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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 30.04.2004
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GREEN PAPER

**on the approximation, mutual recognition and enforcement of criminal sanctions in the
European Union**

(presented by the Commission)

OBJECTIVES OF THE GREEN PAPER

The European Union has set itself the objective of offering its citizens a high level of protection in an area of freedom, security and justice (Article 29 of the Treaty on European Union). For this the Commission considers that it is worth analysing whether national differences regarding criminal penalties are an obstacle to attaining that objective. It is also necessary to analyse whether these differences raise problems for judicial cooperation between Member States, which entails first identifying the barriers to implementation of the mutual recognition principle, which, according to the conclusions of the Tampere European Council, is to “become the cornerstone of judicial cooperation in both civil and criminal matters within the Union” and in general terms make it easier to have penalties ordered in one Member State enforced in others.

This document is a preliminary reflection instrument so that at a second stage a better informed opinion can be reached, in the light of the reactions and comments on it, on the utility and feasibility of a legislative proposal, and to some extent also on the approximation of the rules applicable to criminal penalties in general and to the mutual recognition of custodial sentences and alternative sanctions in the European Union.

CONSULTATION OF ALL INTERESTED PARTIES

A series of questions have arisen on problems that the Commission regards as the most important in establishing a genuine law enforcement area which would give rise to a degree of approximation of the rules applicable to criminal penalties in the Union.

The Commission would like to receive reasoned replies to these questions from all interested parties. Comments may also be offered on other interesting aspects, whether or not they are mentioned in the Green Paper. Replies to the questions and other comments should be sent **no later than 31 July 2004** to:

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To simplify management, interested parties who respond by two different means (by e-mail and by post, for instance) are requested to specify that the same document has already been sent to the Commission. Interested parties wishing to comment on this Green Paper must give particulars of the interests they represent and the level at which they do so.

This consultation and the replies and comments will be published on the Commission's website: http://europa.eu.int/comm/justice_home/news_consulting_public_en.htm, unless the author specifically objects to this.

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1. INTRODUCTION

Article 31(1)(e) of the Treaty on European Union provides for the gradual adoption of “*measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties*” in certain fields. This approach is confirmed by the Council and Commission Action Plan on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice¹ (Vienna Action Plan) and the conclusions of the Tampere European Council² (paragraph 48).

The approximation of criminal penalties would also contribute to ensuring such compatibility in rules applicable in the Member States as may be necessary to improve such cooperation (Article 31(1)(c)), and to facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States, in relation to proceedings and the enforcement of decisions (Article 31(1)(a)).

To act on this, the Council has already adopted legislative instruments (Framework Decisions) on fraud involving non-cash means of payment, euro counterfeiting, money laundering, terrorism, environmental crime, trafficking in human beings and facilitation of unauthorised entry and residence. Other instruments are under discussion in the Council and the European Parliament, such as the proposals for Council Framework Decisions on the fight against ship-source pollution and racism and xenophobia.³ The purpose of the Framework Decisions is to approximate the Member States’ legislation and regulations. Framework Decisions are binding upon the Member States as to the result to be achieved but leave to the national authorities the choice of form and methods.⁴

As regards penalties, there are provisions determining penalties applicable. The formula used to harmonise penalties has not been so much to determine effective, proportionate and dissuasive penalties as to set minimum levels for maximum penalties.⁵ In the Commission’s view this approach, which is confined to custodial sentences, produces a minimum approximation which may not be adequate to meet the declared objectives. The Commission is meeting a need to identify the areas in which Union action is justified.

It must also be borne in mind that the action undertaken by the Community on the basis of the Union Treaty is without prejudice to its powers to work for the objectives set out in Article 2 of the EC Treaty, to require the Member States to legislate for national penalties, criminal penalties if need be, where a Community objective is to be secured. This would include, for example, protection of the environment, including the prohibition on illicit discharge from vessels at sea, and the common fisheries policy.

Apart from imprisonment, a wide range of criminal sanctions is provided for by the Member States’ criminal systems. And regarding imprisonment, even if the same penalty is set for an offence, there are major divergences between the general rules of criminal law in the Member

¹ OJ C 19, 23.1.1999, p. 1. See also point 2.1.2.

² Accessible at: <http://ue.eu.int/en/Info/eurocouncil/index.htm>.

³ See point 2.1.5.

⁴ Article 34(2)(b) of the Treaty on European Union.

⁵ But the Council Joint Action of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union does not provide for a minimum penalty.

States, which generate a difference between the sentence that is passed and the penalty that is served.

This Green Paper contains a comparative analysis of the Member States' legislation. The situation of the acceding countries has not been reflected at this stage, since the studies used did not extend to the legislation of all of them. In the consultations launched by this Green Paper, the acceding countries will of course have every opportunity to make their views known. And the Commission will invite them to send contributions so as to complete the information about their legislation in the relevant matters.

In this context, it is worth asking in terms of effectiveness, whether the penalty is actually applied and if it has a truly dissuasive effect, to take over the now well known concepts of the Greek-Yugoslav Maize case⁶ that underlie the system for the approximation of penalties established by third-pillar instruments. In conclusion, the penalty served is ultimately the result of a complex equation involving an extremely large number of variables: theoretically action would have to be taken on every one of them to guarantee an identical penalty in all the legal orders.

However, it must be acknowledged that it is not possible simultaneously to harmonise all the relevant factors in the short term and the Commission obviously has no intention of proposing the standardisation of all criminal penalties in the European Union. This would be neither desirable nor legally feasible.

The differences between the Member States' legislation on penalties are still quite sharp. There are historical, cultural and legal reasons for this, deeply-rooted in their legal systems, which have evolved over time and are the expression of the way in which Member States have faced and answered fundamental questions about criminal law. These systems have their own internal coherence, and amending individual rules without regard for the overall picture would risk generating distortions.

