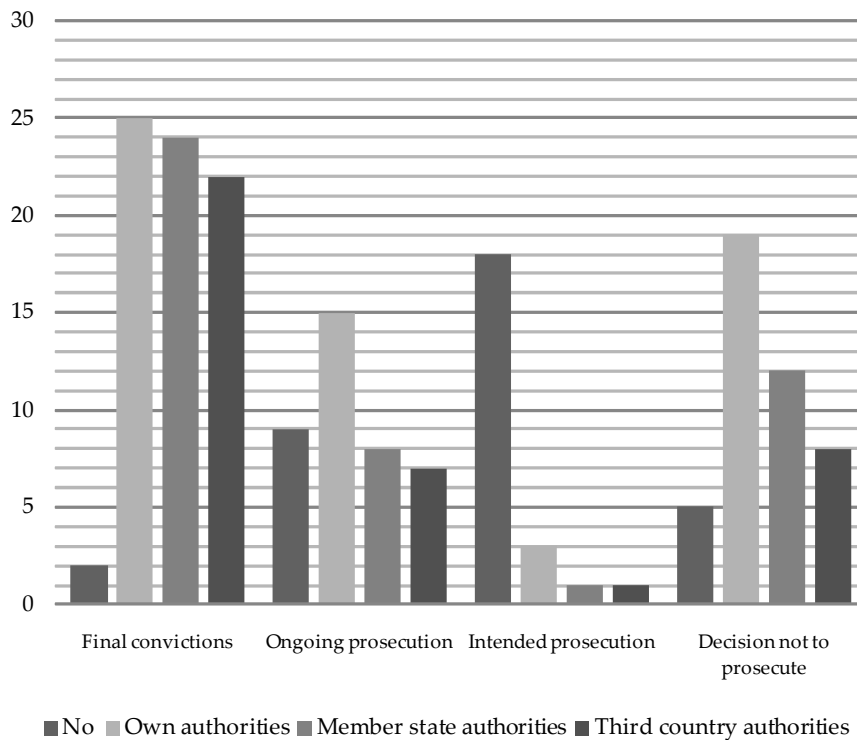
<sup>188</sup> ECJ, Case C- 261/09, Gaetano Mantello [2010] ECR, n.y.r.

<sup>189</sup> G. Vermeulen, W. De Bondt and Y. Van Damme (2010), *EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence?*, Antwerpen-Apeldoorn, Maklu.

would accept the introduction of a ground for refusal or non-execution on the basis of immunity from prosecution.

In conclusion, the introduction of a refusal ground for immunity from prosecution is not only a logical application of the ECJ jurisprudence, it is also politically feasible, as shown in the figure below.

**3.3.1 What type of situations can give rise to the application of the ne bis in idem principle according to your national law?**



As said above, the interpretation of *Gözütok/Brügge* should not only apply to the phrase ‘finally disposed of’ in Art. 54 SIC, but also to the EU cooperation context as such. Building on that premise, the explanation of ‘finally disposed of’ should consequently apply to the phrase ‘finally judged’ from Art. 2, par. 3 FD EAW. This reading implies that any situation by which the prosecution is definitively barred, i.e. full immunity from prosecution, should *in principle* (the system suggested is more nuanced, see below) qualify as a mandatory refusal ground in the context of the EAW. This, however, is not the case today. Looking back at Art. 4, par. 3 FD EAW, it becomes apparent that the second situation described in that refusal ground precisely deals with how *Gözütok/Brügge* should

be read: indeed, it refers to a final judgment which has been passed upon the requested person in another member state, in respect of the same acts, which prevents further proceedings. Due to the particular sensitivity of the issue, however, the project team proposed to introduce a nuanced system, with a built-in level of scrutiny carried out by Eurojust. The choice for Eurojust in this regard should not be surprising, given that this institution is, according to art. 85 TEU, required to “support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more member states”. Additionally, it already plays a successful role in relation to multiple prosecutions, and facilitating judicial cooperation and coordination of investigations is its natural task; because of its experience in this field, this institution has a particularly privileged position.<sup>190</sup> The TFEU provision regarding the strengthened competences does not only represent a solid legal basis for the elaboration of the competences, the regulation which will contain this elaboration can be expected shortly: as a matter of fact, according to the Commission’s Action Plan implementing the Stockholm programme, the proposal should have been presented by 2012.

It is recommended to leave it to the member states how heavily they want the immunity they have granted, to prevent cooperation regarding that person, throughout the entire European Union. In case they want to be able to guarantee that all member states will refuse cooperation regarding the same facts committed by that person, they should seek out the fiat of Eurojust to grant such immunity. The project team propose to make the involvement of Eurojust obligatory in case of “EU-worthy” crimes: as is proposed below (5.2), in the future, a set of offences needs to be defined based on the EU level offence classification system; for those offences Eurojust needs to be attributed competences reaching further than those existing today. In the view of the authors, “EU-worthy” offences are offences affecting several member states and being of such importance that a supra-national approach is warranted (e.g. such as organised crime). In relation to the EU-worthy offences where Eurojust’s opinion is positive, and in relation to all other crimes, the following mechanisms are proposed. Seeking out Eurojust’s advise (obligatory for the core-crimes, optional for others) allows a level of scrutiny regarding the granting of the immunity: if Eurojust opinions that there were indeed valid reasons for granting immunity, reasons which do not merely touch upon national interests, it is justifiable that any EU member state should refuse cooperation regarding the concerned collaborator with justice. In that case, *Gözütok/Brügge* should apply fully: through the inclusion of Eurojust scrutiny, the arguments voiced above, mentioning the far-going effect and often national reasons for the granting of

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<sup>190</sup> SPIEZIA, F., “How to improve cooperation between member states and European Union institutions so as to better ensure the protection of whistleblowers”, Trier, ERA, 2011.

immunity, become invalid and a mandatory refusal ground in the sense of Art. 3, par. 2 FD EAW should apply. Without Eurojust's fiat, however, the refusal ground should be merely optional. It be stressed that member states remain free to grant the immunity or not, it is merely the effect on cooperation which changes. The effect on cooperation changes in the sense that in these cases, the requested/executing member states should decide whether or not they wish to cooperate. Consequently, an optional refusal ground in the sense of Art. 4, par. 3 FD EAW should apply. Naturally, the likelihood of the requested/executing member state calling on this refusal ground is far greater when it is that state which granted the status of collaborator with justice to begin with.

The above results show that there are several uncertainties regarding the application of immunity from prosecution as a refusal ground and that far from all member states apply it as a refusal ground. Consequently, there are many variations throughout the member states and someone who was granted immunity from prosecution in one member state cannot be sure to be immune from prosecution for the same facts in another member state. A first step should be to at least make the refusal ground explicit in all cooperation instruments, and apply it with a built-in level of scrutiny as described above. However, the project team believes that this would not suffice and that there is a need for a system of mutual recognition of immunity from prosecution granted to collaborators with justice.<sup>191</sup>

### 3.3.3.8 Amnesty and Pardon

The eighth type of refusal grounds are those related to the application of amnesty and pardon. A thorough analysis of the legal instrumentarium leads to the overview included in the following table.

Amnesty <sup>192</sup>	
CoE Extradition	<i>2<sup>nd</sup> protocol (amnesty has been declared in the requested state )</i>
CoE ECMA	None.
CoE Cond Sentenced	<i>Article 7, par. 1, e : shall be refused in case of amnesty in requesting or requested state.</i>
CoE Transfer Proceedings	Link with ne bis in idem for this instrument.
CoE Validity	<i>Article 10, par. 2 j.° article 12, par. 1 . Both states can grant amnesty and in those cases the requested state shall discontinue enforcement.</i>

<sup>191</sup> Infra 5.3.2.

<sup>192</sup> When italics are used, this indicates that the refusal ground is mandatory.

Amnesty <sup>192</sup>	
CoE Transfer Sentenced Persons	<i>Not explicitly mandatory, but implied. Article 12. Each Party may grant pardon, amnesty or commutation in accordance with its Constitution/law.</i>
SIC	None.
EU MLA	None.
FD EAW	<i>Article 3, par. 1. The offence is covered by amnesty in the EMS, where that State had jurisdiction to prosecute the offence under its own criminal law.</i>
FD Freezing	None.
FD Fin Pen	<i>Not explicitly mandatory, but implied. OK Article 11, par. 1. Amnesty and pardon may be granted by the IMS and by the EMS.</i>
FD Confiscation	<i>Not explicitly mandatory, but implied. Art. 13, par. 1. Amnesty and pardon may be granted by the IMS and by the EMS.</i>
FD Deprivation of Liberty	<i>Not explicitly mandatory, but implied. Article 19, par. 1. Amnesty and pardon may be granted by the IMS and by the EMS.</i>
FD EEW	None.
FD Alternative	<i>Not explicitly mandatory, but implied. Article 19, par. 1. Amnesty and pardon may be granted by the IMS and by the EMS.</i>
FD Supervision	None.
FD Jurisdiction	None.
General Approach EIO	None.

The EU instrumentarium is straightforward and consistent in this context, as was the case with the CoE conventions (see table). Furthermore, it is only logical that the refusal ground was not included in the FD Supervision given that amnesty and pardon are non-reoccurring measures concerning existing convictions without resorting effect on future convictions. Given that supervision forms part of the pre-trial phase and consequently does not constitute a final conviction, it is logical that considerations regarding amnesty and pardon would be out of place in that particular framework decision. It is commendable that when lists of refusal grounds are considered for a certain instrument the concrete usefulness of every single one is thoroughly assessed before including it, instead of copying entire lists without really tailoring them to that particular instrument, a mistake which was made more than once in the past.

3.3.3.9 *In absentia*

The ninth type of refusal grounds are those related to the application of amnesty and pardon. A thorough analysis of the legal instrumentarium leads to the overview included in the following table.

In absentia <sup>193</sup>	
CoE Extradition	Article 3 second protocol. Requested State may refuse when defense rights not sufficient due to trial in absentia, unless requesting State reassures that right to retrial was offered.
CoE ECMA	None.
CoE Cond Sentenced	Article 7, par. 2, c. The sentence to which the request relates was pronounced in absentia.
CoE Transfer Proceedings	None.
CoE Validity	None.
CoE Transfer Sentenced Persons	None.
SIC	None.
EU MLA	None.
FD EAW	Many circumstances can preclude the refusal. Article 4 a. Different from other MR instruments: when he was not personally served with the decision: not necessarily RG.
FD Freezing	None.
FD Fin Pen	Article 7, par. 2, g. The person concerned, in case of a written procedure, was not, in accordance with the law of the issuing State, informed personally or via a representative, competent according to national law, of his/her right to contest the case and of the time limits for such a legal remedy. Many circumstances can preclude the refusal. Article 7, par. 2, i. Point j: specific, different from FD EAW, Confisc, Cust and Alt: waive right to appear in person. Point g also differs from other instruments.
FD Confiscation	Optional, yet many circumstances can preclude the refusal. Article 8, par. 2, e.
FD Deprivation of Liberty	Id. FD Confiscation. Article 9, par. 1, i.

<sup>193</sup> When italics are used, this indicates that the refusal ground is mandatory.

FD EEW	None.
FD Alternative	Id. FD confiscation and FD Deprivation of Liberty. Article 11, par. 1, h.
FD Supervision	None.
FD Jurisdiction	None.
General Approach EIO	None.

Because of the diversity in the rules relating to in absentia trials, for long it was unclear how this related to the mutual recognition obligations. The intervention of the 2009 FD absentia has now become a classic example of a trustbuilding standard which was introduced in order to facilitate cooperation (cfr. Art. 82 TFEU)<sup>194</sup>. Only two of the listed Council of Europe Conventions contained such a refusal ground; in contrast several framework decisions included it: FD EAW, FD Fin Pen, FD Confiscation, FD Deprivation of Liberty and FD Alternative. The wording is mostly the same in all framework decisions, except for the EAW, which contains an extra exception on the refusal ground, compared to the FD Fin Pen, FD Confiscation and FD Deprivation of Liberty. Art. 4a, 1, d FD EAW contains an extra situation in which the in absentia ruling cannot be a refusal ground, in other words, in other words there is an extra situation in which the executing member state must execute an order even if the decision leading to the order could be qualified as a decision in absentia. It concerns the situation where the person was not personally served with the decision but (i) will be personally served with it without delay after the surrender and will be expressly informed of his or her right to a retrial or an appeal and (ii) will be informed of the time frame within which he or she has to request such a retrial or appeal, as mentioned in the relevant European arrest warrant. The fact that this 'exception' to the refusal ground is foreseen in the FD EAW and not in the other framework decisions containing similar provisions regarding in absentia, is understandable and commendable. After all, the provision deals with the situation where the person was not personally served with the decision. This situation is tailored to the situation of the EAW: it is only in case of (execution) EAW's that the person will not have been present at the time of conviction. Indeed, chances are high of the person being in another country already at the time of conviction. In the FD Deprivation of Liberty, it is the other way around.

The FD Freezing does not contain an in absentia refusal ground. This too, is logical: freezing only constitutes a preliminary measure vis a vis property or evidence. It is not a true sanction which means that there is no danger for an in absentia ruling. The same logic applies to the FD Supervision: given that supervision forms part of the pre-trial phase and consequently does not

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<sup>194</sup> *Infra* 3.4.

constitute a final conviction, it is logical that considerations regarding in absentia would be out of place in that particular framework decision.

Considering that since the 2009 framework decisions the in absentia trials are no longer a contentious subject in the context of cooperation, no specific questions were asked in the questionnaire.

### 3.3.3.10 *Extra-territoriality*

The tenth type of refusal grounds are those related to the application of the extra-territoriality principle. A thorough analysis of the legal instrumentarium leads to the overview included in the following table.

(Extra)territoriality <sup>195</sup>	
CoE Extradition	Article 7, par. 1. The requested Party may refuse to extradite a person claimed for an offence which is regarded by its law as having been committed in whole or in part in its territory. Article 7, 2. When the offence committed outside the territory of the requesting Party, refusal allowed only if law of requested Party does not allow prosecution for the same category of offence (when committed outside its territory).
CoE ECMA	None.
CoE Cond Sentenced	None.
CoE Transfer Proceedings	Article 11, 1, h. The offence was committed outside the territory of the requesting State.
CoE Transfer Sentenced Persons	None.
CoE Validity	Article 6, g. where the act was committed outside the territory of the requesting State.
SIC	None.
EU MLA	None.
EU MLA <sup>196</sup> Protocol	None.

<sup>195</sup> When italics are used, this indicates that the refusal ground is mandatory.

<sup>196</sup> Banking secrecy no refusal ground: Art. 7 Prot EU MLA.



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FD EAW	Article 4, 7. Where the EAW relates to offences which: (a) are regarded by the law of the EMS as having been committed in whole or in part in its territory; or (b) have been committed outside the IMS territory and the EMS law does not allow prosecution for the same offences committed outside its territory.
FD Freezing	Article 7, 2, d. d) The decision relates to acts which: i) are regarded by the law of the EMS as having been committed in whole or in part in the territory of the EMS, or ii) have been committed outside the territory of the IMS and the law of the EMS does not allow prosecution for the same offences when committed outside its territory;
Fin Pen	Article 7, 2,d. The decision relates to acts which: i) are regarded by the law of the EMS as having been committed in whole or in part in the territory of the EMS or ii) have been committed outside the IMS territory and the EMS law does not allow prosecution for the same offences when committed outside its territory;
FD Confiscation	Article 8, 2, f. The offence is, under the law of the EMS, regarded as having been committed wholly or partly within its territory or were committed outside the territory of the IMS, and the EMS law does not permit legal proceedings to be taken in respect of such offences committed outside its territory.
FD Prior convictions	None.
FD Deprivation of Liberty	Article 9, 1, l. The judgment relates to criminal offences which under the EMS law are regarded as committed wholly or for an essential part within its territory. (par.2 contains extra guidance for the application).
FD EEW	Art. 13, 1, f . Offences which under the law of the EMS are regarded as having been committed wholly or for an essential part within its territory, or were committed outside the territory of the IMS, and the law of the EMS does not permit legal proceedings to be taken in respect of such offences where they are committed outside its territory.
FD Alternative	Article 11, 1, k. The judgment relates to criminal offences which under the law of the EMS are regarded as having been committed wholly or for an essential part within its territory.
FD Supervision	None.

General Approach EIO	Art. 10, 1, f) Recognition/execution may be refused when the EIO relates to a criminal offence which is alleged to have been committed exclusively outside the territory of the IMS and wholly or partially on the territory of the EMS.
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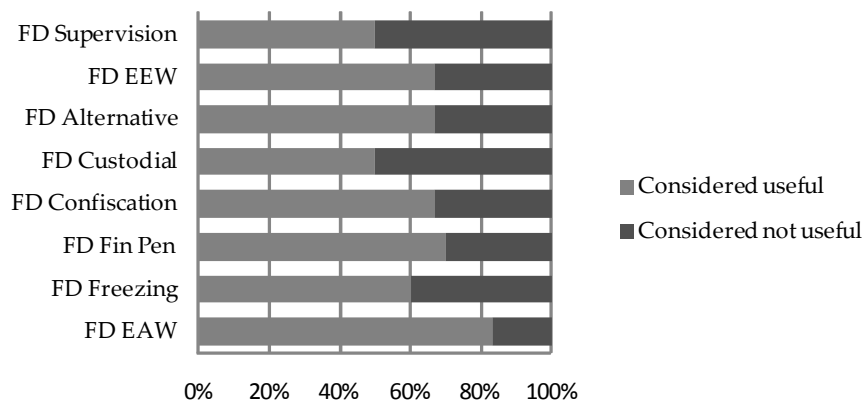
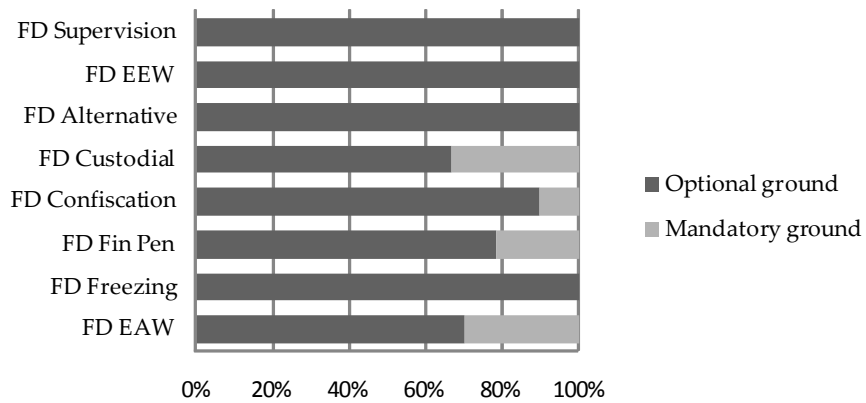
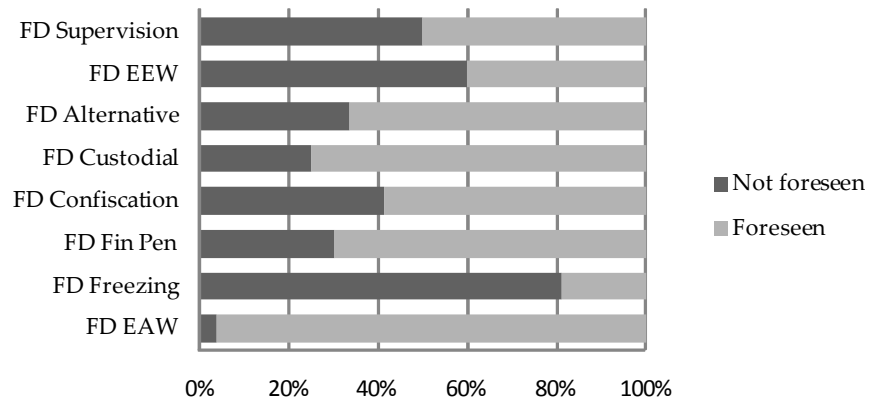
In extradition law, this refusal ground has always taken a prominent place. Traditionally, it did not form part of mutual legal assistance regulations (e.g. ECMA, EU MLA), yet the EEW did introduce the refusal ground. However, copying it into an MLA instrument seems a mistake, and is regrettable. Extradition and surrender law cannot be simply assimilated with MLA. The project team therefore opposes introduction of it in future MLA instruments, and proposes its deletion from the EEW. It therefore regrets that this refusal ground was retained in the General Approach EIO.

From the replies to question 3.3.10 it can be concluded that the refusal ground is absent in 80% of the national implementations of the FD Freezing and that it features in almost all EAW transpositions. The project team is in favour of keeping this refusal ground since it can help prevent unrestrained jurisdiction conflicts.

Only in a minority of cases, the refusal ground was made mandatory. This goes for all instruments. Even though only a few replies were listed concerning the FD Deprivation of Liberty, it shows that again this framework decision has the lowest score concerning usefulness. This is very logical, however: the person has already been convicted and he will get his sentence, whether or not the executing member states decides to execute or to refuse. The matter of extra-territorial jurisdiction seems to have become rather irrelevant in this context.

It be noted that the percentages listed in the first two statistics below need to be seen in light of the limited implementation status of the concerned instruments. The third one however, considering the usefulness of the concerned refusal ground, does allow to answer from a national law perspective, based on practical experiences. It gives an overview of the policy views regarding the (un)useful character of extra-territoriality as a refusal ground, regardless of the implementation status.

**3.3.10 What is the position of “(extra)territoriality” as a ground for refusal in your national implementation law?**



3.3.3.11 *Sanction/sentence too low*

The eleventh type of refusal grounds are those related to the concern that the sentence is too low. Considerations regarding the height of the sanction are not always explicitly listed as a refusal ground throughout the different instruments. However, for the sake of completeness, all related provisions (explicit refusal ground or not) will be listed. A thorough analysis of the legal instrumentarium leads to the overview included in the following table.

Sanction/sentence too low <sup>197</sup>	
CoE Extradition	<i>Article 2, par. 1. Extradition shall be granted in respect of offences punishable under law requesting and requested party for detention/custodial of a maximum period of min 1y. Where a conviction and prison sentence have occurred or a detention order has been made in the territory of the requesting part, the punishment awarded must have been for a period of min 4m.</i>
CoE ECMA	Article 5, par. 1, b. Any Contracting Party may reserve the right to make the execution of letters rogatory dependent on the fact that that the offence motivating the letters rogatory is an extraditable offence in the requested country.
CoE Cond Sentenced	None.
CoE Transfer Proceedings	None.
CoE Transfer Sentenced Persons	Article 3,1,c. Transfer only possible if (amongst others) at the time of receipt of the request for transfer, the sentenced person still has min 6m of the sentence to serve or if the sentence is undeterminate.
CoE Validity	None.
SIC	Article 51. Punishable under law of both States by a custodial/detention of a maximum period of min 6m, or punishable under the law of one of the States by an equivalent penalty and under the law of the other State by virtue of being an infringement of the rules of law prosecuted by administrative authorities, if appeal open before court competent in criminal matters.
EU MLA	None.

<sup>197</sup> When italics are used, this indicates that the refusal ground is mandatory.

ENHANCED STRINGENCY IN COOPERATION

EU MLA Protocol	Article 1,3. Cooperation obligation only applies when it concerns an offence punishable by a custodial sentence/detention order of a maximum period of min 4y in requesting and min 2y in requested state.
FD EAW	Article 2, 1 EAW: EAW may be issued for acts punishable by IMS law by a custodial/detention order for a maximum period of min 12m or, sentence passed/detention order made, min 4m.
FD Freezing	No threshold as such; only regarding the 32 MR list which only applies for offences punishable in the IMS by a custodial sentence of a maximum period of at least three years.
Fin Pen	Article 7, par. 2, h. Cooperation may be refused when the financial penalty is below EUR 70 or the equivalent to that amount. No threshold within 32 list.
FD Confiscation	No threshold as such; for the 32 MR list: no threshold for EMS, IMS maximum penalty of min 3y.
FD Prior convictions	None.
FD Deprivation of Liberty	None.
FD EEW	For 32 MR list (which is only necessary when necessity search or seizure given that outside that scope there is no need for DCT as such): no threshold for EMS, IMS maximum penalty of min 3y.
FD Alternative	Article 11, par. 1, j. Cooperation may be refused if the probation measure or alternative sanction is of less than six months' duration. For 32 MR list: no threshold for EMS, IMS maximum penalty of min 3y.
FD Supervision	For 32 MR list: no threshold for EMS, IMS maximum penalty of min 3y.
General Approach EIO	None.

The following paragraphs will cover a broad range of considerations related to the question whether the sentence is too low or not: sanctions thresholds, remaining parts of sentences etc. will be included.

Without being an actual sanction threshold, closely related is the instance in which the part of the sentence which is still to be served is not sufficient as to justify the execution of a cooperation order. Art. 9, par. 1, h FD Deprivation of Liberty foresees an optional refusal ground when at the time the judgement was

received by the authority of the EMS, less than six months of the sentence remain to be served. This provision closely resembles Art. 11, par. 1, j FD Alternative, which foresees an optional refusal in case the probation measure or alternative sanction is of less than six months' duration, which in turns reminds of Art. 2, par. 1 FD EAW where the threshold is – if a sentence has been passed or a detention order has been made – a sentence of at least four months. In this provision however, the refusal is mandatory in the sense that no EAW's can be issued for imposed sentences less than four months. A difference was made regarding both the binding character and the length of sentences. Did the EU have valid reasons for these differences or are these mere inconsistencies which need to be cleared up? As ever, the answer is nuanced, yet the prevailing conclusion is that those provisions can hardly be called consistent.

Firstly, the difference between mandatory (EAW) and optional (Custodial, Alternative) seems to make sense. Indeed, the measures simply are different in nature: the mandatory nature of the refusal ground in the FD EAW (or more precisely: the prohibition to issue an EAW when the imposed sentence is lower than six months) is mere logic: surrendering a person in case a sentence of not even four months was imposed is undesirable and does not seem justified in light of proportionality.<sup>198</sup> Given that the FD Alternative deals with liberty limiting and not liberty depriving sanctions it seems acceptable that the sentence threshold is merely an optional refusal ground in that case. Regarding the FD Deprivation of Liberty, despite it dealing with actual liberty deprivation, the optional character seems to be justifiable(at first glance): the executing member state needs to be able to choose not to execute, if they reason that – after having spent most of the sentence in the IMS anyway – the transfer of execution is not worth the trouble anymore for the short amount of time the sentenced person has left in custody. It not being mandatory seems acceptable, with one important exception: when the person involved does not want to complete the remainder of his sentence abroad. Indeed, if surrender is not possible when the sentence is lower than x months, it should equally be impossible to have the person sit the remainder of his sentence abroad against his wil. Indeed, in that case, the FD Deprivation of Liberty refusal ground should be mandatory. In sum, even though the difference in the mandatory/optional nature of the refusal grounds seems justifiable at first sight, when having a closer look this difference is inconsistent and should be set right, in particular when the person involved does not want the cross-border execution of his sentence.

Secondly, the difference in threshold can be explained historically: the 4 months in the EAW seems to have been copied from Art. 2, par. 1 of CoE Convention on Extradition,<sup>199</sup> whereas the 6 months from the FD Deprivation of

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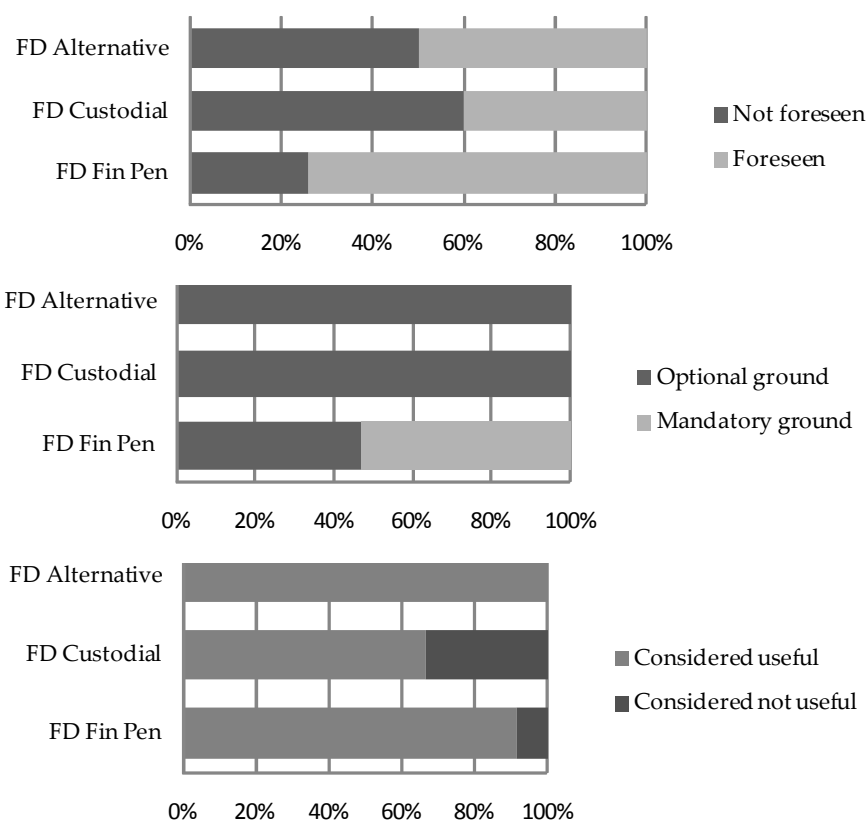
<sup>198</sup> *Supra* 3.3.1.

<sup>199</sup> COUNCIL OF EUROPE (1957), 13 December 1957, "European Convention on Extradition", Paris, *CETS* 024.

Liberty is inspired by Art. 3, par. 1, c of the CoE Convention on the transfer of sentenced persons.<sup>200</sup> Given that the FD Alternative and the FD Deprivation of Liberty were negotiated simultaneously, it does not surprise that the former used the same threshold as the latter. Even though the difference can thus be explained based on historical arguments, consistency would still be served if these threshold would be equalized. In order to avoid unnecessary hindrance of the surrender mechanism, the project team suggests to bring down the 6 months from the FD Alternative and FD Deprivation of Liberty to 4 months.

The survey concerning sentence being too low only included those provisions where the sentence threshold is explicitly stated as a refusal ground. The results are shown below. It be noted that the percentages listed need to be seen in light of de limited implementation status of the concerned instruments.

**3.3.16 What is the position of “the sentence being too low” as a ground for refusal in your national implementation law?**



<sup>200</sup> COUNCIL OF EUROPE (1983), 21 March 1983, “European Convention on the Transfer of Prisoners”, Strasbourg, *CETS* 112.

### 3.3.3.12 *Specific to deprivation/restriction of liberty – Role of person concerned*

Some refusal grounds are by nature specific to measures involving a deprivation or limitation of liberty or to situations where persons subject to such measures are involved. The refusal ground based on the time (which is left of) a liberty depriving sanction was dealt with above under the refusal ground 'sentence too low'.

In Art. 10 FD Deprivation of Liberty there is a possibility for the EMS to refuse partially: when it could consider recognition of the judgment and enforcement of the sentence in part, it can negotiate with the IMS and if both member states reach an agreement the sentence can be executed partially by the EMS. However, this is only allowed if such partial recognition/enforcement does not result in the aggravation of the duration of the sentence.

Also specifically tailored to deprivation of liberty is Art. 5, par. 1 FD EAW concerning life sentences or lifetime detention orders in the IMS. The execution of the EAW may be subject to the condition that the IMS has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years. Conditions concerning clemency can also be imposed.

The choice of which MS the order is sent to is another example of these nature-specific refusal grounds. Again, the analysis is broad in the sense that it also includes those rules which are not literally drafted as a refusal ground, but which do have an effect on the stringency of cooperation. This is one of the areas in which the consent of the individual plays a considerable role.

The role attributed to the individual has an interesting effect on the stringency of cooperation. Indeed, the less the consent of the member state is required, the more stringent cooperation becomes; a logical and straightforward conclusion. The consent of the individual plays a more complex role: in some instances it is a mere 'extra safeguard' for the person concerned and does not necessarily make cooperation more stringent, given that the consent of the member state involved is still required as well. In other cases however, the consent of the individual overtakes the (absence of) consent of the member state involved, for example Art. 11, par. 1, b FD Alternative. This provision foresees an optional refusal ground when the requirements of Art. 5, par.1 or 5, par. 2 FD Alternative are not met. Art. 5, par. 1 FD Alternative determines to which countries the requests can be sent: the member state in which the person is lawfully and ordinarily residing, provided that the person has returned or wants to return to that state. Without the person's consent, the state of residence can thus not be asked to execute the alternative sanction. The 2nd paragraph foresees a considerable role for the individual: on request of the person involved, the request can also be sent to other states than the state where he ordinarily resides. However, the request of the individual is combined with the consent of state concerned who has to agree before having to execute the request. The same rule applies to the FD Supervision (Art. 9, par. 1 and 2 FD Supervision).



In the CoE Convention on conditionally sentenced persons, the rule was much more straightforward: following Art. 6 CoE conditionally sentenced persons, the supervision, enforcement or complete application of the sanction shall be carried out following a request to the state in whose territory the offender establishes his ordinary residence. A (small) role was foreseen for the individual, a role which was elaborated in the context of the EU cooperation instruments, in light of the free movement within the EU. The linkage between place of residence and the choice for executing (requested) member state has thus lost strength over time. Not only was a possibility created to ask other states, the refusal when the applicable rules were not respected are only optional (cfr. FD Alternative); in contrast the CoE Convention on conditionally sentenced persons states that the request shall be carried out by that particular MS, thus implying that if another MS were asked to execute the request, it would have to refuse.

In the CoE Convention on transfer of sentenced persons, first of all, only the member state of which the person is a national is an option in terms of where he can be sent (Art. 3, par. 1, a CoE Transfer of sentenced persons). In terms of role of the administering member state and the person concerned, the rule was very straightforward: Art. 3, par. 1, d and f Transfer of sentenced persons require the consent of both the transferred person and the administering state.

The rule is loosened, however, through the 1997 Additional Protocol: Art. 2, par. 3 1997 Additional Protocol explicitly states that consent of the person involved is not necessary in case he flees to his country of nationality after having been finally judged in another country. Art. 3, par. 1 Additional Protocol also excludes the consent, namely when the sentence passed in the sentencing state also includes a deportation order. Granted, the 2nd paragraph foresees that the person must be heard, but in essence, his/her consent is no longer needed.

With the introduction of the FD Deprivation of Liberty, the loosening of the consent requirement went a step further. In principle, the subject of the custodial sentence has to give his consent before a request for transfer of execution can be made: Art. 6, par. 1. The ratio legis thereof is the very purpose of the Framework Decision, being the facilitation of the rehabilitation of the sentenced person. However, a closer look at the Framework Decision shows that the consent of the sentenced person is only necessary when it concerns another member state than the MS of which he/she has the nationality, the MS to which he/she will be deported, the MS to which he/she had fled following conviction. In other words, the consent is only needed when it concerns a MS outside these categories. Consequently, it is doubtful that the purpose, being true rehabilitation in society, is guaranteed through this consent system. The consent of the member states involved complicates the matter. Combining Art. 4 and Art. 6 FD Deprivation of Liberty, the rule can be summarized as follows:

Consent required for choice of EMS in FD Deprivation of Liberty <sup>201</sup>		
EMS in relation to the individual concerned	Consent of individual	Consent of MS
Country of nationality in which the person lives	-	-
Country of nationality to which the person will be deported	-	-
Country to which the person has fled	-	-
Other country than the three listed above	-	yes
Country to which the person involved has fled or otherwise returned	-	yes
Other country than the five listed above	yes	yes

Remarkable is that the country in which the person is residing, without it being its country of nationality, still requires the consent of the member state involved. Same goes for the country of nationality which does not fit the requirement of one of the first two rows in this table. Again, in light of the said purpose of the FD, the facilitation of the rehabilitation process, it is remarkable that if a person wants to sit his sentence in the country where he has been living (and where his social and arguably family life is situated), the country involved can prevent this by not given its consent. Art. 4, par. 7 FD Deprivation of Liberty deals with this matter: it foresees that each member state may notify the General Secretariat of the Council that – in its relations with other member states that have given the same notification – its prior consent is not required when:

- The person lives in and has been legally residing continuously for at least five years in the executing state and will retain a permanent right of residence in that state;
- The person is a national of the executing state in cases not dealt with in the first two rows of the above table.

The necessity for consent of the individual is remarkably low in the FD Deprivation of Liberty, to the extent that one could wonder how this will serve the ultimate goal of the framework decision: social rehabilitation of that individual. Indeed, persons can, against their will, be transferred to for example their country of nationality.<sup>202</sup> On the other hand, the possible countries to which he/she can be transferred have been opened up: provided that the involved state and individual consent, the country of residence which is different from the state of nationality also becomes a possibility. Considering that the relatives of the

<sup>201</sup> When italics are used, this indicates that the refusal ground is mandatory.

<sup>202</sup> MITSILEGAS, V. "The Third Wave of Third Pillar Law. Which Direction for EU Criminal Justice?" *European Law Review* 2009, 34 (4), p 523-560.

individuals are likely to also reside there, this can indeed serve the purpose of social rehabilitation. Essential is however, that for the four first countries listed in the table, no consent whatsoever of the individual is needed. From the focus group meetings it follows that the consent of the individual is indeed important, but that it should not be the only decisive factor. The project team concedes this, but at the same time recommends to develop clear guidelines, once again emphasizing that the choice of state should be centred around social rehabilitation and to open up the possibility for judicial review based on the violation of that rule.

Another instance in which the consent of the individual matters is the temporary transfer of persons in custody when requested by another state in order to appear as a witness or to take part in an investigation. The lack of consent of the person concerned is not determining, however. It being a merely optional refusal ground entails that it is possible to transfer a person in custody against his will, for the purpose of appearing as a witness or other ways of participating in investigations. Several instruments foresee an optional refusal ground when the person involved would not give his/her consent to the transfer: Art. 11, par. 1, b ECMA j.º Art. 3, par. 1, a 2nd Protocol ECMA; Art. 9 EUMLA requires requesting and requested MS to reach an agreement about the temporary transfer and foresee the option to require the consent of the transferred person. The EIO draft regarding specific measures<sup>203</sup>, Art. 19, par. 2, a drops the requirement of MS having to agree on the matter and foresees an optional refusal ground in case of lack of consent by the person involved; an arrangement that was kept in the General Approach EIO (which has now included the – amended – version of the draft on specific measures). Under the draft regarding specific measures, Art. 20, par. 2, a<sup>204</sup> foresaw the same system, but this has been deleted in the General Approach EIO.

The last example of an enhanced role of the individual concerns the rules applicable to specialty. The speciality principle provides that a person extradited/surrendered (see e.g. Art 27, par. 2 EAW) may not be prosecuted, sentenced or otherwise deprived of his/her liberty for an offence committed prior to his or her surrender other than those for which he or she was surrendered/extradited. This rule was designed in the context of an inherent distrust between member states: the underlying assumption was that there is a latent risk of maltreatment or disrespect for procedural/material safeguards in any member state and that the person involved should not even be given the opportunity to allow a member state whereto he/she is being surrendered, to prosecute him/her or other facts committed prior to the surrender. Indeed, the

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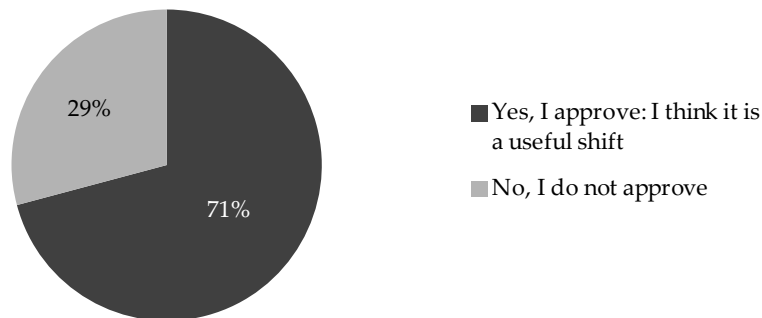
<sup>203</sup> COUNCIL OF THE EUROPEAN UNION, 1 July 2011, 2010/0817 (COD), on the specific measures set out in Articles 19-27 of the EIO initiative.

<sup>204</sup> Dealing with the temporary transfer to the executing State of persons held in custody for the purpose of conducting an investigative measure.

person was not allowed to renounce the specialty principle. In other words, individuals needed to be protected 'against themselves' in light of the presumed reality that in every member state there is a latent risk of not being treated as well as they should. Therefore, only the sending state – and not the person involved – was able to give its fiat to the receiving state for prosecuting the person for other crimes than those for which he/she was surrendered.

This reasoning has changed drastically. Indeed, the necessary consent is now shifting from the state to the person involved. In other words, where the concerned person used to be the object of consent, he now becomes the subject. First of all, Art. 13 FD EAW foresees a possibility for the person involved to consent to his/her initial surrender. More than 70% of the respondents found this to be a positive evolution.

**7.2.2 Do you approve of the shift in required consent from the concerned member state to the concerned person (Art. 13 FD EAW)?**



Secondly, Art. 27, par. 3 FD EAW states that the specialty principle does not apply (in other words, that a receiving state is allowed to prosecute for other facts committed prior to the surrender) when the person consented to his/her surrender or, if not, when the person explicitly renounced entitlement to the specialty rule. This evolution indicates that it is no longer considered irresponsible to let individuals decide that they do not mind that the receiving state would prosecute them for acts committed prior to their surrender.

### 3.3.4 *Limitation versus extension of refusal grounds*

#### 3.3.4.1 *Mutual Recognition of refusal grounds: not feasible nor desirable*

The case of 'mutual recognition of refusal grounds' will here be explained through the example of the European Arrest Warrant.

One might (wrongly) argue that no true mutual recognition applies to the decision to refuse surrender. Before turning to the opinion of the project team about this, first the statement is clarified with a simple example.

When A issues a European Arrest Warrant and B refuses to surrender, the requested person's freedom to travel will be restricted despite the refusal: the EAW is not withdrawn by the issuing member state and remains as an alert, with the likelihood that if the person travels to another MS (C), he or she runs the risk of being arrested (again) and going through a surrender procedure. Some wrongly draw from this that no true mutual recognition was applied. The reasoning mistakenly departs from the assumption that mutual recognition should apply 'in two directions' and that the IMS would consequently have to recognize the decision not to surrender as its own, which would entail that it would not use that very same EAW anymore as a basis for arrest and/or surrender by another member state.

This reasoning – and with it the very concept of mutual recognition of refusal grounds – is flawed. As explained earlier, mutual recognition merely concerns the trust from the executing member state in the issuing member state: it only concerns the matter of the executing member state recognizing and executing the decision of the issuing member state. A crucial mistake which is often made is to assume that mutual recognition applies 'in two directions': it does not. To come back to the example, when the EMS refuses this merely means that that member state did not have the necessary trust in the IMS or that it had other reasons not to execute the order. The refusal does not affect 'the other direction'; it does not resort effects for the issuing member state. The question of mutual recognition of refusal grounds was, at the explicit request of the European Commission, put to the member states through additional questions at the focus group meetings. The response was overwhelmingly clear: there was virtually no support, not regarding any refusal ground, to apply mutual recognition to the refusal ground. There was one noticeable exception; however, that very exception in reality flows from its very nature and its effect can be broadened through various other ways than through the flawed concept of 'mutual recognition of refusal grounds'. It concerns the *ne bis in idem* refusal ground.

### 3.3.4.2 *Exclusion of refusal grounds when detrimental to position of person involved*

Whereas the previous section showed that extending the refusal grounds by allowing them an effect throughout the EU after being relied on by one member state is not desirable (nor legally justifiable) the following will review the question whether the refusal grounds ought to be limited when detrimental to the position of the person involved. Such an exercise comes down to examining one specific possible implication of the *lex mitior* principle.<sup>205</sup> The latter aims to prevent that an individual experiences the negative effect due to the mere fact that multiple member states cooperate in a criminal procedure. It is necessary to look into the question whether the reliance on certain refusal grounds by executing member states is still justifiable when the person involved clearly indicates to consider execution in his/her own interest. Examples are the situation where the gathering of cross-border evidence *à décharge* could be blocked by a refusal ground<sup>206</sup>, or the situation where it would serve the social rehabilitation of a person to sit his/her sentence in the executing country despite the possibility of the latter to rely on certain refusal grounds.

Indeed, there should be a legal possibility to execute cooperation requests despite the existence of a refusal ground; this should however not be done lightly in the sense that safeguards should exist showing that the person involved was well informed when indicating that he/she does not consider the reliance on the refusal ground in his/her own interest. This can be guaranteed through requiring that the wish not to rely on the refusal ground be expressed in written form, signed by the suspect or his legal representative, certifying that the request was made on his request or with his permission and that, when signed by the suspect himself, he has had the opportunity to rely on legal counsel.<sup>207</sup>

Reference should be made to Council of Europe Recommendation (80) 8<sup>208</sup> which stated that “*in complying with a request for assistance, the competent authority of the requested state should be guided by the principles contained in Article 6 of the European Convention on Human Rights*”. This recommendation aims at preventing that the important principles and rights contained in Art. 6 ECHR would be set aside merely because of the international cooperation aspect. Art. 6 ECHR, being a catch-all clause aiming at serving the interests of the suspects/sentenced persons cannot but imply that a member state, when considering whether or not

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<sup>205</sup> Broader aspects and consequences are discussed below: 3.4.4.

<sup>206</sup> VERMEULEN, G., VANDER BEKEN, T. *et al.* (2002). *Een nieuwe Belgische wetgeving inzake internationale rechtshulp in strafzaken*. Antwerp-Apeldoorn, Maklu, p. 134.

<sup>207</sup> VERMEULEN, G., VANDER BEKEN, T. *et al.* (2002). *Een nieuwe Belgische wetgeving inzake internationale rechtshulp in strafzaken*. Antwerp-Apeldoorn, Maklu, p. 26.

<sup>208</sup> COUNCIL OF EUROPE, Recommendation R (80) 8 adopted by the Committee of Ministers on 27 June 1980 concerning the practical application of the European Convention on Mutual Legal Assistance in Criminal Matters.

to refuse cooperation, should take account of declarations of those persons pointing out their wish that the particular refusal ground be set aside. This is especially true for refusal grounds designed to serve the interests of the persons involved: for a long time now, it has been suggested that it should be possible that they make way for the request of that very person that the cooperation would be granted anyway.<sup>209</sup> Without wanting to make it into an absolute rule, the project team submits that considering to set certain refusal grounds aside based on such considerations should be possible both for optional and for mandatory refusal grounds.

### 3.3.5 *Deadlines and postponement grounds*

Besides consent, consistency issues and refusal grounds, deadlines and postponement grounds also form part of the concept of stringency in cooperation. Because of the obvious links between these two aspects of cooperation, they are dealt with consecutively in the following paragraphs.

#### 3.3.5.1 *Deadlines*

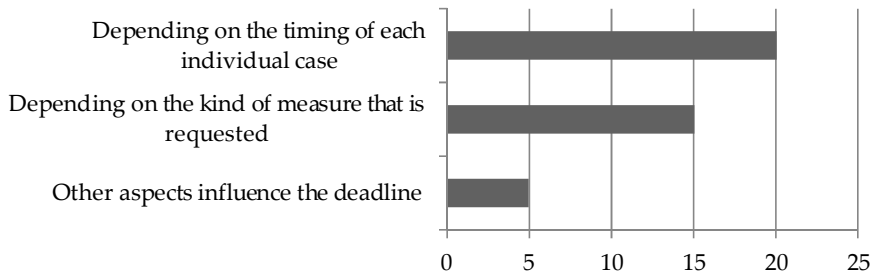
Of vital importance for the effectiveness of cooperation, be it under traditional mutual legal assistance or under the mutual recognition instruments, is that requests or orders are replied to in a timely fashion and executed swiftly. The project team has chosen not to ask member states what deadlines they thought would be appropriate for replying to a request or order. Instead, the following provides with a short overview of the state of affairs regarding the setting of and living up to deadlines by the member states.

Firstly, the replies to question 3.1.1 show that no set rules on how to decide on the length of the deadline are applied. A majority of the member states indicates to decide upon the deadline for execution on a case by case basis, often combined with the type of measure involved.

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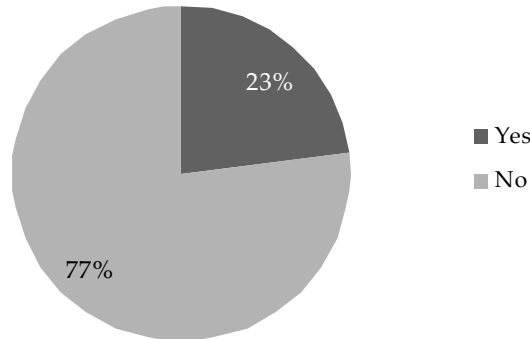
<sup>209</sup> SJÖCRONA, M.J., *De kleine rechtshulp. Nederlands procesrecht ten behoeve van buitenlandse justitie en politie. Een onderzoek naar de betekenis van de artikelen 552h-552q van het Wetboek van Strafvordering*, Arnhem, Gouda Quint BV, 1990, p. 58.

**3.1.1 How do you decide on the deadlines set for execution?**



Secondly, it is shown that replying to and execution of the request/order often go hand in hand. The analysis of the replies to question 3.1.2 reveals that in 77 % of the cases member states do not distinguish between the deadline for replying to the request and the execution of such requests.

**3.1.2 Do you distinguish and set separate deadlines for replying and executing a request/order?**

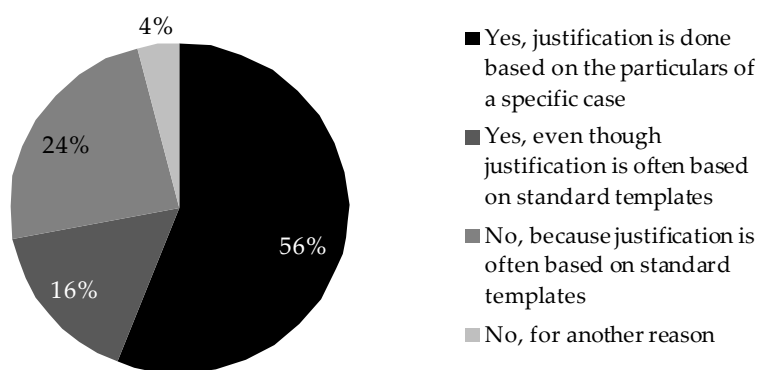


In terms of justification of the deadlines, the situation is rather positive: 72% of the member states indicate that they are sufficiently justified. However, in response to question 3.1.3 40% of the member states indicate that in their impression, standard reasons are used as a justification. Of those 40%, over half of the member states replied that that is the reason why they feel that the justification given by their counterparts is not sufficient. Therefore, it should be recommended that the EU urges the member states to not set deadlines too lightly, and in order to increase the mutual trust, to sufficiently indicate why



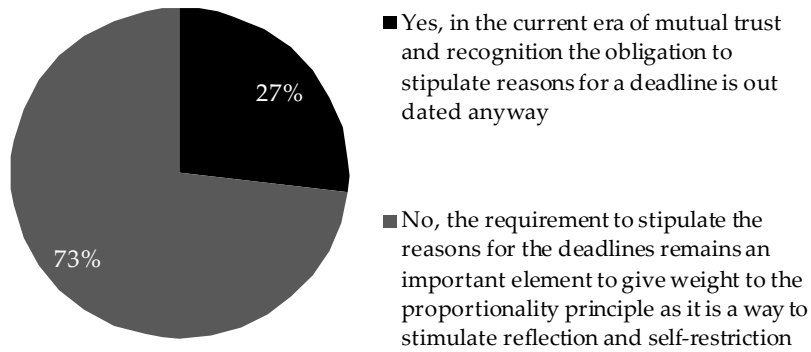
they are asking other member states to comply with a certain request by a set deadline.

**3.1.4 Do you feel that deadlines are sufficiently justified by the issuing member state?**



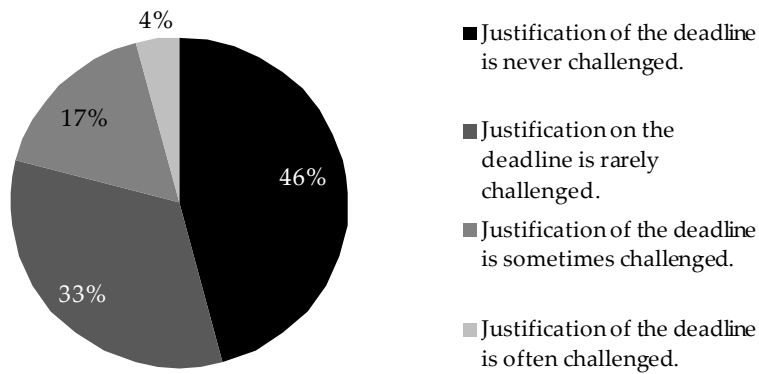
The following question is analogous to the obligation to state reasons for cooperation (supra 3.3.1.2). The replies to question 3.1.5 reveal that over two thirds of the member states have indicated that the obligation to give reasons should remain (69%). Here, the percentage is even higher (73%): the majority of the member states consider the setting of deadlines to be an important element to give weight to the proportionality principle as it is a way to stimulate self-reflection and self-restriction. This can partially be explained by the fact that the mutual trust which theoretically underpins mutual recognition is illusory to a large extent.

**3.1.5 Is it an acceptable future policy option to drop the obligation to explain the reasons for the deadline?**



Even though the member states indicated to consider it important that the reasons for the deadlines are given, almost half of the member states replied that deadlines are never challenged. In combination with the number of member states indicating that the deadlines are rarely challenged, this results in a percentage of 79%. Only 17% indicate that the deadlines are sometimes challenged.

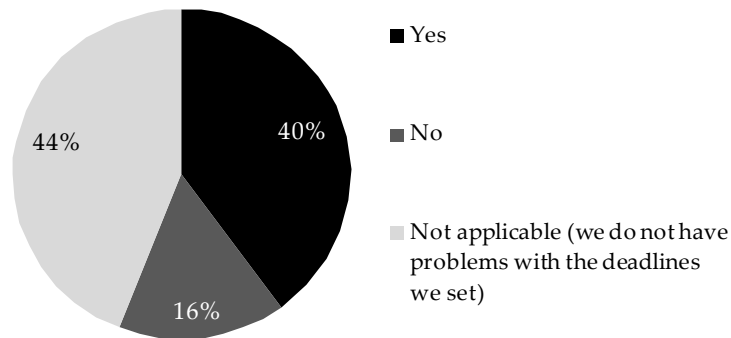
**3.1.3 How do member states respond to the justification of the deadline?**



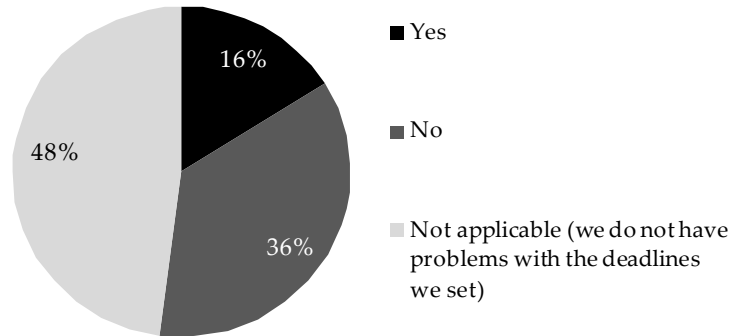
This does not mean however, that no problems occur, as the questions below show. The combination of questions 3.1.9, 3.1.10 and 3.1.12 gives way to an interesting contradiction. In the first two questions not even half of the member

states indicated that the deadlines they set are usually met. On the other hand, when asking whether they have problems to meet the deadlines almost 80% of the member states replied not to have any problems. This comparison shows a discrepancy of over 30%. Additionally, 40% of the member states indicated that the problems they experience in terms of other member states which do not meet their deadlines are linked to certain member states. In contrast, only 11% of the member states indicates that when they experience problems with meeting deadlines, it concerns deadlines set by certain member states. It thus seems that the deadlines which have been set are rarely perceived as difficult to meet, and when they are, they are only linked to specific member states in a tenth of the cases. Despite this however, almost half of the times deadlines are not met, and in those case the failure to meet them is linked to certain member states. Again this shows that the way the deadlines are set as such, are not perceived as problematic, yet living up to them still causes problems. Clearly there is a different perception depending on from which perspective the question is asked. Consequently, it should be recommended to apply a targeted approach in order to verify whether indeed in almost half of the cases, a recurring group of member states fail to meet these deadlines and if so, to identify those member states causing the problems.

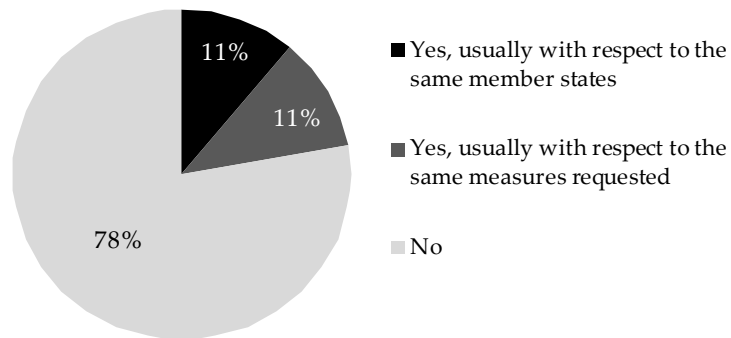
**3.1.9 Are problems with meeting deadlines linked to certain member states?**



**3.1.10 Are problems with meeting deadlines linked to certain measures requested?**

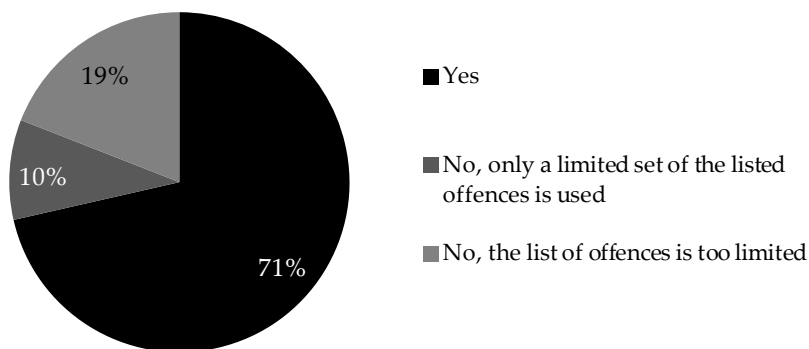


**3.1.12 Do you often have problems to meet the deadlines?**

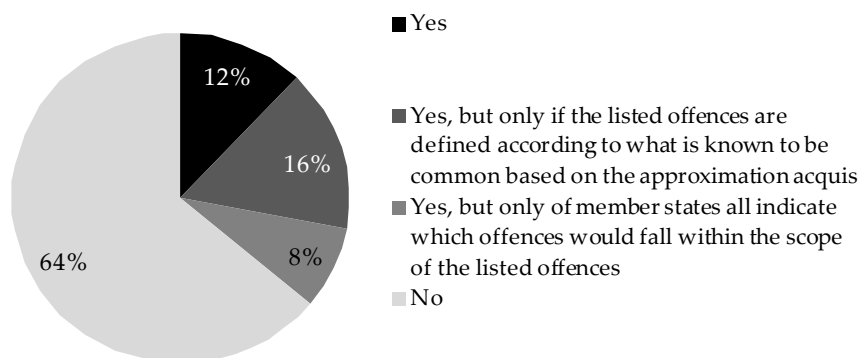


In analogy with the refusal grounds, it was tested whether the member states consider it to be an option to link the scope of the particular urgency to the 32 MR offence list (question 3.1.8). Art 40.7 SIC limits the scope of the urgency provisions to a number of offences. Whereas for the application of refusal grounds the linking to the 32 MR offence list was considered desirable for half of the member states, the support in this case is much less, as shown in the figure below. This is logical however, given that a large majority of the member states indicate that the list given in Art. 40,7 SIC corresponds to practical needs.

**3.1.7 Art 40.7 SIC limits the scope of the urgency provisions to a number of offences. Does this list respond to practical needs?**



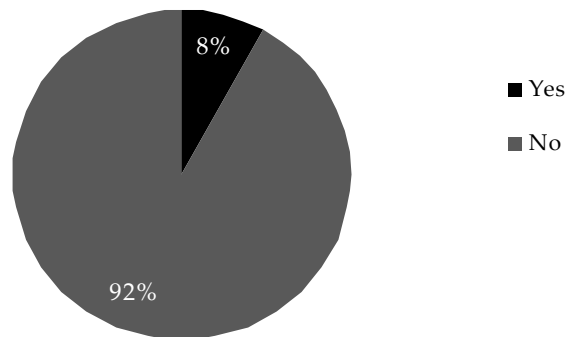
**3.1.8 Is it an acceptable future policy option to link the scope of the particular urgency to the 32 MR offence list?**



Lastly, the following shows that not only do the member states make efforts to meet the deadlines set by their counterparts (as shown above), they also refrain to circumvent the law in instances where they could. The regime regarding cross-border surveillance becomes far more flexible when member states can show that the situation has become particularly urgent (Art. 40,2 SIC), yet 92% of the member states have denied the feeling that requests are consciously postponed until the situation has become particularly urgent, to be able to use those specific provisions. The fact that the abuse is so rare is of course encouraging, and a positive sign, but it is the mere result of the good faith of the

member states, and legally, nothing is preventing future requesting authorities to use the provisions to their benefit. Therefore, the project team recommends to include measures in the relevant article in order to avoid abuse of the relevant provisions in the future through making abuse not only morally or politically but also legally impossible.

**3.1.6 Do you have experience with member states that postpone a request until the situation becomes particularly urgent, to be able to use the specific provisions?**



*3.3.5.2 Grounds for postponement*

The importance of postponement possibilities was tested separately from the living up to deadlines set by the ordering/requesting member state. The project team has identified a limited set of grounds for postponement that were be subject to analysis in the survey:

- Incomplete information – when for example the form required for cooperation is incomplete or manifestly incorrect, cooperation may be postponed until such time as the form has been completed or corrected.
- Waiting translation – for the execution of some requests or orders, member states may require that the request or order is accompanied by additional documentation translated in the official language or an official language of the Member state in which the requested authority is based
- Lack of validation – A Member state may require validation in all cases where the issuing authority is not a judge, a court, an investigating magistrate or a public prosecutor and where the measures necessary to execute the request or order would have to be ordered or supervised by a judge, a court, an investigating magistrate or a public prosecutor under the law of the executing State in a similar domestic case.

- Serious humanitarian reasons – Cooperation may exceptionally be temporarily postponed for serious humanitarian reasons, for example if there are substantial grounds for believing that it would manifestly endanger the requested person’s life or health. The execution of the request or order shall take place as soon as these grounds have ceased to exist.
- Executing own decision – the executing member state may postpone execution of the order or request, to execute its own decision
- Damaging ongoing investigations or prosecution – when execution of the order or request might prejudice an ongoing criminal investigation or prosecution, execution may be postponed until such time as the executing State deems reasonable
- Legal remedies – Member states are required to put in place the necessary arrangements to ensure that any interested party, have legal remedies. When awaiting the outcome of the legal remedies, execution may be postponed.
- Disproportionate burden – when execution of the order or request would place a burden on the executing member state’s authority clearly be disproportionate or irrelevant with regard to the purposes for which cooperation has been requested.

Below, a comprehensive overview of the replies of the member states is given. It should be noted that especially the results for the EU MLA, the FD EAW, the FD Fin Pen and the FD Confiscation are representative, given that the implementation level of the other instruments is still regrettably low. The postponement ground which is by far used the most is ‘incomplete information’, together with ‘awaiting translation’. This is hardly surprising in a European Union consisting of 23 different languages, and again supports the suggestion of the project team<sup>210</sup> to open up the debate on the introduction of one (or more) working language(s) within the international cooperation in criminal matters. A postponement ground which is used by approximately half of the member states is that execution of the request/order could damage the ongoing investigation, especially in the context of the mutual legal assistance and the European Arrest Warrant. Interesting to see is that the position of the project team voiced regarding validation needed by judicial authorities<sup>211</sup> (as required in the General Approach EIO) is supported by the replies of the member states: indeed, only a small minority of the member states indicate to use this as a postponement ground. Combined with the very small amount of problems regarding authorities discussed above in chapter 2 this does indeed subscribe the position that a need for validation of the issuing decision by a judicial authority can be

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<sup>210</sup> Voiced above in the context of horizontalisation (3.2) and below in the context of implementation issues 3.6.1.

<sup>211</sup> *Supra* 2.1.2.4.

expected to do more harm (slowing down, extra administrative burden) than good to the international EU cooperation.

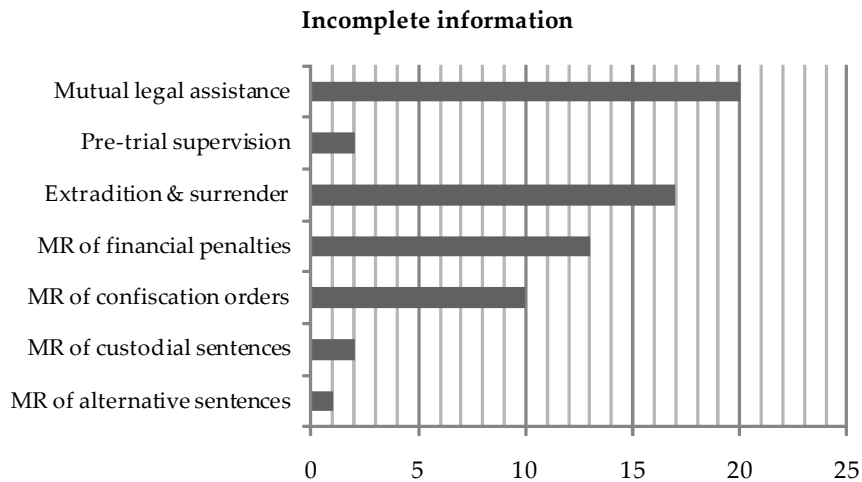
The overview given below shows that some of the reasons listed as refusal grounds actually come down to being postponement grounds, the most prominent example being health considerations.

At the focus group meetings other interesting case-studies were discussed: in Italy for example, when a person is pregnant or a mother to a child less than 3 years old, then the country does not surrender the person concerned. There have indeed been instances where the issuing state reiterated its question after 3 years, showing that this indeed concerns a postponement rather than a refusal ground.

Another example of a refusal ground which can take the form of a postponement ground is, linked to the fundamental rights<sup>212</sup> considerations, serious humanitarian reasons. No less than 9 member states indicated to use considerations of humanitarian nature as postponement grounds in the context of the European Arrest Warrant.

The following provides with an overview of the postponement grounds identified by the project team.

### 3.2.1 Which grounds for postponement do you use?

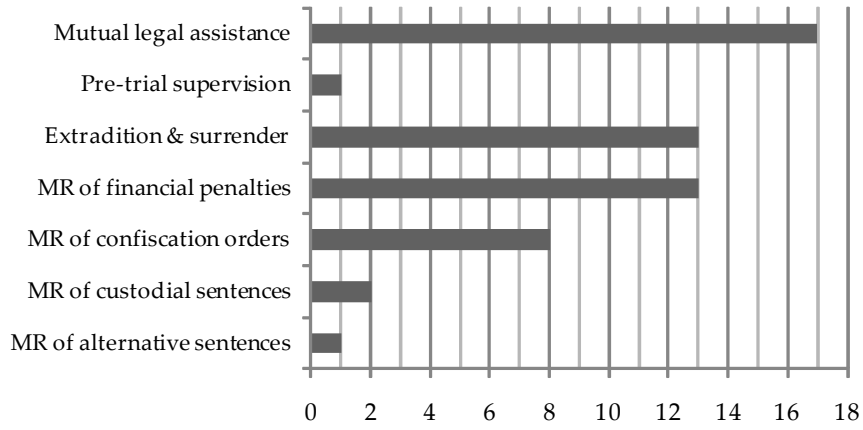


<sup>212</sup> *Supra* 3.3.3.1.

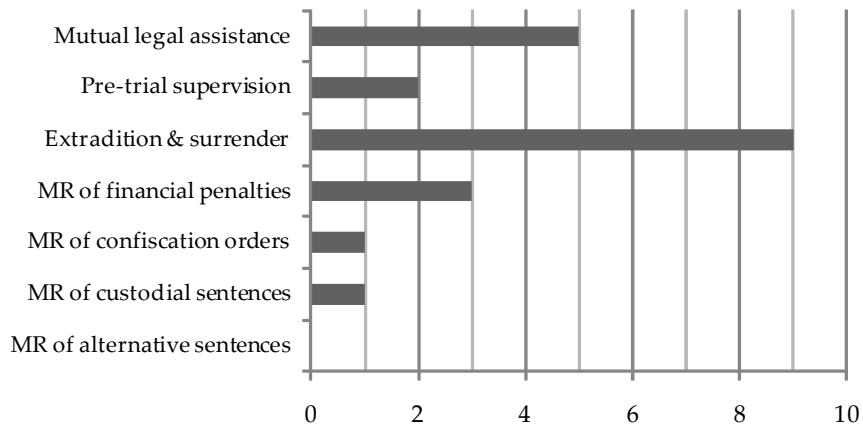


ENHANCED STRINGENCY IN COOPERATION

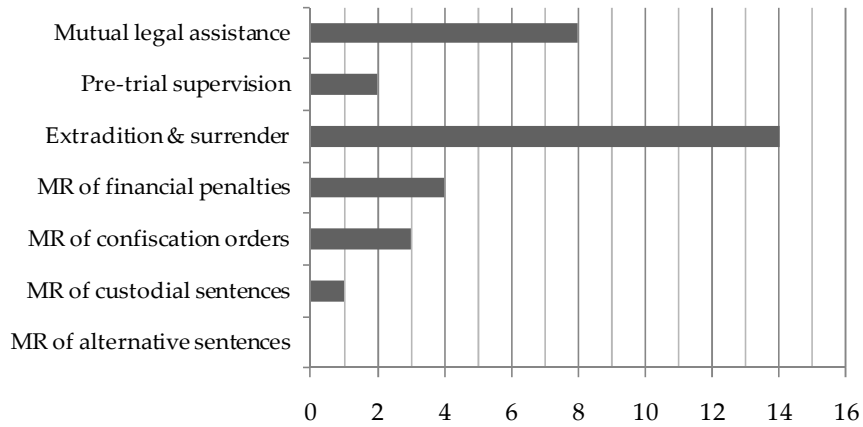
**Awaiting translation**



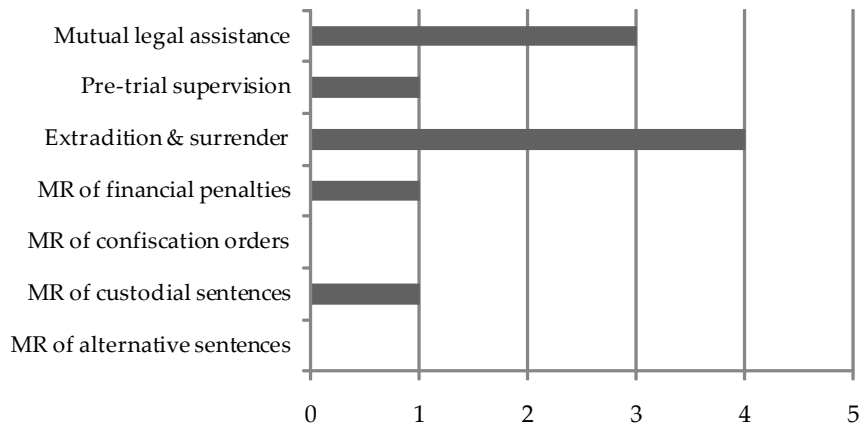
**Lack of validation**



**Serious humanitarian reasons**

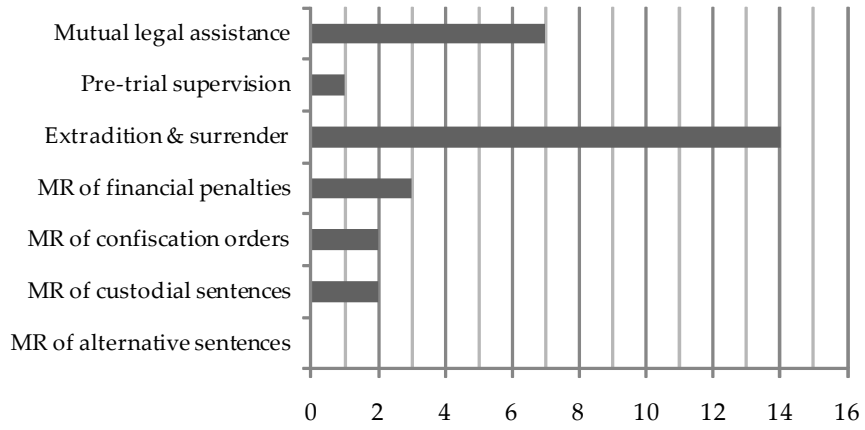


**Disproportionate burden**

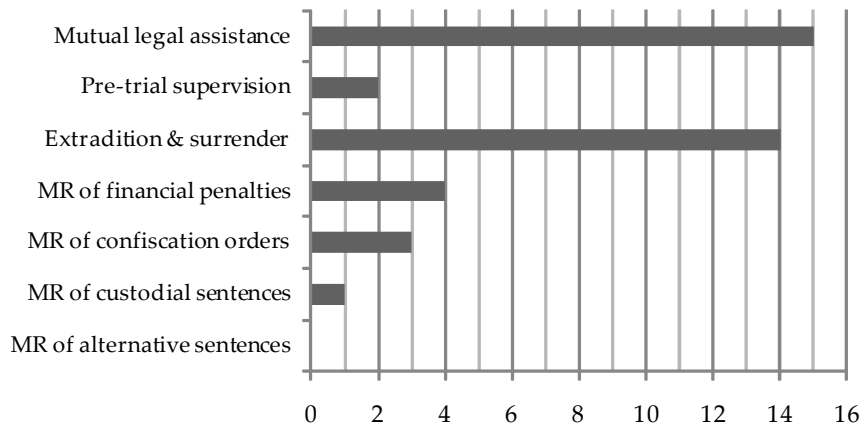


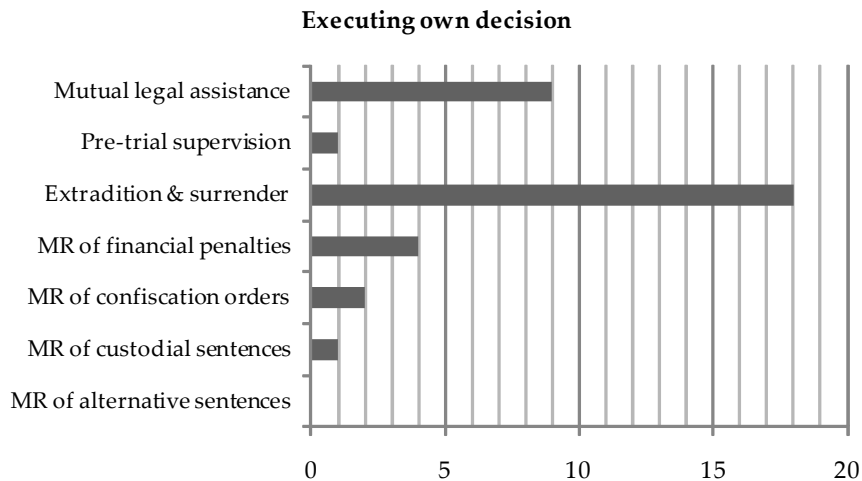
ENHANCED STRINGENCY IN COOPERATION

**Legal remedies**



**Damaging ongoing investigation**





Interestingly, in a previous study<sup>213</sup>, many of the member states indicated that they would not postpone execution, even if such execution would have a significant impact on routine domestic workload or other domestic priorities and even if such execution entails the risk of hampering the fluent functioning of their own criminal justice system. It is particularly encouraging to see that member states show this kind of willingness to cooperate.

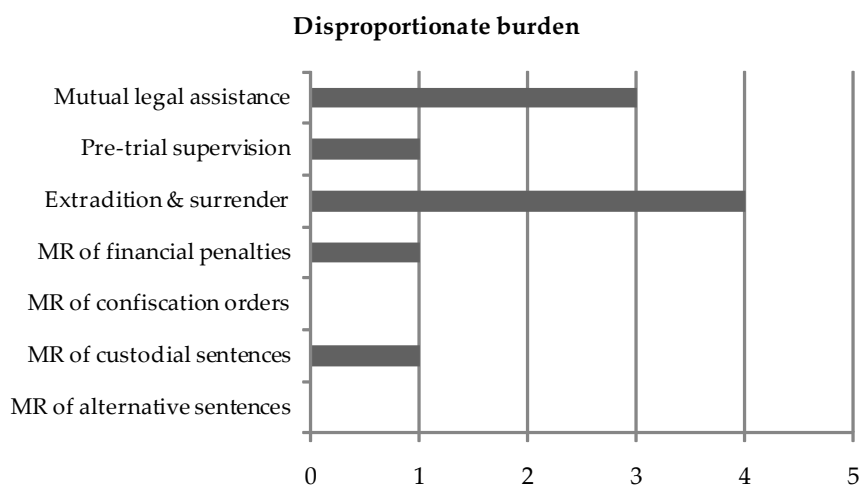
### 3.3.6 Capacity

A final aspect contributing to an enhancement of the stringency in cooperation is the impact of cooperation on capacity issues, both from a financial as well as an operational perspective. The possible implications in terms of operational or financial capacity for the executing member state in executing under a stringent MR cooperation regime may be very substantial. The project team has therefore chosen to not only test the position of member states *vis-à-vis* the (revised) traditional grounds for refusal or non-execution (*supra*), but also to check the preparedness of member states to accept semi-mandatory execution of the foreign orders taking into account their potential financial and operational capacity impact. The current study further builds on the empirical results gathered in 2009 in the context of the Study on EU cross-border gathering and use of evidence in criminal matters that were used as a baseline for the design of the questionnaire in the current study.

Before embarking with the analysis of both financial and operational capacity concerns, it should be noted that so far capacity issues are rarely relied upon as a

<sup>213</sup> G. Vermeulen, W. De Bondt and Y. Van Damme (2010), *EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence?*, Antwerpen-Apeldoorn, Maklu.

reason to delay the cooperation. From the replies to the corresponding question, it is clear that only few member states have indicated to use the postponement ground 'disproportionate burden'. However, as will be shown below, it is no secret (and mere logic) that capacity considerations often represent an important factor when deciding whether or not a certain burden placed on a member state is to be considered disproportionate.



### 3.3.6.1 *Financial capacity*

Though undeniably important in the consideration to afford cooperation or not, financial capacity is never listed as a refusal ground. The absence of a refusal ground for reasons of financial capacity in the current cooperation instrumentarium can be explained by referring to the general rule that each of the cooperating parties is responsible for its own costs. This is reflected by the wording of the following provisions:

- Art. 5 ECMA Second Protocol: parties shall not claim from each other the refund of any costs resulting from the application of the ECMA or its Protocols;
- Art. 24 FD Deprivation of Liberty: costs resulting from the application of this FD shall be borne by the executing state, except for the costs of the transfer of the sentenced person to the executing state and those arising exclusively in the sovereign territory of the issuing state;
- Art. 22 FD Alternative: costs resulting from the application of this FD shall be borne by the executing state, except for costs arising exclusively within the territory of the issuing state;

- Art. 30 FD EAW: expenses incurred in the territory of the executing member state for the execution of a European arrest warrant shall be borne by that member state; all other expenses shall be borne by the issuing member state;
- Art. 17 FD Fin. Pen.: member states shall not claim from each other the refund of costs resulting from the application of this FD;
- Art. 25 FD Supervision: costs resulting from the application of this FD shall be borne by the executing state, except for costs arising exclusively within the territory of the issuing state; and
- Art. 20 FD Confiscation: member states may not claim from each other the refund of costs resulting from application of this FD.

It can however not be denied that there is a considerable difference between the rule not to claim for a refund of costs in a mutual legal assistance context as opposed to a mutual recognition context. In a mutual legal assistance context, there is some flexibility in the sense that member states can decide not to execute the request if they would consider this a too heavy burden on their capacity; this does not mean, however, that they are not under an obligation try at the utmost of their abilities to grant cooperation (Art. 1 ECMA). Within the mutual recognition context however, a member state is to execute the order as drawn up by the issuing member state. This means that both in a mutual legal assistance and (if possible, even more so) in a mutual recognition context it is crucial to carefully consider the impact of the obligations on the financial capacity of the member states. As the negotiations on the EIO stand at the moment there are indications that the obligation to grant each other assistance, in particular to undertake capacity-absorbing investigative measures which used to be dealt with under the mutual legal assistance framework will be brought under a mutual recognition framework without any limits, in the sense that the EIO will “cover any investigative measure with the exception of the setting up of a joint investigation team” (emphasis added) (Art. 3 General Approach EIO). While it only emphasises the urgent need to start thinking about financial and operational capacity concerns, it be noted that this provision, making the gathering of evidence obligatory in virtually all circumstances, is both unrealistic and unworkable. Consequently, it is strongly advised to amend this provision. The position that there is a need for a debate on capacity is supported by the empirical results of a previous study on the impact of introducing mutual recognition in an evidence gathering context. Depending on the type of investigative measure concerned between 40 up to 60% of the member states had indicated that financial capacity should somehow be a refusal ground. Based on those results, the then project team had formulated a series of policy options of which some were tested for acceptability in 2009 and the remaining ones were now tested for acceptability in this new study. The first remaining policy option consisted of reviewing the possibility to further develop the existing provisions on cost-sharing between member states. The second remaining policy option

consisted of reviewing the possibility to put the financial burden completely on the issuing member state. The third remaining policy option consisted of reviewing the possibility to allow the executing member state to suggest less costly alternatives.

Considering the importance of built-in proportionality safeguards in cooperation instruments, it is interesting to recall the conclusions drawn in the 2009 Evidence Study. Financial capacity concerns are intensified by the perception that cooperation is often sought for so-called petty crime. Reference can be made to Art. 28, par. 1 Naples II which stipulates that member states should not be obliged to provide mutual assistance where [...] or where the scope of the action requested, in particular in the context of the special forms of cooperation provided for in Title IV, is obviously disproportionate to the seriousness of the presumed infringement. This provision reflects concerns that the executing member states will have to bear excessive costs for what could be considered to be a petty crime. However, vague proportionality inspired refusal grounds are undesirable because of the uncertainty of cooperation that is linked to them. If the problem is related to cooperation requests for what is considered as petty crime, the cooperation instrument should be designed in such a way that it is impossible to use the instrument as a legal basis for cooperation in such cases. From the replies to the 2009 questionnaire it became clear that the concrete implementation of this policy option is dependent on the investigative measure concerned. It was decided that a list of investigative measures should be drawn up for which it is agreed that they are costly and for those, mutual recognition obligations should be limited to severe crime. The appreciation of the severity of crime would then be linked to the list of 32 offences on the condition that they are clearly defined referring back to the approximation acquis to ensure that a mutual recognition order in relation to petty crime can no longer be issued for the listed investigative measures. Once such a list would come into being, the project team considers three policy options for the concrete development of a system to deal with capacity issues. These policy options, all of which could prove useful, are intended to complement the basic rule, which is that every member states bears its own costs until agreed otherwise. These are first introducing cost-sharing (linked to benefit-sharing) possibly combined with a ceiling provision; Second accruing the costs to the issuing member state when a set threshold is exceeded; and Third allowing the executing member state suggest less costly alternatives.

- Policy option 1:<sup>214</sup> cost-sharing and its relation with benefit-sharing

The first remaining policy option to tackle financial capacity concerns consisted of reviewing the possibility to further develop the existing provisions on cost-sharing between member states. In the current legal instrumentarium traces of this policy option can be found. It is possible that member states work out financial agreements with regard to cooperation costs, *e.g.* in the following situations:

- Art. 46 Prüm Decision: each contracting party shall bear the costs incurred by its authorities in implementing this Convention; in special cases, the contracting parties concerned may agree on different arrangements;
- Art. 29 Naples II: if expenses of a substantial and extraordinary nature are, or will be, required to execute the request, the customs administrations involved shall consult to determine the terms and conditions under which a request shall be executed as well as the manner in which the costs shall be borne; and
- Art. 20 FD Confiscation: where the executing state has had costs which it considers large or exceptional, it may propose to the issuing state that the costs be shared; the issuing state shall take into account any such proposal on the basis of detailed specifications given by the executing state.

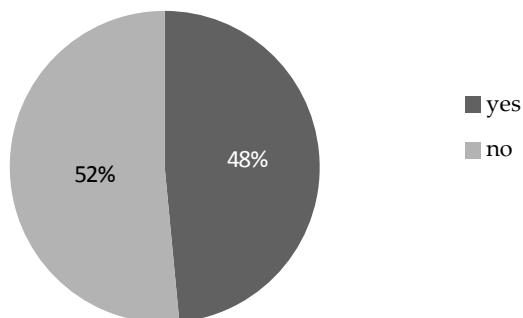
Analysis of the position of member states reveals that the uncertainty that surrounds these provisions has a negative effect on the cooperation relationships. From the replies to question 5.2.1 it shows that even though fortunately financial uncertainty does not cause any of the member states to refrain from pursuing international cooperation, it is alarming that almost half of the member states indicate that financial arrangements do play a role in international cooperation. Financial uncertainty is said to cause delays in cooperation and to undermine trust between cooperating authorities.

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<sup>214</sup> Complementing the basic rule, which is that every member states bears its own costs until agreed otherwise.

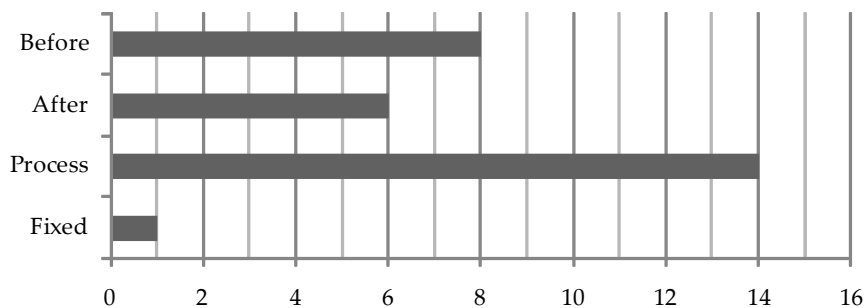


**5.1.2 Does uncertainty with regard to the financial arrangements play a role in international cooperation in criminal matters?**



This uncertainty can partially be explained by the member states' answers to question 5.2.1 as to when consultations with respect to the financial arrangements to share the costs of cooperation take place. With 8 member states stating this happens before cooperation and 14 member stating this happens during the cooperation process, it is clear that for over 75% of the member states the concern of delaying the cooperation process is valid.

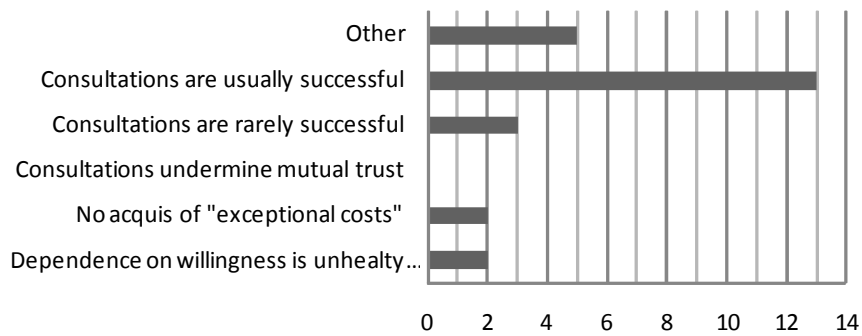
**5.2.1 When do consultations with respect to the financial arrangements to share the costs of cooperation take place?**



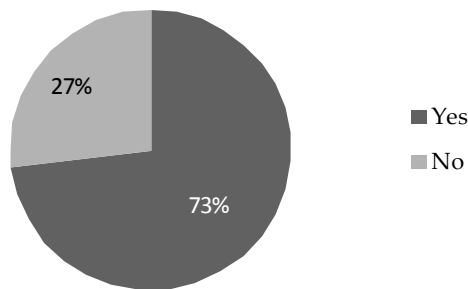
Therefore it comes as no surprise that – even though in the majority of cases member states state that consultations are usually successful as shown by the replies to question 5.2.2 – an almost equal % of member states stated that it would significantly facilitate international cooperation if the financial

agreements were clear cut laid down in cooperation instruments as shown from the replies to 5.1.3.

**5.2.2 What is your experience with the outcome and success of consultations with respect to financial arrangements to share the costs?**



**5.1.3 Do you agree that it would significantly facilitate international cooperation in criminal matters, if the financial arrangements are clear cut laid down in the cooperation instruments [...]?**



A way to make the financial arrangements clear cut at the onset of any cooperation initiative, the project team suggests to look into the possibility to introduce a cost-sharing principle that mirrors the benefit-sharing principle that is included in the FD Confiscation.

The FD Confiscation is interesting because its Art. 16 relates to the division of benefits that arise from the execution of an order or request. It has introduced the splitting of revenues from the execution of confiscation orders surpassing the amount of € 10.000 on a 50/50 basis between the executing and the requesting

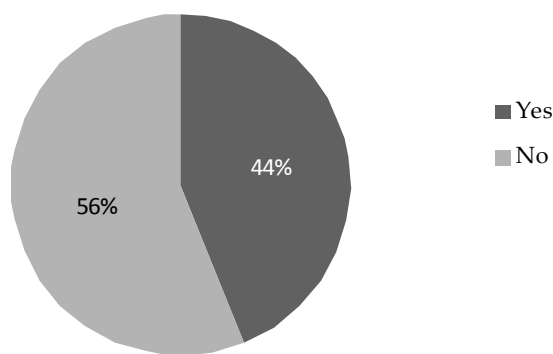
member state. Only if the revenues are not very significant (*i.e.* below € 10.000) they will accrue to the executing member state.

This may not seem directly relevant for the analysis of financial issues that executing requests or orders for cooperative measures can entail. However, the possibility of broadening this approach embedded in the FD Confiscation as to the 50/50 division of profits to a possible future 50/50 division of substantial costs in executing MLA requests or MR orders, deserves further reflection and has therefore been implicitly integrated in the questionnaire by the project team.

The main problem of introducing a general cost sharing principle will be the determination of an adequate threshold. This threshold should not be symbolic but should reflect genuine proportionality and therefore a diversification of thresholds dependent on the situation should be considered. It is submitted that many if not the vast majority of measures would fall under the threshold of 10000; therefore it is advised to agree on a lower threshold.

The responses on this issue (question 5.2.4) were somewhat inconclusive with 11 member states stating it would be viable idea to introduce a cost-sharing principle based on a threshold amount, while 14 member states did not believe this to be a viable option.

#### 5.2.4 Is it a viable idea to introduce a cost-sharing principle based on a threshold amount?



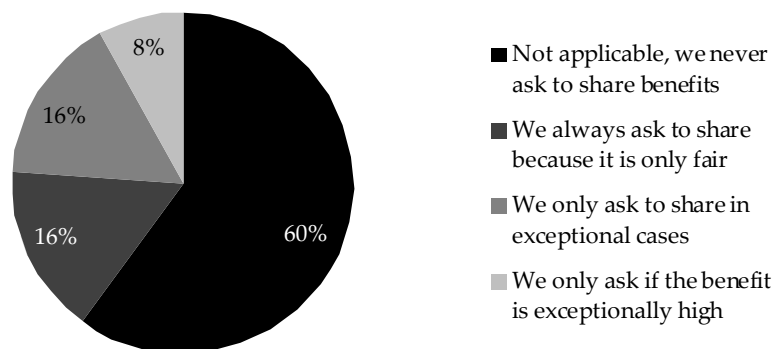
However, even this arrangement might turn out to be insufficient: it is not unthinkable that costs would reach such excessive amounts that even cost sharing beyond the threshold of e.g. € 10.000 would amount to putting a disproportionate burden on the shoulders of the executing member state (*cfr.* the situation where a state is asked to provide for the 'new life' of a protected witness).

In addition to the discussion on the possibility to introduce a cost-sharing principle to tackle financial capacity concerns, the project team wants to seize the opportunity to point to an inconsistency in the current benefit-sharing provisions.

It is inconsistent from a horizontal perspective to introduce an obligation to split the revenue of confiscation when no such obligation is introduced with regard to the revenue of financial penalties. In Art. 13 FD Fin. Pen., the possibility is introduced for the member states involved to come to an agreement although there is no obligation whatsoever for the executing member state to share the revenue. Because the situation that the issuing member state has conducted a lengthy investigation and prosecution without being awarded the revenue from the execution would give way for frustration, and considering the progress made with the introduction of the obligation in the confiscation order, it seems only logical for such an obligation to apply in any other situation as well.

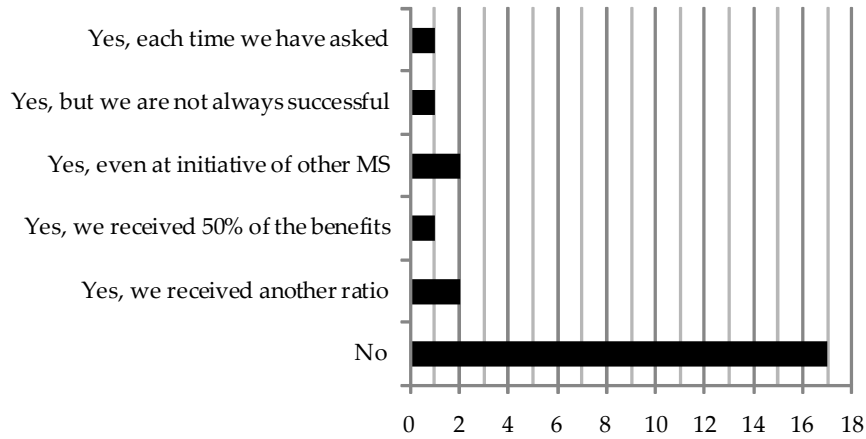
From the member state responses to questions 5.3.1, 5.3.2 and 5.3.3 it can be concluded that, although most issuing member states do not ask the executing states to share the benefits and benefits are not often shared when there is no obligation to do so, benefit-sharing is considered to be a fair option and especially so when the investigation was exceptionally costly or when benefits are exceptionally high.

**5.3.1 Why did you ask the executing member state to share the benefits?**

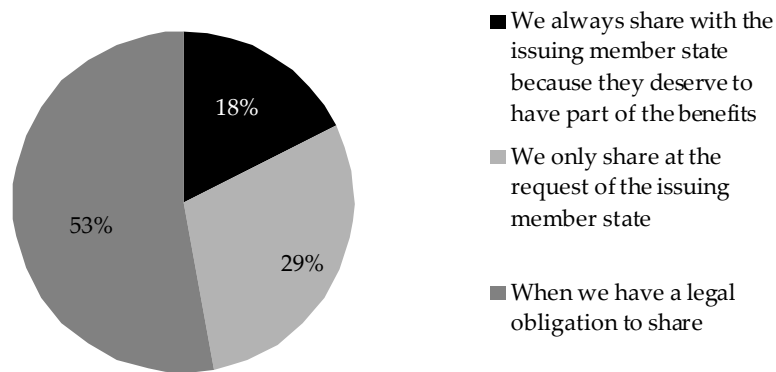


It should be noted that there are only two member states more who indicate that they never receive benefits than member states who indicate that they never ask for them. Hence, it seems that there is only a small part of the member states which consistently draw a blank.

**5.3.2 Have you ever received a portion of the benefits?**



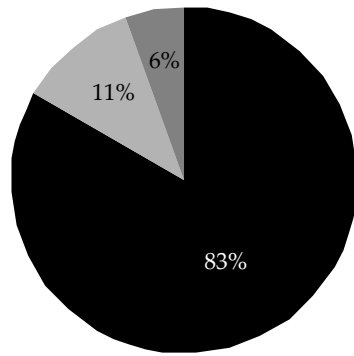
**5.3.3 Why did you share the benefits with the issuing member state?**



According to the project team, there are two main possibilities to define the relation between cost-sharing and benefit-sharing:

First, both could be seen as completely separate so that the settlement of costs may not be influenced by the settlement of benefits and vice-versa. From the responses to question 5.3.4 it can be concluded that this is the *modus operandi* at this moment.

**5.3.4 How do your costs relate to sharing of benefits?**

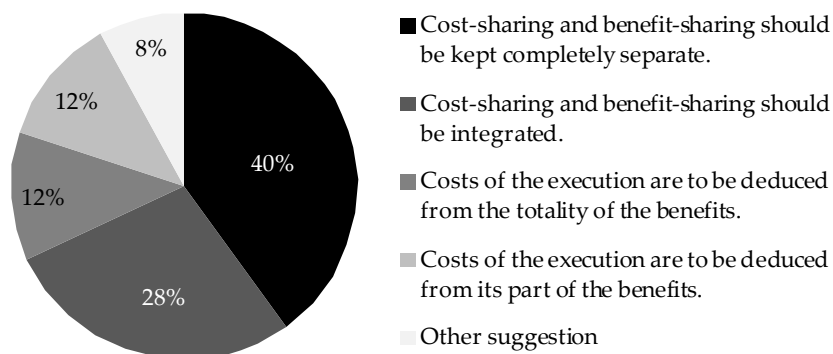


- Cost and benefits are kept separately
  
- Costs are always deduced from the benefits before benefits are shared
  
- Costs are deduced from the benefits as much as possible, before benefits are shared

Second, both costs and benefits could be integrated. This would imply that the costs would be deducted from the benefits in a single settlement of costs and benefits. However, the practical elaboration of this possibility gives way for two different scenarios. First, the executing member state could deduct its costs from its own part of the benefits; if the costs exceed the benefits, the general cost-sharing rules would apply. Second, the executing member state could deduct its costs from the totality of benefits before the rules on benefit-sharing are applied. This means that the issuing member state also bears part of the costs as they have been deducted from its part of the benefits.

Replies to question 5.3.5 on how cost-sharing should relate to benefit-sharing are somewhat divided with 10 member states stating that these should be kept completely separate and 7 member states stating that these should be integrated. In light of the integration of costs and benefits, 3 member states would opt for costs to be deducted from the totality of benefits and 3 member states would opt for costs to be deducted from the executing state’s part of the benefits.

**5.3.5 How should cost-sharing relate to benefit sharing?**



- Policy option 2:<sup>215</sup> costs borne by the issuing member state

The second remaining policy option to tackle financial capacity concerns consisted of reviewing the possibility to put the financial burden completely on the issuing member state. Provisions stipulating that the costs should be borne by the issuing member state, unless the executing member state has waived his right for a refund already exist as an exception to the general rule and can be found in various instruments:

- Art. 5 ECMA Second Protocol states that parties shall not claim from each other the refund of any costs resulting from the application of the ECMA or its Protocols; however, the article further provides for some specific exceptions to the general rule of ‘the executing member state pays’ - particularly noteworthy as an exception to the general rule is that costs of substantial or extraordinary nature in the execution of requests for MLA may be claimed back;
- EU MLA Convention states that costs of substantial or extraordinary nature may be claimed back; reference is made to financial capacity and financial implications of MLA in two specific articles, relating respectively to refunding (which may be waived) of certain costs that the execution of requests for hearings by video conference can entail (Art. 10, 7 EU MLA) and the mandatory payment by the requesting member state of telecommunication interception costs (Art. 21 EU MLA); and
- Art. 29 Naples II stipulates that member states shall normally waive all claims for reimbursement of costs incurred in the implementation of the Convention, with the exception of expenses for fees paid to experts.

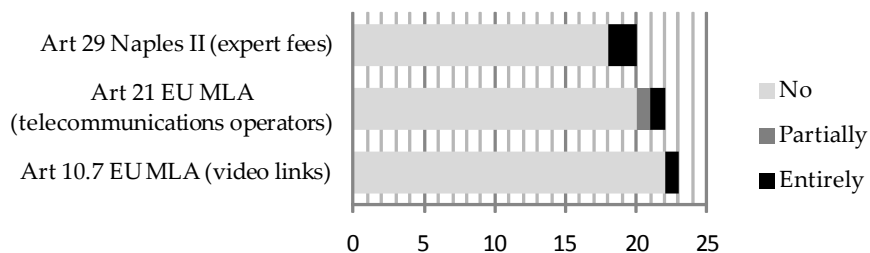
From the member state responses to question 5.1.1 it can be concluded that it is highly exceptional for an executing state to waive its right for a refund so that in the above mentioned situations (video links, telecommunications operators and expert fees) costs are borne by the issuing state as an exception to the general rule.

