



COMMISSION OF THE EUROPEAN COMMUNITIES

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**COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE
EUROPEAN PARLIAMENT**

**Communication on the mutual recognition of judicial decisions in criminal matters and
the strengthening of mutual trust between Member States**

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1. INTRODUCTION

1. The mutual recognition (MR) principle was presented at the Tampere European Council in 1999 as the “cornerstone” of the European judicial area and confirmed in the draft Constitution, and its vital importance is recognised in the Hague Programme, which links its development to enhanced mutual trust between the Member States.
2. Nearly five years after the Council and the Commission adopted the MR programme to give effect to the conclusions of the Tampere European Council, this communication sets out to present the Commission’s thinking on further work to give effect to the MR principle in the light of initial experience to date and on possible items for inclusion in a programme of action to enhance mutual trust between Member States.
3. This communication is part of the Commission’s general process of drawing up a plan of action to give effect to the Hague Programme. It maps the general prospects for the five years ahead (*cf.* SEC(2005) 641), though it specifically stresses the initial implementation period (2005-07), given that there will have to be a mid-term review when the Constitution comes into force. And as the Hague Programme emphasised the importance of evaluating the implementation of policies, the results of the evaluation undertaken here will have to be taken into account and may even inspire changes to the agreed priorities.

2. CONTINUING THE IMPLEMENTATION OF THE MUTUAL RECOGNITION PRINCIPLE

4. For some years now the implementation of the MR principle has been one of the main areas of European Union activity regarding criminal justice, and is probably one of the most promising. After more than four years of operation of the programme adopted in December 2000, about half the planned measures have been converted into legislative instruments, either adopted already or in the pipeline. Of these, the Framework Decision on the European arrest warrant and surrender procedures¹ is the only one for which the time allowed for transposal into national legislation is up.
5. This communication focuses on aspects of the MR programme not yet implemented so as to lay down priorities for the years ahead in the light of the Hague Programme and the analysis of initial achievements.

¹ OJ L 190, 18.7.2002, p. 1.

2.1. Mutual recognition at the pre-trial stages

2.1.1. The MR principle and gathering evidence²

6. The Hague Programme calls on the Council to adopt the proposal on the European evidence warrant by the end of 2005. After the adoption of the Framework Decision on the freezing of assets³, this is a major step forwards in the application of the MR principle at the pre-trial evidence-gathering stage. But the evidence warrant will not be a universal instrument. Investigation measures such as questioning suspects, witnesses and experts or bank account surveillance or telephone-tapping orders will also have to be covered by MR instruments. The ultimate objective is to adopt a single legislative instrument to facilitate the gathering of evidence of all kinds in criminal cases throughout the Union. In the Commission's view, the effect of applying the MR principle here should be to leave the investigations to be run by the issuing State, as the decision to seek this or that piece of evidence cannot be reopened in the executing Member State. That is one of the reasons why the Commission wants the double criminality principle to be dropped in all matters related to gathering evidence. As regards the rules governing the manner in which evidence is gathered, the national rules applicable in each Member State for the relevant type of investigation should be respected, subject to the application of certain formalities or procedures specified by the issuing State in the executing Member State, already provided for by Article 4(1) of the Convention of 29 May 2000. And the adoption of minimum harmonisation rules on the gathering of evidence (*cf. infra* 3.1.1.2.) should help to ensure that evidence lawfully gathered in one Member State can be used in the courts of another.
7. Extending the MR principle to the entire range of matters relating to the gathering of evidence will raise questions as to the future of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union⁴ and the Protocol of 2001⁵, which, incidentally, are not yet in force as the right number of ratifications has not been reached. In addition to establishing a general MR instrument on evidence, the remaining provisions of the two instruments will have to be reformatted as a European Law or European Framework Law after the Constitution comes into force.
8. One of the difficulties that have been identified is that there are differences between the respective powers of the judicial authorities and the police in the Member States. The limits to each of these types of cooperation are thus blurred, for although they complement each other they are subject to different rules. The Commission will make proposals in connection with the implementation of the principle that information in criminal matters must be made available.

² See Commission Green Paper on criminal law protection of the financial interests of the Community and the establishment of a European Prosecutor: COM (2001) 715 final, 11.12.2001.

³ OJ L 196, 2.3.2003, p 45; deadline for transposal 2 August 2005.

⁴ OJ C 197, 12.7.2000.

⁵ OJ C 326, 21.11.2001.

