The Brussels Office Law Reform Update Series:

Judicial Co-operation in Criminal Matters

March 2012

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WHAT’S NEW

Denmark began its presidency of the Council in January 2012 with a focus on the security of the European Union as one of its key priorities. To this end, its legislative agenda in the field of criminal justice prioritises initiatives for the combating of cross-border crimes, including the proposals for greater cooperation between enforcement authorities, the continued development of the proposal on a European investigation Order, and the reform of the Schengen area. The development and use of the European Passenger Name Record system will also have a role to play in this regard.

The European Commission’s publication of its Data Protection proposals has been the most significant development of this year so far. One element of the package is a Directive on the processing of personal data for the purposes of prevention, investigation, detection or prosecution of criminal offences. This is designed to assist in addressing the growing need for law enforcement authorities across borders to process and exchange data for criminal prevention purposes quickly.

Following the Commission’s communication in September 2011 concerning the development of an EU criminal law policy, on 8 February a draft own-initiative report was published by the European Parliament’s Civil Liberties, Justice and Home Affairs Committee entitled ‘an EU approach on criminal law’. This discusses the principles which could direct the future development of EU criminal law policy.

Currently being debated in the European Parliament is the Directive establishing minimum standards of the rights, support and protection of victims of crime.

Later this year the Commission will produce a report on the current legal basis and activities of Europol with a view to later establishing it under the more recent Art.88 TFEU. This is intended to address the balance of power between the two co-legislators in deciding its field of operation and functions.

Also being debated is the proposal for a Directive of the European Parliament and Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest.

The Stockholm Programme refers to the Treaty of Lisbon as providing "an opportunity for the further development of Eurojust in the coming years". The Commission has set a target of June 2012 for its proposal for a Regulation to reform Eurojust’s structure, which it hopes will improve its functioning.
II. JUDICIAL CO-OPERATION IN CRIMINAL MATTERS

Introduction

The creation of an “area of freedom, security and justice” is a key objective of the European Union. In October 1999, a special EU justice summit at Tampere, Finland, agreed the “Tampere Conclusions” which set out three key aims for justice and home affairs: mutual recognition, approximation of procedural law and approximation of substantive law.

Since the Tampere Conclusions, EU policy in the area of freedom, security and justice has been developed in the framework of a general programme set by the Council every five years, the first being the Tampere Programme. This was followed by the Hague Programme which was adopted on 5 November 2004 and set out a comprehensive programme for 2005 to 2010 accompanied by a more detailed Action Plan and a list of implementing measures.

The Stockholm Programme

Following on from the Hague Programme, on 11 December 2009, the European Council adopted the Stockholm Programme, titled “An open and secure Europe serving and protecting the citizen”. It outlines the strategy for the European Union in the area of freedom, security and justice for the period 2010 to 2014.

Among other things, it invites the Commission to:

- examine how to improve legislation and practical support measures for the protection of victims and to improve implementation of existing instruments;
- put forward the proposals in the Roadmap on strengthening the procedural rights of suspected and accused persons in criminal proceedings so that it is implemented swiftly;
- further examine elements of minimum procedural rights for accused and suspect persons and assess whether other issues, for instance the presumption of innocence, need to be addressed;
- explore the results of the European Arrest Warrant evaluation and where appropriate make proposals to increase efficiency and legal protection for individuals;
- propose a comprehensive system for obtaining evidence in cases with a cross-border dimension and explore other means to facilitate admissibility;
- study obstacles to cross border enforcement of road traffic offences and make proposals;
- examine whether the level of approximation is sufficient in relation to adopted framework decisions in cases of particularly serious crime and report on the need to establish common definitions and penalties;
- implement work on model standard provisions in criminal law and continue to reflect, together with the European Parliament, on how to improve the coherence of criminal law provisions embodied in the various EU instruments;
- assess whether the networking of criminal records makes it possible to prevent offences from being committed and establish whether it is possible to extend the exchange of information on supervision measures;

3 http://ec.europa.eu/justice_home/news/information_dossiers/the_hague_priorities/

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propose, in addition to the European Criminal Records Information System (ECRIS), a register of third-country nationals who have been convicted by the courts of the Member States; and
develop a handbook for each of the instruments that have been adopted so far at the end of the five-year period.