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<sup>215</sup> Complementing the basic rule, which is that every member states bears its own costs until agreed otherwise.

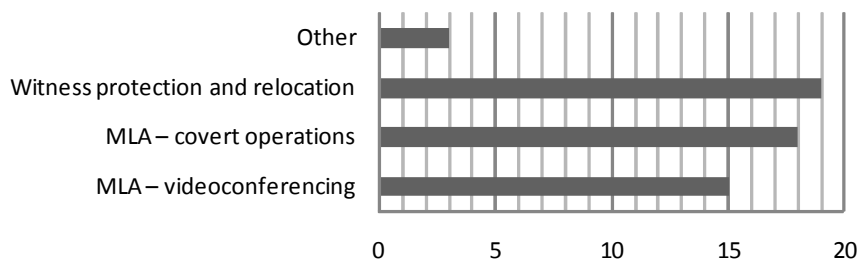


**5.1.1 Did you waive your right for a refund of the costs cause by execution?**



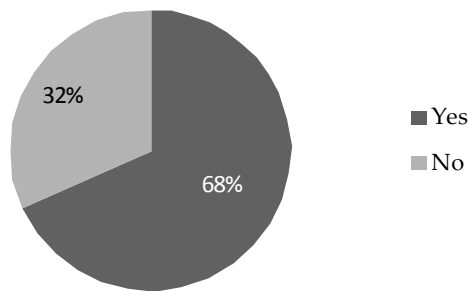
Member states also thought that in the following situations costs should be completely borne by the issuing member state: MLA – videoconferencing (15 member states), MLA – covert operations (18 member states) and witness protection and allocation (19 member states).

**5.2.3 In which situations should the costs be completely born by the issuing/requesting member state?**



A large majority of member states also stated that it would significantly facilitate international cooperation if the financial agreements were clear cut laid down in cooperation instruments instead of being dependent on whether or not member states have waived rights. In the same way, a large majority of member states agreed that it is inconsistent that Art. 10.7 EUMLA foresees in the possibility for the executing state to waive its right for a refund of the expenses and no such clause of waiving rights is foreseen in Art. 21 EUMLA.

**5.1.4 Do you agree that it is inconsistent that Art 10.7 EUMLA foresees in the possibility for the executing member state to waive its right for refund of the expenses and no such clause on waiving rights is foreseen in Art 21 EUMLA?**



The project team submits that, although the basic rule should still be that each country should bear its own costs (until agreed otherwise) some measures indeed allow for more radical rules: consequently, it advises to extend the measures for which the costs accrue entirely to the issuing member state to undercover operations and cross-border surveillance.

- Policy option 3:<sup>216</sup> suggest less costly alternatives

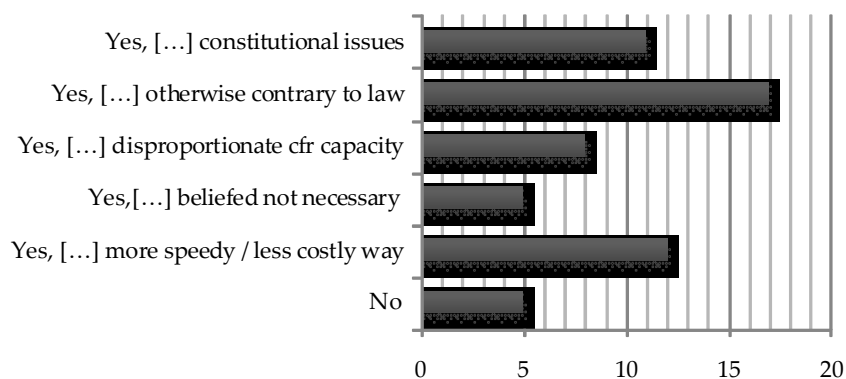
The third remaining policy option to tackle financial capacity concerns consisted of reviewing the possibility to allow the executing member state to suggest less costly alternatives. The project team submits that there should logically always be room for negotiation: if the executing member state can show that the same result would be obtained through less costly measures and without a negative impact on the rights of the person involved, there is no reason why such suggestions should not be allowed.

Responses show that a large majority of member states sometimes suggest alternatives in reply to explicitly requested formalities and procedures, with 8 member states specifically referring to situations where these formalities and procedures place a disproportionate burden on their capacity, 5 member states referring to situations where the requested formalities and procedures are believed to be not necessary and 12 member states referring to the situations where it is believed that the same results can be achieved in a more speedy/less costly way.

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<sup>216</sup> Complementing the basic rule, which is that every member states bears its own costs until agreed otherwise.

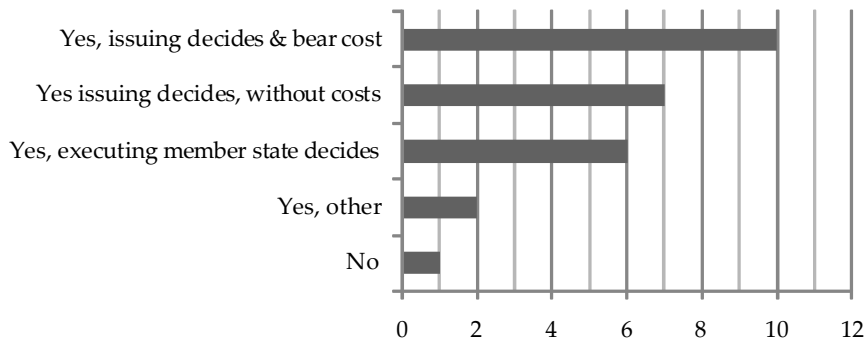
**4.2.4 Do you sometimes suggest alternatives in reply to explicitly requested formalities and procedures?**



Similarly, almost all member states thought it should be possible for an executing member state to suggest less costly alternatives. However, opinions were split on the issue who would eventually have to decide on whether or not an alternative course of action will be adopted and how this would affect the cost-sharing principle:

- 10 member states thought that it should be the issuing member who should decide on the suggestion for a less costly alternative with the implication however that a refusal would have consequences for the cost-sharing principle as it would then be the issuing state who would have to bear the full supplementary cost;
- 7 member states thought that it should be the issuing member who should decide on the suggestion for a less costly alternative without consequences for the application of the cost-sharing principle; and
- and only 6 member states thought that it should be possible for the executing member state to decide on the execution via a less costly alternative.

**5.2.5 Should it be possible for an executing member state to suggest less costly alternatives?**



*3.3.6.2 Operational Capacity*

Similar to the provisions regulating the financial aspects of cooperation, the general rule related to operational capacity states that each member state is to provide its own operational resources.

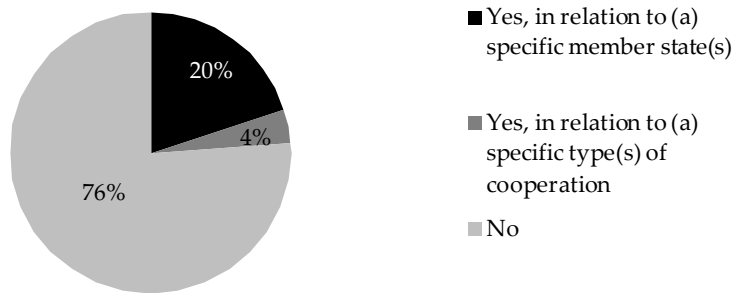
Issues related to operational capacity are potentially even a bigger obstacle for smooth international cooperation in criminal matters. The executing member state may feel that the implications of the execution of a request or order in terms of operational capacity or resources would be too heavy and thus hamper the proper functioning of the executing member state’s own criminal justice system. For example, it is very likely that extensive requests may require a lot of working hours from authorities in the executing member state and that it considers that the impact on the domestic workload is disproportionately heavy or that (priority) domestic cases would be jeopardised. The project team therefore assessed to what extent member states were likely to refuse the execution of requests for operational reasons, or if they felt that refusal for these reasons should be possible.

Again however, a number of exceptions to the general rule can be found. Art 23.1 Naples II stipulates with respect to covert operations that, at the request of the applicant authority, the requested authority may authorize officers of the customs administration of the requesting member state or officers acting on behalf of such administration operating under cover of a false identity (covert investigators) to operate on the territory of the requested member state.

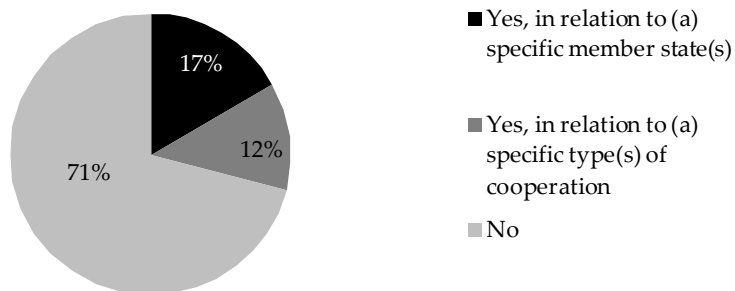
Although a majority of member states, both from the perspective of being the issuing and executing state, confirm that they are not often confronted with operational capacity issues, there is however a fair amount of member states (6 from the issuing state perspective and 7 from the executing state perspective)

who do argue that operational capacity issues are significant enough to start an EU level debate on how to precisely deal with this. (questions 5.4.2 and 5.4.3). This is rather surprising considering the important position operational capacity usually takes in the political debates.

**5.4.2 Are you often confronted as an issuing MS with operational capacity issues of the executing MS? (often meaning the problems are significant enough to start an EU level debate on how to deal with it)**



**5.4.3 Are you as an executing member state often confronted with operational capacity issues? (often meaning the problems are significant enough to start an EU level debate on how to deal with it)**



Additionally, for this reflection exercise, the project team suggests to complement this approach with a binding commitment to ensure cooperation, beyond operational capacity issues. The question arises to what extent a parallel can be drawn with the *aut dedere aut exequi* principle and an *aut exequi aut tolerare* principle can be introduced.

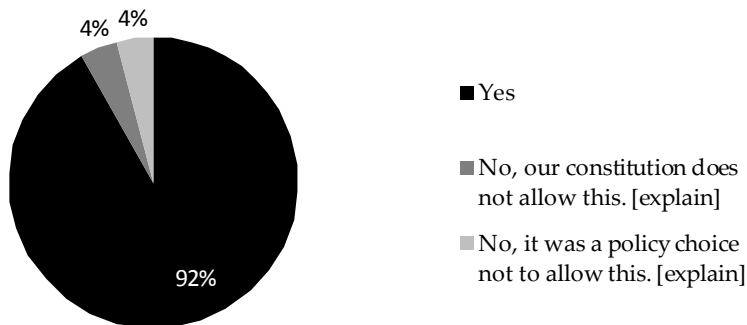
In extradition/surrender cases, the unwillingness or inability of a member state to extradite/surrender a person as an obstacle for execution is overcome by the introduction of the *aut dedere aut exequi* principle, introducing the obligation for the member state involved to execute the decision itself. A parallel *aut exequi, aut tolerare* principle would mean that the executing member state is to execute the order of the issuing member state or alternatively (e.g. in case of operational capacity issues) tolerate the competent authorities of the issuing member state to conduct the order themselves on the other member state's territory.

Introducing this principle with regard to MLA would be consistent with the current international cooperation *acquis*. The conceptual framework of this principle is already in use within the framework of a Joint Investigation Team (JIT). JIT's are only used with regard to "*difficult and demanding investigations having links with other member states*" or cases in which the "*circumstances of the case necessitate coordinated, concerted action in the MS involved*" (art 1, FD JIT), and they should remain a form of exceptional cooperation. However, the principle of '*tolerare*', i.e. tolerating officers of another member state on your territory, could be extended to those situations in which operational capacity issues would lead to difficulties in executing MLA requests.

According to the project team the application of the principle *aut exequi, aut tolerare* should be restricted to those aspects of cooperation that do not require the involvement of a judicial authority and therefore do not relate to coercive or intrusive measures, the enforcement of sentences and any other aspects listed as a prerogative of judicial authorities. It is the project team's position however, that at least for forms of cooperation that do not require the involvement of a judicial cooperation, it should be accepted that authorities from one member state could execute the decision on the territory of another member state.

From the member state responses it can be concluded that almost all member states allow officers of another member state to operate on their territory and that there appear no immediate constitutional hurdles for this to take place.

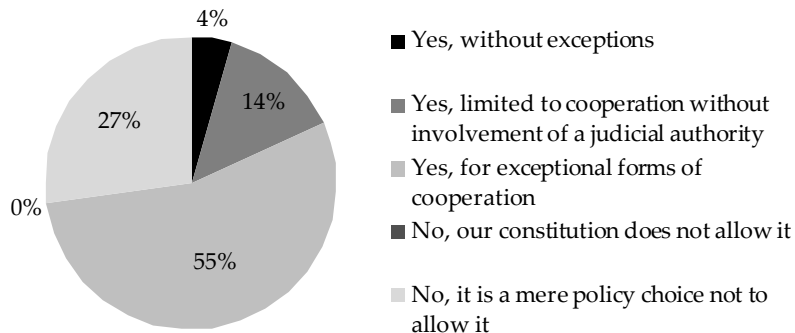
**5.4.1 Does your country allow officers of another member state to operation on your territory?**



However, these results need to be interpreted in the already existing framework of JIT's and Naples II so that it cannot be concluded from the above results that member states already allow officers of another member state to operate on their territory outside the framework of JID's and Naples II or that there appear no immediate constitutional hurdles for a broader interpretation in light of the project team's proposal to introduce a *aut dedere aut tolerare* principle.

Member states do however agree that the application of this principle is an acceptable future policy option, although most member states would limit its application to those aspects of cooperation that do not require the involvement of a judicial authority (3 member states) or to exceptional forms of cooperation such as JIT's, cross-border surveillance and covert operations (12 member states).

**5.4.4 Is the application of aut exequi, aut tolerare an acceptable future policy option?**



## INTERNATIONAL COOPERATION IN CRIMINAL MATTERS

From the member states' comments it can also be concluded that a broader interpretation of this principle in light of the project team's proposal should – politically – at first be introduced on a bilateral level before making it an Europe-wide principle. The project team strongly recommends the initiation of legislation in this regard, especially given the fact that this is exactly what the founding treaties envisage: reference is made to Art. 89 TFEU, a provision which is an almost identical copy of Art. 32 previous TEU, in existence since the Treaty of Amsterdam. The project team submits that after over ten years, the time has come to actually make use of this provision. Art. 89 TFEU foresees the possibility for the Council to legislate the conditions under which “the competent ‘judicial’ and police authorities of the member states can operate on each other’s territories.



### **3.4 Correction mechanisms: A necessity in the current cooperation climate**

*Gert Vermeulen, Wendy De Bondt & Peter Verbeke*

The fourth and final general cooperation principle must be the introduction of correction mechanisms. Because of the differences between the criminal justice systems of the member states of the European Union, simply deciding to cooperate regardless of those differences is bound to cause many problems. This means that initiatives to cooperate must be complemented with a series of what called “correction mechanisms” that have the potential to solve any problems springing from the legal diversity.

There are a number of different types of correction mechanisms, all with different goals and features, different legal bases and different effects for both the member states and the individuals involved. All these correction mechanisms have their own strengths and weaknesses and therefore all involve different requirements to be taken into account.

The project team has identified four different types of correction mechanisms, being trustbuilding measures, minimum standards, flanking measures and the application of the *lex mitior* principle. The following paragraphs aim at elaborating on those different types of correction mechanisms.

#### **3.4.1 Trustbuilding measures**

A first type of correction mechanisms are the trustbuilding measures. Their goal is to facilitate the application of the mutual recognition principle.

In a mutual recognition context, member states are to accept and execute judicial decisions taken by other member states. Considering the differences between criminal justice systems it is not unimaginable that member states are reluctant - or even opposed - to executing a foreign decision. At the time of the adoption of the first mutual recognition instruments, policy makers could benefit from a window of opportunity created in the aftermath of the 9/11 attacks. It created a unique political environment offering considerable willingness of member states to cooperate and move ahead swiftly. Initially, the introduction of the mutual recognition principle seemed relatively straight forward. Unfortunately, since then reality has kicked in. Blind mutual recognition of foreign decisions is not feasible due to the lack of trust that is caused by the differences in member states’ criminal justice systems. Member states are therefore entitled to limit the scope of the obligations that are linked to mutual recognition, implying that mutual recognition is limited to the extent member states trust each other. This type of correction mechanism that consists of a measure that aims to limit the scope of mutual recognition obligations is

characterised as a trustbuilding measure as it intends to ensure that cooperation obligations are delineated in accordance to the trust necessary to render mutual recognition acceptable.

The FD In Absentia is a good example of such a trustbuilding measure. The right of an accused to appear in person at the trial is included in the right to a fair trial provided for in Art. 6 ECHR. The Court has clarified that the right of the accused to appear in person at the trial is not absolute and that under certain conditions the accused person may, of his or her own free will, expressly or tacitly but unequivocally, waive that right. The then framework decisions implementing the principle of mutual recognition of final judicial decisions did not deal consistently with the issue of decisions rendered following a trial at which the person concerned did not appear in person. This diversity complicated the work of practitioners and hampered judicial cooperation. Consequently the FD In Absentia was issued, altering five framework decisions for which it was agreed that they could not work properly because of the uncertainty in some countries regarding whether or not to recognise in absentia judgements. The most significant framework decision changed is the FD EAW, but the same changes are being made to the FD Fin Pen, FD Confiscation, FD Deprivation of Liberty; FD Alternative. A clear and common refusal ground was introduced for decisions rendered at a trial where an accused did not appear in person. The recognition and execution of a decision rendered following a trial at which the person concerned did not appear in person should not be refused if either he or she was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or if he or she actually received, by other means, official information on the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial. In this context, it is understood that the person should have received such information 'in due time', meaning sufficiently in time to allow him or her to participate in the trial and to effectively exercise his or her right of defence. In doing so, the scope of the mutual recognition obligations was limited in accordance to the level of trust that member states have in each others criminal justice systems.

The legal basis for such a trustbuilding measure limiting the scope of the mutual recognition obligation can now be found in Art. 82.2 TFEU which allows for the adoption of measures necessary to facilitate mutual recognition.

It is important to underline that these measures and requirements to take into account in criminal justice procedures (that are up for mutual recognition), are to be interpreted as the limits to mutual recognition and do not impact on the position of the persons involved. An individual tried in a member state cannot claim the application of e.g. the rules laid down in the FD In Absentia. Those rules only limit the cooperation obligations and thus the obligations to mutually recognise and execute decisions that are handed down accordingly. The only certainty an individual has is linked to the recognition of the decision by other

member states. When a person is tried according to the rules laid down in the framework decision, the judicial decision will have to be recognised and executed by the other member states. To the contrary, when the decision was not tried according to the rules laid down in the framework decision, the judicial decision may be refused, but the executing member state has considerable discretion in this respect. Therefore, the individual cannot deduce any rights whatsoever from the trustbuilding measure included in the Framework Decision on Trials in Absentia.

### 3.4.2 *Minimum standards*

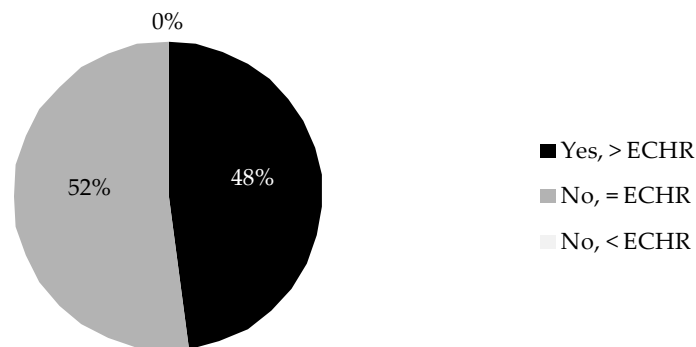
A second type of correction mechanisms are the minimum standards. Their goal is to ensure that the result of an action in one member state is acceptable and admissible in another member state. In other words, their goal is to ensure e.g. that evidence gathered by one member state in the context of a criminal investigation, is acceptable and admissible in any another member state. These minimum standards cannot be characterized as tools to facilitate mutual recognition as the problems they seek to overcome are not mutual recognition related. Mutual recognition is characterised as having to recognise and execute a foreign decision. The problems tackled with minimum standards are not linked to recognising a foreign judicial decision. To the contrary they are linked to recognising the result that springs from a judicial or other action. It is a different type of problem that calls for a different type of solution or correction mechanism.

In international cooperation, it is a general rule that each party applies its own law. As a consequence however, due to the differences between the member states criminal justice systems, there is always a risk that the result of a member state action is not acceptable in another member state simply because of the way the action took place. To accommodate this down side of the general rule that all parties apply their own law, minimum standards are a correction mechanism that give member states the choice to either apply their own law (as before) or see to it that a set of minimum standards is taken into account. As a reward to taking account of those minimum standards, the result of their action can no longer be questioned by other member states. Applied to the example of evidence gathering this means that member states that gather evidence following a cross-border request can decide to follow certain minimum standards so as to ensure that the evidence gathered is admissible not only in the requesting member state, but also in all other member states of the European Union. As a consequence of gathering evidence in accordance with the agreed minimum standards, other member states are to accept an irrefutable presumption of mutual admissibility of evidence which means that the admissibility of evidence can no longer be challenged. In light of the consequence of irrefutability of evidence gathered in accordance to these

minimum standards, it becomes interesting to look into the member state perspectives as to what these minimum standards should look like in light of the ECHR acquis.

From the replies to question 4.2.9 it is clear that evidence cannot be accepted if gathered according to standards that do not meet the ECHR criteria. With respect to the question whether admissibility should be made dependent on standards that mirror the current ECHR acquis or to standards that have a significant added value, the results are inconclusive.

**4.2.9 Should the adoption of EU minimum standards present a clear added value when compared to existing ECHR standards?**

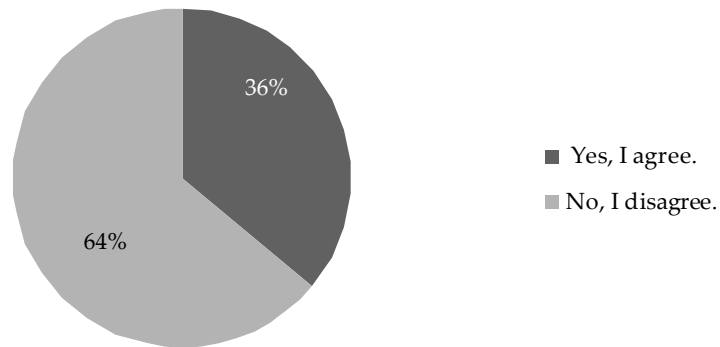


In doing so, agreeing on minimum standards does not only entail a strong commitment for the other member states in that they are to accept the validity of the outcome of another member state's action but also allows for some discretion for the executing member state with respect to either or not taking the minimum standards into account.

From a theoretical perspective, these minimum standards only apply in a cross-border scenario, where the executing member state has autonomously decided to ensure that certain formalities and procedures included in the minimum standards are taken into account. Nevertheless, it is not unimaginable that a member state would develop a policy to always apply those minimum standards in cross-border situations with a view to rendering its efforts as effective and usefull as possible. Furthermore, from an even more pragmatic perspective, member states could also decide to introduce those minimum standards into their national law so as to ensure that all their actions within the criminal justice sphere – regardless of an underlying cross-border cooperation request – are valid throughout the EU. Because the EU has no competence to regulate this latter situation and interfere with mere domestic cases, it is

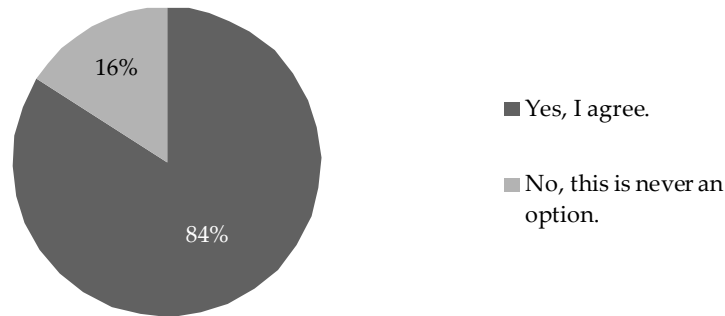
interesting to know how member states perceive the action radius of these minimum standards. The results from question 4.2.7. are interesting in that they reveal that despite a clear lack of EU competence to regulate in that manner, no less than 64% of the member states feel that minimum standards should not be limited to cross-border situations. This means that for 64% of the member states it is not unimaginable to take those minimum standards into account in a mere domestic situation.

**4.2.7 Should the use of minimum standards be limited to cross-border situations?**



Given the importance of this consideration, a second question was included in the member state questionnaire. When reformulating the previous question in a more explicit question, 84% of the member states consider it to be an acceptable future policy option to require member states to implement the minimum standards into their national criminal justice systems.

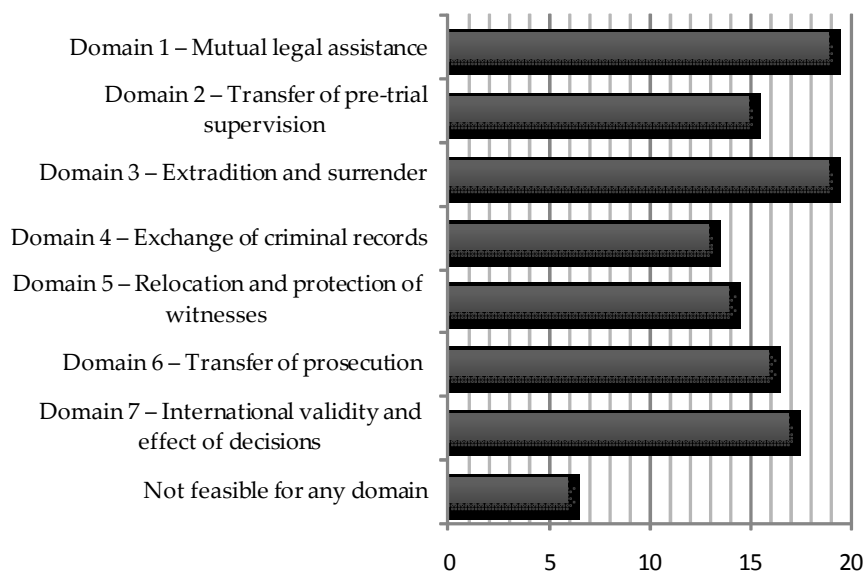
**4.2.8 Is it an acceptable future policy option to require member states to implement the minimum standards into their national criminal justice systems?**



In spite of the obvious beneficial effect to free movement of evidence, it must be underlined that the EU is absolutely not competent to take measures of that kind.

Finally, as a result of the discretionary margin provided to the executing member state, this rule does not affect the position of the persons involved as they cannot deduce any rights from these minimum standards. Completely in parallel to the effect of trustbuilding measures, the only certainty an individual has, is linked to the value of the outcome of the action. The relation between this type of minimum standards and the existing highly criticized *forum regit actum* principle will be further elaborated on below in 5.2.1. The legal basis for this kind of minimum standards can be found in Art. 82.2 TFEU that also explicitly refers to the minimum standards to ensure admissibility of evidence throughout the EU. Even though there are no tangible examples of this kind of correction mechanism in existing cooperation instruments, the results from the discussions during member state focus group meetings reveal that member states are open to the idea to introduce minimum standards in a wide variety of cooperation mechanisms. The replies to question 4.2.10 reveal that no less than 86% of the member states are open for a debate on the introduction of minimum standards. Even though the project team is not convinced that this technique of providing member states with the option to act in accordance to a commonly agreed upon set of rules in a cross-border context would be useful in all cooperation domains, it is reassuring to see that – as a starting point – there are no real restrictions in terms of the cooperation domains included in such a debate.

**4.2.10 Is the feasibility of minimum standards limited to a number of the cooperation domains?**



**3.4.3 Flanking measures**

A third type of correction mechanisms are the flanking measures. Their goal is to complement or flank other cooperation related instruments so as to ensure the good functioning thereof.

The use of some cooperation instruments is dependent on the pursuit of certain standards or principles. The most common example is the FD Deprivation of Liberty, which is centered around the principle of *social rehabilitation*.

Art. 3.1 FD Deprivation of Liberty defines as its very objective to “establish the rules under which a member state, with a view to facilitating the social rehabilitation of the sentenced person, is to recognise a judgement and enforce the sentence”.

Recital 9 Preamble FD Deprivation of Liberty affirms the principle that enforcement of a sentence in the executing state should enhance the possibility of the social rehabilitation of the sentenced person and that the issuing states should satisfy themselves that this is the case. The recital contains a non-exhaustive list of criteria which competent authorities of the issuing state should take into account when reaching a decision as to whether or not the enforcement of a sentence in the executing state will in fact enhance the possibility of the sentenced person’s social rehabilitation prospects. These criteria are: “the

person's attachment to the executing state, whether he/she considers it the place of linguistic, cultural, social or economic and other links to the executing state". Thereafter, Art. 4.2 and 4.6 FD Deprivation of Liberty establish requirements for member states in relation to the competent authorities who will take decisions as to whether the forwarding of a judgement will in fact facilitate the social rehabilitation of the sentenced person. Art. 4.2 FD Deprivation of Liberty is less specifically worded requiring only that the issuing state (where appropriate after consultation with the executing state) should satisfy itself that the enforcement of the sentence by the executing state would facilitate the social rehabilitation of the sentenced person. Art. 4.6 FD Deprivation of Liberty in its turn, is more precise by requiring member states to "adopt measures, in particular taking into account the purpose of facilitating social rehabilitation of the sentenced person, constituting the basis on which their competent authorities have to take their decisions whether or not to consent to the forwarding of the judgement."

The provisions of Art. 4.2 FD Deprivation of Liberty have a general scope whereas those of Art. 4.6 FD Deprivation of Liberty are confined to cases involving transfer to *third party* EU member states i.e. member states other than the state of nationality where the person lives or to which they will be deported on the basis of an expulsion or deportation order arising from the judgement. In such cases, consultation between the issuing state and the executing state is compulsory with provision being made for the latter to provide a reasoned opinion as to why a sentence transfer would not serve the purpose of facilitating the social rehabilitation and reintegration of the sentenced person (Art. 4.3 and 4.4 FD Deprivation of Liberty).

This means that no member state can seek recourse to this framework decision as a legal basis to have its decision executed in another member state, unless it can motivate that social rehabilitation would benefit from such a transfer.

The Court's deliberations in the case of *Dickson v. The United Kingdom* (ECtHR 2007)<sup>217</sup> are of significance to this discussion not because of the judgement reached in the case, but because of the prominence given to articulating the objectives of a prison sentence by the Court during its reasoning. In this judgement, the ECtHR endorsed the principles it viewed as central to rehabilitation in the context of a responsible prison regime, thereby providing a benchmark against which other regimes can reasonably be assessed. While rehabilitation was initially construed as a means of preventing recidivism, more recently and more positively, it has been taken to constitute the idea of re-socialisation through the fostering of personal responsibility. This objective has been reinforced by the development of the 'progression principle' which entails that in the course of serving a sentence, a prisoner should move progressively

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<sup>217</sup> ECtHR, 4 December 2007, Nr. 44362/04, *Dickson v. The United Kingdom*.



through the prison system thereby moving from the early days of a sentence, when the emphasis may be on punishment and retribution, to the later stages, when the emphasis should be on preparation for release.

The judgement goes on to quote extensively from a range of international legal instruments which underpin this standpoint. They include:

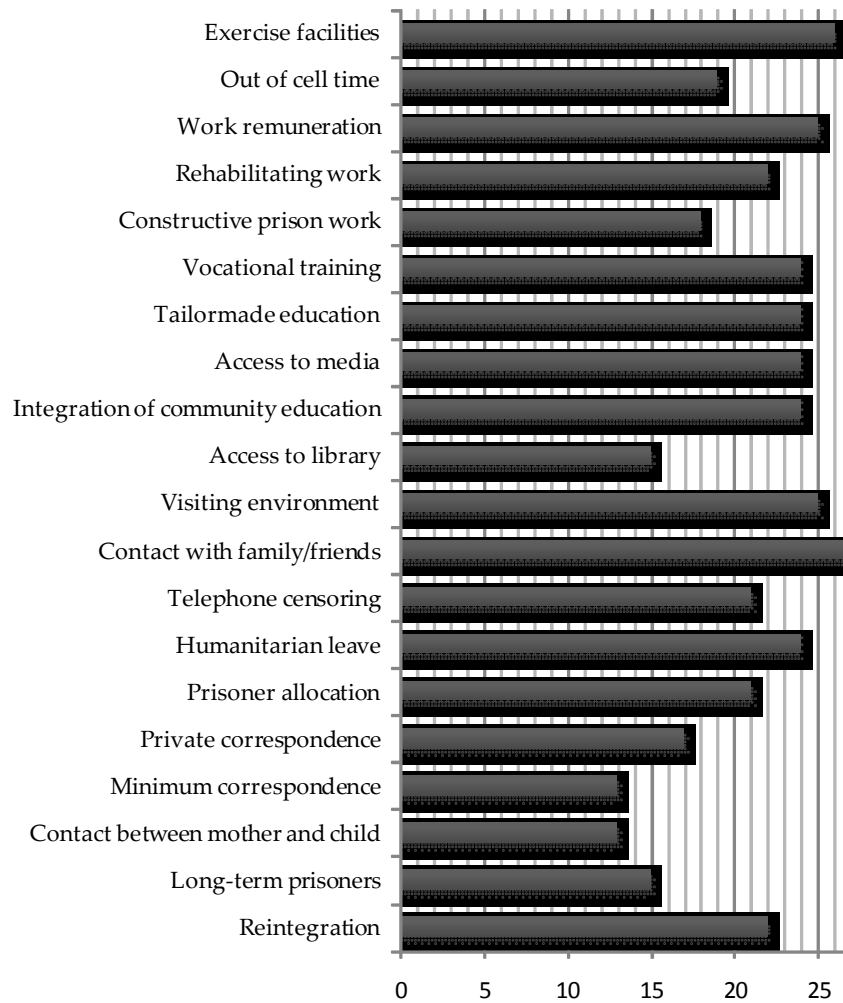
- The UN International Covenant on Civil and Political Rights which provides that the “penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation”;
- The 2006 European Prison Rules and their stipulations that “persons deprived of their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remanding them in custody”, that “life in prison shall approximate as closely as possible the positive aspects of life in the community” and that “all detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty”; Rules 105.1, 106.1 and 107.1 were considered worthy of special mention by the Court in that they impose obligations on States with regard to prisoners’ work, education and pre/post-release programmes with a view to their successful reintegration upon release; and
- The Council of Europe Recommendation R(2003)23 on the Management by Prison Administrations of Life Sentence and other Long-term Prisoners which establishes five linked principles for the management of long-term prisoners:
  - Account must be taken of the personal characteristics of prisoners (individualisation principle);
  - Able the realities of life in the community (normalisation principle);
  - Opportunities should be accorded to exercise personal responsibility in daily prison life (responsibility principle);
  - A distinction should be made between the risks posed by life and longterm prisoners to themselves, to the external community, to other prisoners and to other people working or visiting the prison (security and safety principle);
  - Prisoners should not be segregated on the basis of sentence (nonsegregation principle);
  - The planning of an individual prisoner's long-term sentence should aim at securing progressive movement through the prison system (progression principle).

From the following chart that mirrors a high level overview of the empirical results gathered in a previous study on the cross-border execution of judgments involving deprivation of liberty<sup>218</sup>, it becomes clear that a lot of work remains to be done.

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<sup>218</sup> VERMEULEN, G., van KALMTHOUT, A., MATTERSON, N., KNAPEN, M., VERBEKE, P. en DE BONDT, W., *Cross-border execution of judgments involving deprivation of liberty in the EU*.

**Number of member states that have adopted the following standards relating to detention conditions and social rehabilitation**



If detention conditions are too divergent, it can hardly be argued that the sentence is not fundamentally altered by transferring the prisoner to another member state. Additionally, survey results identified often subordinate material detention conditions in most member states, which could potentially infringe on

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*Overcoming legal and practical problems through flanking measures, Antwerpen-Apeldoorn-Portland, Maklu, 2011.*

prisoners' fundamental rights under the ECHR. In this regard it is alarming to acknowledge that a vast number of inferior standards derive from binding European and international norms and standards and/or ECtHR's jurisprudence, and that the only possible sanctioning of insufficient implementation by the member states appears to be via the ECtHR's jurisprudence, which implies that an immense burden of proof rests upon the prisoner.

Hence, it is reasonable to question whether or not the EU should aim higher than the Council of Europe standards by introducing its own binding minimum detention standards within the mutual recognition framework under Art. 82.2 (b) TFEU.

As opposed to trustbuilding measures and minimum standards elaborated on above, this does imply that reaching a common understanding on the minimum detention conditions as a flanking measure entails commitments for all member states involved (both the issuing as well as the executing member state) and influences the position of the individuals involved in those cross-border situations:

- The issuing member state will have to duly motivate that the transfer of the sentenced person to another member state will be beneficial for the persons social rehabilitation;
- The executing member state will have to ensure to execute the sentence in accordance to the minimum conditions taken into account by the issuing member state in its motivation;
- The person involved can claim that his sentence is executed along the minimum conditions taken into account by the issuing member state in its motivation.

It should be stressed that the flanking measure necessary to ensure the good functioning of the FD Deprivation of Liberty does not consist in the adoption of yet another set of binding minimum detention conditions. Not only will it be very hard to get the member states in support of adopting binding minimum detention standards even if these would only apply within 'multi-member state criminal proceedings'. On top of the enormous expenses this would involve, there are also other reasons for arguing against this kind of a 28<sup>th</sup> EU regime.

First, it is unacceptably complex to have practitioners work with different regimes according to the either or not cross-border character of a cases.

Second, it could amount to equal treatment problems if the regime applicable to a person is dependent on whether or not a case is cross-border or not.

Third, a 28<sup>th</sup> EU regime is non-functional in that it is not always clear from the start whether or not a case is cross-border and therefore maintaining a 28<sup>th</sup> EU regime will not solve problems with existing evidence.

Integrating the minimum standards in each of the 27 national criminal justice systems would be the better option as this would not overcomplicate decisions on the applicable law, it would ensure equal treatment regardless of the cross-

border nature of a case and above all, it would avoid inadmissibility problems as the minimum standards are ideally specifically designed to neutralize any problems. However, the EU does not have the legal competence to require this from the member states and it will be up to each of the EU countries to do so.

To the contrary, the flanking measure consists of introducing a motivational duty with respect to the issuing member state. The issuing member state must duly motivate that the detention conditions in the execution member state meet some minimum requirements in light of the prisoner's social rehabilitation prospects and the executing member state is obliged when operating in a cross-border context to uphold these minimum requirements with respect to detention conditions. Hence, the position of the individual is influenced because a person transferred from one member state to another can claim that his detention conditions have to be of a certain standard.

The difference with the minimum standards elaborated on above is situated in the finality or goal of these correction mechanisms. Whereas minimum standards are intended to secure the free movement of the result of a member state intervention in the context of a criminal proceeding, flanking measures are intended to secure the possibility to use the cooperation instrument they flank.

#### 3.4.4 *Lex mitior principle*

A fourth and final type of correction mechanisms is the application of the *lex mitior* principle. The *lex mitior* principle aims to prevent that an individual experiences the negative effect due to the mere fact that multiple member states cooperate in a criminal procedure. Considering that cooperation between member states should not negatively impact on the position of the individual involved, correcting mechanisms may be in order. Through this type of correction mechanism it is ensured that an individual can keep benefiting from the law that is most favourable for him. The application of the *lex mitior* should be automatic and immediate and therefore leave no room for appreciation by the member states. In doing so this correction mechanisms supports the legal certainty for the persons involved and will speed up cooperation because discussions on the applicable law will no longer be necessary.

In order to clarify the characteristics and requirements of a good application of the *lex mitior* principle, the project team will provide an overview that corresponds to the different phases in the criminal justice chain.

First, the *lex mitior* principle is reviewed in relation to transfer of prosecution as the first phase in the criminal justice chain. Second, *lex mitior* is linked to the equivalence of sentences or measures that is to be guaranteed via the adaptation mechanism currently included in a series of mutual recognition instruments. Third, *lex mitior* is linked to the execution of sentences. Fourth and final, an application of the *lex mitior* principle is identified in the current provisions that regulate the possibility to benefit from amnesty or pardon.

#### 3.4.4.1 *Lex mitior & transfer of prosecution*

First, the *lex mitior* principle needs to be briefly assessed in the context of transfer of prosecution. Two different types of transfer of prosecution need to be distinguished.

Firstly, if transfer of prosecution takes place via so-called “*denunciation*”, i.e. an agreement on the best place for prosecution between different member states competent to prosecute, both of the member states were competent to prosecute. The transfer of prosecution does not change the applicable law, for the legal systems of both member states were applicable in the first place. Secondly, the situation is entirely different when member states competent to prosecute seek cooperation from a member state that did not originally have competence to prosecute. In a such situation, the member state competent to prosecute will transfer that competence to another member state. This operation is governed by the “*transitivity principle*”, pointing to a transfer of competence. As a result, the transfer of prosecution will bring the case within the scope of a legal system that was not applicable to begin with. A different legal system will be applicable to the case when compared to the situation before the transfer of prosecution.

Both these scenarios call for a distinct argumentation with respect to the applicability of the *lex mitior* principle.

Firstly, if the transfer of prosecution takes place via so-called *denunciation* both legal systems were already applicable. Even though it can still be argued that it would be in the persons best interest to apply the law that is most favourable for him, it can equally be argued that the person concerned should have been fully aware of the applicability of the more severe law, and can therefore not call upon the application of a *lex mitior* principle. Secondly, the situation is entirely different when transfer of prosecution is governed by the *transitivity principle*, because in those situations the person involved could not have know, at the time of the facts, that the law of a member state that was originally not competent to deal with the case would be made competent because a competent member state would transfer his competence. In this scenario seeing to the application of the *lex mitior* principle becomes important. Not only in the event the law of the original member state would be more favourable to the person involved, but also in the event the law of the new member state would be more favourable to the person involved. In the scenario where the law of the original member state is more favourable to the person involved, it is obvious that the transfer of prosecution cannot have as a result that the person would be subject to a legal system that is more severe than the original one. The technique of transfer of prosecution is not designed to be used as a tool to seek the applicability of the more severe criminal justice system. The severity of the applicable law may never be an argument in the transfer mechanism. A transfer decision should be based on finding the best place for prosecution in terms of a set of criteria (e.g. nationality of perpetrator,

nationality of victim, location of the evidence and best place for execution of the sentence) amongst which the severity of the criminal justice system has no place. If the law of the original member state is more favourable for the person involved, the characteristics that make it more favourable should be transferred along with the case, so as to ensure that the person involved – in so far as the applicable law is concerned – is not confronted with a negative impact of the transfer of his case to a member state that had no original competence to deal with it. Similarly, in the scenario where the law of the new member state – that did not have original competence – is more favourable than the law of the original competent member state, the person involved should be able to benefit from a *lex mitior* principle. In this scenario, it is the responsibility of the transferring member state to either prosecute the case itself, or transfer the prosecution thereof to another member state being fully aware of the consequences this will have with respect to the severity of the applicable law. If the law of the new member state is more favourable for the person concerned, it is the responsibility of the original member state to either or not accept this and either or not seek transfer of prosecution to that other member state.

#### 3.4.4.2 *Lex mitior & equivalence of sentence/measure*

Second, looking into the relation between the *lex mitior* principle and the sentencing stage, a *lex mitior* like principle can be found in the context of sentence equivalence, when the execution thereof is transferred to another member state. The current possibility to adapt the duration or nature of the sentence in the event it is incompatible with the law of the executing member state, is a *lex mitior* like principle and can be found in Art. 8 FD Fin Pen, Art. 8 FD Deprivation of Liberty, Art. 9 Alternative and Art. 13 Supervision. These provisions are criticized for being only *lex mitior-like* because their application is not automatic and dependent on the appreciation of the authorities in the executing member state.

Besides inconsistency issues, some more fundamental comments should be made with respect to these adaptation provisions, for the current approach is not the best neither to ensure correct application nor to safeguard legal certainty.

First, with respect to the possibility to adapt *the duration* of the sentence, there is some concern with respect to the wording of Art. 8.4 FD Deprivation of Liberty in that it is not made clear that the adaptation of a sentence (and thus bringing it back to the maximum penalty foreseen by the law of the executing member state) should be automatic and leave no room for discretion. An automatic application of the *lex mitior* principle will facilitate the adaptation procedure not only in that it will be more transparent and increase legal certainty, but also because it would no longer require the intervention and consideration of a competent authority. Most unfortunate, two forms of discretionary power can be found in implementation legislation.

Firstly, some member states have introduced the possibility to adapt the duration of the sentence into a duration that still exceeds the maximum penalty in the executing member state. Most member states argue that it is inconsistent with their law to execute a penalty that exceeds the maximum foreseen in their national law. In light thereof it feels somewhat inconsistent for a member state to argue that a foreign penalty is inconsistent with its national law for it exceeds the maximum penalty and at the same time suggest a solution that still exceeds that maximum.

Secondly, it should be noted that in line with Art. 8.2 and 8.4 FD Deprivation of Liberty not all Member states have introduced an obligation to adapt. When the sentence is incompatible with the executing state's laws in terms of its duration, the competent authority of the executing state *may* decide to adapt the sentence. Hence, there is no automatic adaptation applicable when a sentence is incompatible with the law of the executing state in terms of duration.

Both of these situations are unacceptable when taking a strict interpretation of the *lex mitior* principle into account. If cooperation between member states may never negatively affect the position of the person concerned, this means that at least, the sentence may not exceed the maximum penalty in the executing member state, for the person concerned could never have been subject to a more severe penalty when the case was dealt with in the executing member state from the start. Bringing back the duration of a sentence to the maximum eligible to be imposed on the executing member state should be mandatory. This means that member states who allow discretion and accept that the adapted sentence still exceeds the national maximum should adapt their national implementation law to be in line with this position.

Second, with respect to the possibility to adapt *the nature* of the sanction, similar concerns exist. In addition to the fact that here too the EU instruments do not introduce an adaptation obligation, it is not clear by whom nor on what grounds a decision will be made as to whether or not the adapted sentence has in fact aggravated the issuing state's punishment. When someone was sentenced in member state A to 5 years of home detention and member state B decides to adapt this sentence (because home detention as a stand-alone sentence is incompatible with its own laws), it is unclear as how this could be done and how it will be decided that the detention situation is not aggravated in absence of a general EU wide agreed understanding on the severity of all different sanctions that could be applied. It is unclear whether adaptation to 2 years of imprisonment (for example) would be appropriate in this particular case; the duration of detention may have declined but whether or not the sentenced person will feel that his situation has not been deteriorated is less certain. In light of proposals to introduce home detention with electronic monitoring as a stand-alone sentence in various European countries, problems of this kind could well increase in the near future.

In order to amend this problem, two recommendations need to be combined.

First, there is a need to gain a deeper understanding of each other's sentencing legislations and practices. Second, it must be seen to that an adaptation will never unreasonably aggravate the situation of the person involved. Both recommendations need further clarification.

First, because understanding foreign sentencing legislation and practices is crucial, existing instruments that attempt to influence the national situations are welcomed. Before the Amsterdam Treaty and the arrival of the framework decision as a new instrument, the weaker forms of instruments that were then used to extend the range of criminalization within the EU tended to leave the issue of sentencing distinctly vague – typically requiring member states to provide penalties that would be 'effective, proportionate and dissuasive', and letting each member state decide what these would be. However, framework decisions requiring behaviour to be criminalized tend to be more prescriptive. They commonly prescribe a 'maximum minimum penalty' meaning that each member state must ensure that the offence in question carries a maximum penalty of at least a given period of imprisonment. Additionally, the impact of a sanction requirement in the existing sanction climate in each of the 27 different national criminal justice systems will significantly differ in each of these member states. Combined with the considerable discretion a judge will have in each individual case, this makes it impossible to introduce and maintain approximated sanction levels in the EU member states. What is important however, is to learn more about each other's sanction systems and compare it with the own sanction system as an alternative to approximating sentencing legislation and practices. It is required to draw up an index of all sanctions eligible of being imposed in the member states. The sanction tables drawn up in ECRIS can be used as a basis for such an index system.

Second, in order to assess whether the adaptation will not lead to an unreasonable aggravation, it is necessary to complement ECRIS-like tables with a commonly decided nature-based severity ranking. Only such common understanding of the severity of the sanctions visualised in a ranking table will allow an objective assessment of the aggravating effect of adapting the nature of a sanction in the executing member state. With a view to respecting the legality principle and ensuring legal certainty, it is important to have conversion tables between all eligible sanctions in the EU and the known sanctions in the own national legislation. It is important to note that it will be very hard to reach EU wide consensus on such a severity ranking classifying the different types of sanctions according to their nature. Furthermore, it is very much possible that the individual appreciation of a sentenced person deviates from this ranking.

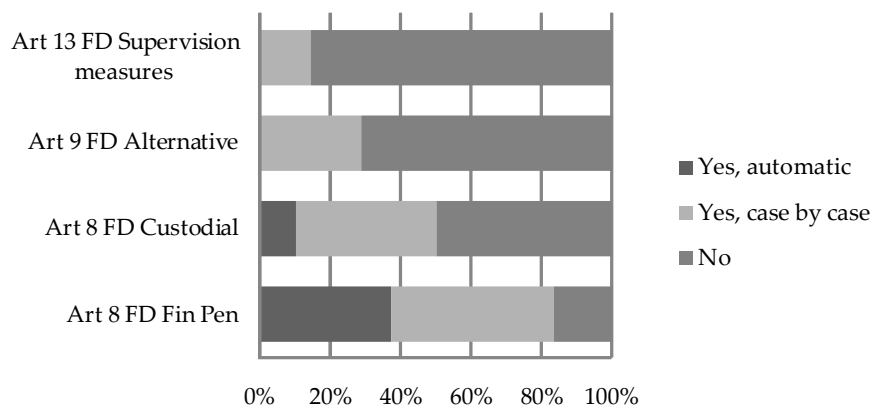
It becomes even more complex if such a severity ranking is complemented with sanction durations. Whereas it is likely that there will be a common understanding that a prison sentence is more severe than electronic monitoring, it will be far more challenging to reach a common understanding on how long a prison sentence will be equal to how long electronic monitoring. In order to



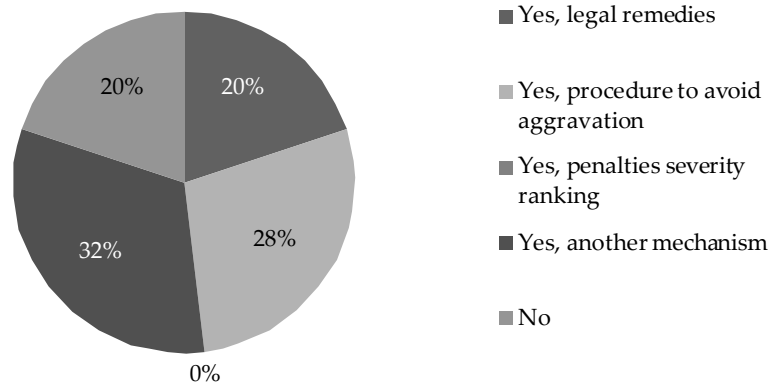
avoid endless discussions with respect to the influence of duration on severity in case sanctions have a different nature, it is recommended to limit the index-exercise to the nature of the sanctions as such and complement it with the principle that adaptations in terms of the nature of a sanction may not unreasonably aggravate the position of the person concerned.

As mentioned, a person involved should always be able to disagree with the outcome of the objective severity analysis and voice this either at the hearing before the decision is finalised and motivated in the issuing state's, or later on in the context a judicial review procedure. It is promising to see that the European Commission has published a call for tender for a study on national sanction legislation and practices.

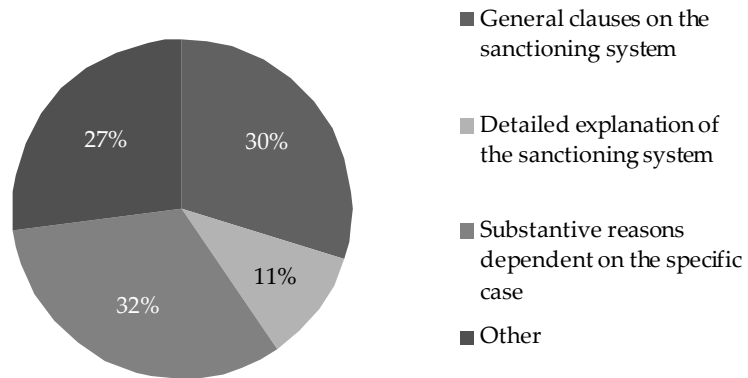
#### 4.1.10 Does your national implementation law foresee in the possibility to adapt the decision of the issuing member state?



**4.1.11 Does your national implementation law provide guarantees to make sure the adaptation is not aggravating?**



**4.1.13 and 4.1.15 Which reasons are given to clarify the adaptation?**



#### 3.4.4.3 *Lex mitior & execution of sentence/measure*

Third, the *lex mitior* principle should also be reviewed in the context of the execution of the sentence. Analysis of the current instruments revealed a lacking *lex mitior* principle in the current provisions on the execution of sentences.

Art. 17.1 FD Deprivation of Liberty determines that the enforcement of a sentence shall be governed by the law of the executing state whose authorities are afforded competence to decide on procedures for enforcement and the determination of any related measures. This includes the grounds for early/conditional release and earned remission. There is however no provision in the FD Deprivation of Liberty specifying that the sentence execution practices of the executing state should not aggravate the prisoner's detention position.

Art. 17.3 FD Deprivation of Liberty allows an issuing state to request information from an executing state regarding the applicable provisions concerning early or conditional release which the executing state is duty bound to supply. The issuing state is thereafter able to withdraw the certificate underpinning sentence transfer (presumably on the basis of concerns relating to these early release provisions).

It is striking that the FD Deprivation of Liberty does not deal with the other side of the problem: the prisoner who, as a result of the transfer, will end up spending a significantly longer time in prison than what he would have had to serve if the transfer had not taken place. Possibly even more than the mere duration of the sentence, early/conditional release provisions truly determine the severity of the sanction and thus whether or not a situation is aggravated or not.

And although Art. 17.4 FD Deprivation of Liberty provides the flexibility for an executing state to take account of an issuing state's provisions governing conditional and early release in their own decision making in individual cases, this is a mere possibility and not an obligation.

In the case of *Szabó v Sweden* (ECtHR 2006), the Court raised a number of interesting issues in respect of early release provisions when a prisoner is transferred to serve his sentence in a country other than that in which he was tried, convicted and sentenced.

The applicant, a Hungarian national, was convicted of drugs offences in Sweden and sentenced to a period of ten years imprisonment with the Swedish Court also ordering that he be permanently expelled from Sweden. Under Swedish law, the applicant would normally have expected to be conditionally released after serving two thirds of such a sentence (*in casu* six years and eight months). Under the terms of the Additional Protocol to the 1983 CoE Convention on the Transfer of Prisoners, the applicant was transferred to Hungary to serve the remainder of his prison sentence there. The applicant declared that he did not consent to such a transfer.

The objectives of the CoE Convention on Transfer of Sentenced Prisoners are mirrored into the objectives of the FD Deprivation of Liberty as they both try to develop international cooperation in the field of criminal law and to further the ends of justice and social rehabilitation of sentenced persons. According to the preamble of the CoE Convention, these objectives require that foreigners who are deprived of their liberty as a result of their commission of a criminal offence should be given the opportunity to serve their sentences within their own society. The main difference between the Convention and the FD Deprivation of Liberty is that the condition of consent by the sentenced person is not longer the general rule for the FD Deprivation of Liberty. However, in this particular case, the applicant's consent was not necessary either for the transfer as he was subject to an expulsion or deportation order (Art. 3 of the Additional Protocol).

The provisions for conditional release under Hungarian law were however, somewhat more stringent than those in Sweden with prisoners (dependent on regime) only becoming eligible for conditional release after serving four fifths of their sentence. This effectively entailed that the applicant would be detained in prison in Hungary for sixteen months longer than would have been the case had he remained in Sweden.

The applicant raised a case before the ECtHR concerning both the increased *de facto* length of his period of imprisonment arising from his transfer from Sweden to Hungary and the fact that this sentence would be served in harsher conditions than would have been the case had he remained in a Swedish prison. In its ruling the court found that the possibility of a longer *de facto* period of imprisonment in an administering state did not in itself render the deprivation of liberty arbitrary (and thus in contravention of Art. 5 ECHR) as long as the sentence to be served did not exceed the sentence imposed by a court in the original criminal proceedings.

*Article 5:*

*1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court,*

Interestingly however, the Court did not exclude the possibility that a *flagrantly* longer *de facto* term of imprisonment in the executing state could give rise to an issue under Art. 5 ECHR and thus engage the responsibility of an administering state under that article. With specific reference to the applicant's case, the Court noted that the likely additional period of detention in Hungary corresponded to an increase of 20% on the time he could have expected to serve in Sweden and that this was not so disproportionate that it would entail a breach of Art. 5 ECHR. Finally, the Court rejected the applicant's claim that harsher prison conditions were *per se* relevant to considerations as to whether the

increase in his *de facto* period of imprisonment amounted to a contravention of Art. 5 ECHR.

Of particular relevance to this assessment however, is the fact that the Court may in fact be willing to uphold a complaint in relation to harsher early release arrangements if the *de facto* period of imprisonment is *flagrantly* longer in an executing state than in an issuing state and that this may have consequences for both the issuing and executing state.<sup>219</sup> *Flagrantly*, according to the Court's reasoning, would seem to be defined using a test based on the principle of proportionality between the actual sentence to be served under the conditional release programme in the executing state and that which would have been served under the conditional release programme of the issuing state. It is open for speculation as to whether the increase of 20% deemed acceptable in the case of Szabó is in fact the highest permissible variance in *de facto* sentencing for cases of this type.

Hence, the provisions in the FD Deprivation of Liberty practices are even more problematic than the provisions related to sentencing equivalence for there is no mentioning of a *lex mitior* principle whatsoever, nor of any rule specifying that a transfer should not deteriorate a prisoner's detention position. Art. 17 FD Deprivation of Liberty merely explains that the enforcement of a sentence shall be governed by the law of the executing state. It must be underlined that the current appearance of the *lex mitior* in the context of adaptation in terms of nature and duration is therefore too narrow and does not fully grasp the sentence severity in order to correctly assess whether a situation is aggravated or not. At the time of the conviction, the convicting authority is only competent to look into the duration of the sentence and does not look in detail to the execution modalities or the application of the rules regulating the early and conditional release. Possibly even more than the mere duration of the sentence, these circumstances truly determine the severity of the sanction and thus whether or not a situation is aggravated or not.

As said, it is most striking that the FD does not deal with this side of the problem. The prisoner who, as a result of the transfer, will end up spending a significantly longer time in prison than what he would have had to serve if the transfer had not taken place. This is a situation which could arise, and cause considerable unfairness, in the case where (say) state A normally releases prisoners at 'half time' and its courts calculate their sentences with an eye to this, whereas state B makes them serve every last minute and its judges, knowing this, impose sentences much shorter than are imposed by their judicial colleagues in state A.<sup>220</sup>

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<sup>219</sup> D. VAN ZYL SMIT and S. SNACKEN, *Principles of European Prison Law and Policy. Penology and Human Rights*, Oxford University Press, 2009, 319.

<sup>220</sup> N. PADFIELD, D. VAN ZAYL SMIT and F. DÜNCKEL (Eds), *Release from Prison: European Policy and Practice*, 36.

It is hard to argue that for a transferred prisoner to be detained longer before release is in his/her best interests (*i.e.* social rehabilitation prospects). Certainly Szabó did not perceive it to be the case that his interests were being served by making him serve a further 16 months. Nor presumably did the Swedish Court, which may have sentenced him on the assumption that he could be released after having served six years and eight months rather than eight years.<sup>221</sup>

As argued, the situation for the person concerned may not be unreasonably aggravated by cooperation between different member states. If the differences in the modalities and detention regime would lead to an unreasonable aggravation of the sentence, this aggravation must be compensated through bringing back the duration of the sentence. This is a decision that can be detailed and final at the time of the transfer provided that there is sufficient readily available information on the specific sentence execution practices. Because of the vast amount and diversity in sentence execution circumstances, it can be difficult to assess which of the two situations is the most favourable for the person concerned. The comparison and weighing out of the different early and conditional release regimes in a specific case is very complex. Some member states work with fractions of the sentence imposed that should have been enforced, others leave it open when a person will fall within the scope of the provisions. In some member states early release is a right whereas in others it is a mere favour. In some member states early release is linked to strict conditions whereas these conditions are a lot more lenient than in others. For the application of the rules is usually strongly dependent on the behaviour of the prisoner, it is impossible to foresee the outcome of the application of the different regimes. Therefore in those situations it is impossible to make a final decision on the most favourable regime at the time of the transfer. This is why it is important to use the law of the executing member state as a baseline and complement it with any of the more favourable aspects of the law of the issuing member state. Putting this into practice is highly challenging. The main challenge is brought about by the fact that besides combining two different legal systems, a combination is required of 'in concreto' and 'in abstracto' case related information. From the original issuing and convicting member state the case related information consists of an 'in concreto imposed sentence and 'in abstracto' applicable execution provisions. From the executing member state, the case related information consists of an 'in abstracto' sentence, translated on the basis of the maximum penalty that could be imposed in the executing member state and the 'in concreto' application of execution provisions.

Though it is not self-evident, it remains the best approach.

First, it must not be forgotten that mutual recognition is and remains the basic principle underlying cooperation. An 'in concreto' assessment of the law of

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<sup>221</sup> N. PADFIELD, D. VAN ZAYL SMIT and F. DÜNCKEL (Eds), *Release from Prison: European Policy and Practice*, 42.

the issuing member state is not possible for the assessment of the case to come to an 'in concreto' result is not purely mathematical. It will have to take into account the way an authority in the issuing member state would have decided in a specific case which does not necessarily represent what the case would have looked like if the sentence was enforced in the issuing member state. To avoid having to combine two time-consuming and full-fledged assessments of the case, the application of the principle of mutual recognition requires that member states respect each other's decision, with the position of the person concerned as the only correction mechanism. Therefore it is not considered to be problematic if the 'in abstracto' rules of the issuing member state are integrated into the 'in concreto' decision making process in the executing member state.

Second, although the combination of the 'in abstracto' situation in the issuing member state, with the 'in concreto' assessment in the executing member state could lead to a situation where the person involved is released earlier than he could have been in the most favourable situation in either of the member states, it is still the best approach. This kind of combination will only exceptionally have as an effect a more lenient regime than either of the member states involved. It is a misconception to think that this combination will have as a consequence that the person involved will automatically benefit from the mere fact that two countries cooperate so that he/she will be released sooner. It is important to underline that, simply because the principles of cooperation entail a recognition of the sentence as it was imposed in the issuing member state wherefore there is never a sentence imposed upon a judicial procedure in the executing member state, an assessment always starts from the in abstracto maximum sentence of the executing member state. This will not give a correct idea of the most lenient situation thinkable. The outcome of the combination of both regimes is only more lenient than would have been possible in the executing member state, if the assessment of the most lenient outcome in the executing member state is based on the minimum sentence possibly imposed in that state, for it can never know what a judge would have decided if the case was tried in the executing member state in the first place.

However, it is correct to state that the person involved would benefit from cooperation in that he/she would be subject to a more lenient regime when the outcome of the combination of both regimes would allow the person involved to be released earlier and/or under more lenient conditions than would have been possible if the minimum sentence in the executing state is taken as a baseline. Therefore, it is crucial to start from the minimal sentence in the executing member state to make a valid assessment as to whether or not the person is offered a more lenient regime. However, considering that not all member states work with minimum sentences, this is a test that cannot be performed for each of the member states. Additionally, the assessment of the acceptability that this situation possibly arises is the responsibility of the issuing member state. Member states are of course allowed to engage in a such in-depth assessment of

the consequences of a transfer and decided that a transfer and foreign enforcement of a sentence imposed by their authorities is undesirable.

In light of the application of the *lex mitior* in situations where the law of the issuing member state and the law of the executing member state vary significantly, the question arises to what extent approximation can support the functioning of the *lex mitior* principle.

54% of all respondents agreed that the EU should introduce binding measures to harmonise sentence execution modalities in relation to custodial sentences or measures involving deprivation of liberty.

Another 63% of all respondents thought the EU should introduce binding measures to harmonise conditional release measures for prisoners.

Sentencing law has been far less studied than substantive criminal law. The studies within the area of sentencing law have placed more emphasis on the rules for imposing imprisonment than on those for release from prison.

So far, no EU instruments have yet presumed to directly lay down rules for the member states about the way in which sentences must be executed.

In analogy to the need to map all existing eligible sanctions from the perspective of their nature, it is important to combine that mapping exercise with the various provisions regarding sentence execution modalities as well as early/conditional release and earned remission provisions. Here too, it is necessary to agree on a severity ranking with regard to sentence execution modalities because a deterioration of a prisoner's detention position following a transfer cannot be said to enhance the possibility of his/her social rehabilitation.

Similar as with respect to the assessment of sentencing equivalence (*supra*), the prisoner should be allowed the right to voice his disagreement at the initial hearing or later on in the context of a judicial review procedure (*infra*) in case he/she feels that a transfer decision will *unreasonably* aggravate his/her detention position.

#### 3.4.4.4 *Lex mitior & review of sentence/measure*

Fourth and final it is interesting to note that the only true application of the *lex mitior* principle found in the current cooperation instruments is the possibility to benefit from amnesty or pardon. That benefit is based on the laws of both the issuing as well as the executing member state as included in Art. 19.1. of the FD Deprivation of Liberty and the FD Alternative.



## 3.5 Liability of legal persons for offences: ensuring consistent cooperation

*Wendy De Bondt, Charlotte Ryckman & Gert Vermeulen*

For several decades, the common desire of European states to undertake a joint effort to fight crime at the international level was expressed in the EU's and – more commonly – in Council of Europe's legal texts. Given that this joint effort also includes the fight against crimes committed by legal persons inevitably the diversity in the member states' approaches with respect to the liability of legal persons for offences impacts on the design of the joint effort to fight crime. This final chapter looks into the position of legal persons in the instruments regulating international cooperation in criminal matters.<sup>222</sup> The empirical data with respect to the experiences of the member states in relation to cooperation were presented above (3.3.2.4). A distinction is made between providing mutual legal assistance and executing a foreign decision.

### 3.5.1 *Providing mutual legal assistance*

#### 3.5.1.1 *Position of legal persons in cooperation instruments*

Because difficulties still hinder smooth cooperation with respect to legal persons (see above 3.3.2.4), the question arises to what extent the diversity in the national approaches can be used as a refusal ground in the context of mutual legal assistance. Therefore, the current legal framework is analysed with a view to identifying the position of legal persons therein.

Relevant provisions can be found in the 2000 Convention on mutual legal assistance in criminal matters<sup>223</sup> [hereafter EU MLA]. It explicitly stipulates that mutual assistance shall be afforded even when it concerns criminal proceedings in connection to offences/infringements for which a legal person may be liable in the requesting state (Art. 3, par. 2 EU MLA). The provision inflicts on the many different fields that are covered by the EU MLA, for example the placing of articles obtained by criminal means at the disposal of the requesting state with a view to their return to the rightful owners, making the impact of these rules quite far reaching.<sup>224</sup> Art. 3, par. 2 EU MLA fits the evolution that the EU MLA

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<sup>222</sup> For more details on the concerning liability of legal persons, see VERMEULEN, G., DE BOND, W. and RYCKMAN, C., Study on the liability of legal persons for offences, Antwerp, Maklu, 2012, forthcoming.

<sup>223</sup> COUNCIL OF THE EUROPEAN UNION (2000), "Convention of 29 May 2000 on Mutual Legal Assistance between member states of the European Union", OJ C 197/1, 12.7.2000.

<sup>224</sup> S. ADAM, G. VERMEULEN, W. DE BOND, "Corporate criminal liability and the EC/EU: bridging sovereignty paradigms for the sake of an area of justice, freedom and security" in

makes from *locus to forum regit actum*, meaning that instead of applying the law of the requested member state, the law of the requesting member state applies: in principle, the assumption is made that the request for mutual assistance is compatible with the legal system of the requested state.<sup>225</sup> Only with a selected number of investigative measures for which cooperation is still governed by the *locus regit actum* principle, questions related to differences in the liability of legal persons can arise. As a baseline however, *forum regit actum* precludes the use of diversity in the liability of legal persons as a refusal ground.

Unfortunately, this trend is not explicitly included in more recent instruments on mutual recognition. No reference to legal persons is made whatsoever in the Framework decision on the freezing of evidence [hereafter FD Freezing]<sup>226</sup>. Following the policy line that can be identified within the existing legal framework and considering that confiscation cannot be refused based on unacceptability of the liability of legal persons for the underlying conviction, this caveat is remarkable considering that a freezing order can proceed a confiscation order. It is only logical that no refusal ground should be allowed in a freezing context. This caveat comes to testify that provisions including an obligation to cooperate even if a legal person cannot be held liable in the requested/executing member state, are not consistently copied into all cooperation instruments. Especially for legal assistances which involves only minor intrusion in the legal order of the cooperating member state, differences related to the liability of legal persons should not be used as a ground to refuse cooperation.

### 3.5.2 *Execution of foreign sentences*

#### 3.5.2.1 *Position of legal persons in cooperation instruments*

Because the differences in the liability of legal persons hinder smooth cooperation with respect to offences committed by / attributed to legal persons, the question arises to what extent those differences can be used as a ground for refusal. Therefore, the current legal framework is analysed with a view to identifying the current position of legal persons therein.

First, at Council of Europe level, it is the Convention on the International Validity of Criminal Judgments<sup>227</sup> which deals with the cross-border

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ADAM, S., COLETTE-BASECQZ, N. e.a. (eds.), *La responsabilité pénale des personnes morales en Europe/Corporate criminal liability in Europe*, Brussels, La Chartre, 2008, (373)

<sup>225</sup> VERMEULEN, G., "EU Conventions enhancing and updating traditional mechanisms for judicial cooperation in criminal matters", *Revue Internationale de Droit Pénal* 2006, 77 (1-2), (59) 82-83.

<sup>226</sup> COUNCIL OF THE EUROPEAN UNION (2003), "Framework Decision of 22 July 2003 on the execution in the European Union of orders freezing property or evidence" OJ L 196/45, 2.8.2003.

<sup>227</sup> COUNCIL OF EUROPE (1970), 28 May 1970, "European Convention on the international validity of criminal judgments", The Hague, *CETS* 070.

enforcement of sentences and contains the early steps towards executing foreign decisions. An important provision in the context of this contribution is Art. 4, which reads:

“The sanction shall not be enforced by another Contracting State unless under its law the act for which the sanction was imposed would be an offence if committed on its territory and the person on whom the sanction was imposed liable to punishment if he had committed the act there”. Even though legal persons are not mentioned explicitly, from this provision it follows that requested states shall be exempt from the obligation to execute a foreign sentence when the latter was imposed on a legal person and the requested state does not recognize the principle of criminal liability of legal persons. Because of its very low ratification until the nineties however, the cited provision did not resort much practical relevance.

Significant progress is made at EU level. The framework decisions dealing with the execution of criminal judgments which can be imposed on legal persons are the framework decision regarding mutual recognition of financial penalties<sup>228</sup> [hereafter FD Fin Pen] and the framework decision regarding mutual recognition of confiscation orders [hereafter FD Confiscation]<sup>229</sup>, which both stipulate that the national differences the liability of legal persons are no basis to refuse cooperation.

The basis for this EU policy can be found in the 2000 Programme of Measures implementing mutual recognition<sup>230</sup> which explicitly refers to the matter of liability of legal persons. In measure 18, which urges member states to prepare measures for cross-border execution of financial penalties, it is said that account will be taken of “*the differences between EU member states on the issue of liability of legal persons*”.<sup>231</sup>

The proposal for the FD Fin Pen made the enforcement subject to the law of the executing state, but required enforcement against legal persons “*even when the executing state does not recognize the principle of criminal liability of legal*

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<sup>228</sup> COUNCIL OF THE EUROPEAN UNION (2005), “Framework Decision of 24 February 2005 on the application of the principle of mutual recognition to financial penalties”, OJ L 76/16, 22.3.2005.

<sup>229</sup> COUNCIL OF THE EUROPEAN UNION (2006), “Framework Decision of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders”, OJ L 328, 24.11.2006.

<sup>230</sup> COUNCIL OF THE EUROPEAN UNION (2000), “Programme of measures of 30 November 2000 to implement the principle of mutual recognition of decisions in criminal matters”, OJ C 12, 15.1.2001.

<sup>231</sup>After all, because of the low ratification level of the abovementioned Council of Europe Convention on the Validity of Judgments, fines imposed by criminal courts (or administrative authorities) could not be enforced in other member states unless there was a bilateral agreement concluded to that aim: K. LIGETI, “Mutual recognition of financial penalties in the European Union” *Revue Internationale de Droit Pénal* 2006, 77, (145) 146.

persons".<sup>232</sup> An optional transition period is included: Art. 20, par. 2, b provides that member states may (until maximum 22 March 2010)<sup>233</sup> limit the enforcement of a foreign decision sentencing a legal person to those offences for which a European instrument provides for the application of the principle of corporate liability. The FD Confiscation also applies the default position of the FD Fin Pen. However, it does not foresee in a transitional period.

Especially because execution of a sentence is far more intrusive than mere cooperation it is important that also with respect to mutual legal assistance the diversity with respect to the liability of legal persons is recognised and no longer regarded as a legitimate obstacle to cooperation.

### 3.5.3 *Need for the EU to safeguard its own approximation policy*

In the margin of the discussion on whether or not the differences in the liability of legal persons ought to be accepted/recognised, it is important for the EU to ensure that the compromise reached by the member states does not undermine the progress made in and consistency of its own policy making.

In situations where member states introduce a transition period of 5 years to adjust to having to execute sanctions handed down against legal persons, it is important for the EU to see to it that such – be it temporary – refusal grounds are no threat for its approximation policy and should do what is possible to facilitate the identification of obligations that spring from its approximation policy.

With respect to the transitional period found in Art. 20, 2, b FD Fin Pen, respect for the EUs approximation efforts is safeguarded in that the possibility to wait with the recognition and execution of sanctions handed down against legal persons may not be introduced with respect to just any offences. The scope is limited to offences that have not been subject to approximation and introduction of the obligation to foresee liability for legal persons. Differently put, the provision stipulates that at least for the offences that have been subject to approximation, recognition and execution is mandatory from the initial entry into force of the instrument.

Obviously, the formulation of the provision could have been more concrete on the specific offences it relates to. A practitioner is now expected to either know by heart which offences have been subject to approximation or check the legislation. It would have been more user-friendly if the EU would make a consolidated list of those offences available for practical use. Significant first

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<sup>232</sup> COUNCIL OF THE EUROPEAN UNION (2001), Explanatory note on the Initiative from the French republic, the Kingdom of Sweden and the United Kingdom for the adoption by the Council on a draft framework decision on the application of the principle of mutual recognition to financial penalties (10710/01), <http://register.consilium.europa.eu/pdf/en/01/st10/st10710-ad01.en01.pdf>.

<sup>233</sup> Art. 20 j.° 21 FD Fin Pen: transition period of five years after entry into force; entered into force on the date of publication in the Official Journal, which was 22.03.2005.

steps towards the introduction of such a consolidated list that can be used for these kinds of purposes have been made via the development of EULOCS, short for the EU level offence classification system that has amongst others the ambition to visualise the existing acquis.<sup>234</sup>

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<sup>234</sup> VERMEULEN, G. and DE BONDT, W. EULOCS. The EU level offence classification system : a bench-mark for enhanced internal coherence of the EU's criminal policy. Antwerp - Apeldoorn - Portland, Maklu, 2009, 212p



## 3.6 Implementation issues: An old sore in international cooperation in criminal matters

*Charlotte Ryckman & Gert Vermeulen*

### 3.6.1 *Practical considerations regarding implementation*

In this Study the European Commission requested an overview and analysis of the relevant instruments that are currently operational in the field of ‘judicial’ cooperation in criminal matters in order to attain insight in the current difficulties and gaps, and in view of analysing future policy options.

One of the core difficulties in the field of international cooperation in criminal matters is the implementation issue. Due to both internal (within the member states national legal systems) and external (cooperation, interaction and reciprocity between the member states’ national legal systems) implementation cruxes, one of the most essential aspects of international cooperation in criminal matters in the EU – fast, speedy and efficient cooperation between the member states – is undermined.

Based on a thorough state-by-state analysis consisting of questions in the final part (part 7) of the questionnaire and extensive interviews during the focus group meetings the project team has identified some of the core problems, their possible causes and solutions. The most recurring concerns expressed by the member states have been comprised in a table at the end of this subsection.

#### 3.6.1.1 *Slow or incorrect implementation: Problems and causes*

One of the main observations regarding the current relevant cooperation instruments is the inertia (and sometimes lassitude) of the member states to implement them. Consequently many of the instruments remain ineffective. Rather than solely appointing the states as being responsible for this, it is necessary to look into some of the causes for this behaviour.

- Lack of specific support in order to meet implementation deadlines<sup>235</sup>

Several member states pointed out that their alleged tardiness is due to the tight deadlines set for implementation; this in combination with the sometimes insufficient lucidity of the EU legislation itself. However, stressing that most framework decisions apply implementation deadlines which surpass several years, the project team doubts that the length of the deadlines are in itself problematic. Rather, it is that proper implementation of the involved framework decisions which causes the delay. Indeed, in the field of freedom, security and

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<sup>235</sup> To be distinguished from the deadlines dealt with in 3.3.5.1. The latter concern execution deadlines (as opposed to implementation deadlines).

justice, the Commission and EP apply more or less the same implementation deadlines as they do in more traditional fields of EU legislation. There are, however, considerable differences to take into account between the more traditional fields of EU law and the area of freedom, security and justice, not in the least that the latter is a field in which many member states' systems are inherently different. Indeed, the instruments which are already in place have clearly shown that not only adaptation of the national legislations is required: national practices and sometimes even the way in which matters are organised in a member state also need alteration. The FD Fin Pen for example shows that mere alteration of the national legislation does not suffice. The Directive interpretation and translation<sup>236</sup> will also require more than legislation alone. Furthermore, the proposal for a Directive information<sup>237</sup> will require an adjustment of the working methods of all police stations, prosecutor's offices and courts throughout the member states. These examples illustrate that the implementation in a relatively new policy terrain inevitably leads to severe changes to the national justice systems. It is important to recognize this and to put more emphasis on the actual practical implementation more during negotiations. This approach – which should consist of a very clear and swift communication between the negotiators of the member states and their internal administration – is far more useful than merely extending the already rather generous implementation deadlines.

– Legislative fatigue

There is a general consensus that the member states suffer from a certain abundance of legislative instruments in need of implementation, combined with the unrealistic deadlines to transpose them. It is obvious that (some of) the member states seem to suffer from a legislative fatigue, rendering them reticent to implement the instruments in due time, or even at all.

An explanation seems to be that despite the fact that some of the EU instruments are (with the noticeable exception of the FD EAW) not yet commonly used by the member states, new legislation is being proposed at a very high pace, a contradiction which obviously leads to irritation and alienation. Additionally, remarks on how every member state wants their presidency in the Council of the European Union crowned with the achievement of a legislative instrument that is usually hastily constructed and therefore insufficiently clear or practically unworkable were voiced by several member states.

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<sup>236</sup> COUNCIL OF THE EUROPEAN UNION, EUROPEAN PARLIAMENT, "Directive of 20 October 2010 on the right to interpretation and translation in criminal proceedings", *OJ L 280/L*, 26.10.2010.

<sup>237</sup> COUNCIL OF THE EUROPEAN UNION, EUROPEAN PARLIAMENT, 2010/0215(COD) "Proposal of 3 October 2011 for a Directive on the right to information in criminal proceedings: Provisional agreement on the compromise package".



- Practitioners' concerns

It was also indicated that the member states find it very hard to conjoin certain JC instruments with the needs of their practitioners on a national level.

Several member states employ the blanco implementation method, entailing a mere copy/paste of the particular EU instrument into the national legislation. This risks threatening the practical operability, as often considerable divergence exists between the EU instrument and the specifics of a particular national legal system. On the other hand, blanco implementation guarantees a certain uniformity, according to some practitioners. The project team dismisses this last stance: it is too simplistic to assume that from the mere fact that all member states would use the same wording it would follow that the instruments would indeed be applied in a uniform way: in practice differences between the member states remain. Consequently, considering that the alleged advantage of blanco implementation appears to be moot, the project team wishes to stress its dangers, being that the implementations are not tailored to the national system and thus unworkable, resulting in the recommendation to dissuade the usage of this implementation method.

- Technical and linguistic concerns

Often member states face capacity issues, unquestionably resulting in delay. Acknowledging these practical concerns and formulating an adequate answer to them is indispensable as it consists 'merely' of a technical limitation rather than a substantial reticence. The sometimes trivial character of practical concerns (e.g. direct internet access, telephone and/or fax communication or even proper post-office communication etc.) contrasts with the often severe delay resulting from them and can even, in worst-case scenarios, lead to vacuity of a procedure.

Another major concern acknowledged by all the member states, important both from a technical/implementation and a practical application perspective, is the insufficiently precise nature of translations. Despite language clauses in the EU instruments, all of the member states have declared that the translation issue is in dire need of a solution as it slows down implementation of -and compliance with- the EU's international cooperation instruments.

- Constitutional issues

The hindrance of constitutional objections emerged especially shortly after the entry into force of one of the most effective international cooperation in criminal matters instruments, the European Arrest Warrant . A number of (constitutional) national courts ruled against the constitutional compatibility of the EAW's provisions permitting the surrender of member states' citizens to

other EU member states<sup>238</sup>. It be noted that many of the nationally embedded constitutional guarantees are derivatives of international treaty obligations, apart from their own constitutional traditions, making it a hard task for the member states to reconcile European and international obligations.

A combination of all of the above mentioned issues leads to general restraint and even fatigue of the member states to further cooperate in criminal matters.

### 3.6.1.2 *Slow or incorrect implementation: Solutions*

As mentioned above, the suggestion voiced by some member states to make more use of *blanco* implementation (thus eliminating reinterpretation problems) is not likely to improve the situation, quite the contrary.

A much more appropriate way forward would be to reduce any uncertainty and doubt – leading to hesitation and delay – concerning the instruments. One of the proposed ideas is to create an ‘extended explanatory memorandum’ for every instrument, which includes guidelines and information for the national legislators as well as the practitioners, and comprises the purpose, rationale and practical implementation. Currently, only the original legislative Commission proposals contain explanatory memoranda. It is recommended to also include one in the final version of every instrument. Additionally, the project team points out the usefulness of non-binding ‘model’-documents, such as the JIT model. If and when such models would be developed for the implementation of mutual recognition instruments, it is of course crucial that they would be developed with great care. When the EU instrument allows member states to choose between mandatory and optional refusal grounds for example, it is important that a model implementation would not only contain mandatory refusal grounds, in order to avoid the development of overly repressive national implementations.

Most member states have pointed to the comparison between the development and extent of the Council of Europe instruments as opposed to those of the EU. The Council of Europe works at a much more moderate pace and delivers fewer instruments, but these are alleged to be of higher legal quality. The PC-OC (Council of Europe’s own Committee of Experts on the Operations of the European Conventions on Cooperation in criminal matters) is suggested to serve as an example for developing a knowledge-based department within the EU responsible for monitoring implementation processes. This recommendation answers amongst others to one of the causes outlined above,

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<sup>238</sup> See, among others: S. ALEGRE & M. LEAF’s contribution ‘Mutual recognition in European Judicial Cooperation: a step too far too soon? Case study- the European Arrest Warrant’, *European Law Journal*, Vol. 10, No. 2, March 2004, pp. 200-217; Z. DEEN-RACSMÁNY’s contribution ‘The European Arrest Warrant and the surrender of Nationals revisited: The lessons of constitutional challenges’, *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 14/3, 2006, pp. 271-305.

being the insufficient specific support in order to meet implementation deadlines. Sufficient training and explanation, rather than a mere extension of the deadlines, would prove useful as a means to remedy slow and/or incorrect implementation. All too often, the responsible authorities of the member states only learn of the instruments when they have reached their final phase. In order to allow member states to prepare the changes that will be required for implementation, it is important to establish a quick and solid link between the national negotiators and the authorities which will be responsible for the actual implementation within the respective member states.

Regarding the legislative arsenal the member states have expressed their concerns against the plethora of formats under which they are constructed. Therefore, with respect to the new 'weapon-of-choice' legal instrument of the Directive, it is of outmost importance that these do not merely consist of brushed-up copies of the classic framework decisions, but actually contain relevant changes where and if needed. The amount of legislative instruments form a complex legal jungle for the member states. While the general aim of improvement of the legislative arsenal is of course admirable, it needs to be clearly assessed whether or not the new legislative initiatives actually provide with the targeted improvement and whether or not this is based on genuine concerns and necessities expressed by the member states and their practitioners.

As mentioned, there is a general dismay about the pace and amount of EU instruments. It would be an improvement if the necessity of new instruments would be more thoroughly assessed, and if assessments on the co-existence of the current and new instruments to avoid overlaps and inconsistencies would be made. In general, an updated overview of the current legislative arsenal, and a future policy which emphasizes long term strategies are preferred. In order to avoid co-existence of legal instruments the project team recommends to – if and when new instruments are introduced – employ provisions abolishing older related instruments (*cfr.* in FD EAW), as opposed to letting the different but closely related instruments co-exist, for example in the context of the FD EEW. It should be hoped that the European Investigation Order will finally do away with that confusing state of affairs in the field of evidence, as it acknowledges explicitly that *“since the adoption of Framework Decisions 2003/577/JHA and 2008/978/JHA, it has become clear that the existing framework for the gathering of evidence is too fragmented and complicated. A new approach is therefore necessary”* (consideration 5, General Approach EIO). Art. 29 of the General Approach to the EIO outlines the relationship of the EIO with other related instruments. In relation to several conventions, such the EU MLA and the Schengen Agreement, it applies a 'repeal and replace method'. However, in relation to the FD EEW, no solution has yet been reached. Art. 29, par. 2 of the General Approach mentions that the FD EEW will be repealed in relation to the member states which participated in the adoption of the Directive, but in relation to the remaining EU members, the relation to the FD EEW needs to be negotiated. The project team

strongly recommends to ensure clarity. Even though there is indeed merit in keeping a distinction between existing evidence (FD EEW) and the gathering of evidence (EIO), there is no reason why both regimes could not be included in one comprehensive instrument. An extra argument for this statement is the fact that most member states are simply waiting to implement – or do not plan to implement – the FD EEW in light of the negotiations on the EIO.

An important problem to consider when applying the repeal and replace method however, is the need for transitional measures: indeed, the reality is that all too often member states have not implemented the new legislation by the time that its implementation deadline is reached. Consequently, if the instrument abolishes the previously applicable instruments, those member states which have not implemented the new one lack every legal base to carry out those particular cooperation actions. Result: legal deadlock. This is in part caused by the fact that, as stated in the pre-Lisbon Art. 34, par. 2, b TEU, framework decisions do “*not entail direct effect*”. The question arises whether a “Lisbonisation” of the framework decisions, being the replacement of framework decisions by directives, could solve this problem in that they would resort direct effect. As is well known, directives do in principle not resort direct effect. However, according to settled ECJ case-law, individual provisions may have direct effect without requiring transposition in national law, under three conditions<sup>239</sup>:

- The period for transposition expired and the directive has not been transposed (correctly);
- The provisions of the directive are imperative and sufficiently clear; and
- Provisions of the directive confer rights on individuals.

The instruments regarding international cooperation in criminal matters usually do not fulfil this last condition.<sup>240</sup> However, when the two former conditions are fulfilled, then the court’s case-law says that member states’ authorities have the legal duty to comply with untransposed directives<sup>241</sup>. This is justified based on the theory of *effet utile* and penalisation of violations of the treaty. Additionally, In 2005, the Court of Justice delivered a seminal judgment, *Pupino*, in which it held that, even though the Treaty excludes that third pillar framework decisions can have direct effect, these are not prevented from having indirect effect<sup>242</sup> (meaning that national law needs to be interpreted in light of

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<sup>239</sup> ECJ, 33/70, *SACE* (1970) ECR 1213.

<sup>240</sup> Except when all member states unanimously agree to confer rights on individuals, as happened with COUNCIL OF THE EUROPEAN UNION, EUROPEAN PARLIAMENT, “Directive of 20 October 2010 on the right to interpretation and translation in criminal proceedings”, *OJ L 280/1*, 26.10.2010.

<sup>241</sup> ECJ, C-431/92, *Großkrotzenburg* (1995) ECR I-2189, p. 2224.

<sup>242</sup> ECJ, C-105/03, *Pupino* (2005) ECR I-5285.

that particular EU rule).<sup>243</sup> The case-law about the unnecessary character of the third characteristic is rather incidental however, and few other cases have been decided in this regard. The indirect effect, which entails the obligation to interpret national law in light of the untransposed directives, however useful to interpret certain national legislations, is unable to truly fill the legal vacuum which is caused by late transposition. It thus becomes apparent that directives, especially directives which do not intend to confer rights on individuals, do not resort a direct effect. However, the 'indirect effect' case-law means at least that more pressure can be applied to the member states when the concerned EU instruments are directives. Therefore, the fact that all minimum rules in the area of 'judicial' cooperation in criminal matters are now to be set in directives (Art. 83 TFEU) and the fact that existing framework decisions will be replaced by directives should be welcomed. However, the lack of direct effect of directives not intended to grant rights to individuals means that the the problem of a legal deadlock in between the expiration of the implementation deadline and the actual implementation is not solved by the replacement of framework decisions by directives, and should still be closely monitored and examined. Indeed, the direct effect attributed to such directives (if any) is not as strong as the direct effect granted to regulations or directives which do confer rights to individuals. Hence, the replacement of framework decisions by directives in itself, does not guarantee to solve the deadlock problem. Additionally, even if this would be the case, it be noted that the replacement of all relevant instruments by directives will naturally take some time; in the mean-time, the current framework decisions (with their limited legal effects) will be preserved until they are repealed, annulled or amended.<sup>244</sup> Summarizing, even though the future replacement of framework decisions by and current issuing of directives will provide with somewhat stronger legal instruments, no 'classic' direct effect applies to them when they do not intend to confer rights on individuals – and the transposition will take time. Therefore, a debate on how to deal with the legal deadlock is necessary.

The FD EAW did include a transitional measure, being that executing member states may indicate that they will continue to apply the previous extradition system for acts which happened before a certain date. That date, however, is 7 August 2002 (Art. 31,3 FD EAW). This means that for all acts happened after that date for which a surrender order was issued after the implementation deadline (1 January 2004), the new regime applied. The framework decision did not foresee however, what to do when such requests were directed at or intended to be issued by member states who had failed to

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<sup>243</sup> What is sure, however, is that directives resort no *horizontal* direct effect, (ECJ, C-91/92 *Faccini Dori* (1994) ECR I-3325) meaning that one individual cannot rely on directives against another individual.

<sup>244</sup> Art. 9 Protocol nr. 36 on Transitional Provisions.

implement the FD EAW on time. Granted, it is of course contradictory to start making arrangements for those instances in which member states would breach their commitments, in other words, to beforehand assume non-compliance with EU legislation. While recognizing this, the project team maintains that the problem should at least be considered.

In terms of creating one overall legal framework, there are some member state suggestions to create an overarching EU criminal cooperation code, consisting of the overarching principles in cooperation in criminal matters, and some member states have even proposed to compel all the existing instruments in one reviewed, updated instrument (the *tabula rasa* argument), since this would diminish any current inconsistencies and overlaps. Such suggestions are not carried by a broad basis of member states, but they do indicate a certain keenness to tackle the overdose issue. This entire Study is aimed at reinstalling consistency and coherence; this is the most important challenge in the JHA field at the moment. The project team submits that this should indeed be the primary goal, before debating which form the instruments should take.

To enhance the national operability of the cooperation instruments, training efforts at EU-level (e.g. organized by the European Commission) should be stepped up; the same goes for the national level. This is especially so in light of the current decentralisation process<sup>245</sup>. Accustoming the national practitioners to EU practices, enhancing interoperability between the member states etc. can only lead to an improved understanding for the practitioners and a more workable arsenal of instruments. The project team acknowledges and welcomes the already considerable EU efforts in this regard. However, during the focus group meetings it was voiced regularly that the current training efforts do not always produce the results hoped for. This has often to do with the number of practitioners involved: practitioners from 27 different member states imply 27 different legal systems and up to 23 different languages. Therefore, the suggestion is to ask member states for their statistics regarding the countries with which they cooperate the most. This would enable the Commission to organise training sessions within closed groups, having several advantages: less different languages and different legal systems and high relevance for the practical application of the instruments due to the high level of cooperation, in turn resulting in a higher level of attention paid by the practitioners, and more input from the base.

### 3.6.1.3 *Enhanced scrutiny by the European Union level?*

As outlined above, member states are still renouncing to implement certain cooperation instruments, they fail to meet the implementation deadlines or

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<sup>245</sup> *Supra* 3.2.

(ab)use their interpretational right to implement instruments. Therefore, the project team recommends the EU to actively use the infringement procedures (infringement procedure by the European Commission before the European Court of Justice<sup>246</sup>) to enforce -correct- implementation. This competence which will be applicable to the former third pillar acquis within five years after the entry into force of the Lisbon Treaty<sup>247</sup> indeed has the potential to further strengthen correct implementation and execution of the legislative arsenal. The project team submits, however, that this possibility for the European Commission to start infringement procedures before the ECJ should not be applied lightly: it should only be used if and when the member states have been given the chance to communicate their objections to certain instruments, including those which have already been adopted. Even though the following may seem to be a very pragmatic consideration, most negotiators reading the argument will have to acknowledge that it is more accurate than some would readily admit. The truth of the matter is that member states may well have agreed more quickly to certain provisions in the cooperation instrumentarium than they would have, had they known that an infringement of the provision could lead to an infringement procedure before the ECJ. Therefore, it seems that before the new power given by the Lisbon Treaty would be exercised, member states need to be given the opportunity to rectify this situation and speak honestly if there are provisions of which they know that they will not be implemented properly at national level.

A full renegotiation of every single instrument does not seem feasible; however, it is recommended to use the “Lisbonisation” of the framework decisions as an opportunity to eliminate inconsistencies or fill gaps – the analysis conducted for this Study revealed several, and are elaborated on throughout this report (e.g. in relation to double criminality, in relation to refusal grounds). A well thought-through conversion of the framework decisions into directives – instead of a mere copy/paste – is the only sensible way to proceed.

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<sup>246</sup> Abbreviated for the remainder of this text as: ECJ

<sup>247</sup> Art. 10 Protocol nr. 36 on Transitional Provisions.

The following table provides an overview of raised concerns and proposed solutions. Those suggestions with which the project team agrees are indicated with a √, others with an X. Blanco implementation for example, was raised both as a cause for the problems and as a solution. The project team recognises it as part of the problem, and consequently does not see merit in proposing it as a solution. Therefore, it has an '√' in the column of causes, but an 'X' in the column of solutions.

Member state input – Implementation issues from an internal perspective (problems with national law). X/V indicate to what extent the raised causes/solutions are deemed accurate		
Issue	Cause	Solution
Too slow	X The deadlines are too tight	X Blanco implementation law avoids national reinterpretation need
	√ EU-level Legislation insufficiently clear	√ Extended 'explanatory memorandum' which includes guidelines for national legislators (cfr handbook)
Legislative fatigue	√ EU-level Legislation insufficiently clear	X Overarching EU criminal cooperation code starting with overarching principles <sup>248</sup>
		X Review of existing instruments and then tabula rasa: one instrument comprising all useful, relevant provisions <sup>249</sup>
	√ Proposals MS (presidency): poor quality in comparison to COM	√ Emphasize long term, tackle short term presidency ambitions
	√ The pace at which new instruments are adopted and introduced	X Blanco implementation law avoids national reinterpretation need
√ Develop and extend CoE instruments; higher quality than EU		
Practitioner s' Use of EU-	√ Attempt to find national solution for the need to combine different	√ Avoid co-existence between old and new instruments (current situation with overlap pecuniary: politically not transposable, practically not usable)

<sup>248</sup> Reaction project team: more important than debating which form a review of the existing legislation should take, the focus should be on eliminating inconsistencies and filling gaps.

<sup>249</sup> Reaction project team: more important than debating which form a review of the existing legislation should take, the focus should be on eliminating inconsistencies and filling gaps; the complexity of the field of international cooperation one instrument does not seem feasible.



Member state input – Implementation issues from an internal perspective (problems with national law). X/V indicate to what extent the raised causes/solutions are deemed accurate		
Issue	Cause	Solution
	instruments	
	√ Limited access to preparatory works to clarify the rationale and support practical implementation	√ Extended 'explanatory memorandum' which includes guidelines for practitioners (cfr handbook)
		√ Step up training Efforts at EU-level (positive to have contacts between the different experts from the MS, take care not to make the training too theoretical)
		√ Training efforts at national level (through central authorities)
		√ Focus training on those countries with whom most cooperation and provide for interpreters
	√ Blanco implementation	X Extended 'explanatory memorandum' which includes guidelines for practitioners (cfr handbook)
	√ Mere copy/paste of instruments	
	√ Insufficient capacity at national level	
	√ Insufficiently precise translation despite language clauses in EU instruments	√ Open the debate on one (or more) working languages
	√ No official channel through which complaints can be shared	√ Install PC-OC like body (cfr. Council of Europe) at EU level

Member state input – Implementation issues from an external perspective (problems related to the law of other MS) X/V indicates to what extent the raised causes/solutions are deemed accurate		
Issue	Cause	Solution
Unclearly regarding Implementation	√ MS disrespect for Implementation Deadlines	X Blanco Implementation law avoids national reinterpretation
		√ Step up training efforts at EU-level
		√ Active use of infringement procedures, provided that the necessary explanatory memoranda are provided and that the directives are more than copy of FD's
	√ Lack of EU-level overview of Implementation	√ Overview in analogy with Council of Europe-instruments
	X Too much diversity in national implementations	X Blanco Implementation law (or literal copy paste) avoids national reinterpretation
		√ Active use of infringement procedures (ECJ) on condition of necessary explanatory memoranda + directives more than copy of FD's
		√ Step up training efforts at EU-level (practitioners). X Important is that they include the experts of all the different MS
	√ Insufficient knowledge of legal systems of the different MS	√ Initiatives similar to Matteus Project in the field of customs cooperation
	√ Insufficiently precise translation	√ Open up the debate on one (or more) working language(s)
√ MS do not always provide sufficient amount of information		
√ Insufficient feedback from practitioners during drafting stage	√ Extend deadlines for feedback on instruments at national level (drafting stage: too tight)	

Making the lack of implementation available to the public would give the EU a tool to apply pressure to the member states by making the lack of implementation available to the public before actually starting an infringement procedure. The insufficient monitoring of implementation at EU level is discussed in the following, separate subsection.

### 3.6.2 *Overview of national implementation status*

One of the main hindrances towards effective international cooperation in criminal matters is the lack of a thorough and updated overview of the current implementation status of the legislative instruments at member state level.<sup>250</sup> The project team has undertaken an attempt to provide with an updated overview regarding the relevant legislative instruments in the field of international cooperation in criminal matters, but stumbled on a few significant obstacles. On the following pages, a critical evaluation of the current regime towards the gathering and sharing of implementation information is provided. Lastly, based on our survey explained below, an implementation overview is provided.<sup>251</sup>

At present, no accurate and complete overview of the current implementation-status of the framework decisions regarding 'judicial' cooperation is available. It is nearly impossible to present a complete conception of the countries who have implemented the specific framework decisions (correctly). One can only develop a partial view based on separate (and often outdated) statements and reports.

The absence of a thorough overview of the implementation-status is unjustifiable. Even the project team, specialized in International and European criminal law, was again confronted with the fact that the available information is insufficient to present a correct overview. This situation is unacceptable, especially in light of the fact that the instruments contain an obligation for member states to inform EU institutions about the transposition of those instruments in national law. Some instruments instruct to inform both the General Secretariat of the Council and the Commission (EU MLA - FD Freezing - FD Prior Convictions - FD Data Protection - FD Crim Records). Others only demand that the General Secretariat is briefed, the latter has to then inform the Commission (FD Alternative; FD Confiscation; FD Deprivation of Liberty; FD EAW; FD EEW; FD Fin Pen; FD Supervision; Swedish FD). The member states are in need of clear communication channels and contact points, this will only benefit their implementation- and notification progress.