2.1.2. *Mutual recognition of non-custodial pre-trial supervision measures*

9. In August 2004 the Commission published a Green Paper on mutual recognition of non-custodial pre-trial supervision measures⁶. The Green Paper observes that excessive use of pre-trial detention is one of the causes of prison overcrowding and that the alternatives available in national law are often impossible to use where the person resides in another Member State, and suggests a number of solutions. In 2005, once the consultations are over, the Commission will make legislative proposals.

2.2. **Mutual recognition of final judgments**

10. The effect of the MR principle is that, where there is a final judgment in one Member State, it must have a series of consequences in the others. Apart from the European Arrest Warrant, two specific aspects of the question have been covered by proposals for Framework Decisions on the application of the MR principle to financial penalties⁷ and to confiscation orders⁸. But a number of fundamental aspects remain to be considered.

2.2.1. *Mutual information on convictions*

11. Mutual recognition of convictions depends on information on convictions being able to circulate freely between Member States. Taking up an idea already formulated in the conclusions of the European Council of 25 and 26 March 2004, the Hague Programme calls on the Commission to “present its proposals on enhancing the exchange of information from national records of convictions and disqualifications, in particular of sex offenders, with a view to its adoption by the Council by the end of 2005”. In January 2005 the Commission presented a White Paper analysing the main difficulties in exchanging information on convictions and making proposals for a computerised information exchange system. Proposals will be presented in 2005 following initial discussion in Council on the subject.

2.2.2. *The ne bis in idem principle*

12. Article 50 of the Charter of Fundamental Rights of the European Union provides: “No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law”. The Charter broadens the territorial scope of the *ne bis in idem* principle to cover the entire Union, which is progress compared with Protocol 7 to the European Human Rights Convention (ECHR), which provided for it to apply only in each contracting State’s territory.
13. This principle underlies two major judgments given by the European Court of Justice⁹, specifying its scope in terms of the Schengen Implementing Convention, Articles 54 to 58 of which affirm and adapt the *ne bis in idem* principle. Initial work on the application of the *ne bis in idem* principle began on the basis of an initiative

⁶ COM(2004) 562 final.

⁷ OJ L76, 22.3.2005 p.16.

⁸ OJ C 184, 2.8.2002.

⁹ Cases C-187/01 and C-385/01 *Gozütok and Brugge* (judgment given on 11 February 2003) and Case C-469/03 *Miraglia* (judgement given on 10 March 2005).

from Greece¹⁰. It was suspended on account of the close link with the problem of conflicts of jurisdiction (*cf. infra*). There will be a Commission Green Paper on the two issues in 2005, followed by a legislative proposal in 2006.

2.2.3. *Taking account of convictions in the Member States in the course of criminal proceedings*

14. In most Member States, the existence of previous convictions can have effects at the time of fresh criminal proceedings: repeat offending, for instance, can influence the procedural rules that apply, the type of offence charged or, more often, the nature and quantum of the sentence. The Commission recently presented a proposal for a Framework Decision on taking account of convictions in the Member States of the European Union, which establishes a general principle whereby each Member State is to attach the same effects to convictions handed down in the other Member States as to national convictions and sets out a series of rules for the application of the principle. A principle of recognition of repeat offending along these lines was in the Framework Decision of 6 December 2001 on the protection of the Euro¹¹. The new instrument will be a major contribution to the MR of final judgments.

2.2.4. *The enforcement of criminal penalties*

15. It must be possible for a sentence handed down in a Member State to be enforced anywhere in the Union. In April 2004 the Commission launched a consultation on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union on the basis of a Green Paper¹². Austria, Sweden and Finland have presented an initiative to permit enforcement in the Member State of nationality or residence of a prison sentence ordered in another Member State. This instrument should also make it easier to apply certain provisions on the European arrest warrant that allow a surrender request to be refused where the sentence is executed in the executing State.
16. But it is silent on the question of the enforcement of non-custodial measures, on suspended sentences and the conditions for it to be overridden by a penalty ordered in another Member State. The Commission will present legislative proposals on these topics in 2007.

2.2.5. *The mutual recognition of disqualifications*

17. Convicted offenders are often subject to disqualifications (from working with children, tendering for public contracts, driving or whatever), and depending on the Member State these disqualifications may flow from statutory provisions, court decisions or administrative instruments. This is a particularly delicate question both because such disqualifications vary widely in nature and because there are difficulties in the exchange of information about them. Major initial progress will be achievable once information on convictions can be exchanged via the computerised system. Generally speaking the Commission recommends a sector-by-sector approach here, taking each type of sentence in turn, and will present a

¹⁰ OJ C 100, 26.4.2003, p. 24.

¹¹ OJ L 329, 14.12.2001, p.3.

