Call for tenders JLS/D3/2007/03 European Commission

Study

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

Interim report

Coordinator: Gisèle Vernimmen–Van Tiggelen
Assistant: Laura Surano

Université libre de Bruxelles– Institute of European Studies
ECLAN –European Criminal Law Academic Network
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Interim report

This report establishes a first, non-exhaustive review of the information collected up until 31 May 2008.

I. General tendencies

1. The way mutual recognition is perceived

It is not easy to define the principle of mutual recognition. Few people have tried it. For some, it involves a different and almost revolutionary approach of judicial cooperation in criminal matters\(^1\). At the other extreme, it is just one more step towards simplification\(^2\).

This is illustrated by the fact that the principle of mutual recognition has been included as a rule of interpretation in some implementing legislations\(^3\), by the fact that a foreign decision can be treated the same as a national decision\(^4\) or even by the fact a foreign decision can be recognised and executed with no further verification\(^5\).

All those spoken to emphasise the relationship between mutual recognition and mutual trust. Mutual trust is either presupposed or more often considered not yet achieved.

2. A complex array of differing instruments

Implementing the instruments raises the problem of measuring their impact on related legislation. The rate of successive legislative changes leads to decreasing enthusiasm\(^6\). The absence of information and accessible training makes their practical application awkward and somewhat random. Practitioners find it difficult to keep up with the application of instruments that are numerous and sometimes too specific\(^7\).

The policy of implementing the mutual recognition programme in a piecemeal manner is perceived as a strategic error especially as regards pre-trial decisions\(^8\). The effort to familiarise oneself with a new instrument is felt to be disproportionate compared to its effectiveness which is limited in any event in a procedure requiring several mutual assistance measures\(^9\).

\(^{1}\)National Reports BG, FI, LT.
Mission CZ.
\(^{2}\)National Report NL.
Missions NL, DE.
\(^{3}\)Transposition law RO (Article 77 (2), Law 302/2004).
\(^{4}\)National Reports PT, SK.
\(^{5}\)National Reports EL, IE.
\(^{6}\)National Report LT.
BXL meetings of 26.2.08, 25.4.08.
\(^{7}\)National Report LT.
Mission FR.
BXL meetings of 2.4.08, 15.4.08.
\(^{8}\)National Report NL.
Missions NL, FR, UK, DE.
BXL meetings of 21.1.08, 11.2.08.
\(^{9}\)National Report NL.
Missions NL (+ Eurojust), FR, CZ, ES.
BXL meetings of 2.4.08, 15.5.08.
National Reports FI, PT, SI, SK.
Many of the interviewed persons consider that present circumstances mean that codification is not feasible at this stage.\footnote{In this sense: National Reports FR, LT, MT, PT, SI. On the other hand: National Reports EL, ES, FI, RO, SK.} but they lead nonetheless to a broader set of measure being included in one instrument\footnote{National Report FI. Missions NL, FR, CZ, ES, DE.} including those which have already been the subject of EU initiatives. The risks of reformatting were noted\footnote{BXL meeting of 11.2.08.}.

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

In practice there were few obvious cases of problems linked to differences of substantive law of the issuing MS and that of the executing MS. And even in cases falling within one of the 32 categories of offences for which the dual criminality check is abolished by the Framework Decision on the European arrest warrant, it is nonetheless still considered necessary to check the facts with the selected category\footnote{National Reports BG (practical given), FR (decision overturned by the Supreme Court of Appeal of 21.11.2007), IE, LT, MT, PT (Supreme Court n° 06P4707 of 4.01.2007). Missions IT, ES, DE. BXL meeting of 15.4.08. National Reports FI, NL, ES, LT (link with legality). National Report IT. Missions NL, CZ, IT, UK, ES. Notwithstanding National Report SI. See however missions IT and DE. Mission DE. BXL meeting of 15.5.08. National Report CZ. National Report PT. Mission LU. Transposition Laws FI (Article 5 (1) 6, Extradition Act), IT (Article 2 (3), Law 69/2005).}.

Conversely we noted clear concerns with regard to the issuing of European arrest warrants in relation to facts classified as minor offences in the executing MS\footnote{National Reports FI, NL, ES, LT (link with legality). National Report IT. Missions NL, CZ, IT, UK, ES. Notwithstanding National Report SI. See however missions IT and DE. Mission DE. BXL meeting of 15.5.08. National Report CZ. National Report PT. Mission LU. Transposition Laws FI (Article 5 (1) 6, Extradition Act), IT (Article 2 (3), Law 69/2005).}.

Although the quantitative application criteria (level of sanction or length of the sentence) are not disputed and although differing sensitivities as regards the gravity of certain offences (theft, vandalism, attacks and injuries, etc.) are regarded as normal, there are calls for more moderation and proportionality in the issuing of the European arrest warrants\footnote{BXL meeting of 15.4.08. National Report IT. Missions NL, CZ, IT, UK, ES. Notwithstanding National Report SI. See however missions IT and DE. Mission DE. BXL meeting of 15.5.08. National Report CZ. National Report PT. Mission LU. Transposition Laws FI (Article 5 (1) 6, Extradition Act), IT (Article 2 (3), Law 69/2005).}.

In other words, proceeding with the approximation of substantive law that is to say drawing up a common definition of offences is not generally perceived as a precondition to the adoption and implementation of mutual recognition instruments\footnote{Notwithstanding National Report SI. See however missions IT and DE. Mission DE. BXL meeting of 15.5.08. National Report CZ. National Report PT. Mission LU. Transposition Laws FI (Article 5 (1) 6, Extradition Act), IT (Article 2 (3), Law 69/2005).}.

However, differences in other aspects of criminal law, such as the age of criminal liability\footnote{Mission DE. BXL meeting of 15.5.08. National Report CZ. National Report PT. Mission LU. Transposition Laws FI (Article 5 (1) 6, Extradition Act), IT (Article 2 (3), Law 69/2005).}, the liability of legal persons\footnote{National Report CZ.} and limitation periods\footnote{National Report PT. Mission LU. Transposition Laws FI (Article 5 (1) 6, Extradition Act), IT (Article 2 (3), Law 69/2005).} were raised as obstacles to the operation of the instruments.

4. **Mutual recognition and approximation of procedural law**

The possibility of checking whether fundamental rights have been respected is expressly envisaged the implementing legislation of a number of MSs\footnote{Transposition Laws FI (Article 5 (1) 6, Extradition Act), IT (Article 2 (3), Law 69/2005).}. If it is not
explicitly mentioned, it is often implied. Authorities make little use of it and cases of refusal are very limited. The relationship between the level of harmonisation procedural law and procedural safeguards on the one hand and level of mutual trust as a condition for successful mutual recognition on the other, is not in dispute. Only a few of those interviewed representing both a minority of MSs and a minority of experts, remain reluctant to see greater approximation in this area.

In the light of the failure to reach agreement on the proposal for a framework decision on procedural rights, most practitioners expressed wished that work on this proposal should continue on an ambitious basis, that is to say, they do not see any added value in a EU instrument that had only achieved agreement on the lowest common denominator.

Many practitioners wished for approximation of the rules on gathering evidence. However, respect for the legal traditions and legal systems of the different MSs, and in particular, maintaining the special characteristics of the common law system, would limit such an exercise.

5. **Does mutual recognition of final decisions differ from that of pre-trial decisions?**

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

This distinction was expressed in different ways in a number of interviews and is sometimes seen in the instruments negotiated. Indeed, the extent to which the executing authority can trust the issuing authority and therefore limit the checks to be carried out by the executing authority depend on the extent of intrusiveness of the action to be taken by the executing authority. In some cases it is enough, for

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21 National Report SK.  
22 National Reports ES, HU, LV, LT, PT, RO, SI; NL (District Court of Amsterdam, 1.7.2005), FR (Pau Court of Appeal, n° 94/2008 of 7.3.2008), BG (Sofia Court of Appeal, AFF. 205/2007 of 8.3.2007), IT (Supreme Court of Appeal, n° 17632 of the 3.5.2007), IE (Supreme Court, Krasnovas judgement of 24.11.2006). Missions NL, FR, CZ, DE, IT, IE.  
23 National Reports EL, FI, LT, NL, PT. Missions FR, CZ, ES, DE, UK. BXL meetings of 2.4.08, 25.4.08.  
24 National Reports LV, MT. Missions FR, IT, NL, SI, SK. BXL meetings of 11.2.08, 15.4.08, 25.4.08, 15.5.08.  
25 National Reports ES, UK, SI, SK. Missions FR, IT, IE, ES, DE. BXL meetings of 11.2.08, 15.4.08, 25.4.08, 15.5.08.  
26 National Reports EL, NL, RO, SK, LT. Missions NL (Eurojust), FR, IT, DE. BXL meetings of 15.5 08, 15.4. 08.  
27 National Report IE. Missions IT, IE, ES, UK.  
28 National Reports EL, HU, LT, SK. Mission IT. BXL meetings of the 25.4. 08, 15.5. 08.  
29 National Reports LV, PT.  
30 National Reports HU, NL, SI.
example, to recognise a decision to transmit evidence or to ensure that a person observes their bail conditions. In others, responsibility for the procedure shifts from the issuing MS to the executing MS.