On the contrary, in accordance with the subsidiarity principle, the aim must be to focus on areas where a need has been identified, in the light of the objectives set and the legal bases available. The point, therefore, is really to identify differences in penalties that have harmful effects and the limits to be imposed, if any, in order to attain a European law-enforcement area.

The first paragraph of Article I-41 of the Draft Constitution,⁷ concerning the area of freedom, security and justice, provides that the Union shall establish that area:

- by adopting European laws and framework laws intended, where necessary, to approximate national laws in the areas listed in Part III;
- by promoting mutual confidence between the competent authorities of the Member States, in particular on the basis of mutual recognition of judicial and extrajudicial decisions;
- by operational cooperation between the competent authorities of the Member States.

Part III of the Draft Constitution, in the Section on judicial cooperation in criminal matters (Article III-171), specifies that this cooperation is to be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in certain areas. The Council, acting unanimously

⁶ ECJ, Case 68/88, judgment given on 21 September 1989, Commission v Hellenic Republic [1989] ECR 2965.

⁷ Accessible at: <http://european-convention.eu.int/>.

after obtaining the consent of the European Parliament, may adopt a European decision identifying other areas of crime. Article III-172 provides that “*European framework laws may establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with cross-border dimensions resulting from the nature or impact of such offences or from a special need to combat them on a common basis*”.

By point 2(d) of the second subparagraph of Article III-171(1) of the Draft Constitution, European laws or framework laws shall establish measures to “*facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions*”. The Council of Ministers, acting unanimously after obtaining the consent of the European Parliament, may adopt a European decision identifying any other specific aspects of criminal procedure (third subparagraph of Article III-172(1)).

If the approximation of criminal legislation proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, European framework laws may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned (Article III-172(2)).

Under Article III-173 of the Draft Constitution, European laws or framework laws may establish measures to promote and support the action of Member States in the field of crime prevention, which is important for the implementation of custodial sentences and alternative sanctions (**Annexes I and II**). But such measures may not include the approximation of Member States’ legislative and regulatory provisions.

1.1. Objectives

The approximation of criminal penalties can satisfy several mutually complementary objectives:

- First, by defining common offences and penalties in relation to certain forms of crime, the Union would be putting out a symbolic message. The approximation of penalties would help to give the general public a shared sense of justice, which is one of the conditions for establishing the area of freedom, security and justice.⁸ It would also be a clear signal that certain forms of conduct are unacceptable and punished on an equivalent basis. The sexual exploitation of children is a good example. Approximation of the definition of the offence and of the level of the penalty incurred for it, provides effective and equivalent protection for citizens throughout the Union against a phenomenon that strikes against the principles and values shared by the Member States.

- The corollary of a European area of justice would be that the same criminal conduct incurs similar penalties wherever the offence is committed in the Union. The approximation of legislation is accordingly an autonomous objective in areas regarded as deserving priority and identified as such. A degree of approximation of provisions of substantive criminal law is needed since certain forms of crime have a transnational dimension and the Member States cannot combat them effectively on their own.

- Union minimum standards thus help to prevent offenders (or at least certain categories of them, such as organised crime) from taking advantage of divergences between penalties in the Member States and moving from one to another to evade prosecution or the enforcement

⁸ See point 15 of the Vienna Action Plan.

of penalties. The Tampere conclusions (point 5) state that criminals must not find ways of exploiting differences in the judicial systems of Member States. This is particularly true of financial crime.

- Discussions in Council on the draft Framework Decision on the “*ne bis in idem*” principle have also shown that the application of the principle in Article 50 of the Charter of Fundamental Rights of the European Union will be easier to accept if the penalties are comparable and actually applied.

- While the operation of certain mechanisms for judicial cooperation in criminal matters was dependent on the level of penalties, this is no longer the case following the adoption of instruments based on the principle of mutual recognition.

- There is also a link, as Article III-172(2) of the Draft Constitution makes clear, between the approximation of criminal law and the effective implementation of a Union policy where harmonisation measures have been taken. Examples are protection of the environment, safety at work and economic and financial transactions, as areas where criminal law could help to enforce a Union policy.

- Finally, the approximation of rules of criminal law concerning penalties and their enforcement also helps to secure acceptance of the mutual recognition of judgments, since it enhances mutual trust. But approximation is not a *sine qua non* for mutual recognition; rather, these are two complementary mechanisms for achieving the European area of justice. Compatibility between the rules applicable in the Member States would thus be facilitated, as required by Article 31(1)(c) of the TEU, and cooperation between the authorities of the Member States in the enforcement of decisions (Article 31(1)(a)) would be improved. Compatible conditions for enforcement of penalties between the Member States would promote the rehabilitation of persons by allowing them to serve their sentence in a Member State other than the one where they were convicted.

Even so, any action seeking to approximate criminal penalties must quite obviously respect the subsidiarity and proportionality principles. The Protocol on the application of the principles of subsidiarity and proportionality annexed to the EC Treaty by the Amsterdam Treaty contains guidelines for the application of these principles. Community action is justified where the issue under consideration has transnational aspects, where actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty or where action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.

Under Article 2 of the Union Treaty, these guidelines are applicable in the context of the powers conferred on the Union. To attain the objective set by the Union Treaty of establishing an area of freedom, security and justice in the European Union, any effort at approximation of the application and enforcement of penalties is therefore justified since the objectives of the proposed action cannot be sufficiently achieved by Member States’ action in the framework of their national constitutional system and can therefore be better achieved by action on the part of the Union. To attain these objectives, the proposed approximation measures could refer to the various aspects of penalties that correspond somehow to four themes:

- (1) what penalties can be imposed under the criminal law?
- (2) how are offences prosecuted?