The Stockholm Action Plan

On 20 April 2010, the Commission published the Stockholm Action Plan. The Action Plan describes how the priorities in the Stockholm Programme will be delivered at both a European and global level.

On 3 June 2010, the Council considered the Action Plan. Notably, the Council merely “took note” due to a number of concerns amongst Member States. The Council’s press release:

- noted that some of the actions proposed by the Commission were not in line with the Stockholm Programme and that others, which did form part of the Stockholm Programme, were not reflected in the Communication of the Commission;
- urged the Commission only to take forward those initiatives that are in full conformity with the Stockholm Programme; and
- called on the Commission to present the mid-term review of the implementation of the Stockholm Programme by June 2012.

The Commission Work Programme 2012

On 15 November 2011 the Commission published its Work Programme for 2012. This set out the Commission’s priorities and indicated possible legislative and non-legislative initiatives. Those of relevance to criminal law in 2012 include:

- a legislative proposal to harmonise criminal procedure in the EU in regards to the treatment of vulnerable suspects;
- a proposal to approximate offences and sanctions across the EU concerning drug trafficking;
- a proposal to amend Directive 2004/80 to ensure that victims of crime across the EU receive fair and appropriate compensation;
- a proposal to help create legal certainty for prescription periods in cross-border traffic accidents; and
- the creation of the European Terrorist Finance Tracking System (TFTS) which will collect relevant information at the EU level and share this with the United States where appropriate under international bi-lateral agreements.

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9 http://ec.europa.eu/atwork/programmes/index_en.htm
The Work Programme also listed a number of initiatives for 2013 and 2014; including:

- a Regulation to ensure the proper functioning of the 116 child helpline in all Member States;
- an initiative to define common minimum rules for legal aid for defendants in criminal trials;
- a Green Paper on whether further harmonisation of minimum standards for accused and suspected persons is required; and
- a proposal to establish the European Public Prosecutor's Office to protect the financial interests of the EU.

The Law Society of England and Wales

On 14 July 2009 the Law Society of England and Wales set out its vision for an Area of Freedom, Security and Justice in Europe in 2010 to 2014 in relation to criminal matters including procedural rights. The Law Society’s vision, endorsed by the Law Society of Scotland, responded to the House of Commons Justice Committee’s Inquiry on Justice Issues in Europe. Among other things, it highlighted the importance of the EU:

- introducing a series of binding minimum procedural rights in criminal matters throughout the EU for suspects and defendants at all stages of the criminal process from investigation onwards;
- ensuring that the European e-Justice project respects fundamental rights by ensuring that it does not encroach on the entitlement to be present at all hearings in person;
- providing EU funding for networking and training for all legal professionals in the criminal justice field, not just judges and prosecutors, and providing information and education to ensure that all people understand their rights;
- ensuring public consultation and impact assessments on all proposals, including Member State initiatives;
- addressing fundamental deficiencies in current legislation; and
- conducting an evaluation of the European Criminal Records and Information Exchange System, not only in terms of how the exchange of information operates but also in terms of how the information exchanged is used.

Treaty of Lisbon

The Treaty of Lisbon entered into force on 1 December 2009. The Treaty provides for the sharing of decision-making power between the Parliament and Council in the field of judicial co-operation in criminal matters, thus consigning the unanimity procedure to the history books. Under the Treaty the UK can decide whether to opt in to a piece of legislation. In addition, a Member State can apply an emergency brake if it feels that the measures proposed will affect fundamental aspects of its criminal justice system.

The Treaty underlines the principle of mutual recognition, allowing a court in one EU country to recognise and enforce a criminal conviction from another. It also envisages that minimum rules will be adopted in relation to the mutual admissibility of evidence, rights of individuals and victims of crime in criminal proceedings. It allows for the

possible creation of a European Public Prosecutor should all national governments agree to it.