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

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

6. Treatment of nationals

One of the major advances of the European Arrest Warrant was to eliminate refusals to extradite nationals, which had been the rule in the majority of the MSs. This development was debated vigorously in the light of the constitutions of several MSs. In some cases this lead to the Constitution being changed or changes in the implementing legislation.

Currently however there are still many differences, more or less marked, in the way nationals and residents are treated both in law and in practice. Although this is unlikely to be raised before the European Court of Human Rights, it is currently the subject of preliminary questions before the ECJ. The future judgments will perhaps lead to further changes. It could be, however, that these very sensitive problems call for a response beyond the circumstances specific to these cases and require an overall legislative response at Union level.

7. Evolving case law: the role of the Supreme Courts

Missions FR, CZ, IT.
BXL meeting of 15.4.08. See however BXL meeting of 11.2.08.
31 Article 7 of the CD 2005/214 of 24.2.2005 (JO L 76 of 22.3.2005) and Article 15 of the proposal for CD on the MOP (political agreement of 1.6.2006).
32 For example Supreme Court EL (CS 923/2005).
33 National Report IE (the text of this statement is reproduced in the Dail Debates of 5.12.2003 Col. 893). See also High Court, Mc Ardle 27.5.2005 and Ostrovskij 26.6.2006.
34 National Report LT.
35 Subject to the Austrian temporary derogation, see Article 33 of the CD 2002/584 of 13.6.2002 (JO L 190 of 18.7.2002).
36 Constitutional Court RO, judgement 445 of 10.5.2007; Court of Appeal LT, n° 1N-11/2006; Supreme Court EL, n° 591/2005.
37 National Report SK.
38 As a result of the judgment of the Constitutional Court DE, B verfG 2 BvR 2236/04 of 18.7.2005, and the judgment of the Constitutional Court PL, P 1/05 of 27.4.2005.
39 National Reports EL, CZ, ES, FI, HU.
Missions IT, LU.
BXL meeting of 15.5.08.
41 BXL meeting of 6.3.08.
42 AFF. Kozlwski n° C-66/08 and Welzenbuy C-123/08.
Without always expressly quoting the ECJ's decision in the Pupino case, in all the MSs, Supreme Courts were keen to respect the letter and the spirit of the European instrument as faithfully as possible. Both the interviews and the reports showed support for constructing the European judicial area. This attitude can probably be explained by the fact that these courts are more bound by the law than the facts of the case and they are generally responsible for laying down binding judgments. When Constitutional Courts have been called upon to rule they have sometimes concluded that the constitution needed to be amended to comply with the EU instrument. That said, they have also expressed a generally positive attitude towards mutual recognition.

8. **Who benefits from mutual recognition? The defence lawyers' position**

All lawyers report that, at this stage, the principle of mutual recognition does not benefit the defence and that the approach is generally unbalanced. This feeling can be explained because the only instrument in force so far and used Union-wide is the European Arrest Warrant. The only advantage - and it is not always perceived as such - for the person who is the subject of an EAW, is that the procedure is faster. Since the grounds for refusal are limited (and this varies between Member States) defence lawyers plays a minor role in the hearing and surrender procedure. Added to that is the fact that the profession does not have sufficient access to information and training on the new instruments. Furthermore it lacks the means to ensure continuity and a fully effective defence in cross-border situations.

9. **Expectations with regard to the Lisbon Treaty**

Many of those interviewed hoped for a boost with the entry into force of the Lisbon Treaty. The so-called "Community" method should make it possible to revive discussions, in particular in connection with procedural rights, and to overcome certain obstacles. The possibility of referral to the Court of Justice should accelerate the application and ensure more consistency in transposition. The new legal basis brings clarity as regards the Union's competence. Despite this optimism, problems may still occur in particular where legislative action aims for harmonisation, problems such as the condition that such action is necessary to facilitate mutual recognition, the requirement for a cross-border dimension and the obligation to take into account the differences between the legal traditions and systems of the MSs.

Last, the possibility that all MSs will not take part completely in the development of Union law in these matters causes undeniable concern, both for practitioners who

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44HU (Constitutional Court, judgement of 8.3.2008).
45CZ (Constitutional Court n° PI.US 66/04 of 3.5.2005).
46Missions NL, IE, UK, DE.
47BXL meeting of 25.4.08.
48Missions IT, NL.
49BXL meeting of 25.4.08.
49BXL meetings of 15.5.08, 11.2 08.
49Missions FR, CZ, IE, LU, ES.
are likely to be faced with even greater complexity and for politicians who fear the negative effects of a two-speed legal Europe.

II. Consensus

10. Mutual trust - myth or reality?

The designation of the principle of mutual recognition as an engine of judicial cooperation in criminal matters is not the result of a lengthy process or the logical consequence of a high level of mutual trust. It is true that mutual trust was presupposed by the European Council of Cardiff, and subsequently the Council of Tampere. However, in reality it is still not felt. All those interviewed agree that mutual confidence is a two-way learning process. It requires an effort and a frame of mind of the two parties: confidence is given, but it is also earned.

11. Information

All those interviewed agree that it was necessary that all professionals who use the new instruments need to be much better informed. The aim is for practitioners to feel at ease with the new mechanisms. To that end it is important to make available to them any tools that would assist them (manuals, guidelines, models, websites referring to the case law of relevant courts in all MSs...).

From this point of view, opinions are divided on the respective advantages and disadvantages of decentralisation. For some, it is to the detriment of specialisation which would safeguard correct and consistent application and that is one of the reasons for making optional grounds for refusal compulsory in the implementing legislation. For others, it is the only way to develop a genuine common culture of judicial cooperation.

12. Training

The need to develop language skills and knowledge of legal systems of other MSs as well as of relevant cooperation and mutual recognition instruments, both during the initial and continuous training of practitioners is emphasised. The efforts already made in this direction are welcome but are still insufficient. Several initiatives should be supported: developing common training modules, internships (exchange programmes) for future and existing practitioners in other MSs,

BXL meetings of 1.4.08, 2.4.08, 15.4.08, 25.4.08, 15.5.08.

National Reports IE, HU, CZ, NL, PT.

Missions NL (+ Eurojust), IE, UK, LU.

BXL meetings of 25.4.08, 7.5.08, 15.5.08.

National Report FR.

Missions NL, IT.

For the respective advantages, see the National Reports BG, ES, PT, RO.

Mission IE.

National Reports HU, LT, NL.

National Report ES.

National Report LV.

National Reports BG, LV, LT, NL, SK.

National Reports BG, LT.

Missions NL, IT, ES.

BXL meeting of 15.5.08.
participation of practitioners from other MSs in (national) training sessions, possibly the creation a European legal training school…

13. Feedback

Mutual recognition mechanisms are set up in a wide variety of ways, and that explains, in part, why the feedback is either non-existing or is very badly organised\(^58\). For a start, assessment of implementation is fragmented and random, and \textit{ex post} evaluation, where it is possible to carry it out, lacks rigour, in that evidence and survey based appraisal is not supported by reliable statistical data.

Apart from information on the actual application of the instruments it should be possible to assess the impact of cooperation mechanisms on the effectiveness of justice, the reduction in crime, the prison population, the general feeling of justice and fairness. Suitable statistical tools and surveys for example, should be developed.

14. Networking

Professionals would also like to meet and to get to know each other\(^59\). The quality and the simplicity of the instruments are not enough. All successful experiences in the field of mutual recognition are based on the participants having a positive attitude and on dialogue, which are the foundation for mutual trust.

Defence lawyers in particular are unhappy in the face of developments to which they do not contribute\(^60\).