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<sup>250</sup> With the exception of a few cooperation instruments, be it still in a insufficient manner, *cfr. infra*.

<sup>251</sup> As the following will show, the making of a complete overview is impossible due to lack of available information.

Thanks to the in-depth responses of SPOC-network, an implementation status overview could be drafted. This was done based on the very first table from the questionnaire, which asked the SPOCs and experts to indicate which type of authority their member state had declared competent following the framework decisions. This information thus provides a picture of the current situation in each member state. However, some results are still missing and a margin of faults should be taken into account: e.g. it is possible that national practitioners, experts and SPOC's are already informed of the content of the implementation provisions when a member state is actually still preparing the implementation of a specific framework decision. Although these persons are able to indicate certain details about the new legislation, officially, the instrument remains largely unexplored, even at the level of the General Secretariat of the Council and at Commission level.

In the context of the Study, following a direct request the Council of the European Union provided the project team with information on the implementation status of certain instruments. However, the project team was surprised to conclude that it concerned information which was limited to only four instruments (being the FD EAW, FD Fin Pen, FD Confiscation and FD Freezing). The project team was informed that for the other instruments the implementation information is kept on paper and it was added that 'the member states are often negligent in implementing the concerned instruments. Consequently, the paper dossiers are incomplete.'

Needless to say, it is disturbing that even the Council, of which the General Secretariat is *the* body in charge of keeping track of the implementation of the cooperation related framework decisions (as is consistently stated in all FD's involved) does not dispose of a comprehensive overview: not only is there no complete overview accessible online for practitioners, even those with a direct lead (like the project team) to the very source of the information (the Council) are unable to retrieve the necessary information. The other institution with access to implementation information (be it sometimes indirectly after notification of the Council), the Commission, also fails to provide with a comprehensive overview of the instruments (the information is again limited to the same four FD's).

Practitioners should be able to rely on the information readily available in reports and regularly updated websites; unfortunately, such information (except for the reports on the EJN website concerning the previously mentioned four framework decisions) is missing. Most framework decisions oblige all member states to communicate their progress and implementation status (e.g. Art. 29 FD Deprivation of Liberty). It is unacceptable that this information, if submitted by a member state, is not immediately published – be it on the official European Commission website or on the website of the Council. For this study only the few reports that provide concrete information about the implementation status in each country could be relied upon. However, it is customary to only dispense

a general and abstract view of the implementation progress. This kind of cautious behaviour in reporting on the compliance of the member states with their implementation obligations is understandable; nonetheless, the information is crucial for practitioners in the member states. A complete overview would not only lead to more clarity but would also be an extra incentive for the member states to step up their implementation processes. After all, when a member state is in breach of its EU obligations and the outside world is hardly aware of such breaches it becomes rather logical that rectifying those breaches (and thus implementing on time) is being moved down on the national priority lists.

Assumed that it was agreed that readily accessible overviews would be made available, another fundamental practical problem following from the framework decisions would significantly complicate this task: uncertainty exists regarding the institution responsible for the follow-up of the implementation processes: the project team advises the EU to make a clear-cut choice to appoint either the General Secretariat of the Council or the European Commission as the responsible institution. Nowadays, as mentioned, some instruments indicate the former, others the latter, others a combination of both.

Of the four framework decisions for which overviews do exist (FD EAW, FD Freezing, FD Fin Pen, FD Confiscation) the imposed implementation deadline has expired for at least 3 years. Since then, other implementation deadlines have passed (EEW, FD Prior Convictions, and the Swedish FD) and many more will expire in the near future (FD Alternative, FD Criminal records, FD Deprivation of Liberty Sanctions, FD Data Protection, FD Jurisdiction and FD Supervision). With this prospect, there is an urgent need of effective measures to secure that correct information is consistently made available to the member states in the future. The monitoring of the compliance by member states with existing commitments is directly interconnected with the idea of one judicial space in Europe.

It needs to be stressed that implementation information is not only important for those instruments which have already reached the implementation deadline. Even if the imposed implementation date has not yet expired, it can always be useful to make an updated overview available of which member states have already implemented which framework decisions. Despite the obvious relevance of the information which would be provided, it should not be underestimated to what extent such 'real-time' reporting of the implementation activities would create extra motivation to step up the national implementation processes.

Regarding the implementation status of instruments for which the implementation deadline has not yet expired, giving a conclusive overview is simply not possible given the lack of adequate information. Only the information of which the project team is absolutely certain shall be listed here.

**FD Deprivation of Liberty:** implementation deadline: 05-12-2011<sup>252</sup>

Countries like Hungary, Czech Republic, Slovenia, Germany and Finland indicate that implementation is pending or not yet began. Spain, Lithuania, and Latvia do not have immediate plans for implementation. In Poland it is a certainty that the implementation will not happen by the current parliament; elections are planned in October. Hopes are that implementation will happen soon after. The answers of France, Italy and Slovakia show that an authority is assigned to issue a custodial sentence or other measure involving deprivation of liberty, however, nowhere it is indicated that the framework decision is implemented. In Belgium, even though the future competent authorities are known, the absence of government has obviously slowed down the implementation process (even more). Due to a lack of results, there is no certainty about the progression in Greece, Ireland, United Kingdom or Romania. As to the Netherlands, a legislative proposal for implementation is currently up for vote in the second parliamentary chamber. To overcome uncertainties relating to the implementation status in the different member states, the framework decision indicates in Art. 29 FD Deprivation of Liberty that states need to communicate the text of the provisions that implement the obligations of the framework decision in the national legislation. The Commission then will draft a report so the Council can investigate the compliance of the different member states with the framework decision before December 5<sup>th</sup> 2012, a year after the imposed implementation deadline.

**FD Alternative:** implementation deadline: 06-12-2011<sup>253</sup>

Nine countries indicate a pending implementation. France and Slovakia recognize the competence of the judicial authority to issue a probation decision (Art 2.5 FD Alternative), decide on conditional release (Art 2.6 FD Alternative) and decide on probation measures (Art 2.6 FD Alternative), but there is no official confirmation of implementation. Bulgaria and Austria neither award competence to authority nor implement the framework decision. In Belgium, even though competent authorities were indicated, the absence of government has obviously slowed down the implementation process (even more). As to the Netherlands, a legislative proposal for implementation is currently up for vote in the second parliamentary chamber.

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<sup>252</sup> Overview is reliable until the date the replies of the member state experts were received, which is April/May 2011.

<sup>253</sup> Overview is reliable until the date the replies of the member state experts were received, which is April/May 2011.

**FD Criminal Records:** implementation deadline: 27-04-2012<sup>254</sup>

In different states such as Poland, Germany and the Czech Republic implementation is pending. In Poland it is a certainty that the implementation will not happen by the current parliament; elections are planned in October. In France, Hungary and Slovakia, an official authority is assigned for the exchange of data. It is unclear if these competences are the result of implementation or simply national law measures. In Bulgaria, no authority is competent. The results do not show whether Estonia, Greece, Ireland and the United Kingdom have implemented and/or assigned a competent authority.

**FD Supervision:** implementation deadline: 01-12-2012<sup>255</sup>

The implementation is pending in eight member states. France and Slovakia do not confirm any implementation but issuing or adapting a decision on a supervision measure is the responsibility of the judicial authority. In Poland, the Ministry of Justice has prepared draft statutes, however it is waiting for the new parliament to be elected as the current parliament will not finalise the transposition (elections are due in October).

The following attempts to provide with an overview of the implementation status of those instruments for which the implementation deadline has expired, based on (outdated) evaluation reports of the Council of the European Union, more recent information provided by the personal contacts of the project team and the information of our SPOC network. For the reasons explained above, a fault margin can – unfortunately – not be excluded.<sup>256</sup>

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<sup>254</sup> Overview is reliable until the date the replies of the member state experts were received, which is April/May 2011.

<sup>255</sup> Overview is reliable until the date the replies of the member state experts were received, which is April/May 2011.

<sup>256</sup> Because of incomplete information there is no update provided Council Framework Decision of 24 July 2008 on taking account of convictions in the member states of the European Union in the course of new criminal proceedings (FD Prior Convictions).

**Convention of 29 May 2000 on mutual assistance in criminal matters between the member states of the European Union (MLA)**<sup>257</sup>

Implemented*	Not Implemented
AT – BE – CZ – DE – DK – EE – EL – IE – ES – FIN – FR – LV – LU – LT – MT – NL – PL – PT – SE – SI – SK; CY – HU – UK (c= implementation completed, legislation has not entered into force;)	IT

*\*This information is based on the Council report of 22 November 2005 and information of our SPOC network*

Even though the MLA convention is implemented by all member states except Italy. The research shows however that the Czech Republic and Lithuania have no authority who are able to deal with infringements of the rule of law (Art 3.1 EU MLA). Portugal, France, Bulgaria and the Czech Republic do not foresee an equivalent authority competent to order interception of telecommunication (art. 17 EU MLA).

**Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between member states (FD EAW)**<sup>258</sup>

Implementation deadline: 31-12-2003

Implemented on Time	Implemented after deadline
AT - BE - BG - CY - CZ - DE - DK - EE - ES - FI - FR - EL - HU - IE - LV - LT - LU - MT - NL - PL - PT - RO - SE - SI - SK - UK	IT (22-04-2005)

Despite an initial delay of up to 16 months (IT) and stumbling blocks caused by constitutional difficulties in at least two member states (DE during part of 2005 and 2006, CY), the implementation of the Framework Decision has been a success. The European arrest warrant has been operational throughout all the member states including BU and RO since 1 January 2007. Its positive impact is borne out daily in terms of judicial control, efficiency and speed, always with full respect for fundamental rights.

<sup>257</sup> Overview is reliable until the date the replies of the member state experts were received, which is April/May 2011.

<sup>258</sup> <http://www.ejn-crimjust.europa.eu/ejn/libcategories.aspx?Id=14>



The evaluation report of 2007 denounces that twelve member states (BE, CY, DK, DE, EL, ES, FI, IT, MT, NL, SE, UK) have not made amendments to their respective legislations, although they were recommended to do so in previous Council and Commission reports. This is even more regrettable in the case of member states that were expressly mentioned in the 2007 Report of the Commission as requiring an effort to comply fully with the Council Framework Decision (CY, DK, IT, MT, NL, UK).

**Framework Decision of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (FD Freezing)<sup>259</sup>**

Implementation deadline: 02-08-2005

Implemented	Not Implemented
AT - BE - BG - CZ - DK - DE - EE - ES - FR - IE - CY - LT - LU - LV - HU - MT - NL - PL - PT - RO - SL - SK - FI - SE - UK	EL - IT

**Council Framework Decision of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (FD Fin Pen)<sup>260, 261</sup>**

Implementation deadline: 22-03-2007

Implemented *	Not Implemented
HU - AT - BE (legislative work still ongoing) - BG - CZ - CY - DE - DK - EE - ES - FI - FR - LT - LV - LU - MT - NL - PL - PT - RO - SE - SL - SK (The entry into force is expected for 1st April 2011) - UK	IE - IT

*\*Unfortunately, no official information exists on the implementation status of Greece, Ireland and Slovakia*

The results obtained from the information of our SPOC network do not prove that following countries have implemented: Spain, Greece, France, Ireland, Slovakia and United Kingdom. The report of the Council of the European Union

<sup>259</sup> <http://register.consilium.europa.eu/pdf/en/10/st16/st16921-re01.en10.pdf>

<sup>260</sup> <http://register.consilium.europa.eu/pdf/en/10/st16/st16924-re02.en10.pdf>

<sup>261</sup> Overview is reliable until the date the replies of the member state experts were received, which is April/May 2011.

however states that France, the United Kingdom and Spain have already implemented.<sup>262</sup>

**Framework Decision of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the member states of the European Union (Swedish FD)**<sup>263</sup>

Implementation deadline: 19-12-2006

Implemented*	Not Implemented
BE – BG – CZ – CY – FI – FR** - LT – MT – NL – PT – RO – SE – SL – SK** - LU	IT - ES - DK - DE - PL

\* Unfortunately, no official information exists on the implementation status of Austria, Hungary, Ireland, Estonia, Latvia, and United Kingdom

Italy, Spain, Denmark and Germany have declared that the framework decision is not implemented, Germany however adds that the implementation is pending.

For Austria and Hungary, the only knowledge available is that there is no authority assigned for competent law enforcement (Art 2 a) Swedish FD). There is no specific information in the results about Ireland, Estonia, Latvia, and the United Kingdom. In Poland it is a certainty that the implementation will not happen by the current parliament; elections are planned in October. Hopes are that implementation will happen soon after. \*\*However it does not say that France or Slovakia have implemented, the results show the assignment of specific authorities.

**Framework Decision of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters (FD EEW)**<sup>264</sup>

Implementation deadline: 19-01-2011

Implemented	Not Implemented
FI	HU - CZ - SL - LU - CY - DE - IT - LT - LV - PL - PT

<sup>262</sup> <http://register.consilium.europa.eu/pdf/en/10/st16/st16924-re02.en10.pdf>

<sup>263</sup> Overview is reliable until the date the replies of the member state experts were received, which is April/May 2011.

<sup>264</sup> Overview is reliable until the date the replies of the member state experts were received, which is April/May 2011.

*\*Unfortunately, no official information exists on the implementation status of Austria, Belgium, Bulgaria, Denmark, Estonia, Greece, Malta, Spain, Sweden, France, Ireland, Romania, Slovakia and the United Kingdom*

The implementation deadline for the framework decision on the European Evidence warrant was January 19<sup>th</sup> 2011. However, only one member state have implemented it, seven states suggest that they never will and results are missing for the remainder of the member states. In the Netherlands the legislative proposal for implementation has reached an advanced stage in the 2<sup>nd</sup> parliamentary chamber. Naturally, the difficult implementation process of the FD EEW needs to be seen in light of the negotiations on the EIO.

In Art. 24 FD EEW, the framework decision poses that the Commission will compose an evaluation report by January 19<sup>th</sup> 2014. This means that only after a period of three year, the domestic situations are examined.

**Framework Decision of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders (FD CONFISCATION)<sup>265, 266</sup>**  
Implementation deadline: 24-11-2008

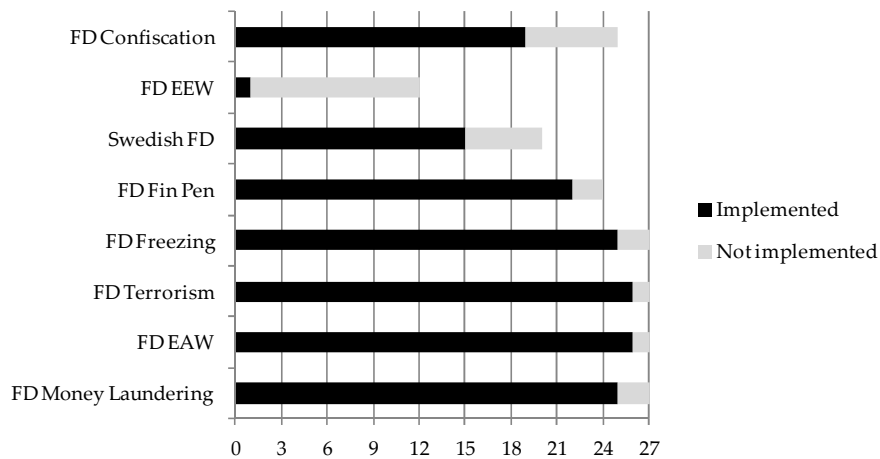
Implemented*	Not Implemented
BE - BG - CZ - DK - DE - ES - FR - CY - LV - HU - MT - NL - AT - PL - PT - RO - SL - FI - SD	EE - EL- IE - IT - LT - LU

*\*Unfortunately, no official information exists on the implementation status of Slovakia and the United Kingdom*

The results do not show that Slovakia or the United Kingdom has implemented this framework decision, but it says that the Slovakian judicial authority is responsible to issue a confiscation order (Art 3.1 FD Confiscation) or execute it (Art 3.1 FD Confiscation).

<sup>265</sup> <http://www.ejn-crimjust.europa.eu/ejn/libcategories.aspx?Id=34>

<sup>266</sup> Overview is reliable until the date the replies of the member state experts were received, which is April/May 2011.



The above shows that on the one hand the implementation is late in many member states and on the other hand that information on the implementation status in many countries is lacking.

The project team strongly recommends a more thorough monitoring of the implementation-status in the 27 member states. First, implementation reports should be made available and updated regularly (for example every six months to a year), modeled on the implementation reports which exist for four instruments so far. This should happen for all relevant instruments. Publishing the results of thorough and regular compliance tests will only benefit the implementation performances of the member states, the legal security of the process and the effective application of the framework decisions. Second, real-time updates of implementation legislations are necessary. The mere 'implemented' or 'not implemented' status is the very minimum that the EU (be it Commission or Council) should communicate to the outside world as the information reaches them.

The project team submits that the combination of both recommendations provides with a balanced solution for the current problem: practitioners can rely on the information made available to verify whether or not an instrument has been implemented by his European counterpart. For more detailed information he has recourse to the implementation reports. More than six monthly updates would place a disproportionate burden on the institutions. Hence, if the practitioners were to see that the member state with which they wish to cooperate has implemented, but the detailed info is not available yet, then he/she would still need to seek out those details himself/herself. This however, would only exceptionally be the case. If the recommendations would be followed, those who need to actually apply the instruments would be fully aware of who has implemented and who has not, and would have access to the details of such implementation, to be updated at least yearly.

## 4 Unregulated and inadequately regulated forms of cooperation

*Gert Vermeulen, Wendy De Bondt & Yasmin Van Damme*

As a third line of argumentation, the projectteam wishes to point to (the problems related to) unregulated and inadequately regulated forms of cooperation.

The previous chapter identified general principles applicable throughout the domain of cooperation; this chapter will deal with certain specific issues which were not yet covered in the previous one, nor will they be dealt with in chapter 5, given that the latter deals with matters which are rather EU-level issues (related to but not consisting of cooperation issues as such). An example of what will be dealt with here are the gaps in cooperation legislation, as treated in the second to last part of the questionnaire.

During the desk-top review and the Delphi rounds<sup>267</sup>, the project team identified several domains of cooperation, which were either dealt with in the previous chapter, or which will be discussed below. The domains are:

Domain 1 - Mutual legal assistance: below the lack of any regulation regarding post-trial MLA is qualified as being a gap, an unregulated form of cooperation (4.1.2); the question of mutual admissibility of evidence is fully absent from any regulation, yet the project team submits that it has not been addressed adequately by the EU legislator (4.2.1). It be noted that regarding MLA, the project team has also included a section on the cross-border admissibility of evidence as an EU-issue (5.3.1) instead of as a cooperation related issue.

Domain 2 - Transfer of pre-trial supervision: here the EU has recently taken an initiative, yet the project team has identified problems and developed solutions for those problems. This means that this domain was also qualified as an inadequately regulated form of cooperation.

Domain 3 - Extradition and surrender: the FD EAW has of course already been dealt with: indeed, one cannot fully deal with the general principles within cooperation in criminal matters without touching upon the FD EAW; however, there are certain specific aspects of EU surrender which are, according to the project team, not adequately regulated; aspects which have not yet been discussed in the previous chapter.

Domain 4 - Exchange of criminal records: given the need for EU action regardless of concrete links with cooperation situations, this will be dealt with in chapter 5, especially in light of disqualifications (5.3.4).

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<sup>267</sup> *Supra* 1.4.2.

Domain 5 - Relocation and protection of witnesses: only soft-law regulation exists on this point. The project team discusses this gap in the part on unregulated forms of cooperation (4.1).

Domain 6 - Transfer of prosecution: the project team proposes the introduction of a comprehensive matrix of non-hierarchical criteria. Because of the indispensable role of Eurojust in this regard, however, this will be dealt with in the part dealing with the debate on the creation of an EPPO/the elaboration on Eurojust's competences.<sup>268</sup>

Domain 7 - International validity of judgements and disqualifications: given the need for EU action regardless of concrete links with cooperation situations, this will be dealt with in chapter 5 (5.2.4).

## **4.1 Unregulated forms of cooperation**

### ***4.1.1 Relocation and protection of witnesses***

With respect to witnesses two related yet very different issues should be distinguished: on the one hand the actual relocating and protecting witnesses (including collaborators with justice), on the other, the issue of mutual recognition of benefits granted to collaborators with justice in the course of a criminal proceeding. The latter will be dealt with in the part on EU matters<sup>269</sup>. The former qualifies as an issue of actual, practical cooperation between member states: cooperating in the field of relocating and protecting witnesses involves actual resources from all member states involved and is consequently discussed under this chapter. Of course, both matters are intertwined in the sense that protection or relocation can also be applicable to collaborators with justice. The following indeed also applies to that situation, as will be explained below.

Because the successful conclusion of each stage in criminal proceedings often depends on the cooperation of witnesses, providing witnesses with proper and adequate protection can play a crucial part in bringing offenders to justice. The position of the witness is therefore central to any modern criminal justice system. This is especially true for adversarial systems, where at a public hearing the prosecution must prove its case by leading evidence which can then be challenged by the defence. Here, the rights of defence should obviously be balanced against the use of protective measures, especially those who conceal the identity of the witness.<sup>270</sup>

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<sup>268</sup> *Infra* 5.2.

<sup>269</sup> *Infra* 5.3.2.

<sup>270</sup> G. VERMEULEN, *EU standards in witness protection and collaboration with justice*, in *IRCP-series*, 25, Antwerp-Apeldoorn, Maklu, 2005, p. 25.

At member states level, the regulation concerning witness protection differs considerably throughout the EU.<sup>271</sup> At EU level, in the field of (both procedural and non-procedural) witness protection and relocation, the current EU and multilateral *acquis* encompasses only a set of mainstream ideas, non-binding best practices and soft law instruments.

There is the 1995<sup>272</sup> resolution which calls on the member states to guarantee proper protection of witnesses against all forms of threat. This, however, has a limited scope by applying only to cases of fighting organised crime and take soft law form.

Furthermore, the importance of taking EU legislative initiative in the sphere of (international cooperation relating to) protection of witnesses was underlined in Recommendation 25 of the 2000 Millennium Strategy<sup>273</sup>. At Council of Europe level there is the Recommendation 97 (13) concerning the intimidation of witnesses and the rights of defense. In essence, the Recommendation encourages member states to adopt appropriate and practical measures which ensure that witnesses can testify freely and without intimidation. In 2005 another Recommendation was issued: Recommendation (2005) 9 on the protection of witnesses and collaborators with justice.

Additionally, several studies were carried out, the most prominent being the a joint project of Europol-ISISC-OPCO and the Study on relocation and protection of witnesses carried out by IRCP.<sup>274</sup> Over the years several calls were made by different Council formations to initiate legislation concerning protection of witnesses. A Eurobarometer survey of 2006<sup>275</sup> on EU citizens' views demonstrated support for dealing with witness protection at European Union level. 86% of the citizens supports the establishment of an EU policy dealing with cross-border and international cooperation on witness protection, 45% even strongly supports this idea.<sup>276</sup>

The Commission's Legislative and Work Programme for 2007<sup>277</sup> listed the protection of witnesses and individuals who cooperate with the judicial process as a priority initiative.

The importance of legislative initiative was stressed in March 2007 at an expert meeting held during which it was said that the added value of EU action

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<sup>271</sup> For an overview (updated only until the end of 2007), see Annex to: EUROPEAN COMMISSION, COM(2007) 693 final (19.11.2007).

<sup>272</sup> COUNCIL OF THE EUROPEAN UNION, "Resolution of 23 November 1995 on the protection of witnesses in the fight against organised crime", *O.J. C 327/05*, 07/12/1995.

<sup>273</sup> *O.J. C 124/1*, 3.05.2000.

<sup>274</sup> G. VERMEULEN, *EU standards in witness protection and collaboration with justice*, in *IRCP-series*, 25, Antwerp-Apeldoorn, Maklu, 2005.

<sup>275</sup> Special Eurobarometer survey, No 264 – The role of the European Union in fighting against organised crime, [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_264\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_264_en.pdf).

<sup>276</sup> Only 7% opposed to the launching of an EU policy and 7% replied "don't know".

<sup>277</sup> EUROPEAN COMMISSION, Communication COM(2006) 629 final (24.10.2006), p.22.

cannot be questioned.<sup>278</sup> The meeting was held based on a discussion paper drafted by the European Commission.

Following the meeting, in November 2007, the European Commission issued a working document on the feasibility of EU legislation in the area of protection of witnesses and collaborators with justice.<sup>279</sup> It is surprising that no legislative initiative was taken since: as pointed out by the Commission following the consultation of experts and practitioners, the legal framework is not sufficiently stabilised.<sup>280</sup> Granted, the document stated that "at present it is not advisable to proceed with legislation at EU level." However, stressing the words *at present*, the time frame for legislative initiative that followed from the document should immediately be added: 4-5 years. Indeed, the European Commission foresaw a role for EU legislation by 2011-2012: the time is ripe for the debate on EU regulation concerning protection of witnesses and collaborators with justice. In terms of preparatory work for future legislation, the Commission had put the elaboration of a paper as a target for the years 2011-2012: not only is the time ripe, it seems like the necessary action and preparation should have started a considerable while ago.

Before developing recommendations as to what such a legislative initiative should entail, a distinction must be made between procedural protection and non-procedural protection. The first type relates to protective measures in the framework of the pre-trial investigation or the court trial and is specifically aimed at concealing the identity of the witness during the criminal proceedings. The latter type deals with non-procedural or material protection, which ranges from concealing a person's license plate to a relocation of the witness in or outside of the country he resides in, sometimes including the change of his and his family's identity. The making of a distinction between both types is especially important in relation to the rights of defence, not to mention the financial consequences the choice for one of both types will imply.

The focus here is not on minimum procedural standards; for this the project team refers to its previous Study.<sup>281</sup>

Non-procedural protection is aimed at witnesses who are effectively threatened and for whom the concealment of their identity during trial will not sufficiently safeguard their physical or mental integrity. Such a threatened witness can be granted the status of protected witness, implying that he will be granted one or more non-procedural protective measures that are to guarantee that no harm will come to him or her. This should stimulate the witness to give

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<sup>278</sup> EUROPEAN COMMISSION, "Draft Meeting Report - Subject: Meeting of European Witnesses Protection Experts - 5th March 2007." (confidential)

<sup>279</sup> EUROPEAN COMMISSION, COM(2007) 693 final (19.11.2007).

<sup>280</sup> EUROPEAN COMMISSION, COM(2007) 693 final (19.11.2007), p. 6.

<sup>281</sup> G. VERMEULEN, *EU standards in witness protection and collaboration with justice*, in *IRCP-series*, 25, Antwerp-Apeldoorn, Maklu, 2005.



testimony on the crimes witnessed. As such, protection can be given to persons who witnessed a crime by accident as well as accomplices, who, in the framework of this research, are to a large extent dealt with under the term 'collaborator with justice'. The following includes recommendations regarding a legislative proposal on the non-procedural protection of a witness, the latter potentially also including collaborators with justice.

Three different policy options were outlined in the 2007 working document:

- Policy option 1 - status quo based on developing current arrangements.  
If status quo is maintained, the existing legal and operational instruments should form the core of a European policy framework and be complemented by a wider coordination. Given the disparity and soft law character of the applicable rules and the limited scope of certain instruments (see above), this option is not desirable and would – given the need – for additional, strong action, be a set-back rather than a status quo;
- Policy option 2 - harmonised witness protection system in the eu through minimum standards in a binding legislation. This option will be examined together with the third option; and
- Policy option 3 - increased co-operation between member states in the area of relocation through binding legislation.

Policy option 3 is worth examining: it would entail increased cooperation between member states without altering their national systems: an approach which – traditionally – has the most chance of being accepted by the member states. However, proposals such as the one made by Europol-ISISC-OPCO working group provides a model bilateral agreement for relocation for witnesses. As with policy option 1, with this option the costs may outweigh the benefits: the very low utility of such an instrument would not justify the legislative negotiations and efforts it would take: as the Commission has rightly pointed out, "*in practice it would not bring the desired policy improvement at EU level*".

Therefore, one needs to be realistic: without entailing a true harmonisation of the entire domain of witness protection, enhanced cooperation between member states in this field can only become reality through at least a considerable approximation of the rules, in the very least by developing a hard law framework containing sufficiently flexible provisions. This does not mean that granting the status of and protection to certain witnesses would have to go through a centralised system, which again shows how the proposed solution is results from a balancing exercise between policy option 2 and 3.

In sum, the project team does not support the introduction of a harmonised witness protection program throughout the EU. However, if and when the need for protection exists (a need which does nothing but increase, following the immense expansion of serious crime does), a framework needs to be in place in order to allow member states to help each other. Here too, restraint seems

appropriate: member states helping each other does not mean that member states can be obliged to take care of the relocation of foreign witnesses or witnesses involved in foreign cases. In other words, witness protection is a domain which should *not* be brought within the realm of mutual recognition. This is simply not realistic, given the high costs which accompany relocation and/or protection of witnesses.

The project team suggests certain solutions/rules regarding capacity, but as will become clear, even those are unable to anticipate all possible situations. The proposed rules should indeed be legislated in order to support and stimulate cooperation between member states, and in order to offer them a legal framework. Their goal is not, however, to form a basis for an automatic and obligated executing of requests for help in the witness protection domain: too many different situations and circumstances exist. The rules the project team has in mind, are: a) those costs which exist on top of police personnel costs, such as rent, accrue to the requesting state; b) even the costs of police personnel can rise dramatically, so flexibility is advised in that regard. One possible solution is to legislate a threshold, as was pointed out in the part on capacity<sup>282</sup>. Another – possibly complementary – solution could be to foresee a mechanism whereby states can raise the alarm when certain cases would indeed become unacceptably expensive. In this context, Eurojust could play a useful role: a system can be envisaged whereby Eurojust is given a supportive role in the debate as to whether a person should be relocated.

It is important to clearly define the scope of such rules, in other words, to clearly delineate in the context of which offences the witness protection and relocation rules apply. In order to make sure that cooperation is stepped up for those offences which are ‘EU-worthy’, the future framework should contain a provision stating that the listed rules are at least applicable to serious crime as defined in the Eurojust/Europol ‘strict mandate’. This is a concept explained below (5.2.), explained in brief a series of serious offences for which Eurojust should receive more elaborate powers than it has today, even after the broadening of the powers following the Revised Eurojust Decision. Obviously, the future legal framework for cooperation in protection and relocation should be open to use beyond those offences. In other words, the offences as described here are those for which the framework *should* be used, but when several member states wish to do so, they can operate according to the future framework for relocation/protection related to any offence.

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<sup>282</sup> *Supra* 4.3.6.

Furthermore, as was done in the 2005 Study, a non-exhaustive list of possible measures should feature in the legal framework.<sup>283</sup> It is advisable to include a distinction between mandatory and optional measures. The following is a proposal for such a list:

*“(1) Member states shall ensure the proper and effective protection of protected witnesses and their family members. To that end, they shall provide in their national legislation for the possibility to grant, at least, the following non-procedural protective measures:*

- (a) direct and physical protection;*
- (b) placement of a detainee in a specialised and protected section of the prison;*
- (c) relocation for a short period not exceeding 45 days;*
- (d) relocation for a longer or indefinite period; and*
- (e) change of identity, including the concealment of certain personal data by the administrative authorities.*

*(2) Member states may provide in their national legislation for the possibility to grant, inter alia, one of the following non-procedural protective measures:*

- (a) provision of advice concerning prevention;*
- (b) the use of techno-preventive equipment;*
- (c) appointment of a public servant who acts as a contact point;*
- (d) preventive patrols by the police;*
- (e) registration of incoming and outgoing telecommunication;*
- (f) regular control of the consultations of the state registry and/or the concealment of certain data concerning the person;*
- (g) provision of a secret telephone number;*
- (h) provision of a cloaked license plate;*
- (i) provision of a mobile phone for emergencies;*
- (j) electronic protection of the witness; and*
- (k) the concealment of certain personal data by the administrative authorities, other than the data mentioned in Article (1) (e)”.*

As mentioned before, harmonisation is not the solution. However, there exists an urgent need for a legal framework, offering the possibility to work together and proposing solutions to the potential problems. ‘Soft hard law’, tailored based on for example the undercover rules in the EU MLA, is the only

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<sup>283</sup> G. VERMEULEN, *EU standards in witness protection and collaboration with justice*, in *IRCP-series*, 25, Antwerp-Apeldoorn, Maklu, 2005, p. 263

workable way forward. An example is the proposal made in 2005 for 'additional supportive measures'<sup>284</sup>: "The competent authority may decide to grant additional supportive measures. It shall take the specific situation of the protected person and the non-procedural protective measures that have been granted into account. Additional support may include financial, psychological, social and other support".

Furthermore, a specific section as to how member states can assist each other should be included in the future framework. As a matter of principle, member states should be encouraged to grant each other assistance, and here too, examples of what such assistance could entail should be included. It should be said that, when persons are willing to provide information concerning the offences falling within the scope of the rules laid down in the framework, the member states shall provide each other assistance in protecting them as well as their family members. It should then be added that such assistance might consist of relocation of protected witnesses and, where necessary, their family members, a relocation which can include the facilitation of transportation of the protected witness and his family members, the provision of residence permits as well as other documents to successfully implement the relocation, assistance in the search for a suitable residence, assistance in the search for suitable work or the provision of psychological assistance. Another measure could consist of concealing the link between the former and the new identity of persons whose identity has been changed.

As in 2005, the project team proposes to add a rule containing the commitment of member states to also assist each other in the use of audio-visual media, including the use of modern means of telecommunication, such as video-links, to facilitate simultaneous examination of protected witnesses whose appearance in court in the requesting party is otherwise impossible, difficult or costly.

Naturally, a future legislative framework should also contain a model certificate whereby member states shall request each other's assistance. Given its technical character and the fact that no amendments appear necessary at this stage, it suffices to refer to the proposal done in the previous Study regarding witness protection<sup>285</sup>.

Where the details of the EU action might remain subject to debate, the very fact that EU action is needed, is not. EU action would present an added value in fighting serious crime by enhancing cross-border cooperation through encouraging witnesses to testify in return for protection. While respecting the different legal systems and administrative organisation of each member state, a

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<sup>284</sup> G. VERMEULEN, *EU standards in witness protection and collaboration with justice*, in *IRCP-series*, 25, Antwerp-Apeldoorn, Maklu, 2005, p. 264.

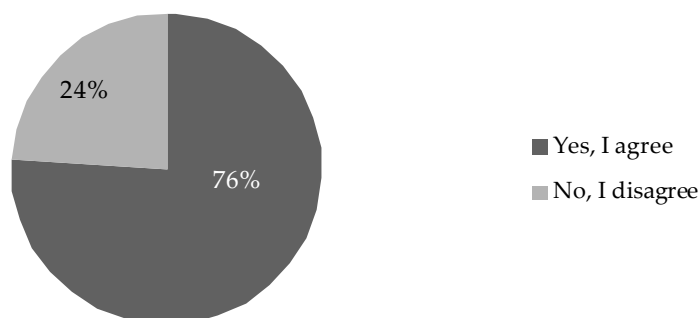
<sup>285</sup> G. VERMEULEN, *EU standards in witness protection and collaboration with justice*, in *IRCP-series*, 25, Antwerp-Apeldoorn, Maklu, 2005, p. 267.

common approach in relation to the protection of witnesses, collaborators, and people close to them could lead to more conviction in cases of serious crime. Witness protection should eventually be made available in all the member states, as it is a very powerful tool in the fight against serious and organised crime and terrorism since the closed nature of such groups makes it difficult to use traditional investigative methods.

One of the main driving forces behind formalising the existing practice is that relocation of protected persons is by far the area that should enjoy the highest priority for action due to increased need (geographical concerns, widespread criminality etc.) for temporary or permanently locating people abroad in order to ensure their safety<sup>286</sup>.

The replies to question 6.3.1 show that more than 75% of the member states indeed agree that the regulation of relocation of witnesses needs to be stepped up.

**6.3.1 Do you agree that relocation of witnesses is a valuable aspect of the international cooperation in criminal matters in the EU and thus that its regulation should be stepped up?**



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<sup>286</sup> EUROPEAN COMMISSION, COM(2007) 693 final (19.11.2007), p. 8.

#### 4.1.2 *Post-Trial MLA*

No specific legal basis for MLA exists in the post-trial phase. With “post-trial MLA” the project team refers to cooperation in criminal matters between member states, not in the investigative phase but in a phase in which a criminal case has already been brought to trial and has therefore been closed. Most MLA-instruments focus on cooperation in criminal matters in the pre-trial phase, and mutual assistance is usually intended to promote the requesting state’s criminal investigation. However, the importance of assistance in the post-trial phase is not to be downplayed. A common scenario, in which mutual assistance in the post-sentencing phase is of vital importance, is e.g. cooperation among member states in tracking down convicted felons who have escaped from prison. A plausible scenario is that one member state could require another member state to perform a house search with a relative of a fugitive, in order to search for information on his whereabouts. There are no European instruments that can serve as a basis for such “post-trial-MLA-requests”. Furthermore, not only in European but also in national legislations a lack of regulation of this area exists. A reference can be made to the Belgian legal system in which there is no legal basis what-so-ever for mere national investigative measures in post-trial phases. A full scan was made of European instruments, aimed at finding a possible legal basis, even an implicit one, for post-trial MLA. Multiple possibilities were considered, such as:

- The 1959 European Convention on mutual assistance in criminal matters in its Art. 1 states that Contracting Parties undertake to afford each other, in accordance with the provisions of this Convention, the *widest measure* of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party;
- The 1978 Additional Protocol to the previous instrument states in its Art. 3 that The Convention shall also apply to: a. the service of documents concerning the enforcement of a sentence, the recovery of a fine or the payment of costs of proceedings and b. measures relating to the suspension of pronouncement of a sentence or of its enforcement, to conditional release, to deferment of the commencement of the enforcement of a sentence or to the interruption of such enforcement; and
- The previous Art. 3 a and b are mirrored in Art. 49 e) respectively f) of the SIC, stating that mutual assistance shall also be afforded [...] in respect of measures relating to the deferral of delivery or suspension of enforcement of a sentence or a preventive measure, to conditional release or to a stay or interruption of enforcement of a sentence or a preventive measure.

The ECMA, as amended by the Protocol, does not only cover those forms explicitly mentioned in the convention (or in a supplementing legal instrument), which essentially are mere investigation related, but also every other kind of MLA (in which case there is an undertaking to afford only, though), including even in the post-sentencing phase (such as assistance relating to application for review of the sentence or to proceedings for the compensation of persons found innocent, service of documents related to enforcement or measures relating to suspension, deferment, interruption, termination of enforcement), be it never for the actual purpose of execution or enforcement of sentences which is explicitly excluded. The conclusion of the scan of these instruments therefore is that they do not provide a legal basis for cross-border post-sentencing investigative measures aimed at tracing fugitives.

- The 1997 Naples II Convention (mutual assistance in cooperation between customs authorities) covers the following forms of MLA: hot pursuit, cross-border surveillance, covert investigations, joint special investigation teams, surveillance, but the provisions are all limited to the prevention, (detection), investigation or prosecution of (planned or committed) infringements. Therefore, the Convention provides no legal basis for investigative measures or cooperation in the post-sentencing phase;
- As for the 2006 FD Swedish, its scope is limited to exchange of information and intelligence for the purpose of conducting pre-trial criminal investigations or criminal intelligence operations not yet having reached the stage of a criminal investigation, meaning that it can neither serve as a legal basis for cooperation in the post-sentencing phase;
- The 2005 Prüm Convention and 2008 Prüm Decision, introducing the essential Prüm acquis on the level of the EU with 27 member states, equally only applies to the investigation of offences. For example, fingerprint and vehicle registration data is only exchanged for the prevention and investigation of offences. Again, no legal basis can be found in this instrument; and
- The 2004 Benelux Convention on cross-border police intervention in its Art. 18 regarding cross-border hot pursuit broadens the scope of Art. 41 1990 SIC. It maintains none of the traditional MLA-limitations, and more importantly it contains a right to arrest on another member states' territory, in conformity with the national law, of persons who [by escaping] have avoided the enforcement of a penalty involving deprivation of liberty. Although "broadening" the SIC, the convention has a limited added value for EU MLA, as it applies for the Benelux only. Furthermore, there is an uncertainty about which national law of the states concerned applies, as this is unspecified in the article. Lastly, immediacy is required in case of hot pursuit, rendering the measure unfit therefore for 'fugitive search' purposes in a context of investigative measures in the post-trial phase. Similar limitations exist for the

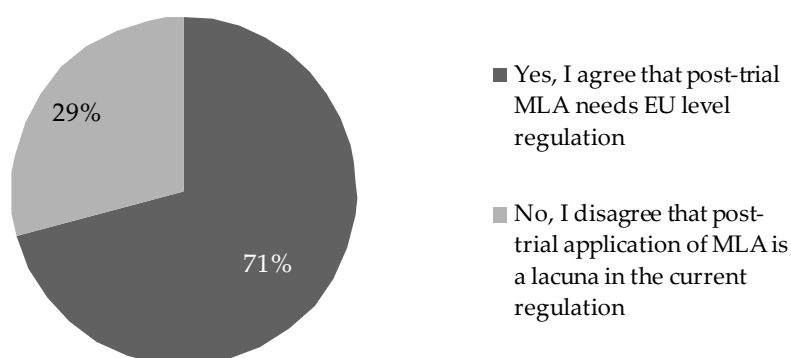
Convention's Art. 19, regarding cross-border surveillance. In other words, this Convention also does not contain real possibilities for serving as a legal basis for post-trial MLA.

Considering the importance of this domain and the current practices of cooperation in the post-trial phase on a mostly voluntary basis due to goodwill and the so-called "old-boys-network"- i.e. good relations between law enforcement in different member states-, the project team pleads for regulation of this area. First, the scope of relevant international assistance and cooperation instruments, Europol and Eurojust should be radically broadened to the post-sentencing phase. Second, on a member state level, there should be a mandatory introduction of the possibility to take investigative measures in the post-sentencing phase. Third, there should be a mandatory introduction of sufficient (independent and impartial) post-sentencing judicial control mechanisms on investigative measures for fugitive search purposes. To support this position, the large majority of member states agrees with the stance that post-trial MLA needs EU-level regulation. Opponents however state that these cases are rare, and that they are better dealt with at police-level considering the fact that most member states have developed a national system in the field of search of escaped convicts at the police operational level. However, the arguments given by opponents ignore the fact that the problems presented are not only a matter of "bringing home escaped fellows" but every step taken towards finding him first. Investigative measures such as taps and house searches which can lead to the recovery of an escaped prisoner should never be conducted without a legal basis and without the possibility for judicial control, which is now obviously the case.

A considerable majority of the member states followed the argumentation of the project team and confirmed that the post-trial MLA indeed needs additional regulation at EU level.



### 6.1.1 Do you agree that post-trial MLA needs EU level regulation?



## 4.2 Inadequately regulated forms of cooperation

Analysis revealed that there are three topics within the currently regulated forms of cooperation that are inadequately regulated and therefore deserve specific attention in this Study. These are

- the technique introduced in mutual legal assistance instruments to ensure the admissibility of evidence when it is gathered abroad upon the request of another member state;
- in the field of surrender and pre-trial supervision several specific shortcomings are outlined;

In the domain of transfer of prosecution the project team proposes the introduction of a comprehensive matrix of non-hierarchical criteria. Because of the indispensable role of Eurojust in this regard, however, this will be dealt with in the part dealing with the debate on the creation of an EPPO/the elaboration on Eurojust's competences.<sup>287</sup>

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<sup>287</sup> *Infra* 5.1.2.

#### **4.2.1 Mutual admissibility of evidence gathered abroad following a cooperation request: the FRA illusion**

##### **4.2.1.1 Introduction of FRA**

FRA is short for *forum regit actum*, a principle that was introduced in the 2000 EU MLA Convention. It was supposed to accommodate concerns of admissibility of evidence that resulted from foreign evidence gathering along the then known cooperation principles. To fully grasp the origin of FRA, it is key to have insight into the complexity that characterises the development of cooperation instruments more in general.

It is well known that European integration, especially on the level of cooperation in criminal matters, has not been developing at one single pace. Partnerships like the Council of Europe, Schengen, Prüm, the Benelux and the possibility of reinforced cooperation introduced for the EU by the Treaty of Amsterdam, have made sure that European integration and cooperation mechanisms have always been shaping up at multiple speeds and intensities. This signifies that cooperation between a certain nod of member states may have been developing more rapidly than cooperation between others and also between the whole of the EU. It is important to realise that these accelerated cooperations between certain smaller groups of EU-member states have often proven to be the catalyst for the further spreading of this reinforced cooperation for the whole of the EU.

If the evolution at different speeds, on different levels and with different intensities, specifically regarding cooperation in criminal matters, has known one rather negative consequence, it must be the over-load of legal instruments in which the legal basis can be found for a certain form of cooperation. For practitioners this implies, that finding the correct legal basis for a request for mutual legal assistance may sometimes be challenging.

The duality that is interesting when assessing the techniques used to accommodate concerns of admissibility of evidence, is the duality between applying the rule of *locus regit actum* or the rule of *forum regit actum*. Originally, mutual legal assistance between the member states of the European Union had its legal basis in the Council of Europe ECMA. That first instrument notes in its Art. 3 that the requested state shall execute a request for mutual legal assistance according to its own rules and regulations, i.e. according to the *locus regit actum* principle. The location where the investigative measure takes place is the decisive element when determining the applicable law. This means that a request made by one state, for which the legal basis can be found in the ECMA, to be executed in another state, shall be executed according to the law of this requested state. However, as a result to differences between national procedures, sometimes information gathered in one member state could not be used in the other member state because the way the information was obtained did not fit

with the national procedural requirements. In the following years problems with the admissibility of evidence gathered abroad in the context of mutual legal assistance requests gained more and more attention. The fact that certain formalities or procedural requirements that are crucial when determining the admissibility of evidence were not complied with during the foreign gathering process proved to be a significant hindrance to the effectivity of foreign evidence gathering. Therefore when developing an EU instrument to complement the existing CoE instrument, a solution was sought. As a result, the EU MLA Convention provides that the requesting state can ask the receiving state to comply with some formalities or procedural requirements which are essential under its national legislation. According to Art. 4 EU MLA must the state receiving a request for mutual assistance in principle comply with the formalities and procedures indicated by the requesting state. The only derogation allowed is an incompatibility with the fundamental principles of the law of the executing member state. With this rule the EU MLA introduced the principle of *forum regit actum*. The state where the *forum* i.e. the court is located could now have a say in the way evidence was to be gathered.

#### 4.2.1.2 *Conceptual flaws and weaknesses of FRA*

Because the entire design of the evidence landscape and the instruments regulating the gathering of evidence via different investigative measures are currently under review, it is important to include a critical assessment of FRA therein.

From the very beginning it was clear that FRA had a lot of flaws and weaknesses and would not be capable of providing an adequate answer to the admissibility concerns.

First, even though FRA is designed to accommodate the aspirations of the requesting member states and their concerns with respect to the admissibility of evidence gathered upon their request, no commitment to accept per se admissibility can be found in the cooperation instruments. This means that a request to take certain formalities or procedures into account, does not entail the commitment to accept the admissibility of evidence gathered accordingly. In other words, an executing member state that puts in a lot of effort into gathering evidence according to the requested formalities and procedures, has no guarantee that its efforts will be rewarded with the recognition of the admissibility of the evidence it gathered. As a result, FRA seems to remain a tool for the requesting member state to impose its formalities and procedures upon the requested member state without having to commit to accepting admissibility of the evidence gathered accordingly.

Second, FRA only has a very limited admissibility effect in the sense that it only seeks to ensure admissibility in a one on one relation between the requesting and requested member state. In doing so, it has no potential of

ensuring admissibility within the entirety of the Union. However, undeniably, the possibility to adjust the way of gathering evidence is a opportunity to work towards a situation in which the admissibility of newly gathered evidence is accepted throughout the Union. Only an approach that would ensure EU wide admissibility would really support and shape the evolution towards free movement of evidence. FRA fails to contribute thereto.

Third and most fundamentally, even in the one on one situation, the strength of FRA is relatively weak in the sense that it does not create a true and transparent situation in terms of the lawfulness of the way evidence was gathered, let alone the admissibility of evidence that is linked to that. Allowing one member state to request for certain formalities and procedures to be taken into account and therefore requiring another member state to take those formalities and procedures into account, runs the risk of undermining the status of being either lawfully or unlawfully gathered evidence. Four different situations can be distinguished that can best be clarified along the following example: state A is requesting a house search to be performed in state B and the specifically requested procedure is that this search would be conducted at 2 am.

1. The formality/procedure requested by state A is lawful in its own country and would be lawful in a similar situation in requested state B. This refers to the situation where nightly house searches are lawful in both the requesting and the requested state which means that the formalities and procedures of state A and B mirror each other. No problems will arise here as the requested formality/procedure will not impact on the way evidence is gathered. In these situations the request to take certain formalities or procedures into account is superfluous and the evidence gathered will be admissible according to both legal systems;

2. The formality/procedure requested by A can also be lawful in A but unlawful in B. This refers to the situation where nightly house searches are lawful in the requesting state but are unlawful according to the law of the requested state. This type of requests will bring about a challenge for B as it is required to decide whether to take the procedure into account or to seek recourse to the possibility to refuse due to an incompatibility with a fundamental principle in its own legal system. It is not clear what the impact on the lawfulness of the gathered evidence – and therefore the admissibility thereof – would be from the perspective of state B, because there is no common understanding on what constitutes a fundamental principle. For those member states that have a link between fundamental principles and admissibility of evidence in the sense that a only a breach of a fundamental principle would render evidence manifestly inadmissible, it is clear that unlawfully gathered evidence would be inadmissible. For other member states the admissibility status of the evidence gathered following an unlawful procedure is unknown. As a result it will be very hard to determine, whether from a theoretical perspective, it is possible for evidence to be declared admissible in the

requesting member state in a situation where it would be declared inadmissible in the gathering member state;

3. The formality/procedure requested is unlawful in A but lawful in B. This refers to the situation where the requesting state is requesting a nightly house search while this is unlawful according to its own law but is lawful in the requested state. It is unclear what would be the impact on admissibility of evidence if the requested formalities and procedures are unlawful in the requesting member state. It is very well possible that the request contains an error and therefore stipulates formalities and procedures that are unlawful in the requesting member state. Likewise it is very well possible that the request contains a formality or procedure that is not allowed in the requesting member state, but is included because it is known to be allowed in the requested member state. In these situations the question arises whether the lawful character of evidence gathering in the requested member state can remedy the unlawfulness of the requested formalities and procedures. It is not clear whether the lawfully gathered evidence that is admissible in the requested member state will encounter a negative effect of the unlawfulness of the request when it is returned to the requesting member state;

4. The requested formality/procedure is unlawful in A and unlawful in B. In the example this would refer to the situation where the requesting state is requesting a nightly house search while this is unlawful according to its own law and also according to the law of the state they are sending the request to. Even though not explicitly regulated anywhere it is likely that the unlawful character of the request cannot be remedied because of the unlawfulness of the evidence gathering in state B. However, this does not allow for final conclusions to be drawn with respect to the admissibility of the evidence gathered, because the mere fact that the evidence was gathered by state B means that state B did not call upon an incompatibility with a fundamental principle of its own national law. This would suggest that the evidence gathered is not absolutely inadmissible in the gathering state and leaves the question with respect to the admissibility in the requesting member state unresolved.

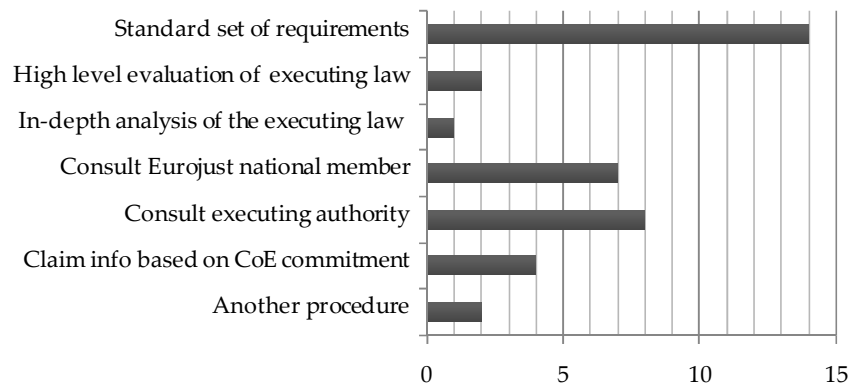
#### *4.2.1.3 Practice developed with respect to FRA*

In addition to three above mentioned major conceptual critiques with respect to the usefulness of *forum regit actum*, the added value of the concept is further challenged by the practice that has developed around it.

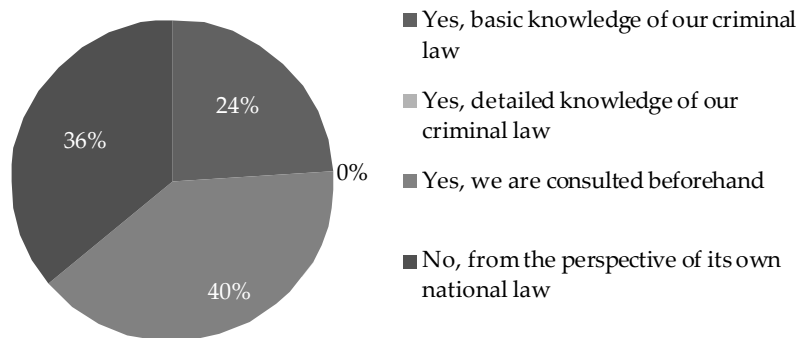
The figure on the replies to question 4.2.1. inserted below shows that most member states have a standard set of requirements mirroring their own national procedural to prevent problems in a later stage of the procedure. Follow up analysis on the replies to question 4.2.3. revealed that in a lot of situations the listed requirements are not prompted because of concerns that rise from the law

of the requested member state, but are prompted as a precaution solely based on the requirements included in their own national criminal justice systems.

**4.2.1 How do you decide when to ask for specific formalities and procedures to be taken into account?**



**4.2.3 Is it your experience that the request to take account of specific formalities and procedures are useful considering the procedures of your own national law?**



Even though most member states have a standard set of requirements mirroring their own national procedural laws to prevent problems in a later stage of the procedure, there is a considerable number of member states that make use of a consultation process prior to sending the request. This practice shows both from the results of question 4.2.1 as well as of question 4.2.3. Consultation mostly takes place either with the executing authority or the Eurojust national member. A single member state has indicated to prefer

contacting a member of the European Judicial Network as they are perceived to be closer to the practitioners reality than Eurojust national members. In spite of this consultation practice, it is interesting to note that not a single member state has indicated that the nature of the requested formalities or procedures shows a detailed knowledge of their law.

A consultation procedure has three main advantages. First, because consultation takes place prior to drafting the formalities and procedures to be taken into account, redundant requests will be avoided. Second, consultation and dialogues related to the differences between the criminal justice systems has the potential to significantly improve the knowledge and understanding of other European criminal justice systems. Third, communication with counterparts of other member states will also positively impact on personal relationships and thus positively influence cooperation in general. Obviously, consultation also has a number of disadvantages of which the time consuming character of consultation processes is the most important disadvantage.

Only a minority of member states indicated to make use of the commitment made at Council of Europe level to supply one and other with information on substantive and procedural law and judicial organisation in the criminal field.<sup>288</sup>

A very small number of member states analyses the law of the executing state themselves, to check whether or not they should take into account specific formalities or procedures to avoid admissibility-problems in a later stage of the criminal process.

When reviewing the *forum regit actum* principle based on the follow up of the requested formalities, analysis on the replies to question 4.2.2. – of which the figure is inserted below – revealed that only 5 member states never suggest alternatives and therefore have never experienced problems whatsoever with the execution of the requested formalities and procedures. This is said to be due to the vague and high level character of the requested formalities and procedures and the limited derogation of their own formalities and procedures. This conclusion strongly questions the need and possible added value of introducing a *forum regit actum* principle, when the fear of not complying with

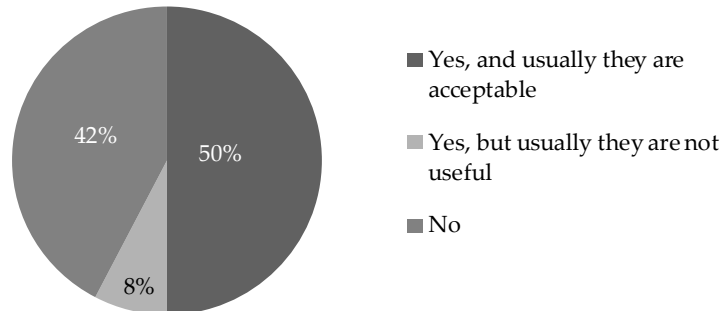
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<sup>288</sup> Council of Europe, Additional Protocol to the European Convention on Information on Foreign Law, Strasbourg, 15.III.1978. I. The European Convention on Information on Foreign Law was opened to signature by the member states of the Council of Europe on 7 June 1968, and entered into force on 17 December 1969. The Additional Protocol to the Convention was prepared under the joint authority of the European Committee on Legal Co-operation (CDCJ) and the European Committee on Crime Problems (CDCP). The provisions relating to criminal law and procedure were prepared by the CDCP and those relating to the field of legal aid and advice by the Committee of Experts on Economic and other Obstacles to Civil Proceedings *inter alia*, Abroad, set up by the CDCJ. The Additional Protocol was opened to the signature of the member states of the Council of Europe, signatory to the European Convention on Information on Foreign Law, on 13 February 1978.

formalities and procedures in the executing member state and the consequences this could have on the admissibility of evidence gathered accordingly is all based on perceived differences in criminal justice systems.

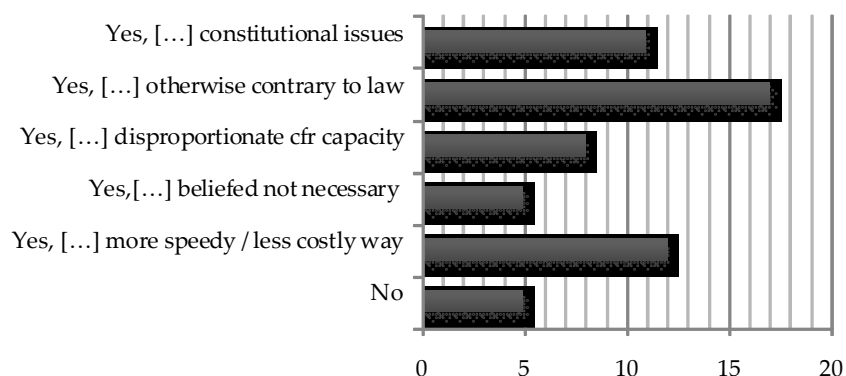
Likewise, in spite of consultation practices before the formulation of the request, analysis on the replies to question 4.2.2. also revealed that executing member states still do suggest alternatives when they receive requests containing specific requests for formalities or procedures. As shown from the replies to question 4.2.4. this is notably the case when the receiving member state believes that the same result can be achieved in a more speedy or a less costly way, when the requested formalities and procedures are contrary to their national laws or regulations, and definitely when the requested formalities and procedures cannot be respected due to constitutional issues. That fact that 50% of the member states indicate that alternatives suggested to them by the executing member states are acceptable places question marks to the necessity to comply with the requested formalities and procedures in the first place.

**4.2.2 Do executing member states sometimes suggest alternatives?**





#### 4.2.4 Do you sometimes suggest alternatives in reply to explicitly requested formalities and procedures?



Furthermore, though to a lesser extent, other reasons for suggesting alternatives are because receiving member states believe the requested formalities and procedures are not necessary or because executing the requested formalities and procedures would place a disproportionate burden on their capacity.

##### 4.2.1.4 Conclusion: Minimum standards as opposed to FRA in future instruments

Considering the conceptual flaws and weaknesses of FRA and the poor practice developed around it, one would expect that the current momentum to redesign the entire landscape of mutual legal assistance and foreign evidence gathering would be seized to drastically rethink the approach to tackle admissibility problems. This expectation however is far from self-evident, when analyzing the current status of the EIO discussions.

After discussing the initiative for over a year, at the Council meeting on 9/10 June 2011, a partial general approach<sup>289</sup> had been reached on the main regime of the draft Directive regarding the EIO. It defined the EIO in its Art. 1 as a judicial

<sup>289</sup> The partial general approach allows for the Council Preparatory Bodies to further proceed with the examination of the specific provisions on certain investigative measures contained in the remaining part of the initiative. The general approach on the whole text will then constitute the basis for further negotiations with the European Parliament with a view to reaching an agreement on the draft Directive according to the ordinary legislative procedure; Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters - Partial general approach, 11735/11, 17-06-2011.

decision issued or validated by a judicial authority of a Member state ("the issuing State") in order to have one or several specific investigative measure(s) carried out in another Member state ("the executing State") with a view to obtaining evidence in accordance with the provisions of the Directive. This approach was retained entirely with the adoption of the General Approach EIO.<sup>290</sup>

Specifically regarding formalities and procedures, Art. 8.2 of the partial Agreement EIO – and its updated version, the General Approach EIO – notes that the executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority unless otherwise provided in this Directive and provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing State. It is most deplorable that this principle is again included into the new instrument without any remedy to the conceptual flaws and weaknesses.

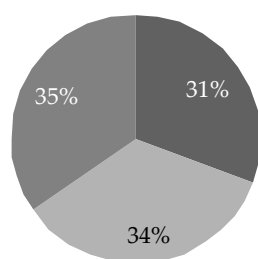
The only way to remedy those conceptual flaws and weaknesses and tackle the admissibility issues is via the introduction of minimum standards according to which evidence is to be gathered. This would mean that all evidence that is gathered following a cross-border request will have to be gathered according to the commonly agreed minimum standards. This would do away with discussions on the lawfulness of the evidence gathering technique and subsequently, the admissibility of the evidence gathered must be accepted in all 27 member states. In doing so, newly gathered evidence in a cross-border context would be subject to an irrefutable presumption of admissibility and can therefore be subject to free movement throughout the Union. The analysis of the replies to question 4.2.6. show that only 31% of the member states already realises that replacing the FRA principle with the introduction of minimum standards is the only way forward, and the only way to truly start building on a framework that would support and shape the free movement of newly gathered evidence following a cross-border effect. It is reassuring to find that another 34% of the member states is very much in favour of the idea though feels that even the introduction of a set of minimum standards would not be able to do away with the FRA principle in total. It is important to understand that a combination of minimum standards and FRA possibilities has significant consequences for the finality of FRA requests. They cannot be linked to accepting the admissibility of evidence gathered upon their request because an irrefutable presumption of admissibility is already covered by the minimum standards. The only added value FRA requests can bring is situated at the level of the evidential value that is to be attached to evidence gathered upon their request. However, here the lack of commitment to link these requests to an irrefutable presumption

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<sup>290</sup> COUNCIL OF THE EUROPEAN UNION (2011), 2010/0817 (COD), "Text agreed as general approach to the initiative for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters", 21 December 2011.

resurfaces. If member states are allowed to ask for certain formalities and procedures to be taken into account in order to secure the evidential value when the evidence returns to their jurisdiction, this should be complemented with the introduction of irrefutable presumptions.

**4.2.6 Do you agree that it is a better policy option to harmonise (and introduce minimum standards) the most important formalities (that give way for inadmissibility issues) as opposed to requesting member states to apply each other's criminal law?**



- Yes, [...] only way. Should replace FRA in MLA-matters.
- Yes. However, not possible to fully do away with FRA in MLA-matters.
- No, minimum standards are not useful in this context.

In light of this recommendation to replace references to the FRA principle with commonly agreed and tangible minimum standards, it is applaudable that the General Approach EIO, in the philosophy that specific rules are necessary for some types of investigative measures, it includes such rules for:

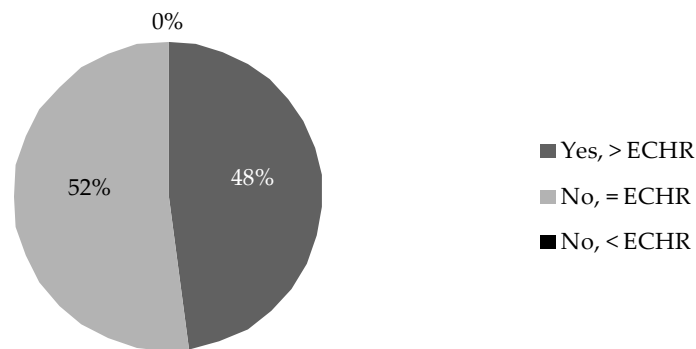
- Temporary transfer for the issuing State of persons held in custody for purpose of investigation;
- Temporary transfer to the executing State of persons held in custody for purpose of investigation;
- Hearing by videoconference;
- Hearing by telephone conference;
- Information on bank account;
- Information on banking transactions;
- The monitoring of banking transactions;
- Controlled deliveries;
- Investigative measures implying gathering of evidence in real time, continuously and over a certain period of time; and
- Covert investigations.

The existing instruments can already provide a solid basis as they often provide specific rules for certain types of investigative measures which take into

account the specificities or sensitiveness of the measure concerned. Naturally it is important to ensure that new agreements are no step backwards when compared to the *acquis* that can now already be found in the different cooperation instruments and the ECHR (combined with the jurisprudence of the ECtHR).

From the replies to question 4.2.9, it shows that member states either find that these minimum standards should be stricter than ECHR standards and thus present a clear added value when compared to existing ECHR standards, or mirror them. Fortunately, no member state finds that the minimum standards should be less strict than standards elaborated in the jurisprudence of the ECHR.

**4.2.9 Should the adoption of EU minimum standards present a clear added value when compared to existing ECHR standards?**



It should be recalled however, that truly creating an added value when compared to existing instruments, cannot only be done through the introduction of more strict standards. Even combining the existing standards with irrefutable presumptions of admissibility to be attached to evidence that was gathered accordingly, would constitute a significant progress compared to the existing situation.

**4.2.2 *Tensions between supervision, surrender and transfer of prosecution***

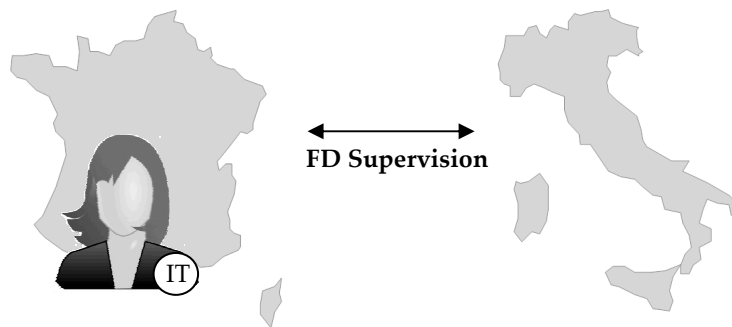
A second cluster of cooperation forms that are considered to be inadequately regulated are linked to domains 2 (transfer of pre-trial supervision), 3 (extradition and surrender) and 6 (transfer of prosecution). The concerns related to these cooperation domains are of two kinds. First, there is a concern related to the recent FD Supervision which is intertwined with (avoiding) the issuing of an EAW. The second concerns relates to a specific gap in the current mechanisms

governing EAW and transfer of prosecution in that so-called active transfer of prosecution is not explicitly regulated.

#### 4.2.2.1 *Tensions between FD Supervision and FD EAW*

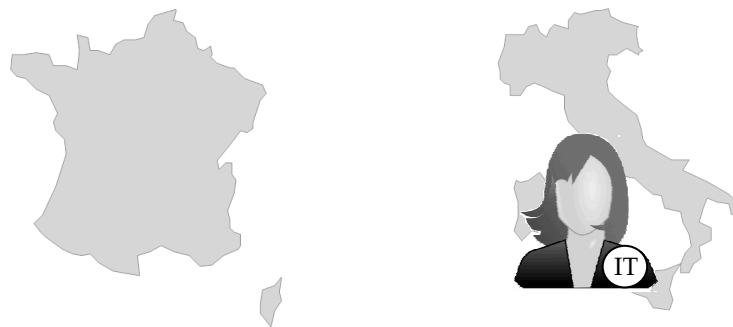
The FD Supervision was adopted in 2009. Supervision measures may include, for instance, an obligation not to enter locations, an obligation to avoid contact with specific persons, or an obligation to report weekly to the police. The fact that its implementation is due only by the end of 2012, provides the opportunity to, where necessary, amend the framework decision before all member states have completed implementation. Therefore, if alterations are necessary in order to make the instrument more efficient, the time is now.

The aim of the framework decision was to reduce the number of pre-trial detentions imposed on suspects who are nationals or residents of other member states. The FD is undoubtedly an improvement in the sense that it effectively fights discrimination towards non-nationals. The following example – illustrated on the figure below – should clarify this.



A person with the Italian nationality commits an offence in France, i.e. outside her country of nationality or residence. It concerns an offence for which a French judge would usually impose a supervision measure in the run to the actual trial. However, with respect to this Italian woman, it is unlikely that he will impose that measure. Chances of the Italian national fleeing to home state Italy are considerable. Consequently, the judge will probably impose a custodial sentence, as a result of which the Italian woman is discriminated when compared to a French national. The FD Supervision provides a solution to this problem in that it allows the judge to impose a supervision measure, which will be recognised and executed in the home country. Art. 21 FD Supervision guarantees that the Italian woman will be surrendered back to France, once the latter will issue an EAW.

The first recommendation of the project team concerns the fact that, despite the said improvement, the FD Supervision could have gone much further, given that currently it does not cover the situation where the Italian woman is not (no longer) present in France. In this second scenario illustrated with the figure below, France cannot use the FD Supervision (which is in essence a temporary export mechanism) and will most likely issue an EAW for the Italian woman, who will then be surrendered to France and will be kept in custody until the very beginning of her trial, which might take years. If the FD Supervision would be applicable to that situation, it would be feasible for a member state to issue a 'Supervision Warrant' to the home country regardless of the presence of the person concerned in its territory. The person concerned would then be immediately placed under supervision in her home country instead of in custody in a foreign country.



As long as the applicability is not extended to persons who are not present in the country wanting to impose a supervision measure it is hard to take the purported aim of the framework decision – being the reduction of the number of pre-trial detentions imposed on suspects who are nationals or residents of other member states – seriously.

A second recommendation concerns the procedural aspects of the physical transfer of the person concerned: this is not dealt with in any way in the framework decision. Naturally, given the capacity issues and endless practical problems concerned, the smooth functioning of the framework decision is highly doubtful as long as the way in which the physical transfer should take place, is not included therein. This does not mean that the instrument should cover every single detail of the transfer, yet a minimum amount of guidance is required. It remains unclear whether an EAW should be issued for the transfer, and if not (and it is indeed unlikely given that the "EAW-issuing state" – being the executing state within the application of the FD Supervision – would in that situation not be the state intending prosecution), which other legal base could serve for it.

A third and final recommendation relates to the influence adaptation and in doing so reducing the duration of the supervision measure for the applicability of the EAW. When an issuing member state imposes a supervision order for a duration of 1 year, the executing member state has the possibility to adapt the duration of that supervision measure if it is deemed incompatible with its national law. A reduction of the duration of the supervision is seemingly in the best interest of the person concerned and therefore a correct application of the *lex mitior* principle. However, it should be realised that the reduction of duration of the supervision measure will only have as its result that the person concerned will be transferred (back) to the issuing member state earlier in the procedure. It is well known that a reduction of the duration of the supervision measure in the executing member state will result in a pre-trial detention period for the remaining time in the issuing member state. Therefore, the use of the possibility to adapt the duration of a supervision measure should be carefully considered in light of the implications it may have for the applicability of the EAW.

#### 4.2.2.2 *Active transfer of prosecution*

Throughout the part on general cooperation principles a few aspects of the EAW were mentioned where the project team sees room for improvement (e.g. the absence of the non-discrimination exception and more elaborated proportionality concerns). The following deals with a very specific aspect of the EAW, which is additionally not only EAW specific in the sense that it concerns the relationship of the EAW with another form of cooperation, being the transfer of prosecution.

When the necessity of a transfer of prosecution coincides with the issuing of a European Arrest Warrant, the risk of a deadlock (or at least of an unnecessary administrative burden and/or loss of time) becomes apparent. Two situations which need improvement can be distinguished.

First, the situation where two member states are competent to prosecute. The person is in one member state (A), but it is decided that the other member state (B) decides will prosecute. As such there is no problem, although it should be pointed out that two separate administrative steps will be needed: first, the decision whereby B is chosen as the MS who will prosecute; second, the issuing by B of an EAW.

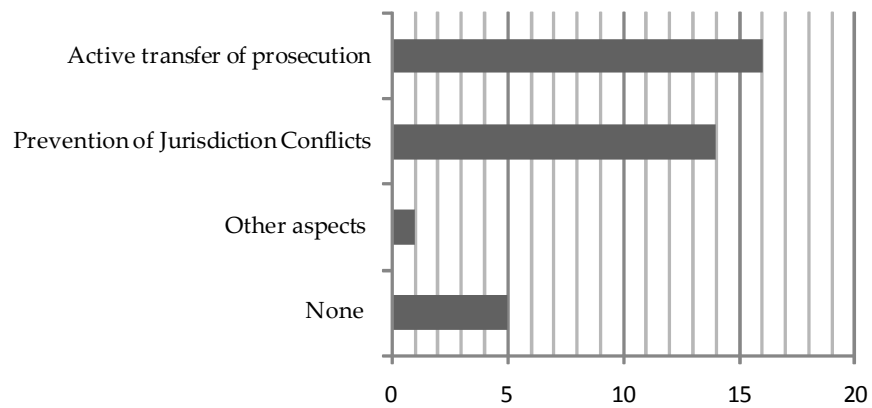
Second, the situation where only one MS (A) is competent to prosecute. The person is in A. However, it is decided amongst A and B that B will be competent because it is the best place to prosecute. Considerable time will be lost between the decision to prosecute and the person being transferred to B: first, B will have to process the decision to make it competent; only then there is a legal base for B to issue an EAW.

This is why the project team proposes to apply an 'active transfer', meaning a combination between a transfer of prosecution and the issuing of an EAW. In those cases where both member states wish to keep the steps separate this should remain possible, however, a system which would allow to take both steps in one decision should at least be made possible (after all, today, there is no legal system allowing for an active transfer of prosecution).

Both situations described above could be dealt with more efficiently. First, the amount of administrative steps (and thus costs) would decrease. This necessarily implies that the process would take place faster, especially in the second situation described above: there would be no more reason for B to have to wait until it would have internally processed its jurisdiction before it would be legally entitled to issue an EAW. Second, in the event that the person involved would be held in pre-trial custody in A, through an active transfer the duration of this pre-trial custody would be shortened considerably: indeed, whereas today the pre-trial custody in A equals the sum of the period for the administrative/legal processing of the jurisdiction by B and the consequent period of issuing (B) and executing (A) the EAW, it would then only involve the period for the administrative/legal processing of the jurisdiction by B given that the latter would *imply* the issuing of an EAW. The replies to question 6.4.2. reveal that a large majority of the member states have agreed that a system of active transfer of prosecution should indeed be envisaged.



#### 6.4.2 Which aspects of transfer of prosecution need additional regulation at EU level?



The suggestion of an active transfer deals with a very specific aspect of transfer of prosecution. Unfortunately, more broad (and fundamental) concerns regarding transfer of prosecution, and more specifically the resolution of conflicts or jurisdiction, are at hand. Those are dealt with in the following chapter, in relation to the elaboration of Eurojust's competences.<sup>291</sup>

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<sup>291</sup> *Infra* 5.1.2.



## 5 Overarching EU Issues

Besides the possibility for the EU to regulate the rules and procedures to be followed in a cross-border cooperation situation, it is clear that there are always mirroring concerns that are detached from any form of cooperation. Regulating situations with a cross-border element immediately raises questions as to the impact this could or even should have on similar mere domestic situations. Based on the results from a literature review and the concerns raised during the Study, the project team has decided to single out 4 case studies looking into the possibility to ensure an EU wide effect, namely, first, Cross-border admissibility of evidence gathered in a mere domestic context: a legal basis?, second Mutual recognition of collaborators with justice; third, Mutual understanding of the *ne bis in idem* principle; and fourth and final the EU wide effect of disqualifications. Before elaborating on those case studies, two other overarching issues are dealt with, namely the introduction of an EU level offence classification system as a leitmotif through international cooperation in criminal matters and the relationship between a possible elaboration of Eurojust's competences following Art. 85 TFEU in the context of the debate regarding the creation of a European Public Prosecutor's Office (EPPO) following Art. 86 TFEU.



## 5.1 EULOCs in support of international cooperation in criminal matters

*Wendy De Bondt & Gert Vermeulen*

### 5.1.1 Introduction

EULOCs is short for EU level offence classification system and brings together the so-called approximation *acquis*. It provides an overview of what is known to be common in terms of criminalisation between the member states of the EU. In several of the preceding chapters, it was observed that the diversity in the criminalisation between the member states can make cooperation complex and knowledge on what is common can provide some breathing room. The application of many mechanisms and principles turn out to be dependent on the typology of the underlying behaviour.

This chapter aims at demonstrating the need for and/or at least the added value of a EULOCs in support of international cooperation in criminal matters. In doing so, the chapter also looks into the function of the approximation *acquis*. Both in legal and policy documents, the function is barely mentioned and in literature hardly elaborated on.<sup>292</sup> To ensure a proper understanding of the argumentation developed, it is important to first provide a comprehensive introduction to EULOCs itself, its origin, its main features, its ambition. To that end, this introduction has a double focus. On the one hand approximation is elaborated on, clarifying what it entails and what the current approximation *acquis* looks like. On the other hand, the design of EULOCs receives significant attention, focussing on the considerations that were taken into account in the building phase and the challenges identified to keep EULOCs updated for the future.

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<sup>292</sup> WEYEMBERGH, A. (2005). The functions of approximation of penal legislation within the European Union. *Maastricht Journal of European and Comparative Law*, 12(2), 149.; BORGERS, M. J. (2010). Functions and Aims of Harmonisation After the Lisbon Treaty. A European Perspective. In C. Fijnaut, & J. Ouwerkerk (Eds.), *The Future of Police and Judicial Cooperation in the European Union* (pp. 347-355). Leiden: Koninklijke Brill.

5.1.1.1 *Approximation: what's in a name?*

The first part of the introduction aims at clarifying what approximation means.<sup>293</sup>

In essence, approximation is not really a legal term as it is most commonly used in exact sciences and mathematics. There it is defined as the *inexact representation* of something that is still *close enough* to be useful. Surprisingly this definition turns out to fit a legal context better than one might expect. For the purpose of this chapter, approximation refers to the establishment of common *minimum standards* with respect to the constituent elements of offences.<sup>294</sup> This means that the approximation *acquis* is an *inexact representation* of the criminalisation in the member states, for it will only represent a common denominator amongst the constituent elements of offences. At the same time it is still *close enough* to be useful for it will provide valuable insight into the commonalities in the criminal justice systems of the member states. Especially knowledge on and use of those commonalities can facilitate international cooperation in criminal matters. Approximation will give you insight in the largest common denominator for which a supranational or international legal basis supporting that commonality exists. That does however not mean that the *de facto* largest common denominator cannot be even wider than what is found in approximation instruments. To the contrary, it is even very likely that the *de facto* common denominator is wider than the *de jure* common denominator provided for by the approximation *acquis*, because notwithstanding that far from all offences have been subject to approximation, there is e.g. some common

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<sup>293</sup> There is no official definition of approximation, but several scholars have attempted to define it: NELLES, U. (2002). Definitions of harmonisation. in KLIP, A. and VAN DER WILT, H. Harmonisation and harmonising measures in criminal law. Amsterdam, Royal Netherlands Academy of Arts and Sciences: 31-43, VAN DER WILT, H. (2002). Some critical reflections on the process of harmonisation of criminal law within the European Union. in KLIP, A. and VAN DER WILT, H. Harmonisation and harmonising measures in criminal law. Amsterdam, Royal Netherlands Academy of Arts and Sciences: 77-87, VANDER BEKEN, T. (2002). Freedom, security and justice in the European Union. A plea for Alternative views on harmonisation. in KLIP, A. and VAN DER WILT, H. Harmonisation and harmonising measures in criminal law. Amsterdam, Royal Netherlands Academy of Arts and Science: 95-103, WEYEMBERGH, A. (2006). "Le rapprochement des incriminations et des sanctions pénales." *Revue Internationale de Droit Pénal* 77(1-2): 185, KLIP, A. (2009). *European Criminal Law. An integrative Approach*. Antwerp - Oxford - Portland, Intersentia

<sup>294</sup> Because this chapter elaborates on the EU level *offence* classification system, the scope of the approximation *acquis* is limited accordingly, in spite of the fact that approximation can also refer to the establishment of common minimum standards with respect to the penalties involved.

understanding of what constitutes theft or murder, though even with respect to those seemingly straightforward offences, differences exist.<sup>295</sup>

Though all EU member states have developed their own criminal law and the decision on what does and does not constitute an offence is (to a large extent)<sup>296</sup> still a national prerogative, approximation is a valuable tool to identify those commonalities.

The possibility to approximate offences was formally introduced at EU level in Artt. 29 and 31(e) TEU as amended by the Amsterdam Treaty. They allowed for the adoption of measures *establishing minimum rules relating to the constituent elements of criminal acts* in the fields of organised crime, terrorism and illicit drug trafficking. The Union's overall objective is to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action in the fields of police and judicial cooperation in criminal matters [...]. Approximation, where necessary, is considered to be one of the means to achieve that objective. The then new provisions were inspired by the conclusions of the High Level Group created by the Dublin European Council and tasked to examine the fight against organised crime in all its aspects.<sup>297</sup> The High Level Group spent considerable time discussing the possible contribution legislative approximation might offer to the fight against organised crime.<sup>298</sup> To that end Art. 34 TEU introduced the framework decision as a new instrument specifically designed to shape the approximation *acquis*. The rules governing this instrument were carefully chosen as it invites member states to agree on common criminal law provisions, leaving them with the discretionary power to choose method and means to achieve the stipulated goals. With the coming into force of the new legal framework as provided by the Lisbon treaty, directives will now be the instruments used to approximate the constituent elements of offences.

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<sup>295</sup> Traditionally, reference is made to the discussions surrounding the criminalisation of abortion and euthanasia to substantiate that assertion. Cadoppi, A. (1996). Towards a European Criminal Code. *European Journal of Crime, Criminal Law and Criminal Justice*, 1, 2.

<sup>296</sup> It should be noted that only recently, member states have lost their prerogative to decide what does and does not constitute an offence. Whereas before, approximation required unanimity amongst member states, the coming into force of the Lisbon treaty has made it possible to pursue approximation via a qualified majority voting. As a result, it is now possible that a criminalisation obligation is imposed on member states that have voted against a particular form of approximation.

<sup>297</sup> EUROPEAN COUNCIL (1996), *Dublin Presidency Conclusions*.

<sup>298</sup> HIGH LEVEL GROUP ON ORGANISED CRIME (1997), *Letter to the Chairman of the Intergovernmental Conference Representatives Group*, 2 May 1997, CONF 3903/97; Action Plan to combat organized crime (Adopted by the Council on 28 April 1997), OJ C 251 of 15.8.1997.

5.1.1.2 *Identifying approximation acquis*

Traditionally, as a result of the treaty base provided for approximation, the scope of the *acquis* is limited to those old framework decisions, complemented with post-Lisbon directives.<sup>299</sup> Framework decisions and post-Lisbon directives have been adopted for euro counterfeiting<sup>300</sup>, fraud and counterfeiting of non-cash means of payment<sup>301</sup>, money laundering<sup>302</sup>, terrorism<sup>303</sup>, trafficking in human beings<sup>304</sup>, illegal (im)migration<sup>305</sup>, environmental offences<sup>306</sup>, corruption<sup>307</sup>, sexual exploitation of a child and child pornography<sup>308</sup>, drug trafficking<sup>309</sup>,

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<sup>299</sup> See also: DE BONDT, W., & VERMEULEN, G. (2010). Appreciating Approximation. Using common offence concepts to facilitate police and judicial cooperation in the EU. In M. COOLS (Ed.), *Readings On Criminal Justice, Criminal Law & Policing* (Vol. 4, pp. 15-40). Antwerp-Apeldoorn-Portland: Maklu.

<sup>300</sup> Council Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, OJ L 140 of 14.06.2000 *as amended by* the Council Framework Decision of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, OJ L 329 of 14.12.2001.

<sup>301</sup> Council Framework Decision of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment, OJ L 149 of 2.6.2001.

<sup>302</sup> Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, OJ L 182 of 5.7.2001 [hereafter: FD Money Laundering].

<sup>303</sup> Council Framework Decision of 13 June 2002 on combating terrorism, OJ L 164 of 22.6.2002 *as amended by* Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism, OJ L 330 of 9.12.2008.

<sup>304</sup> Council Framework Decision of 19 July 2002 on combating trafficking in human beings, OJ L 20 of 1.8.2002 *repealed and replaced by* Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA, OJ L 101 of 15.4.2011.

<sup>305</sup> Council Framework Decision of 28 November 2002 on the strengthening of the legal framework to prevent the facilitation of unauthorised entry, transit and residence, *as complemented by* the Council Directive of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L 128 of 5.12.2002.

<sup>306</sup> Council Framework Decision 2003/80/JHA on the protection of the environment through criminal law, OJ L 29 of 5.2.2003 and Council Framework Decision 2005/667/JHA to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution, OJ L 255 of 30.9.2005 *annulled and replaced by* Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, OJ L 328 of 6.12.2008.

<sup>307</sup> Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, OJ L 192 of 31.7.2003.

<sup>308</sup> Council Framework Decision of 22 December 2003 on combating the sexual exploitation of children and child pornography, OJ L 13 of 20.1.2004 *repealed and replaced by* Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, OJ L 335 of 17.12.2011.



offences against information systems<sup>310</sup>, participation in a criminal organisation<sup>311</sup> and racism and xenophobia<sup>312</sup>.

However, even a quick analysis of those approximation instruments *in the treaty's sense of the word*, reveals that the approximation *acquis* extends beyond those instruments. The 2002 framework decision on the facilitation of unauthorised entry, transit and residence comes to testify to that conclusion. Whereas the approximation of the penalties is included in that framework decision, the approximation of the constituent elements of the offence involved is included in a separate (formerly first pillar) directive<sup>313</sup>, even though the treaty had appointed the framework decision as the legal basis for the approximation of the constituent elements of offences.<sup>314</sup> This duo of complementing

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<sup>309</sup> Council Framework Decision of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, OJ L 335 of 11.11.2004.

<sup>310</sup> Council Framework Decision of 21 February 2005 on attacks against information systems, OJ L 69 of 16.3.2005.

<sup>311</sup> Council Framework Decision of 24 October 2008 on the fight against organised crime, OJ L 300 of 11.11.2008 [hereafter: FD Organised Crime].

<sup>312</sup> Council Framework Decision of 29 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328 of 6.12.2008.

<sup>313</sup> Council Directive of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence

<sup>314</sup> Not only does this duo of legal instruments point to the fact that the approximation *acquis* extends beyond the framework decisions, it also indicates that the division of competences between the former first and third pillars gave way for complex discussions in the implication of those divisions on the competence to approximate the constituent elements of offences and sanctions. The complexity is created by the fact that migration is a first pillar competence and criminal law is a third pillar competence. Therefore, the approximation competence needed to be split accordingly. The identification of the constituent elements of offences fell within the competence sphere of the first pillar, whereas the approximation of the penalty remained a third pillar competence. As a result, approximation requires the combination of two instruments. The discussion on the division of competences between the first and third pillar reached its ultimate high with the adoption of the so-called environmental framework decisions. The European Court of Justice confirmed the division as applied in the older migration file. Because the protection of the environment is a first pillar competence, the approximation of the constituent elements of environmental offences should be inserted in a first pillar instrument. With respect to the sanctions, that first pillar instrument can only include the obligation for the member states to introduce effective, proportionate and dissuasive sanctions. See: EUROPEAN COURT OF JUSTICE (Case 176/03), *Commission v. Council*, Judgment of 13.9.2005, Rec. 2005, p. I-7879; EUROPEAN COURT OF JUSTICE (Case 440/05), *Commission v. Council*, Judgment of 23.10.2007, Rec. 2007, p. I-9097; This discussion has been subject to extensive debate in literature. See e.g. S. ADAM, G. VERMEULEN and W. DE BONDT (2008), "Corporate criminal liability and the EC/EU bridging sovereignty paradigms for the sake of an area of justice, freedom and security" in *La responsabilité pénale des personnes morales en Europe. Corporate Criminal Liability in Europe*, La Charte/Die Keure, Bruges, 2008, 501, 373-432; A. DAWES & O. LYNKEY. (2008). The Ever-longer Arm of EC law: The Extension of Community Competence into the Field of Criminal Law. *Common Market Law Review*, 45, 131; L. SIRACUSA, (2008). Harmonisation of criminal law between first and third pillar or the EU: Environmental

instruments clearly illustrates that there is more to approximation than the framework decisions and the post-Lisbon directives.

Furthermore, analysis revealed that within a European Union context, in the past approximation was also pursued via other instruments.<sup>315</sup> The Union has adopted joint actions and conventions that contain substantive criminal law provisions. The 1995 Europol Convention for example introduces definitions of “illegal migrant smuggling”, “motor vehicle crime” and “traffic in human beings”.<sup>316</sup> More obvious are the 1995 Convention on the Protection of the Communities Financial Interests<sup>317</sup> or the 1997 Convention on the fight against corruption involving Community Officials<sup>318</sup>. Finally, the 1998 Joint Action on drug trafficking can be mentioned.<sup>319</sup>

Finally, it is important to underline that this approach still fails to take into account those substantive criminal law provisions that originate from other cooperation levels, amongst which the Council of Europe and the United Nations are the most significant, even where no such ‘*conclusion instrument*’ exists. The importance of non-EU-instruments for the European Union is emphasized through the incorporation of some of them in the so-called JHA-acquis, which lists the legal instruments, irrespective of the cooperation level at which they were negotiated, to which all EU (candidate) member states must conform.<sup>320</sup> An initial impetus for the establishment of an EU JHA acquis can be

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protection as a Trojan horse of criminal law in the European first pillar? A new Statement of the ECJ. In C. BASSIOUNI, V. MILITELLO, & H. SATZGER (Eds.), *European Cooperation in Penal Matters: Issues and Perspectives* (pp. 62-86). Milan: CEDAM - Casa Editrice Dott. Antonio Milani.

<sup>315</sup> See also: WEYEMBERGH, A. (2004). *L'harmonisation des législations: condition de l'espace pénal européen et rélevateur de ses tensions* (Collection "études européennes"). Brussels: Éditions de l'Université de Bruxelles; DE BONDT, W., & VERMEULEN, G. (2009). *Esperanto for EU Crime Statistics. Towards Common EU offences in an EU level offence classification system*. In M. COOLS (Ed.), *Readings On Criminal Justice, Criminal Law & Policing* (Vol. 2, pp. 87-124). Antwerp - Apeldoorn - Portland: Maklu.

<sup>316</sup> *Convention of 26 July 1995 on the establishment of a European Police Office (EUROPOL)*, OJ C 316 of 27.11.1995.

<sup>317</sup> *Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests*, OJ C 316 of 27.11.1995.

<sup>318</sup> *Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of member states of the European Union*, OJ C 195 of 25.6.1997.

<sup>319</sup> Joint Action 96/750/JHA of 17 December 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning the approximation of the laws and practices of the Member States of the European Union to combat drug addiction and to prevent and combat illegal drug trafficking, OJ L 342 of 31.12.1996.

<sup>320</sup> Up until 2009, an updated version of the acquis could be consulted on the website of the Directorate General Freedom, Security and Justice of the European Commission. Unfortunately, the split of that Directorate General into a Directorate General on Justice and a Directorate General on Home Affairs has had a baleful effect on the continuation of the JHA acquis. The most recent version available dates from October 2009 and can be consulted on the website of

found in the 1996 action plan which lists non-EU instruments to which all member states and candidates must comply.<sup>321</sup> Because the Union itself underlined the importance of these non-EU instruments through the inclusion thereof into the EU JHA acquis, the Union may be expected to take those instruments into account as part of the approximation acquis. As a result, member states must accede to e.g. the United Nations *Single Convention on Narcotic Drugs*<sup>322</sup> or the Council of Europe *Convention on the Suppression of Terrorism of 27 January 1977*.<sup>323</sup>

Based on this analysis it is indisputable that within the EU, approximation is pursued via various sorts of instruments. It has developed rather fast and organically in the sense that it is strongly dependant on the political climate, lacking a long term consistent policy plan. When trying to assemble all the relevant provisions, analysis of framework decisions alone is insufficient. The exercise to map the approximation acquis was conducted in 2008, in the context of a study on crime statistics,<sup>324</sup> and kept updated ever since. At the time, the mapping exercise was intended to provide insight into the extent to which offences are known to be common in the member states and therefore there would be no definitional problems to compare the crime statistics.<sup>325</sup> It resulted in the identification of 62 offence labels, for which approximated offence definitions existed.<sup>326</sup> Already at that time, it was argued that the knowledge on the scope of the approximation acquis should be used wisely to support as much

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the Directorate General on Justice. EUROPEAN COMMISSION (2009) *Acquis of The European Union Consolidated and completely revised new version Cut-off-date: October 2009* [http://ec.europa.eu/justice/doc\\_centre/intro/docs/jha\\_acquis\\_1009\\_en.pdf](http://ec.europa.eu/justice/doc_centre/intro/docs/jha_acquis_1009_en.pdf)

<sup>321</sup> COUNCIL OF THE EUROPEAN UNION (1997), *Action Plan to combat organized crime (Adopted by the Council on 28 April 1997)*, OJ C 251 of 15.8.1997.

<sup>322</sup> In the JHA acquis it is clarified that the obligation to accede is not explicit but results from the references to this instrument in the EU Action Plan on Drugs (2000-2004)

<sup>323</sup> In the JHA acquis it is clarified that the obligation to accede is not explicit, but results from the binding force of secondary legislation, from Council Conclusions or from Article 10 EC.

<sup>324</sup> A. MENNENS, W. DE WEVER, A. DALAMANGA, A. KALAMARA, G. KASLAUSKAITE, G. VERMEULEN & W. DE BONDT. (2009). *Developing an EU level offence classification system: EU study to implement the Action Plan to measure crime and criminal justice (Vol. 34, IRCP-series)*. Antwerp-Apeldoorn-Portland: Maklu.

<sup>325</sup> Though there can be a lot of reasons why crime statistics from one member state cannot be compared with the crime statistics of another member state, comparative criminologists argue that the problems related to the diversity in offence definitions are the most significant. See e.g. HARRENDORF, S. (2012). *Offence Definitions in the European Sourcebook of Crime and Criminal Justice Statistics and Their Influence on Data Quality and Comparability*. *European Journal on Criminal Policy and Research*, 18, 23; LEWIS, C. (1995). *International Studies and Statistics on Crime and Criminal Justice*. In J.-M. JEHLE, & C. LEWIS (Eds.), *Improving Criminal Justice Statistics (Vol. 15, pp. 167-176)*. Wiesbaden: Kriminologischen Zentralstelle.

<sup>326</sup> W. DE BONDT & G. VERMEULEN (2009). *Esperanto for EU Crime Statistics. Towards Common EU offences in an EU level offence classification system*. In M. COOLS (Ed.), *Readings On Criminal Justice, Criminal Law & Policing (Vol. 2, pp. 87-124)*. Antwerp - Apeldoorn - Portland: Maklu.

as possible any policy domain that is offence-dependent, i.e. any policy domain in which knowledge on the underlying offence can be crucial to decide on the applicable rules.<sup>327</sup>

#### 5.1.1.3 *Building a classification system*

The second part of the introduction aims at clarifying the architecture of EULOCS. If it is the intention to use the approximation *acquis* to its full potential and ensure that it can support international cooperation in criminal matters, it is important that the *acquis* is presented in a comprehensive and comprehensible way. Mirroring the approach used with respect to the JHA *acquis* and merely listing the instruments that comprise the approximation *acquis* will not provide the insight necessary for it to fulfil its supporting role. A presentation should clearly visualise the scope of the *acquis* and should provide insight into the extent of the commonalities in the offence definitions in the member states. It is important to immediately show what is common in terms of criminalisation of offences and where the criminalisation of offences differs between the member states. Taking those considerations into account, the decision was made to develop an offence classification system, now known as EULOCS.

When designing an offence classification system to support (amongst others) international cooperation in criminal matters, a number of considerations must be taken into account. The following paragraphs will elaborate on considerations related to first, the accurateness of what is common in light of its dependence on correct and complete implementation by the member states, second, the presentation of the distinction between what is common and what is different, and third, the compatibility of the classification system with existing classification systems.

The first consideration relates to the accurateness with which the approximation *acquis* provides insight into the common offences in the EU. It must be recognised that the approximation *acquis* as found in the international and supranational legal instruments is only an indication of the common offences in the member states. The actual existence of common offences is dependent on the correct and complete implementation of all approximation obligations. Because EU (but also non-EU) instruments suffer from poor implementation,<sup>328</sup> it is not unlikely that there is a discrepancy between what

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<sup>327</sup> See also: DE BONDT, W., & VERMEULEN, G. (2010). Appreciating Approximation. Using common offence concepts to facilitate police and judicial cooperation in the EU. In M. Cools (Ed.), *Readings On Criminal Justice, Criminal Law & Policing* (Vol. 4, pp. 15-40). Antwerp-Apeldoorn-Portland: Maklu.

<sup>328</sup> See e.g. Report on the implementation of the Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, COM(2004) 409 final of 12.10.2004; Report from the Commission based on Article 12 of the Council Framework Decision of 22 December 2003 on combating the sexual exploitation of children and child pornography, COM(2007) 716 final of 4.12.2007; Report

*should* be common and what *is* common in terms of criminalisation in the member states. However, that complexity is not taken into account in this exercise. EULOCS is built using the approximation *acquis* as a basis, regardless of the implementation status in the member states. This is not so much a pragmatic choice but a choice that is based on the implications poor implementation should have (in the context of international cooperation in criminal matters). The choice between either or not taking account of the implementation status is dependent on the choice whether or not poor implementation can be used as an argument (in the context of international cooperation in criminal matters). In the event cooperation is e.g. dependent on the double criminality requirement, the question arises whether it is acceptable to raise a double criminality issue with respect to an offence that has been subject to approximation and would not have caused a double criminality issue if the executing member state involved would have complied with its approximation obligation. Because that question should be answered negatively for it cannot be accepted that a member state uses its own lagging behind in the implementation of approximation instruments as an argument to refuse cooperation, the implementation status in the member states is not relevant for the design of EULOCS.

The main goal of the development of an offence classification system is the later use thereof in support of (amongst others) international cooperation in criminal matters; the goal is that the knowledge on what should be common in terms of offence definitions is used to facilitate international cooperation in criminal matters. EULOCS will be used as a tool to identify not only what is common in terms of offence definitions in the member states, but also what should be common in light of approximation obligations member states should adhere to. Incorrect or incomplete implementation cannot be accepted as an argument to limit the scope of the approximation *acquis* and the added value it can have in support of offence-dependent mechanisms in international cooperation in criminal matters. Therefore, the approximation *acquis* in its entirety is taken into account regardless of implementation issues.