For further information on the Treaty, see the Law Society of England and Wales’ Guide to the Lisbon Treaty,\textsuperscript{12} the General Secretariat of the Council EU document on its impact on Justice and Home Affairs\textsuperscript{13} and the press release on the Treaty issued by the Court of Justice of the European Union on 30 November 2009.\textsuperscript{14}

The European Commission published a Communication on the consequences of the entry into force of the Treaty of Lisbon for ongoing inter-institutional decision-making procedures on 11 December 2009.\textsuperscript{15} It includes, among other things, an annex listing proposals that will need to be withdrawn and replaced with new proposals due to a change in the legal framework. It is important to remember that, under the Treaty, a group of Member States, numbering at least one quarter of the Member States of the EU, also have the right to put forward proposals.

Under Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, the UK and Ireland have the right to opt-in to all measures in Title V of Part Three TFEU, which includes the provisions on judicial cooperation in criminal matters. Should the UK wish to opt-in to a particular proposal, it must notify the President of the Council of its intention to do so within three months of the proposal’s presentation. The UK may also opt-in following the adoption of the measure.

**European Parliament**

The European Parliament committees concerned with criminal law are the Civil Liberties, Justice and Home Affairs (LIBE) Committee whose chair is Juan Fernando López Aguilar MEP (Spain S&D) and the Legal Affairs (JURI) Committee whose chair is Klaus-Heiner Lehne MEP (Germany, EPP).

The Commission

On 9 February 2010, the new European Commission was formally appointed.¹⁶

The job of the previous Commissioner for Justice, Freedom and Security has been split into two: Vice President Viviane Reding (Luxembourg) is the Commissioner for Justice, Fundamental Rights and Citizenship and Commissioner Cecilia Malmström (Sweden) is the Commissioner for Home Affairs.

The Directorate General for Freedom, Security and Justice has been divided into the Directorate General for Justice and the Directorate General for Home Affairs.