III. Points to develop

15. Obtaining evidence from another MS

It is necessary to look into the context in which a new EU instrument on obtaining evidence in another MS would fit. To that end, it is necessary to draw up the inventory of existing instruments and try to ascertain:

- Which instruments should be replaced,
- which existing instruments could coexist with a new initiative,
- to what extent an overall and consolidated initiative is feasible.

16. The civil judicial cooperation model

The practitioners we met do not draw parallels since they do not normally have experience of civil judicial cooperation.

It is true that civil and criminal judicial cooperation is fundamentally different (nature of the parties and role of the State) which means that the almost automatic recognition of civil decision is not applicable in the criminal field\(^61\). This requires further analysis.

Although the subject matter and the impact on sovereignty are markedly different\(^62\)

\(^{58}\)National Reports BG, CZ, EL, ES.
\(^{59}\)National Report FI.
\(^{60}\)National Report PT.
\(^{61}\)Mission LU.
\(^{62}\)National Reports SI, SK.
and probably entail adapted requirements, the approach is intellectually similar and can be a source of inspiration which has not yet fully exploited\textsuperscript{63}.

IV. Horizontal problems

17. Negotiations

It is clear from the interviews to date show that the common law civil law divide is felt in discussions whether they relate to the negotiations of a specific instrument\textsuperscript{64} or general policy debates. The Lisbon Treaty and its protocols confirm this. Moreover, negotiations sometimes occur in a climate of suspicion rather than mutual trust\textsuperscript{65}. Owing to the fact that practitioners are only rarely involved in the process that leads to a mutual recognition instrument\textsuperscript{66}, at times the end results reflects a theoretical, abstract and arbitrary approach.

There is an insufficient level of mutual trust during the preparation and discussion of the instruments. The recent enlargements of the EU, which were very rapid, were felt to be too sudden. It was not preceded by a familiarisation process either in the old States where certain prejudices remain strong, sometimes reinforced by bad experiences\textsuperscript{67} or in the new Member States where the requirement to assimilate a voluminous and complex acquis was considered extremely burdensome\textsuperscript{68}, and didn’t take into account the sensitivities, interests and values of their young democracies.

18. Transposition

The current legal framework, in particular the absence of infringement procedure, means that transposition does not necessarily receive the priority to which the Union aspires\textsuperscript{69}.

The instruments to be transposed are numerous and complex. Their transposition into national law requires both a good overview and excellent legislative skills, especially when these instruments need to be incorporated into existing legislation\textsuperscript{70}. The impact of their implementation has still not been fully assessed.

The necessary expertise is limited: persons who negotiate the instruments are often the only experts who could ensure that they are properly transposed\textsuperscript{71}. For the new MSs, the fact of not having taken part in the negotiations of the instruments makes it

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\textsuperscript{63}Missions FR, LU.
\textsuperscript{64}BXL meetings of 7.5 08, 15.5. 08.
\textsuperscript{65}Mission NL.
\textsuperscript{66}Mission CZ.
\textsuperscript{67}BXL meetings of 22.1 08, 15.4 08, 15.5. 08.
\textsuperscript{68}National Reports FI, PT, SI, SK, BG (subject to the recent creation of an interdepartmental group of penal cooperation).
\textsuperscript{69}Mission NL.
\textsuperscript{70}BXL meeting of 15.4.08.
\textsuperscript{71}Missions FR, DE, NL, IT.
\textsuperscript{72}BXL meetings of 25.4.08, 15.4.08.
\textsuperscript{73}National report SK.
\textsuperscript{74}Mission CZ.
\textsuperscript{75}National Report LT.
\textsuperscript{76}Mission LU.
\textsuperscript{77}National Reports HU, SK.
\textsuperscript{78}National Reports IE, LT, SK.
difficult for them to understand the compromises that were necessary to achieve the end result\textsuperscript{72} and which led to successive adjustments\textsuperscript{73}. The need to make constitutional changes in certain cases, e.g. to allow the surrender of nationals, naturally slowed down the transposition process\textsuperscript{74}.

19. Application

The need for information and training varies according to whether the MS has opted for a centralised or decentralised system. Some instruments are less suitable for centralisation, and the dual goal of short deadlines and direct contact between judicial authorities favour decentralisation. However decentralisation requires effective resources\textsuperscript{75}, a good command of languages\textsuperscript{76}, simplified connections and reliable contacts and IT tools. This applies especially to new Member States, where the professionals in charge of applying these instruments still do not have the experience to think in terms of automatic direct cooperation. Feedback from all quarters should be insisted upon\textsuperscript{77}, so that a review can be carried out of the implementation of each instrument to detect incorrect application and gaps, and to identify where improvement is needed.

At a more fundamental level, practitioners must reflect on the choice of the most appropriate instrument and on its appropriate use. It is to be hoped that when the full range of EU instruments exists, overuse of the European arrest warrant will stop, or at least that is how many practitioners see it\textsuperscript{78}, and they hope that more precise instrument will overcome the problem.

Finally, the question arises whether fundamental rights in the issuing MS should be checked by the authorities in the executing MS. This is a question of principle or of degree, according to those interviewed\textsuperscript{79}.

V. Gaps

20. Better access to defence rights

So far, the emphasis was placed on improving cooperation between judicial authorities, which is understandable. Although attempts were made to take into account individual rights, provisions aiming to protect rights have sometimes been lost during negotiations\textsuperscript{80}, so that a lack of equilibrium occurred or seemed to occur.

Two points in particular are worth pointing out. The first concerns legal remedies of the person affected by the mutual recognition measure. The situation regarding possible legal remedies against the decision to recognise the decision of another MS varies widely from one MS to another\textsuperscript{81}. The deadlines also vary enormously\textsuperscript{82}.

\textsuperscript{72}National Report LV.
\textsuperscript{73}National Reports BG, CZ, MT, SI.
\textsuperscript{74}National Report SK.
\textsuperscript{75}Mission NL.
\textsuperscript{76}National Reports BG, LV, LT, NL, SK.
\textsuperscript{77}National Reports BG, CZ, EL, ES.
\textsuperscript{78}Mission NL, FR, CZ, DE.
\textsuperscript{79}See above Section 4.
\textsuperscript{80}E.g. Articles 13 and 34 of the proposal of the CD MAE (COM (2001) 522).
\textsuperscript{81}Mission NL.
\textsuperscript{82}See for particularly short timeframes the National Report SI.
Additionally, the legal remedies against the decision to be recognised and executed are dealt with in a logical way, but not in a way that is easily accessible for those who wish to make use of them\textsuperscript{83}. There are probably ways to improve this.

The second aspect relates to the way defence lawyers are organised. The EU should endeavour to support lawyers’ efforts to organise themselves in order better to understand measures taken by judicial authorities and to improve their knowledge of what measures their clients can initiate themselves. It is of utmost importance to support, financially if necessary, training for lawyers to specialise in this type of work and help them establish networks to safeguard defence, from the investigation phase right until any execution phase in cross-border cases\textsuperscript{84}.

21. **Coordination of proceedings**

Apart from the creation of Eurojust and the Framework Decision on joint investigation teams, no tools exist at Union level for coordinating proceedings and in particular there is no EU instrument on transfer of proceedings. Eurojust does not intervene in all cases of conflicts of jurisdiction and its decisions are not binding. However, it is increasingly used and enjoys growing success\textsuperscript{85}.

Experiences with joint investigation teams are extremely limited. Yet the results are very encouraging where they have been set up\textsuperscript{86}.

Jurisdiction criteria and giving up jurisdiction for the benefit of another MS in the interest of proper administration of justice raise a difficult problem to which only very embryonic solutions have so far been suggested. This can be seen in the way in which the ‘principle of legality’ (i.e. the obligation to prosecute) is interpreted in MSs where it applies\textsuperscript{87}, the way in which the territorial clause (i.e. a ground for refusal based on the fact that the offence was committed in full or in part in the territory of the executing MS) has been transposed\textsuperscript{88} and correctly applied\textsuperscript{89}.

The interviews and the national reports show however that there is no consensus as to how to tackle this question\textsuperscript{90}. Several experts pointed out that negative conflicts of jurisdiction were more common in their view and more difficult to solve\textsuperscript{91}. Most of the experts interviewed opposed binding solutions in any event. They preferred dialogue and flexibility\textsuperscript{92}.

\textsuperscript{83}National Report LV.

Missions IT, DE.

BXL meeting of 25.4.08.