The second consideration relates to the clear distinction between what is common in terms of the constituent elements of offences and where the offence stops being a *common offence* and turns into an offence for which the determination of the constituent elements is a national prerogative. In relation to this consideration, it is important to duly take account of the specificities of the legislative technique of approximation. The approximating instruments only include minimum rules for approximation, they only include those acts for

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from the Commission – Second report based on Article 14 of the Council Framework Decision of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment, COM(2006) 65 final of 10.3.2006; See also: Borgers, M. J. (2007). Implementing framework decisions. *Common Market Law Review*, 44, 1361.

which member states must ensure that they are criminalised and punishable under their national legislation. Approximation will not lead to unification. The fact that the approximation instrument only contains the minimum rules means that member states retain the competence to criminalise beyond that minimum. Member states can complement the constituent elements included in the approximation instrument with an additional set of nationally identified constituent elements and bring them all together underneath the same offence label. A reference to the offence definition of trafficking in human beings can illustrate this. Art. 2 of the 2011 directive on trafficking in human beings stipulates that member states must legislate to ensure that *the recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation is considered to be an offence. Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.* Because these are the minimum requirements of the offence, member states can include other forms of exploitation into their national offence definition, or can decide e.g. that the use of any kind of force is not necessary for the behaviour to be punishable.<sup>329</sup> As a consequence, a distinction should be made between on the one hand the constituent elements that are known to be common because they were jointly identified as acts falling within the scope of an offence label and on the other hand other constituent elements that appear in national criminalisation provisions as a result of the specificities of the technique of approximation. To that end a distinction was made between *jointly identified parts of the offences* – in the case of trafficking in human beings, this means a criminalization that is limited to the said forms of exploitation and requires the use of force – and *other parts of the offences* – which may include other forms of exploitation and punishability even beyond the use of force. To clearly visualize (the rationale behind) the distinction between those two parts of trafficking in human beings, the commonly defined parts of the definition will be complemented with a reference to the approximating instrument(s). Each individual externalization of trafficking in human beings, i.e. each individual purpose with which human beings are trafficked receives a separate code for future reference, and future distinction between forms of trafficking in human beings within the *jointly identified part* of the offence and *other parts* of the offence. Before inserting a

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<sup>329</sup> A reference to the Belgian situation can serve as an example here. When deciding on the constituent elements of trafficking in human beings, the choice was made not to include the use of force as a required element in Art. 433 *quinquies* of the Belgian Criminal Code.

snapshot of EULOCS to make the distinction between *jointly identified* and *other parts* of offences more tangible, a third consideration will be dealt with.

The third consideration relates to the compatibility of the newly developed classification system with existing offence classification systems. Within the European area of freedom, security and justice, a proliferation of classification systems is taking place. Reference can be made to the classification systems that form the backbone of the data systems of EU level actors such as Europol and Eurojust, but more recently the classification system designed to organise the exchange of criminal records information received a lot of attention. ECRIS, short for European Criminal Records Information System, is a decentralised information technology system that governs the computerised exchange of criminal records information.<sup>330</sup> The computerised system uses a coded offence template similar to EULOCS to classify the criminal records information based on the underlying offence. When elaborating on the added value of EULOCS with respect to information exchange (*infra*), the weaknesses of ECRIS will be clarified. Nevertheless, a perfect compatibility between EULOCS and ECRIS was achieved. To ensure the feasibility of the introduction of a system such as EULOCS, it was deemed important to ensure that the new system is perfectly compatible with all the existing systems. To that end, the offence categories used in the existing systems were catalogued and used either as a basis for the development of EULOCS<sup>331</sup> or as a way to fine tune and perfect EULOCS in the final stage<sup>332</sup>. This perfect compatibility with existing classification systems is important not only to ensure that EULOCS can be used for various purposes and an easy conversion can be guaranteed, it is also important not to jeopardise the ongoing implementation of other classification systems. It is important to note that ECRIS was developed by the European Commission in parallel to the development of EULOCS, and needs to be implemented by the member states before the end of April 2012. Taking account of the broader scope and the possibility to also use EULOCS as a basis for criminal records exchange, some member states expressed concerns with respect to the ongoing efforts to implement ECRIS. Whenever a new system is being developed and promoted whilst another (older) system is still being implemented, this might have a baleful effect on the implementation of the latter.<sup>333</sup> In this case however, the

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<sup>330</sup> Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA. OJ L 93 of 7.4.2009.

<sup>331</sup> This was the case for classification systems used e.g. by the European Actors

<sup>332</sup> This was the case for the offence classification system used in ECRIS, which was developed by the European Commission in parallel to the development of EULOCS.

<sup>333</sup> Examples thereof are *legio*, but today the poor implementation of the European Evidence Warrant is the best example. Member state reluctance to go ahead with the implementation of the European Evidence Warrant is due to initially the echoes and now the concrete proposals for the transformation of the evidence gathering scene via the introduction of the European Investigation Order. Member states are awaiting the new instrument to ensure that no

ongoing implementation processes where not hindered by the promotion of EULOCS as an alternative, because the (further) implementation of the existing classification systems will ultimately facilitate future transition to EULOCS.

The construction the EU Level Offence Classification System was finalised in 2009.<sup>334</sup> The table inserted below provides an overview of what EULOCS looks like, visualising not only the distinction between *jointly identified parts* of the offence and *other parts* of the offence, but also the coding system and the inclusion of definitions and their sources as elaborated on above. The choice was made to insert an example with respect to participation in a criminal organisation for it allows visualising the approach that was used in the event the EU's approximation instruments were complemented by non-EU approximation instruments. With respect to participation in a criminal organisation, the 2008 Framework Decision needs to be complemented with the 2000 United Nations Convention on Organised Crime, for the latter also requests member states to foresee the punishability of knowingly taking part in the *non-criminal* activities of a criminal organisation, whereas the framework decision only refers to the punishability of a person taking part in the *criminal* activities of a criminal organisation.

Code level 1	PARTICIPATION IN A CRIMINAL ORGANISATION
Article 1 Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime	"Criminal organisation" means a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit; "Structured association" means an association that is not randomly formed for the immediate commission of an offence, nor does it need to have formally defined roles for its members, continuity of its membership, or a developed structure
Code level 1.1	OFFENCES JOINTLY IDENTIFIED AS PARTICIPATION IN A CRIMINAL ORGANISATION
Code level 1.1.1	Directing a criminal organisation
Article 2 (b) , Council	Conduct by any person consisting in an agreement with one or

implementation efforts are in vain. A such implementation deadlock is avoided with respect to offence classification systems by stressing the perfect compatibility of the proposed EULOCS with all existing classification systems. The efforts put into the implementation of ECRIS will have a significant impact on the ease with which EULOCS will be implemented. A full overview of the compatibility between EULOCS and the other classification systems is available for CIRCA users.

<sup>334</sup> G. VERMEULEN & W. DE BONDT (2009). EULOCS. The EU level offence classification system : a bench-mark for enhanced internal coherence of the EU's criminal policy (Vol. 35, IRCP-series). Antwerp - Apeldoorn - Portland: Maklu.



Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime	more persons that an activity should be pursued which, if carried out, would amount to the commission of offences, even if that person does not take part in the actual execution of the activity.
<b>Code level 1.1.2</b>	<b>Knowingly participating in the criminal activities, <i>without being a director</i></b>
Article 2 (a), Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime	Conduct by any person who, with intent and with knowledge of either the aim and general criminal activity of the organisation or the intention of the organisation to commit the offences in question, actively takes part in the organisation's criminal activities, even where that person does not take part in the actual execution of the offences concerned and, subject to the general principles of the criminal law of the member state concerned, even where the offences concerned are not actually committed,
<b>Code level 1.1.3</b>	<b>Knowingly taking part in the non-criminal activities of a criminal organisation, <i>without being a director</i></b>
Article 5 - United Nations Convention on Transnational Organised Crime (UNTS no. 39574, New York, 15.11.2000)	Conduct by any person who, with intent and with knowledge of either the aim and general criminal activity of the organisation or the intention of the organisation to commit the offences in question, actively takes part in the organisation's other activities (i.e. non-criminal) in the further knowledge that his participation will contribute to the achievement of the organisation's criminal activities.
<b>Code level 1.2</b>	<b>OTHER FORMS OF PARTICIPATION IN A CRIMINAL ORGANISATION</b>
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy

#### 5.1.1.4 Maintaining the classification system

Even though the construction of EULOCS was said to be finalised in 2009, the approximation acquis is not static and has evolved since then. New approximating instruments have been adopted with respect to trafficking in human beings<sup>335</sup> and also with respect to sexual exploitation of children and child pornography<sup>336</sup>. An update of the framework decision on attacks against information systems is on its way.<sup>337</sup> Additionally, a new instrument is being

<sup>335</sup> Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA.

<sup>336</sup> Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA.

<sup>337</sup> Proposal for a Directive of the European Parliament and of the Council on attacks against information systems and repealing Council Framework Decision 2005/222/JHA, COM(2010) 517 final of 6.9.2010

negotiated on market abuse in which the member states are to ensure that are punishable as offences.<sup>338</sup> The dynamic character of the approximation *acquis* makes it challenging to keep EULOCs updated. To that end it could be suggested to set up a panel of experts specifically assigned with that task. Furthermore, to guarantee the feasibility of using it in practice, it is required to see to it that older versions of EULOCs can still be consulted, as for some of its applications it may be important to look into the approximation *acquis* at any given time in the past.

Two concerns make it complex to keep EULOCs updated.

The first concern relates to the availability of an updated JHA *acquis*. Up until 2009, an updated version of the *acquis* could be consulted on the website of the Directorate General Freedom, Security and Justice of the European Commission. Unfortunately, the split of that Directorate General into a Directorate General on Justice and a Directorate General on Home Affairs has had a baleful effect on the continuation of the JHA *acquis*. The most recent version available dates from October 2009 and can be consulted on the website of the Directorate General on Justice. This means that an update of EULOCs can no longer rely on the inclusion of non-EU instruments in the JHA *acquis* available on the Commission website, but requires an analysis of the position of non-EU instruments in EU policy documents.<sup>339</sup>

The second concern relates to the increased flexibility allowed with respect to the area of freedom, security and justice. The United Kingdom and Ireland have obtained the right to opt-out,<sup>340</sup> whereas Denmark is excluded from participation.<sup>341</sup> This flexibility has significant impact on the way the approximation *acquis* should be dealt with. For each of the approximation instruments adopted under the legal framework established with the Lisbon Treaty, it must be assessed whether or not the United Kingdom and Ireland have opted in. With respect to the new instruments currently adopted, both member states have opted in, be it that the United Kingdom initially opted-out with

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<sup>338</sup> Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation, COM(2011) 654 final, of 20.10.2011

<sup>339</sup> As illustrated above, some non-EU instruments are considered to be part of the EU JHA *acquis* because an EU instrument exists that concludes the Convention on behalf of the European Union. Other non-EU instruments are considered to be part of the EU JHA *acquis* due to the position they assume in EU policy documents. The UN Single Convention on Narcotic Drugs is an example thereof, included in the EU JHA *acquis* following the references thereto in the EU Action Plan on Drugs (2000-2004)

<sup>340</sup> Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Consolidated version of the treaty on the functioning of the European Union, OJ C 115 of 9.5.2008.

<sup>341</sup> Protocol (No 22) on the position of Denmark, annexed to the Consolidated version of the treaty on the functioning of the European Union, OJ C 115 of 9.5.2008.

respect to the Directive on trafficking in human beings.<sup>342</sup> With respect to the new proposal for a directive on market abuse, the position of the United Kingdom is not clear yet. Because Denmark is always excluded, it is important to consistently mention this as a caveat with respect to the newly adopted directives. It must be tested to what extent the Danish criminal law already foresees the punishability of the offences included in the new approximation instruments or is voluntarily adapting its criminal law in accordance with the new instrument.

Having introduced EULOCS – be it in a nutshell – the classification system will be brought in relation to various mechanisms to elaborate on the need therefore, at least added value thereof. The added value of EULOCS will be discussed against the background of first, the double criminality requirement, second, the mechanisms that are responsible for enhanced stringency in cooperation, third, the complexities surrounding the admissibility of evidence, fourth, the information exchange between member states and finally fifth, the functioning of the EU level actors.

### 5.1.2 *EULOCS & double criminality*

The first context in which EULOCS might be necessary, at least can have an added value relates to the position of double criminality in international cooperation in criminal matters.<sup>343</sup> As elaborated on in the chapter dedicated to double criminality, one of the first questions member states are confronted with in relation to international cooperation in criminal matters is what to do with a request that relates to behaviour that would not constitute an offence if committed in their jurisdiction. Though cooperation is important, it is far from self-evident that member states cooperate with respect to cases that are not criminally actionable in their jurisdiction. Mirroring the structure of that chapter on double criminality, the need for at least added value of EULOCS will be reviewed using the same three perspectives.<sup>344</sup> First, EULOCS will be brought in relation to double criminality from the *EU's perspective* and the need to strive for consistency and safeguard the approximation acquis. Second, EULOCS will be brought in relation to double criminality from a *member state's perspective* and the

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<sup>342</sup> Commission Decision of 14 October 2011 on the request by the United Kingdom to accept Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA

<sup>343</sup> See also: DE BONDT, W., & VERMEULEN, G. (2010). Appreciating Approximation. Using common offence concepts to facilitate police and judicial cooperation in the EU. In M. Cools (Ed.), Readings On Criminal Justice, Criminal Law & Policing (Vol. 4, pp. 15-40). Antwerp-Apeldoorn-Portland: Maklu.

<sup>344</sup> In the chapter on double criminality in international cooperation in criminal matters, a distinction is made between the position of the issuing and the executing member state. For the purpose of the discussion here, both perspectives are joint together.

added value thereof in light of the current double criminality verifications. Third, EULOCs will be brought in relation to double criminality from the *individual's perspective* and the added value thereof in light of the possibility to transfer execution of sentences.

#### 5.1.2.1 EU's perspective: Safeguarding the approximation *acquis*

Using the perspective of the EU as a policy maker, the link with EULOCs consists of ensuring policy consistency and thus safeguarding the approximation *acquis*. It is the responsibility of each policy maker to ensure that the policy choices made are adhered to and are not undermined by other policy choices. To safeguard the approximation *acquis*, it is required that double criminality as a refusal ground is not used in relation to offences that have been subject to approximation. Allowing the use of double criminality as a refusal ground in relation to offences that should have been criminalised throughout the EU effectively undermines the strength of the approximation *acquis*. The current approach with respect to double criminality as a refusal ground does not hold that guarantee.

To explain that position, a distinction must be made between instruments with a simple double criminality clause and instruments with a more complex double criminality system due to the abandonment of the double criminality requirement for a list of 32 offences.

First, as clarified in the chapter on double criminality in international cooperation, double criminality is far from a general requirement. Though member states have made some cooperation mechanisms dependent on a double criminality requirement, other forms of cooperation can be pursued in spite of a lacking double criminality. Instruments regulating mechanisms that are made dependent on a simple double criminality clause, usually stipulate that *the act constitutes an offence under the law of the executing member state, whatever the constituent elements or however it is described*.<sup>345</sup> A such formulation however, is completely detached from the approximation *acquis*. Stipulating that cooperation may be refused if the act is not criminalised under the law of the executing member state fails to appreciate that some offences have been subject to approximation and it would therefore be inconsistent to allow member states to call upon a double criminality issue in relation those offences. To get a clear overview of the approximation *acquis* and therefore the offences for which double criminality as a refusal ground cannot be accepted, EULOCs can have a significant added value. The distinction included therein between *jointly identified parts* of offences and *other parts* of offences immediately reflects the

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<sup>345</sup> This specific formulation can be found in the framework decision on the European arrest warrant. However, as argued in the chapter on double criminality in international cooperation in criminal matters, no standard formulation can be found. Double criminality appears in as many shapes and sizes as there are instruments referring to it.

boundaries of double criminality as a refusal ground. This gap in the current formulation of the refusal ground can be filled by stipulating that *“Double criminality as a refusal ground is never acceptable with respect to offences that have been subject to approximation and identified as such in the EU level offence classification system that can be consulted on the website of the European Commission”*.

Second, mutual recognition instruments hold a more complex double criminality regime, for it is abandoned with respect to a list of 32 offences and maintained for any other offence in a way that is similar to the one described above. This means that with respect to the *left-over* double criminality refusal ground in mutual recognition instruments – as a baseline – the same argument applies. Double criminality is not acceptable with respect to offences that have been subject to approximation. The question arises however, whether the approximation argument has not been sufficiently tackled by the introduction of a list of 32 offences for which double criminality is abandoned. After all, if the approximation *acquis* is reflected in the list of offences for which double criminality is no longer an acceptable refusal ground, the critique of not safeguarding the approximation *acquis* would not stand. To that end, the labels in the approximation *acquis* must be compared to the 32 labels included in the offence list. Analysis reveals that for the offence labels that have been subject to approximation in framework decisions or post-Lisbon directives, double criminality is abandoned through the introduction of the 32 offence list. As a result, as double criminality cannot be raised to limit cooperation, the approximation *acquis* seems to be sufficiently safeguarded. It seems as though the approach developed in the mutual recognition instruments is not in need of a revision to ensure that the approximation *acquis* is appropriately safeguarded.

However, there are two reasons why that conclusion cannot stand in light of the scope of the current approximation *acquis* and the dynamic character thereof.

Firstly, as argued in the introduction, the approximation *acquis* extends beyond what is included in framework decisions and post-Lisbon directives. When mapping the approximation *acquis* in 2008, no less than 62 offence labels were identified as having been subject to approximation in the EU.<sup>346</sup> Amongst those 62 offence labels market abuse can be found, an offence label that has been subject to approximation at Council of Europe level and found its way into the

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<sup>346</sup> This does however not mean that the list of 32 offences should be doubled for it to encompass all 62 offence labels. The result of the mapping exercise was presented in a very detailed way, referring to all the subcategories that can be found in the approximating instruments. For corruption e.g. a distinction was made between active and passive corruption, for cybercrime e.g. a distinction was made between illegal access, illegal interception, illegal system interference and illegal data interference. As an example of an offence label included in the 2008 mapping exercise and not included in the 32 offence list for which the double criminality requirement has been abandoned, reference can be made to market abuse and market manipulation.

EU JHA acquis<sup>347</sup> and is not included in the list of offences for which the double criminality requirement has been abandoned. Furthermore, taking account of the dynamic character of the approximation acquis, it is only a matter of time before the approximation acquis included in post-Lisbon directives is extended further beyond the offence labels included in the 32 offence list. Art. 83(1)2 TFEU allows the Council, after the consent of the Parliament and acting with unanimity, to extend the list of offences that can be subject to approximation and adopt an instrument establishing minimum rules with respect to offences and sanctions beyond the 32 offence list. Retaking the example of the current proposal for a directive with respect to insider dealing and market manipulation<sup>348</sup>, it is likely that it will not be long before the approximation acquis extends beyond the labels included in the 32 offence list.

Secondly, the possibility introduced to issue a declaration with respect to the offence list in which member states can declare not to accept the abandonment of the double criminality requirement with respect to all or some of the listed offences, opens the possibility that double criminality as a refusal ground is reintroduced with respect to offences that have been subject to approximation. In the event a member state declares to no longer accept the abandonment of the double criminality requirement for e.g. trafficking in human beings, cooperation may be refused with respect to trafficking cases for which the underlying behaviour does not meet the double criminality requirement, in spite of the fact that the behaviour is included in an approximation instrument. Therefore, from the perspective of the EU as a policy maker responsible to ensure adherence to the policy choices it has made, the unlimited possibility to declare not to accept the abandonment of the double criminality any longer, was a bad policy choice. As a result, even the 32 offence list read together with the possibility to issue a declaration should be complemented with the above introduced provision that stipulates that refusal cannot be accepted in relation to offences that have been subject to approximation

In sum, to safeguard the approximation acquis, there is a *need* to complement the current approach with respect to the use of double criminality as a refusal ground. The *added value* EULOCS would bring consists of its simplicity, accessibility and ability to stand the test of time. If EULOCS is built in such a way that visualises the current approximation acquis at any given time, and is updated e.g. under the auspice of the European Commission in cooperation with an expert group, it would suffice to introduce a provision in the cooperation instruments stipulating that *“Double criminality as a refusal ground is never acceptable with respect to offences that have been subject to approximation and identified*

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<sup>347</sup> The approximation instrument is included in the EU JHA acquis, which can be consulted online on the website of the European Commission. Council of Europe Convention on Insider Trading, Strasbourg, 20.IV.1989.

<sup>348</sup> Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation, COM(2011) 654 final, of 20.10.2011

as such in the EU level offence classification system that can be consulted on the website of the European Commission”

#### 5.1.2.2 Member state’s perspective: Limiting double criminality verification

From the perspective of the cooperating member states, there is a practical interest to try and limit the time dedicated to establishing whether or not double criminality is met in the event cooperation is dependent on a double criminality requirement. To the extent cooperation is dependent on double criminality, member states reportedly lose significant time in establishing double criminality in relation to cases for which double criminality is known to be met<sup>349</sup> based on the approximation *acquis*.<sup>350</sup> Immediate recognition of cases that relate to offences that have been subject to approximation would limit the double criminality verification process to those cases where verification is useful which would have the potential of speeding up the cooperation process.

A such policy option obviously requires that member states seeking cooperation are able to identify a case as either or not related to an offence that has been subject to approximation. On the other hand, other member states would be required to trust and accept the classification of cases in either or not relating to offences that have been subject to approximation. In practice, this would mean that whenever seeking cooperation, member states not only mention the label of the offence for which cooperation is sought, but also whether or not the underlying behaviour falls within the scope of the approximation *acquis* or not. To that end, EULOCS could be used as a tool against which member states can map the cases for which cooperation is sought. Cooperation will not be sought for a case of *trafficking in human beings* full stop, but for a 0401 01 case of trafficking in human beings indicating that it relates to behaviour that is *jointly identified* as trafficking in human beings, or to a 0401 02 case of trafficking in human beings, indicating that the underlying behaviour falls outside the scope of the approximation *acquis* and might therefore not be considered criminal in the other member state.

This does however not mean that the added value of EULOCS and the limitation of the double criminality verification is limited to the approximation *acquis*. It could very well be that member states want to extend the knowledge on the fulfilment of the double criminality requirement and bring it together in a tool such as EULOCS. It is not unimaginable that member states would want to have a more developed and detailed view on the existing double criminality

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<sup>349</sup> ... or refusal based on a double criminality issue should not be acceptable due to the existence of an approximation instrument.

<sup>350</sup> During the focus group meetings held in the member states, the time consuming nature of double criminality testing was often raised as an issue member states are struggling with. Member states are open to look into ways that could facilitate the current approach of double criminality verification.

with respect to an offence-domain that is frequently subject to cooperation initiatives. It is not unimaginable that EULOCs is further elaborated on to also visualise and classify the offences for which double criminality is known to be met even though there is not legal instrument that can be used as a basis therefore.<sup>351</sup> In parallel to the trust that member states should have in one and other with respect to the classification of a case in either or not relating to behaviour that has been subject to approximation, it can be considered by the member states whether they are willing to extend that trust beyond the categories of offences that have been subject to approximation and also encompass behaviour that is known to be criminal all over the EU. If member states would be prepared to have that degree of trust in each other, EULOCs could constitute a significant added value and the use thereof result in a significant saving of time due to the abandonment of the time consuming double criminality verifications.

#### 5.1.2.3 *Individual's perspective: Strengthening the position of the person involved*

Taking the perspective of the person involved, the double criminality limit to cooperation as introduced by the member states has an impact on the position of the person involved, which can be both positively and negatively perceived. If the member state in which a person is found refuses to cooperate due to a double criminality issue, the person involved will benefit from this refusal in that no action will be taken against him. If a person wishes to be transferred to another member state for the execution of the sentence, but that transfer is refused due to a double criminality issue, the person involved will perceive this as a disadvantage of the double criminality limit to cooperation.

It must be reiterated that under no circumstances a person should have the *right* to benefit from a double criminality shield. In an ever evolving European Union it is unacceptable that a person would call upon a sort of *vested right* to benefit from the protection of double criminality as a mandatory refusal ground for any of the member states. As a baseline, it should be the prerogative of the member state to decide whether or not double criminality as a refusal ground will be called upon. However, it can be argued that it may be considered to grant the person involved the right to request a member state not to call upon the

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<sup>351</sup> In this respect it is interesting to point to the future use of approximation instruments. So far, approximation instruments have been adopted with a view to ensuring the common criminalisation of offences that are considered to be priorities in European policy making; Approximation is used as a tool to identify the behaviour that is the most reprehensible in the Union and for which common action is required. However, because simple knowledge on common offence definitions can prove interesting (amongst others) in light of the verification of double criminality as a limit to international cooperation in criminal matters, it would be interesting to open the debate as to the acceptability to use approximation also to identify the *existing commonalities* as opposed to approximation being used to establish *new commonalities*.



double criminality requirement as a refusal ground. This links in with the situation described above where a person wishes to be transferred to his member state of nationality or residence, but that transfer is blocked for reasons of lacking double criminality. Though there might not be an immediate pressing *need* in relation to the position of the person involved, in the chapter on double criminality it was suggested to *open the debate* as to the acceptability and feasibility to introduce the possibility for the person involved to enter into a dialogue with the refusing member state in order to seek execution in the member state of nationality or residence. In the course of that debate, EULOCS could have an *added value*, in the sense that should member states consider a step-by-step introduction of this mechanism singling out a limited number of offences is a first step.

To further clarify that suggestion, it must be stressed that EULOCS is more than a visualisation of what is *common* in terms of offence definitions in the member states. At times the approximating instruments also provide insight into the differences in the offence definitions for they sometimes list the behaviour for which the decision to either or not include it in the offence definition is left to the member states. A reference can be made to the framework decision on drug trafficking as an illustration. In its Art. 2 the crimes linked to trafficking in drugs and precursors are listed. Each member state shall take the necessary measures to ensure that the conduct when committed intentionally is punishable. However, that article also stipulates that the conduct described does not have to be punishable when it was committed exclusively for their own personal consumption. In doing so the framework decision does not only provide insight into the common offence definition for drug trafficking, it also provides insight into the *diversity* that will exist with respect to trafficking with a view to organising the personal consumption. Therefore, the framework decision will feed not only the *jointly identified parts* of drug trafficking, but also the *other parts* of drug trafficking, for which common criminalisation is uncertain. A number of member states, amongst which the Netherlands is the most obvious example, have decided not to criminalise trafficking with a view to organising the own personal consumption of drugs.

Taking the criminalisation of drug trafficking as an example, a situation may occur in which a Dutch national is convicted abroad to an imprisonment for three years for having trafficked drugs in spite of the fact that it was for own personal consumption. Being a Dutch national, it will not be uncommon for the person to seek a transfer back to the Netherlands and prefer execution in its member state of nationality and residence. To that end, the framework decision on the transfer of sentences involving deprivation of liberty can be used. However if the Netherlands – for the sake of the argumentation – would make execution of the foreign sentences dependent on double criminality, this would mean that the Dutch national will be denied the possibility to have its sentence executed in its member state of nationality, which seems harsh considering that

the behaviour underlying the conviction is not even punishable in the Netherlands<sup>352</sup> This is the reason why it was argued that member states should consider introducing double criminality as an *optional* as opposed to *mandatory* refusal ground, leaving the door open to go ahead with cooperation – *in casu* execution – in spite of a lacking double criminality.

It is not unimaginable that member states do not want to introduce this possibility for all offences and identify a number of offences for which a double criminality dialogue is made possible. If this policy option is pursued, the categorisation in EULOCS can support the identification of (parts of) offences.

### 5.1.3 EULOCS & proportionality and capacity

The second context in which EULOCS might be necessary or at least can have an added value consists of the mechanisms that intend to balance proportionality and capacity concerns in cooperation. Underneath this heading a built-in proportionality approach and an alternative to deal with capacity concerns will be discussed.

#### 5.1.3.1 Considering built-in proportionality

The transformation from a request-based into an ordering-based cooperation system has sparked concerns with respect to the position of proportionality guarantees therein. Member states want to ensure that the cooperation efforts expected from them remain within the limits of what is (considered) proportionate.

In the past decade, proportionality concerns have become inextricably linked to the European arrest warrant, the mutual recognition instrument with which the member states have an extended practical experience. Because there is no real proportionality clause included in the European arrest warrant, the instrument can be used for almost any case, in spite of the fact that member states intended for it to be used only in serious cross-border situations. The European Commission has expressed its concern about the evolution to also use the European arrest warrant for petty crime.<sup>353</sup> It appears that the scope

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<sup>352</sup> The example is oversimplified to avoid an unnecessary complex explanation. Technically, the execution of sentences involving deprivation of liberty can be made fully dependent on the double criminality requirement if a member state has issued a declaration stating that it will not accept the abandonment of the double criminality requirement of any of the listed offences.

<sup>353</sup> See: Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM(2011) 175 final of 11.4.2011. The Commission clarifies that judicial authorities should use the EAW system only when a surrender request is proportionate in all the circumstances of the case and should apply a proportionality test in a uniform way across Member States. Member States must take positive steps to ensure that practitioners use the amended handbook (in conjunction with their

limitation through stipulating that *a European arrest warrant may be issued for acts punishable by the law of the issuing member state by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months*<sup>354</sup> is not sufficient. Member states are entirely dependent on the way the criminal legislation in another member state is formulated and are looking into alternatives to ensure a proportionate use of the European arrest warrant and more in general the instruments governing international cooperation in criminal matters.

In the recent political debate on the European Investigation Order, this proportionality concern has led to the introduction of a general proportionality clause, stipulating that *an EIO may be issued only when the issuing authority is satisfied that the following conditions have been met: the issuing of the EIO is necessary and proportionate for the purpose of the proceedings referred to in Article 4; and the investigative measure(s) mentioned in EIO could have been ordered under the same conditions in a similar national case*.<sup>355</sup> A such way of trying to ensure the proportionate use of a cooperation instrument still holds little guarantees for the receiving member states. Ultimately it is nothing more than a reminder for the issuing authority to carefully consider the necessity and proportionality for the use of the EU instrument. There is no common EU position on what should be considered proportionate and what can be subject to a proportionality debate.

Alternatively, the proportionality concern could be tackled through working with so-called built-in proportionality solutions. A such built-in strategy could effectively *build* the proportionality limits *into* the instrument. To that end, it could stipulate that the use of the instrument is in any event proportionate in relation to a selection of *jointly identified parts* of offences as indicated using EULOCS as a reference tool. For any other offence proportionality may be subject to debate and proportionality inspired refusal grounds may be introduced. To test the feasibility of working with such built-in proportionality limits, question 2.1.2 of the questionnaire aimed at gaining insight into the extent member states would consider it feasible to limit the scope of the instrument along the proportionality requirement. Amongst the possibilities presented to the member states were offence-based proportionality limits, meaning that the severity of some *jointly identified parts of offences* proportionality is automatically accepted and for other offences proportionality can be subject to debate. The

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respective statutory provisions, if any) as the guideline for the manner in which a proportionality test should be applied.

<sup>354</sup> Art. 2.1 Framework decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States. OJ L 190 of 18.07.2002.

<sup>355</sup> Art 5a Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters, Brussels, 21.12.2011

replies show that in addition to a requirement for the issuing authority to carefully consider the proportionality of each case for which cooperation is sought, built-in proportionality with respect to the offences is supported by over 80% of the member states. To that end EULOCS would prove useful, as its classification and coding system would facilitate a detailed indication of the offence categories to which the use of the instrument is uncontested or for which proportionality cannot be raised as an issue limiting cooperation.

As the flipside of the coin however, practical implementation of this policy option would mean that the stringent use of the instrument is limited based on a selection of offences as included in EULOCS beyond which proportionality based refusal grounds are acceptable. Vice versa, this means that proportionality based refusal grounds are not acceptable in relation to the selected offences. In the course of a proportionality debate, the executing member state could bring capacity concerns to the table.

#### 5.1.3.2 *Recognising capacity concerns*

The second concern relates to capacity issues. It must be mentioned that some concerns have not found their way into a refusal ground (yet). Though undeniably important in the consideration to either or not afford cooperation, financial nor operational capacity are listed as a refusal ground. Nevertheless, as argued elsewhere,<sup>356</sup> the transition from a request-based into an order-based cooperation scene may have very substantial implications on the member states' financial and operational capacity. Whereas before member states had some flexibility in dealing with cooperation requests, the transition to an order-based cooperation scene entails that member states are to execute the order in the way it was formulated by the issuing authority.

Therefore, in addition to the future position of refusal grounds in international cooperation in criminal matters and the possible added value EULOCS can have, it was deemed necessary to look into the willingness of member states to accept semi-mandatory execution of the foreign orders taking into account their potential financial and operational capacity impact.

Two policy options have been developed in this respect. The first relates to the acceptability to introduce more capacity-based refusal grounds, or at least a capacity-based acceptability to suggest less costly alternatives. The second relates to the introduction of the new *aut exequi, aut tolerare* principle, which would entail that a capacity issue results in the execution by the issuing member state.

First, it can be considered to introduce capacity as a refusal ground in instruments governing international cooperation in criminal matters. As a result,

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<sup>356</sup> VERMEULEN, G., DE BONDT, W., & VAN DAMME, Y. (2010). EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence? (Vol. 37, IRCP-series). Antwerp-Apeldoorn-Portland: Maklu.

member states would be allowed to refuse cooperation if there would be a disproportionate capacity burden when brought in relation to the severity of the offence. However, because it is important not to jeopardise cooperation, especially with respect to those offences that have been attributed significant importance through being subject to approximation, the possibility to call upon capacity as a refusal ground should not be unlimited. Mirroring the argumentation developed above, the introduction of new capacity based refusal grounds should also take that consideration into account.

Second, the possibility to introduce a principle such as *aut exequi, aut tolerare* to shift the capacity burden to the issuing member state, can also be brought in relation to EULOCS as a way to limit the applicability thereof.

The *aut exequi, aut tolerare* principle is a new principle that mirrors the *aut dedere, aut exequi* principle found in extradition or surrender instruments. In extradition or surrender instruments, the unwillingness or inability of a member state to extradite or surrender a person as an obstacle for execution is overcome by the introduction of the *aut dedere aut exequi* principle. This principle introduces the obligation for the member state involved to execute the decision itself, if it is unwilling or unable to extradite or surrender the person involved.<sup>357</sup> A parallel *aut exequi, aut tolerare* principle would mean that the executing member state is to execute the order of the issuing member state or alternatively tolerate the competent authorities of the issuing member state to conduct the order themselves on the other member state's territory. Though this technique of accepting the presence of competent authorities of another member states is not as revolutionary as it may seem for it can be found in existing cooperation instruments,<sup>358</sup> it can be expected that member states are reluctant to further introduce this principle in other cooperation instruments. Here too, it can be considered to limit the scope of the *aut exequi aut tolerare* principle to the *jointly identified parts* of offences, as included in EULOCS.

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<sup>357</sup> See more elaborately: BASSIOUNI, M.C., and WISE, E.M. (1995), *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, Dordrecht, Martinus Nijhoff Publishers. VAN STEENBERGHE, R. (2011). *The Obligation to Extradite or Prosecute: Clarifying its Nature*. *Journal of International Criminal Justice*, 9(5), 1089. An example thereof can be found in Art. 6.2 CoE Extradition which stipulates that *[i]f the requested Party does not extradite its national, it shall at the request of the requesting Party submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate*.

<sup>358</sup> An example thereof can be found in the setting up of joint investigation teams. Art 13.6 EU MLA stipulates that *[s]econded members of the joint investigation team may, in accordance with the law of the member state where the team operates, be entrusted by the leader of the team with the task of taking certain investigative measures where this has been approved by the competent authorities of the member state of operation and the seconding member state*. Similarly Art 23.1 Naples II stipulates with respect to covert operations that, *[a]t the request of the applicant authority, the requested authority may authorize officers of the customs administration of the requesting member state or officers acting on behalf of such administration operating under cover of a false identity (covert investigators) to operate on the territory of the requested member state*.

#### 5.1.4 EULOCS & admissibility of evidence

The third context in which EULOCS might be necessary at least has an added value comprises the concerns related to the admissibility of evidence.

As argued elsewhere, it is important to note that the gathering of evidence is subject to two completely different regimes.<sup>359</sup> On the one hand, there is the mutual legal assistance regime represented by the 2000 EU Mutual Legal Assistance Convention<sup>360</sup> and its protocol<sup>361</sup>, and on the other hand, there is the mutual recognition regime represented by the 2008 European Evidence Warrant.<sup>362</sup> Underneath this heading, it will be clarified why it is felt that admissibility of evidence is insufficiently dealt with in both of those regimes. Thereafter, the feasibility of an alternative will be elaborated on.

##### 5.1.4.1 Gaps in the current regimes

First, with the specific intention to tackle admissibility concerns, the principle of *forum regit actum* was introduced in the 2000 EU MLA Convention. Art 4.1 stipulates that *[w]here mutual assistance is afforded, the requested member state shall comply with the formalities and procedures expressly indicated by the requesting Member State, unless otherwise provided in this Convention and provided that such formalities and procedures are not contrary to the fundamental principles of law in the requested member state.* An obligation is placed on the requested member state to comply with the requested formalities and procedures. The only exception allowed consists of an incompatibility with the fundamental principles of its law. The law of the member state that *houses* the *forum* (i.e. court) that will rule on the case has the power to decide on the applicable formalities and procedures. Therefore, Art. 4.1. is also referred to as the clause introducing the *forum regit actum* principle, abbreviated to FRA principle.

In spite of the good intentions surrounding the introduction of that principle, from the very beginning the principle was criticised highlighting its inherent flaws and weaknesses. Firstly, the FRA principle only has the potential to tackle

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<sup>359</sup> VERMEULEN, G., DE BONDT, W., & VAN DAMME, Y. (2010). EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence? (Vol. 37, IRCP-series). Antwerp-Apeldoorn-Portland: Maklu.

<sup>360</sup> Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ L 197 of 12.7.2000 [hereafter: EU MLA Convention].

<sup>361</sup> Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union established by the Council in accordance with Article 34 of the Treaty on European Union, OJ C 326 of 21.11.2001.

<sup>362</sup> Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L 350 of 30.12.2008 [hereafter: EEW].

admissibility concerns with respect to evidence that will be gathered upon an explicit request. It cannot accommodate the admissibility concerns related to evidence that was already gathered by the requested member state. No solution was found to tackle admissibility issues in relation to existing evidence. Secondly, the FRA principle lacks ambition in that it only deals with the one on one situation between the requesting and requested member state involved. This means that evidence gathered by a requested member state in accordance with the formalities and procedures explicitly mentioned by the requesting member state by no means guarantees that the evidence will be admissible in any of the other member states. In a Union where prosecution can be transferred from one member state to another, it would make sense to strive for a balance between all possible instruments involved, ensure their compatibility and complementarity and use this opportunity to introduce an evidence gathering technique that ensures admissibility of the evidence regardless of the member state that will ultimately host the procedure. What is even more, thirdly, admissibility of the evidence is not even guaranteed in the requesting member state. The way the FRA principle is formulated, the requesting member state is by no means obliged to accept the admissibility of the evidence even if it was gathered in full compliance with the formalities and procedures it requested. It is most unfortunate that the FRA principle is non-committal and does not result in a *per se* admissibility obligation for the requesting member state. Taking account of these weaknesses of the FRA principle, it is regrettable that it is copied into the European Investigation Order. It is stipulated that *[t]he executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority unless otherwise provided in this Directive and provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing State.*<sup>363</sup>

Second, also in a mutual recognition context, the concerns related to the admissibility of evidence received too little attention, even though it was prioritised in several policy documents. Already in the Tampere conclusions it is stipulated that *the principle of mutual recognition should apply to pre-trial orders, in particular to those which would enable competent authorities to quickly secure evidence and to seize assets which are easily movable, and that evidence lawfully gathered by one member state's authorities should be admissible before the courts of other member states, taking into account the standards that apply there.*<sup>364</sup> The subsequent programme of measures adopted to implement the mutual recognition principle, states that *the aim, in relation to orders for the purpose of obtaining evidence, is to ensure that the*

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<sup>363</sup> Art. 8.2, Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters, doc 18918/11 of 21.12.2011.

<sup>364</sup> §36 Tampere European Council (15-16 October 1999). Conclusions of the Presidency. SN 200/1/99 REV 1.

evidence is admissible, to prevent its disappearance and to facilitate the enforcement of search and seizure orders, so that evidence can be quickly secured in a criminal case.<sup>365</sup> In spite of the admissibility concerns raised, the EEW remains largely silent on this topic. In its 14<sup>th</sup> preamble it is stipulated that it should be possible for the issuing authority to ask the executing authority to follow specified formalities and procedures in respect of legal or administrative processes which might assist in making the evidence sought admissible in the issuing state, for example the official stamping of a document, the presence of a representative from the issuing state, or the recording of times and dates to create a chain of evidence. It is obvious though that a stamp will not be able to accommodate admissibility restraints that are linked to the way the evidence was gathered, the way the investigative measure was carried out. Considering that the EEW relates to existing evidence it is too late for the issuing member state to request that certain formalities and procedures are taken into account during the evidence gathering. FRA cannot solve the reported problems.

#### 5.1.4.2 Minimum standards as an alternative

As an alternative to the FRA principle the way it is found in the mutual legal assistance as well as the mutual recognition instruments, it has been argued elsewhere that it could be considered to introduce minimum standards with respect to the gathering of evidence in the EU.<sup>366</sup> Whenever evidence is gathered in compliance to those minimum standards, the evidence would be *per se* admissible.<sup>367</sup> The practical implementation of this policy option requires that minimum standards are developed with respect to each investigative measure. Though this may seem a daunting task, it should be noted that the case law of the European Court of Human Rights can be used as a starting point. In the past, the court has already clarified which procedures should be taken into account in relation to a number of investigative measures.<sup>368</sup> In *Van Rossem* the ECHR

<sup>365</sup> Heading 2.1.1. Programme of Measures of 30 November 2000 to implement the principle of mutual recognition of decisions in criminal matters. OJ C 12 of 15.1.2001.

<sup>366</sup> VERMEULEN, G., DE BONDT, W., & VAN DAMME, Y. (2010). EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence? (Vol. 37, IRCP-series). Antwerp-Apeldoorn-Portland: Maklu.

<sup>367</sup> It should be noted that the national rules governing the admissibility of evidence vary significantly. Besides the way in which evidence was gathered, there can be various other elements that influence the admissibility of evidence. The introduction of minimum standards is only intended to tackle admissibility concerns that are related to the manner in which evidence was gathered.

<sup>368</sup> See also: DE BONDT, W., & VERMEULEN, G. (2010). The Procedural Rights Debate. A Bridge Too Far or Still Not Far Enough? . EUCRIM(3), 163; VAN PUYENBROECK, L., & VERMEULEN, G. (2010). Approximation and mutual recognition of procedural safeguards of suspects and defendants in criminal proceedings throughout the European Union. In M. COOLS, B. DE RUYVER, M. EASTON, L. PAUWELS, P. PONSAERS, G. VANDE WALLE, et al. (Eds.), EU and International Crime Control (Vol. 4, pp. 41-62). Antwerpen-Apeldoorn-Portland: Maklu. VERMEULEN, G. (2011). Free gathering and movement of evidence in criminal matters in the EU.



elaborated on the standards that should be taken into account during a house search.<sup>369</sup> In *Huvig & Kruslin*<sup>370</sup> for example the court dealt with the interception of telecommunications. In *Doorson, Visser* and *Solakov*<sup>371</sup> for example the court dealt with the testimony of anonymous witnesses.<sup>372</sup>

The introduction of such a set of minimum standards has the potential to significantly impact on evidence gathering in the EU.

Firstly, with respect to evidence gathered upon request, it should not be a big problem to convince member states of the added value of executing the mutual legal assistance requests in a way that ensures that the evidence is gathered in compliance with the minimum standards adopted at EU level. Not only did the member states introduce an explicit legal basis in the new treaty text, the empirical evidence gathered in the context of this study also revealed that member states are willing to use that legal basis and adopt corresponding legal instruments. Should member states be unwilling to put in an extra effort and introduce the obligation to comply with the minimum standards in relation to just any offence, it can be considered to introduce the obligation to gather evidence according to the minimum standards for cases that relate to offences that have been subject to approximation and introduced under the heading of *jointly identified parts* of the offence in EULOCS. At least for the offences that have been subject to approximation and for which it may be expected that member states consider it important to strengthen the fight against those offences by ensuring that evidence gathered in a way that ensures the *per se* admissibility thereof, the introduction of binding minimum standards should be considered.

Secondly, with respect to evidence that is gathered in a mere national context, problems may arise with respect to the interpretation of the legal basis for EU intervention. Art. 82.2 TFEU only introduces the competence to adopt minimum standards to ensure the admissibility of evidence to the extent that is necessary to support cooperation and thus relates to cross-border situations. A strict reading of that legal basis does not allow it to be used to introduce minimum standards that should be followed with respect to evidence gathering in a mere domestic situation. However, the adoption of instruments implementing the Roadmap on Procedural Safeguards has illustrated that a

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Thinking beyond borders, striving for balance, in search of coherence. Antwerp-Apeldoorn-Portland: Maklu.

<sup>369</sup> ECtHR, case 41872/89 *Van Rossem v. Belgium*, 9 December 2004

<sup>370</sup> ECtHR, case 11105/84 *Huvig v. France*, 24 April 1990 and ECtHR, case 11801/85 *Kruslin v. France*, 24 April 1990

<sup>371</sup> ECtHR, case 20524/92 *Doorson v. The Netherlands*, 26 March 1996, ECtHR, case 26668/95, *Visser v. The Netherlands*, 14 February 2002, ECtHR, case 47023/99 *Solakov v. FYROM*, 31 October 2001

<sup>372</sup> Complexities related to anonymous witnesses was already subject to an in-depth study in the past: VERMEULEN, G. (2005). *EU standards in witness protection and collaboration with justice* (Vol. 25, IRCP-series). Antwerp-Apeldoorn: Maklu.

questionable legal basis does not have to be problematic as long as member states are willing to go ahead with the adoption of EU instruments.<sup>373</sup> Here too, it can be considered to introduce the obligation to gather evidence in accordance with the minimum standards agreed to at EU level, either or not with respect to a selection of *jointly identified parts* of offences as included in EULOCS.

### 5.1.5 *EULOCS & information exchange between member states*

The fourth context in which EULOCS might be necessary at least has an added value comprises the mechanisms governing the exchange of information between the member states; not only criminal records information, but also the exchange of conviction information with a view to seeking the execution thereof.

#### 5.1.5.1 *Notifying the conviction of an EU foreign national*

Recently, the legal framework governing the criminal records exchange has been subject to a make-over. Whereas originally the exchange of criminal records information was regulated by Art. 13 and 22 ECMA<sup>374</sup>, as of April 2012, the exchange of criminal records is governed by two new EU instruments, being the framework decision on the organisation and content of criminal records<sup>375</sup> and the complementing decision on the development of ECRIS<sup>376</sup>, short for the European Criminal Records Information System. As clarified in the sixth preamble it is argued that such a system *should be capable of communicating information on convictions in a form which is easily understandable*. The decentralised computerised system uses a coded offence template similar to EULOCS to classify the criminal records information based on the underlying offence. Specifically that aim of creating a coding system that ensures that exchanged

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<sup>373</sup> See also: SPRONKEN, T., VERMEULEN, G., DE VOCHT, D., & VAN PUYENBROECK, L. (2009). EU Procedural Rights in Criminal Proceedings. Antwerp-Apeldoorn-Portland: Maklu; VERMEULEN, G. (2011). Free gathering and movement of evidence in criminal matters in the EU. Thinking beyond borders, striving for balance, in search of coherence. Antwerp-Apeldoorn-Portland: Maklu.

<sup>374</sup> Art. 13 ECMA stipulates that *[a] requested Party shall communicate extracts from and information relating to judicial records, requested from it by the judicial authorities of a Contracting Party and needed in a criminal matter, to the same extent that these may be made available to its own judicial authorities in like case*; Art. 22 ECMA stipulates that *[e]ach Contracting Party shall inform any other Party of all criminal convictions and subsequent measures in respect of nationals of the latter Party, entered in the judicial records. Ministries of Justice shall communicate such information to one another at least once a year*. European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 20.IV.1959.

<sup>375</sup> Framework Decision 2009/315/JHA on the organisation and content of the exchange of information extracted from the criminal record between Member States. OJ L 93 of 7.4.2009

<sup>376</sup> Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA. OJ L 93 of 7.4.2009.

criminal records information can be understood easily is criticized when compared to the added value EULOCS could have to achieve that particular goal. The table inserted below compares the two coding systems with respect to a money laundering conviction.

Immediately it becomes clear that EULOCS is far more detailed and offers the possibility to choose one out of at least six different codes. The ECRIS coding system only includes one single code for money laundering convictions.

Coding system with respect to a money laundering conviction		
ECRIS	1504	MONEY LAUNDERING
EULOCS	0906 00	MONEY LAUNDERING
	0906 01	<b>Offences jointly identified as Money Laundering</b>
	0906 01 01	The conversion or transfer of property
	0906 01 02	The illicit concealment or disguise of property related information
	0906 01 03	The illicit acquisition, possession or use of laundered property
	0906 02	<b>Other forms of Money Laundering</b>

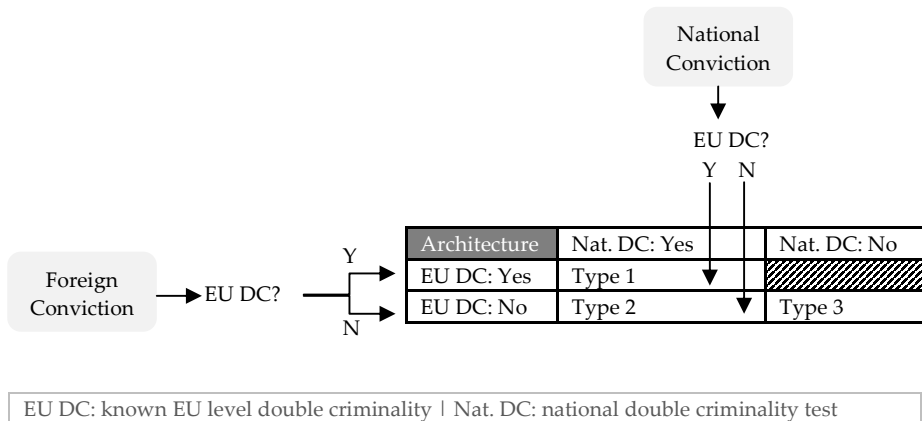
The importance of the detailed coding system becomes clear when linking it to the objective of information exchange. Criminal records information is not exchanged merely for the sake of notifying another member state of having convicted one of its nationals or notifying another member state of the criminal records that is compiled with respect to one of the former's nationals. Information is exchanged for it to be used in a later stage, at a time when mechanisms are applied for which the applicable rules are dependent on the existence and specific nature of prior convictions.<sup>377</sup> Even though the storage of criminal records in the databases in itself are not dependent on detailed information with respect to the underlying offence, it must be recommended that already when exchanging and storing criminal records information the later use of that information is anticipated to. The architecture recommended in the chapter on double criminality in international cooperation will be retaken and brought in relation to both ECRIS and EULOCS to point to the weaknesses of ECRIS and highlight the strengths of EULOCS.

It was argued that inclusion of criminal records into a criminal records database should be done preserving as much detail as possible with respect to

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<sup>377</sup> Depending on the formulation of national recidivism provisions, the taking account of prior convictions in the course of a new criminal procedure can either or not be dependent on a double criminality requirement. Double criminality verification of prior convictions can slow down the sentencing phase. Convictions for which it is known that the underlying behaviour has been subject to approximation can immediately be set aside as convictions that can be taken into account without further ado.

the underlying offence to allow future double criminality testing where relevant. The scheme developed in the chapter on double criminality and inserted again below visualises how double criminality distinctions could be made.



To ensure the feasibility to use foreign criminal records information in a later stage without having to request additional information, it is required that the notification of each foreign conviction is complemented with information that is sufficiently detailed to be able to distinguish between convictions for which the underlying behaviour is known to be criminalised in all EU member states and convictions for which the underlying behaviour should be subjected to a double criminality test where relevant. If the EU level double criminality requirement is met (i.e. EU DC: Yes), then the conviction can be included as a *type 1* conviction in the criminal records database in the member state of the person’s nationality. If the EU level double criminality requirement is fulfilled, then national double criminality is also known to be fulfilled. Only for convictions for which the convicting member state is not sure that the underlying behaviour would constitute an offence in all 27 member states (i.e. EU DC: No), a double criminality verification would need to be conducted by the authorities in the member state of the person’s nationality to allow a distinction between *type 2* convictions (i.e. foreign convictions that pass the national double criminality test – Nat. DC: Yes) and *type 3* convictions (i.e. foreign convictions that do not pass the national double criminality test – Nat. DC: No).

The currently existing coded classification system developed to support criminal records exchange is not sufficiently detailed to make that distinction. The ECRIS classification system is detached from the approximation acquis and its developers failed to see the added value of working with that acquis. As a result, the exchange of criminal records information with respect to a money laundering offence will include a reference to ECRIS code 1504, which does not allow to the receiving member state to decide whether or not that conviction

should be labelled as a conviction that meets the double criminality requirement and should be taken into account as such in any future proceeding or whether the conviction might not meet the double criminality requirement, which can be decisive for its future use.

The coded EULOCS is far more detailed. Using EULOCS as a reference index when exchanging criminal records information, the money laundering conviction will either be complemented with a 0906 01 code indicating that the behaviour relates to *jointly identified parts* of money laundering or alternatively with a 0906 02 code indicating that the behaviour relates to *other forms* of money laundering. Such a simple increase in the level of detail in the coding system can have a significant facilitating impact on the later use of the said money laundering conviction.

It was also argued that in parallel thereto, national convictions should equally be entered into the national criminal records database, distinguishing between *type 1* convictions (i.e. national convictions for which the underlying behaviour is known to be criminalised in all 27 member states – EU DC: Yes) and *type 2* convictions (i.e. national convictions for which it is not sure that the underlying behaviour is criminalised in all 27 member states – EU DC: No). A similar argumentation with respect to the added value of the use of EULOCS applies.

#### 5.1.5.2 Seeking cross-border execution of a sentence

Besides notifying another member state of having convicted one of its nationals, a member state can also contact its counterparts in another member state seeking the execution of the conviction involved. The extent to which cross-border execution of sentences are subject to double criminality has been elaborated on in the chapter on double criminality in international cooperation. Linked thereto, the fact that EULOCS can facilitate double criminality verification has been dealt with above. What remains is the link between EULOCS and the provisions that govern the adaptation of the sentences in case there is an inconsistency with the law of the executing member state.

The mutual recognition instruments governing the cross-border execution of sentences hold a provision that regulates the fate of a sentence that is incompatible either in nature or duration with the national law of the executing member state.

- Art. 8.1 FD Fin Pen stipulates that [...] *the executing state may decide to reduce the amount of the penalty enforced to the maximum amount provided for acts of the same kind under the national law of the executing state, when the acts fall within the jurisdiction of that state;*

- Art. 8.2 and 3 FD Deprivation of liberty stipulate that *[w]here the sentence is incompatible with the law of the executing state in terms of its duration, the competent authority of the executing state may decide to adapt the sentence only where that sentence exceeds the maximum penalty provided for similar offences under its national law and [w]here the sentence is incompatible with the law of the executing state in terms of its nature, the competent authority of the executing state may adapt it to the punishment or measure provided for under its own law for similar offences;*
- Art. 13.1 FD Supervision stipulates that *[i]f the nature of the supervision measures is incompatible with the law of the executing state, the competent authority in that member state may adapt them in line with the types of supervision measures which apply, under the law of the executing state, to equivalent offences; and*
- Art 9.1 FD Alternatives stipulates that *[i]f the nature or duration of the relevant probation measure or alternative sanction, or the duration of the probation period, are incompatible with the law of the executing state, the competent authority of that state may adapt them in line with the nature and duration of the probation measures and alternative sanctions, or duration of the probation period, which apply, under the law of the executing state, to equivalent offences.*

Assessing whether or not the sentence is compatible in terms of its duration and nature with the sentence that would have been imposed in the executing member state, presupposes that sufficiently detailed information is available on the offence underlying the conviction to be able to determine what the nationally imposed sentence would be. Where a custodial sentence for a period of 10 years was imposed for a money laundering offence, a simple reference to code 1504 as included in ECRIS might not be sufficient to conduct a compatibility test with respect to the duration of the sentence. Even a EULOCS code 0906 01 may not be sufficient. It is very much possible that different sanction levels are foreseen dependent on the type of money laundering offence involved. A specification of the underlying behaviour using the more detailed EULOCS coding system can provide the level of detail necessary to conduct this compatibility test. Similarly, if a person is placed under electronic surveillance for that money laundering offence, and the executing member state has not introduced electronic surveillance as a sanction measure in its national criminal justice system, it will be important that the information on the underlying offence is as detailed as possible to be able to adapt the electronic surveillance into a sentence that is in line with the nature and duration of the sanction that would have applied under the law of the executing member state to equivalent offences.<sup>378</sup>

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<sup>378</sup> The current EU level policy has not sufficiently dealt with the adaptation of sanctions, because no EU level common understanding exists on the severity ranking of the different sanctions that can be imposed and the effect of a change in the nature or the duration of the sanction. In light thereof, it is somewhat reassuring that the European Commission has launched a call for tender on the future policy with respect to the diversity in sanction

Finally, the automatic *lex mitior* principle suggested in a previous study, should be recalled.<sup>379</sup> In their current formulation, the adaptation provisions provide the executing member state with the *possibility* to adapt the nature or duration of the sentences in case of incompatibility with the sentence provided for in their national legal system. It was argued that it would increase consistency in EU policy making if it was considered to reshape adaptation to not be a *possibility* left to the discretion of the member state, but a *mandatory* conversion based on the *lex mitior* principle. If the issuing member state seeks cross-border execution of the sentence it has imposed, the issuing member state should accept the consequences thereof, especially if execution is transferred to a member state with a more lenient criminal justice system. The person involved could be granted the right to benefit from the *lex mitior* (i.e. the mildest regime). Moreover, during the focus group meetings, practitioners have raised concerns with respect to the motivation required when either or not adapting a foreign sentence. Furthermore, debates on the appropriateness of either or not adapting a foreign sentence can be very time consuming. To accommodate those concerns, an automatic *lex mitior* principle could be introduced. Automatic, in the sense that no do or don't discussion is necessary, but also in the sense that member states could work towards introducing a system that limits the intervention of a judge to those situations where it is absolutely necessary. In light thereof, complementing the execution request with a detailed EULOCS code creates the possibility for the member states to introduce an automatic conversion system that is capable of identifying the (maximum) sentence that could be imposed nationally.

### 5.1.6 EULOCS & EU level actors

Finally, EULOCS is brought in relation to the EU level actors to demonstrate its added value in that context. Eurojust and Europol are singled out as the EU level actors that will be reviewed.<sup>380</sup> The link between approximation and the mandates of the EU level actors has been made before,<sup>381</sup> but the further development thereof rarely critically evaluated. First, the added value of EULOCS will be reviewed with respect to the delineation of the mandated

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mechanisms in the member states. This gap in the current EU policy was highlighted in the project proposal drafted in reply to the call.

<sup>379</sup> See more elaborately, particularly in the context of the cross-border executions of sentences involving deprivation of liberty : VERMEULEN, G., VAN KALMTHOUT, A., PATERSON, N., KNAPEN, M., VERBEKE, P., & DE BONDT, W. (2011). Cross-border execution of judgements involving deprivation of liberty in the EU. Overcoming legal and practical problems through flanking measures (Vol. 40, IRCP-series). Antwerp-Apeldoorn-Portland: Maklu.

<sup>380</sup> The argumentation applies *mutatis mutandis* to the mandate of any other actor such as Frontex for example.

<sup>381</sup> WEYEMBERGH, A. (2005). The functions of approximation of penal legislation within the European Union. *Maastricht Journal of European and Comparative Law*, 12(2), 163.

offences. Second, the added value of EULOCS will be reviewed with respect to the possible introduction of so-called *stronger powers*. To that end, the possible intervention of Eurojust in finding the best place for prosecution and the award of the status of ‘collaborator with justice’ have been singled out to serve as examples<sup>382</sup> thereof.

#### 5.1.6.1 *Delineating mandated offences*

The mandated offences of Eurojust and Europol are closely intertwined due to the fact that the Eurojust Decision initially referred to the Europol Convention and now refers to the Europol Decision when introducing which offences the general competence is comprised of. As the first out of three criteria to delineate the scope of the mandated offences Art. 4.1(a) of the original 2002 Eurojust Decision<sup>383</sup> stipulated that the general competence of Eurojust shall cover *the types of crime and the offences in respect of which Europol is at all times competent to act pursuant to Article 2 of the Europol Convention of 26 July 1995*. Art. 4.1(b) added a set of additional offences and (c) provided that offences committed together with the abovementioned offences are also included. The need to complement the Europol offences with a set of additional offences was no longer felt when revisiting the Eurojust Decision as a result of which Art. 4 of the consolidated new Eurojust Decision now refers to *(a) the types of crime and the offences in respect of which Europol is at all times competent to act and (b) other offences committed together with the types of crime and the offences referred to in point (a)*.<sup>384</sup> Therefore it is important to first look into the Europol mandated offences before elaborating on the Eurojust mandated offences.

The Europol mandate is composed of two components, being Art. 2 (now Art. 4) and the Annex thereto.<sup>385</sup> Art. 2 of the original Europol Convention stipulated that the objective of Europol consists of preventing and combating

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<sup>382</sup> The argumentation applies mutatis mutandis to any other *stronger power* that is being considered to add to the competence of any of the EU level actors and for which member states wish to delineate the scope thereof in light of the offences involved.

<sup>383</sup> Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 63 of 6.3.2002.

<sup>384</sup> Consolidated version of Council Decision on the strengthening of Eurojust and amending Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime as amended by COUNCIL DECISION 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, Doc 5347/3/09 of 15.7.2009.

<sup>385</sup> For more detail on the development of the Europol mandate see e.g. DE BONDT, W., & VERMEULEN, G. (2010). Appreciating Approximation. Using common offence concepts to facilitate police and judicial cooperation in the EU. In M. COOLS (Ed.), Readings On Criminal Justice, Criminal Law & Policing (Vol. 4, pp. 15-40). Antwerp-Apeldoorn-Portland: Maklu; DE MOOR, A. & VERMEULEN, G. (2010) Shaping the competence of Europol. An FBI Perspective. In M. COOLS (Ed.), Readings On Criminal Justice, Criminal Law & Policing (Vol. 4, pp. 63-94). Antwerp-Apeldoorn-Portland: Maklu.



*terrorism, unlawful drug trafficking and other serious forms of international crime where there are factual indications that an organised criminal structure is involved [...].*<sup>386</sup> The second paragraph further elaborates on those other forms of serious international crime, stipulating that Europol shall initially focus on *unlawful drug trafficking, trafficking in nuclear and radioactive substances, illegal migrant smuggling, trade in human beings and motor vehicle crime*. Dealing with terrorism is postponed for a maximum of two years.<sup>387</sup> Additionally, as of 1 January 2002 18 other serious forms of international crime clustered underneath three headings in the Annex to the Europol Convention formed an integral part of the Europol mandated offences.<sup>388</sup> Some of those offences have received an independent Europol definition whereas others are left undefined. With respect to those undefined offences, the Annex clarifies that *[t]he forms of crime referred to in Article 2 (now Article 4) and in this Annex shall be assessed by the competent authorities of the member states in accordance with the law of the member states to which they belong.*<sup>389</sup>

The open-ended nature of the Europol mandate has both advantages and disadvantages. First, the main advantage consists of the fact that member states are unrestricted in seeking Europol intervention. The door is open to contact Europol with respect to the said offences, whatever the definition thereof, as long as the requirements in terms of the number of member states involved are fulfilled. In spite of the disadvantages that will be dealt with in the following paragraph, this flexibility in the mandate of Europol should be maintained for the future. There is no need to clearly delineate the mandated offences and thus restrict the functioning of EU level actors in relation to all their tasks and competences. Second, the main disadvantages relate to the clarity with which the mandate is defined.<sup>390</sup> Firstly, looking at the need felt when elaborating on

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<sup>386</sup> Council Act of 26 July 1995 drawing up the Convention on the establishment of a European Police Office, OJ C 316 of 27.11.1995.

<sup>387</sup> See more elaborately on the inclusion of terrorism as a Europol mandated offence and the decision to introduce a two-year waiting period: VERBRUGGEN, F. (1995). Euro-cops? Just say maybe. European lessons from the 1993 reshuffle of US drug enforcement. *European Journal of Crime, Criminal Law and Criminal Justice*, 3, 150. DE MOOR, A. & VERMEULEN, G. (2010) Shaping the competence of Europol. An FBI Perspective. In M. COOLS (Ed.), *Readings On Criminal Justice, Criminal Law & Policing* (Vol. 4, pp. 63-94). Antwerp-Apeldoorn-Portland: Maklu.

<sup>388</sup> Council Decision of 6 December 2001 extending Europol's mandate to deal with the serious forms of international crime listed in the Annex to the Europol Convention, OJ C 362 of 18.12.2001.

<sup>389</sup> Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol), OJ L 121 of 15.5.2009.

<sup>390</sup> Especially the shift to serious crime more in general gives way for increased concerns. Mitsilegas, V. (2009). The Third Wave of Third Pillar Law. Which Direction for EU Criminal Justice? *European Law Review*, 34(4), 523; De Moor, A., & Vermeulen, G. (2010). The Europol council decision : transforming Europol into an agency of the European union. *Common Market Law Review*, 47(4), 1089.

the original Eurojust mandate to add a set of offences to the offences that fall within the Europol mandate, raises questions with respect to the clarity of the approach chosen in the then Europol Convention. As already mentioned above, Art. 4.1(b) of the original Eurojust Decision added computer crime, fraud and corruption and any criminal offence affecting the European Community's financial interests, the laundering of the proceeds of crime, environmental crime and participation in a criminal organisation to the list of offences that comprise the general Eurojust mandate. However, when comparing that list to the offences included in the then Art. 2 Europol Convention as complemented with the offences included in the Annex<sup>391</sup>, the need is unfounded. Computer crime, fraud, corruption and environmental crime are amongst the offences listed in the Annex. Laundering of proceeds of crime is listed in Art. 2.3. Participation in a criminal organisation as defined in the then joint action surely falls within the scope of organised crime which forms the basis of the Europol mandate.

Secondly, the lack of definitions for the offences in the Europol mandate has been subject to extensive debate. When discussing the extension of the Europol mandate to also encompass the offences included in the Annex, the Swedish Presidency has expressed its intention to want to discuss *whether definitions are needed for all forms of crime listed in the Annex*.<sup>392</sup> Not only the lack of definitions should be criticized, also where definitions are introduced, this is done in complete isolation of the existing common offence definitions. From an offence policy perspective, the delineation of the Europol mandated offences should be criticised for not taking account of the existing EU definitions and developing a set of internal Europol definitions for its offences. A reference to the Europol definition for trafficking in human beings can serve as an example here. In the original 1995 Convention, traffic in human beings receives an autonomous Europol definition and is defined as *the subjection of a person to the real and illegal sway of other persons using violence or menaces or by abuse of authority or intrigue with a view to the exploitation of prostitution, forms of sexual exploitation and assault of minors or trade in abandoned children*. Without any reference to this Europol definition, a Joint Action is adopted in 1997 providing the EU definition for trafficking in human beings to support the fight against that crime, stipulating that trafficking should be understood *as any behaviour which facilitates the entry*

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<sup>391</sup> The Europol competence was extended to encompass also the offences included in the Annex as of 1 January 2002: Council Decision of 6 December 2001 extending Europol's mandate to deal with the serious forms of international crime listed in the Annex to the Europol Convention, OJ C 362 of 18.12.2001.

<sup>392</sup> Point 3.1.b), Note from the Swedish Presidency on the possible amendments to the Europol Convention and the possible extensions of Europol's competence, Doc 5555/01 of 22.1.2001; This position was shared by Germany who stated that *when laying down the areas of crime to which Europol is to give priority in accordance with Article 2(1) of the Decision, the Council will give a description of those areas*. German Statement with respect to the Draft Council Decision extending Europol's mandate to deal with the serious forms of international crime listed in the Annex to the Europol Convention, Doc 14196/01 of 4.12.2001.

into, transit through, residence in or exit from the territory of a member state, for the purpose of the sexual exploitation of either a child or an adult.<sup>393</sup> In addition thereto, sexual exploitation is further elaborated on. In spite of the EU wide definition of trafficking in human being, developed specifically to support the fight against that crime type, the Europol definition of trafficking in human beings was adapted in 1999, without any reference to the joint action. The Europol definition of trafficking in human beings now includes *the production, sale or distribution of child-pornography material*.<sup>394</sup> In doing so, the distinction between the Europol definition and the other EU definition is maintained, for slight differences in the definition still exists without them being clarified let alone justified. When the joint action was repealed and replaced with a framework decision in 2002, the opportunity was not seized to coordinate the existing definitions for trafficking in human beings. More recently, the transition to the Europol Decision has again not been seized as a *coordinating* opportunity.<sup>395</sup> The definition in the Annex now defines trafficking in human beings as *the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, the production, sale or distribution of child-pornography material, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs*<sup>396</sup>, which does not fully correspond to the definition included in the 2002 framework decision.<sup>397</sup>

A clear definition of the mandated offences is particularly important in light of the operational competences of EU level actors. Clearly defined (semi-) operational competences require clearly defined offence definitions. In light thereof, the approach used in the original 2002 Eurojust decision to delineate the scope of participation in a criminal organisation referring to the 1998 joint action should be applauded.<sup>398</sup> At the same time though, it must be recalled that the

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<sup>393</sup> Joint Action of 24 February 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning action to combat trafficking in human beings and sexual exploitation of children, OJ L 63 of 4.3.1997.

<sup>394</sup> Council Decision supplementing the definition of the form of crime "traffic in human beings" in the Annex to the Europol Convention, OJ C 26 of 30.1.1999.

<sup>395</sup> It will be clarified in the following paragraphs that coordination should not be read as copying. There is no need for the definitions to be exactly the same scope.

<sup>396</sup> Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol), OJ L 121 of 15.5.2009.

<sup>397</sup> Framework decision of 19 July 2002 on combating trafficking in human beings OJ L 203 of 1.8.2002.

<sup>398</sup> It is unfortunate however that the Eurojust Decision fails to refer to the 1995 Convention on the Protection of the European Communities' Financial interests (OJ C 316 of 27.11.1995), nor to the 1997 Convention on the fight against corruption involving Community Officials (OJ C 195 of

inclusion of full references to approximation instruments in other EU instruments runs the risk of being outdated rather soon. However, no so much the fact that a *different* definition is used to delineate the scope of the Europol mandated offences is considered problematic, but the fact that it is *detached* from the approximation *acquis*, and it is therefore not transparent what the difference between both definitions is. It should be stressed that it is very much possible that the Europol mandated offence only reflects part of the approximation *acquis*. It would not be illogical to limit certain strong powers (*infra*) of EU level actors to only some forms of trafficking in human beings. From that perspective, the suggestion made by the European parliament that *if the Council adopts framework decisions determining the constituent elements of individual criminal offences these shall replace the corresponding provisions of the Europol Convention and the Annexes thereto*<sup>399</sup> comes close but is not a good solution. Alternatively, whenever adopting an instrument in which constituent elements of offences are defined, a discussion should be held on the relation between those newly defined offences and the mandates of the EU level actors. For each approximation instrument, it should be clarified what the relation thereof is with the mandates of the EU level actors.

In sum, the practical implementation of that approach results in a system that delineates the mandated offences using a double approach. For the purpose of allowing the member states to seek the intervention of the EU level actor, the offence labels are left undefined at EU level and *shall be assessed by the competent authorities of the member states in accordance with the law of the member states to which they belong*, as currently stipulated in the Europol Annex. Additionally, when it comes to delineating the scope of (especially) the *strong powers* of the EU level actors, the offences will be delineated referring to the coded EU level offence classification system, which will be used to indicate for which offence categories member states have accepted a strong power. To make this latter recommendation more tangible, two possible *strong powers* for which it can be considered to add them to the Eurojust competences, are briefly elaborated on in the following paragraphs.

#### 5.1.6.2 *Finding the best place for prosecution*

The first example of a *stronger power* that can be granted to Eurojust relates to the decision on the best place for prosecution. Especially when dealing with cross-border crime, it is not uncommon that more than one member state has the

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25.6.1997). Furthermore, it is unfortunate that the reference was not updated when the 1998 joint action was repealed by the 2008 FD on organised crime (OJ L 300 of 11.11.2008).

<sup>399</sup> European Parliament legislative resolution on the initiative of the Kingdom of Belgium and the Kingdom of Sweden with a view to adopting a Council decision extending Europol's mandate to deal with the serious forms of international crime listed in the Annex to the Europol Convention, OJ C 140/E of 13.6.2002.

jurisdiction to deal with the case. Even more, the jurisdiction clauses in the approximation instruments require that member states legislate in a way that establishes its jurisdiction to deal with the approximated offences, not only where (a) *the offence is committed in whole or in part in its territory*, but also (b) *the offence is committed on board a vessel flying its flag or an aircraft registered there*, (c) *the offender is one of its nationals or residents*, (d) *the offence is committed for the benefit of a legal person established in its territory* or (e) *the offence is committed against the institutions or people of the member state in question or against an institution of the European Union or a body set up in accordance with the Treaty establishing the European Community or the Treaty on European Union and based in that member state*.<sup>400</sup> By making extraterritorial jurisdiction mandatory, the EU creates positive jurisdiction conflicts. In light thereof, it is not illogical for the EU to also introduce a system to settle those jurisdiction conflicts.

With its 2003 annual report, it became clear that Eurojust was developing into a centre of excellence when it comes to the settlement of jurisdiction conflicts. The Annex holds [g]uidelines for deciding “*which jurisdiction should prosecute*”. A set of criteria is elaborated on that can be used to decide which of the competent jurisdictions should get preference, reflecting the conclusions of a seminar organised to discuss and debate the question of which jurisdiction should prosecute in those cross border cases where there is a possibility of a prosecution being launched in two or more different jurisdictions.<sup>401</sup>

Taking account of the prominent role Eurojust already plays advising member states how to settle a jurisdiction conflict and taking account of the explicit introduction of the possibility to extend the Eurojust mandate with *the strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction* in Art. 85.1(c) TFEU, the momentum could be seized to extend the Eurojust mandate accordingly. It could be considered to introduce an obligation for member states to present a jurisdiction conflict to Eurojust for a binding settlement thereof. However, considering that it would not be wise to flood Eurojust with settlement cases and considering that member states would not accept such a binding settlement for any offence, not even all offences in the general Eurojust mandate, it is important to clearly delineate the offences for which this competence is introduced. Different than the technique used in Art. 13.6 of the revised Eurojust Decision to delineate the offences to which the strict rules governing the exchange of information apply, the scope of the offences could be clearly delineated using the EULOCS categories as a reference. As clarified above when criticising the introduction of an independent Europol

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<sup>400</sup> This formulation was copied from Art. 9 Framework decision of 13 June 2002 on combating terrorism OJ L 164 of 22.06.2002. Similar provisions can be found in other approximation instruments.

<sup>401</sup> See also the recommendations formulated in VANDER BEKEN, T., VERMEULEN, G., STEVERLYNCK, S., & THOMAES, S. (2002). Finding the best place for prosecution (Vol. 12, IRCP-series). Antwerp-Apeldoorn: Maklu.

definition for trafficking in human beings, it is very much possible that this competence to settle jurisdiction conflicts is introduced not for any form of trafficking in human beings, not even for the approximation *acquis* for trafficking in human beings, but only with respect to a selection of *jointly identified parts* thereof.

#### 5.1.6.3 Awarding the status of collaborator with justice

The second example of a *stronger power* that can be granted to Eurojust relates to the award of the status of collaborator with justice. As elaborated in the chapter on double criminality, a person granted the status of collaborator with justice enjoys the benefit of immunity from prosecution. It is important to note that not all member states have a legal framework for this status, and where the status exists, it is most commonly used for persons prosecuted for participation in a criminal organisation and who have decided to collaborate with justice with a view to being immune for prosecution for their crimes. It was argued that mutual recognition of the status of collaborator with justice is essential for its success. The status of collaborator with justice and the immunity from prosecution that comes along with it, loses a lot (if not all) of its persuasive strength if it is not recognised throughout the EU. In other words, if the status of a collaborator with justice is not mutually recognised by all member states, the value thereof is significantly eroded. *Per se* recognition of the immunity from prosecution is the only way to guarantee the success of awarding a person the status of collaborator with justice.

The outcome of the focus group meetings in the member states have clarified that member states are not unconditionally willing to accept such a *per se* recognition of the immunity from prosecution. Member states have indicated that immunity from prosecution should only be granted in exceptional cases in which it is clear that the help of the person involved is crucial for the investigation and prosecution of the facts and the severity of the offences involved justify the granted immunity. It is clear that member states are not willing to accept this status with respect to minor offences. The categorisation of offences in EULOCS can prove to be a welcome tool used to identify for which of the *jointly identified parts* of offences, member states are willing to accept immunity from prosecution. Furthermore, the member states have indicated that the award of the status of collaborator should be further restricted. In light thereof, it can be recommended to appoint Eurojust as the independent body deciding on the appropriateness of the award of such a status. The possibility could be considered to introduce a mandatory consultation of Eurojust in the sense that it could advise member states prior to granting the status of collaborator with justice and the immunity from prosecution linked thereto. In this scenario, mutual recognition could be limited to cases that received a positive Eurojust advice. Perceived from a Eurojust *mandate* perspective, this

would mean that Eurojust is given the competence to decide on the appropriateness of the award of the status of collaborator with justice and the immunity from prosecution that comes along with it, with respect to a selection of *jointly identified parts* of offences as indicated in EULOCS.

### 5.1.7 Conclusion

Member states are struggling with the offence diversity between the national criminal codes when they are engaging in international cooperation in criminal matters. Part of that struggle can easily be avoided if the knowledge on the approximation *acquis* is used to its full potential.

EULOCS proves to be a useful tool at least to identify the offences:

- for which cooperation can be speed up by lifting redundant double criminality verification because double criminality is known to be met based on the approximation *acquis* and allowing a double criminality based refusal would be inconsistent from an approximation perspective;
- for which cooperation could be stepped up if the request to deploy a specific investigative measure would be considered *per se* proportionate (vice versa, it also provides insight into the offences in relation to which a cooperation request can be subject to a proportionality discussion);
- for which it could be considered to prohibit capacity issues from being raised and/or for which an *aut exequi, aut tolerare* principle could be introduced;
- for which the rules governing admissibility of evidence gathered abroad (be it or not following a cross-border request) should be drawn up;
- for which criminal records information exchange could be reorganised to ensure inclusion of sufficiently detailed information with a view to facilitating later use of the criminal records information;
- for which the identification of the equivalent sentence could be automated to support the application of the adaptation provisions prior to the start of the execution of a foreign sentence; and
- that form the basis for the delineation of the mandated offences of the EU level actors and thus clarify the scope of some of their tasks and competences.

Consistent EU policy making supports cooperation between member states where it can, especially when such support also helps safeguard the approximation *acquis*, which would logically be an EU policy priority.





## 5.2 Eurojust & the European Public Prosecutor's Office: Reflections on future policy options

Gert Vermeulen, Wendy De Bondt and Charlotte Ryckman

After some years of silence, the debate on the possible creation of a European Public Prosecutor's Office [EPPO] has been put back on the political agenda.<sup>402</sup> This re-emergence is due to the inclusion of a provision that allows for the setting up of an EPPO in the TFEU. Art. 86 TFEU reads that "*in order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust. [...]*". The critiques against this evolution have equally re-emerged from past debates. The strongest critique remains the questionable added value of an EPPO in an environment where Eurojust keeps developing and has gained an ever stronger position in the field of international cooperation in criminal matters.

*Art. 85 TFEU reads*

*"Eurojust's mission shall be to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member states or requiring a prosecution on common bases, on the basis of operations conducted and information supplied by the Member states' authorities and by Europol. In this context, the European Parliament and the Council, by means of regulations adopted in accordance with the ordinary legislative procedure, shall determine Eurojust's structure, operation, field of action and tasks.*

*These tasks may include:*

*(a) the initiation of criminal investigations, as well as proposing the initiation of prosecutions conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union;*

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<sup>402</sup> See for the previous debate: DELMAS-MARTY, M. *Corpus Juris* introducing penal provisions for the purpose of the financial interests of the European Union. Paris, *Economica*, 1997, 179p; DELMAS-MARTY, M. "Combating Fraud - Necessity, legitimacy and feasibility of *corpus iuris*." *Common Market Law Review* 2000, 37, p 247-256; WHITE, S. "EC Criminal Law: Prospects for the *Corpus Juris*." *Journal of Financial Crime* 1997-1998, 1, p 223-231; WHITE, S. "The European prosecutor: extension of Eurojust or prolongation of the *Corpus Juris* proposals", in DE KERCHOVE, G. and WEYEMBERGH, A., *L' espace penal européen: enjeux et perspectives*, Brussels, Editions de l' Université de Bruxelles, 2002, 47-52.

*(b) the coordination of investigations and prosecutions referred to in point (a);*

*(c) the strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction and by close cooperation with the European Judicial Network.*

*These regulations shall also determine arrangements for involving the European Parliament and national Parliaments in the evaluation of Eurojust's activities".*

Considering the prospect of a regulation granting far-reaching competences to Eurojust, a central topic in the EPPO debate concerns the further development of Eurojust and the implications this has for the potential creation of an EPPO.

### **5.2.1 Taking note of the current strengthening of Eurojust**

A first step when assessing which future an EPPO can have in a policy climate where a choice to strengthen Eurojust was made, is providing proof to support the very claim that an environment in favour of a stronger Eurojust was indeed developed. Therefore, this section discusses how the Eurojust Decision has been revised, and how this reinforces Eurojust's competences.

Eurojust gathers national members who are globally referred to as the "College". Each of them is a prosecutor, judge or police officer of equivalent competence seconded for the first time by his/her member state at EU level in The Hague. All national members are located under "one single roof", which creates an ideal environment for a faster cooperation and a better knowledge of each other's different criminal legal system. Eurojust's unique and unprecedented structure represents an important step forward to enhance multilateral cooperation in EU criminal matters.

As is well known, the current tasks of Eurojust are threefold and comprise of first, its right to receive information following Art. 13 Original Eurojust Decision, second, its coordinating, facilitating and supporting role and third, its advisory role in resolving jurisdiction conflicts.

All these powers except for the right for information however, as they are foreseen in the original Eurojust Decision, are essentially 'soft' powers, a term referring to the fact that they are not enforceable. The national members<sup>403</sup> and the College<sup>404</sup>, may only *ask* the member states to undertake certain measures and when coordinating in jurisdiction conflicts, this happens on the request of member states. The provisions related to information exchange are excluded from this "soft" power because they are more stringent: for certain offences, member states *have to* provide Eurojust with information.

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<sup>403</sup> through Art. 6 Eurojust Decision

<sup>404</sup> through Art. 7 Eurojust Decision

The Revised Eurojust Decision<sup>405</sup> is designed to strengthen Eurojust's powers, serving several objectives, such as the enhancement of its operational capabilities, an increase of information exchange, the facilitation and strengthening of cooperation between national authorities and Eurojust/EJN contact points, and the strengthening of its relationships with partners and third countries.

#### 5.2.1.1 *Strengthening the position of the Eurojust national members*

With respect to the second objective, the Revised Eurojust Decision, which had to be implemented by all member states by June 4<sup>th</sup> 2011, was intended to give the national members more powers in order to give them competences equivalent to the Eurojust College. The following non-exhaustive list gives an overview of the extent to which Eurojust's national members are about to evolve.

First, there are significant changes with respect to the human resources. Art. 2 Revised Eurojust Decision shows that every member *shall* from now on be assisted by at least one person. Before, this was explicitly optional, a change showing an expected increase in workload; Art. 9, par. 1 Revised Eurojust Decision introduces a minimum term of office for the national members, thus making way for more long term decision making within Eurojust. Before, the term of office was to be decided fully by the member states. In this regard it be noted that the 2011 Eurojust Work Program explicitly includes "*contributing to the future development of Eurojust*" in its list of priorities for organisational development.<sup>406</sup>

Second, through Art. 6, par. 3 Revised Eurojust Decision national members receive the power to issue non-binding opinions when one member state reports repeating difficulties regarding cooperation with a certain member state.

Third, the powers of the national members change dramatically. Following the original decision, Eurojust was mostly College based. As a result the national members only retained their national competences when its member state decided so. In the revised Decision, the national members *have* to retain national competences. Even though it is still up to the member states to define the precise nature and extent of the judiciary powers of the national members (Art. 9a, par. 2 Revised Eurojust Decision), there now is a set minimum: the member states will grant their national member *at least* the powers "*referred to in Article 9b and, subject to Article 9e, the powers described in Articles 9c and 9d, which would be available to him as a judge, prosecutor or police officer, whichever is applicable, at*

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<sup>405</sup> COUNCIL OF THE EUROPEAN UNION (2008), "Decision of 16 December 2008 on the strengthening of Eurojust and amending Decision setting up Eurojust with a view to reinforcing the fight against serious crime" OJ L 138/14, 4.6.2009.

<sup>406</sup> Eurojust, WP 2011, <http://www.Eurojust.europa.eu/administration/WP-2011.pdf>, p. 10.

*national level*". This entails that, when requests for cooperation are executed inadequately or only partially, the national member shall be entitled to ask the competent national authority of its member state for supplementary measures in order for the request to be fully executed.<sup>407</sup>

Furthermore, national members will be able to, in agreement with a competent national authority<sup>408</sup>:

- a) issue and complete requests for, and decisions on, judicial cooperation;
- b) **execute in their member state requests for, and decisions on, judicial cooperation;**
- c) order in their member state investigative measures considered necessary at a coordination meeting investigation and to which competent national authorities concerned with the investigation are invited to participate; and
- d) authorize and coordinate controlled deliveries in their member state.

There is however, a 'safety clause': Art. 9e, 1 Revised Eurojust Decision states that, if the national member cannot exercise its competences, it is in its capacity as a competent national authority, at least competent to submit a proposal to the authority competent for the carrying out of powers referred to in Art. 9c and 9d Revised Eurojust Decision when granting such powers to the national member is contrary to: (a) constitutional rules, (b) fundamental aspects of the criminal justice system.<sup>409</sup>

Additionally, where the original 2002 Eurojust Decision explicitly stated that it could merely establish contacts and exchange experiences of a non-operational nature with international organisations, Art. 9a, 4 Revised Eurojust Decision now leaves more room for an elaborated role on the international scene.<sup>410</sup>

There is little doubt that the execution of "*a detailed Programme establishing the Internal and External implementation of the Council Decision on strengthening Eurojust*", and the relevant marketing seminars as announced in the 2011 Eurojust Work Programme,<sup>411</sup> has become rather urgent. In a workshop organized by Eurojust itself, involving over 120 experts, it was also agreed that

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<sup>407</sup> Art. 9b, 2<sup>nd</sup> al Revised Eurojust Decision

<sup>408</sup> Art. 9c Revised Eurojust Decision

<sup>409</sup> The 2<sup>nd</sup> paragraph contains an obligation for member states to ensure that in those cases the request issued by the national member be handled without undue delay by the competent national authority.

<sup>410</sup> It leaves it up to the member states to define the right for a national member to act in relation to foreign judicial authorities, in accordance with its international commitments. In addition, Art. 26 Revised Eurojust Decision now speaks of "establish and maintain cooperative relations" with international organisations.

<sup>411</sup> Eurojust, WP 2011, <http://www.Eurojust.europa.eu/administration/WP-2011.pdf>, p. 18.

one of the first priorities is the full implementation of the revised Eurojust Decision.<sup>412</sup>

#### 5.2.1.2 *Strengthening the position of the Eurojust College*

The revised Eurojust Decision further anchors the existing competences of Eurojust as a College. The following paragraphs provide a brief overview:

First, for the offences described in its mandate as determined by Art. 4 Original Eurojust Decision, the College may ask, whilst giving its reasons, the competent authorities of the Member states concerned:

- (i) to undertake an investigation or prosecution of specific acts;*
- (ii) to accept that one of them may be in a better position to undertake an investigation or to prosecute specific acts;*
- (iii) to coordinate between the competent authorities of the member states concerned*
- (iv) to set up a joint investigation team in keeping with the relevant cooperation instruments; and*
- (v) to provide it with any information that is necessary for it to carry out its task.*

Second, Eurojust is responsible for ensuring that the competent authorities of the member states inform each other of investigations and prosecutions of which it has been informed and which have repercussions at Union level or which might affect member states other than those directly concerned.

In accordance with Art. 7, 1, c – d original Eurojust Decision Eurojust fulfills a coordinating, facilitating role, both vis a vis the member states and vis à vis Europol. The language of these provisions was kept in the revised Eurojust Decision, yet a second and third paragraph were added. These give Eurojust some scrutinizing powers and they make the advisory role in jurisdiction conflicts explicit, yet these remain non binding powers.

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<sup>412</sup> EUROPEAN PARLIAMENT, Policy Department Budgetary Affairs, PE 453.219, Study “Improving coordination between the bodies competent in police and judicial cooperation: moving towards a European Public Prosecutor”, p. 31.

Third, in light of the objective to increase the information exchange, following Art. 13 Revised Eurojust Decision the member states are obliged to push information regarding any case “*in which at least three member states are directly involved and for which requests for or decisions on judicial cooperation, including regarding instruments giving effect to the principle of mutual recognition, have been transmitted to at least two member states and*

*(a) the offence involved is punishable in the requesting or issuing Member state by a custodial sentence or a detention order for a maximum period of at least five or six years, to be decided by the Member state concerned, and is included in the following list:*

*(i) trafficking in human beings; (ii) sexual exploitation of children and child pornography; (iii) drug trafficking; (iv) trafficking in firearms, their parts and components and ammunition; (v) corruption; (vi) fraud affecting the financial interests of the European Communities; (vii) counterfeiting of the euro; (viii) money laundering; (ix) attacks against information systems;*

*or (b) there are factual indications that a criminal organization is involved;*

*or (c) there are indications that the case may have a serious cross-border dimension or repercussions at European Union level or that it might affect member states other than those directly involved.<sup>413</sup>*

The project team submits that this information-pushing obligation should be maintained and even broadened in the future, as will be elaborated below in the part on the proposed future Eurojust competences (5.2.2.3).

Fourth and final, the last current competence of Eurojust is its advisory role in jurisdiction conflicts. Its competence in relation to jurisdiction can refer to the jurisdiction to *prescribe* or the jurisdiction to *enforce*. Naturally, Eurojust plays a role in the context of the jurisdiction to *enforce*.<sup>414</sup> It is appropriate however to in this context too, urge the Union to take measures to ensure that member states act cautiously when prescribing their jurisdiction.<sup>415</sup> Whereas Art. 7, c original Eurojust Decision merely stated that Eurojust will assist the competent authorities of the member states, at their request, in ensuring the best possible coordination of investigations and prosecutions, this is now made explicit

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<sup>413</sup> Art. 13 Revised Eurojust Decision

<sup>414</sup> The project team submits that, apart from the question of solving jurisdiction conflicts (jurisdiction to enforce), such conflicts could be avoided through a more adequate and more precise system of criteria determining the jurisdiction to enforce. In the context of this study, however, only the jurisdiction to enforce is dealt with.

<sup>415</sup> After all, the less criteria are able to trigger jurisdiction, the less situations in which the countries will consider enforcing their jurisdiction and the less jurisdiction conflicts would occur. This debate falls outside the scope of the study, however.

through the revised Eurojust Decision, yet the role of Eurojust in resolving jurisdiction conflicts remains mostly advisory: Art. 7, par. 2 Revised Eurojust Decision now provides that when national members cannot agree on how to resolve a case of conflict of jurisdiction, the College shall be asked to issue a written non-binding opinion on the case, provided the matter could not be resolved through mutual agreement between the competent national authorities concerned. The opinion of Eurojust thus remains non-binding. This non-binding competence should remain: the member states should be able to ask Eurojust for advice whenever a conflict of jurisdiction would arise. Additionally, the project team advocates an extension of Eurojust's role in this regard (see below, on the future strengthening of Eurojust, in particular 5.2.2.3).

### **5.2.2 *Future strengthening of Eurojust and implications for the debate regarding EPPO***

Art. 85 TFEU, entails a solid legal basis to further broaden Eurojust's competences. A regulation will be proposed by the Commission to that end. It is important to recall that according to the Commission's Action Plan implementing the Stockholm programme,<sup>416</sup> this proposal should be presented by 2012. This chapter examines to what extent its full implementation links in with the debate on a European Public Prosecutor's Office. The argument will be made that a comprehensive, full elaboration of Eurojust's powers based on necessity and subsidiarity would abrogate the need for a creation of a separate European Public Prosecutor's Office.

#### *5.2.2.1 A clear demarcation of Eurojust's mandate – "EU-worthy" offences*

Before addressing the content of potential future elaborated competences and the relation to the EPPO debate, it should first be discussed what Eurojust's mandate is; in other words, for which offences it is competent. As argued above, clarity is key when it comes to defining Eurojust's mandate:<sup>417</sup> the offences for which Eurojust is competent should be agreed upon unambiguously, instead of the rather confusing situation which existed under the original Eurojust Decision. Back then, the original Eurojust mandate (Article 4 original Eurojust Decision) referred to the Europol mandate, but added other offences as well and contained a clause providing Eurojust with powers outside these offences as long as member states asked for its assistance. This was improved with the revised Eurojust Decision, in the sense that part of the original Article 4 was deleted, and now the mandate of Eurojust and Europol are identical. However,

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<sup>416</sup> EUROPEAN COMMISSION, COM(2010) 171, 20 April 2010, "Delivering an area of freedom, security and justice for Europe's citizens. Action Plan implementing the Stockholm programme."

<sup>417</sup> *Supra* 5.1.

analysis of Europol's mandate reveals that the situation is still not entirely straightforward. The Annex of the Convention lists several crimes falling under Europol's mandate. As is with the 32 MR offence list, which was partially inspired on the Europol mandate, it is problematic that no clear definition is given to most of the offences qualifying as part of Europol's mandate.<sup>418</sup> The project team advocates to refer to the existing approximation instruments (some already do, e.g. the participation in a criminal organisation), thus guaranteeing that it is clear which type of behaviour forms part of the mandate. However, as argued above in 5.1, the referral system does not stand the test of time, and the project team advises to introduce an EU Level Offence Classification System. Apart from the recommendations regarding manner of defining the offences, the project team also recommends to develop two different groups of offences within Eurojust's mandate:

- First, a group of “EU-worthy” offences for which Eurojust should receive stronger competences, based on the possibilities provided by Art. 85 TFEU. These stronger powers should – following the subsidiarity principle – not apply to the minor offences which do not qualify as “EU-worthy”. (i.e. serious priority offences as opposed to minor offences or petty crime). The project team does not wish to make detailed suggestions regarding the list of offences, given that this will necessarily have to be subject to political negotiations. However, some suggestions can be made: it would not be illogical to include a referral to the approximated definition of terrorism, given that a special Counterterrorism Team is already operable within Eurojust. Other offences, such as sexual exploitation of minors, are also dealt with as priority measures within Eurojust. The list of offences in Art. 13 revised Eurojust Decision could serve as a non-exhaustive guideline.<sup>419</sup> Another criterion to qualify as an “EU-worthy” offences, according to the project team, it should concern cross-border offences, meaning that at least two member states should be involved.
- Second, the rest category: offences for which Eurojust has less far-reaching powers (namely mostly advisory etc.). For this category of offences, mandatory powers (e.g. initiation of prosecution, resolution of conflicts of jurisdiction) would not pass the subsidiarity and/or necessity test, given that they would not classify as “EU-worthy” and consequently not justify a ‘supra-national’ approach. However, Eurojust can of course prove useful in an advisory or supporting role regarding a wide range of offences.

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<sup>418</sup> *Supra* 5.1, though the delineation of the Europol mandate is not crucial for all its current competences, the efficiency even feasibility of other (future) competences depends on it.

<sup>419</sup> Please note that offences against the EU-budget also form part of that list, see below: 5.2.2.4..



### 5.2.2.2 *In detail: Future Eurojust competences regarding information exchange*

Improving the information flow between Eurojust and competent national authorities is a pre-condition for the reinforcement of the tasks and powers of Eurojust under Article 85(1) TFEU.<sup>420</sup> As a complement to the obligation of the member states to share information based on Art. 13 Eurojust Decision (and strengthened following the Revised Eurojust Decision), it would only be logical that Eurojust would also be granted the right to claim information. The pushing obligation for member states following said Art. 13 is confined to cases in which at least three member states are directly involved and for which requests on judicial cooperation have been transmitted to at least two member states. Above it was argued that an unambiguous description of the offences for which Eurojust is competent, is necessary, and that within such description, a demarcation should be made of “EU-worthy” offences. For such offences, the project team does not see why a right for Eurojust to claim information from the member states should be confined to cases where at least three member states are involved. As soon as an “EU-worthy” offence is concerned, granting Eurojust the right to claim information would be a mere logical and necessary complement of several competences foreseen in Art. 85 TFEU.

First, adequately fulfilling its role in resolving conflicts of jurisdiction (Art. 85, 1, c TFEU – see below for more details) necessarily implies that Eurojust would need full information regarding judicial decisions taken throughout the EU. Therefore, the project team suggests a right to claim information for Eurojust on the one hand (when “EU-worthy offences are concerned), and to include Eurojust in the functioning of the ECRIS system (the European Criminal Records Information System<sup>421</sup>), in the sense it would only be logical to link the exchange of information not only to the member state of the person’s nationality, but also to Eurojust.

Second, adequately fulfilling its initiating and coordinating role regarding criminal investigations (coordinating non-binding competence is already in place; however potential elaboration to actual initiation in the future based on Art. 85, 1, a and b TFEU), necessarily implies that Eurojust would need full information regarding ongoing investigations – and prosecutions – throughout the EU, if and when “EU-worthy offences” are involved. The project team wishes to point to the project regarding the development of an EPRIS-system (European Police Records Index System). This originally German initiative aims to create a system which gives Member States’ law enforcement authorities a quick overview of whether and possibly where relevant police information on a

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<sup>420</sup> F. SPIEZIA, How to improve cooperation between member states and European Union institutions so as to better ensure the protection of whistleblowers, Trier, ERA, 2011.

<sup>421</sup> COUNCIL OF THE EUROPEAN UNION (2009), “Framework Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA” OJ L 93/33, 7.4.2009.

certain person can be found.<sup>422</sup> A Study<sup>423</sup> regarding the development of such a system is currently being conducted by the IRCP and Unisys. Originally, the aim was to only include police authorities in this system, but currently, voices are being raised to broaden this to prosecution authorities. The project team supports this view, in light of its position that the artificial boundaries between authorities are artificial (examples are found throughout this report, but especially supra in chapter 2). The EPRIS project is still a work in progress; however, when it comes into being, and especially if prosecution authorities would be included, Eurojust should form part of it in light of the specific competences foreseen in Art. 85, 1, a and b TFEU.

#### 5.2.2.3 *In detail: Future Eurojust competence to initiate investigations/request initiations of prosecutions*

Even though the powers of Eurojust are currently being strengthened (see above), the Revised Eurojust Decision has been drafted cautiously, evidenced by the safety clause in Art.9e, 1 mentioned above. That does not mean however, that the Revised Eurojust Decision represents a ceiling to the powers Eurojust could potentially acquire: the Treaty of Lisbon through Art. 85 TFEU has explicitly created the possibility for Eurojust to initiate criminal investigations, as well as propose the initiation of prosecutions conducted by the competent national authorities. Before, under the Corpus Juris proposal<sup>424</sup>, the actual carrying out of the prosecution was foreseen for "deputy-prosecutors". This was not feasible nor desirable however, given that the actual initiating was to be carried out *automatically* by those people. Doing so would be in breach of the subsidiarity principle. Indeed, the new powers following Art. 85 TFEU should give Eurojust a complementary role: for the EU-worthy offences it would then be able to ask the member states to initiate the prosecution and *only when* the member states would decline to do so, the actual initiating power would lie with

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<sup>422</sup> COUNCIL OF THE EUROPEAN UNION (2009), 15526/2/09 Note of 21 December 2009 from Presidency to Ad Hoc Working Group on Information Exchange regarding a European Police Records System.

<sup>423</sup> EUROPEAN COMMISSION, DG HOME AFFAIRS, 8 April 2011, Call for tender No. HOME/2010/ISEC/PR/068-A3 for a Study on possible ways to enhance efficiency in the exchange of police records between the Member States by setting up a European Police Records Index System (EPRIS).

<sup>424</sup> DELMAS-MARTY, M. Corpus Juris introducing penal provisions for the purpose of the financial interests of the European Union. Paris, Economica, 1997, 179p; DELMAS-MARTY, M. "Combating Fraud - Necessity, legitimacy and feasibility of corpus iuris." Common Market Law Review 2000, 37, p 247-256; WHITE, S. "EC Criminal Law: Prospects for the Corpus Juris." Journal of Financial Crime 1997-1998, 1, p 223-231; WHITE, S. "The European prosecutor: extension of Eurojust or prolongation of the Corpus Juris proposals", in DE KERCHOVE, G. and WEYEMBERGH, A., L' espace penal européen: enjeux et perspectives, Brussels, Editions de l' Université de Bruxelles, 2002, 47-52.