- (3) how are penalties imposed?
- (4) how are the penalties that have been imposed enforced?

The Commission considers that the problem should be seen in comprehensive terms and not merely in terms of approximating penalties themselves. It is not enough, for instance, for similar penalty levels to be set in the Member States if penalties, once imposed, are applied more flexibly or more strictly in one country than in another. Opting for a penalty that is applicable necessarily entails opting for the way in which it will be enforced.

A consistent policy on sentencing in the Union must therefore at least⁹ consider the four following issues, without there being any prior judgement as to the value or feasibility of Union action on each of them:

- (1) the level of penalties and the range of penalties available (for example, custodial penalties, alternatives to custodial penalties, fines, etc.);
- (2) the rules governing prosecution (discretionary or mandatory prosecution, priorities in criminal policy etc.);
- (3) the general rules of criminal law (participation, attempts, aiding and abetting, instigation, aggravating and mitigating circumstances, recidivism etc.);
- (4) rules and practices regarding enforcement (different forms of conditional release, remission and reduction of sentence, amnesty, pardon, rehabilitation, involvement of judicial and other authorities in enforcing sentences, measures for personalisation of penalties to facilitate reintegration, etc.).

In considering all these questions, the Commission will also be mindful of the results of a recent study on “Harmonisation of criminal penalties in Europe”¹⁰ by the “*Unité Mixte de Recherche de Droit Comparé*” in Paris. The study, which was financed under the Grotius

⁹ All the following factors influence criminal penalties:

- the type of penalty prescribed by the law (custodial penalties or financial penalties, disqualification, confiscation, “informal penalties” in the context of restorative justice; possibility of combining different types of penalty; level of the various types of penalty);
- the prosecution system (mandatory or discretionary; triangular cooperation between police, prosecution authorities and courts; the role of victims in criminal proceedings; police powers of discretion and decision);
- the specificities of criminal proceedings (availability or not of a restorative justice scheme; payment of amounts to the community; participation in training schemes; community service; eligibility);
- sentencing (practices and traditions; discretion available, application of aggravating or mitigating circumstances, application of concepts of attempt/ participation/preparation, use of unconditional and (fully or partly) conditional penalties, including duration of probation periods);
- enforcement of penalties (including the possibility of suspended or deferred sentencing and remission or discharge);
- for fines: possibility of daily fines, of payment in instalments and of imprisonment for failure to pay;
- for custodial penalties: standards regarding cells, treatment of prisoners, possibility of remuneration for work done by them; social security systems; rules on early release (conditionally or unconditionally), amnesty and pardon.

¹⁰ “L’harmonisation des sanctions pénales en Europe”. Dir: M. Delmas-Marty, G. Giudicelli-Delage, E. Lambert-Abdelgawad. Société de législation comparée. Collection de l’UMR de Droit comparé de Paris (Paris I- CNRS, vol.V), Paris, 2003.

Programme, focuses on the feasibility of harmonising the general rules of criminal law relating to sentencing and on the rules governing enforcement. The results of the study could be helpful in subsequently clarifying the issues where Union action might be envisaged.

1.2. Objectives of mutual recognition

Article 31(1)(a) of the Union Treaty provides that common action on judicial cooperation in criminal matters is to include “facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States ... in relation to proceedings and the enforcement of decisions”. This provision was added at Amsterdam¹¹ and does not mention the principle of mutual recognition, whereby judgments and other decisions by the judicial authorities of a Member State (Member State of judgment) are recognised and, if necessary, enforced in another Member State (Member State of enforcement).

The Cardiff European Council on 15 and 16 June 1998 made the first mention of this concept, borrowed from the single market, and asked the Council to determine to what extent it should be extended to the decisions of the courts of the Member States.¹²

Mentioned at point 45(f) of the Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, adopted on 3 December 1998, the idea of mutual recognition was taken up by the Tampere European Council in October 1999, which felt that it should be “*the cornerstone of judicial cooperation in both civil and criminal matters within the Union*” (points 33 to 37). The Tampere conclusions state: “*Enhanced mutual recognition of judicial decisions and judgments and the necessary approximation of legislation would facilitate cooperation between authorities and the judicial protection of individual rights*”. Mutual recognition must therefore not only ensure that effect is given to judgments but also that this is done in such a way as to secure individual rights. By way of example, the recognition and enforcement of a judgment in a Member State must also be sought where it improves the prospects for the social rehabilitation of the offender.

The Tampere European Council asked the Council and the Commission to adopt a programme of measures to implement the principle of mutual recognition.¹³

In its Communication to the Council and Parliament on Mutual Recognition of Final Decisions in Criminal Matters of 26 July 2000,¹⁴ the Commission proposed basic guidelines.

These were then spelled out in a Programme of measures to implement the principle of mutual recognition of decisions in criminal matters.¹⁵ This programme states that the mutual recognition of judgments is a factor for certainty as to the law in the European Union since it ensures that a judgment given in one Member State will not be questioned in another. It further notes that implementing the principle of mutual recognition of judgments on criminal matters presupposes mutual trust between the Member States in their respective criminal justice systems. Such trust is based in particular on the common core of principles in their attachment to the principles of freedom, democracy, respect for human rights and fundamental freedoms and the rule of law. And mutual trust is facilitated by the

¹¹ Signed on 2 October 1997 and in force on 1 May 1999.

¹² Presidency Conclusions, point 39.

¹³ Presidency Conclusions, point 37.

¹⁴ COM(2000)495 final.

¹⁵ OJ C 12, 15.1.2001, p. 10.

approximation of national legislation, as can be seen in the experience of cooperation between the Nordic countries (see point 3.2.1.4.).