\textsuperscript{84}National Reports FI, NL, SI, LT.

Missions NL, FR, IT, IE, ES, DE.

BXL meeting of 25.4.08.

\textsuperscript{85}Mission NL (Eurojust).

\textsuperscript{86}Mission ES.

\textsuperscript{87}Missions CZ, IT.

BXL meetings of 2.4.08. 11.2.08.

\textsuperscript{88}National Reports CZ, FR. See also FR Supreme Court of Appeal (Crim.), judgement n° 43 51 of 8.7.2004; EL Court of Appeal of Athens, 29/2005 and 6/2007.

\textsuperscript{89}National Report BG. See also NL Supreme Court AY 6631 of 28.11.2006; MT Court of Magistrates, case 700/2007 Police v. Emanuel Borg of 7.9.2007.

Missions NL, LU.

\textsuperscript{90}Compare National Reports EL, ES, FI, LT, PT, RO (in favour) and HU.

Missions CZ, IT, ES.

Less favourable missions UK, BXL meeting of 21.1.08.

\textsuperscript{91}National Reports LV, LT.

Missions NL, UK.

BXL meeting of 15.4.08.
At this stage it therefore seems preferable to favour the use of existing mechanisms - Eurojust and/or joint investigation teams - and systematically to analyse the circumstances in which they prove successful or not. Moreover, developments in other fields, such as approximation of rules on evidence gathering may have a positive effect on the possibilities of coordinating proceedings.

22. A criminal justice policy for the Union?

There is not the political will, nor a legal basis to agree on a common criminal justice policy. MSs are not able to have a common position on what conduct should be sanctioned, what means should be available and applied, what level of sanctions should apply and on rehabilitation methods. The EU therefore faces the challenge of setting up a legal framework in which MSs are required to render assistance to each other and to recognise each others decisions without forcing the most tolerant to accept the more restricted approach of others but rather enabling the ethical choices and social policies of all the MSs to coexist. Nevertheless one would expect there to be a body in which national criminal policies can be discussed, at least in those areas that are subject to approximation of substantive law.

23. European judicial area

Any EU initiative must comply with the basic objective, which is to ensure effective exercise of justice and to protect fundamental rights of all persons concerned without discrimination. That means that the instruments adopted must strike a balance between effective prosecution and sentencing for criminal behaviour and protection of individuals. This also supposes that the instrument is limited to the actual needs, that it is part of an overall scheme and that its content is clear and predictable both for practitioners and individuals.

24. Methodology

The final report will draw conclusions and lessons from analysing national reports, from discussions with practitioners and from discussions with experts (in particular the small group of experts which has assisted the researchers and the Justice Forum meeting organised by the Commission). The final report will consist of a summary, which will be fuller than this interim report and it will identify a number of options listing their respective advantages and disadvantages so as to steer future initiatives. Here is a simplified example of how the options will be presented.

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92 National Report BG.
Missions UK, DE.
BXL meeting of 15.5.08.

93 National Reports HU, SK.
Missions NL (Eurojust), FR, IT, DE. Compare Mission CZ.
BXL meetings of 15.4.08, 15.5.08.

94 Mission LU.
Approximation of procedural rights

**Advantages**
- Strengthening the way the European judicial area is perceived
- Increasing the protection of individual rights
- Under the Lisbon Treaty: Competence of the ECJ
- Emphasising the unique nature of the EU which allows greater mutual trust and systematic application of the mutual recognition principle

**Disadvantages**
- Risk of requests for derogations for certain types of crime
- Risk of a minimum harmonisation which would serve as a pretext for a revision of the existing guarantees
- Under the Lisbon Treaty: Approximation only applicable to cases with a cross-border dimension
- Need to take account of the legal traditions and legal systems of the MSs
- Opt outs for IE, UK and DK
- Risk of use of the 'emergency break' by certain MSs and possibility of enhanced cooperation.

Consolidation of existing instruments

**Advantages**
- Complete rereading of the existing instruments
- Better accessibility
- Enabling practitioners to have the time to try out instruments and to report any problems
- Documented determination of areas which require new initiatives

**Disadvantages**
- Coexistence of instruments based on different concepts
- Lack of impetus to apply mutual recognition instruments
- Risk that the development of the principle of mutual recognition will be interrupted
- Risk of inconsistency and breach of procedure
- Problems of interpretation on the part of courts and tribunals faced with instruments that are not based on the same philosophy.
Annex 1

List of persons interviewed in Brussels

Council of the European Union:
- Hans Nilsson – Head of Division, Judicial Cooperation, Council of the EU

European Parliament:
- Emilio De Capitani – Head of Unit, LIBE Committee, European Parliament
- Wouter van Ballegooij – MEP Assistant, NL ECLAN Correspondent

European Commission:
- Lorenzo Salazar – Member of the Cabinet of Commissioner Franco Frattini
- Paolo Ponzano – Principal Adviser “Institutional Issues”, Secretariat-General, European Commission
- Clemens Ladenburger – Legal Service, European Commission
- Rudi Trooster – Legal Service, European Commission
- Denise Sorasio – former Director of Internal Security and Criminal Justice, DG JLS
- Salla Saastamoinen – Head of Unit C1–Civil Justice, DG JLS

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

Belgium:
- Pierre Monville – Lawyer
- Daniel Flore – Conseiller Général au Ministère de la Justice

France:
- Frédéric Baab – Magistrate, Judicial Cooperation in Criminal Matters (Former French Liaison Magistrate to DE), Permanent Representation of France to the EU
- Daniel Lecriubier – Representative at CATS

Portugal:
- Joana Ferreira – General Attorney Office, Lisbon

Sweden:
- Lars Werkstrom – Representative at CATS

Academics:
- Laurent Scheeck – Researcher at the Institute for European Studies (ULB)
- Amaya Ubeda – Researcher at the Institute for European Studies (ULB)
Total of persons interviewed in Brussels (from January to May 2008): 20
Annex 2

List of persons interviewed in the Member States

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

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

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

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

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

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

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

Paris (FR) – 26/28 February 2008

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

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

Lawyer:
- Bertrand Favreau – Avocat
Hearing on EAW and extradition at the Chambre de l’Instruction de la Cour d’Appel de Paris:

- Norbert Gurtner (President)

Prague (CZ) – 12/14 March 2008

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

Magistrate:
- Světlana Kloučková – Supreme Prosecutor Office

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

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

Rome (IT) – 26/28 March 2008

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

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

Hearing « in camera » on EAW at the Court of Cassation:
- Giovanni De Roberto (President)
- Luigi Lanza (Judge reporter)

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

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

Liaison Magistrate:
- Sally Cullen – UK Liaison Magistrate to IT [phone interview]

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

Dublin (IE) – 7/9 April 2008

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

Supreme Court:
- Susan Denham – Judge
- Nial Fennelly – Judge

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

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

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

London (UK) – 28/30 April 2008
Royal Court of Justice:
- Adrian Fulford – Judge, Royal Courts of Justice and ICC

Ministry of Justice & Home Office:
- Emma Gibbons – Head of EU Section, International Directorate, Home Office
- Edwin Kilby – Head of European Policy, Ministry of Justice

Lawyer:
- Adam Gersch – Barrister (ECBA)

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

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

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

Hearing on EAW at Westminster District Court

Luxemburg (LU) – 5/6 May 2008
European Court of Justice:
- Koen Lenaerts – Judge, BE
- Lars Bay Larsen – Judge, DK
- Eleanor Sharpston – Advocate General, UK

Madrid (ES) – 12/14 May 2008
Consejo General del Poder Judicial:
- Luis Francesco de Jorge Mesas – Senior Judge, Director of International Relations

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

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

Hearing « in camera » on EAW at the Audiencia Nacional

General Prosecutor’s Office:
- Rosa Ana Moran – Prosecutor, International Cooperation Section
- Isabel Guajardo Pérez – Prosecutor, International Cooperation Section

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

Liaison Magistrate:
- Dominic Barry – UK Liaison Magistrate to ES

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

Berlin (DE) – 26/28 May 2008

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

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

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

Academic:
Mr. Thomas Wahl – Researcher at Max Planck Institut, DE ECLAN Correspondent
Total of persons interviewed in MS (from January to May 2008): 103