¹² COM (2004) 334 final.

communication in 2005. In November 2004 Belgium presented an initiative relating to the MR of disqualifications from working with children following convictions for child pornography offences. Sector-by-sector work will continue in 2006 with a proposal for the MR of driving disqualifications.

3. REINFORCING MUTUAL TRUST

18. Reinforcing mutual trust is the key to making MR operate smoothly. This is one of the important messages in the Hague Programme and involves both legislative action to ensure a high degree of protection for personal rights in the EU and a series of practical measures to give legal practitioners a stronger sense of belonging to a common judicial culture.

3.1. Reinforcing mutual trust by legislative measures

19. The first endeavours to apply the MR principle, in particular with the European arrest warrant, revealed a series of difficulties which could to some extent be resolved if the Union were to adopt harmonisation legislation. This can revolve around two axes: ensuring that mutually recognised judgments meet high standards in terms of securing personal rights and also ensuring that the courts giving the judgments really were the best placed to do so. Taking MR a stage further might imply giving further consideration to certain measures to approximate legislation on substantive criminal law.

3.1.1. Harmonising the law of criminal procedure

3.1.1.1. Improving guarantees in criminal proceedings

20. In April 2004, the Commission presented a proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union¹³. It seeks to ensure that suspects and defendants in criminal proceedings enjoy the minimum rights secured in all the Union Member States as regards access to lawyers, interpreters and translators, the right to communicate with consular and other authorities, information on one's rights and the protection of vulnerable categories. The European Council has asked that this Decision be adopted by the end of 2005.

21. But this is only a first stage. Work must continue in the years ahead to provide permanent back-up for MR. There are three areas in particular where work needs doing: the presumption of innocence, gathering evidence in criminal cases and decisions *in absentia*¹⁴. In each of them there will have to be extensive analysis and consultation with the 25 Member States and criminal-law practitioners to identify the difficulties and potential solutions in the light of each Member State's legal traditions.

¹³ COM (2004) 328 final.

¹⁴ See Commission Green Paper on criminal law protection of the financial interests of the Community and the establishment of a European Prosecutor: COM (2001) 715 final, 11.12.2001.

3.1.1.2. Reinforcing the presumption of innocence.

22. The presumption of innocence is one of the foremost foundations of the criminal law. It is asserted by Article 6 of the ECHR and taken over in Article 48 of the Charter of Fundamental Rights of the European Union; it exists in all the Member States but the concept is not universally co-extensive. In 2005 the Commission will issue a Green Paper to spell out the scope of the concept, consider ways of reinforcing it and determine the limits to it, if any.

3.1.1.3. Minimum standards on the gathering of evidence

23. Cross-border court actions entail the possibility for evidence gathered in one Member State to be used in another. But respect for defence rights entails certain minimum rules on the gathering of evidence being observed throughout the Union. The Commission will issue a Green Paper in 2006 on the basis of a study¹⁵, proposing a minimum harmonisation exercise regarding standards for the gathering and disclosure of evidence, admissibility criteria and possible exceptions.
24. Following in-depth consultation on the basis of these two Green Papers, the Commission will present a proposal for a Framework Decision on the presumption of innocence and minimum standards on the gathering of evidence.

3.1.1.4. Judgments *in absentia*

25. The question of judgments *in absentia* has often been raised in the EU and regularly re-appears in instruments that have been adopted. In practice the matter has been much discussed, and both experience and the decisions of the European Court of Human Rights have clearly shown that there are difficulties. In 2006 the Commission will issue a Green Paper, possibly to be followed by legislative proposals to resolve the difficulties and bring about greater certainty as to the law.

3.1.1.5. Transparency in the choice of court

26. In criminal matters, where the courts of several Member States have jurisdiction over the same case, investigations and prosecutions may be commenced simultaneously in both. Such multiple proceedings can be seriously detrimental both to personal rights and to procedural efficiency. A procedure to determine the most appropriate place for conducting a prosecution is more and more necessary and will be a major factor in facilitating the application of the mutual recognition principle. It should make it easier to gather evidence at the pre-trial stage (once the Member States have agreed on where the trial is to take place, on which the applicable law is predicated) and to enforce the final judgment (once the Member States have acknowledged in advance that the case has been tried at the most appropriate place). It should also help to avoid cases in which the *ne bis in idem* principle applies.
27. In 2005 the Commission will present a Green Paper on conflicts of jurisdiction and the *ne bis in idem* principle, which, without interfering with the national machinery for determining jurisdiction, will propose solutions to settle conflicts of jurisdiction

¹⁵ Study of the laws of evidence in criminal proceedings throughout the EU, October 2004.

in the European Union on the basis of, among other things, the role of Eurojust under Article III-273 of the Constitution and the calls made in the Hague Programme.