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<th>Proposal</th>
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<tr>
<td>1</td>
<td>European Arrest Warrant P-L</td>
<td>Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States (European Arrest Warrant).</td>
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<td>• Framework Decision 2002/584/JHA on the European Arrest Warrant and the surrender procedures between Member States.</td>
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<td>• In force and implemented in the UK by the Extradition Act 2003.</td>
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<td>• Report on fourth round of mutual evaluations on practical application of EAW 28 May 2009.</td>
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<td>• Adopted by Council 5 June 2009.</td>
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<td>• Council adopted a resolution on a model agreement for setting up a Joint Investigation Team (JIT), 25-26 March 2010.</td>
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<td>• Replies to questionnaire on quantitative information on the practical operation of the European Arrest Warrant, 12 July 2010.</td>
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<td>• Home Office began review of UK extradition proceedings, including the EAW, 7 September 2010. Report delivered 30 September 2011.</td>
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<td>• Council Decision 2009/371 establishing the European Police Office (Europol)</td>
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<td>• Europol and Eurojust sign cooperation agreement 1 October 2009.</td>
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<td>• Draft work programme 2010 2 October 2009.</td>
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<td>• Interparliamentry Committee meeting evaluating Europol, Eurojust, Frontex and Schengen 4-5 October 2010.</td>
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<td>• Europol Work Programme 2011 endorsed by Justice and Home Affairs Council 8-9 November 2010.</td>
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<td>• Commission’s 2012 Work Programme includes establishing Europol under new Art. 88 TFEU legal basis.</td>
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<td>• Europol and Eurojust signed cooperation agreement 1 October 2009.</td>
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|          |         | • Interparliamentry Committee meeting evaluating Europol, Eurojust, Frontex and Sc
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| Schengen 4-5 October 2010.  
- **Study** on 'Improving Coordination between the EU bodies competent in the area of Police and Judicial Cooperation: Moving towards a European Prosecutor’ considered by the European Parliament's Budgetary Control Committee, 27 January 2011.  
- Commission **communication** published on 26 May 2011 called for creation of EPPO to combat fraud involving EU financial interests.  
- **Legislative proposal to create a European Public Prosecutors Office expected 2014.**  
- **Commission’s 2012 Work Programme includes reforming Eurojust’s structure.** |
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• Report from JURI, 18 December 2008.  
• Law Societies and others joint position on European e-Justice 14 July 2009.  
• e-Justice portal launched 14 July 2010.  
• e-Codex portal launched January 2011. Project will run until January 2014.  
• ECRIS due to be implemented by April 2012.  
• Commission’s 2012 Work Programme includes a measure to strengthen the E-Justice project as a tool for creating legal certainty in the internal market. |
• UK opted-in to proposal on 8 March 2010.  
• Council reach agreement on draft Directive, 4 June 2010.  
• European Parliament report 20 October 2010.  
• Directive is to be implemented by 27 October 2013. |
• Consultation of the ECON Committee and the Committee of the Regions published 27 September 2010.  
• Result of Council discussions, 7 October 2010.  
• UK opted in to proposal October 2010.  
• Result of Council discussions, 8 November 2011.  
• Council agreement on text 2 December 2010.  
• General approach agreed in Council, 2 December 2010.  
• Draft report from LIBE, 20 December 2010.  
• Opinion on report adopted by JURI, 27 January 2011.  
• Presentation by Rapporteur to LIBE, on the state of negotiations after first triilogue. |
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<td>2 May 2011.</td>
<td>European Parliament <strong>adopted</strong> proposal at its plenary session on 13 December 2011. <strong>The proposal is now awaiting approval by the Council.</strong></td>
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</table>
| Access to a Lawyer | • Study launched by the Commission into EU Procedural Rights in Criminal Proceedings carried out by Professors Taru Spronken (University of Maastricht) and Gert Vermeulen (Ghent University) and **published**, 8 September 2009.  
• **Commission proposal** for a Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, 8 June 2011.  
Accompanying **Commission staff working paper** and **impact assessment**, 8 June 2011.  
• Commission **presented** proposal to Council, 23 September 2011  
• UK decided not to **opt-in** to proposal (p. 72 of linked Hansard Report), 14 September 2011.  
• **Opinion of the European Economic and Social Committee on the ‘Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest’**, 15 February 2012. | |
| Legal Aid | • **The Commission’s work programme** lists for 2013 a legislative initiative to define common minimum rules to ensure that suspects and accused persons in criminal proceedings are entitled to legal aid between the charge and the end of the trial in criminal proceedings. | |
• Council **identified outstanding issues** regarding proposal 5 June 2009.  
• Council **conclusions** on coalitions against child pornography on the internet 23 October 2009.  
• **European Council meeting**, 28 to 29 October 2009.  
• Further consideration by **JHA Council**, 30 November and 1 December 2009.  
**To be withdrawn and replaced** to ensure compliance with the Treaty of Lisbon. | |
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• [Opinion](#) of the European Data Supervisor, 16 July 2010.  
• European Economic and Social Committee [Opinion](#) on proposed Directive, 15 September 2010.  
• Council reached [general agreement](#) on proposal, 2 December 2010.  
• Council adopted proposal, 15 November 2011.  
• [Directive is due to be implemented within the next two years](#).  
• Related: [JHA Council conclusions](#) on using SIS database to search for missing children 4 June 2009. |
### Proposal Summary

#### Human trafficking

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- Public hearing in LIBE and FEMM Committees 10 June 2010.
- UK Government announced that it would not opt-in to the proposed Directive 31 August 2010.
- LIBE/FEMM Committees voted on amendments to draft Directive 2 September 2010.
- Legal Affairs (JURI) Committee Opinion on legal basis published 22 September 2010.
- COREPER reached agreement on text 24 November 2010.
- LIBE/FEMM adopted text 29 November 2010.
- Council agreement on text 2-3 December 2010.