Total of persons interviewed (from January to May 2008): 123
Annex 3

List of further possible persons to be interviewed in the coming months

- Françoise Tulkens – Judge at the European Court of Human Rights
- Claudia Gualtieri – Civil Servant, LIBE Committee, European Parliament
- Members of the European Parliament
- Civil Servants from the Civil Justice Unit, DG JLS, European Commission
- David Dickson – Principal Procurator Fiscal Depute (UK)
- Emanuelle Bribosia – Professor at the Institute for European Studies, ULB
- Representatives from Poland (mission to Warsaw in June)
- Representatives from Denmark (mission to Copenhagen in June)
- Representatives from Hungary (mission to Budapest in June)
- Representatives from Romania
- Representatives from Bulgaria
- Representatives from Lithuania, Latvia and/or Estonia
Annex 4

National reports received by ECLAN correspondents

(Last update 2.6.2008)

1. Bulgaria (3.5.08)
2. Czech Republic (16.5.08)
3. Finland (5.5.08)
4. France (15.5.08)
5. Greece (30.4.08)
6. Hungary (7.5.08)
7. Ireland (5.5.08)
8. Italy (29.4.08)
9. Latvia (29.4.08)
10. Lithuania (27.4.08)
11. Malted (30.4.08)
12. Portugal (13.5.08)
13. Romania (4.5.08)
14. Slovakia (30.4.08)
15. Slovenia (26.4.08)
16. Spain (30.4.08)
17. The Netherlands (13.5.08)
18. United Kingdom (30.5.08)
## Annex 5

### Work progress: January – May 2008

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
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</thead>
<tbody>
<tr>
<td>28/31 Jan.</td>
<td>Mission to the Netherlands</td>
</tr>
<tr>
<td>19 Feb.</td>
<td>1st Steering Committee meeting with COM</td>
</tr>
<tr>
<td>26/28 Feb.</td>
<td>Mission to France</td>
</tr>
<tr>
<td>12/14 Mar.</td>
<td>Mission to Czech Republic</td>
</tr>
<tr>
<td>26/28 Mar.</td>
<td>Mission to Italy</td>
</tr>
<tr>
<td>7/9 Apr.</td>
<td>Mission to Ireland</td>
</tr>
<tr>
<td>28/30 Apr.</td>
<td>Mission to the United Kingdom</td>
</tr>
<tr>
<td>30 Apr.</td>
<td>Deadline for receiving national reports</td>
</tr>
<tr>
<td>5/6 May</td>
<td>Mission to Luxemburg</td>
</tr>
<tr>
<td>12/14 May</td>
<td>Mission to Spain</td>
</tr>
<tr>
<td>16 May</td>
<td>2nd Steering Committee meeting with COM</td>
</tr>
<tr>
<td>23 May</td>
<td>1st Restricted Experts Committee meeting (organised by ECLAN)</td>
</tr>
<tr>
<td>26/28 May</td>
<td>Mission to Germany</td>
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</table>
**Annex 6**

**Planning June – November 2008**

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
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</thead>
<tbody>
<tr>
<td>6 June</td>
<td><em>Draft Interim Report (revised if necessary before 15/7)</em></td>
</tr>
<tr>
<td>12/13 June</td>
<td><em>Mission to Poland</em></td>
</tr>
<tr>
<td>18/19 June</td>
<td><em>Mission to Denmark</em></td>
</tr>
<tr>
<td>24 June</td>
<td><em>3rd Steering Committee meeting with COM</em></td>
</tr>
<tr>
<td>25/26 June</td>
<td><em>Mission to Hungary</em></td>
</tr>
<tr>
<td>10 July</td>
<td><em>1st Plenary Experts meeting (Criminal Sub-group of Justice Forum)</em></td>
</tr>
<tr>
<td>28 July (week of)</td>
<td><em>4th Steering Committee meeting with COM</em></td>
</tr>
<tr>
<td>12 Sept.</td>
<td><em>2nd Restricted Experts Committee meeting (organised by ECLAN)</em></td>
</tr>
<tr>
<td>Mid-Sept.</td>
<td><em>5th Steering Committee meeting with COM</em></td>
</tr>
<tr>
<td>17 Oct.</td>
<td><em>Draft Final report (revised if necessary before end November)</em></td>
</tr>
<tr>
<td>27/31 Oct. (week of)</td>
<td><em>2nd Plenary Experts meeting (ECLAN national correspondents)</em></td>
</tr>
</tbody>
</table>
Annex 7

Discussions on mutual recognition in other contexts

Some experts involved in the Study have chosen the future of mutual recognition in criminal matters in the EU as a theme to be examined thoroughly in other relevant contexts, namely:

- **Judge Adrian Fulford**: EN CJ-European Network of Councils of the Judiciary ⇒ discussion among the members.


Possible interesting feedbacks and results will be taken into account in the final report.
Annex 8

1st Restricted Experts Committee meeting
(organised by ECLAN)
Brussels, 23 May 2008

LIST OF PARTICIPANTS:

- Světlana Kloučková – Public Prosecutor at the Supreme Court of Brno
- Anne Weyembergh – Professeur à l’Institut d’Études Européennes de l’Université Libre de Bruxelles, Coordinatrice d’ECLAN
- Eric Ruelle – Chef du Pôle de négociation et de transposition des normes pénales internationales au Ministère de la Justice à Paris
- Eugenio Selvaggi – Deputy of the Prosecutor General at the Court of Cassation in Rome
- Fernando Piernavieja Niembro – Lawyer, Member of CCBE, Criminal Law Committee, Malaga
- Joachim Vogel – Professor and Magistrate at the Oberlandesgericht of Stuttgart
- Daniel Flore – Conseiller Général au Ministère de la Justice à Bruxelles
- Samuli Miettinen – Senior Lecturer in Law, Edge Hill University (UK)
- Gisèle Vernimmen-Van Tiggelen – Project Coordinator
- Laura Surano – Project Assistant
- Veronica Santamaria – ECLAN Researcher
WORKING PAPER (English version):

I) What has fundamentally changed?

MR is at the heart of mutual assistance. Is it a fundamentally different approach or just a more wilful attitude towards judicial cooperation between MSs?

Is there an agreed definition of MR: “recognise and give effect in the whole EU to judicial decisions taken in one MS”?

What are the main characteristics of MR (judiciarisation and direct communication between competent authorities, drastic reduction of grounds for refusal, enforcement - possibly adaptation - but no conversion, speeding up, standardisation of the decision or of the accompanying certificate, sharing of roles between issuing and executing authorities)?

II) Everyone calls for a European judicial area, but at the same time notes resistance and a lack of ambition of instruments adopted or close to being adopted.

Filling the gap between regularly displayed political will and concrete and visible development of that judicial area is a challenge, but equally a question of credibility. Citizens expect from the Union that consistent choices will be made and that action lines to which it has committed itself will be steadfastly followed.

It is important to reaffirm the guiding principles of EU action in this field, and even more to measure the texts under discussion with those criteria.

1. Remain true to the pursued objective: to keep a “European judicial area with respect for fundamental rights and the different legal systems and traditions of the MSs”, i.e. ensure efficient exercise of justice together with protection of fundamental rights of all without distinction?

2. Agree matters which require a common EU criminal policy or Community policies which need action under criminal law? Beyond that, respect ethical and societal choices of each MS, without imposing them on others?

3. Address concrete difficulties and react when and where they appear?

4. Keep a global consistency; in other words, retain only ad hoc solutions when they are duly justified?

5. Ensure as far as possible the legibility of the legislative framework; avoid parcelling the cooperation rules as far as possible?

6. Try to set up a judicial area which offers the most predictable environment for the citizen?

7. Ensure a fair balance between the aims of efficient prosecution and punishment of crime on one side and individual protection on the other?

III) EU programmes and action plans aspire to create an entire regime based on the MR principle. They aspire to a regular pace which is not maintained in reality.
Not all the measures announced have been proposed, those which have been adopted have only been partially implemented, and often with considerable delay, those which are still under consideration risk not being adopted under the current legal basis.

Instruments adopted or approved so far are not always consistent: grounds for refusal are worded differently, structure is not uniform (sometimes the decision in the issuing MS is the instrument (e.g. FD on EAW), sometimes it is accompanied by a certificate (e.g. FD on MR of confiscation orders), the extent of recognition has evolved, if not diminished (at least in the context of the negotiation). How and why?

Implementation in domestic law is variable, faithfulness towards the EU text and its spirit is far from guaranteed.

The process undoubtedly needs adjustments (legal amendments, development in case-law), but it is progressing.