The Draft Constitution confirms this method and this approach. Article III-171 provides that cooperation in criminal matters in the Union “*shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States*”

1.3. Method and structure of the Green Paper

The Green Paper takes stock of the measures taken by the European Union for the approximation, mutual recognition and enforcement of criminal penalties in another Member State (Chapter II) and proceeds then to consider the situation regarding the legislation of the Member States on the general principles of criminal law, penalties and their enforcement and relevant international agreements concluded by the Member States (Chapter III, plus **Annexes I, II and III**).

The final part (Chapter IV) identifies the problems remaining despite the adoption of a series of Union measures for approximation and mutual recognition and the conclusion of international agreements by the Member States. That part will give examples of actual or potential legal and practical barriers to the establishment of the European area of justice. On the basis of that analysis, the Chapter will go on to consider the needs for Union action as seen by the Commission at the present time, given the legal possibilities of attaining these objectives. It will look only at the mutual recognition of custodial sentences (including the enforcement rules) and alternative sanctions. Initiatives are under discussion in the Council regarding the recognition of financial penalties and confiscation orders. The Commission will consider the question of disqualification orders in a separate Communication. Reactions to the Green Paper, and in particular the answers to the questions in this Chapter (see **Annex IV**, summing up all the questions), will provide a basis for adding or removing items on the list of needs identified or modifying them.

2. MEASURES TAKEN BY THE EUROPEAN UNION – A STOCK-TAKING

2.1. Approximation of sanctions

2.1.1. *The Treaty on European Union*

The Treaty on European Union (TEU), as last amended by the Nice Treaty, which came into force in February 2003, sets the Union the objective of providing citizens with a high level of safety within an area of freedom, security and justice (Article 29). This objective is to be attained by, among other means, approximation, where necessary, of rules on criminal matters in the Member States. In particular, Article 31(1)(e) provides for the gradual adoption of “*measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking*”.

Under the Maastricht Treaty, approximation measures had already begun to be taken. Joint actions had laid down common definitions of offences in areas such as racism and xenophobia¹⁶ and participation in a criminal organisation,¹⁷ but these instruments are silent on the question of penalties.

2.1.2. *The Vienna Action Plan*

Point 46 of the Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice¹⁸ provides for approximating the Member States’ criminal law rules relating to a number of offences, within two or five years of the entry into force of the Treaty, as the case may be.

There are references in particular to organised crime, terrorism and drug trafficking, where it is urgent and necessary to adopt measures establishing minimum rules relating to the constituent elements and to penalties and, if necessary, elaborate measures accordingly. The first areas in which this is envisaged might, in accordance with the Action Plan, be offences linked to organised crime, terrorism and drug trafficking such as trafficking in human beings and the sexual exploitation of children, offences against the drug-trafficking legislation, corruption, computer fraud, offences committed by terrorists, offences against the environment, offences via the Internet and money-laundering linked to these forms of crime.

2.1.3. *Conclusions of the Tampere European Council*

The Tampere European Council – October 1999 (paragraph 48 of the conclusions) also considered that “*with regard to national criminal law, efforts to agree on common definitions, incriminations and sanctions should be focused in the first instance on a limited number of sectors of particular relevance, such as financial crime (money laundering, corruption, Euro counterfeiting), drugs trafficking, trafficking in human beings, particularly exploitation of women, sexual exploitation of children, high tech crime and environmental crime*”.

There is accordingly an obligation to approximate penalties, both under the Treaty and the Vienna Action Plan and in response to the political will of the European Council expressed at Tampere.

¹⁶ OJ L 185, 24.7.1996, p. 5.

¹⁷ OJ L 351, 29.12.1998, p. 1.

¹⁸ OJ C 19, 23.1.1999, p. 1.

2.1.4. *Instruments adopted or under negotiation*

In all the areas mentioned in the Union Treaty, the Vienna Action Plan and the conclusions of the Tampere European Council there have already been initiatives from the Member States or proposals from the Commission that have been adopted or are under negotiation. They are listed here on the basis of the type of penalty:

2.1.5. *Custodial sentences*

The formula used to harmonise penalties has not been so much to determine effective, proportionate and dissuasive penalties as to set minimum levels for maximum penalties. The instruments adopted are the following:

- The Council Framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro:¹⁹ this provides for effective, proportionate and dissuasive criminal penalties, including custodial penalties which can give rise to extradition. For certain forms of conduct covered by the Framework Decision, provision is made for terms of imprisonment, the maximum being not less than eight years.
- The Council Framework Decision of 28 May 2001 on combating fraud and counterfeiting of non-cash means of payment:²⁰ this provides for effective, proportionate and dissuasive criminal penalties including, at least in serious cases, custodial penalties which can give rise to extradition.
- The Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime:²¹ this provides that the offence of money laundering will be punishable by deprivation of liberty for a maximum of not less than four years.
- The Council Framework Decision of 13 June 2002 on combating terrorism:²² this provides for effective, proportionate and dissuasive criminal penalties which can give rise to extradition. The relevant offences, where there are terrorist motives, must be punishable by custodial sentences heavier than those imposable under national law for such offences in the absence of the special intent. Offences relating to a terrorist group must be punishable by a maximum sentence of no less than eight years for participation in the activities of such groups and fifteen years for the offence of directing a terrorist group.
- The Council Framework Decision of 19 July 2002 on combating trafficking in human beings:²³ this provides that Member States must ensure that the offences are punishable by effective, proportionate and dissuasive criminal penalties, which may entail extradition.
- Council Directive 2002/90/EC of 28 November 2002 and the Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to

¹⁹ OJ L 140, 14.6.2000, p. 1.

²⁰ OJ L 149, 2.6.2001, p. 1.

²¹ OJ L 182, 5.7.2001, p. 1.

²² OJ L 164, 22.6.2002, p. 3.