3.1.2. *Further approximation of substantive criminal law*

28. Considerable approximation work has been done here in recent years. It must be continued, with consideration being given to the value of promoting more diversified forms of punishment in the Union and not focusing simply on prison sentences. The accent should be on evaluating the implementation of such instruments as have been adopted, initial results being disappointing, and on the operation of the mechanism of the positive list of offences for which there is no check as to double criminality in MR instruments so that the difficulties that have been identified can be remedied wherever possible.
29. Initial reflections on the need for a Union-wide definition of concepts such as the liability of bodies corporate or the approximation of fines were set out in the Green Paper on penalties. The Commission will make a proposal for a Framework Decision in 2007 following a Green Paper.

3.2. **Reinforcing mutual trust by practical flanking measures**

3.2.1. *Reinforcing evaluation mechanisms*

30. The European Council stated that “Evaluation of the implementation as well as of the effects of all measures is ... essential to the effectiveness of Union action”. Future developments in the MR principle in criminal matters will have to be accompanied by evaluation mechanisms. These must be capable of meeting two methodological objectives that are separate from the job of verifying whether Union instruments have been correctly transposed into national law within the time allowed:
- Evaluating the practical needs of the justice system, and particularly identifying potential barriers before new instruments are adopted; and
 - Evaluating the specific practical conditions for implementing Union instruments, in particular best practices and how they can meet the needs identified at the first stage.

These two objectives will have to be applied in relation to all instruments. They are predicated on stronger tools for analysing judicial practice being available to the Commission.

31. A third objective, of undertaking a more general evaluation of the conditions in which judgments are produced in order to ensure that they meet high quality standards enabling mutual trust between judicial systems to be reinforced, without which MR will not be able to work, depends on broader-based and longer-term action. The Hague Programme states as a matter of principle that “mutual confidence [must] be based on the certainty that all European citizens have access to a judicial system meeting high standards of quality” and calls for “a system providing for objective and impartial evaluation of the implementation of EU policies in the field of justice, while fully respecting the independence of the judiciary” to be established. In the context of boosting mutual trust by the certainty that judicial systems

producing judgments that are eligible for Union-wide enforcement meet high quality standards, this evaluation must provide a fully comprehensive view of national systems. The credibility and efficiency of a judicial system need to be assessed in overall terms, covering both institutional mechanisms and procedural aspects. This will be tricky, and the subsidiarity and proportionality principles and the independence of the judiciary must be respected. The object of the exercise is to produce regular rapports based strictly on criteria of independence and transparency, highlighting best practices.

32. In February 2005 the European Parliament adopted a recommendation¹⁶, and in 2006, after close consultations with judicial organisations and institutions, the Commission will produce a communication on evaluation of the quality of justice.

3.2.2. *Promoting networking among practitioners of justice and developing judicial training*

33. The Hague Programme emphasises the importance of improving mutual understanding between judicial authorities and legal systems. It calls for the development of networks of judicial organisations and institutions, such as the Network of Councils for the Judiciary, the European Network of Supreme Courts and the European Judicial Training Network, with which the Commission wishes to develop close relations. By bringing professionals together more often and promoting reflection on the implementation of Union instruments and on matters of horizontal interest such as the quality of justice, such networks, which should include advocates, should play a key role in gradually building up a common judicial culture.

34. Second, the Hague Programme emphasises the importance of training as a means of promoting mutual trust. Since 2004, at the European Parliament's request the Commission has been operating a judicial exchanges scheme as a pilot project alongside the AGIS programme. This is to continue in 2005 and will be evaluated in 2006 before final proposals are made.

35. The effect of developing the MR principle is to give judgments an impact that extends well beyond national borders. Consequently, the European dimension of the judicial function must be fully integrated into syllabuses at all stages of the careers of judges and prosecutors. The training of judicial authorities is based on national entities responsible for organising it and determining the content. Training is now grouped in a network currently operating on an association basis. The Hague Programme emphasises the importance of boosting the network to make it into an effective structure for meetings and cooperation between judicial authorities. At the end of 2005, after consultations, the Commission will present a communication on judicial training in the European Union.

3.2.3. *Support for the development of quality justice*

36. In the new financial perspective 2007-12, the Commission presented three proposals for action programmes including a specific criminal justice programme. This programme will increase the support that the Union can give for judicial cooperation,

¹⁶ Recommendation from the European Parliament to the Council on the quality of criminal justice and the harmonisation of criminal law in the Member States: A6-0036/2005.

the development of MR and the reinforcement of mutual trust between Member States. Its objectives are in particular to promote contacts and exchanges between practitioners, strengthen judicial training and improve access to justice.