1. How can the correct implementation of EU legislation, today and tomorrow be guaranteed in practice? Evaluation mechanisms? Role of the ECJ?

2. Should the instruments’ logic be more rigorous? Arbitrary aspects be eliminated? Should divergences between instruments be better explained in terms of their specific objective?

3. How to find the right balance in the wording of forms (not too long, but explicit enough)?

4. Should practitioners be more involved in the preparation of instruments and how? In which forum should ex post impact assessments and regular evaluations be conducted? How can lacunae and dysfunction be detected?

IV) Judicial cooperation currently rests on a range of instruments with different geographic scope, subject matter, legal nature and basic principle.

Some apply among all MSs, some form part of the acquis, some do not.

Some are of a conventional nature and depend on ratification, others are not directly applicable and must be transposed into domestic law, but are not transposed yet everywhere.

Some have a very broad field of application; others deal with rather specific measures.

Some rest on the MR principle, others do not.

1. Problems of fragmentation, source of complexity: which instrument is to be applied in a particular case? Do the EJN “fiches belges” fulfil their purpose?

2. If MR is irreversible, it should be implemented in a realistic manner. Is it necessary or not to replace instruments which are not yet fully applied but are uncontroversial (e.g. 2000 Convention and its protocol)?

3. Problems of global understanding: must the matter be tackled in a more systematic way? Should there be a consolidation? If so, how?
4. Should MSs endeavour to provide more information to practitioners, and training to make use of them? Should the dissemination of practical guides, under the responsibility of central authorities, be supported?

V) MR and mutual trust are closely interlinked. Mutual confidence is more than an assumption or a regulatory interpretation principle of the MSs’ obligations in the implementation of MR instruments. It is a learning process, a dynamic and reciprocal process.

It is essential to create a favourable environment for MR, through exchanges of information, training, networking, developing practical tools, traineeships in other jurisdictions, turning the financing programmes to the best account.

Trust must be both given and deserved: assessing the means and quality of justice in the various MSs is not a taboo subject.

1. Translate and disseminate case law concerning MR instruments? Set up and update a website? Put on it important decisions relating to mutual assistance, references to implementing legislation, guidelines and manuals intended for practitioners? Under whose control?

2. Develop common training modules, harmonise initial training programmes? Send future practitioners to another MS during their training? Invite practitioners or experts from other MSs to contribute to the training? Create a common training centre? Should practitioners be offered common continuous training sessions first and should they be subject to harmonised assessment mechanisms? To which categories of practitioners should such options be made available?

3. Convene the various networks created by the EU or spontaneously, evaluate their specificities and respective means, agree on common functioning principles (reciprocal information and consultation, mutual association to projects, internal dissemination and feedback mechanisms)?

4. Define working tools (forms, research, translation)?

5. Support visits and traineeships in courts of other MSs?

6. Set up a multidisciplinary and non-political forum to discuss problems encountered in administration of justice (integrity, budget, resources,…) and the penal response towards criminal phenomena?

VI) Harmonisation and mutual recognition are not alternative and mutually exclusive tracks. Building a genuine European judicial area requires the right proportion of both approaches.

The perception of obstacles to the achievement of the MR programme or to the implementation of MR instruments differs according to the interlocutors, depending on their role in the administration of justice and/or the legal tradition to which they belong.

Pursuing approximation of criminal law must be made in a discerning manner, i.e., with regard to substantive law, carry out a preliminary comparison between MSs positions towards
the criminal phenomenon, and bring about globally consistent political choices. With regard to procedural law, discussion should be relaunched on approximation of procedural safeguards, and collection of evidence, in the light of concrete difficulties which emerge from decisions of national courts and from experience.

**Legal classifications**

Difficulties relating to the lack of common precise legal classification.

1. **Set up concretely a transparent system on the legal classification in each MS corresponding to the 32 or 39 categories of offences in relation to which dual criminality should be abolished under the FDs on EAW or financial penalties?**

2. **Review the issue of dual criminality in the light of practical experience? Reexamine the need for assessing dual criminality with respect to the enforcement of a sanction? Consider whether to mitigate the requirement by associating it to other criteria (e.g. the place where the act was committed)?**

3. **Draw up an inventory of the EU’s fields of action which require intervention in the criminal sphere, examine the possible lacunae, or inefficiencies resulting sometimes from different legal classifications?**

**Sanctions**

Difficulties relating to the existence of a different criminal policy in the issuing MS (e.g.: severity of sanctions for offences which are regarded as minor in the executing MS, criminal liability in some MSs and administrative in others).

4. **Draw up an inventory of the EU’s fields of the possible lacunae, or inefficiencies resulting sometimes from uneven sanctions (level and/or nature of sanctions, disqualifications or prohibitions, for instance), from different regimes of liability of legal entities)?**

5. **Reconsider the conclusions on the range of sanctions? Agree on orientation guidelines concerning applicable and applied sanctions?**

**Jurisdictional competence**

Constraints resulting from the legal system of the executing MS (e.g.: requirement that a procedure be formally initiated, jurisdictional competence based on territoriality or nationality principle, legality of prosecution,…)

6. **Re-examine the need for the territorial clause and its functioning in the various instruments? Collect experience and circumstances where it applies in practice?**

7. **Detect situations where conflicts of jurisdiction occur and check the impact of the legality principle, assess the consequences on the possibilities for centralising prosecutions with the aim of improving sound administration of justice?**

8. **Are there instead risks of negative conflicts of jurisdiction, no authority feeling responsible for protecting EU common interest?**

9. **Review the CoE 1972 Convention and the question of transfer of proceedings?**
10. Would it be possible to put in place at EU level a system to detect ne bis in idem? Or connected cases?

**Discrimination**

11. Make sure that the response to an EAW, even when surrender is refused, does not lead to artificial impunity or discrimination between Union citizens?

12. Would one or more EU instruments be appropriate to eliminate all risks of discrimination?

**Issuing conditions**

Higher levels of confidence in a final decision, and, by contrast, greater need to check a pre-trial decision.

Difficulties linked to specificities of procedural system of issuing MS, perceived as weaknesses, or even violations of protection of fundamental rights (e.g. default judgments).

13. Define the issuing conditions for a decision to be recognised and executed in another MS without extending the control in the executing MS? Compare with MR in civil and commercial matters?

14. Strengthen the value of pre-trial decisions? If it is not mandatory that all domestic remedies be exhausted prior to the recognition in another MS, should interim measures with subsequent validation be favoured? Support cooperation mechanisms aimed at facilitating redress in cross border cases?

**Collecting evidence**

15. Extend the EEW to other procedures for obtaining evidence, e.g. hearing by videoconference? Confrontation? DNA samples?

16. Give responsibility for fair procedure and lawful gathering of the evidence exclusively to the MS of the procedure? Which judge should be the arbitrator of the fairness of the proceedings?

17. Start approximating the conditions for gathering evidence? Is it essential in order to allow the smooth operating of transfer of proceedings? Is it a corollary to the possibility of prosecuting instead of surrendering a suspect? Is it a condition for Eurojust decisions to be effective?

**Legal remedies**

18. Draw the lessons of the failure of the proposed FD: risk of “setting” the case law of Luxembourg and above all Strasbourg? Risk of underlining or extending exceptional situations? Advantage of submitting the implementation of the rights to the ECJ control?

19. Or, leave the protection of procedural rights to the ECJ instead (by means of preliminary rulings) and European Court of Human Rights? Random character of cases, lack of strict respect for decisions,

**Legal aid**
20. Use the civil field with respect to legal aid as an example?

21. Facilitate networking of defence lawyers, seek adequate financial means?

VII) The analysis cannot be conducted on the basis of existing law only; one should look to the entry into force of the Lisbon Treaty.

The Lisbon Treaty is more than a working hypothesis. It brings improvement in terms of functioning and efficiency. It describes more precisely the scope of action of the EU. It potentially opens the way for even bigger fragmentation.

1. The Treaty confirms MR, it generalises co-decision with qualified majority, extends the ECJ oversight (with a 5 years transitional period with regard to the acquis). Must most of the instruments be “reformatted”? What are the risks thereof?

2. On the other side, it defines the Union competences more closely, set boundaries to its action: which conclusions are to be drawn for the pursuit of the MR programme?

3. Through the opt-out system, the possibility of enhanced cooperation made easier when some MSs invoke the emergency brake, the Treaty allows the development and coexistence of different regimes: is it a chance, a way of convincing by demonstration, or in the contrary, a risk of confusion? What consequences should be drawn in the context of mutual recognition and confidence?