²³ OJ L 203, 1.8.2002, p. 1.

prevent the facilitation of unauthorised entry, transit and residence.²⁴ Member States must ensure that the offences are punishable by effective, proportionate and dissuasive criminal penalties, which may entail extradition.

- The Council Framework Decision of 27 January 2003 on the protection of the environment through criminal law:²⁵ this provides for effective, proportionate and dissuasive penalties including, at least in serious cases, penalties which can give rise to extradition. There is also provision for the disqualification for a natural person from engaging in an activity requiring official authorisation or approval.
- The Council Framework Decision of 22 July 2003 on combating corruption in the private sector:²⁶ this provides for effective, proportionate and dissuasive penalties. Certain offences must be punishable by a maximum penalty of at least one to three years of imprisonment.
- The Council Framework Decision of 22 December 2003 on combating the sexual exploitation of children and child pornography:²⁷ this provides for maximum criminal penalties of at least between one and three years of imprisonment.

The Joint Action adopted by the Council on 21 December 1998²⁸ on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union does not provide for minimum levels of penalty.

Other instruments are under discussion:

- Proposal for a Council Framework Decision laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking.²⁹ Political agreement was recorded at the (JHA) Council on 27-28 November 2003.
- Proposal for a Council Framework Decision on racism and xenophobia:³⁰ this provides for effective, proportionate and dissuasive penalties. For certain offences, the maximum custodial penalty must be at least between one and three years.
- Proposal for a Council Framework Decision on attacks against information systems:³¹ this provides for effective, proportionate and dissuasive penalties. For certain offences, the maximum custodial penalty must be at least between one and

²⁴ OJ L 328, 5.12.2002, pages 1 et 17.

²⁵ OJ L 29, 5.2.2003, p. 55. The Commission has brought an action in the Court of Justice against the Council challenging the legality of the Framework Decision and seeking a declaration that it encroaches on Community powers in requiring the Member States to impose penalties, including criminal penalties, where that is necessary for the attainment of Community objective.

²⁶ OJ L 192, 31.7.2003, p. 54.

²⁷ OJ L 13, 20.1.2004, p. 44.

²⁸ OJ L 351, 29.12.1998, p. 1.

²⁹ Proposal for a Council Framework Decision laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, presented by the Commission on 23 May 2001 (COM(2001)259; OJ C 270 E, 25.9.2001, p. 144).

³⁰ Proposal for a Council Framework Decision on racism and xenophobia, presented by the Commission on 29 November 2001 (COM (2001) 664; OJ C 75 E, 26.03.2002, p. 269).

³¹ Proposal for a Council Framework Decision on attacks against information systems, presented by the Commission on 19 April 2002 (OJ C 203 E, 27.8.2002, p. 109).

three years. Political agreement was recorded at the Council (JHA) on 27 and 28 February 2003.

- Draft Council Framework Decision concerning the prevention and control of trafficking in human organs and tissues.³²
- Proposal for a Council Framework Decision to strengthen the criminal law framework for the enforcement of the law against ship-source pollution:³³ this provides for a maximum sentence of at least five to ten years' imprisonment in the most serious cases, and for criminal or non-criminal fines. Negotiations in the Council have begun.

The **Council Declaration annexed to the Framework Decision on the European arrest warrant and the surrender procedures between Member States**,³⁴ adopted on 13 June 2002, calls for further harmonisation in relation to the offences listed in Article 2(2) of the Framework Decision,³⁵ where there has been no approximation in the Union as yet. But this declaration certainly does not remove the need for case-by-case review of the exercise in subsidiarity and proportionality terms. Regarding the level of penalties, following consideration of the issues under the Belgian and Spanish Presidencies, **the Council (JHA) on 25 and 26 April 2002** adopted conclusions on the approach to apply regarding approximation of penalties, with the establishment of ranges to determine the **minimum level of the maximum penalty to be applied**, as follows:

- Level 1: Penalties of a maximum of at least between 1 and 3 years of imprisonment
- Level 2: Penalties of a maximum of at least between 2 and 5 years of imprisonment
- Level 3: Penalties of a maximum of at least between 5 and 10 years of imprisonment
- Level 4: Penalties of a maximum of at least 10 years of imprisonment

The conclusions expressly foresee the possibility of going beyond level 4 in specific circumstances. For example, the Council Framework Decision of 13 June 2002 on combating terrorism³⁶ provides for maximum custodial sentences of at least fifteen years for directing a terrorist group.

The presentation in the form of ranges is a purely cosmetic exercise: only the lower level of each range really counts as the maximum applicable is to be at least 1, 2, 5 or 10 years, as the case may be.

But there are no Union instruments providing for **minimum penalties**. It should be remembered that *Declaration 8 annexed to the Amsterdam Treaty* provides that a Member State which does not provide for minimum penalties cannot be obliged to adopt them.

³² Initiative by the Hellenic Republic for a Council Framework Decision concerning the prevention and control of trafficking in human organs and tissues (OJ C 100, 26.4.2003, p. 27).

³³ COM(2003)227, 2.5.2003.

³⁴ OJ L 190, 18.7.2002, p. 1.

³⁵ Article 2(2) of the Decision refers to a list of 32 offences.

³⁶ OJ L 164, 22.6.2002, p. 3.

As regards the enforcement of custodial penalties (such as suspended sentences and suspended or deferred sentencing, day-release, enforcement in instalments, electronic surveillance and home detention), there is no European Union legislation.

2.1.6. Financial penalties

As has already been seen, hitherto the Union's activities in relation to penalties have been confined to custodial penalties.

But the Commission proposal for a Council Framework Decision to strengthen the criminal law framework for the enforcement of the law against ship-source pollution³⁷ proposes a scale that involves setting a minimum level of maximum penalties to be imposed under the proposal for a directive that it amplifies³⁸ on natural and legal persons for offences that it covers. The Commission considers that fines would be more appropriate than imprisonment for such offences.