Eurojust. So far, the proposals made in this section concerned the competences of Eurojust as a College: indeed, it is the Eurojust College which should have the competence to ask initiation of prosecution from the member states and who should – complementary – have the possibility to actually initiate the prosecution. However, in this latter case, it is of course important to look into who would carry out this initiation in practice. As opposed to the majority of the arguments in the current debate on the EPPO, the project team submits that granting this competence to the national members is merely one of the possibilities. Looking at Art. 85, par. 2 TFEU, it states that, in case Eurojust (read Eurojust College) is granted the power to initiate prosecution, “*formal acts of judicial procedure shall be carried out by the competent national officials*”. A competent national official can indeed be a national member; however, the project team does not see why this cannot be another national competent authority.

An argument raised regularly against initiating powers for Eurojust, but in favour of a separate EPPO, is the fact that a separate institution as envisaged in Art. 86 TFEU would have a hierarchical structure, a necessity when an institution is to get binding initiating powers for prosecution. This argument can easily be rebutted. After all, a Eurojust with strong national members and a college ‘in charge’ is in itself a hierarchical structure: indeed, a clear ‘chain of command’ would equally be in place, the only difference with the envisaged EPPO would be that instead of one natural person, the top of the hierarchy would be a college of several people. This is not necessarily unworkable in practice, quite the contrary, given that different national members are focused on specific subjects. Hence, there is a high degree of specialisation, but when it comes to the final decision, the College decides as a whole.

#### 5.2.2.4 *In detail: Future Eurojust decision-making power in solving conflicts of jurisdiction*

The annex to the annual report on Eurojust from 2003<sup>425</sup> – for which a study<sup>426</sup> conducted in 2002 served as an inspiration – contains valuable information regarding the expertise Eurojust has already built and is currently perfecting regarding determination of the best place to prosecute.<sup>427</sup> It shows that Eurojust has the capacity to (and does already) serve as a knowledge center, as a body

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<sup>425</sup> Eurojust, WP 2003,

[http://www.Eurojust.europa.eu/press\\_releases/annual\\_reports/2003/Euj%20008%20Annual%20Report%20EN.pdf](http://www.Eurojust.europa.eu/press_releases/annual_reports/2003/Euj%20008%20Annual%20Report%20EN.pdf).

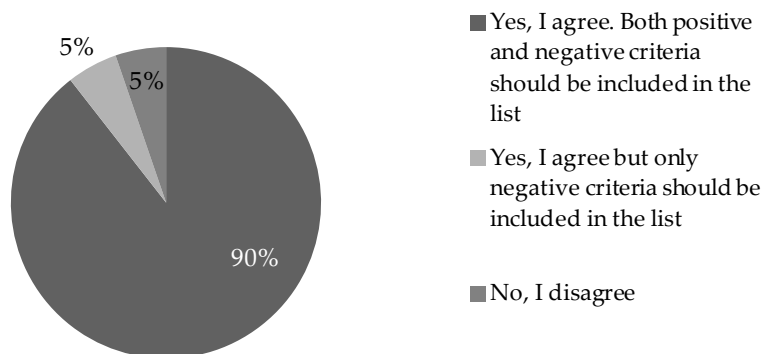
<sup>426</sup> T. VANDER BEKEN, G. VERMEULEN, S. STEVERLYNCK en S. THOMAES, *Finding the best place for prosecution in IRCP-series*, 12, Antwerp-Apeldoorn, Maklu, 2002.

<sup>427</sup> The project team submits that, apart from the question of solving jurisdiction conflicts (jurisdiction to enforce), such conflicts could be avoided through a more adequate and more precise system of criteria determining the jurisdiction to enforce. In the context of this study, however, only the jurisdiction to enforce is dealt with.

where all expertise is being centralized regarding the complex matter of finding the best place to prosecute. In light of the fact that Eurojust already plays a prominent role in suggesting the preferred member state for prosecution, of the debate on the creation of a possible European Public Prosecutor and of the possibility for binding resolution of jurisdiction conflicts by Eurojust in Art. 85 TFEU, the time has arrived to start exploring the elaboration of the guidelines from the Annex to the 2003 annual report on Eurojust. It be remembered that the binding competence of Eurojust which will be suggested below should only apply to those 'EU-worthy' offences as described above. Indeed, in the context of deliberation, it is important to draw attention to the subsidiarity principle, which means that not every case with jurisdiction links in more than one State can be deliberated at a European level, such as, for example, a Belgian who commits shoplifting in the Netherlands. Such a case falls into the hands of a national prosecutor and will probably never reach the discussion on an international level. The criteria based on which Eurojust evaluates the EU-worthy conflicts of jurisdiction can of course also be used by the member states for non-EU-worthy cases, but the binding power to definitively decide on such conflicts should only rest with Eurojust when qualifying as EU-worthy.

The member states showed overwhelming support for the idea of creating a set of criteria based on which transfer of prosecution matters can be decided: no less than 90% of the member states indicated such an effort to be necessary.

#### 6.4.1 Do you agree that a list of potentially acceptable criteria should be drafted in which a transfer of proceedings is recommendable?



Besides the need for a comprehensive, transparent framework containing a system of criteria for the decision making in conflicts of jurisdiction, another important aspect will have to be considered before granting Eurojust the binding power to resolve such conflicts, namely the legal remedy possibility. Before

discussing those legal remedies, the proposed system of criteria most suited for the decision making process regarding conflicts of jurisdiction, and how this can be accomplished, will now be discussed.

In the study conducted in 2002 proposals were made for a comprehensive, transparent system of criteria which should be used to determine the best place for prosecution. Giving Eurojust a binding competence to decide would have to entail the drafting of an unambiguous and transparent directive<sup>428</sup> containing the criteria which Eurojust will use when deciding. It is not commendable to have one approach which leaves no room for flexibility: every case should be looked at individually and circumstances of the case may influence the outcome, as was confirmed in the 2003 annual report on Eurojust. However, it is of the utmost importance that Eurojust would develop and list the criteria it would normally take into account, and elaborate on how specific circumstances might alter the application of these criteria. Without being fully predictable, it would at least step up the foreseeability of decisions in the future. This could be done through the development of a matrix which would be applied in deciding the best place to prosecute, a method foreseen in the annex to the 2003 report on Eurojust: *“During the Eurojust seminar on this topic a number of delegates found it useful to apply a matrix. Whilst applying a matrix rigidly may be too prescriptive, some may find a more structured approach to resolving conflicts of jurisdiction helpful. The matrix allows a direct comparison and weighting of the relevant factors which will apply in the different possible jurisdictions”*<sup>429</sup>. The default position, as said above, is that a hierarchical list of criteria is not workable. Yet, a matrix system providing with clear criteria which allow to take all concrete circumstances of the case into account, without entailing a classic hierarchy, is needed.

Finding the best place for prosecution should always be done in a way that serves the proper administration of justice. ‘Proper administration of justice’ is the justification of the system of adoption of proceedings. In these cases a State enforces jurisdiction not because it can justify a strong contact point (=link), but because it is in the best position to do this.<sup>430</sup> Therefore, ‘reasonableness’ should be a leading principle in the search for the best place for prosecution. The project team recommends to include this concept explicitly in any future instrument

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<sup>428</sup> In the 2002 study the proposed instrument in which a comprehensive system of criteria should be included was not a directive; however, the type of instrument used is obviously not the center of the discussion.

<sup>429</sup> It be noted that before the end of this year, an evaluation is expected of the guidelines from the annex to the 2003 report and of the application of Art. 7, par. 2 Revised Eurojust Decision which deals with the College’s competence to solve jurisdiction conflicts.

<sup>430</sup> A.H.J. SWART, ‘De overdracht van strafvervolgingen’, *Nederlands Juristenblad*, 1982, 211; A.H.J. SWART, *Goede rechtsbedeling en internationale rechtshulp in strafzaken*, Deventer, Kluwer, 1983, 3; A.H.J. SWART, ‘Internationalisering van de strafrechtspleging’, in C. KELK a.o. (eds.), *Grenzen en mogelijkheden. Opstellen over en rondom de strafrechtspleging*, Nijmegen, Ars Aequi Libri, 1984, 117.

dealing with jurisdictions conflicts. Doing so could allow for a system of preliminary questions which Eurojust could ask the ECJ.

In terms of elements of which the matrix should consist, the first step would be to develop a limitative list of 'potentially reasonable jurisdiction criteria'. Those would entail the *locus delicti*; the criteria listed in Art. 8 CoE Transfer of proceedings, being the state of ordinary residence or nationality of the suspected person, the state where the person is (planned to) undergo(ing) his sanction, the state on whose territory concurrent proceedings against the same suspects are held, the state where the most important items of evidence are located, the state which is most likely to improve the prospects of social rehabilitation, the state where the presence of the suspect at the court proceedings is guaranteed, the state where enforcement of a possible sentence would be allowed; however, the last few criteria are clearly linked to the position of the suspect and the project team urges to include victim-related criteria as well: the state of ordinary residence or nationality or origin of the victim, and the state where the damage has occurred should be added to the list.

The above list should serve as a 'pool' of criteria, based on which the best place for prosecution should be decided through a system of scoring the criteria in the matrix. This is not enough, however. In addition to the set formal criteria a 'prosecution policy' should be developed: indeed, from the prosecution side it is also crucial to take the practical and legal consequences of the choice of best place for prosecution into account. For example, in the context of interception of telecommunication, one knows for a fact that in the UK the result of such interception will not be allowed as evidence in court. This is obviously also an important criterion to take into account. Another example: in Belgium, the presence of the suspect is prohibited when a witness *à charge* is heard; in the Netherlands however, it is obligatory. Therefore, allowing the results of the hearing in the Netherlands, when conducted in Belgium, will be difficult. Even factors such as the attention of the public opinion for a case should be up for consideration.

In sum, the project team proposed a matrix in which formal criteria are scored on the one hand, but in which on the other hand a prosecution policy involving more indirect or practical considerations are included. It is conceivable that the latter would sometimes be decisive and thus 'take over' the formal criteria. In that case, if, based on the matrix, rather indirect or practical considerations would outweigh the former, proper administration of justice should lead to deeming the country which scores the highest on the entirety of the matrix, the best place to prosecute.

This hypothetical situation is visualized in the following table, resulting in Germany being the best place for prosecution, even if more formal criteria were ticked for the UK and France (as opposed to only 1 formal criterium for DE).

	Formal criteria												Practical criteria						
Member State analysis																			
Locus delicti																			
State of ordinary residence suspect																			
State of nationality suspect																			
State of concurrent proceedings regarding suspect																			
State of most important evidence																			
State most likely to improve social rehabilitation																			
State where presence in court is guaranteed																			
State where sentence enforcement would be allowed																			
State of ordinary residence victim																			
State of nationality victim																			
State of origin victim																			
State where damage has occurred																			
To be completed based on the specificities of the case																			
To be completed based on the specificities of the case																			
To be completed based on the specificities of the case																			
To be completed based on the specificities of the case																			
Result																			
UK	X	X		X	X	X	X	X											7
FR			X						X		X	X							4
DE										X			X	X	X	X			5

Apart from this matrix, which should contain a comprehensive set of positive criteria, negative criteria to find the best place for prosecution also have to be used. The most prominent one according to the project team is one following from the application of *lex mitior*, the principle which was discussed under the Correction Mechanisms above in 3.4 and which aims to prevent that an individual experiences the negative effect due to the mere fact that multiple member states cooperate in a criminal procedure. From this it follows that if an analysis based on the matrix would result in two countries being equally suited to serve as the place to prosecute, the country with the highest standards of legal protection and fundamental rights protection should be chosen.

As said above, legal remedies need to be considered in order to make the binding power of Eurojust in the context of jurisdiction conflicts workable. Before moving to the actual 'remedies' it be remembered that a form of judicial

review could be ensured through Eurojust asking preliminary questions to the ECJ. Art. 267, a TFEU indeed foresees jurisdiction of the ECJ to give preliminary rulings concerning “*the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union*” and the application by Eurojust of its power to resolve binding jurisdiction conflicts as foreseen in Art. 85 TFEU would qualify as such. However, it is not entirely sure that Eurojust would qualify as a ‘court’ in the sense of Art. 267 TFEU, however, given the case-law of the ECJ in this regard, it is far from impossible: according to settled case-law, in order to determine whether a body making a reference is a court or tribunal for the purposes of Art. 267 TFEU, which is a question governed by EU law alone, the ECJ takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent.<sup>431</sup>

However, the preliminary ruling cannot (always) be *demand*ed by the person involved, as a result of which additional judicial review is necessary. Before elaborating on possible models it should be emphasized that naturally, when deciding a jurisdiction conflict, Eurojust should be under an extensive motivation obligation. This is yet another argument in favour of the matrix method: while being flexible it is a system which can be verified. For the legal remedies for the persons involved in the conflicts of jurisdictions (suspects/perpetrators on the one hand and victims on the other) different models can be considered. One option could consist of a specialized court attached to the General Court following Art. 257 TFEU, although the first instance character of the decisions by that court would most likely be subject to discussion and debate.

Another option which should be up for consideration is to give national level courts the competence to rule on actions brought by individuals challenging the latter’s decision. Here again, the motivation obligation of Eurojust is essential: as pointed out in the Commission Green Paper,<sup>432</sup> national courts seem well placed to carry out the review of whether the forum chosen is an appropriate one to deal with the case. Indeed, judicial review could amount to adjudication on whether the principles of reasonableness and of due process have been respected. A choice of jurisdiction could thus be set aside by the competent

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<sup>431</sup> Case C-54/96 Dorsch Consult [1997] ECR I-4961, paragraph 23; Case C-53/03 Syfait and Others [2005] ECR I-4609, paragraph 29; Case C-246/05 Häupl [2007] ECR I-4673, paragraph 16; and Case C-118/09 Koller [2010] ECR I-0000, paragraph 22.

<sup>432</sup> For which the 2002 Study (T. VANDER BEKEN, G. VERMEULEN, S. STEVERLYNCK en S. THOMAES, *Finding the best place for prosecution in IRCP-series*, 12, Antwerp-Apeldoorn, Maklu, 2002) served as an inspiration: EUROPEAN COMMISSION, COM(2005) 696 final, 23.12.2005 “Green Paper On Conflicts of Jurisdiction and the Principle of ne bis in idem in Criminal Proceedings”.



tribunal if it finds that the choice made is arbitrary.<sup>433</sup> Additionally it be noted that these courts too would have the option of referring a preliminary question to the ECJ.

Additionally, legal remedies of the member states involved have to be considered. A possible mechanism concerning the ECJ which could be applied to binding decisions on jurisdiction conflicts by Eurojust is Art. 263 TFEU; indeed, such a decision of Eurojust could be argued to be covered by this article, which states that the ECJ shall (also) “*review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties. It shall for this purpose have jurisdiction in actions brought by a Member state, [...] on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers*”.

The last two options concern tribunals outside of the EU. Firstly, the European Court of Human Rights should be considered: jurisdiction influences the legal status of the victims and the suspects. Consequently, it could be argued that unreasonably enforced jurisdiction could be contrary to art. 6 of the European Convention on Human Rights.<sup>434</sup> Naturally, this should only be allowed in case the jurisdiction decision of Eurojust was challenged before that court. As a result, the European Court of Human Rights could convict a State, on the request of a party, for not respecting the rules of fair trial and thus for enforcing jurisdiction on an arbitrary basis. Secondly, it be remembered that also the International Court of Justice is an option to consider<sup>435</sup>: The International Court of Justice has jurisdiction for all cases referred to it by the parties and all matters specially provided for in the Charter of the United Nations, or in treaties and conventions in force. The relevance here is that a state can ask the International Court of Justice to check whether the enforced jurisdiction was contrary to international law. Such an *a posteriori* control can, for example, be found in the Lotus-case and in the Yerodia-case.

It be remembered that the binding powers of Eurojust in terms of deciding the best place for prosecution should exist for the mandate covering “EU-worthy” offences (see above 5.2.2.1). For those cases the project team thus proposes a top-down approach. For other offences a bottom-up approach as applied today should stay in place: member states can ask Eurojust’s non-binding advice in jurisdiction conflicts regarding the non EU-worthy offences.

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<sup>433</sup> EUROPEAN COMMISSION, COM(2005) 696 final, 23.12.2005 “Green Paper On Conflicts of Jurisdiction and the Principle of ne bis in idem in Criminal Proceedings”, p.6.

<sup>434</sup> T. VANDER BEKEN, G. VERMEULEN, S. STEVERLYNCK en S. THOMAES, *Finding the best place for prosecution in IRCP-series*, 12, Antwerp-Apeldoorn, Maklu, 2002, p. 118.

<sup>435</sup> T. VANDER BEKEN, G. VERMEULEN, S. STEVERLYNCK en S. THOMAES, *Finding the best place for prosecution in IRCP-series*, 12, Antwerp-Apeldoorn, Maklu, 2002, p. 119.

### 5.2.3 *Necessity of an EPPO revised*

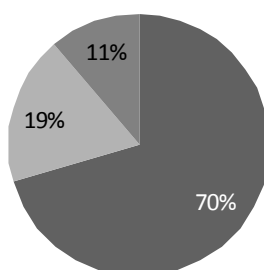
The project team strongly doubts the usefulness of a separate institution apart from Eurojust, in light of the debate of the creation of a European Public Prosecutor's Office. Firstly, because Eurojust already offers the necessary structures and expertise. Secondly, because of the broad mandate of Eurojust and the wide range of competences it is expected to acquire in the future.

It is no surprise that the Lisbon Treaty created the possibility to install a mechanism that deals with offences against the financial interests at a supranational level (Art. 86 TFEU). The definition of the budget as "the visible sign of a true patrimony common to the citizens of the Union" as Delmas-Marty describes it, has been reflected in the central position the European Commission has attributed to offences against it. As briefly elaborated elsewhere, the EPPO is indeed an idea which goes back some decades. In the mid-1990s, the European Commission asked a group of experts to work out a Corpus Juris aimed at establishing some basic principles for the criminal law protection of the financial interests of the European Union. The Corpus Juris was published in 1997 and included the proposal to introduce a European Public Prosecutor (EPP) (Art. 18.5). In the beginning of the 21st century the debate on the European Prosecutor advanced. On 11 December 2001, a Green paper on "Criminal law protection of the financial interests of the Community and the establishment of a European Prosecutor" was drafted by the European Commission. The European Parliament expressed its faith in the utility of a European Public Prosecutor's office. Additionally, in its Action Plan, the Commission explicitly stated its intention to create a European Public Prosecutor's Office, again fitting the climate in the EU institutions which seemed to be one of eagerness to install this new body.

This eagerness, however, seems to be turning, and rightly so. On 12 July 2010 the European Commission presented a reflection paper on the reform of OLAF to the European Parliament's budgetary control committee. The European Commission leaves little doubt that further discussion is vital to identify the best options for the EPPO and that a thorough impact assessment is required. In the survey conducted for this Study, a large majority of the member states (70%) also indicated that a necessity and subsidiarity test are indeed still necessary (see figure below).

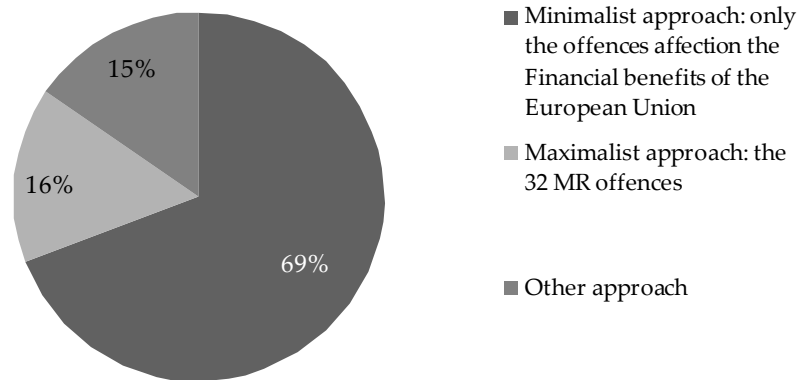
**1.4.5 Do you agree that the setting up of a European Public Prosecutor's Office (EPPO) should be dependent on necessity and a thorough analysis of the subsidiarity principle?**

- Yes, analysis still needs to be performed
- The inclusion of the possibility to set up an EPPO in the new Treaties indicates that both necessity and subsidiarity requirements are met
- No



Especially in light of the elaboration of Eurojust's powers, it seems that a creation of an EPPO cannot stand the subsidiarity/necessity test. Based on Art. 86 TFEU, this institution would be created in order to tackle the crimes affecting the financial interests of the Union. And indeed, when member states were asked about it, a large majority indicated that it would only want to see an EPPO created for these offences.

#### 1.4.6 For what type of offences should EPPO be competent?



The project team urges the EU to be careful when considering the creation of an EPPO. The member states are understandably reluctant when considering plans for a European Public Prosecutor's Office, and their reflex is to support its creation *provided that EPPO has a limited mandate*: given the relatively low intrusion level of the offences against the EU's financial interests, the member states prefer its creation *only* for such offences.

There are two legal possibilities for the prosecution at EU level of crimes against the EU budget. The first scenario entails the creation of a separate body following Art. 86 TFEU; the second entails a deepening of the Eurojust competences following Art. 85 TFEU. The choice for the first scenario, however, would make little sense.

Firstly, given that the installation of an entire new bureaucratic system to deal merely<sup>436</sup> with this one type of offences, does not stand the proportionality test.

Secondly, there is no reason why Eurojust – in its elaborated, strengthened form – would not be able to fulfil the EPPO's role: after all, offences against the financial interests of the Union already form part of Eurojust's mandate: in the original Eurojust Decision fraud affecting the financial interests of the EU was explicitly included. With the revised Eurojust Decision the mandate becomes even stronger: the Eurojust mandate refers to that of Europol and in the Europol Annex, several offences are listed, amongst which the term 'fraud'. This term, being more generic than "fraud affecting the financial interests of the EU" allows for a more comprehensive approach when dealing with EU-budget crimes. It be

<sup>436</sup> Even though these offences are important, it remains merely one category of offences, leaving severe crimes such as organized crime, aside.

noted that also in the list provided in Art. 13 revised Eurojust Decision, fraud affecting the financial interests of the EU is explicitly mentioned. It be reminded that this article imposes an information pushing obligation on the member states. The First Protocol to PIF Convention also explicitly deals with the protection of the European Communities' financial interests. The combination of all these existing provisions and possibilities underline that structures are indeed in place show that the financial interests of the European Union are receiving the appropriate focus. Deepening those structures rather than creating new ones is undoubtedly the best way forward.

Additionally, in the list of potential future competences for Eurojust, Art. 85 TFEU explicitly refers to offences against the financial interest of the Union. Considering the attention those offences received in the EU's policy discourse, and the willingness of the member states to create an EPPO for *these* offences, it is likely that the offences against the EU budget would qualify as an "EU-worthy" offence (see above 5.2.2.1), allowing for the application of the strengthened competences of Eurojust. It be repeated that the project team supports a complementary approach: the EU level – in this case Eurojust – should only exercise binding powers when member states are either unwilling or unable to prosecute. An example is serious crimes committed by officials from European institutions. As pointed out by OLAF,<sup>437</sup> this is one area where the efforts at national level until now are more than limited in particular because national authorities do not have the means to take all the necessary actions.

Creating yet another bureaucracy and setting up new institutional structures which would require tremendous resources and manpower cannot be defended given the existence and possibility for future competence elaboration of Eurojust. As shown above, Art. 85 TFEU allows for strengthened action against the EU budget offences, but – even more importantly – it also allows to step up the joint efforts in tackling other severe crimes effecting the European Union. Rather than investing in the creation of a new body to fight one type of crimes (against EU budget) it is far more logical to deepen an existing institution, Eurojust, allowing for actual decision-making powers concerning a wide range of crimes effecting many different member states (terrorism, trafficking in human beings, corruption, trafficking in fire arms etc.). Such should be done in a sensible way: complementary, and only for "EU-worthy" offences. As to the other offences falling under Eurojust's competence, the current supporting and facilitating role should remain in place. This combination between its current powers, and future strengthened powers, is the way forward to achieve a supporting Eurojust that has the power to initiate investigations, to propose the

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<sup>437</sup> EUROPEAN PARLIAMENT, Policy Department Budgetary Affairs, 2011, PE 453.219, Study "Improving coordination between the bodies competent in police and judicial cooperation: moving towards a European Public Prosecutor", p. 36.

## INTERNATIONAL COOPERATION IN CRIMINAL MATTERS

initiation of prosecution, and to resolve conflicts of jurisdiction in relation to those offences requiring a cross-border solution. To do otherwise – and focus merely on the offences against the EU budget – would mean the loss of an exceptional opportunity, offered by the Lisbon Treaty, to step up the fight against severe cross-border crimes.

### 5.3 EU-wide effect in criminal matters: Logical domestic consequences of international cooperation

*Gert Vermeulen, Wendy De Bondt and Charlotte Ryckman*

Besides the possibility for the EU to regulate the rules and procedures to be followed in a cross-border situation, it is clear that there are always mirroring concerns linked to mere domestic situations detached from any form of cooperation. Regulating situations with a cross-border element immediately raises questions as to the impact this could (or even should) have on similar mere domestic situations. Based on the results from a literature review and the concerns raised during the Study, the project team has decided to single out 4 case studies in this respect.

First, mirroring the concerns and recommendations raised in 4.2.1 with respect to the mutual admissibility of evidence gathered abroad following a cooperation request, the project team has reviewed the difficulties linked to cross-border admissibility of evidence gathered in a mere domestic context. In analogy to the admissibility concerns raised when a member state seeks the help of another member state to gather evidence upon its request, obviously similar admissibility concerns exist with respect to evidence that already exists in another member state. The question is raised whether the EU is competent to interfere with evidence gathering that takes place outside a cooperation context.

The second issue with “EU-wide effect”, mirroring the concerns and recommendations raised in the part on refusal grounds, examines the need for an effect given throughout the Union to the immunity from prosecution granted to a person by one member state.

Thirdly, again mirroring the concerns and recommendations raised in the part on refusal grounds, the mutual understanding of *ne bis in idem* was considered. In accordance with the Programme of Measures adopted over eleven years ago,<sup>438</sup> the project team discusses whether decisions to prosecute taken by one member state should create a barring effect throughout the Union.

Fourthly, an EU-wide effect of disqualifications is elaborated on, exploring the possibility to introduce new disqualifying effects and dealing with the question of an EU wide effect prior convictions.

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<sup>438</sup> COUNCIL OF THE EUROPEAN UNION, “Programme of measures of 30 November 2000 to implement the principle of mutual recognition of decisions in criminal matters”, OJ C 12, 15.1.2001.

### **5.3.1 *Cross-border admissibility of evidence gathered in a mere domestic context: a legal basis?***

#### *5.3.1.1 The difference between existing evidence and evidence still to be gathered*

The first case study to point out the relevance and complexity of EU-wide effects in criminal matters relates to the cross-border admissibility of existing evidence previously gathered in a mere domestic context. When discussing the concerns related to mutual admissibility of evidence gathered abroad following a cooperation request in 4.2.1, similar concerns related to the admissibility of evidence that already existed in another member state were not included in reasoning. This strict scope demarcation was introduced because dealing with admissibility concerns related to evidence that already exists in another member state falls outside the scope of problems related to cooperation in criminal matters; it is not a cooperation problem, because the problem is not situated at the level of the cooperation mechanism that ensures the transfer of evidence from one member state to another. Rather, it concerns the later cross-border use of existing evidence previously gathered in a mere domestic context. This does not mean, however, that the problem is not valid and should not be included in a Study that intends to review the entirety of international cooperation in criminal matters and the problems that are linked to it. Therefore, the cross-border admissibility of evidence gathered in a mere domestic context, and more generally the possibility to attach an EU-wide effect to evidence that is gathered and perceived admissible in one member state – so that the admissible evidence would be considered admissible in all other member states – is included in this part of the Study.

#### *5.3.1.2 Unsuitability of existing solutions*

When critically reviewing the existing – cross-border cooperation related – solutions to admissibility problems, it soon becomes clear that they totally lack any potential to offer relief in this – mere domestic – situation. The highly criticized FRA principle that was introduced in the 2000 EU MLA Convention and allows member states to request that certain formalities and procedures be taken into account when gathering evidence upon their request is utterly useless when it comes to ensuring the admissibility of existing evidence. In the unlikely situation that the critiques with respect to FRA as elaborated above<sup>439</sup> were not convincing, this limitation can be seen as an additional argument.

In spite of the profound concerns with respect to the admissibility of evidence that lead to the introduction of the FRA principle into the EU MLA Convention, no traces of admissibility concerns, let alone solutions thereto can

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<sup>439</sup> *Supra* 4.2.1.



be found in the Framework Decision on the European Evidence Warrant (EEW), the most recent instrument that deals with the transfer of existing evidence. An EEW is an order issued by a competent authority in one member state, which under the principle of mutual recognition must be executed in another member state. According to the framework decision it may be deployed for the purpose of obtaining objects, documents and data for use in criminal proceedings. The framework decision applies to objects, documents or data obtained under various procedural powers, including seizure, production or search powers. However, the EEW is not intended to be used to initiate the interviewing of suspects, taking statements, or hearing of witnesses and victims. Taking bodily evidence from a person, in particular DNA samples, is also excluded from the scope of the EEW. Furthermore, the EEW is not intended to be used to initiate procedural investigative measures which involve obtaining evidence in real-time such as interception of communications and monitoring of bank accounts. The EEW is equally not intended to be used to obtain evidence that can only result from further investigation or analysis. To the contrary, EEW's can be used where the evidence is directly available in the executing State for example by extracting the relevant information from a register. It can also be used for requesting data on the existence of bank accounts where such data is available in the requested State. The EEW may equally be used for the purpose of obtaining objects, documents or data falling within the excluded categories provided that they had already been gathered prior to the requesting of the warrant.<sup>440</sup> Taking account this scope of the EEW, it is most deplorable that no attempt was made whatsoever to tackle admissibility issues.

The European Council indicated, as also noted in the 2010 *Evidence-study*,<sup>441</sup> that the existing instruments in this area constitute a fragmentary and unsatisfactory regime and that a new approach was needed, based on the principle of mutual recognition taking into account the flexibility of the traditional system of mutual legal assistance. The European Council therefore called for a comprehensive system to replace all the existing instruments in this area, including the EEW, covering as far as possible all types of evidence and containing deadlines for enforcement and limiting as far as possible the grounds for refusal.<sup>442</sup> A European Investigation Order (EIO) is to be issued for the

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<sup>440</sup> G. Vermeulen, W. De Bondt and Y. Van Damme (2010), *EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence?*, Antwerpen-Apeldoorn, Maklu, p. 17.

<sup>441</sup> G. Vermeulen, W. De Bondt and Y. Van Damme (2010), *EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence?*, Antwerpen-Apeldoorn, Maklu.

<sup>442</sup> Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters, Interinstitutional file: 2010/0817 (COD), considerans 6.

purpose of having one or several specific investigative measure(s) carried out in the executing State with a view to gathering evidence. This includes the obtaining of evidence that is already in the possession of the executing authority. Considering the clear objective to replace the entirety of the existing evidence related instruments, including the EEW, by the European investigation order (*supra* 3.6.2), it becomes more than interesting to review the position of the EIO with regard to admissibility concerns related to existing evidence. It is most unfortunate that again, the admissibility concerns related to existing evidence, are not included in the current initiatives.

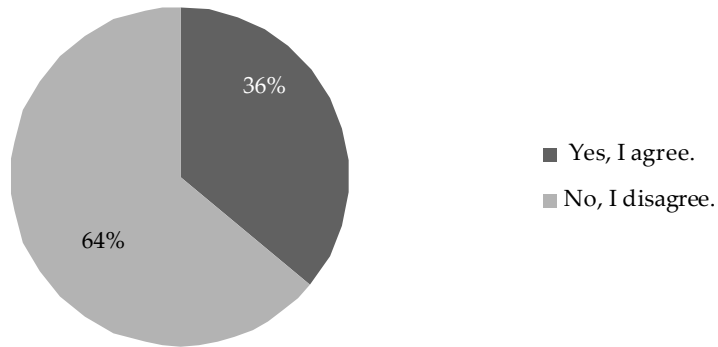
#### *5.3.1.3 Conclusion: Minimum standards for existing evidence?*

The easiest and rather pragmatic solution would obviously be to introduce minimum standards for evidence gathering all together, obliging member states to include them into their national criminal law systems and apply them equally in mere domestic as well as cross-border situations. The legal basis required to do so is highly questionable. A strict reading of the possibility to introduce minimum standards as included in Art. 82.2 TFEU clearly limits this competence to the extent necessary to facilitate mutual recognition of judgements and police and 'judicial' cooperation in criminal matters having a cross-border dimension more in general. A such strict reading would lead to the conclusion that problems originating from mere domestic situations such as the effect of evidence that was already gathered in a mere domestic context, falls outside the scope thereof.

However, an interpretation of the scope of the possibility to introduce minimum rules as included in Art. 82.2 TFEU based on a analysis of the recent political discourse and the adoption of a number of instruments, leads to the conclusion that the scope limitation is not all that strictly linked to cross-border situations. From the political discourse of Ms. Vivian Reding and the content of the instruments adopted following the measures included in the Procedural Rights Road map, it can but be concluded that – as long as member states are willing to agree to it – it is possible to adopt minimum rules that are applicable in a mere domestic situation and therefore require member states to adapt their national law when necessary.

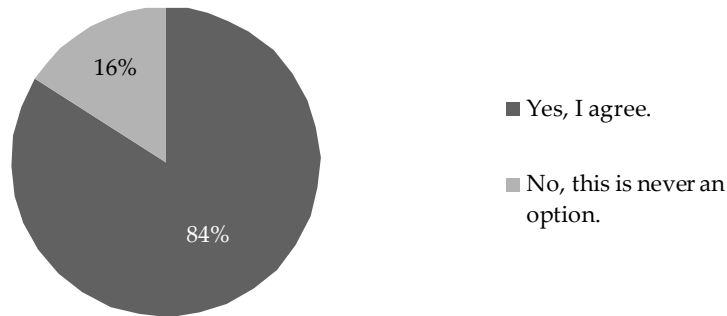
This willingness to extend the adoption of minimum rules beyond the strict cross-border limitation also shows from the results of the replies to question 4.2.7. No less than 64 % of the member states have indicated that the minimum standards should not be limited to cross-border situations, and thus that it is acceptable to introduce minimum standards that also apply in mere domestic situations.

**4.2.7 Should the use of minimum standards be limited to cross-border situations?**



Member states clearly understand the consequences of extending the choice to allow minimum standards to be adopted beyond cross-border situations. The replies to question 4.2.8. corroborate the above in the sense that 84% of the member state is aware and accepts that this means that they will be required to implement certain minimum standards into their national criminal justice systems and apply them also in a mere domestic situation. Furthermore, from the 36% member states that are reluctant to extend the scope of minimum rules beyond cross-border situations – and therefore indicated in question 4.2.7. to agree that the use of minimum standards should be limited to cross-border situations – only 16% consider it unacceptable to be required to adapt their national criminal justice systems. This means that even though not in favour of an extension of the scope of minimum rules beyond cross-border situations, 72% of those member states would not oppose to an evolution in that direction.

**4.2.8 Is it an acceptable future policy option to require member states to implement the minimum standards into their national criminal justice systems?**



Considering this flexible interpretation of the legal basis for the adoption of minimum rules to ensure admissibility of evidence included in Art. 82.2 (a) TFEU, it is no longer completely impossible to agree upon common minimum standards for any type of evidence gathering, be it in a mere domestic situation or upon a request from another member state. As a consequence, evidence gathered accordingly must be accepted as admissible in all member states following the introduction of an irrefutable presumption of admissibility. This would of course significantly influence the admissibility of evidence and would be a major step in trying to achieve free movement of evidence throughout the Union.

**5.3.2 *Mutual recognition of collaborators with justice***

The second case study to point to the relevance and complexity of EU-wide effects in criminal matters relates to the mutual recognition of collaborators with justice and the complementing benefits previously granted in a mere domestic context. Unlike cross-border relocation, which entails physically moving a person from one location to another and in doing so requires per se involvement of multiple member states, the matter of collaboration with justice can also relate to a situation in which the effect of a decision in a mere domestic case raises questions in a later cross-border context. This section outlines why EU action is still required in this field: it outlines the necessity for a system whereby the member states mutually recognize the status of collaborator with justice. What is meant here is an *a priori* recognition, without necessarily relating to a concrete case at hand, in other words the creation of an EU-wide effect to the status of collaborator with justice granted by one member state. Indeed, an offender will

hardly be prepared to cooperate when one member state will grant him the favour of for example not prosecuting him, while other member states still can.<sup>443</sup>

That the most valuable information can only be provided by people close to or part of the criminal organisation, must be clear. The use of severe violence against members who violate the secrecy rules of the criminal group is often an effective tool to prevent members from talking to the judicial authorities. An effective way through which people close to these groups can be persuaded to provide crucial information is through offering them the necessary protection<sup>444</sup> and by granting them certain benefits.

Although the words 'collaborator with justice' will not often be found in the national penal codes, nearly all the states provide the possibility for the court or judge to give a reduced punishment to offenders who help the police/judicial authorities to clarify their or other crimes. Nevertheless, some member states have chosen not to enact regulation on collaborators (either because they are seldom confronted with the types of crimes for which the figure is effective or because they have moral objections to the waiving/mitigating of punishment). In other states, the benefits are limited to the sentencing level: a reduced sentence will be imposed or exclusion from any sentence all together. Other member states, on the contrary, make a very broad use of the figure and a person facing criminal charges who is able to provide the police/prosecution with helpful information could be granted immunity from prosecution. Other variations occur with benefits granted at the penalty execution level. This contribution, and with it the proposal of mutual recognition of the status of collaborator with justice, only deals with this latter meaning: the immunity from prosecution.

The EU and the Council of Europe have specifically dealt with the collaborator with justice, although not as elaborately as with witness protection. Additionally, the current EU/multilateral *acquis* encompasses only a set of mainstream ideas, non-binding best practices and soft law instruments.

A relatively early relevant EU-measure is the 1996 resolution on individuals cooperating with the judicial process.<sup>445</sup> The possibility to grant benefits in exchange for information is foreseen in binding legislation like the Framework Decision on terrorism<sup>446</sup>, and the Council Framework Decision on the standing of victims in criminal proceedings.<sup>447</sup>

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<sup>443</sup> G. VERMEULEN, *EU standards in witness protection and collaboration with justice*, in *IRCP-series*, 25, Antwerp-Apeldoorn, Maklu, 2005, p. 74.

<sup>444</sup> *Supra* 4.1.1.

<sup>445</sup> COUNCIL OF THE EUROPEAN UNION, "Resolution of 20 December 1996 on individuals who cooperate with the judicial process in the fight of international crime", *O.J. C 10*, 11/01/1997.

<sup>446</sup> OJ L 164, 22.06.2002, p.3., Art. 6.

<sup>447</sup> OJ L 82, 22.03.2001, p.1., Art. 8.

The importance of taking EU legislative initiative in the sphere of (international cooperation relating to) collaborators with justice was underlined in Recommendation 25 of the 2000 Millennium Strategy<sup>448</sup>. In 2005, Lithuania, Estonia and Latvia concluded an agreement *on co-operation in protection of witnesses and victims*.<sup>449</sup> The three member states agreed to cooperate in criminal matters by ceasing further prosecution or reducing the punishment of persons who have rendered assistance to the law enforcement authorities of another Party to this agreement and have assisted to disclose a serious crime. The crime revealed has to be more serious than the offence committed by the offender.<sup>450</sup>

At Council of Europe level Recommendation (2005) 9 on the protection of witnesses and collaborators with justice was adopted. The rules set therein are not directly relevant to the part under this heading, given that the Recommendation deals with the protection of the collaborators and does not allude to the status applying throughout several territories. However, the state of the art definition of the very concept of collaborators with justice, is all the more so: *“collaborator of justice means any person who faces criminal charges, or has been convicted of taking part in a criminal association or other criminal organisation of any kind, or in offences of organised crime, but who agrees to cooperate with criminal justice authorities, particularly by giving testimony about a criminal association or organisation, or about any offence connected with organised crime or other serious crimes”*.

Without fully reiterating its position from the Study in 2005, where a proposal was developed for the introduction of the legal figure of collaboration with justice in the procedural laws of the member states<sup>451</sup> several aspects of the original proposal remain. The focus here however, is merely on the effect that is given to the benefit of immunity from prosecution granted to collaborators with justice throughout the Union, without necessarily influencing the figure in the national laws: member states need to recognize the benefit granted to collaborators with justice in another member state – under certain conditions, see below), but they remain free to introduce the concept nationally; the obligation thus only applies to recognizing each other’s decisions.

The concept of collaborators with justice was already mentioned above, in the context of refusal grounds.<sup>452</sup> What was proposed there, being the introduction of an optional (preferably mandatory) refusal ground throughout all EU cooperation instruments, is what should at least be agreed. Additionally

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<sup>448</sup> OJ C 124/1, 3.05.2000.

<sup>449</sup> COUCIL OF EUROPE, Committee of experts on the protection of witnesses and collaborators of justice, (2005) Inf 01, Strasbourg, 14 -17 February 2005.

<sup>450</sup> G. VERMEULEN, *EU standards in witness protection and collaboration with justice*, in *IRCP-series*, 25, Antwerp-Apeldoorn, Maklu, 2005, p. 62.

<sup>451</sup> G. VERMEULEN, *EU standards in witness protection and collaboration with justice*, in *IRCP-series*, 25, Antwerp-Apeldoorn, Maklu, 2005, p. 251-257.

<sup>452</sup> *Supra* 3.3.3.7.

however, the debate on an EU wide effect of the status of collaborator with justice should be opened. The aim should be that when a person gets the status of collaborator with justice in one member state, this person receives the subjective right not to be prosecuted for the same facts in another member state.

Again it needs to be stressed that the project team does *not* propose to agree on EU-wide criteria which would force a member state to grant the status of collaborator. The proposal is to, *when* a member state has granted immunity from prosecution, this immunity has EU-wide effect. Realising that this would of course be a major novelty in the EU area of freedom, security, and justice, clarity about the concept should exist and a level of scrutiny is necessary when the immunity from prosecution is granted, before it can resort EU-wide effect (see below).

Again, a key concept is the strengthened mandate of Eurojust. The experience gained by Eurojust from operational cases gives it a privileged point of observation in order to understand trends, typologies and forms of modern cross-border criminality and to help practitioners to tackle them more efficiently, improving judicial cooperation and coordination among the responsible national authorities. The project team suggests to grant – in light of the future competences foreseen in Art. 85 TFEU and the expected regulation dealing with these competences – Eurojust additional competences for a clearly defined mandate, dealing with “EU-worthy offences” (see above 5.2). In light of the highly sensitive character and complexity of the phenomenon of collaborators with justice, the role foreseen by the authors would not inflict on the granting of the status of collaborator with justice at a *national* level. However, based on the very same consideration, for certain severe, “EU-worthy” offences, the experience of this institution should be relied upon in the cross-border context of collaborators with justice. The authors suggest a veto-right for Eurojust: when a member state wishes to, for the “EU-worthy” offences, grant the status of collaborators with justice, and Eurojust would veto this, the effect would be that, despite the *national* status of collaborator with justice, this could not result an EU-wide effect. The other way around, if Eurojust approves, this should entail that the other member states should recognize such a status, in the sense that other member states should be obliged to recognize the status and thus refrain from prosecution. This way it would be guaranteed that, when severe crimes are involved, member states cannot one-sidedly decide on the granting of *an EU-wide* immunity from prosecution. The choice of letting Eurojust carry out such scrutiny is logical given that Eurojust already provides an excellent and to a certain extent operational platform where issues concerning cooperation can be discussed. In those situations where an institution such as Eurojust agrees that a particular person should be granted immunity from prosecution it is justifiable that all member states would indeed recognize this immunity. The authors underline the necessity of this scrutiny level, not only because of the sensitive character of the matter of collaboration with justice, but also in light of the

debate regarding the wordings “finally disposed of” used in the *Gözütok/Brügge* jurisprudence.

Outside of the realm of the “EU-worthy”, more flexibility is necessary: it proposed to in this context keep a merely advisory role for Eurojust.

### 5.3.3 *Mutual understanding of the ne bis in idem principle*

The third case study to point to the relevance and complexity of EU-wide effect in criminal matters relates to the mutual understanding of the *ne bis in idem* principle. Broadly speaking, regarding a mutual understanding of the *ne bis in idem* principle, two main issues are at stake.

Firstly there is the application of the *ne bis in idem* principle as a substantive ground for refusal in the context of cooperation between member states, whereby the *ne bis* principle is generally present in every cooperation instrument, either as an optional or mandatory ground (however, no such refusal ground can explicitly be found in the traditional mutual legal assistance instruments. Note that they are included in the recent FD EEW and General Approach EIO). This was discussed in the part on refusal grounds in chapter 3.

Secondly, the *ne bis in idem* principle – being a generally accepted and fundamental legal principle - has the potential of creating EU wide effects with regard to the possibility of member states to initiate criminal proceedings against a person targeted by an ongoing investigation (as opposed to merely being applied to final decisions). In other words, the *ne bis in idem* principle has the capacity to provide an answer to positive jurisdiction conflicts.<sup>453</sup> Multiple prosecutions are detrimental to the rights and interests of individuals and can lead to duplication of activities. Furthermore, without a system for appropriately allocating cases to one particular jurisdiction already at the phase of ongoing prosecutions, the application of the *ne bis in idem* principle in its ‘traditional’ meaning (being *ne bis* inflicted by final decisions) risks leading to accidental or even arbitrary results: by giving preference to whichever jurisdiction can first take a final decision, its effects amount to a ‘first come first served’ principle, as pointed out by the Commission in its 2005 Green Paper.<sup>454</sup>

In this respect it is important to recall the aim set out in the 2000 MR Programme of measures.<sup>455</sup> Point 2.3 concerns the “*taking account of decisions to prosecute taken in other Member states.*” Unfortunately, the text accompanying that subtitle does not elaborate on what it should entail in concrete terms. The project

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<sup>453</sup> EUROPEAN COMMISSION, COM(2005) 696 final, 23.12.2005 “Green Paper On Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings”.

<sup>454</sup> EUROPEAN COMMISSION, COM(2005) 696 final, 23.12.2005 “Green Paper On Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings”, p. 3.

<sup>455</sup> COUNCIL OF THE EUROPEAN UNION, “Programme of measures of 30 November 2000 to implement the principle of mutual recognition of decisions in criminal matters”, OJ C 12, 15.1.2001.



team recommends to, in order to make this point of the Programme of measures workable, grant a *barring effect* (i.e. a restriction for all other member states to start a prosecution for the same fact) to the decision of a member state to initiate criminal proceedings, in that no other prosecutions can be started concerning those same facts. Here, the difference with the *cooperation* perspective of *ne bis in idem* becomes clear: the principle as discussed above under the section 4.3.3 concerns the *ne bis* refusal ground, in other words the principle within concrete cooperation situations: it concerns the question whether or not a member state should grant cooperation if that cooperation could be in violation of the *ne bis in idem* principle. Here on the other hand, it concerns what one could call the automatic EU-wide effect that a decision of one member state to prosecute could resort.

Obviously, if the EU is genuine about wanting to introduce such a system, it is vital to develop a clear and elaborated system to find the best place to prosecute.<sup>456</sup> In absence of such a system there would be an imminent risk that whichever member state would happen to decide to start prosecution first would then per definition be the competent member state, without other member states being able to start prosecuting the same facts in their respective countries.<sup>457</sup> A mutual understanding and recognition of the *ne bis in idem* principle in the sense that it would bar the initiation of prosecutions throughout the EU once a decision has been made to prosecute for a certain offence that effects multiple member states, would avoid the negative effects of multiple prosecutions in the same case, which are incompatible with the development of an area of freedom, security and justice.

Several policy recommendations concerning a mechanism of finding the best place for prosecution are developed above (see 5.2), thereby attributing a central role to Eurojust. Similar to Eurojust's proposed role in the cooperation context, here too, the choice for Eurojust should not be surprising, given the central role of this institution attributed in art. 85 TEU, in relation to cross-border prosecution policy. Additionally, it already plays a relatively successful role in relation to jurisdiction conflicts. First, a distinction needs to be made based on the offences involved: in the future, a set of "EU-worthy" offences needs to be defined based on the EU level offence classification system; for those offences

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<sup>456</sup> *Supra* 5.2.3.4; the complex mechanism that is required to make such a decision has already been discussed profoundly by IRCP: VANDER BEKEN, T., VERMEULEN, G., STEVERLYNCK, S. en THOMAES, S., *Finding the best place for prosecution in IRCP-series*, 12, Antwerp-Apeldoorn, Maklu, 2002, 91 p.

<sup>457</sup> This aspect of the principle was mentioned in a proposal for framework decision, presented by Greece: Proposal of Framework Decision on the application of *ne bis in idem*, 13 February 2003 (6356/03). The proposal died a silent death due to lack of political agreement. Comments on this proposal, see M FLETCHER, "Some Developments to the *ne bis in idem* Principle in the European Union: Criminal Proceedings Against Hüseyin Gözütok and Klaus Brügge", 66 M.L.Rev. (5) 769-780.

Eurojust needs to be attributed competences reaching further than those existing today (see above). Regarding finding the best place for prosecution, this would entail that Eurojust would retain its non-binding competences for the non-EU-worthy offences, but that additionally, it would receive a binding competence when EU-worthy offences are concerned. To that end, a measurable system based on<sup>458</sup> the matrix-system proposed in the 2003 Working Program<sup>459</sup> needs to be developed.

The project team wishes to point to the project regarding the development of an EPRIS-system (European Police Records Index System). This originally German initiative aims to create a system which gives Member States' law enforcement authorities a quick overview of whether and possibly where relevant police information on a certain person can be found.<sup>460</sup> A Study<sup>461</sup> regarding the development of such a system is currently being conducted by the IRCP and Unisys. Originally, the aim was to only include police authorities in this system, but currently, voices are being raised to broaden this to prosecution authorities. The project team supports this view, in light of its position that the artificial boundaries between authorities are artificial (examples are found throughout this report, but especially supra in chapter 2). The EPRIS project is still a work in progress; however, when it comes into being, and especially if prosecution authorities would be included, Eurojust should form part of it in light of the specific competences foreseen in Art. 85, 1, a and b TFEU.

In the alternative of the development of an ECRIS system, reference can be made to the empirical results regarding the desirability of a register of pending prosecutions. The question regarding such a register answers to the reference made to a "central casebook", which would make it possible to avoid bringing charges that would be rejected under the *ne bis in idem* principle and which would also provide useful information on investigations concerning offences involving the same person. In the survey member states were asked to give their view on the need to install such a register for pending and ongoing prosecutions, for the sake of (better) applying the *ne bis in idem* principle, and more in particular for which type of offences such a register would be necessary. There is

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<sup>458</sup> As argued elsewhere, the matrix-system would have to be elaborated, not only through inclusion more 'formal' criteria of jurisdiction, but also through formal introduction of the reasonableness requirement and through the development of a true prosecution policy.

<sup>459</sup> Eurojust, WP 2003,

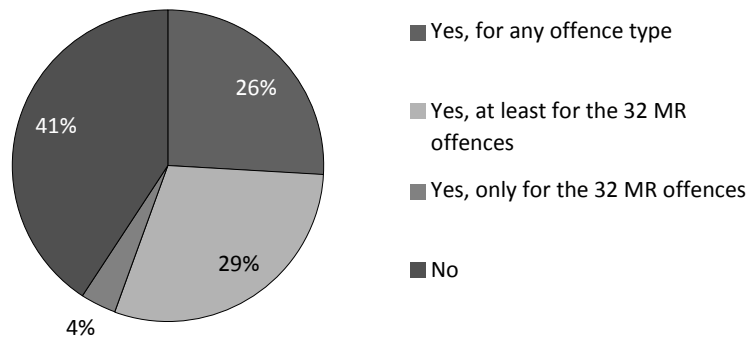
[http://www.Eurojust.europa.eu/press\\_releases/annual\\_reports/2003/Euj%20008%20Annual%20Report%20EN.pdf](http://www.Eurojust.europa.eu/press_releases/annual_reports/2003/Euj%20008%20Annual%20Report%20EN.pdf).

<sup>460</sup> COUNCIL OF THE EUROPEAN UNION (2009), 15526/2/09 Note of 21 December 2009 from Presidency to Ad Hoc Working Group on Information Exchange regarding a European Police Records System.

<sup>461</sup> EUROPEAN COMMISSION, DG HOME AFFAIRS, 8 April 2011, Call for tender No. HOME/2010/ISEC/PR/068-A3 for a Study on possible ways to enhance efficiency in the exchange of police records between the Member States by setting up a European Police Records Index System (EPRIS).

considerable support for such a suggestion: fifteen member states agree that this would be helpful. Several concerns are raised, however, the main ones relating to issues such as data protection, proportionality, reliability and practical feasibility of the suggested register. Consequently, it seems that there is indeed a need for the feasibility study in order to examine the possibilities for the adoption of such a register through a costs-benefit analysis, a feasibility study which the EU itself explicitly suggested in the Programme of measures, to date almost twelve years ago.

**Figure 2 Is there a need to install a register for pending and ongoing prosecutions to be able to (better) apply the *ne bis in idem* pinciple?**



In terms of feedback of the member states regarding the application of the EU-wide *ne bis* principle as a result of an ongoing prosecution, the picture is divided. No more than a third of the member states applies such an understanding of *ne bis* with regard to ongoing prosecutions by other (member state or third country) authorities.

These relatively low results need to be put in perspective, however: no EU instrument obliges the member states to give a *ne bis in idem* effect to ongoing prosecutions in other member states, yet almost a third of the member states already do so voluntarily. Consequently, the results do not contradict the above recommendation, quite the contrary: they show that a certain political base for such measures already exists, despite the absence of any obligation at EU-level. However, the undoubtedly high costs of both a potential feasibility study and of the potential register in itself are additional arguments in favour of the broadening of the future EPRIS system to prosecution authorities, including Eurojust.

### 5.3.4 *EU wide effect of disqualifications*

#### 5.3.4.1 *Gap in current instruments regulating the execution of foreign sentences*

The fourth and final case study to point to the relevance and complexity of EU-wide effect in criminal matters relates to the disqualifications as sanction measures.

The past few years, a lot of attention has been paid to the cross-border execution of foreign decisions and the sanctions imposed therein.

First, the framework decision on the mutual recognition of financial penalties was adopted. For long, it was felt that the principle of mutual recognition should apply to financial penalties imposed by judicial or administrative authorities<sup>462</sup> for the purpose of facilitating the enforcement of such penalties in a member state other than the state in which the penalties are imposed. Measure 18 of the Programme of Measures<sup>463</sup> – the latter was adopted to implement the principle of mutual recognition in criminal matters as agreed at the Tampere European Council – gave priority to an instrument that would apply mutual recognition to financial penalties.

Second, the framework decision on the mutual recognition of confiscation orders followed the next year. According to paragraph 51 of the Tampere European Council Presidency Conclusions, money laundering is at the very heart of organised crime, and should be rooted out wherever it occurs; the European Council was determined to ensure that concrete steps were taken to trace, freeze, seize and confiscate the proceeds of crime. In that connection, in paragraph 55 of the conclusions, the European Council calls for the approximation of criminal law and procedures on money laundering. Considering that all member states have ratified the Council of Europe Convention of 8 November 1990 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, it came as no surprise that applying the principle of mutual recognition to confiscation, was listed as a priority in measure 6 and 7 of the Programme of Measures to implement the principle of mutual recognition.

Third, the framework decision on the application of the mutual recognition principle to measures involving deprivation of liberty was adopted. Considering that all member states had ratified the 1983 Council of Europe Convention on the Transfer of Sentenced Persons, this too was an expected priority. With the adoption of the 2008 framework decision, measures 14 and 16 of the Programme of Measures to implement the principle of mutual recognition were covered.

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<sup>462</sup> Provided that open to appeal before a judge also competent in criminal matters: see above 2.2.3.1.

<sup>463</sup> COUNCIL OF THE EUROPEAN UNION, “Programme of measures of 30 November 2000 to implement the principle of mutual recognition of decisions in criminal matters”, OJ C 12, 15.1.2001, measure 18.

Fourth and final, a framework decision on the application of the mutual recognition principle to probation measures and alternative sanctions was adopted. This instrument links in perfectly with the Programme of Measures of 29 November 2000, in which the Council pronounced itself in favour of cooperation in the area of suspended sentences and parole.

To date, the big gap in terms of cross-border execution of sentences consists of a measure related to disqualifications. The Programme of Measures to implement the principle of mutual recognition had as its aim “gradually to extend the effects of disqualifications throughout the European Union: the effectiveness of certain sanctions in the European context depends on their being recognised and enforced throughout the Union”. With a view to achieving this aim, the Programme provides for the following measures:

- Measure 20: *“Compile a list of the decisions regarding disqualification, prohibition and incapacity common to all Member states, handed down when sentencing a natural or legal person or further thereto.”*
- Measure 21: *“Carry out a feasibility study to determine how best to ensure, while taking full account of requirements relating to personal freedoms and data protection, that the competent authorities in the European Union are informed of any disqualification, prohibition or incapacity handed down by the courts in a Member state. The study should also consider which of the following would be the best method: (a) to facilitate bilateral information exchanges; (b) to network national criminal records offices; or (c) to establish a genuine European central criminal records office.”*
- Measure 22: *“Draw up one or more instruments enabling the listed disqualifications to be enforced in the sentenced person’s Member state of residence and certain disqualifications to be extended to the Union as a whole, at least as regards certain types of offence and disqualification. The question whether a decision to ban a person from entering the territory issued in one Member state should be extended to the entire Union also needs to be dealt with in this context.”*

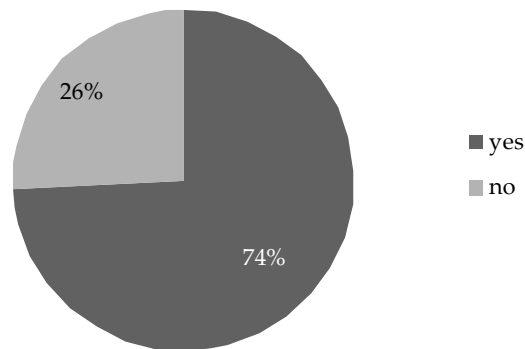
In absence of a study to determine how to best ensure the effective execution of disqualifications throughout the EU, Denmark presented an initiative in 2002 “with a view to adopting a Council Decision on increasing cooperation between European Union Member states with regard to disqualifications”. It is regrettable that the draft does not contain any provisions on the mutual recognition of disqualifications or any other technique to ensure effective cross-border execution. It is highly disappointing that despite the measures included in the Programme of Measures, the European Commission, in its 2004 Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union, stated that – at the moment – there is no obvious need to propose general approximation measures here.

Despite the lack of a general framework, traces of cross-border effect of disqualifications can be found in the current set of framework decisions. In its 2004 green paper on the approximation of sanctions, the European Commission does refer to three examples. Firstly, the Council Framework Decision strengthening the penal framework to prevent the facilitation of unauthorised entry, transit and residence provides for the possibility of a prohibition on practising directly or through an intermediary the occupational activity in the exercise of which the offence was committed. Secondly, the Council Framework Decision on combating corruption in the private sector contains a provision requiring member states to take measures to ensure that where a natural person has been convicted of active or passive corruption in the private sector he may in certain circumstances be temporarily prohibited from carrying on this particular or comparable business activity in a similar position or capacity. Thirdly, the Council Framework Decision on combating the sexual exploitation of children and child pornography requires member states to take measures to ensure that a person who has been convicted of one of the offences referred to in the framework decision may, if appropriate, be temporarily or permanently prevented from exercising professional activities related to the supervision of children.

Especially this last example is interesting in light of a series of pedophilia cases in Europe, of which the Fourniret case is probably the most notorious. Michel Fourniret is a French national convicted of having kidnapped, raped and murdered 9 girls during the eighties, nineties and early twothousands. He was ultimately arrested after a failed attempt to kidnap a Belgian girl in June 2003, but could have been arrested a lot earlier had the Belgian authorities known about his convictions. Furthermore, despite his obvious criminal record, Fourniret could start a new life just across the border in Belgium, working as a teacher without anyone knowing his past. In the margin of this case, the need to not only exchange information on criminal records but also seek execution of foreign disqualifications (in this case being disqualified to work with children) throughout Europe as well as take prior convictions into account in disqualification assessments, regardless of whether a disqualification was attached to the original conviction, has become apparent. It is applaudable that contrary to the position that there is no obvious need for a general approach with respect to disqualifications, the European Commission issued a separate communication in 2006 specifically on the way forward with respect to disqualifications arising from criminal convictions.

Because of the disperse attention for cross-border effect of disqualifications, the prioritisation in the member states was assessed in the survey. From the results to question 6.5.1. it is clear that no less than 74% of the member states considers the lack of a legal framework for recognition (and thus cross-border effect) of disqualifications an important lacunae within the domain of international validity and effect of decisions.

**6.5.1 Is the recognition of disqualifications an important lacunae with regard to international validity?**



There are however a number of difficulties related to the cross-border effect of disqualifications. First, there is no common definition of what constitutes a disqualification and considering the variety between the member states' criminal justice systems, this will be very hard to achieve. Second, when compared to the other mutual recognition instruments, the idea underlying the cross-border effect of disqualifications is entirely different. The idea is not to transfer the execution to another member state, but to extent the execution to other member states. This raises complications in terms of the aggravating effect this may have. Therefore, both the conceptual scope of disqualification as well as the limits of mutual recognition need to be thoroughly assessed before being able to formulate a policy option to fill the remaining gap.

*5.3.4.2 Difficulty in defining 'a disqualification'*

As elaborated in the 2006 Communication on disqualifications arising from criminal convictions in the EU, different kinds of disqualifications, prohibitions and incapacities exist, and the concepts of disqualifications, prohibitions and incapacities are not used in a consistent manner.

For reasons of clarity, from this point onwards, the project team will use the term disqualifications as the overall concept, including all the different types in its scope.

Disqualifications can be imposed by a wide range of authorities, in a wide range of procedures. Disqualifications can be imposed in the context of criminal, civil, commercial, administrative or disciplinary proceedings. The differences between the member states impact significantly on the consequences of the disqualification and the inclusion (or not) in the criminal record of the disqualified person.

First, disqualifications can be expressly imposed, as a principal sanction, an additional sanction or a alternative sanction. Examples are legio, but differ between member states. Reference can be made to:

- a driving disqualification which can be an additional sanction in case of drunk driving;
- disqualifications from exercising parental authority which can be a principle or additional sanction in case of child abuse; or
- the prohibition from entry to a mass event like a football match in case of a conviction for hooliganism.

In general, when disqualifications are expressly imposed, they are introduced in the persons criminal records, but exceptions do exist.

Second, disqualifications can be an automatic consequence of a conviction, even if it was not expressly ordered. These consequences are the same for all persons convicted (for that offence or to that sanction). Again examples are legio, but differ between member states. As an example linked to a conviction for a specific offence, reference can be made to no longer being allowed to work with children as a consequence of having been convicted for a sexual offence, which links in with the example of the Fourniret case elaborated on above. As an example linked to a conviction to a certain sanction, reference can be made to the loss or suspension of the right to vote or be elected as a consequence of a sanction involving deprivation of liberty. To illustrate the complexity and the differences between member states, reference can also be made to the situation involving the prohibition from entry to a mass event like a football match as the consequence of a conviction for hooliganism without it being expressly ordered. In some member states this disqualification will need to be expressly ordered in other member states this will be an automatic consequence. Furthermore there are large differences between the member states in either or not including this type of disqualifications in a person's criminal record. This is also confirmed by the *Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member states*. Its Art. 11.b. (iv) lists *disqualifications arising from the*



*conviction as one of the optional information that shall be transmitted if entered in the criminal Record.*

Third, disqualifications can also appear under certain circumstances, and are therefore rather indirect effects of another sanction. Again examples are legio, but differ between member states. Reference can be made to the prohibition to enter in contact with children, which only surfaces if the persons applies for a specific job type. Reference can also be made to the mandatory exclusion grounds that appear in the public procurement regulations and which are only an indirect effect of a sanction in the sense that the convicted persons will not notice any disqualifying effect unless a tendering procedure is initiated. Here too, reference can be made to no longer being allowed to work with children when having been convicted for a sexual offence. In most member states you will not find these qualifications in a person's criminal records, because the disqualification is regulated as part of the administrative procedure (e.g. public procurement regulations) it features in.

Considering the huge variety in disqualifications and the different characteristics attached to them, it should come as no surprise that there is no common legally binding definition of "disqualifications" at the EU level. Nevertheless, a description of a disqualification is given by the Green Paper of 30 April 2004 on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union<sup>464</sup> where at point 2.1.7, it is stated that a disqualification is a mere penalty withdrawing or restricting rights or a preventive measure whereby a natural or legal person is prohibited, for a limited or unlimited period, from exercising certain rights, occupying a position, going to certain places or doing certain things. On the contrary a detailed legally binding definition of a driving disqualification is reported in the Convention on Driving Disqualifications of 17 June 1998 which under Art 1.1.a states that 'driving disqualification' shall mean any measure related to the commission of a road traffic offence which results in withdrawal or suspension of the right to drive of a driver of a motor vehicle and which is no longer subject to a right of appeal. The measure may constitute either a primary, secondary or supplementary penalty or a safety measure and may have been taken either by a judicial authority or by an administrative authority. The only European legally binding definition available that refers to the general concept of disqualification, is the one described in a Convention of the Council of Europe, namely, the European Convention of 28 May 1970 on the international validity of criminal judgments where, in Art 1.e, it is stated that a "disqualification" means any loss or suspension of a right or any prohibition or loss of legal capacity.

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<sup>464</sup> EUROPEAN COMMISSION, COM(2004) 334 final, 30.04.2004, "Green Paper of 30 April 2004 on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union".

Nevertheless, in spite of the lack of an EU level definition, there have been a number of EU initiatives to regulate disqualifications, both in a general as well as in an ad hoc thematic fashion. Even though the Initiative of the Kingdom of Denmark with a view to adopting a Council Decision on increasing cooperation between European Union Member states with regard to disqualifications<sup>465</sup>, never got airborne, there are numerous instruments that refer to sanction measures that could qualify as a disqualification.

A detailed review of the current body of instruments of the JHA acquis, which resulted in the table below, revealed that references to disqualifications appear both in approximation instruments as well as in instruments regulating international cooperation in criminal matters. To visualize such distinction, the same distinction is introduced in the tables below.

Table 1 – Disqualification as a sanction or consequence of having been convicted	
WITHDRAWAL OF LICENSES	
Driving License	
Convention 98/C 216/01 drawn up on the basis of Article K.3 of the Treaty on European Union on Driving Disqualifications	Convention on Driving Disqualifications
Directive 2006/126/EC of The European Parliament and of the Council of 20 December 2006 on driving licenses (Recast)	Art 11.4 a Member state shall refuse to issue a driving license to an applicant whose driving license is restricted, suspended or withdrawn in another Member state. A Member state shall refuse to recognise the validity of any driving license issued by another Member state to a person whose driving license is restricted, suspended or withdrawn in the former State's territory. A Member state may also refuse to issue a driving license to an applicant whose license is cancelled in another Member state.

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<sup>465</sup> Kingdom of Denmark within the COUNCIL OF THE EUROPEAN UNION, “Initiative of the Kingdom of Denmark with a view to adopting a Council Decision on increasing cooperation between European Union Member states with regard to disqualifications”, OJ C 223/17 , 19/09/2002.

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Council Decision 2009/316/JHA-6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA	3006 Cancellation of the driving license 3007 Suspension of driving license 3008 Prohibition to drive certain vehicles
<b>Hunting And Fishing License</b>	
Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy	Art. 25.3 (d) temporary immobilisation of the vessel; (e) suspension of the license; (f) withdrawal of the license.
Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA	3017 Withdrawal of a hunting/fishing license
<b>Weapons And Other Items</b>	
Council Decision 2009/316/JHA-6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA	3016 Prohibition to hold or to carry weapons 3020 Prohibition to possess or use certain items other than weapons
<b>ECONOMIC AND COMMERCIAL ACTIVITIES</b>	
<b>Commercial Activities In General</b>	
Framework decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro	Art 09.1.b temporary or permanent disqualification from the practice of commercial activities;
Framework decision 2001/413/JHA of 28 May 2001-combating fraud and counterfeiting of non-cash means of payment	Art 8.1.b temporary or permanent disqualification from the practice of commercial activities
Framework Decision of 13 June 2002 on combating terrorism (as amended by Council Framework Decision 2008/919/JHA of 28 November 2008)	Art. 8.b temporary or permanent disqualification from the practice of commercial activities
Framework decision 2002/629/JHA of	Art 5.b temporary or permanent

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19 July 2002 on combating trafficking in human beings	disqualification from the practice of commercial activities
Framework decision 2002/946/JHA of 28 November 2002 on strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence	Art 3.1.b temporary or permanent disqualification from the practice of commercial activities
Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law	Art 7.b temporary or permanent disqualification from the practice of industrial or commercial activities
Framework decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector	Art 6.1.b temporary or permanent disqualification from the practice of commercial activities;
Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking	Art 7.1.b temporary or permanent disqualification from the pursuit of commercial activities
Framework decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography	Art 7.1.b temporary or permanent disqualification from the practice of commercial activities
Framework decision 2005/222/JHA of 24 February 2005 on attacks against information systems	Art 9.1.b temporary or permanent disqualification from the practice of commercial activities;
Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime	Art 6.1.b temporary or permanent disqualification from the practice of commercial activities;
Council Decision 2009/316/JHA-6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA	3013 Prohibition to exercise professional, commercial or social activity
Proposal of 30 September 2010 for a directive on attacks against information systems and repealing Council Framework decision 2005/222/JHA on attacks against	Art 12.1.b temporary or permanent disqualification from the practice of commercial activities

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information systems (COM(2010)final 30.09.2010)	
Proposal of 29 March 2010 for a Directive on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA	12.b temporary or permanent disqualification from the practice of commercial activities;
Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA , OJ L 101/1, 15.4.2011.	Art 6.b temporary or permanent disqualification from the practice of commercial activities
<b>Specific Professions Or Functions</b>	
<b>Managing, Directing Or Leading A Company</b>	
Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law	Art 5.2 disqualification for a natural person from [...] managing or directing a company or a foundation
Framework decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector	Art 4.3 natural person in relation to a certain business activity [...] may, where appropriate, at least in cases where he or she had a leading position in a company within the business concerned, be temporarily prohibited from carrying on this particular or comparable business activity in a similar position or capacity
<b>Work With Children</b>	
Framework decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography	Art 5.3 a natural person [...] may, if appropriate be temporarily or permanently prevented from exercising professional activities related to the supervision of children
Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records	3014 Prohibition from working or activity with Minors

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Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA	
Proposal of 26 March 2010 for a Directive on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision	Art 10.1 a natural person [...] may be temporarily or permanently prevented from exercising at least professional activities involving regular contacts with children.
<b>Other Professions Or Functions</b>	
Directive 98/5/EC of The European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member state other than that in which the qualification was obtained	Art 7.5. Although it is not a rerequisite for the decision of the competent authority in the host Member state, the temporary or permanent withdrawal by the competent authority in the home Member state of the authorization to practise the profession shall automatically lead to the lawyer concerned being temporarily or permanently prohibited from practising under his home-country professional title in the host Member state.
Framework decision 2002/946/JHA of 28 November 2002 on strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence	Art.1 prohibition on practising directly or through an intermediary the occupational activity in the exercise of which the offence was committed,
Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law	Art 5.2 disqualification for a natural person from engaging in an activity requiring official authorisation
Directive 2005/36/EC of The European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications	Art 56.2. The competent authorities of the host and home Member states shall exchange information regarding disciplinary action or criminal sanctions taken or any other serious, specific circumstances which are likely to have consequences for the pursuit of activities under this Directive, respecting personal data protection legislation provided for in

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	<p>Directives 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) The home Member state shall examine the veracity of the circumstances and its authorities shall decide on the nature and scope of the investigations which need to be carried out and shall inform the host Member state of the conclusions which it draws from the information available to it.</p>
<p>Council Decision 2009/316/JHA-6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA</p>	<p>3001 Disqualification from function</p>
<b>Specific (Commercial) Acts</b>	
<p>Council Decision 2009/316/JHA-6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA</p>	<p>3018 Prohibition to issue cheques or to use payment/credit cards</p>
<b>Public Benefits Or Aid</b>	
<p>Framework decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the</p>	<p>Art 9.1.an exclusion from entitlement to public benefits or aid;</p>

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introduction of the euro	
Framework decision 2001/413/JHA of 28 May 2001-combating fraud and counterfeiting of non-cash means of payment	Art 8.1.a: exclusion from entitlement to public benefits or aid
Framework Decision of 13 June 2002 on combating terrorism (as amended by Council Framework Decision 2008/919/JHA of 28 November 2008)	Art 8.a exclusion from entitlement to public benefits or aid
Framework decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings	Art 5.a exclusion from entitlement to public benefits or aid
Framework decision 2002/946/JHA of 28 November 2002-strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence	Art 3.1.a exclusion from entitlement to public benefits or aid
Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law	Art 7.a exclusion from entitlement to public benefits or aid
Framework decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector	Art 6.1.a exclusion from entitlement to public benefits or aid
Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking	Art 7.1.a exclusion from entitlement to tax relief or other benefits or public aid
Framework decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography	Art 7.1.a exclusion from entitlement to public benefits or aid
Framework decision 2005/222/JHA of 24 February 2005 on attacks against information systems	Art 9.1.a exclusion from entitlement to public benefits or aid
Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime	Art 6.1.a exclusion from entitlement to public benefits or aid;
Council Decision 2009/316/JHA-6 April 2009 on the establishment of	3005 Ineligibility to obtain public subsidies



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the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA	
Proposal of 30 September 2010 for a directive on attacks against information systems and repealing Council Framework Decision 2005/222/JHA (COM(2010) 517 final-30 09 2010)	12.1.a exclusion from entitlement to public benefits or aid
Proposal of 29 March 2010 for a Directive on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA	12.a exclusion from entitlement to public benefits or aid;
Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA , OJ L 101/1, 15.4.2011.	6.a exclusion from entitlement to public benefits or aid;
<b>Incapacity To Contract</b>	
Financial Regulation applicable to the general budget of the European Communities European Parliament resolution on the proposal for a Council regulation amending Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities COM(2005)0181 – COM(2006)0213 – C6-0234/2005 – 2005/0090(CNS))	Art 93 Candidates or tenderers shall be excluded from participation in a procurement procedure if [...]
Directive 2004/18/EC -31 March 2004 - coordination of procedures for the award of public works contracts, public supply contracts and public	Art. 45.1 Any candidate or tenderer who has been the subject of a conviction by final judgment of which the contracting authority is

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service contracts	aware for one or more of the reasons listed below shall be excluded from participation in a public contract
Council Decision 2009/316/JHA-6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA	3004 Incapacity to contract with public administration
Winding Up	
Framework decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro	Art 9.1.d judicial winding-up order.
Framework decision 2001/413/JHA of 28 May 2001-combating fraud and counterfeiting of non-cash means of payment	Art 8.1.d judicial winding-up order
Framework Decision of 13 June 2002 on combating terrorism (as amended by Council Framework Decision 2008/919/JHA of 28 November 2008)	Art 8.d judicial winding-up order
Framework decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings	Art 5.d judicial winding-up order,
Framework decision 2002/946/JHA of 28 November 2002-strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence	Art 3.1.d judicial winding-up order
Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law	Art 7.d judicial winding-up order
Framework decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector	Art 6.1.d judicial winding-up order.
Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the	Art 7.1.d judicial winding-up order

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constituent elements of criminal acts and penalties in the field of illicit drug trafficking	
Framework decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography	Art 7.1.d judicial winding-up order;
Framework decision 2005/222/JHA of 24 February 2005 on attacks against information systems	Art 9.1.b judicial winding-up order.
Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime	Art 6.1.d judicial winding-up;
Proposal of 30 September 2010 for a directive on attacks against information systems and repealing Council Framework Decision 2005/222/JHA (COM(2010) 517 final 30 09 2010)	Art. 12. d judicial winding-up;
Proposal of 15 December 2010 for a Directive on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA (17583/10 - 15 12 2010)	Art 12.1.d judicial winding-up;
Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA , OJ L 101/1, 15.4.2011.	Art 6.d judicial winding-up
<b>Closure Of The Establishment</b>	
Framework decision 2001/413/JHA of 28 May 2001-combating fraud and counterfeiting of non-cash means of payment	Art 8.e temporary or permanent closure of establishments which have been used for committing the offence.
Framework Decision of 13 June 2002 on combating terrorism (as amended by Council Framework Decision	Art 8.e temporary or permanent closure of establishments which have been used for committing the offence

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2008/919/JHA of 28 November 2008)	
Framework decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings	Art 5.e temporary or permanent closure of establishments which have been used for committing the offence
Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking	Art 7.1.e temporary or permanent closure of establishments used for committing the offence
Framework decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography	Art 7.1.e temporary or permanent closure of establishments which have been used for committing the offence
Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime	Art 6.1.e temporary or permanent closure of establishments which have been used for committing the offence
Council Decision 2009/316/JHA-6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA	3015 Obligation to close an establishment
Proposal of 30 September 2010 for a directive on attacks against information systems and repealing Council Framework Decision 2005/222/JHA (COM(2010) 517 final-30 09 2010 )	Art 12.1.a temporary or permanent closure of establishments which have been used for committing the offence
Proposal of 15 December 2010 for a Directive on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA (17583/10 15 12 2010)	Art 12. e temporary or permanent closure of establishments which have been used for committing the offence
Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA , OJ L 101/1,	Art 6.e temporary or permanent closure of establishments which have been used for committing the offence

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15.4.2011.	
<b>Free Movement</b>	
<b>Prohibition To Go Somewhere</b>	
Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals	<p>Art. 1</p> <p>1. Without prejudice to the obligations arising from Article 23 and to the application of Article 96 of the Convention implementing the Schengen Agreement of 14 June 1985, signed at Schengen on 19 June 1990, hereinafter referred to as the 'Schengen Convention', the purpose of this Directive is to make possible the recognition of an expulsion decision issued by a competent authority in one Member state, hereinafter referred to as the 'issuing Member state', against a third country national present within the territory of another Member state, hereinafter referred to as the 'enforcing Member state'.</p> <p>2. Any decision taken pursuant to paragraph 1 shall be implemented according to the applicable legislation of the enforcing Member state.</p> <p>3. This Directive shall not apply to family members of citizens of the Union who have exercised their right of free movement</p>
Council Decision 2009/316/JHA-6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA	<p>2001 Prohibition from frequenting some places</p> <p>2003 Prohibition to stay in some places</p> <p>2004 Prohibition from entry to a mass event</p> <p>2005 Prohibition to enter in contact with certain persons through whatever means</p>
<b>Prohibition To Leave Area</b>	
Council Decision 2009/316/JHA-6 April 2009 on the establishment of	2002 Restriction to travel abroad

<p>the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA</p>	
<p>Civil And Political Rights</p>	
<p>Council Decision 2009/316/JHA-6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA</p>	<p>3002 Loss/suspension of capacity to hold or to be appointed to public office                      3010 Loss/suspension of right to be an expert in court proceedings /witness under oath/juror                      3012 Loss/suspension of right of decoration or title                      10001 Loss of military rank</p>
<p>Right To Vote/ To Be Elected</p>	
<p>Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member state of which they are not nationals</p>	<p>Art 3 Any person [...] shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member state of residence unless deprived of those rights pursuant to Articles 6 and 7.</p> <p>Art 6.1 Any citizen of the Union who resides in a Member state of which he is not a national and who, through an individual criminal law or civil law decision, has been deprived of his right to stand as a candidate under either the law of the Member state of residence or the law of his home Member state, shall be precluded from exercising that right in the Member state of residence in elections to the European Parliament</p> <p>Art.7                      1. The Member state of residence may check whether the citizens of the Union who have expressed a desire to exercise their right to vote there have not been deprived of that right in the home Member state</p>

	<p>through an individual civil law or criminal law decision.</p> <p>Art. 10.2. When he submits his application to stand as a candidate a Community national must also produce an attestation from the competent administrative authorities of his home Member state certifying that he has not been deprived of the right to stand as a candidate in that Member state or that no such disqualification is known to those authorities.</p>
<p>Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member state of which they are not nationals</p>	<p>Art. 5.1. Member states of residence may provide that any citizen of the Union who, through an individual decision under civil law or a criminal law decision, has been deprived of his right to stand as a candidate under the law of his home Member state, shall be precluded from exercising that right in municipal elections.</p> <p>Art 9.2 The Member state of residence may also require a person entitled to stand as a candidate within the scope of Article 3 to:</p> <p>(a) state in the formal declaration which he produces in accordance with paragraph 1 when submitting his application to stand as a candidate that he has not been deprived of the right to stand as a candidate in his home Member state;</p> <p>(b) in case of doubt regarding the content of the declaration pursuant to (a), or where required under the legal provisions of a Member state, to produce before or after the election an attestation from the competent</p>

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	administrative authorities in his home Member state certifying that he has not been deprived of the right to stand as a candidate in that State or that no such disqualification is known to those authorities;
Council Decision 2009/316/JHA-6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA	3003 Loss/suspension of the right to vote or to be elected
<b>Position Within The Family</b>	
Council Decision 2009/316/JHA-6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA	3009 Loss/suspension of the parental authority 3011 Loss/suspension of right to be a legal guardian 5003 Obligation to be under the care/control of the Family
<b>Animals/Sport</b>	
Council Decision 2009/316/JHA-6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA	3019 Prohibition to keep animals 3021 Prohibition to play certain games/sports



As explained above this second table groups the references to the international effect and validity of disqualifications.

Table 2 – International effect and validity of disqualification	
European Convention of 28 May 1970 on the international validity of criminal judgments	Art 1.e “Disqualification” means any loss or suspension of a right or any prohibition or loss of legal capacity
European Convention of 28 May 1970 on the international validity of criminal judgments	Art 2.–This part is applicable to: a) sanctions involving deprivation of liberty; b) fines or confiscation; c) disqualifications
European Convention of 28 May 1970 on the international validity of criminal judgments	Art 49-52 Clauses relating specifically to enforcement of disqualification
European Convention of 28 May 1970 on the international validity of criminal judgments	Art 57 Each Contracting State shall legislate as it deems appropriate to allow the taking into consideration of any European criminal judgment rendered after a hearing of the accused so as to enable application of all or part of a disqualification attached by its law to judgments rendered in its territory. It shall determine the conditions in which this judgment is taken into consideration.
European Convention of 3 June 1976 on the International Effects of Deprivation of the Right to Drive a Motor Vehicle	International validity of driving disqualifications
Convention Implementing The Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders – Joint Declaration By the Ministers and State Secretaries Meeting in Schengen on 19 June 1990, third hyphen: arrangements for the mutual recognition of	International validity of driving disqualifications

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disqualifications from driving motor vehicles	
Council Resolution of 9 June 1997 on preventing and restraining football hooliganism through the exchange of experience, exclusion from stadiums and media policy	1. The responsible Ministers invite their national sports associations to examine, in accordance with national law, how stadium exclusions imposed under civil law could also apply to football matches in a European context.
Programme of measures of 30 November 2000 to implement the principle of mutual recognition of decisions in criminal matters	3.4. Disqualifications and similar sanctions
Council Resolution of 17 November 2003 on the use by Member states of bans on access to venues of football matches with an international dimension	<p>1. The Member states are invited to examine the possibility of introducing provisions establishing a means of banning individuals previously guilty of violent conduct at football matches from stadiums at which football matches are to be held.</p> <p>2. In order to ensure compliance with orders imposing stadium bans, Member states should supplement them with provision for penalties in the event of non-compliance.</p> <p>3. Each Member state in which stadium bans as referred to in paragraph 1 are in force is furthermore invited to consider the possibility of taking appropriate steps to ensure that orders imposing them issued domestically may also be extended to cover certain football matches held in other Member states and take into account orders issued by other Member states.</p> <p>4. If there are stadium bans in a Member state imposed by sports organisations, the competent authorities of this Member state are invited, where appropriate, to contact these organisations to examine whether such stadium bans issued</p>

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	domestically could be applicable to football matches which are to be held in other countries. Member states, where appropriate, will invite the sports organisations to exchange the information between themselves.
Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union COM(2004)334 final	2.1. Approximation of sanctions 2.1.7. Disqualification 2.1.9. Sanctions for legal persons 2.1.10. Alternative sanctions
	2.2. Mutual recognition and enforcement of criminal penalties in another Member State 2.2.4. Recognition of decisions regarding disqualification
	3.1.1. General rules of criminal law 3.1.4. Disqualification
	3.2. An incomplete range of mutual recognition instruments 3.2.3. Recognition of disqualification decisions
	4.1. Approximation of custodial penalties and alternative sanctions 4.1.4. Disqualification
	4.2. Recognition and enforcement of custodial penalties and alternative sanctions in another Member state 4.2.1. Scope of possible European Union rules 4.2.1.2. Material scope
4/5 November 2004- the Hague programme strengthening freedom, security and justice in the European Union	3.3.1 Mutual recognition The Commission is invited to present its proposals on enhancing the exchange of information from national records of convictions and disqualifications, in particular of sex offenders, by December 2004 with a view to their adoption by the Council by the end of 2005. This should be followed in March 2005 by a further

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	proposal on a computerised system of exchange of information.
10 May 2005 Action Plan (Communication from the Commission to the Council and the European Parliament The Hague Programme: Ten priorities for the next five years The Partnership for European renewal in the field of Freedom, Security and Justice)	4.2. Judicial cooperation in criminal matters Communication on disqualification (2005) Proposal on driving disqualifications (reformatting 1998 Convention) (2006)
Communication from the Commission To the Council and the European Parliament (COM (2006) 73 final, 21.02.2006)	Disqualifications arising from criminal convictions in the European Union
The Stockholm Programme adopted on 1 December 2009 – An open and secure Europe serving and protecting the citizen	3.1.1 criminal law (...)The Union should aim for the systematic exchange of information and, as a long term goal, mutual recognition of judgments imposing certain types of disqualification. The European Council invites the Commission to - study the use of disqualification in the Member states and propose to the Council a programme of measures, including exchange of information on certain types of disqualifications and, by adopting a long term step-by-step approach, which accords priority to cases where disqualification is most likely to affect personal safety or business life.
Green Paper on the modernization of EU public procurement policy Towards a more efficient European Procurement Market, COM(2011) 15 final of 27 January 2011	5.3. Exclusion of "unsound" bidders

To finalise the presentation of the results from the analysis on the effects disqualifications may have as they appear in the current body of EU level instruments, the project team wants to underline that beside the instruments adopted in the context of Justice and Home affairs, attention in this field should be paid also to initiatives taken by other DGs like DG Mobility and Transport in

Europe for example. In fact in the field of road safety a new instrument is currently under discussion, namely a proposal of the Commission for a *Directive of The European Parliament and of the Council facilitating cross-border enforcement in the field of road safety*. However, in the opinion of the project team, the adequacy of this Cross-Border Road Safety Enforcement Directive is unclear. It is unclear what its added value is, compared to the *Prüm Convention of 27 May 2005 between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross border cooperation, particularly in combating terrorism, cross border crime and illegal migration* which foresees already the exchange of data. Furthermore the offence set in the above mentioned proposal is too limited and the mutual recognition of fines, confiscation and custodial sentences is already possible through the use other approximation instruments.

Similarly, an explicit reference to driving license disqualifications is included in the COMMUNICATION FROM THE COMMISSION European Road Safety Action Programme Halving the number of road accident victims in the European Union by 2010: A shared responsibility Brussels, 2.6.2003 COM(2003) 311 final. At point 5.1.1 it is stated : “(...) The Commission believes the Member states should speed up the application of the 1998 Vienna Convention on decisions relating to the disqualification of drivers.”

#### 5.3.4.3 *Limits to mutually recognising a disqualification*

Having pointed to the lack of a generally accepted definition of disqualifications that is specific enough to encompass all the different types of disqualifications, and having brought together all existing references to disqualifications in EU instruments, it is necessary to assess the possible ways forward. It is clear not only from the position in a series of legal and position documents, but also from the replies to the questionnaire that a general approach with respect to disqualifications is welcome, even necessary. However, as clear as the need to move ahead may be, the more unclear the way to do it is. Considering the steps that have already been taken with respect to the execution of other types of sentences, it will first be assessed to what extent it is feasible to apply mutual recognition in a disqualification context.

The search for EU wide effects is inspired by the overall feeling that the current situation in which effect is limited to the territory of the member state that imposes the disqualification is insufficient as it will not avoid that subjects escape the effect of the disqualification by leaving the territory of the imposing state. This is particularly relevant in cases where the disqualification is imposed in a member state other than the member state of nationality or residence of the person concerned. Especially in those situations, convicted persons can easily avoid the effect of a disqualification.

Analysis has revealed that there are two options to make sure a disqualification is executed beyond the territorial borders of the sentencing state.

A first option allows judges to impose disqualifications with an EU wide effect. This would mean that a disqualification imposed would not only have effect within the territorial boundaries of the sentencing state, but would have an effect throughout the EU, symbolising the existence of one single judicial area. Even though it is not uncommon that the verdict of a judge has effect in another member state (e.g. in the context of confiscation it is quite common that objects in another member state are subject to confiscation), this option is very controversial. It is already controversial when the decision is imposed by a judicial authority, and considering that in most member states disqualifications can also be imposed by non-judicial authorities, this is undoubtedly an unacceptable future policy option for the member states. Taking account of the member state sensitivity with respect to the national sovereignty, this is an option that has not been further developed.

A second option seeks to introduce the concept of mutual recognition in the context of disqualifications. In the field of execution of sentences, mutual recognition entails that a member state is to recognise and execute the decision and the sentence therein passed in another member state. This means that through mutual recognition, execution is *transferred* from one member state to another member state.

The main obstacle that was identified based on a literature review and the feedback of the member states is linked to the specificity that is related to the recognition and execution of a disqualification. Different from the other situations in which mutual recognition is applied to execution of sentences, which has been characterised as transfer of execution of a decision, with respect to disqualifications it is not necessarily the convicting member states' intention to *transfer* the execution of its sentence to another member state. Rather, more commonly, the intention will be to have the decision recognised by other member states and the scope of the execution extended accordingly. The extended execution envisioned will have as a consequence that the decision maintains its effect in the original member state and is also effective on the territory of other member states. After all, when a professional disqualification imposed in one member state is mutually recognised by a second member state, this will mean that the person concerned will not be able to engage in that professional activity in both member states. This is a complicating factor that is specific for disqualifications.

This undeniable aggravating effect is considered to be an unacceptable side effect, to be inconsistent with the philosophy and the current legal framework of mutual recognition. Not only would it be contrary to the general principle that cooperation should never negatively (in casu in an aggravating manner) effect

the position of the person concerned, specific clauses dealing with different forms of aggravating effects can be found in the current international cooperation instruments:

- Art 8.4. FD Deprivation of Liberty clearly stipulates that in the case a sentence is adapted because it is considered to be inconsistent with the law of the executing member state either in terms of its nature or in terms of its duration, it must be seen to it that the adapted sentence does not aggravate the sentence passed in the issuing member state in terms of its nature or duration;
- Art. 10 FD Deprivation of Liberty also refers back to the general principle that recognition and execution of a sentence may not result in an aggravation of thereof in terms of its nature or duration;
- Art. 14 Custodial equally stipulates in the context of a provisional arrest that the duration of the sentence may not be aggravated as a result of any period spent in custody by reason of that provision;
- Art 44.2 CoE Validity that clarifies the enforcement of sanctions involving a deprivation of liberty also stipulates that the court in the executing member state shall not aggravate the penal situation of the person sentenced when compared to the sentence that was passed by the requesting member state;
- Art 48 a) CoE Validity clarifies that also with respect to the conversion of a fine into a sanction involving deprivation of liberty, it must be seen to it that this conversion does not aggravate the situation of the person sentenced as it results from the decision delivered in the requesting member state.
- Art. 10 CoE Transfer of Sentenced Persons likewise stipulates that continued enforcement may not aggravate by its nature or duration, the sanction imposed in the sentencing state;
- Art. 11 CoE Transfer of Sentenced Persons stipulates that the penal position of a sentenced person shall not be aggravated by the conversion of a sentence;
- Art 2 Additional Protocol to CoE Transfer of Sentenced Persons adds to the list that the penal position of the person shall not be aggravated in the situation a person has fled from the sentencing state;
- Art. 9 FD Alternative clarifies that the adaptation following the observation that the original decision is incompatible with the law of the executing member state in terms of its nature or duration, may not be more severe or longer then the measure that was originally imposed;
- Art 13 FD Supervision finally holds that the adapted supervision measure may not be more severe than the supervision measure which was originally imposed.

Within a mutual recognition context, this multiplicity problem can only be avoided if mutual recognition is built around a transfer of execution. So far, the instruments regulating the execution of foreign sentences and measures have all been built around that principle of transfer of execution and are therefore all based on a technique that transfers execution in its entirety to another member state. The fact that there are no execution leftovers in the issuing member state, is inspired by the consideration that the issuing member state is not the best place for execution. Additionally, for the issuing member state execution in its own territory is no policy priority. This entire transfer from the issuing member state to the execution member state of competence *in casu* to execute a sentence, is far from self-evident as a general principle in international cooperation in criminal matters in the EU. A reference to the ongoing discussions with respect to the consequences of transfer of prosecution can serve as an example thereof. In the context of transfer of prosecution, this transfer of the competence to prosecute, is subject to a complex debate. The position of transitivity in that context is far from clear. As a result, transitivity has become a concept that is often referred to when discussing the effects of a transfer of prosecution. When a member state decides to transfer the prosecution to another member state, questions arise as to the “leftovers” in the original member state and more specifically whether the decision to transfer prosecution means that the original member state has lost its competence to initiate prosecutions for the future.

If the original member state keeps its competence to initiate prosecutions, then the transfer of prosecution has given rise to a situation where a person can be subject to prosecution in at least two member states. This situation can be avoided by accepting that transfer of prosecution would entail the loss of the competence to prosecute. This is exactly what transitivity is all about; it means that the competence to prosecute is transferred from one member state to another member state, leaving no “leftovers” whatsoever in the original member state. In the current discussions on an instrument regulating the transfer of prosecution between EU member states, the outstanding question whether or not such a transfer should be linked to transitivity or not, assumes a central position.

Today, when discussing the different future policy options with respect to mutually recognising disqualifications, the discussion on transitivity emerges in the context of cross-border execution of sentences, even though in the past this has never been an issue in that context. Consequently and in analogy to transfer of prosecution, simply because it is never the intention of the issuing/requesting member state to renounce its own competences to execute the disqualification in its own territory, a transitivity discussion is unavoidable. If the convicting member state accepts the effect of the transitivity principle when the execution is transferred to another member state, there is no longer an aggravation problem.

However, this policy option is not acceptable for all types of disqualifications. It can work perfectly when the issuing member state has no



interest in the execution when e.g. the disqualification is related to the driving license of a person that merely stayed in its territory for a short period of time. The discussion soon becomes more complex when it is related to professional activities, for which the issuing member state does have an interest in retaining a disqualifying effect in its own territory. Indeed, besides disqualifications that would best be executed in the country of nationality or residence, there are also disqualifications for which it is desirable that they have a genuine EU wide effect which cannot be attained through the principle of mutual recognition. Again a reference to the Fourniret case, and thus to the disqualification to work with children when having been convicted for certain sexual offences, clarifies that for some disqualifications it makes sense to have an EU wide effect, not limited to the country of nationality or residence. For this situation, the only way to avoid the comments of aggravating effects is to find a way to introduce an equivalent disqualifying effect based on the conviction itself, rather than the execution of the disqualification measure. This means that member states would impose equivalent disqualifying effect based on a foreign conviction, which is totally legitimate and not limited by questions of aggravation and multiplication. This clarifies the limits of mutual recognition in this matter and questions whether with respect to disqualifications, the introduction of mutual recognition is the best way forward.

#### *5.3.4.4 Exploring the possibility to introduce equivalent disqualifying effects*

It can be concluded from the analysis with respect to mutual recognition, that the application of the mutual recognition principle in the context of disqualifications has two main shortcomings. First, mutual recognition will force member states to take their hands off the original decision and transfer their competence to execute along with the request seeking execution abroad in order to execute an aggravating effect. This situation is often contrary to the motivation to seek execution (also) in another member state. Second, mutual recognition can only work with respect to disqualifications that are (explicitly) imposed as a sentence in the issuing member state. Considering the wide variety of disqualifications and the practice of introducing a disqualifying effect in later situations reveals that the mutual recognition approach would constitute a significant limitation to the general legal framework to deal with disqualifications at EU level. It is particularly in light of this second consideration that an alternative to mutual recognition is presented. Instead of mutually recognising and executing the disqualification in the sentence passed, it may be possible to attach a similar disqualifying effect to the mere conviction regardless of the sentence included therein. This would mean that disqualification is based on the very fact of having been convicted for a certain offence or to a certain sentence, as opposed to merely executing the sentence itself.

Therefore, a set of policy options will be presented exploring the possibility to introduce the principle of attaching “equivalent disqualifying effects” to having been convicted for either a specific offence or to a specific sentence. It is important to make a distinction between disqualifying effects in the private sector on the one hand and disqualifications in the public sector on the other hand. This distinction is not only inspired by the observation that EU level rules on disqualifications in the public sector already exist, but also by the observation that EU level rules are likely to differ when they are applicable to the private sector.

Firstly, with respect to the private sector using information to disqualify people, the position of the project team can be summarized as follows.

In the context of previous studies, a number of so-called vulnerable sectors have been identified for which it is advisable that use of information to limit access and thus disqualify persons, is allowed and even encouraged. The most obvious sector is working with children, for which it is generally accepted that the access to those positions should be denied to persons that have been convicted e.g. for sexual offences. Follow-up research is necessary and currently conducted by the project team. The findings of previous studies should be taken as a basis to develop the first step and determine to what extent rules are necessary.

The second step should be linked to the information that can be used. Within each of the vulnerable sectors it is necessary to review how information can be obtained (be it via requesting the applicant to provide a certificate of non-prior conviction or via direct access to criminal records information, which is considered unacceptable without prior consent of the applicant) and which information can have a disqualifying effect. Not only should there be a functional link between the information and the disqualification, it is also important to ensure that only official and independent information is used. Additionally, in this context it is equally important to discuss the acceptability at EU level of the use of information beyond convictions, i.e. use information on suspects or ongoing prosecutions or even rumours.

Finally, as a third step, the necessity to harmonise the rules regulating which situations give rise to which disqualifications should be looked into. The harmonisation of disqualifying effects can provide an answer to the difficulties caused by the multiplying effect mutual recognition of a sanction brings about. The alternative to EU wide mutual recognition of a disqualifying sanction measure, would be to introduce harmonised national rules as to which convictions for which offences need to give rise to which convictions. This would mean that an equivalent disqualifying effect is created in each of the member states, based on the mere fact that a person is convicted for a certain offence. The net-effect of the two approaches is the same, namely an EU wide disqualification, be it that foreseeing in an equivalent disqualification is technically not linked to mutual recognition and thus multiplication of the effect

of the original decision which takes away the objection of aggravating effect. To the contrary, it is based on an equivalent disqualifying effect created in another member state.

Secondly, with respect to the public sector using information to disqualify persons, the position of the project team can be summarized as follows.

The first step that should be taken consists of the review of the existing mechanisms in the current body of legal instruments to assess whether their scope needs to be extended.

The second step should be to review the experiences and concerns related to the functioning of these rules in practice.

Specific attention should be paid to concerns of equal treatment and the strict application of the *lex mitior* principle. Both are linked to double criminality issues and the situation where offences or their underlying behaviour is not criminalised in all member states. This situation will significantly complicate the correct application of the “equivalent effect” that needs to be given to a foreign conviction and the equal treatment between foreign nationals and own nationals.



## 6 Critical recommendations to rethink the entirety of international cooperation in criminal matters in the EU

*Gert Vermeulen, Wendy De Bondt & Charlotte Ryckman*

Based on the extensive analysis of different cooperation domains, principles and instruments, several recommendations were developed and listed in this final chapter. The recommendations are introduced in the same sequence as the topics are dealt with in the report with a view to making it more easy to find the corresponding chapter for a more elaborate argumentation and are numbered to facilitate future referencing.