#### Standing of victims in criminal proceedings P-L P-L

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- Commission launched a public consultation on victims’ rights, 15 July 2010 that ended 30 September 2010.
- Council discussion, April 11-12 2011. |
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<tr>
<td><strong>10 Obtaining evidence in criminal matters and securing admissibility</strong>&lt;br&gt;P-L</td>
<td>Green Paper consultation on obtaining evidence in criminal matters from one Member State to another and securing its admissibility</td>
<td></td>
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</table>
- Commission proposal for a Directive establishing minimum standards on the rights, support and protection of victims of crime, 18 May 2011  
- UK **opted-in** to proposal, 26 August 2011  
- Council adopted a general approach, 14 December 2011.  
- **Opinion of the European Economic and Social Committee on the Commission Communication and proposed Directive.**  
- **LIBE draft report published, 26 January 2012.**  
- **S and Marper v United Kingdom** (Applications nos. 30562/04 and 30566/04) 4 December 2008.  
- **Green Paper consultation** on obtaining evidence in criminal matters from one Member State to another and securing its admissibility and **memo**, 11 November 2009.  
- House of Commons European Scrutiny Committee **Fifth Report** 15 January 2010.  
- **Consultation closed** 22 January 2010.  
- **Legislative proposals on obtaining evidence on criminal matters expected 2012.**  