Two levels of penalty are provided for. The first, from 1% to 10% of annual turnover, concerns cases where imprisonment is not provided for by the directive. The second, from 10% to 20% of turnover, concerns more serious cases, where imprisonment could be ordered under the directive.

Other harmonisation criteria could be devised, however, and are currently being discussed in the Council. For example, the scale of the damage caused (by the relevant pollution in this case) seems unlikely to be accepted as it could be seen as condoning small-scale damage, or a minimum fine with the possibility of raising it to two thirds of the value of the cargo or freight carried by the offending ship. Discussions are continuing in the Council.

2.1.7. Disqualification

For the purposes of this Green Paper, disqualification means a penalty withdrawing or restricting rights or a preventive measure whereby a natural or legal person is prohibited, for a limited or unlimited period, from exercising certain rights, occupying a position, going to certain places or doing certain things.

A few Framework Decisions that have been or shortly will be adopted in the Union provide for the possibility of disqualifications in the exercise of certain occupations. The Council Framework Decision strengthening the penal framework to prevent the facilitation of unauthorised entry, transit and residence³⁹ provides for the possibility of a prohibition on practising directly or through an intermediary the occupational activity in the exercise of which the offence was committed.

The Council Framework Decision on combating the sexual exploitation of children and child pornography requires Member States to take measures to ensure that a person who has been convicted of one of the offences referred to in the Framework Decision may, if appropriate, be temporarily or permanently prevented from exercising professional activities related to the supervision of children. The Framework Decision on combating corruption in the private sector contains a provision requiring Member States to take measures to ensure that where a

³⁷ Supra, point 2.1.5.

³⁸ Proposal for a Parliament and Council Directive on ship-source pollution and on the introduction of sanctions, including criminal sanctions, for pollution offences (COM(2003)92 final, 5.3.2003).

³⁹ Article 1(2), OJ L 328, 5.12.2002, p. 1.

natural person has been convicted of active or passive corruption in the private sector he may in certain circumstances be temporarily prohibited from carrying on this particular or comparable business activity in a similar position or capacity.

2.1.8. *Confiscation*

There has been some Union approximation of confiscation orders. The Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime⁴⁰ provides that, in so far as the offence is punishable by deprivation of liberty or a detention order for a maximum of more than one year, Member States may not make or uphold reservations in respect of Article 2 of the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.⁴¹ This provides that each Party to the Convention must adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities and proceeds or property the value of which corresponds to such proceeds. Member States were required to adopt measures to comply with the Framework Decision by 31 December 2002. The Commission will shortly be presenting a report on implementation by the Member States.

The Framework Decision applies horizontally, as the offence is punishable by deprivation of liberty or a detention order for a maximum of more than one year. But other sectoral instruments also contain specific provisions for confiscation: the Council Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence⁴² and the proposal for a Framework Decision on minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking.⁴³

In August 2002 Denmark presented an initiative for a Council Framework Decision on confiscation of crime-related proceeds, instrumentalities and property⁴⁴ on the grounds that existing instruments had not sufficiently achieved effective cross-border cooperation with regard to confiscation as there are still a number of Member States which are unable to confiscate the proceeds from all offences punishable by deprivation of liberty for more than one year.

At the Council (JHA) in December 2002 political agreement was reached on this instrument, which has the purpose of approximating legislation on confiscation orders. It will enable Member States to confiscate, either wholly or in part, instrumentalities and proceeds from criminal offences punishable by deprivation of liberty for more than one year, or property the value of which corresponds to such proceeds. It represents progress over the Framework Decision of 2001 since it also contains extended confiscation powers for a list of offences.

⁴⁰ OJ L 182, 5.7.2001, p. 1. Articles 1 and 3.

⁴¹ Council of Europe Treaty Series, No 141. Opened for signature on 8 November 1990, entered into force on 1 September 1993, accessible at <http://conventions.coe.int>.

⁴² Article 1(2) (OJ L 328, 5.12.2002, p. 17).

⁴³ Article 4, OJ C 270 E, 25.9.2001, p. 144.

⁴⁴ Initiative of the Kingdom of Denmark with a view to the adoption of a Council Framework Decision on Confiscation of Crime-related Proceeds, Instrumentalities and Property (OJ C 184, 2.8.2002, p. 3).

2.1.9. *Sanctions for legal persons.*

In 1997 the Second Protocol of the Convention on the protection of the European Communities' financial interests was adopted.⁴⁵ This required each Member State to take the necessary measures to ensure that legal persons could be held liable for fraud, corruption and money-laundering. Since then, numerous legal instruments based on Title VI of the Treaty on European Union have been adopted or proposed containing provisions of this kind requiring the Member States to take the necessary measures to allow legal persons to be held liable for the offences referred to in the legislation and to lay down sanctions.

These legal instruments do not require the Member States to introduce criminal liability for legal persons - it can be administrative liability - because the criminal liability of legal persons is not an accepted concept in all Member States. The liability of legal persons is not general but confined to specific offences, and the sanctions (which may include criminal and non-criminal fines) must be effective, proportionate and dissuasive. Other sanctions may also be imposed, such as exclusion from entitlement to public benefits or aid, a temporary or permanent disqualification from the practice of commercial activities, placement under judicial supervision or a judicial winding-up order.⁴⁶

The Council Framework Decision on trafficking in human beings, the Framework Decision on combating the sexual exploitation of children and child pornography and the proposal for a Framework Decision on drug trafficking also provide for the temporary or permanent closure of establishments used to commit the offence.

It is clear that whenever there has been an approximation of the constituent elements of offences in a particular area at EU level it has been accompanied by an approximation of the sanctions imposed on natural and legal persons.