1. **Use “international cooperation in criminal matters” instead of “judicial cooperation in criminal matters”.**
  - 1.1. Considering that the distinction between police and judicial cooperation in criminal matters is not justifiable nor workable and that judicial cooperation is more than cooperation between judicial authorities, in the future the term ‘international’ rather than ‘judicial’ cooperation in criminal matters should be used;
  - 1.2. When defining the scope of debating/legislating/practicing international cooperation in criminal matters it is recommended to shift the focus from the authority involved to the aim or finality with which these authorities act. Criminal justice finality is the demarcation line which should be used – in the current EU more than ever: boundaries of the domain need to be set based on whether the authorities act with a criminal justice finality or not, meaning that actions are undertaken, aimed (not only directly) at the prevention, detection, tracing, prosecution, punishment etc of offences, execution of sentences, taking account of prior convictions;  
From a conceptual perspective, intelligence services should not operate with a criminal justice finality. However, in several situations they do operate with a criminal justice finality, or they at least contribute to actions carried out with such finality. Even though *as such* it is considered problematic to attribute tasks with a criminal justice finality to intelligence services, today’s reality clarifies why they cannot be fully excluded from the scope of ‘international’ cooperation in criminal matters;
  - 1.3. A choice should be made to clearly apply the relevant criminal law safeguard provisions to intelligence services when they are acting with a criminal justice finality (be it directly or indirectly);

- 1.4. It is advised to amend Art. 11, d FD Data Protection in order to stop that article from rendering the purpose limitation principle as confirmed in Art. 3, meaningless.
2. **Clarify the concept of a 'judicial authority' and the role thereof.**
  - 2.1. The previous set of recommendations should not be interpreted in a way that the type of authority becomes unimportant in all circumstances; A clear definition of what a judicial authority constitutes for the purpose of international cooperation in criminal matters must be adopted, and a functional distinction between judicial authorities *sensu stricto* and *sensu lato* should be used to delineate the role of judicial authorities in international cooperation in criminal matters. A judicial authority *sensu stricto* encompasses the judicial authorities in the classic sense of the word: courts (or investigative magistrates). A judicial authority *sensu lato* can also encompass prosecution authorities;
  - 2.2. At national level there is an obvious need for the involvement of judicial authorities when coercive measures, liberty depriving measures or privacy invading measures are concerned. This does not mean, however, that judicial authorities should receive reservatory competences in a cross-border context every time such measures are concerned. Firstly, regarding the FD EAW, a 'competent authority' from the EAW is sufficient given that crucial safeguards in the process of executing the EAW apply through the national systems (as imposed by a.o. Art. 11 and 14 FD EAW). Secondly, with regards to MLA measures, even those measures involving coercive measures or breaches of privacy can be left to police authorities given that they respect the same safeguards when acting with a criminal justice finality. However, the inclusion of police authorities is only acceptable under one condition: a judicial review for the person involved should be made available. Thirdly, as to the cross-border execution of sentences involving deprivation of liberty, this will in some member states be decided upon by non-judicial authorities which is, given the complex nature of the decisions, not necessarily negative. However, here too, one condition: a legal remedy for the person involved should be made available;
  - 2.3. As to the *nature* of the bodies carrying out the judicial review it should again be stressed that the name tag they are carrying is not essential. Yet, as little as the name tag matters, as much do the procedural safeguards which are applied by those bodies; as long as they abide by criminal procedural safeguards, the nature of the authority is of minor importance;
  - 2.4. As to *in which cases* judicial review needs to be foreseen, it is applaudable that Art. 18 FD EAW contains a legal remedy possibility, which can also be found in the General Approach to the European Investigation Order (EIO). Another useful remedy provision is included in the FD Confiscation. In sharp contrast, judicial review is lacking from the FD Deprivation of Liberty. It is strongly advised to include a judicial review system therein:

the detainee should be granted a right to a judicial review of the transfer decision when he/she wants to contest the issuing member state's final decision on his/her transfer. Necessarily, this goes hand in hand with an extensive motivational obligation for the issuing member state to explain why the transfer to the executing member state is expected to enhance the social rehabilitation of the prisoner.

**3. Assess the need for a refusal ground *ratione auctoritatis***

- 3.1. There is little to no empirical evidence supporting the introduction of a refusal ground *ratione auctoritatis* in the cooperation instruments. Therefore it should be removed from the FD EEW. Rather than introducing such refusal ground throughout the instrumentarium – which involves the risk of slowing down cooperation as a whole – it is more appropriate to try and solve the problems between specific member states. The few problems experienced in relation to the authorities that were declared competent to act, appear mostly in relation to the same member states;
- 3.2. Even though not explicitly stated as a refusal ground, the *ratione auctoritatis* consideration can indirectly be found in the General Approach regarding the EIO: an EIO is to be issued by a judicial authority, or is to be validated by one. Not only is this clause unnecessary, it could even harm cooperation: first, it risks inducing costs, causing loss of time and second, it risks fuelling the distrust between member states. Consequently, it is strongly advised to remove the validation requirement from the General Approach regarding the EIO.

**4. Ensure consistency with respect to the double criminality requirement; Support the practical application thereof**

- 4.1. Double criminality should not be awarded the status of general principle in international cooperation in criminal matters. The use thereof should be carefully considered taking account of the intrusive or coercive nature of the cooperation either for the person or the member state involved;
- 4.2. Because testing the double criminality requirement is quite cumbersome, it is valid to look into alternatives and ways to facilitate the testing mechanism. A consistent EU policy lifts the test for situations for which the double criminality requirement is known to be fulfilled. Member states should not be allowed to refuse cooperation when an approximation obligation exists. Double criminality testing is redundant and counterproductive when double criminality is known to be fulfilled based on obligations originating from the approximation acquis. Therefore, it is important to see to it that member states can distinguish between cases that relate to offences for which double criminality is known to be met and cases for which double criminality may be verified.
- 4.3. To support the idea that member states must refrain from requesting cooperation for futile cases, an issuing member state must be prepared – at least in a limited set of situations – to execute the cooperation order itself.

- 4.4. Once the offence list is transformed to encompass those offence labels for which the double criminality requirement is known to be fulfilled, a debate on the use beyond double criminality issues should be started, including enhanced stringency provisions;
  - 4.5. Even though there is not a right to benefit from the protection of the double criminality shield and the person involved should not be granted the right to act against a member state cooperating beyond double criminality requirement, the opposite situation does raise questions. Member states should consider introducing only optional double criminality based refusal grounds to allow the possibility for the person involved to request not to use double criminality as a refusal ground when he considers cooperation to be in his best interest. It is not unimaginable that where double criminality is used to refuse the transfer of execution to the member state of the persons nationality, the person involved would want to request his member state of nationality not to use the refusal ground and allow transfer to that member state with a view to safeguarding the best possible rehabilitation.
- 5. Further develop horizontalisation and decentralisation**
- 5.1. It is advised to seek international cooperation in criminal matters as much as possible through decentralized channels, whilst reducing the function of central authorities to being facilitators. There is a need for a targeted assessment study in order to clearly identify the practical (financial) obstacles in each member state for which a differentiated and effective support programme could then be developed;
  - 5.2. Of the two exceptions to decentralisation, being in the field of exchange of criminal records and the transfer of sentenced persons, only the latter should remain;
  - 5.3. Awareness needs to be raised that, despite considerable support for the decentralised model, almost half of the member states still have the reflex to point at the importance of central authorities in the development of national criminal policies, meaning that despite the large support for horizontalisation the very reason for the need of such horizontalisation, being the elimination of political influence in the cooperation process, is far from achieved;
- 6. Introduce explicit proportionality clauses**
- 6.1. There is a need for more explicit proportionality clauses. It is important though to clearly regulate proportionality at the issuing end (and effectively prevent disproportionate requests). To do otherwise, would permit the executing/requested state to refuse its cooperation if it considered that the importance of the matter to which the request related did not justify taking the required measure. It is advised to step up proportionality standards by clearly legislating the limits of certain instruments – in other words to legislate proportionality by referring to



concrete offences for which an instrument can be used, rather than to refer in general terms to serious offences. When cooperation is strictly regulated, strict delimitation is necessary. Only member states are invited to cooperation as much as possible (as is done e.g. in some MLA instruments with respect to unregulated forms of cooperation), a general reference to serious offences can be considered;

- 6.2. With respect to the European Investigation Order, it be noted that Art. 5a of the General Approach regarding the EIO, containing a general proportionality clause and relied upon to justify the obligatory character towards “any investigative measure” does not suffice. It is strongly advised to re-assess the obligatory character of the EIO for *any* investigative measure as such instead of relying on the general terms of the proportionality clause to induce the necessary self-restraint;
7. **Pay more attention to the criminal liability of legal persons**
  - 7.1. It is advised to step up the debate about a general introduction of criminal liability for legal persons throughout the EU, as opposed to instrument specific measures such as Art. 9, par. 3 FD Fin Pen;
  - 7.2. In the current EU policy with respect to the liability of legal persons for offences, public legal persons are not included in the scope. Considering that a lot of member states include one or more types of public legal persons within the scope of their national liability approach, the EU can consider extending its scope accordingly;
  - 7.3. The current instrumentarium regulating the mutual recognition of sentences and governing their cross-border execution is largely focused on the sanctions typically imposed against natural persons. A comprehensive and consistent policy with respect to the liability of legal persons would need to contain instruments regulating the mutual recognition of the sanctions typically imposed against legal persons;
  - 7.4. not all member states keep (complete and comprehensive) records in relation to the liability of legal persons for offence. With a view to extending the information exchange with respect to the liability of legal persons for offences in the EU, the first step would be to introduce an obligation to keep records in order to be able to provide information upon request;
  - 7.5. Analogous to the exchange and storage obligations that have been introduced with respect to the criminal records of natural persons, similar exchange and storage obligations should be introduced with respect to the liability (criminal or other) of legal persons for offences. It would significantly facilitate the taking account of prior convictions in the course of criminal or noncriminal procedures.
8. **Carefully consider the political offence exception**

Even though it can be acknowledged that the actual use of a political offence exception would be rare in many contexts, the project team advises

against removing it altogether. It remains deplorable that it was removed from the FD EAW, especially given that 70 to 80% of the member states cling onto the political offence exception in their national legislation. On the other hand, in the context of terrorism, since 1996 it has been part of the *acquis* that political offence exception cannot play. Given that the project team strongly believes that we should resolutely take the route towards a stronger and more flexible cooperation in criminal matters, this prohibition should be maintained.

**9. Reinstall the non-discrimination exception**

A refusal on the basis of serious indications of discriminatory prosecution or treatment of a suspect in the requesting/executing member state must be possible or made possible – even though it is *de facto* being applied in practice, it needs to be reinstated *de jure* as well;

**10. Rephrase the ordre public exception**

It is recommended to narrow down and tailor the ordre public clause in all EU cooperation instruments, modelled after Art. 13, par. 1, g FD EEW. If not, it is suggested to at least consider reducing it in the sense of the Dutch-German ‘Wittem’ Convention of 30 August 1979, concluded to supplement the ECMA;

**11. Expand the ne bis in idem exception**

11.1. The *Gözütok/Brügge* jurisprudence regarding *ne bis in idem* as formulated in Art. 54 SIC must be mirrored in the EU cooperation instruments as a mandatory refusal ground; the jurisprudence can be interpreted broadly in that *every* decision whereby further prosecution is definitively barred, regardless of whether it was made by a judge or not, should be seen as a case which has been finally disposed of or, in other words, as a final judgment;

11.2. Immunity from prosecution as a refusal ground

Granting full immunity from prosecution qualifies as a decision whereby further prosecution is definitively barred, hence in light of the jurisprudence referred to in recommendation 11.1, it is only logical that immunity from prosecution would be an (at least optional) refusal ground in all EU cooperation instruments. Considering the sensitive nature of the topic, scrutiny applied by Eurojust affecting the cross-border application of the refusal ground is recommended;

11.3. Art. 4, par. 5 FD EAW contains an optional refusal ground for final judgments issued in third countries. For reasons of consistency, it is strongly advised to at least introduce an optional refusal ground for final judgments issued in third countries throughout the instrumentarium;

11.4. Regardless of whether or not the above four recommendations are followed, the member states perceive it as an important problem that the application of *ne bis in idem* differs throughout the member states. Hence, agreement on what the principle entails in cross-border situations is long overdue;

**12. Also in the sphere of *ne bis in idem*: provide the possibility for Eurojust to maintain the overview of pending prosecutions and involve Eurojust when regulating the recognition of granted immunities.**

12.1. A first *ne bis in idem* related issue concerns the *barring effect* of a prosecution in one member state, which should entail a restriction for all other member states to start a prosecution for the same facts. In this regard, Eurojust should be given access to a potential future EPRIS (European Police Records Index System), which ideally should include a flagging system to indicate for each of the requests sent through that system, whether or not prosecution has already been started, or alternatively and following an assessment of the administrative burden, to a potential future register of pending investigations;

12.2. A second *ne bis in idem* related issue concerns the mutual recognition of a nationally granted immunity from prosecution, which does *not* entail an introduction of EU-wide immunity from prosecution criteria. Rather, *when* a member state has granted immunity, it is advised to give EU-wide effect to such immunity. Scrutiny is necessary: for those offences which qualify under a ‘strict Eurojust mandate’ it is advised to oblige member states to get the prior consent of Eurojust. Without this consent other member states would not be obliged to recognize the benefits. In turn, absence of consent does not *prohibit* the granting of national immunity from prosecution. Here too Eurojust access to EPRIS or alternatively to a register of pending investigations would be useful.

**13. Remove immunity or privilege as a refusal ground**

As the introduction of this refusal ground in the EU cooperation instrumentarium is a step backwards, removal is advised. International law arguments in its favour have been proven almost fully invalid.

**14. Remove extra-territoriality as a refusal ground in MLA contexts**

This exception has always taken a prominent place in extradition law – and rightly so – but it should not be transposed into mutual legal assistance instruments given the very different nature and purpose of extradition (surrender) and mutual legal assistance law. Hence, it should be deleted from the FD EEW. Consequently, it is deplorable that the refusal ground was retained in the General Approach on the EIO;

**15. Develop a framework for the position of the individual’s opinion with respect to transferring the execution of a sentence involving deprivation of liberty**

Given that under the FD Deprivation of Liberty in most cases the individual’s consent is not necessary for the choice of executing member state and acknowledging that the consent of the sentenced person should not necessarily be the only decisive factor, it is advised to develop clear guidelines in order to truly ensure that – as is demanded by the framework

decision – the purpose of social rehabilitation is served by the choice of member state;

**16. Dismiss suggestion to ‘mutually recognise refusal grounds’**

There is no reason nor a legal base for a refusal ground to sort effect throughout the EU. An EU-wide effect for certain concepts is possible, yet these are based on solid legal arguments and have no relation with a ‘mutual recognition’ of refusal grounds – a concept which is in itself contradictory and incorrect;

**17. Reconsider the mandatory or optional character of certain refusal grounds. Consider the possibility for the person involved to waive the right to benefit from the effect of certain refusal grounds.**

There is a need for a legal possibility to execute cooperation requests despite the existence of a refusal ground when the person concerned so requests; Therefore, it should be considered to introduce the possibility for the person involved to waive the right to benefit from the effect of certain refusal grounds. Flanking safeguards should exist showing that the person involved was well informed when indicating that he considers that invoking a refusal ground would be contrary to his interests. This can be done, for example through requiring that the wish not to invoke a refusal ground be expressed in written form, signed by the person concerned or his legal representative, certifying that the request was made on his request or with his permission and that, when signed by the suspect himself, he has been given the right to legal counsel.

**18. Take due account of the impact of cooperation on the financial capacity of member states; Install additional mechanisms.**

18.1. The basic principle that every member state bears its own costs unless agreed otherwise, should remain. Nevertheless, it is advised to install additional mechanisms.

18.2. Firstly, a cost sharing mechanism analogous to benefits sharing should be introduced; the threshold of 10.000 euro seems high, however, and it seems appropriate to negotiate a lower threshold. Secondly, the current measures for which the costs accrue entirely to the issuing member states should be extended to undercover operations and cross-border surveillance. Thirdly, the mechanism which is already in place allowing the executing member states to suggest less costly alternatives is useful and should obviously be retained.

18.3. In this context it be noted that the system introduced with the General Agreement regarding the EIO, being that investigative measures which used to be dealt with under the mutual legal assistance framework will be brought under a mutual recognition framework without any limits, in the sense that the EIO will “cover any *investigative measure with the exception of the setting up of a joint investigation team*” (emphasis added), is both unrealistic and unworkable and will induce serious capacity problems

when not accompanied by clear rules. Consequently, it is strongly advised to amend this provision.

- 18.4. Pointing to inconsistencies in the current benefit-sharing arrangements, it is mere logic that the benefit-sharing obligation should apply in any other situation as well (e.g. in the context of the FD Fin Pen).
- 19. Consider the introduction of ‘*aut exequi, aut tolerare*’ to cope with operational capacity concerns**
- It is advised to, in analogy to the *aut dedere aut exequi* principle, introduce an *aut exequi aut tolerare* principle. Tolerating the activity of foreign authorities on your territory is already known and widely accepted in the context of e.g. joint investigation teams. Nevertheless, the replies to the questionnaire reveal that member states are still hesitant to recognise that *acquis* and expand the practice to other forms of cooperation. Be that as it may, the debate on an idea which was put forward as far back as the Treaty of Amsterdam and is now confirmed through Art. 89 TFEU, should urgently be started.
- 20. Further develop existing and introduce new correction mechanisms**
- 20.1. Trustbuilding measures are procedural law inspired limits to mutual recognition. They are in order when the scope of the mutual recognition obligation would otherwise be unacceptable for the member states. Member states are not obliged to mutually recognise decisions that do not meet the procedural minimum requirements.
- 20.2. Minimum standards ensure that the result of a member state action is acceptable and admissible in the jurisdiction of other member states.
- 20.3. Flanking measures are necessary to flank other cooperation instruments so as to ensure their good functioning. Flanking measures to ensure the social rehabilitation is an example of a correction to the FD Deprivation of Liberty.
- 20.4. A *lex mitior* principle should apply throughout international cooperation in criminal matters to ensure that the decision on the applicable law never negatively impacts on the position of the persons involved.
- 21. Support and monitor the implementation processes**
- 21.1. Given that most of the EU cooperation instruments require more than a legislative adaption in the member states, during the implementation period active support should be provided from the EU to the national level; clear, efficient and swift communication should be established between the member states negotiators and the respective national authorities competent for the implementation, in order to allow thorough understanding and preparation of the required changes to the national legal order;
- 21.2. Blanko implementation should not be stimulated but on the contrary member states should be dissuaded from doing so: such implementation

- methods lead to 'blind' legislation which is not tailored to the national situation and therefore not functional;
- 21.3. Rather than opting for blank implementation, steps need to be taken to remove any uncertainty or doubt concerning the legal instruments. Following options would prove useful, as confirmed by practitioners: the creation of an extended explanatory memorandum for every instrument; the creation of a knowledge-based department within the EU responsible for monitoring of and assisting in the implementation process, tailored after the PC-OC (Council of Europe's own Committee of Experts on the Operations of the European Conventions on Cooperation in criminal matters); non-binding model documents, tailored after the JIT model, would prove helpful for practitioners using the relevant instruments;
  - 21.4. Concerning the directives which will replace the framework decisions, it is crucial that these do not merely consist of brushed-up copies of the classic framework decisions, but actually contain relevant changes where and if needed. The recommendations done in this Study, which are built on the inconsistencies and gaps throughout the EU cooperation instrumentarium, can serve as a guideline;
  - 21.5. It is advisable to slow down the pace of legislative initiatives and decrease the amount of legislative instruments; the latter particularly with respect to legislative instruments governing the same type of cooperation and dealing with the same subject: overlapping instruments dealing with one single topic should be avoided. In the context of the European Investigation Order it is strongly recommended to include a specific article applying the repeal and replace method, not merely to related conventions as is the case in the current General Approach to the EIO, but also and especially in relation to the FD EEW. When doing so, however, (as should be done in the context of instruments currently applying the repeal and replace method) transitional measures should be included in order to avoid a legal vacuum in case the new instrument has not been implemented by the expiry date;
  - 21.6. To enhance the national operability of the cooperation instruments training efforts at EU-level (e.g. organized by the European Commission) should be stepped up, especially by organising targeted trainings in small groups of member states which cooperate often (resulting in a higher practical relevance of and fewer language problems during the trainings). At national level the awareness of and education in EU criminal law needs to be stepped up;
  - 21.7. Active use of the infringement procedures before the ECJ is recommended (when the transition period set in the TFEU has expired), provided that the member states are given the opportunity to suggest changes to the framework decisions before they are turned into directives;
  - 21.8. Real-time updates of national implementation legislations are necessary; it is unacceptable that – except for four instruments, albeit in an insufficiently

detailed manner – the responsible EU institutions (sometimes Council, sometimes Commission, sometimes both) do not offer an overview of the implementation status throughout the EU of the relevant EU legal instruments. The mere ‘implemented’ or ‘not implemented’ status is the very minimum that those institutions should communicate to the outside world as soon as the information reaches them;

**22. Regulate cross-border witness protection**

22.1. There is no need to introduce a full-on harmonised witness protection program throughout the EU, nor should it be brought within the realm of mutual recognition: member states assisting each other cannot entail member states being forced to take care of the relocation of foreign witnesses or witnesses involved in foreign cases. However, if and when the need for protection exists, a legal framework needs to be in place in order to allow member states to help each other;

22.2. It is advised to include capacity rules in the future legal framework governing witness protection. First, those costs which exist on top of police personnel costs, such as rent, accrue to the requesting state; Second, even the costs of police personnel can rise dramatically, so flexibility is advised in that regard. Different options are a threshold and/or a mechanism whereby states can raise the alarm when certain cases would indeed become unacceptably expensive: a system can be envisaged whereby Eurojust is given a supportive role in the debate as whereto a person should be relocated;

**23. Introduce minimum evidence gathering standards to ensure admissibility of evidence**

*Forum regit actum* is an illusion in the quest for admissible evidence; Considering the conceptual flaws and weaknesses and the poor practice developed around it, the only way to adequately tackle admissibility issues is through the introduction of minimum standards with respect to the gathering of evidence;

**24. Fill the gaps with respect to supervision orders**

24.1. The scope of the FD Supervision should be extended to persons who are not present in the investigating member state. The latter would then be able to issue a ‘Supervision Warrant’ to the country of residence regardless of the presence of the person concerned in its territory. The person concerned would then be immediately placed under supervision in his member state of residence instead of in custody in the investigating member state. Only in doing so will the FD Supervision truly attain its objective, being to eliminate the discrimination between own and foreign nationals when it comes to pre-trial detention versus pre-trial supervision;

24.2. Within the FD Supervision as it stands today, the procedural aspects of the physical transfer of the person present in the investigating member state are not regulated. It is not clear whether an EAW should be issued for the

transfer, and if not (and it is indeed unlikely given that the “EAW-issuing state” – being the executing state within the application of the FD Supervision – would in that situation not be the state intending prosecution), which other legal base could serve for it. In order to turn the FD Supervision into a fully functional instrument, this aspect needs urgent regulation;

**25. Regulate the so-called “active transfer” of prosecution**

An ‘active transfer’-mechanism needs to be installed, i.e. a combination between a transfer of prosecution and the surrender of a person in execution of an EAW that would need to be issued by the member state taking over the prosecution. In those cases where both member states wish to keep the steps separate this should remain possible; however, a system which would allow to take both steps in one decision should at least be made available. Unnecessary additional administrative burden and loss of time would thus be avoided;

**26. Expand the scope of MLA instruments to also encompass the possibility to seek post-trial MLA**

Mutual legal assistance between member states, not in the investigative phase but in a phase in which a criminal case has already been brought to trial and has therefore been closed, is entirely unregulated at EU-level. Given the importance of post-trial MLA, for example coordinating the search for escaped prisoners, and the feedback from the member states in this regard, it is advised to step up EU action in this domain;

**27. Use EULOCS as a backbone for EU policy making**

27.1. An EU level offence classification system, visualising the clear distinction between those parts of offence labels for which criminalisation is known to be common and those parts of offence labels that are subject to national variation should be used as the backbone for EU policy making. To that end EULOCS was developed;

27.2. Cooperation can be speed up by lifting redundant double criminality verification because double criminality is known to be met based on the approximation *acquis* and allowing a double criminality based refusal would be inconsistent from an approximation perspective. EULOCS should be used to identify the relevant offences;

27.3. Cooperation could be stepped up if the request to deploy a specific investigative measure would be considered *per se* proportionate with respect to a set of offences identified *as such* in EULOCS (vice versa, it also provides insight into the offences in relation to which a cooperation request can be subject to a proportionality discussion);

27.4. It could be considered to prohibit capacity issues from being raised and/or for which an *aut exequi, aut tolerare* principle could be introduced for a set of offences identified as such in EULOCS;



- 27.5. Minimum standards with respect to the gathering of evidence (be it or not following a cross-border request) should be drawn up to ensure the admissibility of evidence at least for a set of priority offences as identified as such in EULOCS;
- 27.6. EULOCS could be used to identify a set of offences for which criminal records information exchange should be reorganised to ensure inclusion of sufficiently detailed information with a view to facilitating later use of the criminal records information;
- 27.7. The identification of the equivalent sentence could be automated to support the application of the adaptation provisions prior to the start of the execution of a foreign sentence for a set of offences identified in EULOCS;
- 27.8. EULOCS should be used as the basis for the delineation of the mandated offences of the EU level actors and thus clarify the scope of some of their tasks and competences.
- 28. European Public Prosecutor's Office – Eurojust**
- 28.1. The debate on the desirability and feasibility of a possible European Public Prosecutor's Office pursuant to Art. 86 TFEU needs to be linked to the possible elaboration of Eurojust's powers following Art. 85 TFEU. Especially in light of the recently elaborated powers of the latter and the fact that its mandate already covers offences against the financial interests of the European Union, the added value of an EPPO is highly questionable. The costs of creating a new full-on bureaucracy in the form of a European Public Prosecutor's Office are not justifiable, *a fortiori* if its role would be confined to crimes against the financial interests of the Union;
- 28.2. Regarding crimes against the financial interests of the Union, a supranational approach can only be justified in a complementary way: it should be confined to only those crimes which the member states cannot/do not want to prosecute;
- 28.3. In reply to the commonly used argument in favour of the creation of a separate EPPO, namely that a separate institution as envisaged in Art. 86 TFEU would – as opposed to Eurojust – have a hierarchical structure, it be noted that a Eurojust with strong national members and a College 'in charge' is in itself a hierarchical structure: indeed, a clear chain of command would equally be in place, the only difference with the envisaged EPPO would be that instead of one natural person, the top of the hierarchy is a college of several people;
- 28.4. The project team advises against focusing the discussion regarding a possible future EPPO on crimes against the financial interests of the Union. Rather, both for these crimes and for other crimes defined as "EU-worthy" a supranational prosecution approach should be envisaged. Eurojust's mandate should be extended: further powers should be granted for those EU-worthy offences. It be noted that fraud against the EU interests already form part of its mandate: the new description within its mandate following

the revised Eurojust Decision, being the generic term “fraud” instead of “fraud affecting the financial interests of the EU” allows for, when supranational action is taken, a comprehensive, efficient, conclusive approach of the occurring fraud;

- 28.5. Having established that Eurojust is the preferred framework for the creation of a future EPPO than an actual new, separate institution, it is advised to – for the EU-worthy offences – grant Eurojust the following new competences (as foreseen in Art. 85 TFEU): first, the competence of taking binding decisions regarding conflicts of jurisdiction, second, a power to initiate prosecution. *Automatically* granting officials within Eurojust initiating competences (as was the case under the Corpus Juris proposal) does not meet the subsidiarity principle. It is advised to give the new powers following Art. 85 TFEU an “ICC-like” complementary character: for the EU-worthy offences, Eurojust (read Eurojust College) should be able to ask the member states to initiate the prosecution and *only when* the member states would decline to do so, the actual initiating power should lie with Eurojust, more specifically with its national members: Art. 85, par. 2 TFEU states that in case Eurojust (read Eurojust College) is granted the power to initiate prosecution, “*formal acts of judicial procedure shall be carried out by the competent national officials*”;
- 29. Avoid creating new conflicts of jurisdiction; Develop a matrix of criteria and a prosecution policy linked thereto**
- 29.1. Only the jurisdiction to enforce (as opposed to the jurisdiction to prescribe) is dealt with in this Study;
- 29.2. It be remembered that the binding competence of Eurojust should only apply to those ‘EU-worthy’ offences as described in this Study. Naturally, Eurojust can continue to fulfil its advisory role with regard to the ‘non EU-worthy’ offences;
- 29.3. Finding the best place for prosecution should be done in a way that serves the proper administration of justice, meaning that jurisdiction is enforced by a particular State not necessarily because it can justify a strong contact point, but because it is in the best position to do this. In this context, it is recommended to include the concept of ‘reasonableness’ explicitly in any future instrument dealing with jurisdiction conflicts, making it into a concept which is up for interpretation by the ECJ;
- 29.4. An unambiguous and transparent directive containing the criteria which Eurojust will use when deciding needs to be drafted. The criteria should leave room for flexibility: every case should be looked at individually and circumstances of the case may influence the outcome. Without being fully predictable, the directive would need to at least step up the foreseeability of decisions in the future;
- 29.5. Concerning the content of a conflicts of jurisdiction directive, several recommendations are made: it is advised to develop a matrix of criteria, in

which each criterion is scored, for working with a hierarchical list of criteria will not lead to identifying the best place for prosecution. Next to the classical criteria (Art. 8 CoE Transfer of Proceedings), many of which are linked to the position of the perpetrator, victim-related criteria should be added, namely the state of ordinary residence or nationality or origin of the victim. Additionally, the state where the damage has occurred should be added to the list. Apart from these formal criteria, it is recommended that a 'prosecution policy' be developed: due regard should be given to less formal criteria which also impact on finding the best place for prosecution. Indeed, from the prosecution side it is crucial to take all practical and legal consequences of the choice of best place for prosecution, into account. Consequently, the outcome of such a comprehensive matrix might very well be that the member state with the least formal links, yet which scored high in terms of prosecution policy, would be deemed the best place to prosecute. An additional advantage is that it would make the decision more 'verifiable', a necessity for the proper functioning of the motivation obligation and potential judicial review possibilities (cfr. recommendation 29.6);

- 29.6. Means of judicial review should be installed if Eurojust were to receive a binding competence to decide on the best place for prosecution. The different identified options are: preliminary questions, both by Eurojust (if it would be qualified as a 'court' for the purpose of Art. 267 TFEU) and by national courts, competence for national level courts to rule on actions brought by individuals challenging the latter's decision, and finally remedies before the European Court of Human Rights and the International Court of Justice. Such review possibilities would go hand in hand with an extensive motivation obligation for Eurojust;
30. **Develop instruments governing the EU wide effects of disqualifications as a sanction measure**
- 30.1. It is advised to step up the debate about a general approach with respect to disqualifications as a sanction measure throughout the EU;
- 30.2. A set of policy options should be explored. First, the possibility should be explored to allow an authority to impose a disqualification that has a territorial application that encompasses the entire European Union. Second, the possibility should be explored to introduce the principle of mutual recognition with respect to disqualifications as a sanction measure. Third, the possibility should be explored to introduce the obligation to at least attach equivalent disqualifying effects to a foreign conviction.



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## **Annex – First Dephi Round**

### **1 Part 1 – The basic principles**

Comment: This first part of the questionnaire is the most elaborate part. It is estimated that two thirds of the time you spend on this questionnaire will be allocated to responding to these questions; the other parts of the questionnaire will only take the remaining third to complete.

In the first part of the questionnaire, the basic principles of international cooperation in criminal matters in the current instrumentarium will be reviewed and tested for consistency in their application and interpretation. As briefly indicated when elaborating on the project approach, the project team has identified three basic principles in the current EU body of legislation on judicial cooperation in criminal matters: gradual horizontalisation in cooperation, stringency in cooperation and the introduction of mutual recognition as the cornerstone of judicial cooperation in criminal matters in the EU.

The first questions deal with policy options related to horizontalisation in international cooperation in criminal matters and are grouped underneath heading 1.1.

Analysing the impact of horizontalisation on international cooperation in criminal matters triggers a more fundamental discussion on the scope of international cooperation in criminal matters with respect to the authorities involved. Because similar discussion points arise when analysing horizontalisation, when analysing the implications of the requirement to accept the validity of a foreign decision, when analysing the possibility to raise an incompatibility *ratione auctoritatis*, when analysing a threat to national security as a ground for refusal or postponement of execution, ... these questions have been clustered and will be discussed underneath a common heading 1.2.

Next, we will continue with the (enhanced) stringency in cooperation (i.e. the lack of a consent requirement from the executing member state, the reduced possibility to raise inconsistencies, the need to respect deadlines and the reduced possibility to raise grounds for refusal or postponement) which links in perfectly with the discussion on the position of the executing member state in the new MR philosophy. Questions related to all these aspects are clustered under the heading 1.3.

Finally, mutual recognition has the potential to have important implications for the law governing the execution of judicial cooperation. Questions on how to balance the *locus regit actum* and the *forum regit actum* principle, be it or not supported by the adoption of flanking measures are grouped underneath heading 1.4.

Please note that the introduction of the 32 MR offences, which is considered to be a key feature of mutual recognition, will be dealt with when discussing the position of offences and sanctions in judicial cooperation in criminal matters.

## 1.1 Horizontalisation

Horizontalisation, or direct communication between the authorities involved, has a significant influence on the speediness and ease of cooperation. In contrast, communication via central authorities can be complex and cumbersome.

Currently, communication via central authorities only takes place for two kinds of cooperation: first, for the transfer of persons held in custody and second for the exchange of criminal records information. Besides these two explicit exceptions, an additional option to derogate from the rule to communicate amongst authorities is foreseen in Art. 6, 2 EU MLA Convention. This article allows for a derogation of the general rule in special cases, without further clarifying what constitutes a special case.

The project team has a twofold recommendation with regard to the further horizontalisation. First, horizontalisation should be pursued throughout international cooperation in criminal matters and therefore it is advisable to eliminate the possibility to derogate from the general rule. Second, only one exception should be maintained namely for the transfer of persons held in custody. The current exception for the exchange of criminal records is no longer required. After all, the exchange of criminal records information is now regulated via the ECRIS system – which will replace the current practice of exchanging criminal records information via central authorities.

1.1.1 Q: To what extent should derogation from the general rule of horizontalisation be allowed, considering the influence on the speediness and ease of operation? To what extent do you agree that the only exception to direct communication is the transfer of persons held in custody?

Consequently, direct communication and thus further horizontalisation of the cooperation environment impacts on the importance of institutional capacity at all authority levels within the member states. Regardless of the investments in EU support mechanisms in the past (EJN, Eurojust, fiches belges, judicial atlas, etc), further investment is vital to ensure that international cooperation in criminal matters becomes a well-oiled machine. In a Union with 27 member states and 23 different languages, linguistic and translation facilities and staff are of undeniable importance. When member states send out requests/orders/ certificates in their own language to other member states that do not have this language in common with the requesting member states, obvious problems arise. Member states cannot reasonably be expected to have the capacity to have interpretation and translation facilities available for the 23 languages of the European Union.

1.1.2 Q: To what extent are language issues an important stumbling block and should horizontalisation lead to the obligation to cooperate in one common language? Is it an option to introduce English as the single language in international cooperation in criminal matters?

Analysing the impact of horizontalisation on international cooperation in criminal matters triggers a more fundamental discussion on the scope of international cooperation in criminal matters with respect to the authorities involved. Because similar discussion points arise when analysing horizontalisation, when analysing the implications of the requirement to accept the validity of a foreign decision, when analysing the possibility to raise an incompatibility *ratione auctoritatis*, when analysing a threat to national security as a ground for refusal or postponement of execution, ... these questions have been clustered in the following paragraphs.

## 1.2 Issue 1 – The scope of ICCM

There are two discussion points the project team wishes to raise: first the relation between judicial cooperation and judicial authorities and our suggestion to use international cooperation in criminal matters and second the impact this all has on rules governing data protection, limitations in use and purpose limitation.

First, as argued when elaborating on the project approach, stating that judicial cooperation equals cooperation between judicial authorities, police cooperation equals cooperation between police authorities, and likewise customs cooperation equals cooperation between customs authorities is far too simplistic and superficial to grasp the current *acquis* in each of those fields of cooperation.

The project team has two main reasons to take that position: Firstly, there is no common understanding of what a judicial authority is. Instruments that refer to the concept leave it up to the member states to decide which authorities qualify as judicial authorities. Secondly, instruments that are labelled as judicial cooperation instruments do not always require the intervention of a judicial authority let alone that cooperation is always reserved for judicial authorities only.

Furthermore, a lot of critique has been formulated on the divergent evolutions in police, customs and judicial cooperation and the different speed with which European integration of these policy areas is being pursued. This leads us to step away from distinguishing cooperation between police, customs and judicial authorities and as a consequence distinguishing between police, customs and judicial cooperation. A fresh start is taken with the introduction of 'international cooperation in criminal matters' as a base line. Within the context of international cooperation in criminal matters the authorities involved are no longer a decisive factor. One should look at the type of cooperation and decide which principles apply and when the occasion arises, whether the nature of the action and the impact for the persons concerned requires the involvement of a judicial authority, *sensu stricto*.

Stepping away from the distinction based on the authorities involved and thus the traditional distinction between police, customs and judicial cooperation is not as revolutionary as it may seem. There are already instruments that apply to both police and judicial cooperation (e.g. the data protection framework decision) and instruments that are used by both customs and judicial authorities (e.g. the Naples II Convention).

In sum, the project team will not use the concept 'judicial cooperation in criminal matters' because of the inevitable confusion with 'cooperation between judicial

authorities'. Rather the project team will review the future legal and institutional framework of international cooperation in criminal matters, starting from the type of cooperation regardless of the authorities involved.

1.2.1 Q: To what extent do you agree with the position that distinctions based on the authorities involved are non-functional and one should rather develop international cooperation in criminal matters, regardless of the authorities involved?

1.2.2 Q: To what extent can non-judicial authorities be accepted as an equal partner in international cooperation in criminal matters? Can a simple administration of justice be a competent authority for some forms of international cooperation in criminal matters?

1.2.3 Q: Please go through each of the eight cooperation domains to assess to what extent judicial authorities should have reservatory competence. Does this mean that judicial authorities always have all competences other authorities have or are exceptions necessary?

Second, it is important to assess how this influences the applicable rules on data protection, purpose limitation and limitations in use.

The current instruments on international cooperation in criminal matters introduce limitations in use in that it is stipulated that exchanged information is for police use only or that exchanged information is not to be used as evidence before a court, without validation by a judicial authority. In practice, this means additional requests have to be send and a judicial detour causes unnecessary delay. The question rises to what extent these limitations in use and the requirement for validation can be abandoned.

A parallel debate can be held with regard to the application of the purpose limitation principle, which entails that data should be processed for a specific purpose and subsequently used or further communicated only in as far as this process is compatible with the purpose of the transfer. The only exception to this rule would be those necessary in a democratic society, for example to protect national security. This explains why we have given the threat to national security as a ground for refusal or postponement a red colour in the scheme.

Finally, data protection rules are scattered over a series of instruments. At times different rules apply according to the authority involved and a distinction is made between traditional police and judicial cooperation, whereas in other instruments one single set of rules is introduced for both police and judicial cooperation in criminal matters. Considering the choice of the project team to use international cooperation in criminal matters as a base line regardless of the authorities involved, this approach should also be reflected in the debate on the applicable data protection rules.

1.2.4 Q: How does working with 'international cooperation in criminal matters' regardless of the authorities involved impact on the application of rules on data protection, purpose limitation and limitations in use?



### 1.3 Stringency in cooperation

Stringency in cooperation has a strong influence on the position of the executing member state in that there is no need to obtain the consent of the executing member state, in that there is a reduced possibility to call upon inconsistencies, in that the executing member state is to respect deadlines and in that there is a reduced possibility to call upon grounds for refusal or postponement. Because stringency in cooperation links in with the position of the executing member state in the mutual recognition philosophy, these principles are dealt with simultaneously.

We will focus this reflection on:

- The need for consent;
- Inconsistencies *ratione personae*;
- Capacity issues.

The colouring in the scheme indicates that inconsistencies *ratione auctoritatis* have already been dealt with when discussing the scope of international cooperation in criminal matters. Both inconsistencies *ratione materiae* and *ratione poenae* will be dealt with in the overarching issue on the position of offences and sanctions in international cooperation in criminal matters in the EU, later on in the questionnaire.

1.3.1 Q: Are there any problems related to inconsistencies *ratione loci* and/or *temporis* you would like to comment on in the context of this study.

- The need for consent

Accepting the validity and executing orders in a stringent regime, means there is no need for consent of the executing member state. The question arises whether this interpretation is applicable/acceptable in the entirety of international cooperation in criminal matters in the EU.

It is clear that there is no such strict interpretation in the current body of legal instruments because numerous examples exist where consent is (still) required.

First, there are a number of investigative measures that can be requested in the context of mutual legal assistance, which need consent (e.g. the setting up of a joint investigation team, the setting up of a covert operation).

Second, in the context of transfer of execution of probation measures and alternative sanctions, the obligation to cooperate is limited to the member state of the person's nationality and the member state of the person's residence. In the context of the transfer of execution of a custodial sentence, a similar limitation can be found. The member state to which the person would have been deported after the execution of the sentence, is added to the list of member state that do not need to consent to cooperation.

1.3.2 Q: Please go through each of the eight cooperation domains and indicate for which forms of cooperation the consent of the executing member state should be maintained/installed? If relevant, please specify to which member state (e.g. any

member state other than the member state of the person's nationality) your position applies.

- Inconsistencies *ratione personae*

1.3.3 Q: The project team has decided to limit this discussion point to the inconsistencies caused by the differences in accepting criminal liability of legal persons between member states. Are there any other inconsistencies *ratione personae* you would like to comment on in the context of this study?

Traditionally, there is a great deal of tolerance and respect for national sovereignty when it comes to either or not accepting the criminal liability of legal persons. Reference can be made to the obligation to criminalise certain behaviour in approximating framework decisions that allow non-criminal sanctions to be introduced for legal persons. Nevertheless, a slightly different trend can be found in international cooperation in criminal matters in which certain instruments (e.g. the framework decision on the mutual recognition of financial penalties) require the acceptance and execution of a decision recognising the criminal liability of legal persons, even though such liability is not recognised in domestic law.

The question arises to what extent mutual recognition of criminal liability of legal persons can be a general principle in judicial cooperation in criminal matters in the EU. In the current body of legal instruments, legal persons are sometimes (expressly) left outside the scope of the instrument. The framework decision regulating the exchange of criminal records information between the EU member states is limited to criminal records of natural persons, whereas the framework decision on the taking into account of prior convictions in the course of new criminal proceedings has no such limitation and suggests that prior convictions of legal persons are also to be taken into account even though there is no mechanism in place to exchange such information.

1.3.4 Q: To what extent can mutual recognition of the criminal liability of legal persons be a general principle in international cooperation in criminal matters in the EU (i.e. to what extent can the basic principles apply to the international cooperation related to legal persons)?

- Capacity issues

In the context of a previous study conducted by the project team, it became clear that the importance of both financial and operational capacity issues is largely underrated.

#### Financial capacity

Because it is a general rule in mutual (legal) assistance that execution is governed by the law of the executing member state, traditionally it is provided that the costs

are to be borne by that executing member state. However, as previous research lead to the conclusion that problems related to the financial capacity of member states as the executing member state is underrated, this matter deserves in depth reflection, notwithstanding with observation that several cooperation instruments stipulate that member states are not to claim from each other any refund of costs resulting from cooperation. Examples can be found in Art. 20 of the framework decision on the application of the principle of mutual recognition to confiscation orders, Art. 17 of the framework decision on the application of the principle of mutual recognition to financial penalties and Art. 22 of the framework decision on the application of the principle of mutual recognition to probation and alternative sanctions. Where relevant, it is further explained that the costs that have occurred on the territory of the issuing member state and costs related to the transfer of the accused/convicted person should be borne by the issuing member state. A (semi-)exception to this traditional view can be found in the 2006 framework decision on the application of the principle of mutual recognition to confiscation orders, where the possibility is introduced for the member states to agree otherwise and thus share the burden. Particularly noteworthy is the exception included in the EU MLA Convention that costs of substantial or extraordinary nature may be claimed back. Reference is made to financial capacity and financial implications of MLA in two specific articles, relating respectively to refunding (which may be waived) of certain costs that the execution of requests for hearing by video conference can entail (Art. 10.7) and the mandatory payment by the requesting member state of telecommunication interception costs (Art. 21).

The question arises whether member states can – in absence of a clause that allows member states to agree otherwise – come to a financial agreement in other than the abovementioned situations. It would in any event be inconsistent to allow a financial agreement in one but not in all forms of cooperation.

Furthermore, the 2006 framework decision on the application of the principle of mutual recognition to confiscation orders is also interesting because it holds a provision relating to the division of benefits that arise from the execution of an order or request. It has introduced the splitting of revenues from the execution of confiscation orders surpassing the amount of € 10.000 on a 50/50 basis between the executing and the requesting member state. Only if the revenues are not very significant (i.e. below € 10.000) they will accrue to the executing member state. It is inconsistent from a horizontal perspective, to introduce a such obligation to split the revenue of confiscation when no such obligation is introduced with regard to the revenue of financial penalties. In Art. 15 of the 2005 framework decision on the application of the principle of mutual recognition to financial penalties, the possibility is introduced for the member states involved to come to an agreement. There is no obligation whatsoever for the executing member state to share the revenue. Because the situation that the issuing member state has conducted a lengthy investigation and prosecution without being awarded the revenue from the execution would give way for frustration, and considering the progress made with the introduction of the obligation in the confiscation order, it seems only logical for such an obligation to also apply in any other situation.

Furthermore, it is only logical when sharing the benefits, that also the costs are shared between the member states involved and a mirroring provision is introduced as a general rule in the entirety of judicial cooperation.

1.3.5 Q: To what extent is a division of the costs and benefits compatible with the mutual recognition philosophy? To what extent should it become a general rule to share both costs and benefits as soon as the € 10.000 threshold is surpassed? Are there any other options? For which forms of international cooperation in criminal matters should there be the possibility for the executing member state to shift the financial burden back to the issuing member state?

Operational capacity

Issues related to operational capacity are potentially even a bigger obstacle for smooth cooperation. In a previous study it was already suggested to link these capacity issues to the typology of offences for which cooperation is requested as member states indicated to be more willing to cooperate for “severe cases”.

Additionally, for this reflection exercise, the project team suggests to complement this approach with a binding commitment to ensure cooperation, beyond operational capacity issues. The question arises to what extent a parallel can be drawn with the *aut dedere aut exequi* principle and introduce an *aut exequi aut tolerare* principle.

In extradition/surrender cases, the unwillingness or inability of a member state to extradite/surrender a person as an obstacle for execution is overcome by the introduction of the *aut dedere aut exequi* principle, that introduced the obligation for the member state involved to execute the decision itself. A parallel *aut exequi, aut tolerare* principle would mean that the executing member state is to execute the order of the issuing member state or alternatively (e.g. in case of operational capacity issues) tolerate the competent authorities of the issuing member state to conduct the order themselves on the other member state’s territory.

1.3.6 Q: To what extent is the idea to not only share costs and benefits, but also share operational capacity a viable idea? Is the introduction of an *aut exequi aut tolerare* principle feasible? Would this be a general option for the entirety of judicial cooperation in criminal matters or should it be limited to certain offences, certain forms of judicial cooperation?

## 1.4 Law governing execution

The strict application of the MR philosophy should lead to the conclusion that execution should be solely governed by the law of the executing member state and should thus favour the application of the *locus regit actum* principle. The executing member state accepts the validity of another member state’s decision if it was taken in accordance with the law of that member state. Likewise the latter member state should accept the way the decision is executed, as long as the decision is executed in accordance with the law of the executing member state. This reasoning represents the basic interpretation of what mutual recognition entails. However, the provisions

regulating the law governing the execution of decisions in the current body of international cooperation instruments, do not always follow this philosophy.

Two examples can illustrate this.

First, in the context of mutual legal assistance in which execution was originally governed by the law of the executing member state (i.e. *locus regit actum*), aspects of *forum regit actum* appeared. This client-orientedness of international cooperation in criminal matters is related to concerns of admissibility of evidence in a later stage of the criminal procedure. These concerns indicate that member states – at the time – were not willing to accept mutual recognition and thus free movement of evidence, which would mean that evidence collected in one member state in accordance with its domestic law and procedures, being eligible for use as evidence under its domestic law, would equally be considered as eligible for use as evidence in any of the other member states. Alternatively the possibility was introduced for the issuing member state to explicitly request that specific formalities were taken into account by the executing member state.

Second, in the context of transfer of execution of sentences, some instruments allow the issuing member state to withdraw the certificate based on either disagreeing with the way the executing member state has adapted the nature or duration of a sanction to its own criminal justice system, or the provisions related to early and conditional release or the provisions related to the sanction incumbent upon a person who has violated his or her probation conditions.

According to the project team, these possibilities are incompatible with a strict application of the mutual recognition philosophy, which would favour a *locus regit actum* regime.

A thorough reflection is needed however on the extent to which a derogation from this general rule should be allowed and/or whether alternatives to derogation are possible (e.g. via the introduction of flanking measures).

1.4.1 Q: To what extent do you agree with the position that strict application of the mutual recognition philosophy cannot but lead to the conclusion that *locus regit actum* should apply? To what extent are deviations to this rule compatible with the MR philosophy?

## 1.5 Issue 2 – Flanking measures

For your convenience, the extract of the scheme inserted indicates which aspects will be dealt with underneath this heading.

A strict application of the *locus regit actum* principle does not do away with problems caused by the differences in the criminal justice systems of the 27 member states. The solution found by requesting formalities to be taken into account or allowing the issuing member state to withdraw the certificate are considered incompatible with the mutual recognition principle.

The preferred alternative would be to introduce flanking measures to the extent needed to ensure the necessary level of mutual trust and to ensure that the application of the mutual recognition principle does not negatively impact on the position of the persons concerned to an extent that would be unacceptable.

Possible examples of flanking measures are *legio*: minimum rules for the application of investigative measures to ensure free movement of evidence, minimum rules related to procedural safeguards, minimum standards for detention conditions, minimum standards on the ranking of sanctions, minimum standards on the sanction incumbent upon violation of probation conditions.

1.5.1 Q: Please go through each of the eight cooperation domains. For which forms of international cooperation in criminal matters do you feel there is currently an introduction of (or tendency to introduce) a *forum regit actum* regime and to what extent can it be avoided through the introduction of flanking measures?

## 1.6 Final questions in part 1

Before moving to part two of the questionnaire, the project team has three more general questions. The project team asserted that three basic principles can be deduced from the current body of international cooperation instruments: gradual horizontalisation in cooperation, stringency in cooperation and the introduction of mutual recognition as the cornerstone of judicial cooperation in criminal matters in the EU.

1.6.1 Q: Having reflected on all related questions, do you consider that there are other basic principles that should have been included in this reflection exercise?

The project team characterised MR referring three characteristics: first, to the need to accept the validity of a foreign decision and execute (timely) unless there are grounds for refusal or postponement, second, the law governing the execution and third, the 32 MR offence list.

1.6.2 Q: Having reflected on all related questions, do you consider that there are other key features of MR that should have been included in this reflection exercise?

The project team indicated that the application and interpretation of the basic principles is not consistent throughout the current body of instruments regulating international cooperation in criminal matters. Therefore, we feel that it would be a better future policy option to cluster all basic principles into one single instrument that is valid for the entirety of international cooperation in criminal matters. It would not only ensure consistent application and interpretation of the principles, but would also avoid having to repeat them in each and every thematic instrument and facilitate the adaptation in light of changes in the member states' vision. Where necessary, thematic instruments can hold exceptions, which would then be more visible for the practitioners using the instruments.

1.6.3 Q: To what extent is it possible to cluster all basic principles of judicial cooperation in criminal matters into one overarching "framework instrument", not only to clearly identify the common principles and ensure consistent application thereof, but also to facilitate the adaptation in light of changes in the member states'

vision? Furthermore, deviations and exceptions can thus be more clearly described in thematic instruments.

## 2 Part 2 – The (un)regulated nature

The current body of legal instruments has a twofold problem.

First, there are difficulties related to the applicability of multiple instruments to the same situation (and a choice can/needs to be made) or the fact that applicable provisions are spread over multiple instruments.

In the past, there have been both successful and unsuccessful attempts to replace the existing jumble of instruments with one single instrument. The EAW is an example of a successful attempt, whereas not the EEW, nor the currently discussed investigation order have such an ambition.

2.1.1 Q: To what extent is it necessary/ possible to adopt integrationist instruments that cluster all relevant provisions into one single instrument?

Second, a number of cooperation mechanisms are not (sufficiently, explicitly) regulated and different opinions exist as to the applicability of the current body of instruments to specific situations (e.g. to what extent can the current mutual legal assistance instruments be used in the post-trial stage?) The question arises to what extent it is feasible/desirable to regulate the entirety of international cooperation in criminal matters in the EU to its smallest detail and to what extent the general principles as they appear in the current body of legal instruments remain applicable. We ask you to systematically reflect on each of the eight cooperation domains and assess the need for further regulation and the applicability of the basic principles.

2.1.2 Q: Mutual legal assistance is the first cooperation domain selected by the project team. To what extent does it need further regulation and to what extent can the basic principles apply? To what extent are the current legal instruments applicable in the post-trial stage? To what extent is it desirable to regulate each of the investigative measures to their smallest detail or to what extent is it desirable to maintain the flexibility of the current “providing the widest possible measure of assistance”?

2.1.3 Q: Supervision is the second cooperation domain selected by the project team. To what extent does it need further regulation and to what extent can the basic principles apply?

2.1.4 Q: Extradition and surrender is the third cooperation domain selected by the project team. To what extent does it need further regulation and to what extent can the basic principles apply?

2.1.5 Q: The exchange of criminal records information is the fourth cooperation domain selected by the project team. To what extent does it need further regulation and to what extent can the basic principles apply? To what extent should the obligation to exchange criminal records information be extended to information of

legal persons? Is a parallel system (in which the member state of the person's nationality keeps all criminal records information) feasible considering that not all member states accept the criminal liability of legal persons? To what extent is it necessary for EU bodies to have direct access to criminal records information?

2.1.6 Q: The taking into account of prior convictions in the course of new criminal proceedings is the fifth cooperation domain selected by the project team. To what extent does it need further regulation and to what extent can the basic principles apply? To what extent is it necessary to better regulate the consequences of a conviction in a foreign legal system? Is there a need to define what constitutes "equivalent national effects"?

2.1.7 Q: Witness protection and relocation is the sixth cooperation domain selected by the project team. This is currently unregulated in the EU. To what extent does it need regulation and to what extent can the basic principles apply?

2.1.8 Q: Transfer of prosecution is the seventh cooperation domain selected by the project team. To what extent does it need further regulation and to what extent can the basic principles apply? To what extent should it be possible to transfer to a member state that did not originally have jurisdiction? To what extent do we need binding indicators that can be used to find the best place for prosecution?

2.1.9 Q: Transfer of execution is the eighth and final cooperation domain selected by the project team. To what extent does it need further regulation and to what extent can the basic principles apply? To what extent does MR of disqualifications need to be regulated, especially in light of discussions on an EU certificate of non prior convictions and an EU certificate of non-disqualification?

2.1.10 Q: To what extent can the basic principles apply to aspects of international cooperation in criminal matters that remain unregulated, especially in light of need for consent, consistency issues, deadlines, grounds for refusal and postponement?

### **3 Part 3 – The position of the central European judicial authority**

For your convenience, the extract of the scheme inserted indicates which aspects will be dealt with underneath this heading.

The project team strongly believes reflection on the future institutional framework of international cooperation in criminal matters, should be founded on practical and functional needs, rather than to start a pro/contra discussion on the feasibility and desirability of setting up of an EPPO and the effect such a policy choice would have on the further development of Eurojust.

The project team addresses these discussion points from the position of "a central European judicial authority" – regardless whether the function should be taken up by Eurojust or EPPO – for each of the eight cooperation domains.

Based on the outcome of practical and functional needs, a reflection can take place on the most appropriate body and whether it is possible to include functions and competences in the Eurojust framework or whether it is necessary to create an additional judicial body.



Linked to the position of the central European judicial authority, you will be asked to reflect on the interaction with and the impact on the position of other EU level actors. The interaction between Eurojust and Europol is often the subject of debate, whereas the interaction with Olaf and Frontex receives far less attention. Nevertheless, they too (can/want/should) play a role in international cooperation in criminal matters.

Frontex is a specialised and independent EU agency tasked to coordinate in operational cooperation between member states in the field of border security and its activities are mainly intelligence driven. Nevertheless, there is an obvious link with judicial cooperation, in that trying to cross the border without a valid permit is regarded as an attempted illegal entry, which is criminalised in the 2002 Framework Decision in illegal entry, transit and residence.

Olaf in its turn is the European Anti-Fraud Office, tasked to protect the financial interests of the European Union. It achieves its mission by conducting investigations and coordinating the activities of the competent authorities of the member states. It goes without saying that Olaf is an important partner in the international cooperation against fraud, corruption and any other irregular activity including misconduct within the European institutions. It is also clear that there is a strong link between Olaf and the possible setting up of a European Public Prosecutors Office, which – according to the treaty provisions – will be primarily entrusted with the protection of the EU's financial interests.

This explains why you will be asked to go through each of the eight cooperation domains and indicate whether there is a need for support by an EU level actor. And if so, indicate which of the existing body is or bodies are most appropriate and in the latter case clarify the interaction between different EU bodies. Furthermore, when considered necessary, you can elaborate on how the existing competences should be extended and possibly to what extent the setting up of a new body (e.g. an EPPO) is desirable.

3.1.1 Q: Mutual legal assistance is the first cooperation domain selected by the project team. To what extent do you foresee a role for a central European judicial authority? Should a central European judicial authority have the competence to formulate and answer MLA requests? Should this have implications for the position of other EU level actors?

3.1.2 Q: Supervision is the second cooperation domain selected by the project team. To what extent do you foresee a role for a central European judicial authority? Should this have implications for the position of other EU level actors?

3.1.3 Q: Extradition and surrender is the third cooperation domain selected by the project team. To what extent do you foresee a role for a central European judicial authority? Should this have implications for the position of other EU level actors?

3.1.4 Q: The exchange of criminal records information is the fourth cooperation domain selected by the project team. To what extent do you foresee a role for a central European judicial authority? Should a central European judicial authority have direct access to criminal record information? Could a central European judicial authority be the central contact point for EU convictions of non-EU citizens and

maybe even EU convictions of legal persons? Should this have implications for the position of other EU level actors?

3.1.5 Q: The taking into account of prior convictions in the course of new criminal proceedings is the fifth cooperation domain selected by the project team. To what extent do you foresee a role for a central European judicial authority? Should this have implications for the position of other EU level actors?

3.1.6 Q: Witness protection and relocation is the sixth cooperation domain selected by the project team. To what extent do you foresee a role for a central European judicial authority? Should this have implications for the position of other EU level actors?

3.1.7 Q: Transfer of prosecution is the seventh cooperation domain selected by the project team. To what extent do you foresee a role for a central European judicial authority? To what extent should a central European judicial authority be competent to take binding decisions on the transfer of prosecution (i.e. including prosecutions it wishes to initiate itself)? Should this have implications for the position of other EU level actors?

3.1.8 Q: Transfer of execution is the eighth and final cooperation domain selected by the project team. To what extent do you foresee a role for a central European judicial authority? Should this have implications for the position of other EU level actors?

3.1.9 Q: What would be the added value of setting up an EPPO in light of the functions a central European judicial authority can have according to your reflection on the questions above and initiatives to strengthen the position of Eurojust?

## **4 Issue 3 – The position of offences and sanctions in judicial cooperation in criminal matters**

For your convenience, the extract of the scheme inserted indicates which aspects will be dealt with underneath this heading. Because offences and sanctions have an important impact on the functioning of international cooperation in criminal matters, references to offences and sanctions can be found in all three parts.

### **4.1 The position of offences**

The definition of what does and does not constitute an offence is part of the sovereignty of each of the member states. The difficulties caused by the differences between offence definitions have been recognised in the past and contributed to the adoption of common minimum definitions in the so-called approximating framework decisions. However, the project team considers it highly inconsistent that there is no link whatsoever between these minimum definitions and the functioning of international cooperation in criminal matters in the EU. The lack of such a link became painfully clear when problems with the 32 MR offence list surfaced.

A key feature of MR we said we would treat later on in this questionnaire, is the so-called 32 MR offence list, that appears in most – but not all – mutual recognition instruments (sometimes in a slightly different composition).

First, the main critique on this list is the lack of definitions of the offences included and thus the lack of a clear delineation of its scope, making it impossible for member states to assess the implications and the scope of the commitment that is required. This is exactly why Germany insisted on being able to attach a declaration to the EEW, setting clear boundaries to its commitment. MR instruments adopted after the EEW, all have the same possibility to make a such declaration.

The nature of the German declaration validates our position that reservations are prompted by the lack of definition. This means that the reservations related to the 32 MR offence list can easily be overcome by making it a “32 defined MR offence list”, referring to the approximation *acquis*.

4.1.1 Q: To what extent do you agree with the project team that there should be a consistent link between the approximation *acquis* and the functioning of international cooperation in criminal matters?

4.1.2 Q: To what extent is it a viable idea to limit the scope of the 32 MR offences to a list of 32 defined MR offences, by introducing commonly agreed upon definitions? What would be the consequence for offences that are currently undefined: should the 32 MR offence list be limited or should more offences be subject to approximation?

Second, considering that in one of the previous studies conducted by the project team, member states have indicated to accept more stringency in cooperation if such cooperation is limited to any of the common EU offences, the importance of creating a 32 defined MR offence list may not be underestimated. Member states indicated they would accept a further reduction of the possibility to call upon inconsistencies or grounds for refusal or postponement, they would be more willing to take formalities into account and they would be more willing to respect deadlines, in spite of capacity issues.

4.1.3 Q: For which cooperation mechanisms can a 32 defined MR offence list have added value in terms of introducing more stringency in cooperation? Is it – for example – a viable future policy option to introduce per se admissibility for anonymous witness statements for (a selection of) the 32 defined MR offences, or to introduce an obligation to execute certain investigative measures without the possibility to call upon grounds for refusal for (a selection of) the 32 defined MR offences?

Third, the project team wishes to also look at the added value of the 32 defined MR offences for the application of certain principles.

The speciality principle provides that a person extradited/surrendered (see e.g. Art 27, 2° EAW) may not be prosecuted, sentenced or otherwise deprived of his/her liberty for an offence committed prior to his or her surrender other than for which he

or she was surrendered/extradited. Within international cooperation in criminal matters the purpose limitation principle applies and some instruments introduce limitations in use. We have already discussed the impact working towards international cooperation in criminal matters regardless of the authorities involved would have on both purpose limitation and limitations in use. The remaining question here would be whether the 32 defined MR offence list can have any added value in that debate.

4.1.4 Q: For which principles can a 32 defined MR offence list have added value in terms of introducing more stringency in cooperation? Is it a viable idea to limit the speciality principle for offences outside the 32 defined MR offence list? What about the limitations in use and the purpose limitation principle?

Fourth and final, in the current body of judicial cooperation instruments, offences also appear in the mandates of the EU level actors. Here too, the main critique is the lack of definitions foreseen and the fact that some actors have introduced their own definitions in spite of the existence of a commonly agreed upon EU definition. This gives way for incompatibilities making it extremely difficult for EU bodies to cooperate.

The project team strongly believes that it would make more sense to use the 32 defined MR offence list to support the delineation of the mandated offences of the EU level actors. This would mean that Eurojust is no longer competent for terrorism as defined by the domestic legislation of each of the individual member states, but for terrorism as defined in the 2002 framework decision. Likewise, this would mean that Europol is no longer competent for trafficking in human beings as it is defined in the Europol Annex, but for trafficking in human beings as defined in the 2002 framework decision.

All EU level actors have the urge to grow. Further integration and developments in international cooperation in criminal matters leads to further development of the competences of the EU bodies. The access of EU level actors to criminal records information has been on the agenda for quite some time now. Member states are reluctant to move ahead because the mandated offences of the EU level actors are not clearly defined and member states fear that the intrusion will be too far reaching. Clearly defined mandated offences and taking a firm position on what constitutes an EU worthy offence and thus the scope of the mandated offences, has the potential to significantly facilitate the discussions on granting EU level actors access to criminal records information.

4.1.5 Q: Would you agree with our position that a 32 defined MR offence list can also support the delineation of the mandated offences of the EU level actors?

4.1.6 Q: To what extent can this operation to introduce clearly defined mandates contribute to the further development of their competences (e.g. direct access to criminal records information)?

## 4.2 The position of sanctions

Just like offences, references to sanctions appear in different contexts in the current body of instruments regulating international cooperation in criminal matters.

There are two situations the project team wishes to address: first, the possibility to adapt the nature or duration of a sanction in the context of the execution of sanctions and second, the sanction thresholds that can be found in several international cooperation instruments. Because the first situation is closely linked to the application of the *lex mitior* principle, the project team will seize this opportunity to discuss the application thereof more in detail.

First however, it is important to clarify the terminology used in the current body of legal instruments to avoid confusion and misinterpretation of reflections. “Conversion”, “continued execution” and “adaptation” are the three terms used in this respect. Conversion is used in the 1983 Council of Europe Convention to describe the situation in which the executing member state replaces the original decision by a new internal decision after having redone the criminal procedure in the executing member state. The same convention refers to continued enforcement to describe the possibility of the executing member state to change the nature and duration of a sanction in case of incompatibilities. This is the same meaning adaptation received in the EU instruments. Therefore it is advised not to use conversion and adaptation as synonyms.

A strict application of the MR philosophy, requires member states to accept a foreign decision, in spite of inconsistencies *ratione poenae* (i.e. regardless of whether the same sanction could have been granted in the executing member state). Even though the possibility to adapt either the duration or the nature of the sanction is therefore incompatible with the mutual recognition philosophy, various examples can be found in the current body of mutual recognition instruments.

Art. 13 of the 2009 framework decision on the application of the principle of mutual recognition to supervision measures as an alternative to provisional detention, introduces the possibility to replace the supervision measure with another one, provided that the situation does not negatively influence the position of the person concerned. The same possibility can be found in Art. 9 of the 2008 framework decision on the application of the principle of mutual recognition to supervision of probation and alternative sanctions and Art. 8 of the 2008 framework decision on the application of the principle of mutual recognition to sentences or measures involving deprivation of liberty. According to the project team the ability to adapt the duration and/or nature of a sanction should not be left to the discretion of the executing member state to be decided on a case-by-case basis, but should be an automatic application of the *lex mitior* principle for the persons concerned. In doing so, durations and natures will be automatically adapted to the (maximum) sanction for similar offences in the executing member state. The application of the *lex mitior* principle is very important for the project team, because mutual recognition should never negatively impact on the position of the persons concerned.

4.2.1 Q: To what extent is the “possibility” to adapt either duration or nature of a sanction compatible with the MR philosophy, in which the executing member state is

to accept the validity of the decision? Would it be better to introduce an automatic binding *lex mitior* mechanism?

4.2.2 Q: So far, the possibility to adapt the sanction is limited to sanctions involving deprivation of liberty (or are otherwise unknown in the executing member state). Should this possibility to adapt be opened up to the entirety of transfer of execution of sanctions and should it therefore be possible to also adapt the height of financial penalties?

4.2.3 Q: To what extent do you agree with our position that an index needs to be drawn up of all possible sanctions applicable in the EU, in which a ranking is foreseen to ensure that a common understanding exists on which sanctions are more severe than others and this can be taken into account when adapting a sanction?

The second situation deals with sanction thresholds introduced to limit the scope of the cooperation commitment. Some instruments indicate that cooperation is only to be granted for serious offences or offences punished with a penalty involving deprivation of liberty for at times at least 4, at times at least 5 years. However, there is no clear explanation for the diversity in the thresholds seen in the current body of instruments.

4.2.4 Q: To what extent is it necessary to work with sanction thresholds, especially in light of the possibilities to limit the scope of cooperation commitments through the 32 defined MR offence list? Have sanction thresholds lost their merit because of this? Is it possible to introduce one (set of) sanction threshold(s) applicable for the entirety of international cooperation in criminal matters?

4.2.5 Q: To what extent should decisions on whether or not behaviour meets the sanction threshold be left to the discretion of the issuing member state, or alternatively to what extent is it possible to use approximation to introduce sanction (scales)?

## **Annex – Second Delphi Round**

### **PART 1 – Clarifying the scope of the study**

#### **1 Authorities involved**

The project team is tasked to study the legal and institutional future of judicial cooperation in criminal matters in the EU. It soon became clear that the concept of “judicial cooperation” is far from self-explanatory. Rephrasing it as “cooperation between judicial authorities” does not adequately capture the current acquis in international cooperation, in which non-judicial authorities also have an important role to play. All experts agree that police, customs and central authorities are also involved in specific forms of cooperation.

##### **1.1 Is it a viable policy option to use the finality to distinguish cooperation types as opposed to authorities involved?**

###### **Position of the project team:**

Extensive debate with the European Commission and a thorough analysis of the results of the first Delphi round lead to the decision to use “criminal justice finality” as the distinguishing factor. Authorities that act with a criminal justice finality are included in the scope of the study. As a consequence, the project team refrains from using the concept of “judicial cooperation” in its scope definition and refers to the study on the legal and institutional future of “international cooperation in criminal matters”. Delineating international cooperation in criminal matters in such a way also clarifies that it is not open to actors who do not have a criminal justice finality: e.g. intelligence services are not a type of authority that could be involved in this cooperation.

Accepting that police, customs and central authorities may also play a role in international cooperation in criminal matters, is not new. This statement is supported by various cooperation instruments explicitly referring to judicial and police and customs authorities as being competent in cooperation in criminal matters:

- The *Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union* refers to national police, customs or other authorities that are authorized by national law to detect, prevent, and investigate offences (but not national security agencies) (art 2).
- The *FD on Data Protection (Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of*

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*police and judicial cooperation in criminal matters*) and the MLA Convention of 2000 also refer to these authorities. The basic principle here is that authorities that operate on the basis of the instrument do not necessarily have to be judicial, as long as they are competent pursuant to their own law and they operate with a criminal justice finality.

- Also in the Eurojust decision we find that the Eurojust national member does not have to be a judicial actor, but can also be a member of the police force (as long as the national member has the competencies required by the Decision)

### Your expert opinion:

- o Yes, I agree that criminal justice finality should be used to define and delineate international cooperation in criminal matters.
- o No, I disagree and feel that judicial cooperation *sensu strictu*, based on the authorities involved, is the most useful delineation.

The project team does not intend to suggest however that police, customs and central authorities can be equalized with judicial authorities. On the contrary, the project team wishes to underline that some aspects of international cooperation in criminal matters do require the implication of a judicial authority. Even stronger: for some aspects of international cooperation in criminal matters judicial authorities are the only authorities that could be competent (e.g. taking coercive measures). Because of this, these aspects of cooperation in which a judicial authority should be implied should be delineated more strongly, so as to make sure that the role of judicial authorities *strictu sensu* is clearly defined.

The main question at hand in cooperation in criminal matters is therefore how to set boundaries and determine which role judicial and other authorities have to play in international cooperation in criminal matters. Extensive debate is needed as to decide on the prerogatives of judicial authorities; the competence for which aspects or types of cooperation can only be attributed to judicial authorities.

The following discussion points were brought up in the first Delphi round, and will be subject of individual questions:

- Investigative measures involving a breach of privacy
- Coercive measures
- The enforcement of sentences involving deprivation of liberty
- Data protection



## **1.2 Is the involvement of a judicial authority required when an investigative measure will encompass a breach of privacy?**

### **Position of the project team:**

As mentioned before, the project team considers some aspects of cooperation in criminal matters to be a prerogative of judicial authorities. This is the case for these elements in which individual freedoms and rights are touched upon. Most national criminal justice systems therefore also require the involvement of a judicial authority in these situations. One of these elements for which the involvement of a judicial actor is logical is the use of specific privacy-related intrusive investigative measures, e.g. taking a DNA-sample. The project team wants to distinguish these measures from other privacy concerns. Here, we do not refer to privacy within the context of information exchange, in which data (and privacy) protection evidently also is an important concern. Instead, reference is made only to those specific measures of investigation for which an intrusion of privacy is required because personal data are gathered. Because of the intrusive character of these measures, the project team considers the involvement of a judicial authority to be absolutely required.

### **Your expert opinion:**

- Yes, I agree.
- No, I disagree.  
If you disagree, please explain your position:

## **1.3 Is the involvement of a judicial authority required to take coercive measures?**

### **Position of the project team:**

Another aspect of cooperation for which the involvement of a judicial authority could be proclaimed is the use of coercive measures. Also in this case, individual freedoms and rights are touched upon. At this moment, the requirement of judicial authorities for coercive measures can for example already be found in the FD EAW which requires that the issuing and executing authorities are judicial (art 6). For cooperation types that require the imposition of coercion the project team deems it logical that they would be dealt with by judicial authorities and not by police and customs.

**Your expert opinion:**

- Yes, I agree.
- No, I disagree.

If you disagree, please explain your position:

### **1.4 Is the involvement of a judicial authority required to enforce sentences involving deprivation of liberty?**

**Position of the project team:**

Imposing liberty depriving sentences is traditionally an important prerogative of judicial authorities, which is reflected in international cooperation in criminal matters. For the enforcement of sentences it can for example be found in the FD concerning sentences involving deprivation of liberty that requires issuing by a court (art 1). It is the position of the project team that the issuing of those sentences that imply a deprivation of liberty by a judicial authority is an important precondition for the cooperation with regard to enforcement of sentences. Sentences involving deprivation of liberty are in this sense different from other sentences that they are more strongly related to individual rights and freedoms than e.g. financial penalties. Moreover, sentences involving deprivation of liberty have always been protected more strongly, for example in the European Convention on Human Rights.

**Your expert opinion:**

- Yes, I agree.
- No, I disagree.

If you disagree, please explain your position:

### **1.5 Is adequate data protection possible, without the involvement of a judicial authority?**

**Position of the project team:**

Contrary to the elements of cooperation dealt with in the three previous questions, the project team argues that the involvement of a judicial authority is not required for adequate data protection with regard to the exchange of data that have already been gathered. The three areas identified above are areas that, according to the project team, require high level protection and therefore the involvement of judicial authorities is not only preferred, but should be required formally. The exchange of information on the other hand, does not necessarily need the

involvement of a judicial authority, as privacy concerns can adequately be dealt with even though judicial authorities are not involved. Data protection rules should therefore be linked to the finality of data handling, regardless of the authorities involved. The following paragraphs clarify our position.

Data protection rules related to the exchange of information concerning persons are dependent on the finality of the measure as opposed to the authorities involved. Therefore, the project team considers it to be self-evident that data protection should be as stringent for all types of cooperation in criminal matters, regardless of whether judicial, police, customs or administrative authorities are implied. One single data protection regime should bind all these actors when they are involved in cooperation in criminal matters.

According to the project team, the protection of data by other than judicial authorities (especially police and customs) should not pose severe problems. After all, currently more attention is often paid to data protection in instruments concerning law enforcement (cooperation) (e.g. data protection regulations in Prüm, or with respect to the functioning of Europol) than in instruments in which cooperation between judicial authorities *strictu sensu* is regulated (e.g. the EU MLA convention only holds one single article on data protection applicable to judicial authorities). As mentioned, even at EU level, the distinction between data protection rules applicable to police cooperation and data protection rules applicable to police cooperation is no longer made. The aforementioned 2008 Data Protection Framework Decision is applicable to both.

If we accept and assure that a stringent data protection regime applies to all these actors, the involvement of the aforementioned non-judicial authorities could even be extended beyond the limits of today, e.g. by allowing the exchange of criminal records by police actors (and Europol, which is actually already competent to hold data on convicted persons).

**Your expert opinion:**

- Yes, I agree. It is indeed not necessary to involve a judicial authority to ensure adequate data protection. Data protection rules should be as stringent for the whole package of international cooperation in criminal matters, regardless of whether a judicial, police or customs authority is involved.
- No, I disagree. The involvement of a judicial authority is essential. I do not agree that rules should be dependent on the finality involved.

If you disagree, please explain your position:

## **1.6 Is the involvement of judicial authorities required in other situations?**

**Your expert opinion:**

- Yes  
If you see other situations in which judicial authorities should be involved, please explain your position:
- No

## **1.7 Should member states be more flexible in allowing the involvement of other authorities, if the involvement of judicial authorities is clearly delineated?**

**Position of the project team:**

Taking into account the elements of cooperation for which the involvement of judicial authorities is required, it becomes clear that judicial authorities will especially be needed in specific cooperation domains. Especially international validity, transfer of prosecution, extradition/surrender and transfer of pre-trial supervision require the involvement of judicial authorities. Next to this, the involvement of judicial authorities will also be necessary with regard to some aspects of MLA (e.g. in case of intrusive investigative measures). The role of other authorities with a criminal justice finality is therefore automatically restricted to the remaining cooperation domains.

The further implication of police and customs authorities in cooperation in criminal matters would thus be (mainly) restricted to specified domains of cooperation, being MLA, witness relocation/protection and the exchange of criminal records. In these domains a greater flexibility regarding the authorities involved would be welcomed, according to the project team. After all, in these domains the elements of cooperation that require involvement of judicial authorities are not present (with the exception of intrusive investigative measures), while adequate data protection can be provided. The project team deems it necessary that other authorities, such as police and customs, could be involved more and more flexibly in these cooperation domains. Also in the operations of Europol and Eurojust, a greater flexibility in this sense is necessary, so that Europol can be involved in more aspects of cooperation than is the case today.

**Your expert opinion:**

- Yes, I agree.
  - No, I disagree.
- If you disagree, please explain your position:

## **2 Domains of cooperation**

Based on a desktop research, the project team had identified the following central domains of cooperation in criminal matters:

- Domain 1 - Mutual legal assistance
- Domain 2 – Transfer of pre-trial supervision
- Domain 3 - Extradition and surrender
- Domain 4 - Exchange of criminal records
- Domain 5 - Taking into account prior convictions
- Domain 6 - Relocation and protection of witnesses
- Domain 7 - Transfer of prosecution
- Domain 8 - Transfer of enforcement

Four concerns were raised in the replies of the first Delphi round:

- Concern 1 – the link between taking into account of prior convictions and prior disqualifications (the latter being listed as an unregulated aspect of transfer of enforcement) is not clear;
- Concern 2 – the distinction between domain 4 and 5 (i.e. exchange of criminal records and the taking into account of prior convictions) is not clear;
- Concern 3 – the link between judicial cooperation and domain 6 “relocation and protection of witnesses” is not clear.

All these concerns have been taken into account and have led the project team to adopt a new classification of the cooperation domains. Based on your remarks, the classification will be changed. The alterations made will be subject to questions in the following sections, so that we can assess whether or not you agree with the new classification.

### **2.1 Do you agree that “taking into account of prior convictions” should be linked to the discussions on the effect of foreign disqualifications?**

The first concern raised in the previous Delphi round was the link between the “taking into account of prior convictions” and the discussions on the effect “foreign

disqualifications” should have in the EU. The discussions related to the effect of foreign disqualifications were indicated by the project team as an example of a currently unregulated aspect of the transfer of enforcement.

**Position of the project team:**

Having reflected on the remarks received, we agree with the position of the experts that the effect of disqualifications also relates to the taking into account of prior convictions. Moreover, the taking account of prior convictions and the taking account of prior disqualifications are both inherent aspects of international validity of judicial decisions within the EU. After all, prior convictions are internationally ‘valid’ in the sense that member states are required to take prior convictions into account in the context of (new) proceedings, without an active request being necessary. It becomes clear then that the taking into account of prior convictions is very strongly related to the transfer of enforcement, which is also based on the validity of judicial decisions throughout the EU. Therefore, in the new classification we add the formerly separate domain 5 ‘taking into account of prior convictions’ to the newly labelled domain 7. The latter will no longer be called ‘Transfer of enforcement’ but ‘International validity of criminal judgments and disqualifications in criminal matters’.

**Your expert opinion:**

- Yes, I agree that international validity encompasses prior and current convictions, and that those previously separate domains can be merged under a new heading.
- No, I disagree  
If you disagree, please explain your position:

## **2.2 Do you agree that “exchange of criminal records” should remain separate from “taking account of prior convictions”?**

The second concern raised in the previous Delphi round was whether or not it would be better to cluster the previous domains 4 and 5, i.e. cluster the exchange of criminal records information and the taking into account of prior convictions in the course of new criminal proceedings.

**Position of the project team:**

Based on the argumentation developed above, the project team strongly believes that the taking into account of prior conviction is in essence an aspect of international

validity and therefore the link with the previous domain 'transfer of enforcement' is the most apparent.

Moreover, the exchange of criminal records is not only related to the international validity of sentences, but also links in with other cooperation domains. Moreover, the project team recognizes that this type of cooperation even touches upon matters beyond mere cooperation:

- Link with Domain 1 - The exchange of criminal records information is obviously linked to MLA as it replaces the provisions that oblige member states to annually exchange criminal record data.
- Link with (new) Domain 7 – The exchange of criminal records is obviously linked to the international validity of prior convictions as the exchange of criminal records information is an important source to be able to take prior convictions into account.
- Link with the mandates of EU level actors – The exchange of criminal records information is also related to the tasks of e.g. Europol. The project team feels it is inconsistent to agree that Europol is entitled to have information on convicted persons but deny Europol access to national criminal records databases.
- Link with data analysis and research – The exchange of criminal records should also be used to support criminological research into crime in Europe in general as well as specific crime phenomena.

Therefore the project team is reluctant to include the exchange of criminal records in one of the other domains. Maintaining criminal records exchange as a separate cooperation domain has the advantage that its autonomous character is acknowledged. Also, it avoids (implicit) limits on the discussions on the possible future use of exchanged criminal record data beyond the current use thereof.

**Your expert opinion:**

- o Yes, I agree that the exchange of criminal records information should be reflected upon separately (and deserves a separate position beyond the boundaries of the other cooperation domains).
- o No, I do not agree that the exchange of criminal records information should be dealt with separately.

Please indicate in which domain you would include the exchange of criminal records:

### **2.3 Do you agree that “Relocation and protection of witnesses” is a form of cooperation in criminal matters?**

The third and final concern with regard to the domains that define international cooperation in criminal matters related to the inclusion of “relocations and protection of witnesses” as a form of cooperation.

#### **Position of the project team:**

Relocation and protection of witnesses in criminal matters is an inherent part of cooperation in criminal matters, because its finality is related to criminal proceedings. The relocation and protection of witnesses deals after all with those individuals who cooperate or have cooperated within the framework of a judicial process.

As such, relocation and protection of witnesses differs fundamentally from other types of security oriented protection. The latter includes, among other things, the protection of VIP’s. This protection is not necessarily cross-border. Adversely, the relocation and protection of witnesses is almost by definition cross border because more often than not the territory of each individual EU member state is too limited to allow for a meaningful relocation.

Analysis in previous IRCP research lead to the conclusion that relocation should be taken up as a valuable aspect of the international cooperation in criminal matters in the EU. This position also has an official underpinning in several documents, especially with regard to organized crime, that refer to the necessity to have adequate protection and/or relocation measures.<sup>466</sup> Reference can be made for example to the Council resolution on the protection of witnesses in the fight against international organised crime (of 23 November 1995) which calls on Member States to guarantee suitable protection to the witnesses. Also, the Council Resolution of 20 December 1996 on individuals who cooperate with the judicial process in the fight against international organized crime stimulates member states to adopt appropriate measures, which could encourage individuals who have participated in a criminal organization of any kind, or in organized crime offences, to cooperate with the judicial process. Also Council Recommendation 16 of the Action programme on the prevention and fight against organised crime (of 28 April 1997) and chapter 2.8 of the Millennium-strategy (Strategy of 27 March 2000 for the beginning of the new millennium, on the prevention and control of organised crime) point to the need to examine the protection of witnesses and persons who collaborate in the action of justice. Policy interest in the matter has also been shown, for example in the Meeting of European Witnesses Protection Experts (of 5 March 2007), organised by the European Commission and in the participation of the Commission in the joint

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<sup>466</sup> Vermeulen, G. EU standards in witness protection and collaboration with justice. Antwerp-Apeldoorn, Maklu, 2005, 280p



Europol-ISISC<sup>467</sup>-OPCO<sup>468</sup> working group with the aim of exploring the possibilities for the harmonisation of the national legislation on witness protection.<sup>469</sup>

**Your expert opinion:**

- Yes, I agree that relocation and protection of witnesses is a form of cooperation in criminal matters
  - No, I do not agree that relocation and protection of witnesses is a form of cooperation in criminal matters
- If you do not agree, please explain your position

## **PART 2 – Interpretation of leading principles**

### **1 Horizontalisation & direct communication**

Cooperation in criminal matters often allows for direct communication between competent authorities. Based on your responses to the first Delphi Round, we found that the support for direct communication among this group of experts is manifestly present. The conclusion could therefore be that central authorities should be involved for the least as possible, unless for domain 8 (concerning international validity) and for the temporary transfer of prisoners based on MLA provisions (domain 1). The use of central authorities for those matters is an inherent requirement and cooperation for these matters could not be handled differently.

All the other aspects of international cooperation in criminal matters should however be handled as much as possible through decentralized channels. It allows for political and interstate dimensions to be cut out of cooperation as much as possible, and no detours in cooperation through funnels and buffers hinder cooperation.

#### **1.1 Should the preferred use of direct communication be accepted as an adequate international cooperation policy line for the future?**

- Yes, I agree.
  - No, I disagree.
- If you disagree, please clarify your position

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<sup>467</sup> International Institute of Higher Studies in Criminal Sciences (ISISC)

<sup>468</sup> Monitoring Centre on Organized Crimes (OPCO)

<sup>469</sup> ISISC-OPCO-EUROPOL. Harmonisation of Witness Protection Legislation - Final proposal of the ISISCOPCO-Europol working group on minimum requirements for potential legislation at European Union level, Explanatory Report. (Italy: Siracusa: International Institute of Higher Studies in Criminal Sciences, 2005)

## 1.2 What should be the role of Central Authorities in cooperation in criminal matters?

### Position of the project team:

That direct communication is preferred, taking into account the reservations explained above, does not mean that central authorities could not have a valuable function in the framework of international cooperation (also in other matters than enforcement of sentences). Although the ordinary channels used would be direct channels, central authorities could have an important added value and should be regarded as a plus in relation to direct communication. Besides their evident operational supporting tasks, the following specific issues are reserved for central authorities:

### Your expert opinion:

- Central Authorities could and should take up more tasks related to the monitoring, managing and evaluation of international cooperation in criminal matters. In this case, decentralized authorities would be required to log acts of international cooperation in criminal matters or report those acts on a semi-regular basis (e.g. annually). Using the logs or reports of the decentralized authorities, central authorities could evaluate practice and identify good/bad practices, without supplementary efforts by the decentralized authorities being necessary.
- Central Authorities should have a role in balancing cooperation against matters touching upon the '*ordre public*', incorporating both public safety matters and national interests. After all, the rationale of an '*ordre public*' lies in protecting national security interests and (classified) (state) intelligence against interference or unwanted disclosure through criminal investigations (irrespective whether these are domestic or foreign investigations). Decentralized authorities could contact a central authority regarding matters related to the '*ordre public*' of the requested country.
- Other: Please clarify your position by given concrete examples of what this controlling role should/could entail

## 2 Mutual recognition

A strict interpretation of mutual recognition entails mutual commitment from all parties involved. This means that all member states involved accept each other's procedures when cooperating in criminal matters: the executing member state accepts the validity of a decision of the issuing member state, and the issuing member state accepts the way its decision is executed.

Irrefutably, the Tampere Presidency Conclusions clearly pointed out that decisions should be dealt with as if they were taken by national authorities. The acceptance of a decision as if it were an internal decision means it can be executed in the same way as an internal decision.

Therefore, the interpretation of mutual recognition in the current debates often is too one-sided. Merely "accepting the validity of a foreign decision and executing it" fails to include the consequences mutual recognition should have for the issuing member state. Both sides of the mutual recognition coin are visualized in the following scheme.

However, applying this theoretical approach of the meaning of mutual recognition has encountered practical and other obstacles in current cooperation instruments. Therefore, today's reality in the current *acquis* of cooperation instruments is very complex.

The strictness which is supposed to be present in mutual recognition cannot entirely be found in the various cooperation domains. In the first place, this strictness is not necessarily present with regard to accepting the way the decision is executed (i.e. the application of the law of the executing state). A series of instruments do not follow this strict interpretation, but (also) allow the law of the issuing member state to apply in the execution of the decision. Deviations from what should be the main principle (i.e. the executing state applies its own law when executing a decision issued in another member state) were deemed necessary based on actual cooperation needs. The reason for member states to seek recourse to the application of their own law and the possibility of the issuing member state to request that certain formalities are taking into account when executing its decision, are mainly linked to the admissibility of evidence in a later stage of the criminal procedure (e.g. in MLA). As will be argued below, this exception to the general rule of mutual recognition does not provide for a comprehensive solution as not all problems are adequately and/or completely solved. For example, the application of the law of the issuing state, even with regard to MLA and the gathering of evidence, does not solve the issue of the admissibility of evidence that has already been gathered. Also, the taking into account of aspects of the law of the issuing state, even with regard to the enforcement of sentences, does not deal with incompatibilities between the law of the issuing and the executing state.

In the second place, the strictness with regard to mutual recognition is also not always applied in the sense that the validity of the sentence is not always accepted. With regard to pre-trial supervision, the FD provides that, if the nature of the supervision is incompatible with the law of the executing state, the type of supervision measures may be adapted to measures which apply to equivalent offences. In this cooperation domain, formalities of the law of the issuing state are adapted so that they are compatible with the law of the executing state. Similar arrangements apply to transfer of enforcement procedures.

This being said, the project team would also like to stress that the principle of mutual recognition is not without boundaries. Firstly, the project team wants to note that the principle of mutual recognition is not applicable to some cooperation forms, such as JIT's or relocation. These cooperation forms require such tailor-made

arrangements and are so specific in nature, that no 'orders' can be introduced here. Secondly, mutual recognition also has limits because of compatibility issues with the law of the executing state: for some specific measures, such as telephone interception or taking a DNA-sample, it should remain possible for a requested member state to refuse the execution unless the measure is fully compatible with its own national law. For some aspects of cooperation, it can thus be important to have a dual locus test which implies that specific investigative measures are only execution in the framework of international cooperation if they could have been taken in a similar national case.

These obstacles also surfaced in the first Delphi round, as your expert responses referred to valid concerns on how to deal with the differences between the criminal justice systems of the member states. The feedback received in the first Delphi round is centred around four main discussion points:

- the law applicable to the order/decision when working in a mutual recognition context (2.1.)
- the law applicable to the execution when working in a mutual recognition context (2.2.)
- the capacity issues when working in a mutual recognition context (2.3.)
- the extent to which differences in legal principles (i.c. liability of legal persons) in criminal justice systems are to be accepted when working in a mutual recognition context (2.4)

## **2.1 Law applicable to the order/decision in the issuing member state**

A strict interpretation of mutual recognition, as explained above, would mean that the issuing member state applies its own national law when it issues an order/a decision. The executing member state is to accept the validity of the order/decision if it was taken in accordance with the law of the issuing member state.

When looking at cooperation in mutual legal assistance, it becomes clear that the differences in the member states' criminal justice systems give way for incompatibilities. The question arises to what extent these incompatibilities are a valid refusal ground.

### **2.1.1 *Should member states yield to inconsistencies racione auctoritatis?***

#### **Position of the project team:**

Because the authorities involved in international cooperation in criminal matters vary across member states, it might very well be that an order/a decision taken in the issuing member state, could not have been taken by that authority in the executing member state. According to the project team, the executing member state should never be allowed to use that inconsistency racione auctoritatis as a ground to refuse cooperation.

**Your expert opinion:**

- Yes, I agree, without any limit to the obligation to yield to inconsistencies *ratione auctoritatis*.
- Yes, I agree, but the obligation to yield to inconsistencies *ratione auctoritatis* should be limited to situations that involve any of the 32 MR offences.
- Yes, I agree, but the obligation to yield to inconsistencies *ratione auctoritatis* should be limited in another way.  
If you feel the obligation should be limited in another way, please clarify your position.
- No, I disagree. Member states should be allowed to call upon inconsistencies *ratione auctoritatis* to refuse cooperation.  
If you disagree, please clarify your position.

**2.1.2 *Should member states yield to inconsistencies ratione personae?***

**Position of the project team:**

Some investigative measures cannot be deployed against specific categories of persons. Member states may have limitations in the possibility to deploy investigative measures against minors or against persons with a reduced accountability. The regulations of these limitations vary across member states. Therefore, it might very well be that an executing member state is confronted with an order/decision that could not have been taken against the type of person involved. According to the project team, the possibility to call on this kind of inconsistencies *ratione personae* should be limited.

**Your expert opinion:**

- Yes, I agree, without any limit to the obligation to yield to inconsistencies *ratione personae*.
- Yes, I agree, but the obligation to yield to inconsistencies *ratione personae* should be limited to situations that involve any of the 32 MR offences.
- Yes, I agree, but the obligation to yield to inconsistencies *ratione personae* should be limited in another way.  
If you feel the obligation should be limited in another way, please clarify your position.
- No, I disagree. Member states should be allowed to call upon inconsistencies *ratione personae* to refuse cooperation.  
If you disagree, please clarify your position.

**2.1.3** *Should member states yield to inconsistencies ratione temporis?*

**Position of the project team:**

Some investigative measures can only be deployed within a certain time-span. Most member states have a fixed time-span within which a house search can be legally conducted. The regulations of these time limits vary across member states. Therefore, it might very well be that an executing member state is confronted with an order/decision that could not be ordered within the indicated time-span. According to the project team, the possibility to call on this kind of inconsistencies ratione temporis should be limited.

**Your expert opinion:**

- Yes, I agree, without any limit to the obligation to yield to inconsistencies ratione temporis.
- Yes, I agree, but the obligation to yield to inconsistencies ratione temporis should be limited to situations that involve any of the 32 MR offences.
- Yes, I agree, but the obligation to yield to inconsistencies ratione temporis should be limited in another way.  
If you feel the obligation should be limited in another way, please clarify your position.
- No, I disagree. Member states should be allowed to call upon inconsistencies ratione temporis to refuse cooperation.  
If you disagree, please clarify your position.

**2.1.4** *Should member states yield to inconsistencies ratione materiae?*

**Position of the project team:**

Some investigative measures can only be deployed in the context of certain offences. Some member states will not allow certain investigative measures for minor offences. The regulations of the use of investigative measures for certain offences vary across member states. Therefore, it might very well be that an executing member state is confronted with an order/decision that could not be ordered in the context of the offences involved. According to the project team, the possibility to call on this kind of inconsistencies ratione materiae should be limited.

**Your expert opinion:**

- Yes, I agree, without any limit to the obligation to yield to inconsistencies ratione materiae.

- Yes, I agree, but the obligation to yield to inconsistencies *ratione materiae* should be limited to situations that involve any of the 32 MR offences.
- Yes, I agree, but the obligation to yield to inconsistencies *ratione materiae* should be limited in another way.  
If you feel the obligation should be limited in another way, please clarify your position.
- No, I disagree. Member states should be allowed to call upon inconsistencies *ratione materiae* to refuse cooperation.  
If you disagree, please clarify your position.

**2.1.5** *Should member states yield to inconsistencies ratione loci?*

**Position of the project team:**

The use of some investigative measures is limited according to the location. Member states may have different definitions of the locations that can be subject to a house-search. Therefore, it might very well be that an executing member state is confronted with an order/decision that could not be ordered in the context involved. According to the project team, the possibility to call on this kind of inconsistencies *ratione loci* should be limited.

**Your expert opinion:**

- Yes, I agree, without any limit to the obligation to yield to inconsistencies *ratione loci*.
- Yes, I agree, but the obligation to yield to inconsistencies *ratione loci* should be limited to situations that involve any of the 32 MR offences.
- Yes, I agree, but the obligation to yield to inconsistencies *ratione loci* should be limited in another way.  
If you feel the obligation should be limited in another way, please clarify your position.
- No, I disagree. Member states should be allowed to call upon inconsistencies *ratione loci* to refuse cooperation.  
If you disagree, please clarify your position.

**2.2 Law applicable to the execution in the executing member state**

A strict interpretation of mutual recognition, as explained above, would mean that executing member states apply their own national law when they execute a decision taken in another member state. The following scheme visualizes the continuum between the application of the law of the executing

and the law of the issuing member state in current instruments and debates on proposed instruments.

The most important question in dealing with mutual recognition in criminal matters is therefore to which extent the law of the executing state could/should be applied and to which extent allowing the application of the law of the issuing state is acceptable.

**2.2.1 *Do you agree that marking out the limits of the application of the law of the issuing and executing state, is a necessary and viable line of thinking for the future?***

- Yes, I agree.
- No, I disagree.

If you disagree, please clarify your position

The project team wants to structure the debate along two possible ways out. First, the question arises to what extent the adoption of minimum rules can avoid seeking recourse to the application of the law of the issuing state. In particular, the project team is of the opinion that minimum rules are needed for MLA (related to procedural safeguards and investigative techniques) and for detention conditions (in view of the international validity of sentences involving deprivation of liberty).

Second, the question arises to what extent ensuring the applicability of the “*lex mitior*” is a viable guideline when attempting to find the right balance between the application of the law of the issuing or the executing state.

**2.2.2 *Minimum standards***

In two specific cooperation domains it could be worthwhile to complement mutual recognition with minimum standards in cross border cases.

Firstly, with regard to MLA and the gathering of evidence, it is often important that certain formalities are taken into account for some investigative measures to ensure admissibility of evidence in a later stage in the criminal procedure. However, recourse to the application of the law of the issuing state and the possibility to request that certain formalities are taking into account is not an overall solution, as it does not accommodate problems related to existing evidence.

A useful alternative could be to provide for minimum standards in investigative measures (e.g. regarding house search, interception of telecommunications). Admissibility problems could be solved, if all member states could agree on the minimum standards that should be met in order for



evidence to be admissible in a later stage in the criminal procedure. In doing so, evidence gathering techniques are harmonized as far as necessary to ensure admissibility, which means that it is no longer necessary to ask for certain formalities to be taken into account. Even though the net effect is the same for the gathering of new evidence, the project team feels this is a better alternative as this approach has the additional potential of avoiding admissibility problems linked to existing evidence and is more true to the meaning of mutual recognition.

Secondly, a need for minimum standards can also be felt in relation to the enforcement of sentences involving deprivation of liberty. Now that judicial decisions imposing such decision are valid EU-wide, differences in detention conditions between the member states of the EU have become a tangible issue in international cooperation. After all, if detention circumstances are too divergent, it can hardly be argued that the sentence could not be altered fundamentally by transferring the enforcement of the sentence. In order to overcome and to preempt such differences, the adoption of minimum standards is recommendable.

It is not the intention of the project team to use minimum standards in such a way that they reflect a lower level of trust among the member states of the EU than would be applied with third states. However, whenever the cooperation in the EU is more far-reaching than the cooperation which is used with third states, it is the opinion of the project team that in those cases higher standards could be required. Because strengthening requirements on procedural safeguards for cooperation in the Union (as opposed to cooperation with third countries) is only justified insofar as the cooperation in the EU is more far-reaching than cooperation with third countries, the project team considers the two domains mentioned to be the domains which are most in need of such minimum standards. After all, in these cooperation domains cooperation would be more far-reaching if (i) a *per se* admissibility of evidence is to be used in the framework of MLA and (ii) the executing state is bound to enforce sentences imposed in another member state. The use of minimum standards would be legitimate here, in respect to the cooperation with third states, because it is attached to a more far-reaching cooperation.

**To what extent is it possible to yield inconsistencies as a way to temper the application of the law of the issuing state in MLA?**

**Position of the project team:**

When looking at cooperation in mutual legal assistance, it becomes clear that the solution sought to overcome differences in criminal law between the cooperating states is different from the situation in other cooperation domains and are taken care of in different ways. For example: the FD EAW allows for the person to be arrested and detained according to the law of the executing state, while the admissibility of

the arrest in the issuing state has not given rise to the (partial) application of the law of the issuing state.