4. What are the precise limits of EU intervention under the Lisbon Treaty: cross border character, respect of judicial traditions, strict enumeration of matters open to approximation?

How to manage the transition? On the basis of what criteria could some or all instruments be reformatted? What will happen to instruments which have got political approval, but may not be formally agreed upon before the entry into force of the Lisbon Treaty?
I) Qu’est-ce qui a fondamentalement changé en pratique?

La RM est au cœur de l’assistance mutuelle. Est-ce une philosophie fondamentalement différente ou seulement une approche « volontariste » de la coopération judiciaire entre EMs ?

Existe-t-il un consensus sur la définition de la RM: « accepter et donner effet dans toute l’UE aux décisions judiciaires prises dans un EM » ?

Quelles sont les caractéristiques essentielles de la RM (judiciarisation et communication directe entre autorités compétentes, réduction drastic des motifs de refus, exécution-éventuellement adaptation-mais pas conversion, accélération, standardisation de la décision, ou du certificat qui l’accompagne, partage des rôles entre autorité émettrice et exécutrice) ?

II) Chacun appelle de ses vœux un espace européen de justice, mais constate en même temps des résistances et un manque d’ambition des instruments adoptés ou en voie de l’être.

Combler le fossé entre une volonté politique régulièrement affichée et le développement concret et visible de cet espace est un défi, mais aussi une question de crédibilité. Les citoyens attendent de l’Union qu’elle opère des choix conséquents et qu’elle suit avec constance les lignes d’action auxquelles elle s’est engagée.

Il est important de réaffirmer les principes directeurs de l’action de l’UE dans ce domaine, et plus encore de confronter les textes en cours de discussion à ces critères.

1. Rester fidèle à l’objectif poursuivi : maintenir un « espace européen de justice dans le respect des droits fondamentaux et des différents systèmes et traditions juridiques des EMs », c’est assurer l’exercice efficace de la justice en même temps que la protection des droits fondamentaux, à l’égard de tous sans distinction ?

2. S’accorder sur les domaines qui requièrent une politique criminelle commune à l’UE, ou sur les politiques communautaires qui appellent une réponse pénale ? Au-delà, respecter les choix éthiques et de société de chaque EM, mais ne pas les imposer aux autres ?

3. Répondre aux difficultés concrètes et agir là où elles se manifestent ?

4. Maintenir une cohésion d’ensemble, en d’autres termes, ne pas préférer de solution ad hoc qui ne soit pas dûment justifiée ?

5. Veiller autant que possible à la lisibilité de l’arsenal législatif, et éviter autant que faire se peut de morceler la coopération ?

6. S’efforcer de créer un espace de justice offrant la plus grande prévisibilité pour le citoyen ?

7. Assurer un équilibre entre les objectifs de poursuite et de sanction efficace de la criminalité et de protection des individus ?
III) Les programmes et plans d’action de l’Union ont l’ambition de mettre sur pied un régime complet basé sur le principe de RM. Ils prévoient un rythme soutenu qui est démenti par les faits.

Toutes les mesures annoncées n’ont pas été proposées, celles qui ont été adoptées n’ont été que partiellement transposées, et souvent avec beaucoup de retard, celles qui sont sur la table risquent de ne pas être adoptées sur les bases légales actuelles.

Les instruments adoptés ou approuvés jusqu’ici ne sont pas toujours cohérents : les motifs de refus sont formulés différemment, la structure n’est pas constante (parfois la décision de l’EM d’émission est l’instrumentum (ex : DC MAE), parfois elle est accompagnée d’un certificat (ex : DC sur la RM des décisions de confiscation)), le degré de reconnaissance a évolué, sinon régressé (au moins dans le contexte de la négociation). Comment et pourquoi ?

La transposition en droit national varie, la fidélité au texte de l’UE et à son esprit est loin d’être garantie.

Le processus nécessite sans doute des ajustements (amendements législatifs, développements jurisprudentiels), mais il est en marche.

1. Comment assurer concrètement le respect de la législation de l’Union aujourd’hui et demain : mécanismes d’évaluation ? rôle de la Cour de Justice ?

2. Doit-on faire preuve d’une plus grande rigueur dans la logique des instruments ? Sortir de l’aléatoire ? Justifier plus strictement les divergences entre instruments au regard des spécificités de leur objectif respectif ?

3. Comment trouver le bon équilibre dans la mise au point des formulaires (pas trop longs, mais suffisamment détaillés) ?

4. Faut-il mieux associer les praticiens dans la préparation des instruments et comment ? Dans quelle enceinte faire des analyses d’impact ex post, des bilans réguliers, identifier les lacunes et les dysfonctionnements ?

IV) La coopération judiciaire repose actuellement sur un éventail d’instruments dont le champ géographique, la portée, la nature juridique et le principe de base différent.

Certains s’appliquent entre tous les EMs, certains font partie de l’acquis de l’Union, d’autres non.

Certains sont de nature conventionnelle et nécessitent une ratification, d’autres ne sont pas directement applicables, et doivent être transposés en droit national, mais ne le sont pas encore partout.

Certains ont un champ d’application très étendu, d’autres ne couvrent que des mesures spécifiques.

Certains se basent sur le principe de RM, d’autres pas.

1. Problèmes de fragmentation, source de complexité : quel est l’instrument applicable dans un cas spécifique ? Les « Fiches belges » du RJE répondent-elles aux besoins ?

2. Si la RM est un choix irréversible, sa mise en œuvre doit s’opérer de manière réaliste. Faut-il ou non remplacer des instruments qui n’ont pas encore eu plein effet, mais ne sont pas controversés (ex : convention 2000 et son protocole) ?

4. Y a-t-il un effort à fournir au niveau de chaque EM, d’information des praticiens, de formation à l’utilisation de ces instruments ? Faut-il encourager la diffusion de guides pratiques sous la responsabilité des autorités centrales ?

V) RM et confiance mutuelle sont intimement liées. La confiance mutuelle est plus qu’un postulat ou un principe normatif d’interprétation des obligations des EMs dans la mise en œuvre des instruments de RM. C’est un apprentissage, un processus dynamique et réciproque.

Il est impératif de créer un environnement favorable à la RM par les échanges d’information, la formation, la mise en réseaux, le développement d’outils, les stages dans d’autres juridictions, en tirant le meilleur parti des programmes de financement. La confiance s’accorde et se mérite, l’évaluation des moyens et de la qualité de la justice dans les différents EMs n’est pas un sujet tabou.

1. Traduire et diffuser les jurisprudences relatives aux instruments de RM ? Créer et entretenir un site web ? Y mettre la jurisprudence importante en matière d’assistance mutuelle, les références aux législations de transposition, les guides et manuels à l’usage des praticiens ? Sous quelle responsabilité ?

2. Développer des modules de formation communs, harmoniser les cursus de formation initiale ? Envoyer les futurs praticiens dans un autre EM pendant leur formation ? Inviter des praticiens ou experts d’autres EMs à participer à la formation ? Créer un centre de formation commun ? Faut-il d’abord rapprocher les praticiens en fonction, offrir des modules de formation continue communs, harmoniser les mécanismes d’évaluation ? A quelles catégories de praticiens ouvrir ces possibilités ?

3. Réunir les différents réseaux créés par l’UE ou constitués spontanément, évaluer leurs spécificités et moyens d’action respectifs, convenir de principes de fonctionnement communs (information, consultation réciproque, association aux projets, mécanismes de dissémination interne et de feedback) ?

4. Définir des outils de travail (formulaire, recherche et navigation, traduction) ?

5. Encourager les visites et stages des praticiens dans les juridictions d’autres EMs ?

6. Recourir à une enceinte multidisciplinaire et apolitique pour discuter des problèmes rencontrés dans l’administration de la justice (intégrité, budget, ressources,…)et de l’approche pénale vis-à-vis des phénomènes criminal ?

VI) Harmonisation et reconnaissance mutuelle ne sont pas des voies alternatives et exclusives l’une de l’autre. La construction d’un espace de justice européen repose sur un bon dosage des deux démarches.