Home Office **consultation** ‘Keep the right people on the DNA database’ following **ECHR judgment** closed 7 August 2009.  
| **11 European Protection Order**<br>P-L | Member State initiative for a Directive on the European Protection Order. |  
- Member State **initiative** published 5 January 2009. (Member States have competence to make proposals in relation to criminal law matters.)  
- **Explanatory Memorandum, detailed statement** and corrigendum 6 January 2009.  
- **Draft Council conclusions** on the eradication of violence against women 13 January 2010.  
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<td>12 European Investigation Order P-L</td>
<td>Member State initiative for a Directive regarding the European Investigation Order in criminal matters.</td>
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<tr>
<td>13 Protection of Personal Data P-L</td>
<td>Framework Decision 2008/977/JHA on the protection of personal data processed in the framework of police</td>
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| and judicial cooperation in criminal matters. | • [European data protection day](#) 28 January 2010.  
• [Public consultation](#) on the Communication launched 4 November 2010.  
• Commissioner Reding [speech](#) on data protection 30 November 2010.  
• Council [discussion](#) 2-3 December 2010.  
• Implementation deadline 27 November 2010.  
• [Commission Communication](#) on a strategy on data protection published 4 November 2010.  
• [Council adopts conclusions](#), 24 February 2011.  
• European Data Protection Supervisor's presentation of Annual Report 2010 to LIBE Committee, 15 June 2011.  
• General Data Protection Agreement – Debriefing to LIBE Committee, 15 June 2011.  
• [Opinion](#) of the European Data Protection Supervisor on "A comprehensive approach to personal data protection in the EU", 22 June 2011.  
• [Commission published its proposal for a Data Protection Directive, 25 January 2012.](#) |
| 14 Directive on the confiscation and recovery of criminal assets in the European Union | EU Action Plans on organised crime constantly highlighted the need to attack the proceeds of crime through an enhanced use of confiscation and asset recovery procedures. An increased and more effective use of confiscation procedures is thus planned. | • Commission published [report](#) on the functioning of 'Asset Recovery Offices' set up in Member States, 12 April 2011.  
• [Commission Management Plan](#) for 2012 states that the proposal for a directive on the confiscation and recovery of criminal assets is expected this year. |
| 15 Communication on strengthening the protection of the financial interests of the EU under the Lisbon Treaty (including by means of criminal law) | The Communication will contribute to the development of a strategy to protect the financial interests of the EU against fraud by criminal law. | • [Communication](#) on protection of the financial interest of the EU, including by means of criminal law, 26 May 2011.  
• in preparatory phase in the European Parliament.  
• [Consultation on ‘Protecting the European Union’s Financial Interests and Enhancing Prosecutions’ From 7 March to 6 June 2012.](#)  
• |
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| 16 | Communication on European judicial training | Following the December 2009 Stockholm Programme, the Communication will aim: (i) to increase the number of legal practitioners trained on the EU *acquis* in the EU Member States, (ii) to support the development and organisation of European judicial training activities, at local, national or European level, and to improve their quality and (iii) to support the development and organisation of Erasmus-type exchanges. | - Stockholm Programme calls for EU efforts to supplement national judicial training, December 2009.  
- Commission announced its *goal* for European judicial training on 13 September 2011.  
- Vote tabled for 14 March 2012 in plenary session. |
| 17 | Report on the Application of the EU Charter of Fundamental Rights | The Report will aim at giving and overview on the application of the Charter of Fundamental Rights of the European Union in the areas where the Union has the power to act. The report will provide information on what the Commission has done to apply its fundamental rights policy. | - *First Annual Report* on the Application of the EU Charter of Fundamental Rights, 30 March 2011.  
- *Council took note* of the report on 12 April 2011.  
- LIBE to *consider* report. In the preparatory phase in Parliament. |
- *First exchange of views* held in LIBE, 16 March 2011.  
- LIBE own-initiative *draft report* published ‘on an EU approach on criminal law’, 8 February 2012. |
| 19 | Green Paper on strengthening mutual trust in the area of detention | The Green Paper will examine how to strengthen mutual trust and render the principle of mutual recognition in the area of detention more efficient. Issues such as alternatives to imprisonment, pilot projects on detention and best practices in prison management will be addressed. | - A *Green Paper* on the application of EU criminal justice legislation in the field of detention – Strengthening mutual trust in the European judicial area, 14 June 2011. Consultation closes on 30 November 2011.  
- LIBE to *draft report*. |
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<tr>
<td>20</td>
<td>Communication on an EU Agenda on the Rights of the Child</td>
<td>To promote and protect the rights of the child in line with the objectives of the EU as further emphasised under the Treaty of Lisbon.</td>
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          |          | • Communication published, 15 February 2011.  
          |          | • Council discussion, 11-12 April 2011.  
          |          | • Currently in preparatory phase in the European Parliament. |
|          |         | • Commission to evaluate the Directive on the retention of telecommunications data, 18 April 2011. |
| 22       | Communication on fighting corruption in the EU | To publish an Anti-Corruption Report every 2 years covering all EU Member States and for the EU to join the Council of Europe Group of States against Corruption (GRECO). |
|          |         | • Communication on fighting corruption in the EU, 6 June 2011.  
          |          | • Commission Decision establishing an anti-corruption reporting mechanism, 6 June 2011.  
          |          | • A report on the implementation of Council Framework Decision 2003/568 on combating corruption in the private sector, 6 June 2011.  
          |          | • A report on the modalities of EU participation in the Council of Europe Group of States against Corruption (GRECO), 6 June 2011.  
          |          | • LIBE to draft report. |
| 23       | Financing of terrorism | A legal and technical framework to establish the European Terrorist Finance Tracking System (TFTS). |
|          |         | • EU and US sign Terrorist Finance Tracking Programme Agreement which took effect on 1 August 2010.  
          |          | • Commission report on implementation of EU - US Agreement published 16 March 2011.  
          |          | • Commission Communication on a European terrorist finance tracking system published 13 July 2011.  
          |          | • Expected 2012. |
| 24       | Vulnerable suspects and accused persons. | To establish special safeguards in criminal procedures for suspected or accused persons who are vulnerable. |
|          |         | • Roadmap for procedural rights in criminal proceedings published 23 October 2009.  
<pre><code>      |          | • Expected 2012. |
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• Expected 2012. |
| 26  Compensation of victims of crime | To revise existing Directive to ensure victims of crime receive fair and appropriate compensation. | • Commission Communication adopted 18 May 2011.  
• Expected 2012. |
| 27  Road traffic accidents | To create more legal certainty on prescription periods for cross-border road traffic accidents. | • Commission roadmap on potential initiative on limitation periods for claims arising from road traffic accidents published November 2011.  
• Public consultation from DG Justice expected in the first half of 2012.  
• Expected 2012. |
| 28  Exports of Firearms | Article 10 of the United Nations protocol against the illicit manufacturing of and trafficking in firearms | The Council adopted a Regulation laying down rules on export authorisation for Firearms, 8 March 2012. |