In comparison, related to MLA the impact of the law of the issuing state is – possibly – far greater. If the application of the law of the issuing state was not deemed necessary with regard to EAW, even though the cooperation requested relates to ongoing proceedings, it could be possible to also temper the application of the law of the issuing state in MLA.

**Your expert opinion:**

- Yield to inconsistencies *ratione auctoritatis*:** the law of the executing member state should apply to execution, even if this would cause an inconsistency *ratione auctoritatis* with the law of the issuing member state, in that the authority involved in the execution could not have been involved according to the law of the issuing member state.
- Yield to inconsistencies *ratione temporis*:** the law of the executing member state should apply to execution, even if this would cause an inconsistency *ratione temporis* with the law of the issuing member state, in that, for example, a house search was conducted within a time-span in which it could not have been conducted according to the law of the issuing member state.
- Yield to other inconsistencies.**  
Please elaborate if you want to suggest any other inconsistencies that should be accepted by the issuing member state.
- No yield to inconsistencies is desirable.**  
Please clarify your position if you feel that no yielding to inconsistencies is desirable.

2.2.2.1 *Is it a viable future policy option to explore the possibility of introducing minimum standards to accommodate the current necessity to apply the law of the issuing state?*

**Position of the project team:**

Certain incompatibilities in the laws of the different member states cannot be overcome however by tempering the application of the law of the issuing state. This is especially true for those types of cooperation which have been mentioned above: MLA and the validity of sentences (involving deprivation of liberty). With regard to MLA, the project team argues that, where differences between the member states are the greatest, certain flanking measures are needed in the form of minimum standards for the application of investigative measures (e.g. for the application of covert investigations or controlled deliveries). Instead of using *forum regit actum*, in view of the admissibility of evidence, rather minimum standards should be used so as to avoid conflicts in applicable laws. With regard to cooperation for the enforcement of custodial sentences, minimum standards with regard to detention conditions are

needed so as to avoid excessive differences in the penal position of the transferred person.

**Your expert opinion:**

- Yes, thinking about the introduction of minimum standards is a useful line of thinking for the future. The introduction of minimum standards is the only way to ensure a genuine application of the mutual recognition principle. Working with minimum standards should replace the application of the law of the issuing state in MLA-matters.
- Yes, this kind of flanking measures to introduce minimum standards is the only way to ensure a genuine application of the mutual recognition principle. However, it will never be possible to fully do away with *forum regit actum* in MLA-matters.
- No, minimum standards are not useful in this context.

2.2.2.2 *Should the use of minimum standards be limited to cross-border situations?*

**Position of the project team:**

The current debates on the introduction of minimum standards have often lost the link with cross-border situations, i.e. situations that involve multiple member states in the investigative and prosecutorial acts, even though those situations were the reason to start the debate and reflection on the necessity for EU intervention.

The project team would like to refer to the debate on minimum standards for procedural rights as an example. The baseline for the debate is that the level of procedural rights should not be affected by whether or not multiple member states are involved. Any debate on the necessity for EU intervention should start from an EU perspective, which means that only problems arising from cross-border and multi-member state criminal proceedings should be subject to debate. The direction chosen with the 2009 Roadmap on procedural rights as the sequel to the failed 2004 proposed framework decision has clearly lost that link with cross-border situations. The Roadmap calls for strengthening a list of traditional fair trial rights such as the right to translation and interpretation, the right to information on the charges and the right to legal aid and advice. Even though we do not intend to minimise the importance of these rights, we consider the formulation of this Roadmap a bridge too far in that it insufficiently clarifies why these rights are the most important concerns in cross-border multi-member state criminal proceedings. The strengthening of these rights is first and foremost inspired by pragmatic and ideological concerns to attain an area of freedom, security and justice in which European citizens and residents can reasonably expect to encounter equivalent standards of procedural rights throughout the EU. This is however beyond the scope of justified EU intervention and is incompatible with the statement that the diversity between the member states' criminal justice systems should be respected unless differences hinder cooperation.

**Your expert opinion:**

- Yes, I agree.
- No, I disagree.

If you disagree, please clarify your position:

2.2.2.3 *Should member states implement the minimum standards into their national criminal justice systems?*

**Position of the project team:**

Minimum rules can be used in different ways. The two most obvious options are

- Integrating the minimum standards into the national criminal justice systems. This means that approximation of the criminal justice systems via implementing minimum standards neutralizes the differences that give way for inadmissibility problems.
- Maintaining a so-called 28<sup>th</sup> EU regime that is used in cross-border situations to avoid incompatibility problems. This means the 27 different regimes of the member states co-exist with the 28<sup>th</sup> EU regime.

The project team has three reasons for arguing in favour of an integration of the minimum standards into the national criminal justice systems of the member states.

First, it is unacceptably complex to have practitioners work with different regimes according to the either or not cross-border character of a cases.

Second, it amounts to equal treatment problems if the regime applicable to a person is dependent on whether or not a case is cross-border or not.

Third, a 28<sup>th</sup> EU regime is non-functional in that it is not always clear from the start whether or not a case is cross-border and therefore maintaining a 28<sup>th</sup> EU regime will not solve problems with existing evidence.

Alternatively, integrating the minimum standards in each of the 27 national criminal justice systems will not overcomplicate decisions on the applicable law, it will ensure equal treatment regardless of the cross-border nature of a case and above all, it will avoid inadmissibility problems as the minimum standards are ideally specifically designed to neutralize any problems.

**Your expert opinion:**

- Yes, I agree.
- No, I disagree.

If you disagree, please clarify your position:

2.2.2.4 *Should the adoption of EU minimum standards present a clear added value when compared to existing ECHR standards?*

In deciding what these minimum standards should look like, the jurisprudence of the European Court of Human Rights could serve as a major point of reference. In its jurisprudence, key principles can be found to guide the admissibility of evidence. The question is however, if the principles deducted from this jurisprudence are adequate, or if higher or lower standards are necessary.

**Your expert opinion:**

- (>ECHR) The standards should have a clear added value (i.e. be more strict) when compared to the standards elaborated in the jurisprudence of the European Court of Human Rights.
- (=ECHR) The standards should mirror the standards elaborated in the jurisprudence of the European Court of Human Rights.
- (<ECHR) The standards may be lower than the standards elaborated in the jurisprudence of the European Court of Human Rights.

2.2.2.5 *Is the feasibility of minimum standards limited to a number of the cooperation domains?*

The project team has indicated that it would like to see minimum standards with regard to (admissibility in) mutual legal assistance and detention circumstances. To conclude, we would like you to point out which cooperation domains are, according to you, the most suitable and preferred for the use of minimum standards. Please indicate the domains for which the adoption of minimum standards could have an added value:

- Domain 1 – Mutual legal assistance
- Domain 2 – Transfer of pre-trial supervision
- Domain 3 – Extradition and surrender
- Domain 4 – Exchange of criminal records
- Domain 5 – Relocation and protection of witnesses (former domain 6)
- Domain 6 – Transfer of prosecution (former domain 7)
- Domain 7 – International validity of decisions (former domain 8)

2.2.3 *Could the lex mitior principle be a guiding principle?*

**Position of the project team:**

The previous paragraphs dealt with the MLA cooperation domain and with a part of the international validity cooperation domain. However, also in the other

domains a right balance between the law of the issuing and of the executing state sometimes has to be struck. For example:

- Exchange of criminal records: if criminal records are used in a particular member state, which law should be applicable to the erasure of convictions?
- Transfer of proceedings: which law should be applicable in deciding if prosecution can be transferred (e.g. expiring of the sentence, previous settlement at prosecution level)?

According to the project team, the main guiding principle that could avoid and solve collisions between legal systems in the framework of cooperation in criminal matters could be the *lex mitior* principle. The *lex mitior* principle is already being used, e.g. with regard to the validity of judicial decisions: as explained above, sentences can be adapted with regard to their nature or duration in case they are incompatible with the law of the executing state. This *lex mitior* principle could also, *mutatis mutandis*, be used as a guiding principle in other cooperation domains. This would mean that e.g. a conviction would be erased from the criminal record if this would be provided by the executing member state, although this is not the case in the issuing member state. Also, if there had already been a settlement at prosecution level in a particular state, this would exclude a transfer of prosecution according to the *lex mitior* principle.

**Your expert opinion:**

- o *Lex mitior* has the potential to resolve legal system conflicts in a lot of cooperation domains and would require that whenever two legal systems clash the law would be applied that is the least far-reaching and drastic with regard to the position of the person concerned.
- o *Lex mitior* cannot serve as a guiding principle in cooperation in criminal matters.  
Please explain your position (if, according to your opinion, other principles do have the potential to serve as guiding principles in resolving conflicts in the applicable law, please mention them here)

### **2.3 Capacity issues when working in a mutual recognition context**

It should be recognized that MR will be confronted with limits stemming from operational and financial capacity. For some domains, important inhibitions will result from these capacity issues. Careful reflection is required as to how to deal with this.

Capacity issues will however not affect every domain of cooperation to the same extent. A diversification of capacity arrangements, which is sufficiently sophisticated, is therefore necessary. For some types of cooperation, the (combination of financial and operational) capacity issues are limited.

**2.3.1 *For which domains are no arrangement with regard to financial and operational capacity issues needed?***

With regard to some domains no specific arrangements are necessary, because there are hardly any capacity issues of a financial nature or of an operational nature with large financial implications.

These domains are:

- Domain 1 – Mutual legal assistance
- Domain 2 – Transfer of pre-trial supervision
- Domain 3 – Extradition and surrender
- Domain 4 – Exchange of criminal records
- Domain 5 – Relocation and protection of witnesses (former domain 6)
- Domain 6 – Transfer of prosecution (former domain 7)
- Domain 7 – International validity of decisions (former domain 8)

For most of the other domains, the capacity issues that are the most strongly in need of a solution are those of a financial nature. After all, some of the capacity issues are intrinsically of a financial nature. Others are of a combined nature, encompassing both financial and operational issues, but the latter especially because of their financial implications. Therefore in sum, the most tangible capacity issues are financial. Financial arrangements which are meaningful with regard to the capacity issues involved should be made for each cooperation domain.

In this paragraph, we therefore deal with possible solutions for those cooperation domains that require specific financial arrangements according to the project team. Financial arrangements have to date only been made for confiscation orders. It has been stipulated that amounts below 10.000 euro shall accrue to the executing state. (Art 16, FD Confiscation) The compensation for the executing member state can be considered adequate and no further arrangements seem to be necessary. However, it could be argued that also for other cooperation types further compensations are needed. Because for most cooperation cases other than confiscation, 10.000 euro is a very high threshold, it should be set differently (e.g. at 2.000 euro).

**2.3.2** *Is it a viable idea to introduce a cost-sharing principle based on a threshold amount?*

**Position of the project team:**

The basic principle to be introduced in international cooperation in criminal matters could be to fully cooperate without taking into account the financial implications if (operational and extra) costs are lower than the threshold amount, but that in all other cases the issuing member state should be asked to cover half of the expenses for the execution of the request.

**Your expert opinion:**

- Yes, I agree that this principle could be used in international cooperation in criminal matters, not only because it helps solve capacity issues, but also because it could have an inhibitory effect on issuing states.
- No, I disagree.  
If you disagree, please clarify your position

**2.3.3** *How does cost-sharing relate to benefit-sharing?*

**Position of the project team:**

According to the project team, there are two main possibilities to define the relation between cost-sharing and benefit-sharing.

First, both could be seen as completely separate. The settlement of costs may not be influenced by the settlement of benefits and vice-versa.

Second, both could be integrated. This would mean that the costs are deducted from the benefits in a single settlement of costs and benefits. However, the practical elaboration of this possibility gives way for two different scenarios. Firstly, the executing member state deduces his costs from his own part of the benefit. If the costs exceed the benefits, the general cost-sharing rules apply. Secondly, the executing member state could also deduce his costs from the totality of benefits before the rules on benefit sharing are applied. This means that the issuing member state also bears part of the costs as they have been deducted from its part of the benefits.

**Your expert opinion:**

- Cost-sharing and benefit-sharing should be kept completely separate.
- Cost-sharing and benefit-sharing should be integrated.
  - The costs of the executing member state are to be deducted from the totality of the benefits.



- The costs of the executing member state are to be deduced from its part of the benefits.
- Other suggestion.  
Please clarify your position, if you want to introduce another form of integrating cost-sharing and benefit-sharing.

2.3.4 *Should it be possible to suggest less costly alternatives?*

**Position of the project team:**

If specific expensive techniques and/or equipment are needed in order to cooperate with the issuing state, alternative solutions could be provided for. The question rises to what extent it should be possible for the executing member state to suggest/decided on less costly alternatives.

**Your expert opinion:**

- The issuing member state decides on the suggestion of the executing member state for a less costly alternative (e.g. If five video conferences are requested, it should be possible for the requested member state to propose a temporary transfer of a prisoner). **However, refusing a suggestion has consequences for the application of the cost-sharing principle. The issuing member state will have to bear the full supplementary cost.**
- The issuing member state decides on the suggestion of the executing member state for a less costly alternative (e.g. If five video conferences are requested, it should be possible for the requested member state to propose a temporary transfer of a prisoner), **without consequences for the application of the cost-sharing principle.**
- It should be possible for the executing member state to decide on the execution via a less costly alternative.
- Other.  
Please elaborate on your opinion.

The project team wants to remind the experts that relocation of witnesses and JITs are not applied in a mutual recognition framework and are therefore not covered by the previously mentioned arrangements. In the case of relocation of witnesses, it is logical that the issuing member state should always pay for the cooperation it requested.

**2.3.5** *Is it a viable future policy option to introduce Aut exequi, aut tolerare to deal with operational capacity issues in MLA?*

**Position of the project team:**

The obligatory and stringent nature of mutual recognition is, especially with regard to MLA, sure to cause operational capacity problems next to the financial issues mentioned above. One possible solution would be to use an *aut exequi, aut tolerare* principle, which would mean that you either execute the request yourselves, or tolerate the issuing member state to deploy its own authorities in your country to come and execute the request themselves.

Introducing this principle with regard to MLA would be consistent with the current international cooperation acquis. We already use the conceptual framework of this principle within the framework of a JIT. JIT's are only used with regard to 'difficult and demanding investigations having links with other member states' or cases in which the 'circumstances of the case necessitate coordinated, concerted action in the MS involved' (art 1, FD JIT), and they should remain a form of exception cooperation. However, the principle of 'tolerare', tolerating officers of another member state on your territory, could be extended to those situations in which operational capacity issues would lead to difficulties in executing MLA requests.

**Your expert opinion:**

- Yes, I agree.
- No, I disagree.  
If you disagree, please explain your position

**2.3.6** *Does aut exequi, aut tolerare provoke application of the law of the territorial state ?*

**Position of the project team:**

Because *aut exequi, aut tolerare* has important implications with regard to applicable law however, the use of this principle should be strongly delineated. Logically, the law of the state on whose territory the measures are taken, would apply to the actions of the authorities of the issuing member state.

**Your expert opinion:**

- Yes, I agree.
- No, I disagree.  
If you disagree, please elaborate on your position.

**2.3.7 *Should aut exequi, aut tolerare be limited, based on the authorities involved?***

**Position of the project team:**

The application of the principle *aut exequi, aut tolerare* should be restricted to those aspects of cooperation that do not require the involvement of a judicial authority and therefore do not relate to coercive or intrusive measures, the enforcement of sentences and any other aspects listed as a prerogative of judicial authorities. It is our position however, that at least for forms of cooperation that do not require the involvement of a judicial cooperation, it should be accepted that authorities from one member state execute the decision on the territory of another member state.

**Your expert opinion:**

- Yes, I agree.
  - No, I disagree.
- If you disagree, please elaborate on your position.

**2.4 To what extent is it an acceptable future policy option to introduce mutual recognition of *criminal liability for legal persons*?**

**Position of the project team:**

Working in a mutual recognition context does not exclude that legal principles in the member states can be different. Most fundamental basic principles are common to the EU MS however, or fundamentally compatible. It is only with regard to some basic principles that fundamental conflicts or incompatibilities could arise. In this research, we would like to single out the liability of legal persons for criminal offences as one of those exceptional differences in legal principles between the member states. After all, legal persons liability is dealt with in various ways in the legislation of the member states, including the presence of a basic split between member states that do and member states that do not recognize liability of legal persons. Because of this, liability of legal persons is a tangible issue nowadays which, in light of an increasingly globalizing market, confronts both practitioners as legal persons with an increasing legal uncertainty.

In the FD on financial penalties and the FD on confiscation orders an important step has been taken in dealing with differences in accepting this liability between the EU MS. Art 4 and 9 of the FD financial penalties and art 12 of the FD confiscation recognize that a financial penalty/confiscation imposed on a legal person shall be enforced even if the executing state does not recognize the principle of criminal liability of legal persons.

This important principle in dealing with differences in liability of legal persons with regard to criminal offences should, according to the project team, be accepted as a general principle.

This means

- **Yielding to inconsistencies ratione forae:**  
Traditionally, there is a great deal of tolerance and respect for national sovereignty when it comes to either or not accepting the criminal liability of legal persons. Reference can be made to the obligation to criminalise certain behaviour in approximating framework decisions that allow non-criminal sanctions to be introduced for legal persons. This means the forum that is competent to deal with liability of legal persons for offences can be criminal, administrative or civil. Yielding to inconsistencies ratione forae means executing member states accept the choice for criminal liability even if that forum is not competent to deal with liability of legal persons for offences in their own domestic regulation.
- **Yielding to inconsistencies ratione personae:**  
Member states often adopt different definitions of central concepts with regard to the liability of legal persons in criminal matters. Firstly, the concept 'legal person' is often conceptualized in various ways in the different member states. Sometimes a legal person is limited to private law artificial persons, sometimes it is limited to public law artificial persons and sometimes it entails both private and public law artificial persons. Moreover, some member states do not include public authorities in the definition of legal person, while other member states do. Yielding to inconsistencies ratione personae means executing member states accept the delineation of the legal person subject to criminal liability, even if that type of legal person would not be criminally liable in their own domestic regulations.
- **Yielding to inconsistencies ratione materiae:**  
Even member states accepting the principle of criminal liability of legal persons do not necessarily share the same view as to the relevant criteria to attribute criminal liability to a legal person. Some member states have opted to extend the liability of legal persons to their entire criminal law (e.g. Belgium). By contrast, other member states have adopted specific clauses that limit the liability of legal persons to specific offences (e.g. Denmark and Estonia). Yielding to inconsistencies ratione materiae means that the executing member state accepts the delineation of offences for which legal persons can be held criminally liable, even if legal persons would not be criminally liable for those offences in their own domestic regulations.

**Your expert opinion:**

- Yes, I agree.
- No, I disagree.

If you disagree, please elaborate on your position.

## **PART 3 – Lacunae**

### **1 Domain-specific lacunae**

A lot of aspects of international cooperation in criminal matters have already been regulated. However, some cooperation types have not been regulated at all, or important aspects thereof lack regulation. In this section we would like to highlight to most important lacunae with regard to international cooperation in criminal matters that exist today. Some domains of cooperation will therefore not be dealt with here, because they have been regulated to a very large extent. These cooperation domains are: transfer of pre-trial supervision, extradition/surrender, exchange of criminal records, and transfer of prosecution. For the other domains, we mention the most important regulation needs according to the project team. Other suggestions can be made by the experts.

#### **1.1 Should a post-trial MLA be elaborated at EU level?**

##### **Position of the project team:**

Some MLA-instruments provide the basis for very extensive cooperation, without further explaining what exactly is meant by this “widest possible assistance”. However, most MLA-instruments focus on cooperation in criminal matters in the pre-trial phase, and mutual assistance is usually intended to promote the requesting state’s criminal investigation.

No such MLA-basis currently exists for mutual assistance in the post-trial phase. The importance of such assistance is however not to be downplayed. A common scenario, in which mutual assistance in the post-sentencing phase is of vital importance, is cooperation among member states in tracking down convicted felons who have for example escaped from prison. For example, one member state could require another member state to perform a house search with a relative of a fugitive, in order to search for information on his whereabouts. There are no European instruments that can serve as a basis for such “post-sentencing-MLA-requests”.

The project team therefore has a threefold proposition:

First, the scope of relevant international assistance and cooperation instruments, Europol and Eurojust should be radically broadened to the post-sentencing phase.

Second, on a member state level, there should be a mandatory introduction of the possibility to take investigative measures in the post-sentencing phase.

Third, there should be a mandatory introduction of sufficient (independent and impartial) post-sentencing judicial control mechanisms on investigative measures for fugitive search purposes.

**Your expert opinion:**

- Yes, I agree that post-trial MLA needs EU level regulation.
- No, I disagree that post-trial application of MLA is a lacunae in the current regulation.  
If you disagree, please clarify your position.

## **1.2 Should relocation of witnesses be regulated in its entirety at EU-level?**

**Position of the project team:**

As argued, the project team considers relocation and protection of witnesses in criminal matters is an inherent part of cooperation in criminal matters, because its finality is related to criminal proceedings. The relocation and protection of witnesses is almost by definition cross border because more often than not the territory of each individual EU member state is too limited to allow for a meaningful relocation. Therefore, relocation should be taken up as a valuable aspect of the international cooperation in criminal matters in the EU. Not in the least because this matter also has an official underpinning in several documents, especially with regard to organized crime.

**Your expert opinion:**

- Yes, I agree.
- No, I disagree.  
Please clarify your position:

## **1.3 To what extent does transfer of prosecution need further regulation?**

- A list of potentially acceptable criteria should be drafted in which a transfer of proceedings is recommendable, that guides transfer of prosecution but still leaves enough room for flexibility.
  - Especially negative criteria should guide transfer of prosecution, e.g. if the main objective of the transfer would be to obtain a more severe punishment (*lex mitior*), *ne bis in idem*
  - Other:
- Active transfer of prosecution (in which the defendant has to be transferred as well) should be possible.
- The prevention of jurisdiction conflicts should be enhanced, e.g. by restricting extraterritorial jurisdiction.

- It should be possible to transfer prosecution to a MS that did not originally have jurisdiction.
- Other:

#### **1.4 The most important lacuna(e) with regard to international validity is(/are):**

- The recognition of disqualifications
- Other:

## **2 General lacunae**

In addition to the domain-specific lacunae, it became clear from the answers to the first Delphi round that many experts felt that also needs for further regulations existed that transcended the specific domains. The most important lacuna, which was referred to by a lot of experts relates to proportionality in criminal matters. Also the need for good practice and clarity on the role of a central EU authority were mentioned as important general lacunae.

### **2.1 What should be the position of proportionality in international cooperation in criminal matters?**

#### **Position of the project team:**

Proportionality has to be an important principle in international cooperation in criminal matters. However, it is equally important that proportionality is well considered, so that the functioning of international cooperation in criminal matters is not jeopardized. Proportionality checks should be sufficiently built-in in each of the cooperation instruments. Proportionality should be considered in the law-making phase and should not be a refusal ground in the law-applying phase.

For example: if the use of cooperation instruments for petty offences is a concern, instruments should be designed in such a way that the scope definition *ratione materiae* does not allow the instrument to be used in such petty cases. Allowing the executing member state to conduct a proportionality check upon the application of the instrument in a specific case will undermine good faith in cooperation and good functioning of the instrument.

#### **Your expert opinion:**

- Proportionality only comes into play at the law-making phase and should be sufficiently built-in in each of the cooperation instruments. Cooperation in specific cases should be based on mutual trust.

- Proportionality should be built-in with regard to the nature of the offences.
- Proportionality should be built-in with regard to operational and financial costs and benefits.
- Other
- Proportionality is important both in the law-making and law-applying stage. Even in specific cases issuing and/or executing member state should have the possibility to seek recourse in the proportionality principle.
  - The issuing member state should consider proportionality in each case.
  - The issuing member state should be required to prove that proportionality requirements are met.
  - The executing member state should be able to refuse cooperation if it considers that proportionality requirements are not met.
  - The executing member state should be able to adapt the request if it considers that proportionality requirements are not met.

**2.2 Is sufficient attention being paid to ‘Good practice’ in international cooperation (e.g. the elaboration of a Good practice declaration)?**

- Yes
- No
  - More ‘good practice’ should be identified
  - More monitoring is needed regarding practices
  - Other:

**2.3 Which of the following tasks of international cooperation in criminal matters should be taken up by a European central authority?**

- Gathering and storage of criminal records information
- Mediation/arbitrage in cooperation issues and conflicts
- Identification of good/bad practices
- Initiation of cooperation in criminal matters
  - Right to evoke cases when member states are unable or unwilling to initiate cooperation
  - Right to oblige member state to undertake action regarding cooperation in criminal matters
  - Other:
- Help and advice in complex cooperation cases
- Simplified cooperation or the establishment of a transnational case method



- Prosecution regarding EU core offences affecting the financial interests of the EU
- Subsidiary prosecution
- Other:

## **PART 4 – The position of offences and sanctions**

### **3 The position of offences in international cooperation in criminal matters**

#### **3.1 Should approximation be linked to cooperation in criminal matters only?**

**Position of the project team:**

Approximation should only be pursued to the extent necessary to support cooperation in criminal matters and should not be a goal in itself.

The definition of what does and does not constitute an offence is part of the sovereignty of each of the member states. The difficulties caused by the differences between offence definitions have been recognised in the past and contributed to the adoption of common minimum definitions in the so-called approximating framework decisions. The project team feels that the EU is not competent to approximate for the sake of approximation and creating common offences; the EU is only competent to intervene to the extent approximation is necessary to ensure smooth cooperation in criminal matters.

**Your expert opinion:**

- Yes, I agree that approximation should be pursued only to the extent necessary to ensure smooth cooperation in criminal matters
- No, I do not agree. It should also be possible to pursue approximation to support the shared sense of justice and create common criminal policy throughout the EU.  
Please clarify your position

### 3.2 Should the approximation *acquis* be used as a basis to define (and limit) the offence labels currently referred to in cooperation instruments?

#### Position of the project team:

The project team considers it highly inconsistent that there is no link whatsoever between approximated minimum definitions and the functioning of international cooperation in criminal matters in the EU.

The lack of such a link became painfully clear when problems arose with the 32 MR offence list, a list that appears in most – but not all – mutual recognition instruments (sometimes in a slightly different composition).

The main critique on this list is the lack of definitions of the offences included and thus the lack of a clear delineation of its scope, making it impossible for member states to assess the implications and the scope of the commitment that is required. This is exactly why Germany insisted on being able to attach a declaration to the EEW, setting clear boundaries to its commitment. MR instruments adopted after the EEW, all have the same possibility to make a such declaration.

The nature of the German declaration validates our position that reservations are prompted by the lack of definition. This means that the reservations related to the 32 MR offence list can easily be overcome by making it a “32 **defined** MR offence list”, referring to the approximation *acquis*.

Furthermore, similar offence concepts with a different meaning/interpretation currently appear throughout cooperation instruments. Some instruments leave it up to the member states to define which behaviour is captured in an offence concept, some instruments refer to an approximating framework decision, some instruments hold their own definition.

The European criminal policy area is clearly in need of a revision of the current position of offences and offence labels in its instruments.

#### Your expert opinion:

- Yes, I agree that it is important to clearly define the offence labels that appear in the cooperation instruments in a way that is common for all instruments and for all member states. **However, exceptions are necessary**, as it is not desirable to limit the scope of all cooperation instruments (e.g. the mandate of Eurojust should not be limited accordingly). I agree that the approximating framework decisions are a good basis.

I suggest the following solution for the observation that not all of the offence labels included in the 32 offence list have a counterpart in approximating framework decisions:

- The 32 offence list should be limited to those offences that have a counterpart in approximating framework decisions

- The 32 offence list should be maintained and the approximation *acquis* should be extended. More approximating framework decisions need to be adopted so that all offence labels in the 32 offence list have a counterpart.
- Yes, I agree that it is important to clearly define the offence labels that appear in the cooperation instruments in a way that is common for all instruments and for all member states, **without exceptions**. I agree that the approximating framework decisions are a good basis.
  - I suggest the following solution for the observation that not all of the offence labels included in the 32 offence list have a counterpart in approximating framework decisions:
    - The 32 offence list should be limited to those offences that have a counterpart in approximating framework decisions
    - The 32 offence list should be maintained and the approximation *acquis* should be extended. More approximating framework decisions need to be adopted so that all offence labels in the 32 offence list have a counterpart.
- No, I disagree that it is important to define the offence labels in the Cooperation instruments and feel that the definition thereof should remain the prerogative of each individual member state. I do not consider it a problem that this means that interpretation varies between instruments and between member states.
 

If you disagree, please clarify your position.

### **3.3 Is it a viable future policy option to use the approximation *acquis* beyond the traditional abandoning of the double criminality test?**

#### **Position of the project team:**

Considering that in one of the previous studies conducted by the project team, member states have indicated to accept more stringency in cooperation if such cooperation is limited to any of the common EU offences, the importance of creating a 32 defined MR offence list may not be underestimated. Member states indicated they would accept a further reduction of the possibility to call upon inconsistencies or grounds for refusal or postponement, they would be more willing to take formalities into account and they would be more willing to respect deadlines, in spite of capacity issues.<sup>470</sup>

Furthermore, the project team feels it is also a future policy option to look at the added value of the 32 defined MR offences for the application of certain principles.

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<sup>470</sup> Vermeulen, G., De Bondt, W. and Van Damme, Y. EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence? Antwerp-Apeldoorn-Portland, Maklu, 2010

The speciality principle provides that a person extradited/surrendered (see e.g. Art 27, 2° EAW) may not be prosecuted, sentenced or otherwise deprived of his/her liberty for an offence committed prior to his or her surrender other than for which he or she was surrendered/extradited. Within international cooperation in criminal matters the purpose limitation principle applies and some instruments introduce limitations in use. We have already discussed the impact working towards international cooperation in criminal matters regardless of the authorities involved would have on both purpose limitation and limitations in use. The remaining question here would be whether the 32 defined MR offence list can have any added value in that debate.

Fourth and final, in the current body of judicial cooperation instruments, offences also appear in the mandates of the EU level actors. Here too, the main critique is the lack of definitions foreseen and the fact that some actors have introduced their own definitions in spite of the existence of a commonly agreed upon EU definition. This gives way for incompatibilities making it extremely difficult for EU bodies to cooperate.

The project team considers it undesirable to limit the current mandates of the EU level actors. They should be able to cooperate for the offence labels currently listed in their mandates – even beyond the EU level definitions thereof – if a member states asks the actor to intervene. However, in the discussions to extent the powers of the EU level actors, the definition of the mandated offences does have an important role to play. The access of EU level actors to criminal records information can serve as a good example here. It has been on the agenda for quite some time now. Member states are reluctant to move ahead because the mandated offences of the EU level actors are not clearly defined and member states fear that the intrusion will be too far reaching. Clearly defined mandated offences and taking a firm position on what constitutes an EU worthy offence and thus the scope of the mandated offences, has the potential to significantly facilitate the discussions on granting EU level actors access to criminal records information.

**Your expert opinion:**

- Yes, I agree that it should be explored to what extent the approximation acquis can serve beyond the traditional abandoning of the double criminality test.
  - It should be explored to what extent the 32 offence list can be used
    - to limit the number of refusal grounds
    - to limit the application of the speciality principle
    - to limit the application of the purpose limitation principle
    - to define the strong competences of the EU level actors
    - to apply less strict data protection rules
    - other: .....
- No, I do not agree that there is a potential for use beyond the double criminality test.  
Please clarify your position

## **4 The position of sanctions in international cooperation in criminal matters**

### **4.1 Have sanction thresholds lost their added value in international cooperation in criminal matters?**

**Position of the project team:**

In the past sanction thresholds have been used to determine whether or not cooperation in criminal matters would be possible, in the sense that cooperation was not possible when an offence was not punishable with a sanction of a particular duration. The use of such thresholds is no longer advantageous, according to the project team. After all, now that cooperation has been linked to the nature of the offence (mainly in the list of 32 offences first introduced in the FD EAW), working with sanction thresholds has been overshadowed by this mechanism. Clearly, cooperation based on the nature of offences is a better alternative than working with sanction thresholds as it is not hindered by differences in penal culture between EU MS. The question rises what the future is of sanction thresholds in international cooperation instruments.

**Your expert opinion:**

- Yes, I agree.
  - No, I disagree.
- If you disagree, please clarify your position.

### **4.2 Do we need a common understanding on the ranking of sanctions?**

**Position of the project team:**

The framework decision on the transfer of execution of alternative sanctions allows executing member states to adapt the nature of the sanction if the original sanction is unknown or incompatible with their criminal justice system.

However, it must be ensured that this adaptation does not lead to a more severe sanction for the persons involved. In the current cooperation sphere, no common understanding exists on the possible sanctions that can be applied, let alone on the ranking of those sanctions. As a consequence, there is no mechanism available to test whether the executing member state complies with the limitation on the possibility to adapt the nature of the sanction (namely the prohibition to increase the severity of the sanction).

Therefore, it is worth discussing whether we need to reach a common understanding on the ranking of sanctions.

INTERNATIONAL COOPERATION IN CRIMINAL MATTERS

**Your expert opinion:**

- Yes, I agree.
- No, I disagree.  
If you disagree, please clarify your position.

## **Annex – Member state questionnaire**

### **1 Authorities involved in cooperation**

As explained above in the note to the respondent: judicial cooperation is more than cooperation between judicial authorities. It is important to support this empirically, based on a survey of which authorities are truly involved in International Cooperation in Criminal Matters. This will be analysed through the following series of questions:

(1) Nature of competent authorities

Several instruments in the field of judicial cooperation give the member state a certain discretion when it comes to authorities involved. Precisely that discretion will be the subject of the questions.

(2) Criminal justice finality and purpose limitation

The involvement of different authorities is important for the application of some basic principles. The principle of purpose limitation for example, does not seem to apply in every case. This principle does not exclude the possibility of (public or private) entities to gather private information with a criminal character; it does however demand that such entities use such information solely for a purpose with criminal finality. It thus contests the practice of entities providing such information to other entities, unless the use of that information has a purely criminal finality. In some member states the authority involved rather than the finality of its activities determines which procedural safeguards apply. The questions will revolve around this problem.

(3) Central Authorities and national contact points?

Considering the evolution towards one area of freedom, security and justice in which national borders lose their relevance, questions arise with respect to the position of central authorities in future international cooperation in criminal matters. The questions aim at revealing the competence and task of central authorities and national contact points.

(4) Position of Eurojust, EJM and EPPO

Finally, the EU-actors within the sphere of cooperation in criminal matters should also be dealt with. The first entities coming to mind are Eurojust and the European Judicial Network (EJM). Naturally, the possible creation of a European Public Prosecutor's Office is also studied in this section.

For the European Commission, the discussions on the authorities involved is a crucial aspect in the analysis of the future institutional and legal framework of international cooperation in criminal matters. This explains the level of detail in the questions below and the necessity to elaborate on this during the focus group meetings in the member states

## 1.1 Nature of competent authorities



### 1.1.1 Which type of authorities is competent according to your national law?

Please provide us with the English name of the concerned authorities – if possible.

It is plausible that several authorities are competent. In that case you are required to list the different authorities in the box “name of authority” and to tick all possible classifications.

Legislative reference	Name of the authority	Classification of the authority						
		Police	Judicial	Customs	Administrative	Central	Intelligence service	No authority
Art. 1.2 and 4.7 Naples II – other authorities than customs authorities		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 5 Naples II – central coordinating unit		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 3.1 EU MLA – dealing with infringements of the rule of law		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 5.2 EU MLA – sending and serving procedural documents		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 6.2 (a) EU MLA – transmission of requests for mutual assistance		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 9 EU MLA – agree on transfer of persons held in custody		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 12 EU MLA – decide on controlled deliveries		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 13 EU MLA – agree to set up joint investigation teams		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 14 EU MLA – agree to start covert operations		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>



## MEMBER STATE QUESTIONNAIRE

Legislative reference	Name of the authority	Classification of the authority						
		Police	Judicial	Customs	Administrative	Central	Intelligence service	No authority
Art 17 EU MLA – equivalent authority competent to order interception of telecommunication		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 1 and 24 CoE ECMA – judicial authority		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 13 CoE ECMA – requesting criminal records		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 2 Eurojust Decision – the person seconded as the national member		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 6 FD EAW – issuing a European Arrest Warrant		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 6 FD EAW – executing a European Arrest Warrant		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 7 FD EAW – assisting the competent authorities		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 6.2 CoE Extradition – competent prosecute offences		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 1 FD Fin Pen – issuing a financial penalty		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 2 FD Fin Pen – assisting the competent authorities		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 3.1 FD Confiscation – issue a confiscation order		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 3.1 FD Confiscation – execute a confiscation order		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 3.2 FD Confiscation – assisting the competent authorities		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

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Legislative reference	Name of the authority	Classification of the authority						
		Police	Judicial	Customs	Administrative	Central	Intelligence service	No authority
Art 2 a) Swedish FD – competent law enforcement authorities		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 3 FD Crim records – exchange data		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 2 FD Deprivation of Liberty– issue a custodial sentence or other measure involving deprivation of liberty		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 2 FD Deprivation of Liberty– execute a custodial sentence or other measure involving deprivation of liberty		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 2.5 FD Alternative – issue a probation decision		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 2.6 FD Alternative – decide on conditional release		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 2.7 FD Alternative – decide on probation measures		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 14.1 (b) FD Alternative – the court-like body that revokes suspension of execution or decides on conditional release		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 14.1 (c) FD Alternative – the court-like body that imposes a custodial sentence or measure involving deprivation of liberty		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

## MEMBER STATE QUESTIONNAIRE

Legislative reference	Name of the authority	Classification of the authority						
		Police	Judicial	Customs	Administrative	Central	Intelligence service	No authority
Art 7.2.a CoE Conditionally sentenced – decide not to take proceedings or to drop proceedings		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 12.2 CoE Conditionally sentenced – supervision of and assistance of offenders		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 2 (c) ii FD EEW – the other judicial authority that can issue an EEW		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 4 FD Supervision – issuing or adapting a decision on a supervision measure		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 7 FD Supervision – assist the competent authorities		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 4 FD Jurisdiction – competent to initiate prosecution		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 9.1 CoE Transfer Proceedings – examine a request		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 1.b CoE Validity – administrative authority dealing with offences		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 6.f CoE Validity – decide not to take proceedings or to drop proceedings		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 16 CoE Validity – certifying the enforceable sanction		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>



**1.1.2** *Looking at the grid above, do you agree that judicial cooperation in your country is more than cooperation between judicial authorities and that therefore a reference to judicial authorities to explain the scope of judicial cooperation is non-functional and even misleading?*

- Yes  
 No

[comment]



**1.1.3** *For which acts/measures is the intervention of a judicial authority required according to your national law?*

- When an investigative measure will encompass a breach of privacy (e.g. house search or interception of telecommunication)  
 To take coercive measures  
 To impose sentences involving deprivation of liberty  
 To enforce sentences involving deprivation of liberty  
 To impose sentences involving financial penalties  
 To enforce sentences involving financial penalties  
 To impose sentences involving alternative sanctions  
 To enforce sentences involving alternative sanctions  
 Gathering of evidence to be used in criminal proceedings  
 Other [explain]

[comment]

## 1.2 Criminal justice finality and purpose limitation

Notwithstanding the reservatory competence of judicial authorities (see above), the finality with which authorities act – as opposed to their nature – is the real demarcation line which can and should consistently delineate the field of cooperation in criminal matters. Lack of respect for this demarcation line is problematic in light of the separation of powers, the procedural guarantees in criminal matters and data protection regulation.

The field of data protection is a very specific example of which the project team opinions that the applicable rules should apply following the finality of the acts, instead of letting the type of data protection rules be determined by the authority involved. The following paragraphs clarify this position.

Data protection rules related to the exchange of information concerning persons are dependent on the finality of the measure as opposed to the

authorities involved. The project team underlines the importance of the principle of purpose limitation in this regard. This principle does not exclude the possibility for entities to gather private information with a criminal justice character, but it prevents those entities to use such information for purposes which do not have a criminal justice character. It thus contests the practice of entities providing such information to other entities, unless the use of that information has a purely criminal justice finality. Therefore, the project team considers it to be self-evident that data protection should be as stringent for all types of cooperation in criminal matters, regardless of whether judicial, police, customs or administrative authorities are implied, as long as they are acting with a criminal justice finality. One single data protection regime should bind all these actors when they are involved in cooperation in criminal matters, as is now also recognised by the EU through the FD Data Protection: the framework decision leaves little doubt as to the importance of the finality with which authorities act: it moves the focus from the nature of the involved authorities to the aim their actions have. The FD is applicable to personal details collected by authorities “for the purpose of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties” (article 1,2).

If we accept and assure that a stringent data protection regime applies to all these actors, the involvement of the aforementioned non-judicial authorities could even be extended beyond the limits of today, e.g. by allowing the exchange of criminal records by police actors (and Europol, which is actually already competent to hold data on convicted persons).



**1.2.1 Do you agree that adequate data protection is possible for actions of police and customs, without the involvement of a judicial authority?**

- Yes  
 No [explain]  
 [Comment]

The project team thus submits that data protection rules should not cause problems where authorities, for those actions acting with a criminal justice finality, are concerned: one regime can apply.

The matter becomes far more complex however, when authorities *without* a criminal justice finality are involved, given that they are often not affected by the current relevant legislation in the field of international cooperation in criminal matters. The concerned authorities are private authorities, public authorities (e.g. universities) and intelligence services. The first two concern an information flux from the criminal justice to the private/administrative sphere. The latter concerns an information flux from the administrative to the criminal justice

sphere. In the course of these mechanisms the principle of purpose limitation is often negated.

### **Flux from the criminal to the private/administrative sphere**

The project team will here only treat problems which arise with private entities, for example employers.

Private actors have a mere complementary role in the framework of criminal matters. However, the role of these actors is increasing: private security companies, video surveillance and the stream of information from government to private level are becoming ever more present in society.

The project team focuses on the trend of screening in private sectors, a phenomenon aiming at the safeguarding of integrity. At European level, private information in general and criminal records information in particular should only be available when the norms of proportionality and subsidiarity are respected. In past research studies carried out by the project team, certain sectors were labelled as "sensitive" and only for those sectors the disclosure of information was deemed relevant; the sectors are the educational, medical, financial, transport and telecommunication sector. The project team stresses the importance of the modalities of access to such information:

- Only the *functional* information should be asked for (e.g. a speeding ticket seems hardly an obstacle for people wishing to work in for example the financial sector)

- The difference between *pushing* or *pulling* information (e.g. in certain member states companies are allowed to pull information, meaning that they can verify whether the scrutinized subjects have a certificate of non-prior convictions, instead of letting the latter push (give) the information themselves).



#### ***1.2.2 Do you have any regulations on which information of criminal justice nature private entities can ask for and to what extent do they apply when such entities ask information of criminal justice nature from other member states?***

The following grid allows you to make a distinction between (columns)

- No such national regulations exist.
- Existing regulations only apply in a **domestic situation** with respect to national entities asking national authorities for information. Those regulations do not apply to entities asking this information from other member states. The regulations do however **only exist for some offence types.**

- Existing regulations only apply in a **domestic situation** with respect to national entities asking national authorities for information. Those regulations do not apply to entities asking this information from other member states. The regulations exist **regardless of offence type**.
  - Existing regulations also apply to entities asking this information **from other member states in a cross-border situation. However, this is only the case for some offence types**.
  - Existing regulations also apply to entities asking this information **from other member states in a cross-border situation. This is the case regardless of offence type**.
- (rows)
- General rules on information flow, not specifically about the functionality condition or on whether information can be pushed or pulled.
  - Rules concerning the functionality condition.
  - Rules **allowing** the pulling of information.
  - Rules concerning the pushing of information.

	No such national regulations exist	Only in domestic situations, with respect to some offence types	Only in domestic situations, regardless of the offence type	Also in cross-border context, with respect to some offence types	Also in cross-border context, regardless of the offence type
Rules on information flow	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Functionality	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Push information	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Pull information	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>



**1.2.3** *Does your member state have any regulations on which information of criminal justice nature private*

*entities can ask for and to what extent do they apply when private entities from other member states ask information of criminal justice nature from your member state?*

The following grid allows you to make a distinction between (columns)

- No such national regulations exist
- Existing regulations only apply in a **domestic situation** with respect to national entities asking national authorities for information. Those regulations do not apply to entities asking this information from other member states. The regulations do however **only exist for some offence types.**
- Existing regulations only apply in a **domestic situation** with respect to national entities asking national authorities for information. Those regulations do not apply to entities asking this information from other member states. The regulations exist **regardless of offence type.**
- Existing regulations also apply to entities from other member states asking this information **from your member state in a cross-border situation. However, this is only the case for some offence types.**
- Existing regulations also apply to entities from other member states asking this information **from your member state in a cross-border situation. This is the case regardless of offence type.**

(rows)

- General rules on information flow, not specifically about the functionality condition or on whether information can be pushed or pulled.
- Rules concerning the functionality condition.
- Rules **allowing** the pulling of information.
- Rules concerning the pushing of information.



	No such national regulations exist	Only in domestic situations, with respect to some offence types	Only in domestic situations, regardless of the offence type	Also in cross-border context, with respect to some offence types	Also in cross-border context, regardless of the offence type
Rules on information flow	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Functionality	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Push information	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Pull information	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

1.2.4 *Omitted*

1.2.5 *Omitted*

The project team proposes to introduce a uniform system regarding the information flux from criminal to the private/administrative sphere, namely *European certificates of non-prior conviction*. The current situation creates practical issues and raises questions of principle. The latter was explained above (for example the situation where private companies are allowed to *pull* information); the former will now briefly be explained. Currently, when nationals from member state A are required by a potential employer from member state B, the criminal records information that the concerned person will provide its potential employer (in MS B) with, will be coming from his member state of origin (MS A). This has several disadvantages:

- Language problems
- Length of the process
- Divergences in existence/qualification of certain offences
- Divergences in which information is included in the respective criminal records

*European certificates of non-prior conviction* could overcome these problems.



**1.2.6** *Do you agree that there should be European level regulation dealing with the information flux from the criminal justice to the private/administrative sphere?*

- Yes and I subscribe the suggestion of European certificates
- Yes, but I do not agree with the suggestion of European certificates
- No [explain]

**Flux from the administrative to the criminal justice sphere**

Carrying out of work with a criminal justice finality always comes with procedural safeguards. If the administration contributes to the role of the judiciary and police, it is vital that they are bound by at least similar safeguards –definitely not less stringent, as if often the case. Indeed, for the sake of “public order” (health, safety) all too often administrative authorities who are not bound by the specific safeguards that accompany actions with a criminal finality, gather information or perform actions with criminal justice finality.

**Domain 1: Mutual Legal Assistance**



**1.2.7** *Are the following articles applicable to intelligence services?*

	Yes	No
Art 14-16 EU MLA Convention	<input type="radio"/>	<input type="radio"/>
Art 17-22 EU MLA Convention	<input type="radio"/>	<input type="radio"/>

These articles are in principle only directed at the judiciary (and indirectly at the police). Hence the intelligence services operate in a legal vacuum, being the IWG (the International Working Group on Undercover Policing). The intelligence services can thus bring information within the criminal justice sphere without abiding by the EUMLA rules applicable to undercover-operations, for the sake of “public order”. Regarding interception of telecommunication, some member states can – without the other member state knowing – tap information from the other member state’s soil, when the primary target of the investigation does not have a criminal justice nature – even if the information is later used for criminal justice purposes.



**1.2.8** *Do you agree that intelligence services should be barred from gathering any information/carrying out any action with a criminal justice character given that they do not have a primarily criminal justice finality and thus escape the procedural safeguards?*

- Yes
- No [explain]



**1.2.9** *Do you agree that if intelligence services are allowed to gather information/carry out actions with a criminal justice finality, they should be bound by the relevant legislation on cooperation in criminal matters?*

- Yes
- No [explain]

Not only the involvement of certain national entities can be problematic, the project team submits that also the access to information of European entities with an administrative finality should be assessed critically. When we look at OLAF for example, we see that article 4, 3, 2nd al of the Regulation concerning investigations carried out by OLAF (Regulation EC no. 1073/1999) obliges people to provide information when requested by OLAF. This is also the case when such information can be incriminating for the concerned people. One might think that this is not problematic, given the administrative finality of OLAF. Indeed, criminal justice safeguards such as the prohibition of self-incrimination do not apply in administrative context. Yet, the said Regulation shows that the finality of OLAF is far from purely administrative. Indeed, the Regulation states that OLAF can put through the acquired information to criminal authorities for the purpose of carrying out an investigation with criminal justice finality.



**1.2.10** *Should criminal procedural safeguards apply to OLAF ?*

	Yes	No
When OLAF is allowed to put information through to criminal justice authorities	<input type="radio"/>	<input type="radio"/>
When OLAF is not allowed to put information through to criminal justice authorities	<input type="radio"/>	<input type="radio"/>

Domain 4: Criminal Records

According to the project team, article 6 of the Criminal Records FD contains a retrogression in comparison to article 13 of the European Convention of 20 April 1959 on mutual assistance in Criminal Matters. The latter provided judicial authorities with the possibility to directly ask the competent national authorities of other member states for information on criminal records. Following Art. 6 FD Crim. Records, any information on criminal records should be obtained through the central authority of the other member state. The project team submits that this creates a rather unnecessary detour, costing both time and money.

Please note that this critique only concerns the information requested “for the purposes of criminal proceedings against a person”.



**1.2.11** *Do you agree that judicial authorities should be able to request criminal records information directly from the competent authorities from the requested member states? In other words, do you agree with a horizontalisation of criminal records information when it is requested by judicial authorities?*

- Yes
- No [explain]

### 1.3 Central authorities and national contact points



#### 1.3.1 What is the competence / task of the central authorities?

The following grid allows you to indicate what the competences of the central authorities are. Cooperation instruments are not always consistent in listing the task of the central authorities. Therefore, some of the possibilities are instrument-specific. Nevertheless, we have included it for all central authorities to give you the opportunity to indicate whether or not you have provided your national central authorities with a consistent package of competences, irrespective of the suggestions that are included in international cooperation instruments

Legislative reference	No central authority installed	Transmission/reception	Other official correspondence	Monitoring of cooperation	Decision multiple requests	Decision deduction served parts	Adapt the decision to be executed	Decision on financial arrangements	Termination of execution
Art 5 Naples II	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 6 EU MLA	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 7 FD EAW	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 2 FD Fin Pen	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 3 FD Confiscation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 3 FD Crim Records	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 3 FD EEW	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 7 FD Supervision	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

INTERNATIONAL COOPERATION IN CRIMINAL MATTERS

Legislative reference	Consultation cooperation willingness	Inform involved persons on rights	Withdraw certificates	Report to Eurojust on refusal grounds	Educate and train authorities	Other (please note that decision making with respect to grounds for refusal or postponement are the subject of the next question)
Art 5 Naples II	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Art 6 EU MLA	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Art 7 FD EAW	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Art 2 FD Fin Pen	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Art 3 FD Confiscation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Art 3 FD Crim Records	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Art 3 FD EEW	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Art 7 FD Supervision	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	

The project team has selected the following grounds for refusal for analysis:

- ***Ordre public*** - the execution of an order or request would harm essential national security interests, jeopardise the source of the information or involve the use of classified information relating to specific intelligence activities
- ***Double criminality*** – if the act on which the request or order is based does not constitute an offence under the law of the executing Member state
- ***Ne bis in idem*** – a fundamental legal principle which is enshrined in most legal systems, according to which a person cannot be prosecuted more than once for the same act (or facts).
- ***Age & criminal responsibility*** – if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State
- ***Immunity from prosecution*** – the situation where the proceedings in the issuing member state relate to a person who the executing member state

has granted immunity from prosecution for the same facts as a benefit for his or her collaboration with justice

- ***Immunity or privilege*** – where there is an immunity or privilege under the law of the executing member state which makes it impossible to execute the request or order
- ***(extra)territoriality*** – execution be refused in the executing state if the order or request relates to criminal offences which: (i) under the law of the executing state are regarded as having been committed wholly or for a major or essential part within its territory, or in a place equivalent to its territory; or (ii) were committed outside the territory of the requesting state, and the law of the executing state does not permit legal proceedings to be taken in respect of such offences where they are committed outside that state's territory
- ***Sentence being too low*** – when the (remaining) sentence is too low (e.g. a financial penalty of less than € 70, a custodial sentence of less than 6 months, cooperation may be refused
- ***Incomplete information*** – when for example the form required for cooperation is incomplete or manifestly incorrect, cooperation may be postponed until such time as the form has been completed or corrected.
- ***Waiting translation*** – for the execution of some requests or orders, member states may require that the request or order is accompanied by additional documentation translated in the official language or an official language of the Member state in which the requested authority is based
- ***Lack of validation*** – A Member state may require validation in all cases where the issuing authority is not a judge, a court, an investigating magistrate or a public prosecutor and where the measures necessary to execute the request or order would have to be ordered or supervised by a judge, a court, an investigating magistrate or a public prosecutor under the law of the executing State in a similar domestic case.
- ***Serious humanitarian reasons*** – Cooperation may exceptionally be temporarily postponed for serious humanitarian reasons, for example if there are substantial grounds for believing that it would manifestly endanger the requested person's life or health. The execution of the request or order shall take place as soon as these grounds have ceased to exist.
- ***Executing own decision*** – the executing member state may postpone execution of the order or request, to execute its own decision
- ***Damaging ongoing investigations or prosecution*** – when execution of the order or request might prejudice an ongoing criminal investigation or prosecution, execution may be postponed until such time as the executing State deems reasonable

- **Legal remedies** – Member states are required to put in place the necessary arrangements to ensure that any interested party, have legal remedies. When awaiting the outcome of the legal remedies, execution may be postponed.
- **Disproportionate burden** – when execution of the order or request would place a burden on the executing member state’s authority clearly be disproportionate or irrelevant with regard to the purposes for which cooperation has been requested.



**1.3.2 With regard to which grounds for refusal / postponement can your central authorities take binding decisions?**

Legislative reference	No central authority installed	No decision making power	Grounds for Refusal							
			National security interests	Double criminality	Ne bis in idem	Age & Criminal responsibility	Immunity from prosecution	Immunity or privilege	(extra)territoriality	Sentence being too low
Art 5 Naples II	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 6 EU MLA	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 7 FD EAW	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 2 FD Fin Pen	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 3 FD Confiscation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 3 FD Crim Records	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 3 FD EEW	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 7 FD Supervision	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

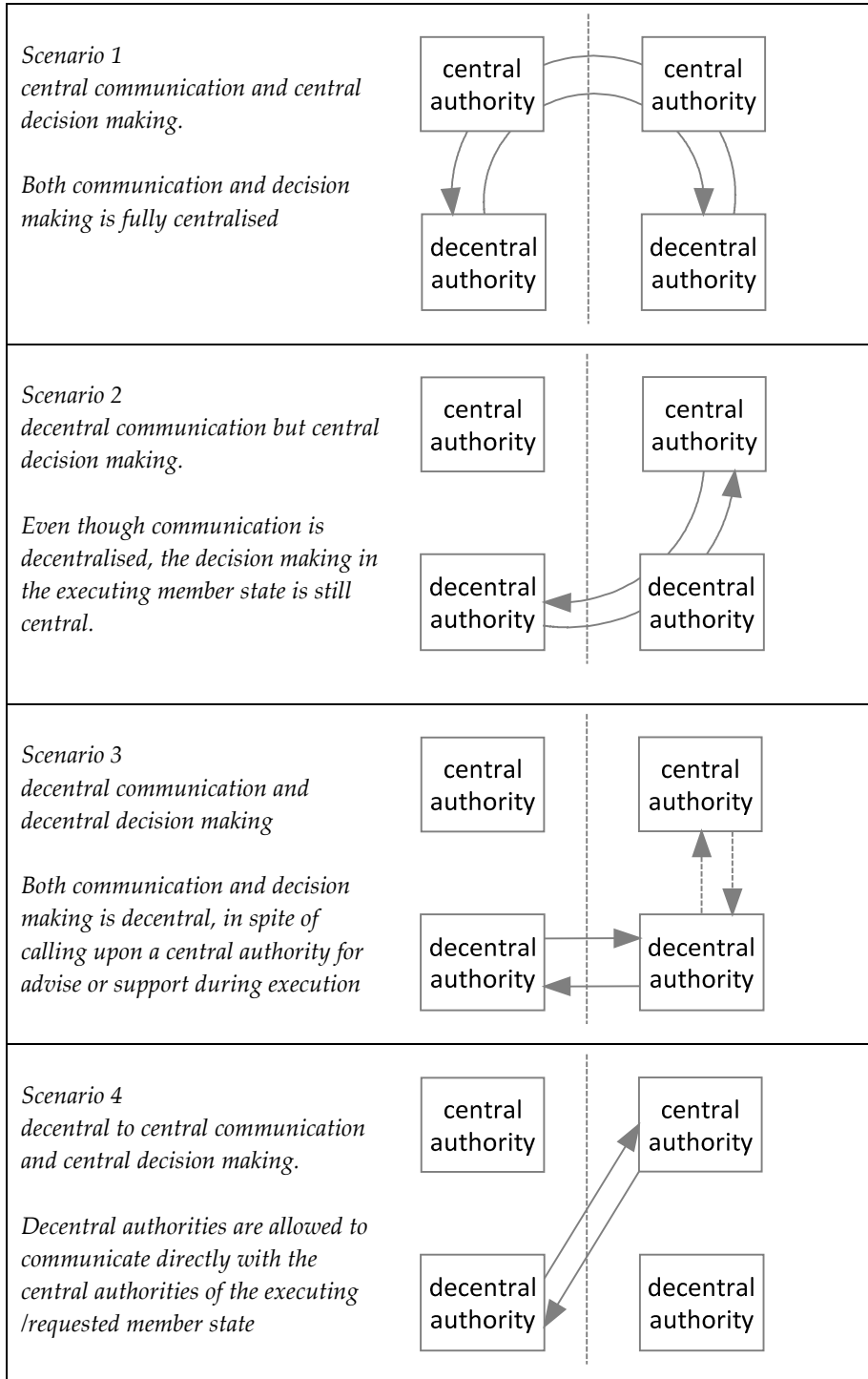


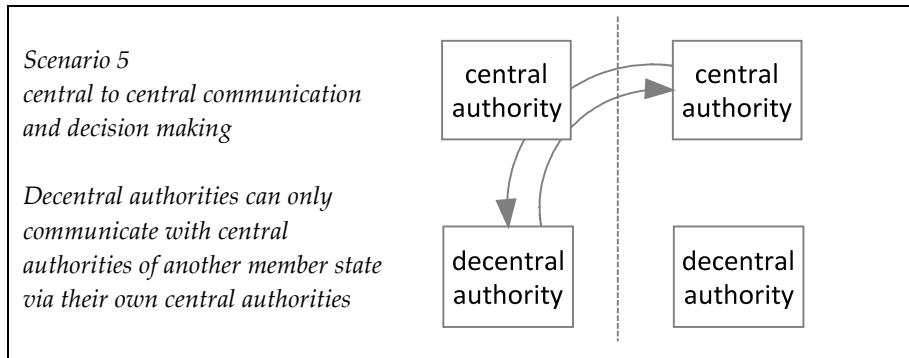
## MEMBER STATE QUESTIONNAIRE

Legislative reference	Postponement							
	Incomplete information	Awaiting translation	Lack of validation	Serious humanitarian reasons	Executing own decision	Damaging ongoing investigation	Legal remedies	Disproportionate burden
Art 5 Naples II	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 6 EU MLA	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 7 FD EAW	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 2 FD Fin Pen	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 3 FD Confiscation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 3 FD Crim Records	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 3 FD EEW	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 7 FD Supervision	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Horizontalization or “direct communication” between authorities involved, has significant influence on the speed and ease of cooperation. Nevertheless, some forms of cooperation require the intervention of a central authority. The following questions aim at assessing the extent to which recourse to a central authority is necessary and to what extent communication and decision making can be decentralized.

The project team has developed five scenarios on the flow of communication and decision making to visualise the different options and facilitate the interpretation of the following questions.





**1.3.3** *To what extent is the installation of a central authority contrary to the idea of developing one area of freedom, security and justice?*

- Central authorities are important to develop national criminal policies
- In modern European judicial cooperation, there is only limited room for national policies as we are developing towards one single European area of freedom, security and justice

[comment]

Art 6.1. EU MLA introduces the general rule to communicate directly between judicial authorities as visualised in scenario 3. Art. 6.8 EU MLA however clarifies that requests or communication with regard to either temporary transfer or transit of persons held in custody or information from judicial records shall be made through the central authorities of the member state, as visualised in scenario 1. Besides these exceptions to the general rule of direct communication, Art 6.2 EU MLA also provides the possibility to seek recourse to central authorities in “specific cases”, without however clarifying the scope of the specific cases this exception applies to.

The project team has a twofold recommendation with regard to the further horizontalization.

First, horizontalization should be pursued throughout international cooperation in criminal matters and therefore it is advisable to eliminate the possibility to derogate from the general rule. Second, in domain 1 (mutual legal assistance) only one exception should be maintained namely for the transfer of persons held in custody. The current exception for the exchange of criminal records is no longer required. After all, the exchange of criminal records information is now regulated via the ECRIS system – which will replace the

current practice of exchanging criminal records information via central authorities



**1.3.4** *Do you agree that transfer of persons held in custody is the only form of mutual legal assistance that essentially requires the involvement of a central authority as the decision making body? In other words that scenario 3 is the baseline with only one exception i.e. using scenario 1 for transfer of persons held in custody?*

- Yes
- No [explain]



**1.3.5** *Do you agree that decision making on supervision orders can be fully decentralised and thus follow scenario 3 (even though actual execution of supervision orders might need the involvement of a central body)?*

- Yes
- No [explain]



**1.3.6** *Do you agree that decision making on extradition and surrender can be fully decentralised and thus follow scenario 3 (even though actual execution of extradition or surrender orders might need the involvement of a central body)?*

- Yes
- No [explain]



**1.3.7** *Do you agree that the EU took a step back in that decision making on the exchange of criminal records is now fully centralised and thus following scenario 1 (whereas before, Art 15.3 European Convention on Mutual Assistance allowed an individual magistrate to contact criminal records authorities in another member state i.e. following scenario 4)?*

- Yes
- No [explain]



**1.3.8** *Do you agree that decision making on witness protection and relocation can be fully decentralised and thus follow scenario 3 (even though actual execution of witness protection and relocation might need the involvement of a central body)?*

- Yes
- No [explain]

Transfer of prosecution has consequences for the competence of the other member states to prosecute for the offences.

If transfer of prosecution takes place via so-called “denunciation”, i.e. an agreement on the best place for prosecution between different member states competent to prosecute, non of the member states loose that competence to prosecute. There is a simple agreement to refrain from prosecution without losing the right or competence to prosecute yourself. The situation is different when member states competent to prosecute seek cooperation from a member state that did not originally have competence to prosecute. In a such situation, the member state competent to prosecute will transfer that competence to another member state. This operation is governed by the “transitivity principle”, pointing to a transfer of competence. This transitivity is an important element to take into account when assessing the necessity to involve central national authorities in this form of cooperation. After all, transitivity impacts on the positive injunction right the Ministry of Justice may have. In many member states, the Ministry of Justice has the right to make prosecution in an individual case mandatory. If national decentral authorities are competent to decide on transfer of prosecution involving the transitivity principle, this would mean the decentral authorities could undermine the positive injunction right of the Ministry of Justice. Especially now the negotiations on an EU instrument on transfer of prosecution are experimenting with the introduction of the transitivity principle in relation to transfer of prosecution between competent authorities, it is important to re-assess the necessity to involve central authorities in the decision process.



**1.3.9** *Do you agree that transitivity in transfer of prosecution may create problems with respect to the positive injunction right of the Ministry of Justice?*

- Yes
  - No
- [Comment]



**1.3.10** *Do you agree that decision making with respect to the international validity of decisions can be fully decentralised and thus follow scenario 3 (even though actual execution of a foreign decision might need the involvement of a central body)?*

- Yes
- No

[Comment]



**1.3.11** *Do you agree that scenario 3 is the preferred future scenario and that decision making should as much as possible be decentralised? Do you agree that the central authority should have a supporting rather than a decision making role, even though the decentralised authority may need to consult a central authority with respect to some aspects of cooperation or needs the central authority to execute the decision itself?*

- Yes
- No

[Comment]

## 1.4 Position of Eurojust, EJN and EPPO



**1.4.1** *Have you ever used the contact points of the European Judicial Network (EJN) to obtain information on the competent authorities of the executing member state?*

	Yes, as the main source	Yes, occasionally	Yes, as a last resort	No
Art 10 FD EAW	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Art 4.5 FD Fin Penalties	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Art 4.4 FD Confiscation	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Art 5.4 FD Deprivation of Liberty	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Art 6.6 FD Probation	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Art 8.4 FD EEW	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Art 10.7 FD Supervision	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

## MEMBER STATE QUESTIONNAIRE

	Yes, as the main source	Yes, occasionally	Yes, as a last resort	No
Art 5.2 FD jurisdiction	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>



**1.4.2** *Do you contact Eurojust to assist with cooperation? What is the character of the assistance provided by Eurojust?*

Legislative reference	Contact					Character		
	Always	Usually	Sometimes	Rare	Never	Binding	Advisory, but always followed	Advisory, not always followed
Art 16.1 FD EAW – multiple request	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Art 11 FD Confiscation – multiple request	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Art 7 FD Organised Crime – Jurisdiction	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Art 13.1 f(i) FD EEW – refusal grounds	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Art 12 FD jurisdiction	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>



**1.4.3** *Is it an acceptable future policy option to extend the competences of Eurojust?*

Extending the competences of Eurojust	Yes	No
Formulate and answer MLA requests	<input type="radio"/>	<input type="radio"/>
Keep a register with convictions of third country nationals	<input type="radio"/>	<input type="radio"/>
Keep a register with convictions of legal persons	<input type="radio"/>	<input type="radio"/>
Help to select an appropriate member state for relocation	<input type="radio"/>	<input type="radio"/>
Decide on the appropriate member state to prosecute	<input type="radio"/>	<input type="radio"/>
Decide in the event multiple EAW are issued	<input type="radio"/>	<input type="radio"/>



**1.4.4** *What would be the added value of an EPPO against a strengthened Eurojust?*

[explain]



**1.4.5** *Do you agree that the setting up of a European Public Prosecutor's Office (EPPO) should be dependent on necessity and a thorough analysis of the subsidiarity principle?*

- Yes, analysis still needs to be performed
- The inclusion of the possibility to set up an EPPO in the new Treaties indicates that both necessity and subsidiarity requirements are met
- No [explain]



**1.4.6** *For what type of offences should EPPO be competent?*

- Minimalist approach: only the offences affection the Financial benefits of the European Union
- Maximalist approach: the 32 MR offences
- Other approach [explain]

## 2 Proportionality limits to cooperation

### 2.1 Introduction

Proportionality is traditionally interpreted as a limit with respect to the offences for which cooperation is required or possible. At times this limit is developed based on a reference to certain offences, or offence labels; in other situations the limits are determined via the reference to sanction thresholds.



**2.1.1** *Do you agree that limits should be sufficiently built-in in the scope of the cooperation instrument meaning that the executing member state only has a limited and pre-defined discretion to assess proportionality (as opposed to introducing a general proportionality test that allows member states to uphold a wide and undefined proportionality test)?*

- Yes



- |  No [explain]

Even though the project team develops proportionality only as a limit to the offences for which cooperation is possible, the proportionality limit is often interpreted in a very broad sense.



**2.1.2** *In which fields of judicial cooperation in criminal matters should proportionality built-in?*

- Proportionality should be built-in with regard to the offences.
- Proportionality should be built-in with regard to operational and financial costs and benefits.
- Proportionality is important both in the law-making and law-applying stage. Even in specific cases issuing and/or executing member state should have the possibility to seek recourse in the proportionality principle.
- The issuing member state should consider proportionality in each case.
- The issuing member state should be required to prove that proportionality requirements are met.
- The executing member state should be able to refuse cooperation if it considers that proportionality requirements are not met.
- Other
- Proportionality should not be included in any more judicial cooperation instruments [explain]

[Comment]

## 2.2 The list of 32 MR offences

The most controversial feature of the mutual recognition instruments is the introduction of the list of 32 offences (i.e. the 32 MR offences), for which the double criminality requirement has been abandoned. Notwithstanding the importance of double criminality, it is considered an obstacle for smooth cooperation. Member states looked into alternatives and the possibility to limit the effect of double criminality. In light thereof the 32 MR offences were listed.



**2.2.1** *Have you experienced difficulties with the implementation of the 32 MR offence list?*

- Yes, because our constitution does not allow us to cooperate for acts that do not constitute an offence in our criminal law
  - Yes, because for some of the offence labels it was not sure which offences of our criminal code would fall under the scope of that offence label
  - Yes, for another reason [explain]
  - No
- [Comment]



2.2.2 *Have you issued a declaration setting out the guidelines for the interpretation of the 32 MR offence list (cfr. Art 23.4 FD EEW and Art 14.4 FD Supervision)?*

- Yes, because our **constitution** does not allow us to cooperation for acts that do not constitute an offence in our criminal law
  - Yes, because for some of the offence labels it was **not sure which offences** of our criminal code would fall under the scope of that offence label
  - Not yet, but we intend to do so because our **constitution** does not allow us to cooperation for acts that do not constitute an offence in our criminal law
  - Not yet, but we intend to do so because for some of the offence labels it was **not sure which offences** of our criminal code would fall under the scope of that offence label
  - Not yet, but we intend to do so for another reason [explain]
  - No
- [Comment]



2.2.3 *Have you ever experienced that your classification in the 32 offence list was not accepted by the executing member state?*

- Yes, because the executing member state did not agree that the **facts qualified** as the indicated offence label
- Yes, because the executing member state argued that the offence label on the 32 offence **list was unclear** what made it impossible for them to assess whether the facts qualified as the label

- Yes, because the executing member state had issued a **declaration** in which it had stated that the offence label would be interpreted according to the rules set out in the declaration
- Yes, with respect to some member states [explain]
- Yes, with respect to some forms of cooperation [explain]
- Yes for another reason [explain]
- No



**2.2.4** *Have you ever challenged a classification in the 32 offence list as presented by the issuing member state?*

- Yes, we did not agree that the **facts qualified** as the indicated offence label
- Yes, we argued that the offence label on the 32 offence **list was unclear** what made it impossible for them to assess whether the facts qualified as the label
- Yes, because we had issued a **declaration** in which we had stated that the offence label would be interpreted according to the rules set out in the declaration
- Yes, with respect to some member states [explain]
- Yes, with respect to some forms of cooperation [explain]
- Yes for another reason [explain]
- No



**2.2.5** *Would it be an acceptable future policy option to clearly define the scope of the 32 MR offence list with common definitions?*

- Yes, reference should be made to the acquis of the approximating framework decisions, and where **no common definition exists**, one should be **elaborated**
- Yes, reference should be made to the acquis of the approximating framework decisions, and where **no common definition exists**, the label should be **removed** from the list
- Yes, reference should be made to the acquis of the approximating framework decisions, and where no common definition exists, and no definition can be elaborated in **a short time**, the label should be (temporarily) removed from the list
- Yes, for another reason [explain]
- No

[Comment]



2.2.6 *Do you agree that cooperation would be facilitated if it was clear which offences from which criminal codes fall within the scope of the 32 MR offence list?*

- Yes, all member states should be obliged to issue a (updating) declaration indicating which offences from their national code fall within the scope of the 32 MR offence list.
- No, a such declaration would not have any added value.

[Comment]



2.2.7 *Would it be an acceptable future policy option to use a clearly defined 32 MR offence list as a basis to make cooperation more stringent?*

- To limit the number of refusal grounds
- To limit the number of postponement grounds
- To regulate financial capacity issues
- To regulate the possibility to call on operational capacity issues
- To make it more strict to respect deadlines for cooperation
- To regulate the admissibility of evidence
- To define the so-called **strong** powers of Eurojust (new to be created e.g. evocation rights, decision making power) without changing the scope of the current powers
- Other [explain]
- No

[Comment]

## 2.3 Sanction thresholds

Sanction thresholds are a way to limit the scope of cooperation instruments to severe offences.

The current body of instruments regulating international cooperation in criminal matters hold a wide variety of sanction thresholds, either to be met in one of the member states or to be met in both of the member states (in which case the threshold can differ in the issuing and the executing member state).

Besides the thresholds that limit the scope of cooperation instruments, also approximation instruments set sanction standards, indicating what penalty member states must ensure with respect to certain offences.

However, critique has arisen to these references to sanctions (be it as thresholds or sanction level requirements) because the penal culture differs significantly in the member states which creates uneven situations. Offences that are punishable with a severe penalty in one member state may be punishable with a far less severe penalty in another member state. Especially the fact that the scope definition is left entirely up to the issuing member state was made some eye brows raise.



**2.3.1 Do you adapt the sanction thresholds according to your penal culture?**

- Yes, for some instruments we have set the threshold at a higher level as we are aware of the impact of our mild penal culture. We will not seek cooperation for cases with respect to acts that do not meet our internal threshold.
- Yes, for some instruments we have lowered the threshold that needs to be met in the executing member state, as we are aware of the impact of or mild penal culture. We will engage in cooperation if our internal threshold is met, even if it is lower than the minimum threshold foreseen in the cooperation instrument.
- No, sanction thresholds are never re-evaluated when implementing EU instruments into national law.

[Comment]



**2.3.2 Which sanction thresholds does your national implementation law foresee?**

Please make a clear distinction between for example six months and more than six months. We suggest you use straightforward symbols. Applied to the example this would become = 6months, respectively > 6 months.

	In the issuing member state	In the executing member state
Art 51 SIC		

INTERNATIONAL COOPERATION IN CRIMINAL MATTERS

Art 15 CIS Convention		
Art 1.3 EUMLA Protocol		
Art 1 FD Money Laundering		
Art 13 Eurojust Decision		
Art 2 FD EAW		
Art 6 FD Confiscation		
Art 7 FD Deprivation of Liberty		
Art 10 FD Alternative		
Art 3 FD Freezing		
Art 14 FD EEW		
Art 14 FD Supervision		
Art 1 FD Organised Crime		
Art 10 Swedish FD		

Sanction thresholds are a way to limit the scope of cooperation instruments to severe offences. At times there is no longer an obligation to participate (*Art 10.2 Swedish FD: Where the request pertains to an offence punishable by a term of imprisonment of one year or less under the law of the requested Member state, the competent law enforcement authority may refuse to provide the requested information or intelligence.*), at times the cooperation is no longer possible (*Art 2.1 FD EAW: A European arrest warrant may be issued for acts punishable by the law of the issuing Member state by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months*)



**2.3.3 Try and see: Are often confronted with requests relating to offences that do not meet the sanction threshold provided for in the instruments in the issuing member state?**

Tick boxes are used here in order to allow you to indicate that sometimes you are cooperating and sometimes you are not. We propose to discuss during the focus group meetings which factors determine whether or not cooperation takes place.

[Comment]

	Yes and we cooperate anyway	Yes but we do not cooperate	No
Art 51 SIC	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

## MEMBER STATE QUESTIONNAIRE

Art 15 CIS Convention	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 1.3 EUMLA Protocol	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 1 FD Money Laundering	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 13 Eurojust Decision	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 2 FD EAW	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 6 FD Confiscation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 7 FD Deprivation of Liberty	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 10 FD Alternative	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 3 FD Freezing	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 14 FD EEW	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 14 FD Supervision	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 1 FD Organised Crime	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Art 10 Swedish FD	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>



**2.3.4** *Are you confronted with requests relating to offences that meet the sanction threshold in the issuing member state, but would not have met the threshold if you were the issuing member state?*

	Yes	No
Art 51 SIC	<input type="radio"/>	<input type="radio"/>
Art 15 CIS Convention	<input type="radio"/>	<input type="radio"/>
Art 1.3 EUMLA Protocol	<input type="radio"/>	<input type="radio"/>
Art 1 FD Money Laundering	<input type="radio"/>	<input type="radio"/>
Art 13 Eurojust Decision	<input type="radio"/>	<input type="radio"/>
Art 2 FD EAW	<input type="radio"/>	<input type="radio"/>
Art 6 FD Confiscation	<input type="radio"/>	<input type="radio"/>
Art 7 FD Deprivation of Liberty	<input type="radio"/>	<input type="radio"/>
Art 10 FD Alternative	<input type="radio"/>	<input type="radio"/>
Art 3 FD Freezing	<input type="radio"/>	<input type="radio"/>
Art 14 FD EEW	<input type="radio"/>	<input type="radio"/>
Art 14 FD Supervision	<input type="radio"/>	<input type="radio"/>
Art 1 FD Organised Crime	<input type="radio"/>	<input type="radio"/>
Art 10 Swedish FD	<input type="radio"/>	<input type="radio"/>



**2.3.5** *Art 13 Eurojust leaves it up to the member states to decide what the sanction threshold is. Which threshold is chosen in your national implementation law?*

- 5 years
- 6 years
- Another threshold
- There is no national implementation law

Art 51 Schengen Implementation Convention requires member states to cooperate as soon as the act is punishable in both states with a penalty involving deprivation of liberty or a detention order of a maximum period of at least six months, or is punishable under the law of one of the two Contracting Parties by an **equivalent penalty** and under the law of the other Contracting Party by virtue of being an infringement of the rules of law which is being prosecuted by the administrative authorities, and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters



2.3.6 *Does your national law foresee a penalty that could qualify as an equivalent penalty in the sense of Art 51 SIC?*

- Yes [explain]
- No



2.3.7 *Have you ever had a discussion on the interpretation of equivalent penalty with an executing member state?*

- Yes [explain]
- No



2.3.8 *Have you ever had a discussion on the interpretation of equivalent penalty with an issuing member state?*

- Yes [explain]
- No

## 2.4 Extraditable offences

Ever since the introduction of the European Arrest Warrant, the reference to extraditable offences is outdated as the concept no longer exists in the cooperation between member states.



The interpretation thereof is now a question mark as it is not clear whether all member states will interpret the scope limitation of the instruments in the same way.



**2.4.1** *Considering that the concept of extradition has seized to exist among the member states of the European Union, how do you currently interpret that scope limitation?*

- We use the definition of Art 2 CoE Extradition to decide what is an extraditable offence
- Historic interpretation: we look at the status of what used to be extraditable offences at the time, because the instrument was intended to be limited in that way.
- Evolutionary interpretation: we look at the current status and thus the current body of instruments, which means that we use the rules in the EAW (i.e. punishable with 12m in cases of prosecution surrenders and 4m in cases of execution surrenders)
- Another interpretation: [explain]



**2.4.2** *Is it an acceptable future policy option for you to amend all remaining provisions that refer to extraditable offences?*

- Yes, but only if it is changed into the current EAW sanction thresholds; meaning: punishable with 12m or punished with 4m
- Yes, but only if it is changed into a reference to the act rather than the incumbent sanction; meaning: for offences that are on the 32 MR offence list.
- No

### 3 Deadlines, postponement, refusal and conditional cooperation

#### 3.1 Deadlines

##### Setting deadlines



3.1.1 *How do you decide on the deadlines set for execution?*

- Depending on the timing of each individual case
- Depending on the kind of measure that is requested
- Other aspects influence the deadline [explain]

[Comment]



3.1.2 *Do you distinguish and set separate deadlines for replying and executing a request/order?*

- Yes
- No



3.1.3 *How do member states respond to the justification of the deadline?*

- Justification of the deadline is never challenged.
- Justification on the deadline is rarely challenged.
- Justification of the deadline is sometimes challenged.
- Justification of the deadline is often challenged.

[Comment]



3.1.4 *Do you feel that deadlines are sufficiently justified by the issuing member state?*

- Yes, justification is done based on the particulars of a specific case
- Yes, even though justification is often based on standard templates
- No, because justification is often based on standard templates
- No, for another reason [explain]



**3.1.5** *Is it an acceptable future policy option to drop the obligation to explain the reasons for the deadline?*

- Yes, in the current era of mutual trust and recognition the obligation to stipulate reasons for a deadline is out dated anyway
- No, the requirement to stipulate the reasons for the deadlines remains an important element to give weight to the proportionality principle as it is a way to stimulate reflection and self-restriction

[Comment]

### **Matters of particular urgency**



**3.1.6** *Do you have experience with member states that postpone a request until the situation becomes particularly urgent, to be able to use the specific provisions?*

- Yes
- No



**3.1.7** *Art 40.7 SIC limits the scope of the urgency provisions to a number of offences. Does this list respond to practical needs?*

- Yes
- No, only a limited set of the listed offences is used [explain]
- No, the list of offences is too limited [explain]



**3.1.8** *Is it an acceptable future policy option to link the scope of the particular urgency to the 32 MR offence list?*

- Yes
- Yes, but only if the listed offences are defined according to what is known to be common based on the approximation acquis
- Yes, but only if member states all indicate which offences would fall within the scope of the listed offences
- No

**Meeting deadlines**



**3.1.9** *Are problems with meeting deadlines linked to certain member states?*

- Yes
- No
- Not applicable (we do not have problems with the deadlines we set)



**3.1.10** *Are problems with meeting deadlines linked to certain measures requested?*

- Yes
- No
- Not applicable (we do not have problems with the deadlines we set)



**3.1.11** *What reasons are usually given for not being able to meet the deadline? Do executing member states always give an indication on which deadline is realistic and possible to be met?*

[explain]



**3.1.12** *Do you often have problems to meet the deadlines?*

- Yes, usually with respect to the same member states
- Yes, usually with respect to the same measures requested
- No

[explain]

### 3.2 Grounds for postponement

The project team has identified a limited set of grounds for postponement that will be subject to analysis in the context of this study.

- *Incomplete information* – when for example the form required for cooperation is incomplete or manifestly incorrect, cooperation may be postponed until such time as the form has been completed or corrected.
- *Waiting translation* – for the execution of some requests or orders, member states may require that the request or order is accompanied by additional documentation translated in the official language or an official language of the Member state in which the requested authority is based
- *Lack of validation* – A Member state may require validation in all cases where the issuing authority is not a judge, a court, an investigating magistrate or a public prosecutor and where the measures necessary to execute the request or order would have to be ordered or supervised by a judge, a court, an investigating magistrate or a public prosecutor under the law of the executing State in a similar domestic case.
- *Serious humanitarian reasons* – Cooperation may exceptionally be temporarily postponed for serious humanitarian reasons, for example if there are substantial grounds for believing that it would manifestly endanger the requested person's life or health. The execution of the request or order shall take place as soon as these grounds have ceased to exist.
- *Executing own decision* – the executing member state may postpone execution of the order or request, to execute its own decision
- *Damaging ongoing investigations or prosecution* – when execution of the order or request might prejudice an ongoing criminal investigation or prosecution, execution may be postponed until such time as the executing State deems reasonable
- *Legal remedies* – Member states are required to put in place the necessary arrangements to ensure that any interested party, have legal remedies. When awaiting the outcome of the legal remedies, execution may be postponed.
- *Disproportionate burden* – when execution of the order or request would place a burden on the executing member state's authority clearly be disproportionate or irrelevant with regard to the purposes for which cooperation has been requested.



#### 3.2.1 Which grounds for postponement do you use? Should other grounds for postponement be added?

INTERNATIONAL COOPERATION IN CRIMINAL MATTERS

Cooperation domains	Grounds for postponement								Other grounds to be added?
	Incomplete information	Awaiting translation	Lack of validation	Serious humanitarian reasons	Executing own decision	Damaging ongoing investigation	Legal remedies	Disproportionate burden	
Mutual legal assistance	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Pre-trial supervision	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Extradition & surrender	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
MR of financial penalties	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
MR of confiscation orders	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
MR of custodial sentences	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
MR of alternative sentences	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	

### 3.3 Grounds for refusal

#### Ne bis in idem



3.3.1 *What type of situations can give rise to the application of the ne bis in idem principle according to your national law?*

	No	Authorities		
		own authorities	Member state authorities	Third country authorities
Final convictions	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Ongoing prosecution	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Intended prosecution	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Decision not to prosecute	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Other		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>



3.3.2 *What is the position of “ne bis in idem” as a ground for refusal in your national implementation law?*



The following grid allows you to make a distinction between a situation where the refusal ground is not foreseen in national law, where it is implemented as an optional ground for refusal or implemented as a mandatory ground for refusal. If the optional or mandatory character is dependent on particulars of the case (e.g. between EU member states as opposed to third countries) you can tick both boxes. Clarification will be possible during the focus group meeting. Additionally, you are asked to indicate whether this refusal ground is considered useful.

[Comment]

	Position in national law	Usefulness
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	Not foreseen	Optional ground	Mandatory ground	Considered useful	Considered not useful
FD EAW	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Freezing	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Fin Pen	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Confiscation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Deprivation of Liberty	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Alternative	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD EEW	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Supervision	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>



**3.3.3** *Do you agree that the ne bis in idem principle should be a refusal ground (at least an optional ground) that can play already in a pre-trial investigative stage (in that pre-trial mutual legal assistance can be refused if a final decision exists) and that calling upon a ne bis situation is not limited to actual prosecution for acts that already have a final decision?*

- Yes
- No [explain]



**3.3.4** *Is there a need to install a register for pending and ongoing prosecutions to be able to (better) apply the ne bis in idem principle?*

- Yes, for any offence type
- Yes, at least for the 32 MR offences
- Yes, only for the 32 MR offences
- No

[Comment]



**3.3.5** *Do you consider it a problem that member states can formulate the exceptions with respect to the application of the ne bis in idem principle (e.g. that it will not apply to foreign decisions that relate to acts that were (partially) committed on the territory of*



*that member state)?*

- Yes, it complicates cooperation
- Yes, it undermines the application of the ne bis in idem principle
- Yes, for another reason
- No

[Comment]

### **Immunity from prosecution**

Linked to the ne bis in idem principle the project team has chosen to also test support among member states for the introduction of an additional substantive ground for refusal or non-execution, i.e. the situation where the proceedings in the issuing member state relate to a person who the executing member state has granted immunity from prosecution for the same facts as a benefit for his or her collaboration with justice, which it believes logically should be introduced from an MR-perspective.

The importance of taking EU legislative initiative in the sphere of (international cooperation relating to) protection of witnesses and collaborators with justice was underlined in Recommendation 25 of the 2000 Millennium Strategy. The importance of MR of immunities granted to collaborators with

justice was already argued in the final report of the 2004 study on EU standards in witness protection and collaboration with justice, conducted by the project team, as a logical complement or extension of the ne bis in idem philosophy underlying the *Gözütok/Brügge* ECJ jurisprudence. In line with the transposition of the Schengen ne bis in idem acquis into a ground for refusal or non-execution in the sphere of MLA, the project team therefore believes an analogue approach should be followed with regard to immunity from prosecution for the same facts.



#### **3.3.6 What is the position of “immunity from prosecution” as a ground for refusal in your national implementation law?**



The following grid allows you to make a distinction between a situation where the refusal ground is not foreseen in national law, where it is implemented as an optional ground for refusal or implemented as a mandatory ground for refusal. If the optional or mandatory character is dependent on particulars of the case (e.g. between EU member states as opposed to third

countries) you can tick both boxes. Clarification will be possible during the focus group meeting. Additionally, you are asked to indicate whether this refusal ground is considered useful

[Comment]

	Position in national law			Usefulness	
	Not foreseen	Optional ground	Mandatory ground	Considered useful	Considered not useful
FD EAW	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Freezing	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Fin Pen	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Confiscation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Deprivation of Liberty	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Alternative	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD EEW	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Supervision	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>

**Immunity or privilege**

Art.13, 1, d FD EEW, as well as Art. 7, 1, (b) of the 2003 FD Freezing, has explicitly introduced as a non-execution ground the circumstance where there is an immunity or privilege under the law of the executing member state which makes it impossible to execute the EEW or respectively freezing order.



**3.3.7** *Do you consider it problematic that there is no common EU level understanding of what constitute immunities or privileges?*

- Yes
- No [explain]



**3.3.8** *What is the position of “immunity or privilege” as a ground for refusal in your national implementation law?*

The following grid allows you to make a distinction between a



situation where the refusal ground is not foreseen in national law, where it is implemented as an optional ground for refusal or implemented as a mandatory ground for refusal. If the optional or mandatory character is dependent on particulars of the case (e.g. between EU member states as opposed to third countries) you can tick both boxes. Clarification will be possible during the focus group meeting. Additionally, you are asked to indicate whether this refusal ground is considered useful

[Comment]

	Position in national law			Usefulness	
	Not foreseen	Optional ground	Mandatory ground	Considered useful	Considered not useful
FD EAW	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Freezing	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Fin Pen	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Confiscation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Deprivation of Liberty	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Alternative	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD EEW	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Supervision	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>

It is important to remember that the introduction of this ground for refusal or non-execution is a step backwards, compared to traditional mutual legal assistance in which cooperation domain this refusal ground was traditionally not included. Furthermore, it is most regrettable that the situation between member states is more stringent than the situation between non-EU member states, in that extradition to Council of Europe states does not foresee the possibility to call upon immunity or privilege under national law to refuse cooperation.



**3.3.9** *Do you agree that the introduction of immunity or privilege as a refusal ground is a step backwards and the refusal ground should therefore be eliminated in the context of international cooperation in criminal*

*matters between EU member states?*

- Yes
- No [explain]

**(Extra)territoriality**

Art 4.7 FD EAW and 13, 1, f FD EEW for example state that recognition or execution of an EEW may be refused in the executing state if the EEW relates to criminal offences which: (i) under the law of the executing state are regarded as having been committed wholly or for a major or essential part within its territory, or in a place equivalent to its territory; or (ii) were committed outside the territory of the requesting state, and the law of the executing state does not permit legal proceedings to be taken in respect of such offences where they are committed outside that state’s territory. This ground for non-execution ground has equally been copied from the EAW. In extradition law, this refusal ground has always taken a prominent place and was part of the *acquis* as found in the CoE Extradition treaty. However, copying it into an MLA instrument seems a mistake, and is regrettable. Extradition and surrender law cannot be simply assimilated with MLA.



**3.3.10** *What is the position of “(extra)territoriality” as a ground for refusal in your national implementation law?*



The following grid allows you to make a distinction between a situation where the refusal ground is not foreseen in national law, where it is implemented as an optional ground for refusal or implemented as a mandatory ground for refusal. If the optional or mandatory character is dependent on particulars of the case (e.g. between EU member states as opposed to third countries) you can tick both boxes. Clarification will be possible during the focus group meeting. Additionally, you are asked to indicate whether this refusal ground is considered useful

[Comment]

	Position in national law	Usefulness
--	--------------------------	------------

	Not foreseen	Optional ground	Mandatory ground	Considered useful	Considered not useful
FD EAW	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Freezing	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Fin Pen	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Confiscation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Deprivation of Liberty	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Alternative	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD EEW	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Supervision	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>

**Age as a condition for criminal responsibility**



**3.3.11** *What is the position of “age as a condition for criminal responsibility” as a ground for refusal in your national implementation law?*

The following grid allows you to make a distinction between a situation where the refusal ground is not foreseen in national law, where it is implemented as an optional ground for refusal or implemented as a mandatory ground for refusal. If the optional or mandatory character is dependent on particulars of the case (e.g. between EU member states as opposed to third countries) you can tick both boxes. Clarification will be possible during the focus group meeting. Additionally, you are asked to indicate whether this refusal ground is considered useful

[Comment]

	Position in national law			Usefulness	
	Not foreseen	Optional ground	Mandatory ground	Considered useful	Considered not useful

FD EAW	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Freezing	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Fin Pen	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Confiscation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Deprivation of Liberty	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Alternative	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD EEW	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Supervision	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>

### Double criminality



#### 3.3.12 *What is the position of “double criminality” as a ground for refusal in your national implementation law?*



The following grid allows you to make a distinction between a situation where the refusal ground is not foreseen in national law, where it is implemented as an optional ground for refusal or implemented as a mandatory ground for refusal. If the optional or mandatory character is dependent on particulars of the case (e.g. between EU member states as opposed to third countries) you can tick both boxes. Clarification will be possible during the focus group meeting. Additionally, you are asked to indicate whether this refusal ground is considered useful

	Position in national law			Usefulness	
	Not foreseen	Optional ground	Mandatory ground	Considered useful	Considered not useful
FD EAW	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Freezing	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Fin Pen	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Confiscation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Deprivation of Liberty	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Alternative	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD EEW	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>

FD Supervision	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
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### **Ordre public**

Two different types of the ordre public exception can be found in the current body of instruments regulating international cooperation in criminal matters.

First, there is the general catch all formulation as can be found in Art 10 EU MLA. The refusal ground refers to a request that is likely to prejudice the sovereignty, security, ordre public or other essential interests of the country. Second, there is a more narrow and specified version of this refusal ground in the FD EEW which refers to a request that would harm essential national security interests, jeopardise the source of information or relating to specific intelligence activities.



**3.3.13** *Do you agree that the scope reduction from “likely to prejudice the sovereignty, security, ordre public or other essential interests of the country” to “harm essential national security interests” is recommendable as it avoids member states from using this exception all too often?*

- Yes  
 No

[Comment]



**3.3.14** *Do you agree that it is recommendable to fine-tune this exception and assess for each of the cooperation instruments whether additional aspects should be brought under the scope of the refusal ground (as is done for the EEW)?*

- Yes  
 No

[Comment]



**3.3.15** *What is the position of “ordre public” as a ground for refusal in your national implementation law?*



The following grid allows you to make a distinction between a situation where the refusal ground is not foreseen in national law, where it is implemented as an optional ground for refusal or implemented as a mandatory ground for refusal. If the

optional or mandatory character is dependent on particulars of the case (e.g. between EU member states as opposed to third countries) you can tick both boxes. Clarification will be possible during the focus group meeting. Additionally, you are asked to indicate whether this refusal ground is considered useful

	Position in national law			Usefulness	
	Not foreseen	Optional ground	Mandatory ground	Considered useful	Considered not useful
FD EAW	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Freezing	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Fin Pen	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Confiscation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Deprivation of Liberty	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Alternative	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD EEW	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Supervision	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>

**Sentence is too low**



**3.3.16** *What is the position of “the sentence being too low” as a ground for refusal in your national implementation law?*



The following grid allows you to make a distinction between a situation where the refusal ground is not foreseen in national law, where it is implemented as an optional ground for refusal or implemented as a mandatory ground for refusal. If the optional or mandatory character is dependent on particulars of the case (e.g. between EU member states as opposed to third countries) you can tick both boxes. Clarification will be possible during the focus group meeting. Additionally, you are asked to indicate whether this refusal ground is considered useful.



	Position in national law			Usefulness	
	Not foreseen	Optional ground	Mandatory ground	Considered useful	Considered not useful
FD Fin Pen	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Deprivation of Liberty	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>
FD Alternative	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="radio"/>	<input type="radio"/>

### 3.4 Conditional cooperation

#### Life sentences

Not all member states have introduced a “life sentence” in their criminal justice system. This is why mutual recognition of custodial sentences or other measures involving deprivation of liberty need to take this into account and provide for compensating mechanisms. A such mechanism can be found in Art 5.2 FD EAW which stipulates that if the offence on the basis of which the European arrest warrant has been issued is punishable by custodial life sentence or life-time detention order, the execution of the said arrest warrant may be subject to the condition that the issuing Member state has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency to which the person is entitled to apply for under the law or practice of the issuing Member state, aiming at a non-execution of such penalty or measure. Therefore it becomes interesting to review the national situations with respect to life sentences and the applicable provisions.



#### 3.4.1 *Does your national law foresee in a custodial life sentence or lifetime detention order?*

- Yes, and we have a review on request or at least after 20 years
- Yes, and we do not have a review on request or at least after 20 years
- No



#### 3.4.2 *Does your national law foresee the possibility to apply for a measure of clemency of the custodial life sentence or lifetime detention order imposed, aiming*

*at the non-execution of the penalty or measure?*

- Yes
- No



**3.4.3** *How do you assess the necessity to require the issuing member state to foresee the possibility for review or a clemency application?*

- We have a national legal obligation to cooperate only under that condition
- We have developed a practice to always require that the possibility as foreseen
- We only ask for the possibility after a high level review of the national law of the issuing member state
- We only ask for the possibility after a thorough review of the national law of the issuing member state
- We contact the issuing authority on their national law, before formally setting that condition

**Return provisions**

Art 5.2 FD EAW also holds a form of conditional cooperation. Where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member state, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member state in order to serve there the custodial sentence or detention order passed against him in the issuing Member state.



**3.4.4** *How do you use the return possibility foreseen in Art 5.2 EAW?*

	Yes	Yes, only with respect to nationals	Yes, only with respect to residents	No / disagree
Our national implementation law holds an obligation to make surrender dependent on	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

return				
We have developed a practice to make surrender dependent on return	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
We never make surrender dependent on return	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
It is our experience that the issuing member state will seek recourse to a transfer of execution if that is desirable	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

**Limitations in use**

Art 16.4 Prum Decision and Convention stipulates that the supplying authority may, in compliance with national law impose conditions on the use made of data and information by the receiving authority.

**3.4.5** *Do you attach conditions to the use of information?*

- Yes, we have a legal obligation to do so [explain]
- Yes, the practice has developed to set conditions [explain]
- Yes, it depends on the member state(s) involved [explain]
- Yes, sometimes [explain]
- No

**3.4.6** *Are you confronted with conditions to the use of information?*

- Yes
- Yes with respect to some member states [explain]
- No

Art 7.2 EU MLA stipulates that the providing authority may pursuant to its national law, impose conditions on the use of spontaneous exchanged information by the receiving authority.

**3.4.7** *What is the main motivation to attach conditions to the use of information?*

- Data protection – protecting the privacy of that data subject
- Purpose limitation principle – avoid that information is used for other purposes than the ones it was gathered for
- Other [explain]

**Cross-border surveillance**

Art 40.1 SIC stipulates that the requested member state may attach conditions to the authorisation to continue surveillance on its territory.



**3.4.8** *Are you confronted with conditional authorisation to continue surveillance on the territory of another member state?*

- Yes [explain]
- No



**3.4.9** *Do you attach conditions to the authorisation to continue surveillance on your territory?*



- Yes, we have a legal obligation to do so [explain]
- Yes, the practice has developed to set conditions [explain]
- Yes, it depends on the member state(s) involved [explain]
- Yes, sometimes [explain]
- No

**Cross-border investigations**

Art 19.4 Naples II stipulates that the competent authorities may make the approval to cooperate subject to certain conditions and requirements that need to be observed in the course of the cross-border investigations.



**3.4.10** *Do you have a standard set of conditions and requirements with respect to Art 19.4 Naples II?*

- Yes [explain]  
 No



**3.4.11** *Is it your experience that the conditions and requirements set based on Art 19.4 Naples II negatively impact on the smoothness of cooperation?*

- Yes [explain]  
 No

## **4 Law applicable to cooperation**

### **4.1 Law governing the decision / order**

The basic principle is that the law of the issuing member state applies to the issuing of a decision or order. However, there are many exceptions in the current body of instruments. The purpose of this section is to verify to what extent it is necessary/desirable/possible to develop or apply alternatives which stay more true to the basic mutual recognition principles.