La perception des obstacles à la réalisation du programme de RM ou à la mise en œuvre des instruments de RM diffère selon les interlocuteurs en fonction de leur rôle dans l’administration de la justice et/ou en fonction de la tradition judiciaire à laquelle ils appartiennent.
Il importe de poursuivre le rapprochement du droit pénal de manière judicieuse, c’càd, en ce qui concerne le droit substantiel, de comparer préalablement les approches des EMs face au phénomène criminel et d’opérer des choix politiques globalement cohérents. En ce qui concerne le droit procédural, il convient de relancer le débat sur le rapprochement des garanties procédurales, et sur l’obtention de la preuve, à la lumière des problèmes concrets qui ressortent de la jurisprudence des tribunaux nationaux et de l’expérience.

Qualifications pénales :

Difficultés liées à l’absence de qualifications pénales communes précises.

1. Mettre concrètement en place un système transparent sur la correspondance des qualifications pénales dans chaque EM avec les 32 ou 39 catégories pour lesquelles le contrôle de double incrimination est aboli par les DC MAE et RM des amendes ?

2. Revoir la question de la double incrimination à la lumière de l’expérience pratique ? Réexaminer le besoin de contrôle de la double incrimination dans le cadre de l’exécution d’une décision de sanction ?, Envisager de la moduler en la couplant avec d’autres critères (lieu de commission des faits) ?

3. Faire l’inventaire des domaines d’action de l’Union qui appellent une intervention du pénal, s’interroger sur les éventuelles lacunes ou inefficacités provenant, parfois d’incriminations pénales différentes,

Sanctions :

Difficultés liées à l’existence d’une politique criminelle différente dans l’EM d’émission (ex : sévérité des sanctions pour des délits considérés comme de minimis dans l’EM d’exécution, responsabilité pénale dans certains EMs et administratives dans d’autres).

4. Faire l’inventaire d’éventuelles lacunes ou inefficacités provenant aussi de sanctions inégales (niveau des peines et/ou leur nature, déchéances ou interdictions d’exercer, par exemple), de régime de responsabilité des personnes morales ?

5. Réexaminer les conclusions relatives aux fourchettes de sanctions ? S’accorder sur des lignes d’orientation sur les peines applicables ? Et appliquées ?

Compétence juridictionnelle :

Contraintes liées au système juridique dans l’EM d’exécution (ex : nécessité de l’engagement formel d’une procédure, compétence juridictionnelle fondée sur la territorialité ou la nationalité, principe de légalité des poursuites,…).

6. Réexaminer la nécessité de la clause territoriale et son traitement dans les différents instruments ? Récolter l’expérience et les circonstances de son application dans la pratique ?

7. Identifier les situations de conflits de juridiction et vérifier l’impact du principe de légalité, étudier les conséquences sur les possibilités de centraliser les poursuites dans un souci de justice plus performante ?

8. Y a-t-il au contraire plutôt des risques de conflits négatifs de compétence, aucune autorité ne se sentant dépositaire de l’intérêt commun de l’UE ?

9. Revoir la Convention CdE de 1972 et la question du transfert de procédure ?
10. Peut-on mettre au point un système permettant de détecter le ne bis in idem au niveau européen ? les affaires connexes ?

Discriminations :

11. Veiller à ce que la réponse à un MAE, même en cas de refus de remise, n’aboutisse pas à créer artificiellement une impunité ou une discrimination entre les citoyens de l’Union ?

12. Un ou des instrument(s) de l’UE est (sont)-ils opportun(s) pour écartner tout risque de discrimination ?

Conditions d’émission :

Niveau de confiance plus élevé à l’égard d’une décision coulée en force de chose jugée, contrastant avec un besoin de contrôle ressenti de façon plus aigüe à l’égard d’une décision pré-sentencelle.

Difficultés liées à des particularités du système procédural de l’EM d’émission, perçues comme des faiblesses, voire des violations de la protection des droits fondamentaux (ex : jugements in absentia).

13. Préciser les conditions d’émission d’une décision à reconnaître dans un autre EM sans alourdir le contrôle dans l’EM d’exécution ? Faut-il prendre exemple sur la RM dans les domaines civil et commercial ?


Collecte des preuves :

15. Étendre le MOP à d’autres procédures d’obtention de preuves, ex audition par video-conférence ? confrontation ? expertises ? Collectes d’ADN ?


Contrôle juridictionnel :

18. Tirer la leçon de l’échec de la proposition de DC : risque de cristallisation de la jurisprudence de Luxembourg et surtout de Strasbourg ? risque de souligner ou d’étendre des situations exceptionnelles ? Avantage de soumettre la transposition de ces règles au contrôle de la CJCE ?
19. Ou au contraire, laisser la protection des droits procéduraux sous le contrôle de la CJCE (par le biais de questions préjudicielles) et de la CtEDH ? Caractère aléatoire des affaires, manque de rigueur dans le respect des décisions ?

Aide judiciaire :

20. S’inspirer de l’exemple du civil en matière d’aide judiciaire ?

21. Faciliter la mise en réseau des avocats de la défense, rechercher les moyens de financement adéquats ?

VII) L’analyse ne peut pas se faire uniquement à droit constant, il faut aussi se placer dans la perspective de l’entrée en vigueur du Traité de Lisbonne.

Le Traité de Lisbonne est plus qu’une hypothèse de travail. Il apporte des améliorations en termes de fonctionnement et d’efficacité. Il circonscrit plus précisément la marge d’action de l’UE. Il ouvre toutefois potentiellement la voie à une plus grande fragmentation encore.

1. Le Traité consacre la reconnaissance mutuelle, il généralise la co-décision à la majorité qualifiée, étend le contrôle de la Cour de Justice (avec une période transitoire de 5 ans pour l’acquis). Faut-il reformater la plupart des instruments ? Quels risques prend-on ?

2. En revanche, il définit plus strictement les compétences de l’Union, pose des limites à son intervention : quelles conclusions en tirer pour la poursuite éventuelle du programme de RM ?

3. Par le jeu des opts out, la possibilité de coopérations renforcées rendues plus faciles lorsque certains EMs tirent la sonnette d’alarme, le Traité permet le développement et la coexistence de régimes différents : est-ce une chance, un moyen de convaincre par la démonstration, ou au contraire un risque de confusion ? Quelles conséquences en tirer dans le contexte de la reconnaissance et de la confiance mutuelles ?

4. Quelles sont les limites exactes d’intervention de l’UE sous l’empire du Traité de Lisbonne : caractère transfrontière, respect des traditions juridiques, énumération limitative des matières susceptibles de rapprochement ?

5. Comment gérer la transition ? Sur base de quels critères reformater tous ou certains des instruments adoptés ? Quel avenir pour les instruments qui ont reçu un accord politique mais ne seraient pas formellement adoptés avant l’entrée en vigueur du Traité de Lisbonne ?
FOLLOW-UP OF THE MEETING:

The first meeting of experts appeared very useful and profitable. All the topics of the working paper were dealt with and were discussed with frankness and openness on the part of the invited experts. Particular attention was devoted to points II, III and VI of the working paper. In particular:

Point II – Lack of ambition of the instruments adopted for a European judicial area:

- The traditions and the guarantees provided for at the national level are important; however, they cannot be the pretext not to advance and not to apply the already adopted instruments.
- The different transposition of the European instruments in each MS causes difficulties for the operation of judicial cooperation.
- The fragmentation of the instruments and the step-by-step approach do not benefit the practitioners at all.

Point III – Control and evaluation of the use of the instruments. Practical difficulties encountered:

- The examination of the conformity of national legislation with the EU instruments, and a complete evaluation mechanism on their operation in practice are essential. An effective and homogeneous system of collection of the data should be organised at European level.
- The Commission should be the first actor in the control of the implementation, and the experts’ opinion should be taken into account at all stages of the process (ascending and descending phases).
- The forms should be filled out in a complete and balanced way and too major differences between MSs should be avoided.

Point VI – Harmonisation and mutual recognition:

- Penal qualifications: double criminality does not raise particular problems; however, a certain degree of alignment of the substantial law, on the basis of the definitions already accepted at international level, would be possible.
- Jurisdictional competence: the problem of possible negative and positive conflicts should be settled, in particular by the intervention of Eurojust.
- Collection of evidence: the MOP is too theoretical and complicated and its extension would not be sufficient either; there should be a new "global" instrument.

The complete report of the meeting will be sent to all the participants.

The same experts have already given their agreement to take part in the second restricted meeting of experts which will take place on 12 September 2008 and which will be devoted to the examination of a preliminary draft of the final report. However, the participation of another expert originating from a country of common law would be desirable in order to better balance the experiences of both systems of civil/common law.