Moreover, horizontal legislation on confiscation and the mutual recognition of fines applies to sanctions imposed on both natural and legal persons, even for non-harmonised offences.

2.1.10. *Alternative sanctions.*

Given the significant differences between the criminal law of the Member States, particularly as regards the classification of punishments into primary,⁴⁷ additional⁴⁸ and ancillary⁴⁹

⁴⁵ OJ C 221, 19.7.1997, p. 11.

⁴⁶ See Council Framework Decision combating fraud and counterfeiting of non-cash means of payment (Articles 7 and 8); Council Framework Decision on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro (Articles 8 and 9); Council Framework Decision on combating trafficking in human beings (Articles 4 and 5); Council Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (Articles 2 and 3); Council Framework Decision on combating terrorism (Articles 7 and 8); Council Framework Decision on the sexual exploitation of children and child pornography (Articles 6 and 7); proposal for a Council Framework Decision on drug trafficking (Articles 7 and 8); proposal for a Council Framework Decision on combating racism and xenophobia (Articles 9 and 10); proposal for a Council Framework Decision on combating corruption in the private sector (Articles 6 and 7) proposal for a Council Framework Decision on attacks against information systems (Articles 9 and 10).

⁴⁷ In most Member States there are two main types of punishment: deprivation of liberty and fines, which are prescribed by the legislatures either as alternatives or cumulatively.

⁴⁸ In French law an additional penalty is one that may be added to the primary penalty by the judge if expressly provided for by the legislation making the act an offence.

penalties, it is hardly surprising that the term “alternative sanction or penalty” is not interpreted in the same way in all Member States. In France, for example, an alternative penalty is one that national legislation allows the judge to impose instead of one or more primary penalties. Alternative sanctions consist of forfeiture or restriction of the rights listed in Article 131-6 of the French Criminal Code,⁵⁰ community service or a daily fine. In Germany, by contrast, the daily fine is a primary penalty because this is the only way fines are calculated,⁵¹ and in Belgium community service was recently introduced as a primary penalty (see below).

To avoid becoming bogged down in a complex comparison between the classifications used by the 15 different criminal law systems in the Member States, we suggest the following definition: for the purpose of this Green Paper, “alternative sanctions” means penalties imposed on natural persons or accepted by them in the course of a mediation or out-of-court settlement procedure which are not custodial penalties (or their implementing rules) or fines, confiscations or disqualifications.⁵²

This definition roughly corresponds to the term “community sanctions” which is defined in the annex to the Council of Europe Committee of Ministers’ Recommendation No R (92) 16 on the European rules on community sanctions and measures (which sets out a range of alternatives to imprisonment): “*The term “community sanctions and measures” refers to sanctions and measures which maintain the offender in the community and involve some restriction of his liberty through the imposition of conditions and/or obligations, and which are implemented by bodies designated in law for that purpose. The term designates any sanction imposed by a court or a judge, and any measure taken before or instead of a decision on a sanction as well as ways of enforcing a sentence of imprisonment outside a prison establishment.*”⁵³

But there is no European Union legislation relating to alternative sanctions.

2.1.11. Enforcement of criminal penalties

Under Article 31(1)(c) of the Union Treaty, “*Common action on judicial cooperation in criminal matters shall include ... ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation*”, which extends to the rules on the enforcement of criminal penalties.

⁴⁹ These are penalties that follow *ipso jure* from the conviction and are therefore applied in conjunction with the primary penalty in certain Member States (e.g. France) without being handed down by the judge.

⁵⁰ 1) Suspension of driving licence; 2) ban on driving certain types of vehicle; 3) cancellation of driving licence; 4) confiscation of one or more vehicles belonging to the offender; 5) immobilisation of one or more vehicles belonging to the offender; 6) ban on possessing or carrying a weapon for which a licence is required for a period of up to five years; 7) confiscation of one or more weapons belonging to the offender or freely available to him; 8) withdrawal of a hunting licence; 9) ban on drawing cheques; 10) confiscation of any object that was used in or intended for use in committing the offence or was the product of the offence; 11) ban on exercising any professional or social activity where the facilities afforded by such an activity were knowingly used to prepare or commit the offence.

⁵¹ “Tagessatzsystem”, Article 40 of the German Criminal Code (StGB).

⁵² Though some Member States class disqualifications as alternative sanctions.

⁵³ See also the list of sanctions and alternative measures in point 1 to Recommendation (2000)22 of the Council of Europe Committee of Ministers on improving the implementation of the European rules on community sanctions and measures adopted on 29 November 2000 and Resolution (76)10 of the Council of Europe Committee of Ministers on certain alternative penal measures to imprisonment, adopted on 9 March 1976.

Although the European Union has powers in relation to the enforcement of criminal penalties, it has not yet been highly active in this field. But some research has been done, with Union support or funding.⁵⁴

2.1.12. *Conclusions*

Union approximation of substantive criminal law has not yet gone far. All areas of crime are not covered, and offences are often defined in minimalist terms or with possibilities for derogations.⁵⁵ And certain forms of potentially criminal conduct have not been defined in the instruments and are perceived differently in the Member States (e.g. attempts, participation, instigation).

It must also be borne in mind that as regards the approximation of penalties the exercise has so far been confined to defining the penalties applicable either as effective, proportionate and dissuasive or in terms of the minimum level of the maximum penalty. Apart from imprisonment, a wide range of penalties is available in the Member States' criminal systems.

Even if the same penalty is defined for the same offence, there are major divergences in the general rules of criminal law on the Member States, so that the penalty imposed and the penalty served may not be the same (for example in the active detection of offences, the principle of mandatory or discretionary prosecution, the level of the sentence imposed and the sentence actually served).