The situations that will be subject to analysis are:

- Domain 1: Stipulating reasons for cooperation
- Domains 2 and 7: Adapting the decision of the issuing member state
- Domains 1, 4 and 7: Criminal liability of legal persons
- Different domains: different authorities competent

#### **Domain 1: Stipulating reasons for cooperation**



**4.1.1** *Case influence: do you have a standard recipe for stating the reasons for a cooperation request, to facilitate and speed up cooperation?*

[Comment]

	No reason provided	Standard recipe that is case-independent	Case by case reasoning	Combination
Art 40.1 SIC – continued surveillance	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Art 5.2 d EU MLA – dispatch of post	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Art 20 EU MLA – telecommunication interception	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Art 1.4 EU MLA Protocol – bank account information	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Art 2.3 and 3.2 EU MLA Protocol – transaction information	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Art 5 Swedish FD – purpose of the information	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Art 23 Naples II – investigative measure	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>



**4.1.2** *Case influence: Do you agree that stipulation of reasons for the request has no added value if most member states use a standard set of reasons?*

- Yes**, in the current era of mutual trust and recognition the obligation to stipulate reasons for cooperation is out dated anyway
- No**, the requirement to stipulate the reasons for the request remains an important element as it is a way to stimulate reflection and self-restriction



**4.1.3** *Evaluation of reasons: Were you ever confronted with a situation where your reasons were considered insufficient by the requested member state?*

[Comment]

	Yes	No
Art 40.1 SIC – continued surveillance	<input type="radio"/>	<input type="radio"/>
Art 5.2 d EU MLA – dispatch of post	<input type="radio"/>	<input type="radio"/>
Art 20 EU MLA – telecommunication interception	<input type="radio"/>	<input type="radio"/>
Art 1.4 EU MLA Protocol – bank account information	<input type="radio"/>	<input type="radio"/>
Art 2.3 and 3.2 EU MLA Protocol – transaction information	<input type="radio"/>	<input type="radio"/>

Art 5 Swedish FD – purpose of the information	<input type="radio"/>	<input type="radio"/>
Art 23 Naples II – investigative measure	<input type="radio"/>	<input type="radio"/>



**4.1.4** *Supplementing reasons: Are you allowed to supplement or clarify your reasons if they were not accepted?*

- Yes, but once the request is rejected, clarification is never successful
- Yes, and clarification can be successful
- Yes, but the deadlines set for clarification can be too tight
- No

[Comment]



**4.1.5** *Case influence: do you have the feeling that member states use standard recipes for the giving of reasons?*

- Yes, but only a minority
- Yes, even the majority
- Yes, but it is difficult to assess the frequency
- No

[Comment]



**4.1.6** *Evaluation of reasons: Do you evaluate the reasons given by the requesting/issuing member state?*

- Yes, it is an important element in our decision to cooperate.
- No, we merely check whether a reason is given in the request if that is legally required.
- No, we do not even check whether a reason is given because it is too complex to know when a reason is or is not required

[Comment]



**4.1.7** *Supplementing reasons: Do you allow requesting member states to supplement or clarify the reasons they stipulate?*

- Yes
- Yes, but we rarely change our position
- No

[Comment]



**4.1.8** *Evaluation of reasons: Is it an acceptable future policy option to reduce the possibility of the requested/executing member state to assess the reasons for the request?*

- Yes, in the current era of mutual trust and recognition, it is inconsistent to allow the requested/executing member state to question the reasons
- No, it is important to maintain the possibility for requested/executing member states to assess the reasons and thus keep a proportionality test.



**4.1.9** *Supplementing reasons: Should there always be a right to supplement or clarify the reasons if they are rejected by the requested/executing member state?*

- Yes, only one clarification attempt should be allowed
- No, if the reasons could not have been properly clarified in the initial request, cooperation is refused.

[Comment]

**Domains 2 and 7: Adapting the decision of the issuing member state**



**4.1.10** *Does your national implementation law foresee in the possibility to adapt the decision of the issuing member state?*

The grid allows you to make a distinction between the following options:

- Yes, my national law foresees in an automatic conversion mechanism
- Yes, my national law foresees in a case by case assessment of the desirability of adapting
- No

	Yes, automatic	Yes, case by case	No
Art 8 FD Fin Pen	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Art 8 FD Deprivation of Liberty	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>



Art 9 FD Alternative	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Art 13 FD Supervision measures	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>



**4.1.11** *Does your national implementation law provide guarantees to make sure the adaptation is not aggravating?*

- Yes, my national law foresees the possibility to introduce a legal remedies based on perceived aggravation
- Yes, my national law foresees in a specific procedure to avoid aggravation when dealing with adaptation
- Yes, my national law foresees in a specific classification to rank penalties according to severity when dealing with adaptation
- Yes, my national law foresees another mechanism [explain]
- No



**4.1.12** *Do executing member states adapt your decisions?*

	Never	Rare	Sometimes	Often	Always	No data
Art 8 FD Fin Pen	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Art 8 FD Deprivation of Liberty	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Art 9 FD Alternative	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Art 13 FD Supervision measures	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>



**4.1.13** *Which reasons are given to clarify the adaptation?*

- General clauses on the sanctioning system
- Detailed explanation of the sanctioning system
- Substantive reasons dependent on the specific case
- Other [explain]



**4.1.14** *Do you adapt the decisions of the issuing member state?*

	Never	Rare	Sometimes	Often	Always	No data
Art 8 FD Fin Pen	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Art 8 FD Deprivation of Liberty	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Art 9 FD Alternative	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Art 13 FD Supervision measures	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>



**4.1.15** Which reasons are given to clarify the adaptation?

- General clauses on the sanctioning system
- Detailed explanation of the sanctioning system
- Substantive reasons dependent on the specific case
- Other [explain]



**4.1.16** Is the fact that the executing member state receives the benefits of the execution of a financial penalty an incentive to maintain the original decision?

- Yes
- No



**4.1.17** Do you agree that it is inconsistent to limit the possibility to adapt a financial penalty to situations where the offences was not committed on the territory of the issuing member state, whereas no such limitation is foreseen with respect to the possibility to adapt sentences involving deprivation of liberty or probation or alternative sanctions or supervision measures?

- Yes
- No

[Comment]



**4.1.18** Do you agree that it is inconsistent to limit the possibility to adapt a deprivation of liberty or probation or alternative sanctions or supervision measures to situations where the sanction is deemed incompatible with the national law of the executing

*member state, where no such requirement is introduced to adapt a financial penalty?*

- Yes
- No

When developing different scenarios of cooperation it is always kept in mind that the mere fact that multiple member states are involved, should not negatively impact on the position of the persons involved. This is why often reference is made to the application of the so-called "*lex mitior*", i.e. the law that is most favourable for the persons involved.



**4.1.19** *Do you agree that the possibility of adapting the decision of the issuing member state (as opposed to a mandatory adaptation) is contrary to the base line of mutual recognition (i.e. accepting the validity of the decision of the issuing member state as is) and that adaptation should therefore not be justified from the perspective of the member state but be justified from the perspective of the persons concerned i.e. based on the automatic application of a lex mitior principle?*

- Yes, because the "*net effect*" would be the same, namely limiting the sanction to maximum foreseen in the law of the executing member state or changing the nature to the closed possible sanction
- Yes, because we think that adaptation should be an automatic mechanism rather than a possibility
- No

[Comment]

**Domains 1, 4 and 7: Criminal liability of legal persons**



**4.1.20** *Do you experience problems with your mutual legal assistance requests due to (in)acceptability of criminal liability of legal persons when you are the issuing member state?*

- Not applicable, we do not accept criminal liability of legal persons in our domestic legislation.
- Yes, with respect to some member states
- Yes, with respect to some forms of cooperation
- No

[Comment]



**4.1.21** *Do you experience problems with the international validity of your decisions due to (in)acceptability of criminal liability of legal persons when you are the issuing member state?*

- Not applicable, we do not accept criminal liability of legal persons in our domestic legislation.
- Yes, with respect to some member states
- Yes, with respect to some forms of cooperation
- No

[Comment]



**4.1.22** *Do you experience problems with mutual legal assistance requests due to (in)acceptability of criminal liability of legal persons when you are the executing member state?*

- Yes, when it concerns a type of liability we do not foresee in our domestic legislation
- Yes, with respect to some forms of cooperation
- Yes, we have constitutional problems with accepting the criminal liability of legal persons
- No

[Comment]



**4.1.23** *Do you experience problems with the international validity of foreign decisions due to (in)acceptability of criminal liability of legal persons when you are the*

*executing member state?*

- Yes, when it concerns a type of liability we do not foresee in our domestic legislation
  - Yes, with respect to some forms of cooperation
  - Yes, we have constitutional problems with accepting the criminal liability of legal persons
  - No
- [Comment]



**4.1.24** *Is it technically possible to store information on convictions of legal persons in your national criminal records system?*

- Yes
- No



**4.1.25** *Would it be an acceptable future policy option to introduce a binding mutual recognition principle for the criminal liability of legal persons?*

- Yes
  - Yes, but it will require amending our constitution
  - Yes, but only for a limited set of legal persons
  - Yes, but only for a limited set of offences
  - Yes, but only for a limited set of types of cooperation
  - Yes, but only for a limited set of sanctions or measures
  - No, it would be contrary to the principle nullum crimen, nulla poena sine lege
  - No for another reason [explain]
- [Comment]

**Different domains: different authorities competent**

**4.1.26** *Do you experience problems with the acceptability of the authorities you have declared competent to act?*

- Yes, with respect to some member states [explain]
- Yes, with respect to some forms of cooperation [explain]
- Yes, with respect to some of my authorities [explain]
- No



4.1.27 *Do you experience problems with the acceptability of the authorities other member states have declared competent to act?*

- Yes, with respect to some member states [explain]
- Yes, with respect to some forms of cooperation [explain]
- Yes, with respect to some of their non-judicial authorities [explain]
- Yes, with respect to some of their types of judicial authorities [explain]
- No



4.1.28 *Would it be an acceptable future policy option to introduce a binding mutual recognition principle to yield to inconsistencies *ratione auctoritatis*?*

- Yes, I agree, without any limit to the obligation to yield to inconsistencies *ratione auctoritatis*.
- Yes, I agree, but the obligation to yield to inconsistencies *ratione auctoritatis* should be limited to situations that involve any of the 32 MR offences.
- Yes, I agree, but the obligation to yield to inconsistencies *ratione auctoritatis* should be limited in another way. [explain]
- No, I disagree. Member states should be allowed to call upon inconsistencies *ratione auctoritatis* to refuse cooperation. [explain]

## 4.2 Law governing the execution

### Domain 1 – mutual legal assistance: taking account of formalities and procedures



4.2.1 *How do you decide when to ask for specific formalities and procedures to be taken into account?*

- We have a **standard set** of requirements **based on the national** procedural law to prevent problems in a later stage of the procedure
- We perform a **high level evaluation** of the law of the executing member state and only ask for specific procedures and formalities to be taken into account if we have reason to believe that the law of the executing

member state would give way for problems in a later stage of the procedure

- We perform **an in-depth analysis** of the law of the executing member state and only ask for specific procedures and formalities to be taken into account if we have reason to believe that the law of the executing member state would give way for problems in a later stage of the procedure
  - We **consult** the **Eurojust** national member to give us the necessary details on the law of the executing member state to decide whether we need to ask for specific procedures and formalities to be taken into account to avoid problems in a later stage of the procedure
  - We make use of the commitment made at Council of Europe level to supply one and other with information on substantive and procedural law and judicial organisation in the criminal field
  - We **consult** the **executing authority** before we send the request to take account of specific formalities and procedures
  - We have another procedure [explain]
- [Comment]



**4.2.2** *Do executing member states sometimes suggest alternatives*

- Yes, and usually they are acceptable
- Yes, but usually they are not useful
- No



**4.2.3** *Is it your experience that the request to take account of specific formalities and procedures are useful considering the procedures of your own national law*

- Yes**, the request we receive show that the issuing member state has **basic knowledge** of our criminal law
- Yes**, the request we receive show that the issuing member state has **detailed knowledge** of our criminal law
- Yes**, we are sometimes even **consulted** on the necessity before we receive a request
- No**, the requests clearly indicate that the issuing state operates from the **perspective of its own** national law



**4.2.4** *Do you sometimes suggest alternatives in reply to explicitly requested formalities and procedures?*

- Yes, when the requested formalities and procedures cannot be respected do to constitutional issues
- Yes, when the requested formalities and procedures are contrary to national laws or regulations
- Yes, when executing the requested formalities and procedures place a disproportionate burden on my capacity
- Yes, when we believe the requested formalities and procedures are not necessary
- Yes, when we believe the same result can be achieved in a more speedy / less costly way
- No



**4.2.5** *Do you agree that – in principle / in theory – notwithstanding possible difficulties with the admissibility of evidence, the possibility to take account of formalities and procedures is contrary to the default position in international cooperation in criminal matters and contrary to the base line of mutual recognition in which the issuing member state also has the obligation to recognise, as is, the way the issue is being executed?*

- Yes
- No

[Comment]



**4.2.6** *Do you agree that it is a better policy option to harmonise (and introduce minimum standards) the most important formalities (that give way for inadmissibility issues) as opposed to requesting member states to apply each other's criminal law?*

- Yes, thinking about the introduction of minimum standards is a useful line of thinking for the future. The introduction of minimum standards is the only way to ensure a genuine application of the mutual recognition principle. Working with minimum standards should replace the application of the law of the issuing state in



MLA-matters.

- Yes, this kind of flanking measures to introduce minimum standards is the only way to ensure a genuine application of the mutual recognition principle. However, it will never be possible to fully do away with *forum regit actum* in MLA-matters.
- No, minimum standards are not useful in this context.

[Comment]

The current debates on the introduction of minimum standards have often lost the link with cross-border situations, i.e. situations that involve multiple member states in the investigative and prosecutorial acts, even though those situations where the reason to start the debate and reflection on the necessity for EU intervention.

The project team would like to refer to the debate on minimum standards for procedural rights as an example. The baseline for the debate is that the level of procedural rights should not be affected by whether or not multiple member states are involved. Any debate on the necessity for EU intervention should start from an EU perspective, which means that only problems arising from cross-border and multi-member state criminal proceedings should be subject to debate. The direction chosen with the 2009 Roadmap on procedural rights as the sequel to the failed 2004 proposed framework decision has clearly lost that link with cross-border situations. The Roadmap calls for strengthening a list of traditional fair trial rights such as the right to translation and interpretation, the right to information on the charges and the right to legal aid and advice. Even though we do not intend to minimise the importance of these rights, we consider the formulation of this Roadmap a bridge too far in that it insufficiently clarifies why these rights are the most important concerns in cross-border multi-member state criminal proceedings. The strengthening of these rights is first and foremost inspired by pragmatic and ideological concerns to attain an area of freedom, security and justice in which European citizens and residents can reasonably expect to encounter equivalent standards of procedural rights throughout the EU. This is however beyond the scope of justified EU intervention and is incompatible with the statement that the diversity between the member states' criminal justice systems should be respected unless differences hinder cooperation.



**4.2.7** *Should the use of minimum standards be limited to cross-border situations?*

- Yes, I agree.
- No, I disagree.

[explain]

Minimum rules can be used in different ways. The most obvious options are

- Integrating the minimum standards into the national criminal justice systems. This means that approximation of the criminal justice systems via implementing minimum standards neutralizes the differences that give way for inadmissibility problems.
- Maintaining a so-called 28<sup>th</sup> EU regime that is used in cross-border situations to avoid incompatibility problems. This means the 27 different regimes of the member states co-exist with the 28<sup>th</sup> EU regime.

The project team has three reasons for arguing in favour of an integration of the minimum standards into the national criminal justice systems of the member states.

First, it is unacceptably complex to have practitioners work with different regimes according to the either or not cross-border character of a cases.

Second, it amounts to equal treatment problems if the regime applicable to a person is dependent on whether or not a case is cross-border or not.

Third, a 28<sup>th</sup> EU regime is non-functional in that it is not always clear from the start whether or not a case is cross-border and therefore maintaining a 28<sup>th</sup> EU regime will not solve problems with existing evidence.

Alternatively, integrating the minimum standards in each of the 27 national criminal justice systems will not overcomplicate decisions on the applicable law, it will ensure equal treatment regardless of the cross-border nature of a case and above all, it will avoid inadmissibility problems as the minimum standards are ideally specifically designed to neutralize any problems. Examples of this approach can already be found in the FD Money Laundering which stipulates in its Art 3 that member states are to ensure that the technique of value confiscation is also possible in a purely domestic situation.



**4.2.8** *Is it an acceptable future policy option to require member states to implement the minimum standards into their national criminal justice systems?*

- Yes, I agree.
- Yes, but only if no constitutional issues arise.
- No, this is never an option.

[explain]



**4.2.9** *Should the adoption of EU minimum standards present a clear added value when compared to existing ECHR standards?*

- (>ECHR) The standards should have a clear added value (i.e. be more strict) when compared to the

- standards elaborated in the jurisprudence of the ECHR.
- (=ECHR) The standards should mirror the standards elaborated in the jurisprudence of the ECHR.
  - (<ECHR) The standards may be lower than the standards elaborated in the jurisprudence of the ECHR



**4.2.10** *Is the feasibility of minimum standards limited to a number of the cooperation domains?*

- Domain 1 – Mutual legal assistance
- Domain 2 – Transfer of pre-trial supervision
- Domain 3 – Extradition and surrender
- Domain 4 – Exchange of criminal records
- Domain 5 – Relocation and protection of witnesses
- Domain 6 – Transfer of prosecution
- Domain 7 – International validity and effect of decisions
- Not feasible for any domain

**Domain 7 – International validity: taking account of prior convictions**



**4.2.11** *What characteristic of a prior conviction is used as a basis to determine its influence in new criminal proceedings?*

The national effect of prior convictions in the course of new criminal proceedings:

- is based on the offence label
- is based on the type of the sanction
- is based on the severity of a specific sanction
- is based on the mere fact of having had a conviction
- is based on a different mechanism [explain]



**4.2.12** *How does your national law regulate the equivalent national effect foreign convictions ought to receive in the course of new criminal proceedings? (Art 3.1 FD Prior Convictions)*

The effect of a foreign conviction will be equivalent in the sense that:

- double criminality will be tested
- the nature of the sanction will ad hoc be reinterpreted and possibly be adapted if it is incompatible with our own national criminal justice system

- the duration of the sanction will ad hoc be reinterpreted and possibly be adapted if it is incompatible with our own national criminal justice system
- we have a pre-set conversion mechanism to reinterpret the effect of foreign decisions
- we have another mechanism [explain]

When developing different scenarios of cooperation it is always kept in mind that the mere fact that multiple member states are involved, should not negatively impact on the position of the persons involved. This is why often reference is made to the application of the so-called "*lex mitior*", i.e. the law that is most favourable for the persons involved.



**4.2.13** *Do you agree that it would be contrary to that general rule to attach effects to a foreign decision it could not have had in the issuing member state?*

- Yes, the issuing authority would probably take the possible effects of a conviction in the course of a new criminal proceeding into account when rendering the decision.
- Yes, a foreign decision should be complemented by a statement clarifying the effects it can have in the course of new criminal proceedings in the issuing member state.
- Yes, but only if the issuing member state would be competent to deal with the new criminal proceedings.
- No, everyone should be aware of the effects a conviction has in the course of new criminal proceedings when committing an act that gives way for a such new criminal proceeding.



**4.2.14** *Does your national law allow to take account of foreign convictions of legal persons?*

- Not applicable, we do not accept criminal liability of legal persons in our domestic legislation
- Yes
- No

**Domain 7 – International validity: custodial sentences**

**4.2.15** *Does your national implementation law allow your authorities to take account of the law of the issuing member state with respect to conditional and early release, as foreseen in Art 17.4 FD 2008 Custodial Sentences*

- Yes, the possibility is foreseen to take account of the law of the issuing member state.
- Yes, it is obligatory to take account of the law of the issuing member state if that law is more favourable for the person concerned.
- No



**4.2.16** *How do you gather the necessary information to take account of the provisions of the issuing member state with respect to early and conditional release?*

- We require the issuing authority to provide us with up to date detailed information
- We seek assistance from the Eurojust national member to provide us with up to date detailed information
- We base our decision on the information provided by the parties involved
- We base our decision on an independent analysis of the law of the issuing member state, because this is the fastest solution
- We have another procedure (explain)

When developing different scenarios of cooperation it is always kept in mind that the mere fact that multiple member states are involved, should not negatively impact on the position of the persons involved. This is why often reference is made to the application of the so-called “*lex mitior*”, i.e. the law that is most favourable for the persons involved.



**4.2.17** *Do you agree that it would be contrary to that general rule to not take account of the law of the issuing member state when this is more favourable for the person involved?*

- Yes, there should be an automatic application of the lex

- mitior  
 No.

### 4.3 Combined use of different instruments

Practitioners often indicate that international cooperation in criminal matters is over complex due to the necessity to combine different legal instruments. The issues related to the diversity of instruments in the context of mutual legal assistance (domain 1) are well known and already have a position on the political agenda. The question remains, whether there are other situations where cooperation is unnecessarily complex due to the need to combine different instruments.

#### Domain 2 and 3: Supervision and EAW

If the duration of the supervision measure imposed by the issuing member state is incompatible with the law of the executing member state, the duration of the supervision measure may be adapted in accordance with the law of the executing member state. The project team argues that this adaptation should not be a possibility but an automatic mechanism in light of the application of the *lex mitior*. However, questions arise with respect to the “*mitior*” character of the adaptation in light of the consequences it has for the use of the EAW. After all, if supervision is limited in duration in the executing member state, the person involved risks to be subject to an EAW sooner. In light thereof, it might be in the persons best interest not to reduce the duration of the supervision in order to avoid an earlier EAW.



4.3.1 *If the duration of your supervision measures is limited, do you automatically antedate the issuing of a subsequent EAW?*

- Yes  
 No

[Comment]



4.3.2 *Is it your experience that EAW are issued sooner if you limit the duration of the supervision measure as stipulated by the issuing member state?*

- Yes  
 No

[Comment]



4.3.3 *Should the interpretation of the application of a **lex mitior** principle also take into account the effects of its application in the long run in order to avoid potential less favourable situations (such as an earlier use of the EAW)?*

- Yes  
 No

[Comment]

### **Domain 3 and 7: return provisions in the EAW**

Art 5 FD EAW stipulates that where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member state, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member state in order to serve there the custodial sentence or detention order passed against him in the issuing Member state.



4.3.4 *Is it your experience that member states automatically call upon this return condition in relation to your surrender requests?*

- Yes  
 No, executing member states wait until we initiate a transfer of execution



4.3.5 *Should the return provision in the EAW be applicable in relation to other forms of transfer of execution?*

- FD Financial Penalties  
 FD Alternative  
 FD Confiscation  
 None

**Domain 7: combination of financial penalties and custodial sentences**

It is not uncommon that convictions combine both financial penalties and custodial sentences, either because both are imposed at the same time, or because a custodial sentence is imposed as a substitute for a non-executed financial penalty.



**4.3.6** *How do you deal with the combination of financial penalties and custodial sentences in one conviction for which execution is transferred?*

- We send two separate requests
  - We are required to send a follow up request for transfer of execution if a substitute custodial sentence is to be executed upon non-execution of the financial penalty
  - Other [explain]
- [Comment]

## 5 Capacity issues caused by cooperation

### 5.1 Uncertain financial arrangements

As a general rule, each of the cooperating parties is responsible for its own costs. The following provisions reflect that rule:

- Art 24 FD Deprivation of Liberty: *Costs resulting from the application of this Framework Decision shall be borne by the **executing State**, except for the costs of the **transfer** of the sentenced person to the executing State **and** those arising exclusively in the sovereign **territory** of the issuing State*
- Art 22 FD Alternative: *Costs resulting from the application of this Framework Decision shall be borne by the **executing State**, except for costs arising exclusively within the **territory** of the issuing State*
- Art 30 FD EAW: *Expenses incurred in the **territory** of the executing Member state for the execution of a European arrest warrant shall be borne by that Member state. All other expenses shall be borne by the issuing Member state*
- Art 17 FD Fin Pen: *Member states shall **not claim from each other** the refund of costs resulting from application of this Framework Decision*
- Art 25 FD Supervision: *Costs resulting from the application of this Framework Decision shall be borne by the **executing State**, except for costs arising exclusively within the **territory** of the issuing State*

However, often exceptions are included for exceptional costs related to expensive forms of cooperation:

- Art 29 Naples II: *If expenses of a substantial and extraordinary nature are, or will be, required to execute the request, the customs administrations involved*



*shall consult to determine the terms and conditions under which a request shall be executed as well as the manner in which the costs shall be borne.*

- Art 46 Prum Decision: *Each Contracting Party shall bear the costs incurred by its authorities in implementing this Convention. In special cases, the Contracting Parties concerned may agree on different arrangements*
- Art 20 FD confiscation: *Where the executing State has had costs which it considers **large or exceptional**, it may **propose** to the issuing State that the costs **be shared**. The issuing State shall take into account any such proposal on the basis of detailed specifications given by the executing State*

Finally, provisions exist with respect to specific and expensive forms of cooperation for which it is stipulated that the costs should be borne by the issuing/requesting member state, unless the executing/requested member state has waived his right for a refund. Art 29 Naples II for instance stipulates that Member states shall normally waive all claims for reimbursement of costs incurred in the implementation of this Convention, with the exception of expenses for fees paid to experts.



**5.1.1** *Did you waive your right for a refund of the costs cause by execution?*

	Entirely	Partially	No
Art 10.7 EU MLA (video links)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Art 21 EU MLA (telecommunications operators)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Art 29 Naples II (expert fees)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other:	<input type="radio"/>	<input type="radio"/>	



**5.1.2** *Does uncertainty with regard to the financial arrangements play a role in international cooperation in criminal matters?*

- Yes**, uncertainty causes me to **refrain** from pursuing international cooperation in criminal matters.
- Yes**, uncertainty can cause significant **delay** in international cooperation in criminal matters
- Yes**, uncertainty undermines the level of **trust** between cooperation authorities
- No**, uncertainty with respect to the financial aspect is of **no concern** to the actors in the field

- No**, there is **no uncertainty** with respect to the financial arrangement of international cooperation in criminal matters

[Comment]



5.1.3 *Do you agree that it would significantly facilitate international cooperation in criminal matters, if the financial arrangements are clear cut laid down in the cooperation instruments instead of being dependent on whether or not member states have waived rights, whether or not a specific agreement is made on a case by case basis for cost that are exceptional without clearly defining what exceptional is?*

- Yes
- No



5.1.4 *Do you agree that it is inconsistent that Art 10.7 EUMLA foresees in the possibility for the executing member state to waive its right for refund of the expenses and no such clause on waiving rights is foreseen in Art 21 EUMLA?*

- Yes
- No

## 5.2 Sharing of costs



5.2.1 *When do consultations with respect to the financial arrangements to share the costs of cooperation take place?*

- Before:** Consultations are lengthy and cause significant delays in international cooperation in criminal matters, because an agreement needs to be reached before cooperation can take place
- After:** Consultations do not influence the speed of cooperation as they take place after the cooperation
- Process:** Before cooperation starts, a baseline is set, but the in depth consultation takes place only after cooperation has ended
- Fixed:** we have standard agreements with the countries with whom we frequently cooperate to ensure that the

agreement is not different each time we cooperate



**5.2.2** *What is your experience with the outcome and success of consultations with respect to financial arrangements to share the costs?*

- It is an unhealthy situation that the executing member state is entirely dependent on the **good will** of the issuing member state
- We do not always agree on what should be considered **large and exceptional** costs
- Consultations undermine mutual **trust**
- Consultations are rarely successful because there is **no obligation** for the issuing/requesting member state to come to an agreement
- Consultations are usually successful, because both parties know a common understanding is **necessary** to maintain trust and a good cooperation relationship for the future
- Other [explain]



**5.2.3** *In which situations should the costs be completely born by the issuing/requesting member state?*

- MLA – videoconferencing
- MLA – covert operations
- Witness protection and relocation
- Other

The basic principle to be introduced in international cooperation in criminal matters could be to fully cooperate without taking into account the financial implications if (operational and extra) costs are lower than the threshold amount, but that in all other cases the issuing member state should be asked to cover half of the expenses for the execution of the request



**5.2.4** *Is it a viable idea to introduce a cost-sharing principle based on a threshold amount?*

- Yes
- No

[Comment]

**5.2.5** *Should it be possible for an executing member state to suggest less costly alternatives?*



- The **issuing** member state **decides** on the suggestion of the executing member state for a less costly alternative (e.g. If five video conferences are requested, it should be possible for the requested member state to propose a temporary transfer of a prisoner). However, refusing a suggestion has **consequences** for the application of the cost-sharing principle. The issuing member state will have to bear the full supplementary cost.
  - The **issuing** member state **decides** on the suggestion of the executing member state for a less costly alternative (e.g. If five video conferences are requested, it should be possible for the requested member state to propose a temporary transfer of a prisoner), **without consequences** for the application of the cost-sharing principle.
  - It should be possible for the **executing** member state to **decide** on the execution via a less costly alternative.
  - Other [explain]
  - No
- [Comment]

### 5.3 Sharing of benefits

- Art 13 FD Fin Pen: the benefits accrue to the executing member state, except when agreed otherwise.
- Art 16 FD Confiscation: when the benefits are below 10000 euros, they accrue to the executing member state ; in all other cases, 50 % of the amount which has been obtained from the execution of the confiscation order shall be transferred by the executing State to the issuing State.



#### 5.3.1 *Why did you ask the executing member state to share the benefits?*

- Not applicable**, we never ask to share benefits
- We **always** ask to share the benefits, because it is **only fair** that the member state who issued the decision also receives a portion of the benefits
- We only ask to share benefits when the investigation was **exceptionally** costly
- We only ask if the benefit is exceptionally high



#### 5.3.2 *Have you ever received a portion of the benefits?*

- Yes, each time we asked to share the benefits
- Yes, but we are not always successful when we ask to

share benefits

- Yes, at the initiative of the executing member state
- Yes, we received half of the total benefits
- Yes, we received another ratio
- No



**5.3.3** *Why did you share the benefits with the issuing member state?*

- We **always** share with the issuing member state because they deserve to have part of the benefits
- We only share at the **request** of the issuing member state
- When we have a legal **obligation** to share



**5.3.4** *How do your costs relate to sharing of benefits?*

- Cost and benefits are kept **separately**
- Costs are **always deducted** from the benefits before benefits are shared
- Costs are deducted from the benefits **as much as possible**, before benefits are shared



**5.3.5** *How should cost-sharing relate to benefit sharing?*

- Cost-sharing and benefit-sharing should be kept completely separate.
- Cost-sharing and benefit-sharing should be integrated.
  - The costs of the executing member state are to be deducted from the totality of the benefits.
  - The costs of the executing member state are to be deducted from its part of the benefits.
  - Other suggestion [explain]

## 5.4 Operational capacity implications

Similar to the provisions regulating the financial aspects of cooperation, the general rule related to the operational capacity of cooperation states that each member state is to provide its own operational resources. Again, a number of exceptions can be found. Art 23.1 Naples II for example stipulates with respect to covert operations: *At the request of the applicant authority, the requested authority may authorize officers of the customs administration of the requesting Member state or officers acting on behalf of such administration operating under cover*

*of a false identity (covert investigators) to operate on the territory of the requested Member state.*



**5.4.1** *Does your country allow officers of another member state to operation on your territory?*

- Yes
- No, our constitution does not allow this. [explain]
- No, it was a policy choice not to allow this. [explain]



**5.4.2** *Are you often confronted with operational capacity issues? (often meaning the problems are significant enough to start an EU level debate on how to deal with it)*

- Yes, in relation to (a) specific member state(s)
- Yes, in relation to (a) specific type(s) of cooperation
- No



**5.4.3** *Are you often confronted with operational capacity issues? (often meaning the problems are significant enough to start an EU level debate on how to deal with it)*

- Yes, in relation to (a) specific member state(s)
- Yes, in relation to (a) specific type(s) of cooperation
- No

In extradition/surrender cases, the unwillingness or inability of a member state to extradite/surrender a person as an obstacle for execution is overcome by the introduction of the *aut dedere aut exequi* principle, that introduced the obligation for the member state involved to execute the decision itself. A parallel *aut exequi, aut tolerare* principle would mean that the executing member state is to execute the order of the issuing member state or alternatively – like for example in the event of operational capacity issues – tolerate the competent authorities of the issuing member state to conduct the order themselves on the other member state's territory.

According to the project team the application of the principle *aut exequi, aut tolerare* should be restricted to those aspects of cooperation that do not require the involvement of a judicial authority and therefore do not relate to coercive or intrusive measures, the enforcement of sentences and any other aspects listed as a prerogative of judicial authorities. It is our position however, that at least for forms of cooperation that do not require the involvement of a judicial

cooperation, it should be accepted that authorities from one member state execute the decision on the territory of another member state.



**5.4.4** *Is the application of aut exequi, aut tolerare an acceptable future policy option?*

- Yes, without exception
- Yes, but only for those aspects of cooperation that do not require the involvement of a judicial authority
- Yes, but only with respect to exceptional forms of cooperation such as joint investigation teams, cross-border surveillance and covert operations
- No, our constitution does not allow it
- No, it is a mere policy choice not to allow it

[Comment]

## 6 Lacunae in the current legislative framework

A lot of aspects of international cooperation in criminal matters have already been regulated.

However, some cooperation types have not been regulated at all, or important aspects thereof lack

regulation. In this section we would like to highlight the most important lacunae with regard to international cooperation in criminal matters that exist today. Some domains of cooperation will therefore not be dealt with here, because they have been regulated to a very large extent. Other suggestions can naturally be made by the experts, at the bottom of this questionnaire.

### 6.1 Post-trial MLA at EU-level

The project team submits that currently no MLA-basis exists in the post-trial phase.

Most MLA-instruments focus on cooperation in criminal matters in the pre-trial phase, and mutual assistance is usually intended to promote the requesting state's criminal investigation. However, the importance of assistance in the post-trial phase is not to be downplayed. A common scenario, in which mutual assistance in the post-sentencing phase is of vital importance, is cooperation among member states in tracking down convicted felons who have for example escaped from prison. A plausible scenario is that one member state could require another member state to perform a house search with a relative of a fugitive, in order to search for information on his whereabouts. There are no European instruments that can serve as a basis for such "post-sentencing-MLA-requests".

The project team therefore has a threefold proposition:

First, the scope of relevant international assistance and cooperation instruments, Europol and Eurojust should be radically broadened to the post-sentencing phase.

Second, on a member state level, there should be a mandatory introduction of the possibility to take

investigative measures in the post-sentencing phase.

Third, there should be a mandatory introduction of sufficient (independent and impartial) post-sentencing judicial control mechanisms on investigative measures for fugitive search purposes.



**6.1.1** *Do you agree that post-trial MLA needs EU level regulation?*

- Yes, I agree that post-trial MLA needs EU level regulation
- No, I disagree that post-trial application of MLA is a lacuna in the current regulation [explain]

## 6.2 Criminal records exchange

The exchange of criminal records from legal persons is not regulated despite the fact that this information is necessary for the application of the FD Prior convictions.



**6.2.1** *Do you agree that the exchange of criminal records of legal persons needs regulation at EU-level?*

- Yes, I agree
- No, I disagree [explain]

The FD Criminal Records does not apply to all people in the EU: it does not cover third country nationals.



**6.2.2** *Do you agree that the EU-level regulation of exchange of criminal records should be extended to third country nationals?*

- Yes, I agree
- No, I disagree [explain]



### 6.3 Relocation of witnesses at EU-level

As argued, the project team considers relocation and protection of witnesses in criminal matters is an inherent part of cooperation in criminal matters, because its finality is related to criminal proceedings. The relocation and protection of witnesses is almost by definition cross border because more often than not the territory of each individual EU member state is too limited to allow for a meaningful relocation. Therefore, relocation should be taken up as a valuable aspect of the international cooperation in criminal matters in the EU. Not in the least because this matter also has an official underpinning in several documents, especially with regard to organized crime.



**6.3.1** *Do you agree that relocation of witnesses is a valuable aspect of the international cooperation in criminal matters in the EU and thus that its regulation should be stepped up?*

- Yes, I agree
- No, I disagree [explain]

### 6.4 Transfer of prosecution

The project team submits that a list of potentially acceptable criteria should be drafted in which a transfer of proceedings is recommendable, which guides transfer of prosecution but still leaves enough room for flexibility. It is important to include negative criteria especially such as if the main objective of the transfer would be to obtain a more severe punishment (lex mitior), ne bis in idem, etc.



**6.4.1** *Do you agree that a list of potentially acceptable criteria should be drafted in which a transfer of proceedings is recommendable?*

- Yes, I agree. Both positive and negative criteria should be included in the list
- Yes, I agree but only negative criteria should be included in the list
- No, I disagree [explain]



6.4.2 *Which aspects of transfer of prosecution need additional regulation at EU level?*

- Active transfer of prosecution
- Prevention of Jurisdiction Conflicts
- Other aspects [explain]
- None [explain]

## 6.5 International validity and effect



6.5.1 *The most important lacunae with regard to international validity are:*

6.5.2 *The recognition of disqualifications*

- Other [explain]

## 6.6 General lacunae



6.6.1 *Besides the ones dealt with above, are there any other lacunae that should be addressed?*

- Yes [Explain]
- No

## 7 Final questions

### 7.1 Good practice



7.1.1 *To what extent do you agree that the importance of good practice should be stepped up?*

- A conclusive Good Practice Declaration should be elaborated
- More monitoring regarding Good Practice is needed, but I do not see a need for a Good Practice Declaration
- I do not think there is any need for further good practice regulation [explain]

## 7.2 Mutual trust issues

Throughout the body of instruments of judicial cooperation, we find provisions which are rooted in a distrust between the member states. It often concerns provisions where the cooperation instruments – despite being cooperation instruments – prescribe the consent of the cooperating member state(s). The project team points out that one should be aware overly cautious rules are likely to enhance a certain distrust between the member states.

Concerning surveillance for the purpose of criminal investigation into an extraditable offense, it is stated that all operations shall be the subject of a report to the authorities of the Contracting Party in whose territory they took place; the officers carrying out the surveillance may be required to appear in person. (art 40.3g SIC). This provision equally hints at a certain amount of distrust between the member states.



### 7.2.1 *Is it common that officers of another contracting party who have operated in your territory must appear in person?*

- Yes, it happens with almost every report that is written following art 40.3g SIC
- No, it happens in roughly half of the times that a report is written following art 40.3g SIC
- No, it rarely happens

Fortunately, other evolutions than an increasing distrust also occur: in relation to the speciality principle, some recent provisions are a clear sign that the distrust between member states is decreasing. The speciality principle provides that a person extradited/surrendered (see e.g. Art 27, 2° EAW) may not be prosecuted, sentenced or otherwise deprived of his/her liberty for an offence committed prior to his or her surrender other than for which he or she was surrendered/extradited. This rule was designed in the context of an inherent distrust between member states: the underlying assumption was that there is a latent risk of maltreatment or disrespect for procedural/material safeguards in any member state and that the person involved should not even be given the opportunity to allow a member state whereto he/she is being surrendered, to prosecute him/her or other facts committed prior to the surrender. Indeed, the person was not allowed to renounce the speciality principle. In other words, individuals needed to be protected 'against themselves' in light of the presumed reality that in every member state there is a latent risk of not being treated as well as they would in other member states. Therefore, only the sending state – and not the person involved – was able to give its fiat to the receiving state for prosecuting the person for other crimes than those for which he/she was

surrendered. This reasoning has changed drastically. Indeed, the necessary consent is now shifting from the state to the person involved. In other words, where the concerned person used to be the object of consent, he now becomes the subject. First of all, article 13 FD EAW foresees a possibility for the person involved to consent to his/her initial surrender. Secondly, article 27,3 FD EAW states that the specialty principle does not apply (in other words, that a receiving state is allowed to prosecute for other facts committed prior to the surrender) when the person consented to his/her surrender or, if not, when the person explicitly renounced entitlement to the specialty rule. This evolution indicates that the presumption of grave risks existing in the other member states has been abandoned, pointing towards an increase of mutual trust: it is no longer considered irresponsible to let individuals decide that they do not mind that the receiving state would prosecute them for acts committed prior to their surrender.



**7.2.2** *Do you approve of the shift in consent from the concerned member state to the concerned person (art 13 j.° art. 27 FD EAW)?*

**7.2.3** *No, I do not approve [explain]*

- Yes, I approve: I think it is a useful shift [explain]

**7.2.4** *Omitted*



**7.2.5** *Do you consider it an option to apply art 27 FD EAW automatically to the 32 offence list?*

- Yes [explain]  
 No [explain]

Another sign of distrust between member states concerns recognition of judgments in criminal matters imposing custodial sentences. Following art 13 FD Deprivation of Liberty, the issuing member state can withdraw the certificate as long as the executing member state has not started the execution.



**7.2.6** *Has your member state already made use of art 13 FD Deprivation of Liberty?*

- Yes  
 No

### 7.3 General feedback questions



7.3.1 *Do you experience difficulties with implementation? Is European law clear enough? Do you receive sufficient guidelines? Should the EU invest more in supporting national implementation? What could be done to facilitate or speed up implementation in your country?*

[Explain]



7.3.2 *Which are the most important practical problems you experience with international cooperation in criminal matters?*

[Explain]



7.3.3 *What are the main problems/shortcomings in the current European policy on international cooperation in criminal matters?*

[Explain]



7.3.4 *Which topics do you consider most relevant to discuss during the focus group meeting in your country?*

[Explain]



## Annex – EU Level Offence Classification System

0100 00 Open Category	CRIMES WITHIN THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT
	The International Criminal Court (ICC) is an independent, permanent court that tries persons accused of the most serious crimes of international concern, namely genocide, crimes against humanity and war crimes. The ICC is based on a treaty, joined by 106 countries. The jurisdiction and functioning of the ICC are governed by the Rome Statute.
0101 00	GENOCIDE
Article 6 of the Statute of the ICC	<p>“Genocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:</p> <ul style="list-style-type: none"> <li>(a) Killing members of the group;</li> <li>(b) Causing serious bodily or mental harm to members of the group;</li> <li>(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;</li> <li>(d) Imposing measures intended to prevent births within the group;</li> <li>(e) Forcibly transferring children of the group to another group.</li> </ul>
0102 00	CRIMES AGAINST HUMANITY
Article 7 of the Statute of the ICC	<p>“Crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:</p> <ul style="list-style-type: none"> <li>(a) Murder;</li> <li>(b) Extermination;</li> <li>(c) Enslavement;</li> <li>(d) Deportation or forcible transfer of population;</li> <li>(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;</li> <li>(f) Torture;</li> <li>(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;</li> <li>(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender [...] or other grounds [...]</li> <li>(i) Enforced disappearance of persons;</li> <li>(j) The crime of apartheid;</li> <li>(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.</li> </ul> <p>2. For the purpose of paragraph 1:</p> <ul style="list-style-type: none"> <li>(a) ‘Attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 [...];</li> </ul>

EULOCS

	<p>(b) 'Extermination' includes the intentional infliction of conditions of life, inter alia [...];</p> <p>(c) 'Enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person [...];</p> <p>(d) 'Deportation or forcible transfer of population' means forced displacement of the persons concerned [...];</p> <p>(e) 'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; [...];</p> <p>(f) 'Forced pregnancy' [...]</p> <p>(g) 'Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;</p> <p>(h) 'The crime of apartheid' means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;</p> <p>(i) 'Enforced disappearance of persons' means the arrest, detention or abduction of persons [...].</p>
<b>0103 00</b>	<b>WAR CRIMES</b>
Article 8 of the Statute of the ICC	<p>"War crimes" means:</p> <p>(a) Grave breaches of the Geneva Conventions [...];</p> <p>(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law: [...]</p> <p>(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause: [...]</p> <p>(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.</p> <p>(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: [...]</p> <p>(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.</p>



	3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.
0104 00	CRIMES OF AGGRESSION
0200 00 Open Category	PARTICIPATION IN A CRIMINAL ORGANISATION
Article 1 Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime	<p>“Criminal organisation” means a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit;</p> <p>“Structured association” means an association that is not randomly formed for the immediate commission of an offence, nor does it need to have formally defined roles for its members, continuity of its membership, or a developed structure</p>
0201 00	OFFENCES JOINTLY IDENTIFIED AS PARTICIPATION IN A CRIMINAL ORGANISATION
0201 01	Directing a criminal organisation
Article 2 (b) , Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime	Conduct by any person consisting in an agreement with one or more persons that an activity should be pursued which, if carried out, would amount to the commission of offences, even if that person does not take part in the actual execution of the activity.
0201 02	Knowingly participating in the criminal activities, <i>without being a director</i>
Article 2 (a), Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime	Conduct by any person who, with intent and with knowledge of either the aim and general criminal activity of the organisation or the intention of the organisation to commit the offences in question, actively takes part in the organisation's criminal activities, even where that person does not take part in the actual execution of the offences concerned and, subject to the general principles of the criminal law of the member state concerned, even where the offences concerned are not actually committed,
0201 03	Knowingly taking part in the non-criminal activities of a criminal organisation, <i>without being a director</i>
Article 5 - United Nations Convention on Transnational Organised Crime (UNTS no. 39574, New York, 15.11.2000)	Conduct by any person who, with intent and with knowledge of either the aim and general criminal activity of the organisation or the intention of the organisation to commit the offences in question, actively takes part in the organisation's other activities (i.e. non-criminal) in the further knowledge that his participation will contribute to the achievement of the organisation's criminal activities.

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0202 00	<b>OTHER FORMS OF PARTICIPATION IN A CRIMINAL ORGANISATION</b>
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
<b>0300 00 Open Category</b>	<b>OFFENCES LINKED TO TERRORISM</b>
Article 1 - Framework Decision 2002/475/JHA, on combating terrorism (2002/475/JHA)	Terrorist offences are those offences committed with a specific intent: i.e. "committed with the aim of seriously intimidating a population, or unduly compelling a Government or international organisation to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental"
0301 00	<b>PARTICIPATION IN A TERRORIST GROUP</b>
Article 1 Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime	A terrorist group is an organised criminal group, committing offences with a terrorist intent. A criminal organisation shall mean a structured association, established over a period of time, of more than two persons, acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, whether such offences are an end in themselves or a means of obtaining material benefits;
0301 01	<b>Offences jointly identified as participation in a terrorist group</b>
0301 01 01	Directing a terrorist group
Article 3 - Framework Decision 2002/475/JHA, on combating terrorism (2002/475/JHA)	
0301 01 02	Knowingly participating in the activities of a terrorist group, without being a director
	Participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group
0301 02	<b>Other forms of participation in a terrorist group</b>
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
0302 00	<b>OFFENCES LINKED TO TERRORIST ACTIVITIES</b>
0302 01	<b>Offences jointly identified as linked to terrorist activities</b>
Article 3 - Framework Decision 2002/475/JHA, on combating terrorism (2002/475/JHA) As amended by: Article 1 – Council Framework Decision of 28	

November 2008 amending Framework Decision 2002/475/JHA on combating terrorism	
<b>0302 01 01</b>	Public provocation to commit a terrorist offence
Article 1 – Council Framework Decision of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism	Distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of one of the offences listed in Article 1(1)(a) to (h) of the Framework Decision on Terrorism (i.e. EULOCS cat 0303 01 until 0303 09), where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed;
<b>0302 01 02</b>	Recruitment for terrorism
Article 1 – Council Framework Decision of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism	To solicit another person to commit one of the offences listed in Article 1(1) (a) to (h) (i.e. EULOCS cat 0303 01 until 0303 09), or in Article 2(2) of the Framework Decision on Terrorism
<b>0302 01 03</b>	Training for terrorism
Article 1 – Council Framework Decision of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism	To provide instruction in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques, for the purpose of committing one of the offences listed in Article 1(1) (a) to (h) (i.e. EULOCS cat 0303 01 until 0303 09), knowing that the skills provided are intended to be used for this purpose
<b>0302 01 04</b>	Aggravated theft with the view of committing a terrorist offence
<b>0302 01 05</b>	Extortion with the view of committing a terrorist offence
<b>0302 01 06</b>	Drawing up false administrative documents with the view of committing a terrorist offence
<b>0302 01 07</b>	Financing of terrorism
<b>0302 02</b>	<b>Other offences linked to terrorist activities</b>
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
<b>0303 00</b>	<b>TERRORIST OFFENCES</b>
Article 1.1 of the Framework Decision 2002/475/JHA, on combating terrorism (2002/475/JHA)	Terrorist offences are "Offences under national law, which, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of: - seriously intimidating a population, or - unduly compelling a Government or international organisation to perform or abstain from performing any act, or - seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation" The Framework Decision lists provides us with a list with the

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	absolute minimum of what shall be deemed to be terrorist offences: That list is used to make the break down structure in the classification and now constitute the subcategories in this section:
<b>0303 00</b>	<b>Offences jointly identified as terrorist offences</b>
Article 1 of the Framework Decision 2002/475/JHA, on combating terrorism (2002/475/JHA)	
<b>0303 01</b>	Terrorist attacks upon a person's life
<b>0303 02</b>	Terrorist attacks upon a person's physical integrity
<b>0303 03</b>	Terrorist kidnapping or hostage taking
<b>0303 04</b>	Causing extensive terrorist destruction
Article 1 (d) of the Framework Decision 2002/475/JHA, on combating terrorism (2002/475/JHA)	Causing extensive terrorist destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;
<b>0303 05</b>	Terrorist seizure of transport
<b>0303 06</b>	Terrorist activities related to weapons
Article 1 (f) of the Framework Decision 2002/475/JHA, on combating terrorism (2002/475/JHA)	Manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons
<b>0303 07</b>	Terrorist release of dangerous substances, or causing fires, floods or explosions
Article 1 (g) of the Framework Decision 2002/475/JHA, on combating terrorism (2002/475/JHA)	Terrorist release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life
<b>0303 08</b>	Terrorist interfering with or disrupting the supply of a fundamental natural resource
Article 1 (h) of the Framework Decision 2002/475/JHA, on combating terrorism (2002/475/JHA)	Terrorist interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life
<b>0303 09</b>	Threatening to commit any of the terrorist acts listed
<b>0304 10</b>	<b>Other terrorist offences</b>
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
<b>0400 00 Open Category</b>	<b>TRAFFICKING IN HUMAN BEINGS</b>

<p>Article 1 – Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings</p>	<p>“Trafficking in human beings” shall mean the recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person, where:</p> <p>(a) use is made of coercion, force or threat, including abduction, or</p> <p>(b) use is made of deceit or fraud, or</p> <p>(c) there is an abuse of authority or of a position of vulnerability, which is such that the person has no real and acceptable alternative but to submit to the abuse involved, or</p> <p>(d) payments or benefits are given or received to achieve the consent of a person having control over another person for the purpose of exploitation of that person’s labour or services, including at least forced or compulsory labour or services, slavery or practices similar to slavery or servitude, or for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including in pornography.</p>
<p>0401 00</p>	<p><b>TRAFFICKING OF AN ADULT</b></p>
<p>Article 1.4 – Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings</p>	<p>Adult shall mean: "any person of 18 years of age or above"</p>
<p>0401 01</p>	<p><b>Offences jointly identified as trafficking of an adult</b></p>
<p>0401 01 01</p>	<p>For the purposes of labour or services exploitation</p>
<p>Article 1 – Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings Article 4 - Council of Europe Convention on Action against Trafficking in Human Beings (Warsaw, 16.V.2005)</p>	<p>Labour or services exploitation shall constitute at least what is defined by the subcategories in this section:</p> <ul style="list-style-type: none"> <li>- Forced or compulsory labour or services</li> <li>- Slavery or practices similar to slavery or servitude, which is defined as: The act of conveying or attempting to convey slaves from one country to another by whatever means of transport, or of being accessory thereto, shall be a criminal offence under the laws of the States Parties to this Convention and persons convicted thereof shall be liable to very severe penalties</li> </ul>
<p>0401 01 02</p>	<p>For the purposes of sexual exploitation</p>
<p>Article 1 – Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings Article 1 of the 1949 UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the</p>	<p>Prostitution and Sexual Exploitation: Sexual exploitation of an adult contains at least: (a) Procuring, enticing or leading away, for purposes of prostitution, another person, even with the consent of that person; (b) Exploiting the prostitution of another person, even with the consent of that person; (c) Keeping or managing, or knowingly financing or taking part in the financing of a brothel; (d) Knowingly letting or renting a building or other place or any part thereof for the purpose of the prostitution of others</p>

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Prostitution of Others	
<b>0401 01 03</b>	For the purposes of organ or human tissue removal
In analogy with: Article 3(1) I (b) of the 2000 UN Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography	A human tissue is a collection of interconnected cells that perform a similar function within an organism. This category also includes the removal of a single cell.
<b>0401 04</b>	<b>Other forms of trafficking of an adult</b>
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
<b>0402 00</b>	<b>TRAFFICKING OF A CHILD</b>
Article 1.4 – Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings	Child shall mean: "any person below 18 years of age"
<b>0402 01</b>	<b>Offences jointly identified as trafficking of a child</b>
<b>0402 01 01</b>	For the purposes of labour or services exploitation of a child
Article 2 Council framework decision of 22 December 2003 on combating the sexual exploitation of children and child pornography (2004/68/JHA)  Article 3(1) I (b) of the 2000 UN Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography	Labour or services exploitation shall constitute at least what is defined by the subcategories in this section: - Forced or compulsory labour or services - Slavery or practices similar to slavery or servitude, which is defined as: The act of conveying or attempting to convey slaves from one country to another by whatever means of transport, or of being accessory thereto, shall be a criminal offence under the laws of the States Parties to this Convention and persons convicted thereof shall be liable to very severe penalties
<b>0402 01 02</b>	For the purposes of sexual exploitation
Article 2 Council framework decision of 22 December 2003 on combating the sexual exploitation of children and child pornography (2004/68/JHA)	Prostitution and Sexual Exploitation of a Child: Sexual exploitation of a child shall contain at least (a) Coercing or recruiting a child into prostitution or into participating in pornographic performances, or profiting from or otherwise exploiting a child for such purposes and (b) Engaging in sexual activities with a child; where use is made of coercion, force or threats, where money or other forms of remuneration or consideration is given as payment in exchange for the child engaging in sexual activities, where abuse is made of a recognised position of trust, authority or influence over the child

<b>0402 01 03</b>	For the purposes of organ or human tissue removal of a child
Article 3(1) I (b) of the 2000 UN Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography	A human tissue is a collection of interconnected cells that perform a similar function within an organism. This category also includes the removal of a single cell.
<b>0402 02</b>	<b>Other forms of trafficking of a child</b>
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
<b>0402 02 01</b>	For the purpose of recruiting child soldiers
Article 4 of the 2000 UN Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography	Child Soldiers: Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.
<b>0402 02 02</b>	For the purpose of illegal adoption
Article 3(1) a (ii) of the 2000 UN Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography	Illegal Adoption: Each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether such offences are committed domestically or transnationally or on an individual or organized basis: (a) In the context of sale of children as defined in article 2(ii) Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption
<b>0402 02 03</b>	For other or unknown purposes
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
<b>0500 00 Open Category</b>	<b>SEXUAL OFFENCES</b>
	Sexual offences is a main cluster, including, sexual assault, sexual exploitation, prostitution and pornography
<b>0501 00</b>	<b>SEXUAL ASSAULT</b>
	Sexual assault consists of any verbal, visual or other act that forces a person to join in or be confronted with unwanted sexual attention or contact
<b>0501 01</b>	<b>Rape</b>
	Rape constitutes any act of sexual penetration (per vaginam or other) by whatever means, of a person against his or her will
0501 01 01	Rape of an adult
	Rape of an adult constitutes any act of sexual penetration (per vaginam or other) by whatever means, of any person above 18 years of age against his or her will

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0501 01 02	Rape of a child
	Rape of a child constitutes any act of sexual penetration (per vaginam or other) by whatever means, of any person below 18 years of age against his or her will
<b>0501 02</b>	<b>Sexual harassment</b>
	Sexual harassment constitutes any threatening or disturbing behaviour or unwelcome sexual attention, requests for sexual favours and other verbal or physical conduct – other than penetration – typically in a work or educational environment
0501 02 01	Sexual harassment of an adult
0501 02 02	Sexual harassment of a child
<b>0501 03</b>	<b>Indecent exposure</b>
	Indecent exposure is the deliberate exposure by a person of a portion or portions of his or her body under the circumstances where a such exposure is likely to be seen as contrary to the standards of decency
<b>0501 04</b>	<b>Other forms of sexual assault</b>
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
0502 00	<b>SEXUAL EXPLOITATION, PROSTITUTION AND PORNOGRAPHY</b>
<b>0502 01</b>	<b>Sexual exploitation</b>
<b>0502 01 01</b>	Offences jointly identified as sexual exploitation of an adult
Article 1 and 2 of the 1949 UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	<p>“Adult” means any person above 18 years of age; this offence is defined by following subcategories</p> <ul style="list-style-type: none"> <li>- Procuring, enticing or leading away, for purposes of prostitution, another person, even with the consent of that person</li> <li>- Exploiting the prostitution of another person, even with the consent of that person</li> <li>- Keeping or managing, or knowingly financing or taking part in the financing of a brothel</li> <li>- Knowingly letting or renting a building or other place or any part thereof for the purpose of the prostitution of others</li> </ul>
<b>0502 01 02</b>	Offences jointly identified as sexual exploitation of a child
Article 2 (a) and (b) Council framework decision of 22 December 2003 on combating the sexual exploitation of children and child pornography (2004/68/JHA)	<p>“Child” means any person below 18 years of age; Sexual exploitation of a child entails coercing or recruiting a child into prostitution or into participating in pornographic performances, or profiting from or otherwise exploiting a child for such purposes;</p> <ul style="list-style-type: none"> <li>- Where use is made of coercion, force or threats</li> <li>- Where money or other forms of remuneration or consideration is given as payment in exchange for the child engaging in sexual activities</li> <li>- Where abuse is made of a recognised position of trust, authority or influence over the child</li> </ul>



<b>0502 01 03</b>	Other forms of sexual exploitation
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
<b>0502 02</b>	<b>Soliciting by a prostitute</b>
	Soliciting by a prostitute shall mean offering of sexual activities in exchange for money or other forms of remuneration
<b>0502 03</b>	<b>Procuring for prostitution or sexual act</b>
	Procuring for prostitution or sexual act shall mean the offering of money or other forms of remuneration to an adult in exchange for engaging in sexual activities
<b>0502 04</b>	<b>Child Pornography</b>
Article 1 (b) Council framework decision of 22 December 2003 on combating the sexual exploitation of children and child pornography (2004/68/JHA)	Offences related to indecent images of children or “child pornography” shall mean pornographic material that visually depicts or represents: (i) a real child involved or engaged in sexually explicit conduct, including lascivious exhibition of the genitals or the pubic area of a child; or (ii) a real person appearing to be a child involved or engaged in the conduct mentioned in (i); or (iii) realistic images of a non-existent child involved or engaged in the conduct mentioned in (i);
<b>0502 04 01</b>	Offences jointly identified as Child Pornography
<b>0502 04 01 01</b>	Possessing child pornography
Article 3 (d) 2 Council framework decision of 22 December 2003 on combating the sexual exploitation of children and child pornography (2004/68/JHA)	Possessing pornographic material that visually depicts or represents: (i) a real child involved or engaged in sexually explicit conduct, including lascivious exhibition of the genitals or the pubic area of a child; or (ii) a real person appearing to be a child involved or engaged in the conduct mentioned in (i); or (iii) realistic images of a non-existent child involved or engaged in the conduct mentioned in (i);
<b>0502 04 01 02</b>	Producing child pornography
Article 3 (a) Council framework decision of 22 December 2003 on combating the sexual exploitation of children and child pornography (2004/68/JHA)	Producing pornographic material that visually depicts or represents: (i) a real child involved or engaged in sexually explicit conduct, including lascivious exhibition of the genitals or the pubic area of a child; or (ii) a real person appearing to be a child involved or engaged in the conduct mentioned in (i); or (iii) realistic images of a non-existent child involved or engaged in the conduct mentioned in (i);
<b>0502 04 01 03</b>	Offering or making available of child pornography
Article 3 (c) Council framework decision of 22 December 2003 on combating the sexual exploitation of children and child pornography (2004/68/JHA)	Offering or making available pornographic material that visually depicts or represents: (i) a real child involved or engaged in sexually explicit conduct, including lascivious exhibition of the genitals or the pubic area of a child; or (ii) a real person appearing to be a child involved or engaged in the conduct mentioned in (i); or (iii) realistic images of a non-existent child involved or engaged in the conduct mentioned in (i);
<b>0502 04 01 04</b>	Distributing or transmitting child pornography

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Article 3 (b) Council framework decision of 22 December 2003 on combating the sexual exploitation of children and child pornography (2004/68/JHA)	Distributing or transmitting pornographic material that visually depicts or represents: (i) a real child involved or engaged in sexually explicit conduct, including lascivious exhibition of the genitals or the pubic area of a child; or (ii) a real person appearing to be a child involved or engaged in the conduct mentioned in (i); or (iii) realistic images of a non-existent child involved or engaged in the conduct mentioned in (i);
<b>0502 04 01 05</b>	Procuring child pornography for oneself or for another person
Article 3 (d) 1 Council framework decision of 22 December 2003 on combating the sexual exploitation of children and child pornography (2004/68/JHA)	Procuring pornographic material that visually depicts or represents: (i) a real child involved or engaged in sexually explicit conduct, including lascivious exhibition of the genitals or the pubic area of a child; or (ii) a real person appearing to be a child involved or engaged in the conduct mentioned in (i); or (iii) realistic images of a non-existent child involved or engaged in the conduct mentioned in (i); for oneself or for another person
<b>0502 04 02</b>	Other offences related to child pornography
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
<b>0600 00 Open Category</b>	<b>OFFENCES RELATED TO DRUGS OR PRECURSORS</b>
<b>0600 01</b>	<b>OFFENCES RELATED TO DRUGS</b>
<b>0600 01 01</b>	<b>Cultivation of opium poppy, coca bush or cannabis plant</b>
Article 2.1 (b) – Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking and Article 1 (b), (c), (o) UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988.	Opium poppy means the plant of the species <i>Papaver somniferum</i> L. Coca bush means the plant of any species of the genus <i>Erythroxylon</i> . Cannabis plant means any plant of the genus <i>Cannabis</i> .
<b>0600 01 01 01</b>	<b>Exclusively for own personal consumption</b>
Article 2.2 – Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking	The conduct is not included in the scope of the framework decision when it is committed by its perpetrators, exclusively for their own personal consumption as defined by national law

<b>0600 01 01 02</b>	<b>Not exclusively for own personal consumption</b>
<b>0600 01 02</b>	<b>Production</b>
Article 2.1 (a) – Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking	Production includes manufacture, extraction and preparation
<b>0600 01 02 01</b>	<b>Exclusively for own personal consumption</b>
Article 2.2 – Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking	The conduct is not included in the scope of the framework decision when it is committed by its perpetrators, exclusively for their own personal consumption as defined by national law
<b>0600 01 02 02</b>	<b>Not exclusively for own personal consumption</b>
<b>0600 01 03</b>	<b>Transport</b>
Article 2.1 (a) – Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking Article 2 (c) and (d) COUNCIL REGULATION (EC) No 111/2005 of 22 December 2004 laying down rules for the monitoring of trade between the Community and third countries in drug precursors	Transport includes dispatch, dispatch in transit, importation and exportation Import means the entry into customs territory of the Community, including temporary storage, the placing in a free zone or free warehouse, the placing under a suspensive procedure and the release for free circulation within the meaning of Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code Export means the departure from the customs territory of the Community, including the departure that requires a customs declaration and the departure after their storage in a free zone of control type I or free warehouse within the meaning of Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code
<b>0600 01 03 01</b>	<b>Exclusively for own personal consumption</b>
Article 2.2 – Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of	The conduct is not included in the scope of the framework decision when it is committed by its perpetrators, exclusively for their own personal consumption as defined by national law

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criminal acts and penalties in the field of illicit drug trafficking	
<b>0600 01 03 02</b>	<b>Not exclusively for own personal consumption</b>
<b>0600 01 04</b>	<b>Distribution</b>
Article 2.1 (a) – Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking and article 1.2(b) COUNCIL DIRECTIVE 92/109/EEC of 14 December 1992 on the manufacture and the placing on the market of certain substances used in the illicit manufacture of narcotic drugs and psychotropic substances	Distribution or placing on the market means any supply against payment or free of charge to third parties including offer, offer for sale, delivery on any terms whatsoever, brokerage and sale.
<b>0600 01 05</b>	<b>Possession and purchase</b>
Article 2.1. (c) - Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking	This category includes the possession and purchase of drugs with a view to conducting either the production, transport or distribution of drugs.
<b>0600 01 05 01</b>	<b>Exclusively for own personal consumption</b>
Article 2.2 – Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking	The conduct is not included in the scope of the framework decision when it is committed by its perpetrators, exclusively for their own personal consumption as defined by national law
<b>0600 01 05 02</b>	<b>Not exclusively for own personal consumption</b>
<b>0600 01 06</b>	<b>Other offences related to drugs</b>
0600 01 06 01	promoting the consumption of drugs
0600 01 06 02	knowingly letting or renting a building or other place where public have access for the purpose of consumption of drugs

0600 01 06 03	other
<b>0600 02</b>	<b>OFFENCES RELATED TO PRECURSORS AND OTHER ESSENTIAL CHEMICALS</b>
Article 1.2 – Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking	Precursors shall mean any substance scheduled in the Community legislation giving effect to the obligations deriving from Article 12 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988
<b>0600 02 01</b>	<b>Manufacture</b>
Article 2.1 (d) – Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking	This category refers to manufacture of precursors, knowing that they are to be used in or for the illicit production of drugs
<b>0600 02 02</b>	<b>Transport</b>
Article 2.1 (d) – Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking Article 2 (c) and (d) COUNCIL REGULATION (EC) No 111/2005 of 22 December 2004 laying down rules for the monitoring of trade between the Community and third countries in drug precursors	This category refers to transport of precursors, knowing that they are to be used in or for the illicit production of drugs Transport includes dispatch, dispatch in transit, importation and exportation Import means the entry into customs territory of the Community, including temporary storage, the placing in a free zone or free warehouse, the placing under a suspensive procedure and the release for free circulation within the meaning of Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code Export means the departure from the customs territory of the Community, including the departure that requires a customs declaration and the departure after their storage in a free zone of control type I or free warehouse within the meaning of Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code
<b>0600 02 03</b>	<b>Distribution</b>
Article 2.1 (d) – Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties	This category refers to distribution of precursors, knowing that they are to be used in or for the illicit production of drugs Distribution or placing on the market means any supply against payment or free of charge to third parties including offer, offer for sale, delivery on any terms whatsoever, brokerage and sale.

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in the field of illicit drug trafficking and article 1.2(b) COUNCIL DIRECTIVE 92/109/EEC of 14 December 1992 on the manufacture and the placing on the market of certain substances used in the illicit manufacture of narcotic drugs and psychotropic substances	
0600 02 04	<b>Other offences related to precursors</b>
0700 00 Open Category	<b>FIREARMS, THEIR PARTS AND COMPONENTS, AMMUNITION AND EXPLOSIVES, <i>not committed or likely to be committed in the course of terrorist activities</i></b>
Article 3(a) of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition	“Firearms” shall mean any portable barrelled weapon that expels, is designed to expel or may be readily converted to expel a shot, bullet or projectile by the action of an explosive, excluding antique firearms or their replicas. Antique firearms and their replicas shall be defined in accordance with domestic law. In no case, however, shall antique firearms include firearms manufactured after 1899; “Parts and components” shall mean any element or replacement element specifically designed for a firearm and essential to its operation, including a barrel, frame or receiver, slide or cylinder, bolt or breech block, and any device designed or adapted to diminish the sound caused by firing a firearm; “Ammunition” shall mean the complete round or its components, including cartridge cases, primers, propellant powder, bullets or projectiles, that are used in a firearm, provided that those components are themselves subject to authorization in the respective State Party
0701 00	<b>ILLICIT MANUFACTURING FIREARMS</b>
Article 3(d) of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, supplementing the 2000 UN Palermo Convention	The offences related to the manufacturing or assembly of firearms, their parts and components or ammunition, listed in the Protocol supplementing the 2000 UN Palermo Convention, are used to introduce the sub categories in this section: (i) From parts and components illicitly trafficked; (ii) Without a licence or authorization from a competent authority of the State Party where the manufacture or assembly takes place; or (iii) Without marking the firearms at the time of manufacture, in accordance with article 8 of this Protocol (article 3d)The definition actually includes the subcategories of illicit trafficking)
0702 00	<b>FALSIFYING OR ILLICITLY ALTERING THE MARKING(S) ON FIREARMS</b>
Article 5(c) of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms,	Falsifying or illicitly obliterating, removing or altering the marking(s) on firearms required by article 8 of this Protocol. According to article 8 1. For the purpose of identifying and tracing each firearm, States Parties shall:

their Parts and Components and Ammunition, supplementing the 2000 UN Palermo Convention	<p>(a) At the time of manufacture of each firearm, either require unique marking providing the name of the manufacturer, the country or place of manufacture and the serial number, or maintain any alternative unique user-friendly marking with simple geometric symbols in combination with a numeric and/or alphanumeric code, permitting ready identification by all States of the country of manufacture;</p> <p>(b) Require appropriate simple marking on each imported firearm, permitting identification of the country of import and, where possible, the year of import and enabling the competent authorities of that country to trace the firearm, and a unique marking, if the firearm does not bear such a marking. The requirements of this subparagraph need not be applied to temporary imports of firearms for verifiable lawful purposes;</p> <p>(c) Ensure, at the time of transfer of a firearm from government stocks to permanent civilian use, the appropriate unique marking permitting identification by all States Parties of the transferring country.</p> <p>2. States Parties shall encourage the firearms manufacturing industry to develop measures against the removal or alteration of markings</p>
0703 00	<b>ILLICIT TRAFFICKING FIREARMS</b>
Article 3(e) of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, supplementing the 2000 UN Palermo Convention	“Illicit trafficking” shall mean the import, export, acquisition, sale, delivery, movement or transfer of firearms, their parts and components and ammunition from or across the territory of one State Party to that of another State Party if any one of the States Parties concerned does not authorize it in accordance with the terms of this Protocol or if the firearms are not marked in accordance with article 8 of this Protocol
0704 00	<b>UNAUTHORISED ACQUISITION</b>
0705 00	<b>UNAUTHORISED POSSESSION OR USE</b>
0706 00	<b>OTHER</b>
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
<b>0800 00 Open Category</b>	<b>HARMING THE ENVIRONMENT AND/OR PUBLIC HEALTH</b> <i>not committed or likely to be committed in the course of terrorist activities</i>
0801 00	<b>OFFENCES JOINTLY IDENTIFIED AS ENVIRONMENTAL OFFENCES</b>
0801 01	<b>Offences related to a quantity of materials or ionizing radiation</b>
Article 3 - Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the	Offences related to a quantity of materials or ionizing radiation which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil, the quality of water or to animals or plants. Including: - the unlawful discharge, emission or introduction of a quantity

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protection of the environment through criminal law	of materials or ionising radiation into air, soil or water
<b>0801 02</b>	<b>Offences related to waste</b>
Article 3 - Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law	Offences related to waste, including the supervision of the hereafter named operations and the after-care of disposal sites, and including actions taken as a dealer or a broker (waste management) which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil, the quality of water or to animals or plants: <ul style="list-style-type: none"> <li>- the unlawful collection of waste</li> <li>- the unlawful transport, export or import of waste</li> <li>- the unlawful recovery of waste</li> <li>- the unlawful disposal of waste</li> <li>- the shipment of waste, where this activity falls within the scope of Article 2(35) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste and is undertaken in a non-negligible quantity, whether executed in a single shipment or in several shipments which appear to be linked;</li> </ul>
<b>0801 03</b>	<b>Offences related to a plant in which a dangerous activity is carried out</b>
Article 3 - Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law	Offences related to a plant in which a dangerous activity is carried out and which, outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil, the quality of water, or to animals or plants: <ul style="list-style-type: none"> <li>- the unlawful operation of such a plant</li> </ul>
<b>0801 04</b>	<b>Offences related to nuclear materials or other hazardous radioactive substances</b>
Article 3 - Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law	Offences related to nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil, the quality of water, or to animals or plants. Including: <ul style="list-style-type: none"> <li>- the unlawful production of nuclear materials or other hazardous radioactive substances</li> <li>- the unlawful processing, handling and use of nuclear materials or other hazardous radioactive substances</li> <li>- the unlawful holding and storage of nuclear materials or other hazardous radioactive substances</li> <li>- the unlawful transport, export or import of nuclear materials or other hazardous radioactive substances</li> <li>- the unlawful disposal of nuclear materials or other hazardous radioactive substances</li> </ul>
<b>0801 05</b>	<b>Offences related to protected fauna and flora species</b>
Article 3 - Directive 2008/99/EC of the	Offences related to protected fauna and flora species or parts or derivatives thereof except for cases when the conduct concerns a



European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law	negligible quantity of such specimens and has a negligible impact on the conservation status of the species. Including: - the unlawful killing of protected wild fauna and flora species - the unlawful destruction of protected wild fauna and flora species - the unlawful possession of protected wild fauna and flora species - the unlawful taking of protected wild fauna and flora species - the unlawful trading of or in protected wild fauna and flora species
<b>0801 06</b>	<b>Offences related to habitats</b>
Article 2 (c) and 3 - Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law	Offences related to habitats, including - the unlawful significant deterioration of a habitat within a protected site 'habitat within a protected site' means any habitat of species for which an area is classified as a special protection area pursuant to Article 4(1) or (2) of Directive 79/409/EEC, or any natural habitat or a habitat of species for which a site is designated as a special area of conservation pursuant to Article 4(4) of Directive 92/43/EEC;
<b>0801 07</b>	<b>Offences related to ozone-depleting substances</b>
Article 3 - Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law	Offences related to ozone-depleting substances - the unlawful production of ozone-depleting substances - the unlawful importation or exportation of ozone-depleting substances - the unlawful placing on the market of ozone-depleting substances - the unlawful use of ozone-depleting substances
<b>0801 08</b>	<b>Offences related to illicit trafficking in hormonal substances and other growth promoters</b>
<b>0802 00</b>	<b>OTHER OFFENCES AGAINST THE ENVIRONMENT OR HARMING PUBLIC HEALTH (NOT-DRUG RELATED)</b>
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
<b>0802 01</b>	<b>Offences related to consumer protection</b>
<b>0802 02</b>	<b>Other offences</b>
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
<b>0900 00 Open Category</b>	<b>OFFENCES AGAINST PROPERTY</b>
<b>0901 00</b>	<b>THEFT</b>
	Theft means depriving a person/ organisation of property with the intent to keep it.
<b>0901 01</b>	<b>Theft with violence or intimidation</b>
<b>0901 02</b>	<b>Theft without violence or intimidation</b>

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0902 00	<b>UNLAWFUL APPROPRIATION</b>
	Unlawful appropriation is the act of unlawfully taking possession of or assigning purpose to properties or ideas
0902 01	<b>Racketeering and extortion</b>
	Racketeering unlawfully obtaining either money, property or services from a company through compelling a person or manipulating them to behave in an involuntary way (whether through action or inaction) by use of threats, intimidation or some other form of pressure or force, typically in exchange of the service of "protection" Extortion is the unlawfully obtaining either money, property or services from a person, entity, or institution, through compelling a person or manipulating them to behave in an involuntary way (whether through action or inaction) by use of threats, intimidation or some other form of pressure or force
0902 02	<b>Knowingly concealing or retaining property resulting from an offence</b>
Article 24 of the 2003 UN Merida Corruption Convention	Knowingly concealing or retaining property resulting from an offence: Article 24 of the 2003 UN Merida Corruption Convention, criminalizes, when committed intentionally, the concealment or continued retention of property when the person involved knows that such property is the result of any of the offences
0902 03	<b>Embezzlement, concealment of assets or unlawful increase in a company's liabilities</b>
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2008/XX/JHA	Embezzlement (the act of dishonestly appropriating goods, usually money, by one to whom they have been entrusted); concealment of assets or unlawful increase in a company's liabilities, (this is an ECRIS category)
0902 04	<b>Unlawful dispossession</b>
	"Unlawful dispossession" means any interference with another person's property
0902 05	<b>Other forms of unlawful appropriation</b>
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
0903 00	<b>ILLICIT DEALING IN OR CONCEALING GOODS</b>
0903 01	<b>Illicit trafficking in cultural goods</b>
Annex to the Convention of 26 July 1995 on the establishment of a European police office and	Illicit trafficking in cultural goods including antiques and works of art, is a category in the Europol Annex and in article 2(2) of the European Arrest Warrant

Article 2 (2) - Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between member states	
<b>0903 02</b>	<b>Dealing in stolen goods</b>
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2008/XX/JHA	Dealing in stolen goods is an ECRIS category
<b>0903 03</b>	<b>Other forms of illicit dealing in or concealing goods</b>
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
<b>0904 00</b>	<b>CRIMINAL DAMAGE</b>
Article 5 – Council framework decision of 24 February 2005 on the application of the principle of mutual recognition to financial penalties	This category is listed in article 5 of the said framework decision, without further explanation.
<b>0904 01</b>	<b>Destruction</b>
	Unlawful destruction of property; destruction is the act of damaging something beyond use or repair, including: - Arson is defined as the maliciously, voluntarily, and wilfully setting fire to the building, buildings, or other property of another, or of burning one's own property for an improper purpose, as to collect Insurance - Explosion is a sudden increase in volume and release of energy in an extreme manner, usually with the generation of high temperatures and the release of gases. An explosion creates a shock wave
<b>0904 02</b>	<b>Sabotage</b>
	Sabotage is a deliberate action of subversion, obstruction, disruption, and/or destruction
<b>0904 03</b>	<b>Smearing</b>
	This includes for example graffiti
<b>0904 04</b>	<b>Other forms of criminal damage</b>
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to

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	uphold a more strict criminal policy
<b>0905 00</b>	<b>CORRUPTION</b>
Annex to the Convention of 26 July 1995 on the establishment of a European police office	This category is listed without further explanation.
<b>0905 01</b>	<b>Offences jointly defined as corruption</b>
0905 01 01	Active corruption in the public sector involving a EU public official
Article 3.1 of the Convention of 26 May 1997 on the fight against corruption involving officials of the European Communities or officials of member states of the European Union	The deliberate action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to an official for himself or for a third party for him to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties shall constitute active corruption. EU public official (community official) shall mean any person who is an official or other contracted employee within the meaning of the Staff Regulations of officials of the European Communities or the Conditions of Employment of other servants of the European Communities; or any person seconded to the European Communities by the member states or by any public or private body, who carries out functions equivalent to those performed by European Community officials or other servants
0905 01 02	Passive corruption in the public sector involving a EU public official
Article 2.1 of the Convention of 26 May 1997 on the fight against corruption involving officials of the European Communities or officials of member states of the European Union	The deliberate action of an official, who, directly or through an intermediary, requests or receives advantages of any kind whatsoever, for himself or for a third party, or accepts a promise of such an advantage, to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties shall constitute passive corruption. EU public official (community official) shall mean any person who is an official or other contracted employee within the meaning of the Staff Regulations of officials of the European Communities or the Conditions of Employment of other servants of the European Communities; or any person seconded to the European Communities by the member states or by any public or private body, who carries out functions equivalent to those performed by European Community officials or other servants
<b>0905 02</b>	<b>Other forms of corruption</b>
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
<b>0906 00</b>	<b>MONEY LAUNDERING</b>
	"Money laundering" or laundering of proceeds of crime "proceeds", consists of any economic advantage from criminal offences.

<b>0906 01</b>	<b>Offences jointly identified as Money Laundering</b>
0906 01 01	The conversion or transfer of property
Article 6(1) of the the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime	The illicit conversion or transfer of property, knowing that such property is proceeds, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of the predicate offence to evade the legal consequences of his actions
0906 01 02	The illicit concealment or disguise of property related information
Article 6(1) of the the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime	The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is proceeds
0906 01 03	The illicit acquisition, possession or use of laundered property
Article 6(1) of the the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime	The acquisition, possession or use of property, knowing, at the time of receipt, that such property was proceeds.
<b>0906 02</b>	<b>Other forms of Money Laundering</b>
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
<b>0907 00</b>	<b>VIOLATION OF COMPETITION RULES</b>
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2008/XX/JHA	Violation of competition rules is an ECRIS category
<b>0908 00</b>	<b>FRAUD AND SWINDLING</b>
Annex to the Convention of 26 July 1995 on the Establishment of a European police office	This category is listed without further explanation.
<b>0908 01</b>	<b>Offences jointly identified as fraud and swindling</b>
<b>0908 01 01</b>	Counterfeiting and piracy products
Annex to the Convention of 26 July 1995 on the	This category is listed without further explanation.

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Establishment of a European police office	
<b>0908 01 02</b>	Forgery (i.e. Counterfeiting) and trafficking of administrative documents
Article 2 (2) - Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between member states	Forgery (i.e. Counterfeiting) of administrative documents and trafficking therein, includes: <ul style="list-style-type: none"> <li>- Possession of a devise for the forging of public or administrative documents</li> <li>- Forging (i.e. counterfeiting) of public or administrative documents</li> <li>- The supply or acquisition of a forged public or administrative document</li> <li>- Using forged public or administrative documents</li> <li>- Trafficking in forged administrative documents</li> </ul>
<b>0908 01 03</b>	Forgery (i.e. Counterfeiting) of means of payment
Article 40(7) – Convention Implementing The Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders	Listed as an offence category, without further explanation.
0908 01 03 01	Forgery (i.e. Counterfeiting) of cash means of payment
Article 3 - Council Framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro	Cash means of payment or currency means paper money (including banknotes) and metallic money, the circulation of which is legally authorised including euro banknotes and euro coins, the circulation of which is legally authorised pursuant to Regulation (EC) 974/98 Forgery (i.e. Counterfeiting) of cash means of payment includes: <ul style="list-style-type: none"> <li>- Any fraudulent making or altering of currency, whatever means are employed (“currency” means paper money (including banknotes) and metallic money, the circulation of which is legally authorised including euro banknotes and euro coins, the circulation of which is legally authorised pursuant to Regulation (EC) 974/98)</li> <li>- The fraudulent uttering of counterfeit currency (“currency” means paper money (including banknotes) and metallic money, the circulation of which is legally authorised including euro banknotes and euro coins, the circulation of which is legally authorised pursuant to Regulation (EC) 974/98)</li> <li>- The import, export, transport, receiving, or obtaining of counterfeit currency with a view to uttering the same and with knowledge that it is counterfeit;</li> <li>- The fraudulent making, receiving, obtaining or possession of (i) instruments, articles, computer programs and any other means peculiarly adapted for the counterfeiting or altering of</li> </ul>

	currency, or holograms or other components of currency which serve to protect against counterfeiting. ("currency" means paper money (including banknotes) and metallic money, the circulation of which is legally authorised including euro banknotes and euro coins, the circulation of which is legally authorised pursuant to Regulation (EC) 974/98)
0908 01 03 02	Forgery (i.e. Counterfeiting) of non-cash means of payment
Article 1 - Council Framework Decision of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment	<p>"Non-cash payment instrument" shall mean a corporeal instrument, other than legal tender (bank notes and coins), enabling, by its specific nature, alone or in conjunction with another (payment) instrument, the holder or user to transfer money or monetary value, as for example credit cards, euro cheque cards, other cards issued by financial institutions, travellers' cheques, euro cheques, other cheques and bills of exchange, which is protected against imitation or fraudulent use, for example through design, coding or signature; Forgery (i.e. Counterfeiting) of non-cash means of payment is defined by following subcategories:</p> <ul style="list-style-type: none"> <li>- The fraudulent uttering of a payment instrument</li> <li>- Receiving, obtaining, transporting, sale or transfer to another person or possession of a stolen or otherwise unlawfully appropriated, or of a counterfeited payment instrument in order for it to be used fraudulently</li> <li>- Performing or causing a transfer of money or monetary value and thereby causing an unauthorised loss of property for another person, with the intention of procuring an unauthorized economic benefit for the person committing the offence or for a third part</li> <li>- The fraudulent making, receiving, obtaining, sale or transfer to another person or possession of (i) instruments, articles, computer programmes and any other means peculiarly adapted for the commission of any of the offences described under Article 2(b);</li> </ul>
0908 01 04	Fraud affecting the financial interests of the European Communities
Article 1 of the Convention of 26 July 1995 on the protection of the European Communities' Financial Interests	<p>Fraud affecting the financial interests of the European Communities, includes:</p> <p>Expenditure fraud meaning:</p> <ul style="list-style-type: none"> <li>- The use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities</li> <li>- The non-disclosure of information in violation of a specific obligation, with the same effect</li> <li>- The misapplication of such funds for purposes other than those for which they were originally granted</li> </ul> <p>Revenue fraud means:</p> <ul style="list-style-type: none"> <li>- The use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal</li> </ul>

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	<p>diminution of the resources of the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities</p> <ul style="list-style-type: none"> <li>- The non-disclosure of information in violation of a specific obligation, with the same effect</li> <li>- The misapplication of a legally obtained benefit, with the same effect</li> </ul>
<b>0908 02</b>	<b>Other forms of fraud and swindling</b>
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
<b>0908 02 01</b>	Tax offences
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2008/XX/JHA	A tax is a financial charge or other levy imposed on an individual or a legal entity by a state or a functional equivalent of a state. "Tax offences" an ECRIS category.
<b>0908 02 02</b>	Social Security or Family Benefit Fraud
<b>0908 02 03</b>	Custom offences
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2008/XX/JHA	Customs is an authority or agency in a country responsible for collecting and safeguarding customs duties and for controlling the flow of goods including animals, personal effects and hazardous items in and out of a country (this is an ECRIS category)
<b>0908 02 04</b>	Fraudulent insolvency
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2008/XX/JHA	Insolvency exists for a person or organization when total financial liabilities exceed total financial assets (this is an ECRIS category)
<b>0908 02 05</b>	Other
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to



	uphold a more strict criminal policy
0909 00	<b>OFFENCES AGAINST INFORMATION SYSTEMS</b>
0909 01	<b>Offences jointly identified as offences against information systems</b>
0909 01 01	Offences against the confidentiality, integrity and availability of computer data and systems
Article 2 of the 2001 CoE Cybercrime Convention	<p>Offences against the confidentiality, integrity and availability of computer data and systems: "computer system" means any device or a group of interconnected or related devices, one or more of which, pursuant to a program, performs automatic processing of data; "computer data" means any representation of facts, information or concepts in a form suitable for processing in a computer system, including a program suitable to cause a computer system to perform a function; "service provider" means any public or private entity that provides to users of its service the ability to communicate by means of a computer system, and any other entity that processes or stores computer data on behalf of such communication service or users of such service. "traffic data" means any computer data relating to a communication by means of a computer system, generated by a computer system that formed a part in the chain of communication, indicating the communication's origin, destination, route, time, date, size, duration, or type of underlying service,</p> <ul style="list-style-type: none"> <li>- Illegal Access: the access to the whole or any part of a computer system without right</li> <li>- Illegal interception: the interception without right, made by technical means, of non-public transmissions of computer data to, from or within a computer system, including electromagnetic emissions from a computer system carrying such computer data</li> <li>- Data interception: the damaging, deletion, deterioration, alteration or suppression of computer data without right</li> <li>- System interference: the serious hindering without right of the functioning of a computer system by inputting, transmitting, damaging, deleting, deteriorating, altering or suppressing computer data</li> <li>- Misuse of devices: committing intentionally and without right: (a) the production, sale, procurement for use, import, distribution or otherwise making available of a device, including a computer program, designed or adapted primarily for the purpose of committing any of the above mentioned; or a computer password, access code, or similar data by which the whole or any part of a computer system is capable of being accessed, with intent that it be used for the purpose of committing any of the above mentioned offences; and (b) the possession of an item referred to in paragraphs a.i or ii above, with intent that it be used for the purpose of committing any of the above mentioned offences</li> </ul>
0909 01 02	Computer-related offences

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	Computer-related offences include - the input, alteration, deletion, or suppression of computer data, resulting in inauthentic data with the intent that it be considered or acted upon for legal purposes as if it were authentic, regardless whether or not the data is directly readable and intelligible - committing intentionally and without right, the causing of a loss of property to another person by: a) any input, alteration, deletion or suppression of computer data, b) any interference with the functioning of a computer system, with fraudulent or dishonest intent of procuring, without right, an economic benefit for oneself or for another person
0909 01 03	Offences related to infringements of copyright and related rights
0909 01 04	Production, possession or trafficking in computer devices or data enabling commitment of computer related offences
<b>0909 02</b>	<b>Other forms of offences against information systems</b>
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
<b>0910 00</b>	<b>OTHER OFFENCES AGAINST PROPERTY</b>
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
<b>1000 00 Open Category</b>	<b>OFFENCES AGAINST LIFE, LIMB AND PERSONAL FREEDOM</b> , <i>not committed or likely to be committed in the course of terrorist activities and other than offences against the state, nation, state symbol or public authority</i>
<b>1001 00</b>	<b>CAUSING DEATH</b>
<b>1001 01</b>	<b>Intentional</b>
Derived from European SourceBook	Intentional homicide means intentional killing of a person. Where possible, the figures include assault leading to death, euthanasia, infanticide, but exclude assistance with suicide
1001 01 01	not further specified
1001 01 02	causing death at the request of the victim
	Euthanasia is causing death at the request of the victim
1001 01 03	causing death of the own child during or immediately after birth
	Infanticide is causing death of the own child during or immediately after birth
1001 01 04	offences related to suicide
1001 01 05	illegal abortion
	Illegal abortion is the removal or expulsion of an embryo or fetus from the uterus, resulting in or caused by its death
<b>1001 02</b>	<b>Unintentional</b>
	Unintentional killing (manslaughter )
<b>1002 00</b>	<b>CAUSING PSYCHOLOGICAL AND/OR BODILY INJURY</b>

<b>1002 01</b>	<b>Torture</b>
Article 1 of the UN 20 December 1984 Convention against Torture	"torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
<b>1002 02</b>	<b>Causing psychological and bodily injury, other than torture</b>
1002 02 01	Causing grievous bodily injury
1002 02 02	Causing minor bodily injury
1002 02 03	Threatening behaviour
1002 02 04	Other
<b>1003 00</b>	<b>FAILURE TO OFFER AID</b>
	Failure to offer aid excludes torture and failure to stop after a road accident
<b>1004 00</b>	<b>EXPOSING TO DANGER OF LOSS OF LIFE OR GRIEVOUS BODILY INJURY</b>
	Exposing to danger of loss of life or grievous bodily injury includes neglect or desertion of a child or a disabled person
<b>1005 00</b>	<b>KIDNAPPING, ILLEGAL RESTRAINT AND HOSTAGE-TAKING</b>
Annex to the Convention of 26 July 1995 on the establishment of a European police office	Kidnapping or hostage taking; Kidnapping is the taking away or aspiration of a person against the person's will; Hostage-taking is the seizing of a person in order to compel another party such as a relative, employer or government to act, or refrain from acting, in a particular way, often under threat of serious physical harm to the hostage(s) after expiration of an ultimatum; Illegal restraint is the holding of the person in false imprisonment, a confinement without legal authority
<b>1006 00</b>	<b>INSULT, SLANDER AND DEFAMATION</b>
	Insults is an expression, statement or behaviour that is considered degrading; Defamation or slander is the communication of a statement that makes a false claim, expressly stated or implied to be factual, that may give an individual, business, product, group, government or nation a negative image
<b>1007 00</b>	<b>BREACH OF PRIVACY, other than through cybercrime</b>
<b>1100 00 Open Category</b>	<b>OFFENCES AGAINST THE STATE, PUBLIC ORDER, COURSE OF JUSTICE OR PUBLIC OFFICIALS</b>
<b>1101 00</b>	<b>OFFENCES AGAINST THE STATE AND/OR PUBLIC AUTHORITIES</b>

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1101 01	<b>Attempt against life or health of the head of State</b>
1101 02	<b>Insult of the State, nation or State symbols</b>
1101 03	<b>Insult or resistance to a representative of public authority</b>
1101 04	<b>Assault on a representative of public authority</b>
1101 05	<b>Unlawful impersonation of a person or an authority</b>
1101 06	<b>Espionage</b>
	Espionage is the obtaining of information that is considered secret or confidential without the permission of the holder of the information
1101 07	<b>High treason</b>
	Criminal disloyalty to one's country constitutes high treason
1101 08	<b>Offences related to elections and referendum</b>
	Offences related to elections and referendum
1101 09	<b>Obstructing of public tender procedures</b>
	Obstructing of public tender procedures to generate competing offers from different bidders looking to obtain an award of business activity in works, supply, or service contracts
1101 10	<b>Obstructing or perverting the course of justice, making false allegations, perjury</b>
	Obstructing or perverting the course of justice, making false allegations, perjury
1101 11	<b>Abuse of function</b>
1101 12	<b>Other offences against the state and/or public authorities</b>
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
1102 00	<b>OFFENCES AGAINST PUBLIC PEACE/PUBLIC ORDER</b>
1102 01	<b>Violence during sports events</b>
Article 5 – Council framework decision of 24 February 2005 on the application of the principle of mutual recognition to financial penalties	This category is listed in article 5 of the said framework decision, without further explanation
1102 02	<b>Violence during international conferences</b>
1102 03	<b>Public abuse of alcohol or drugs, other than related to road traffic regulations</b>
1102 04	<b>Offences related to illegal gambling</b>
1102 05	<b>Disturbing public order through racism and xenophobia</b>
1102 05 01	Publicly inciting to racist or xenophobic violence or hatred
Article 1 – Council Framework Decision of 28 November 2008 on	Publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin

combating certain forms and expressions of racism and xenophobia by means of criminal law	includes: - Publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin by public dissemination or distribution of tracts, pictures or other material - Publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin through other means
1102 05 02	Denial, gross minimisation, approval or justification of genocide or crimes against humanity
Article 1 – Council Framework Decision of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law	Denial, gross minimisation, approval or justification of genocide or crimes against humanity
1102 05 03	Other offences disturbing public order through racism and xenophobia
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
<b>1200 00 Open Category</b>	<b>OFFENCES AGAINST LABOUR LAW</b>
1201 00	<b>UNLAWFUL EMPLOYMENT</b>
1201 01	<b>Unlawful employment of an EU national</b>
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2008/XX/JHA	Unlawful employment of an EU national, this distinction is made by the ECRIS classification system
1201 02	<b>Unlawful employment of a third country national</b>
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2008/XX/JHA	Unlawful employment of a third country national, this distinction is made by the ECRIS classification system
1202 00	<b>OFFENCES RELATING TO REMUNERATION INCLUDING</b>

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	<b>SOCIAL SECURITY CONTRIBUTIONS</b>
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2008/XX/JHA	Offences relating to remuneration including social security contributions, is an ECRIS category.
1203 00	<b>OFFENCES RELATING TO WORKING CONDITIONS, HEALTH AND SAFETY AT WORK</b>
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2008/XX/JHA	Offences relating to working conditions, health and safety at work, is an ECRIS category.
1204 00	<b>OFFENCES RELATING TO ACCESS TO OR EXERCISE OF A PROFESSIONAL ACTIVITY</b>
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2008/XX/JHA	Offences relating to access to or exercise of a professional activity, is an ECRIS category.
1205 00	<b>OFFENCES RELATING TO WORKING HOURS AND REST TIME, <i>other than road traffic offences</i></b>
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2008/XX/JHA	Offences relating to working hours and rest time, other than those in road traffic regulations, is an ECRIS category
1206 00	<b>OTHER OFFENCES AGAINST RIGHTS OF THE EMPLOYEES</b>
	Rest category, as the jointly identified forms an on offences type

	only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy (e.g. the right to form and join trade unions)
<b>1300 00 Open Category</b>	<b>MOTOR VEHICLE CRIME AND OFFENCES AGAINST TRAFFIC REGULATIONS, <i>other than theft, misappropriation and trafficking in stolen vehicles</i></b>
Article 5 – Council framework decision of 24 February 2005 on the application of the principle of mutual recognition to financial penalties and 4th indent of the Annex to the Council Act of 26 July 1995 drawing up the Convention on the establishment of a European Police Office	Conduct which infringes road traffic regulations include breaches of regulations pertaining to driving hours and rest periods and regulations on hazardous goods. "Vehicle" shall mean any motor vehicle, trailer or caravan as defined in the provisions relating to the Schengen Information System (SIS)
<b>1301 00</b>	<b>DANGEROUS DRIVING</b>
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2008/XX/JHA	Dangerous driving is an ECRIS category and includes: - Driving over the speed limit - Driving under the influence of alcohol or narcotic drugs - Driving without seat belts or child seat
<b>1302 00</b>	<b>DRIVING WITHOUT A LICENCE OR WHILE DISQUALIFIED</b>
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2008/XX/JHA	Driving without a licence or while disqualified is an ECRIS category
<b>1303 00</b>	<b>FAILURE TO STOP AFTER A ROAD ACCIDENT</b>
Article 41(4) – Convention Implementing The Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and	Failure to stop after a road accident which has resulted in death or serious injury

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the French Republic on the gradual abolition of checks at their common borders	
<b>1304 00</b>	<b>AVOIDING A ROAD CHECK</b>
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2008/XX/JHA	Avoiding a road check is an ECRIS category
<b>1305 00</b>	<b>OFFENCES RELATED TO ROAD TRANSPORT</b>
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2008/XX/JHA	Offences related to road transport, including breaches of regulations pertaining to driving hours and rest periods and regulations on hazardous goods
<b>1306 00</b>	<b>OTHER OFFENCES RELATED TO VEHICLES AND ROAD TRAFFIC REGULATIONS</b>
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
<b>1400 00 Open Category</b>	<b>OFFENCES AGAINST MIGRATION LAW</b>
Article 2, 1 (b) of Regulation (EC) No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council Regulation (EEC) No 311/76 on the compilation of statistics	"Immigration" means the action by which a person establishes his or her usual residence in the territory of a member state for a period that is, or is expected to be, of at least 12 months, having previously been usually resident in another member state or a third country. "Emigration" means the action by which a person, having previously been usually resident in the territory of a member state, ceases to have his or her usual residence in that member state for a period that is, or is expected to be, of at least 12 months;
<b>1401 00</b>	<b>OFFENCES JOINTLY IDENTIFIED AS OFFENCES AGAINST MIGRATION LAW</b>
<b>1401 01</b>	<b>Unauthorised entry, transit and/or residence</b>
Article 3(b) of the Council Decision of 24 July 2006 Article 5 Council	Illegal (unauthorised) entry' is defined as crossing borders without complying with the necessary requirements for legal entry into the receiving State. It includes:



Regulation (EC) No 562/2006 of the European Council and of the European Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders.	<ul style="list-style-type: none"> <li>- Unauthorised entry, transit and/or residence for fictitious scientific research</li> <li>- Unauthorised entry, transit and/or residence for fictitious studies</li> <li>- Unauthorised entry, transit and/or residence for fictitious pupil exchange</li> <li>- Unauthorised entry, transit and/or residence for fictitious unremunerated training</li> <li>- Unauthorised entry, transit and/or residence for fictitious voluntary service</li> <li>- Unauthorised entry, transit and/or residence for fictitious family reunification - family reunification' means the entry into and residence in a member state by family members of a third country national residing lawfully in that member state in order to preserve the family unit, whether the family relationship arose before or after the resident's entry;</li> <li>- Unauthorised entry, transit and/or residence for fictitious pursuit of activities as self-employed person - "Activity as a self-employed person' means any activity carried out in a personal capacity or in the legal form of a company or firm within the meaning of the second paragraph of Article 58 of the EC Treaty without being answerable to an employer in either case</li> </ul>
<b>1401 02</b>	<b>Facilitation of unauthorised entry, transit and residence</b>
Article 1 of the Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence	<p>Facilitation of unauthorised entry, transit and residence includes:</p> <ul style="list-style-type: none"> <li>- Assisting a person who is not a national of a member state to enter, or transit across, the territory of a member state in breach of the laws of the State concerned on the entry or transit of aliens, either in order to obtain a financial or other material benefit (i.e. smuggling of migrants), or irrespective of a financial or other material benefit (e.g. marriage of convenience: this is a marriage contracted for reasons other than the reasons of relationship, family, or love. Instead, such a marriage is orchestrated for personal gain or some other sort of strategic purpose, such as immigration.)</li> <li>- Intentionally assisting a person – for financial gain - who is not a national of a member state to reside within the territory of a member state in breach of the laws of the State concerned on the residence of aliens</li> </ul>
1404 00	<b>OTHER OFFENCES RELATED TO IMMIGRATION/ALIEN LAWS</b>
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
<b>1500 00 Open Category</b>	<b>OFFENCES RELATED TO FAMILY LAW</b>
1501 00	<b>OFFENCES RELATED TO FAMILY LAW, <i>not further specified</i></b>
	Rest category: included to allow member states to provide additional information if they collect data on other types of offences.

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1502 00	<b>BIGAMY</b>
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2008/XX/JHA	Bigamy is the act or condition of a person marrying another person while still being lawfully married to a second person. Bigamy is an ECRIS category.
1503 00	<b>FAMILY ABANDONMENT BY EVADING THE ALIMONY OR MAINTENANCE OBLIGATION</b>
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2008/XX/JHA	Family Abandonment via evading the alimony or maintenance obligation, is an ECRIS category.
1504 00	<b>REMOVAL OF A CHILD OR FAILURE TO COMPLY WITH AN ORDER TO PRODUCE A CHILD</b>
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2008/XX/JHA	Failure to comply with an order to produce a minor or removal of a minor, is an ECRIS category
<b>1600 00 open Category</b>	<b>OFFENCES AGAINST MILITARY OBLIGATIONS</b>
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2008/XX/JHA	Offences against military obligations is an ECRIS category.

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