⁵⁴ Examples of projects and measures:

1. European citizens in prison abroad (financed by the GROTIUS – II (Criminal) programme: 2001/GRP/020) sets out, among other things, to establish and support a network of non-governmental organisations representing the needs of European prisoners.
2. Des innovations pour une réinsertion durable des délinquants – modèles de réforme dans les Etats de l'UE (financed by the GROTIUS – II (Criminal) programme: 2002/GRP/019) deals with support for the rehabilitation of offenders on the basis of a systematic comparison of experience in the Member States.
3. HERO (Health and Educational Support for the Rehabilitation of Offenders) is an “e-learning” project of DG Education and Culture. It is a research and technological development project financed by the European Commission under the Information Society Technology (IST) programme. HERO addresses two problems facing most societies: how to improve conditions in prisons, and how to reduce the phenomenon of recidivism and thereby also reduce the growing number of people sent to prison. HERO addresses these problems from two angles. First, by helping prisoners and prison staff take decisions on health and education matters more efficiently and with fuller information. Second, by helping offenders to better prepare for their release and life outside prison.
4. Draft Resolution of the Representatives of the Governments of the Member States meeting in the Council on the treatment of drug abusers in prisons (Doc. 10497/4/02, REV 4, CORDROGUE 54). The Member States are called on to consider ways of introducing or expanding programmes that promote and enhance the health of drug abusers in prisons in a way that does not compromise the general efforts of keeping drugs out of prisons.
5. Study done in 2003 by the Unité Mixte de Recherche de Droit Comparé de Paris, directed by Ms Delmas-Marty, Ms Guidicelli-Delage and Ms Lambert-Abdelgawad on the harmonisation of criminal penalties in Europe.

⁵⁵ For example, the Framework Decision of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment does not cover all means of payment; the proposal for a Framework Decision on attacks against information systems, on which political agreement was reached at the Council (JHA) in February 2003, allows unlawful attacks to be excluded where security measures are not breached.

2.2. Mutual recognition and enforcement of criminal penalties in another Member State

Regarding the mutual recognition and enforcement of criminal penalties in another Member State, the following measures have been or are about to be prepared in the Commission or adopted by the Council:

2.2.1. European arrest warrant

On 13 June 2002 the Council adopted a Framework Decision on the European arrest warrant and the surrender procedures between Member States,⁵⁶ which entered into force on 7 August 2002. It had to be transposed by the Member States by 31 December 2003. The European arrest warrant is the first practical manifestation, in the criminal law field, of the principle of mutual recognition of judicial decisions. Its aim is to ensure that the person concerned is returned to the Member State which sentenced him (Article 1(1)). But the executing Member State may refuse to execute the European arrest warrant where the requested person is staying in, or is a national or a resident of, the executing Member State and that State undertakes to enforce the sentence or detention order in accordance with its domestic law (Article 4(6) of the Decision).

2.2.2. Recognition of financial penalties

In this area, on 8 May 2003 political agreement was reached within the Council on an initiative of the United Kingdom, France and Sweden with a view to the adoption by the Council of a Framework Decision on the application of the principle of mutual recognition to financial penalties.⁵⁷ This initiative corresponds to Conclusion 37 of the Tampere European Council and to Measure 18 in the Programme of measures to implement the principle of mutual recognition, which refers to “*preparation of an instrument enabling the State of residence to levy fines imposed by final decision on a natural or legal person by another Member State*”. The Framework Decision will be applicable to any decision which definitively imposes a financial penalty on a natural or legal person. The decision imposing the financial penalty may be adopted either by a court or by an administrative authority, provided the person concerned has been given the opportunity to have the case heard by a court whose jurisdiction includes criminal matters.

Measure 18 provides that the instrument to be adopted should also include provisions on procedure in the event of non-payment. The current draft, however, contains no such provision. The question arises, therefore, whether it ought not to be supplemented by another instrument.

2.2.3. Recognition of decisions regarding confiscation

In 2001 the Danish Government presented an initiative with a view to the adoption of a Council Framework Decision on the enforcement in the European Union of confiscation orders.⁵⁸ This initiative provides for the mutual recognition of confiscation orders between

⁵⁶ OJ L 190, 18.7.2002, p. 1.

⁵⁷ OJ C 278, 2.10.2001, p. 4.

⁵⁸ OJ C 184, 2.8.2002, p. 8.

Member States and supplements the draft Framework Decision on the execution in the European Union of orders freezing assets or evidence.⁵⁹ It has not yet been adopted by the Council. It implements Measure 19, first indent, in the Programme of measures to implement the principle of mutual recognition of decisions in criminal matters (*“Examine: ... in particular whether the grounds for refusal of enforcement of a confiscation measure in Article 18 of the 1990 Convention are all compatible with the principle of mutual recognition”*),⁶⁰ without, however, covering the aim in the second indent of Measure 19 (*“Examine ... how to improve the recognition and immediate enforcement in one Member State of another Member State’s decision to protect a victim’s interests, where such a decision forms part of a decision imposing a criminal conviction”*), which has still to be achieved.

2.2.4. Recognition of decisions regarding disqualification

As far as the recognition of decisions regarding disqualification is concerned, the Programme of measures to implement the principle of mutual recognition has as its aim *“gradually to extend the effects of disqualifications throughout the European Union: the effectiveness of certain sanctions in the European context depends on their being recognised and enforced throughout the Union”*. With a view to achieving this aim, the Programme provides for the following measures:

Measure 20: *“Compile a list of the decisions regarding disqualification, prohibition and incapacity common to all Member States, handed down when sentencing a natural or legal person or further thereto.”*

Measure 21: *“Carry out a feasibility study to determine how best to ensure, while taking full account of requirements relating to personal freedoms and data protection, that the competent authorities in the European Union are informed of any disqualification, prohibition or incapacity handed down by the courts in a Member State. The study should also consider which of the following would be the best method: (a) to facilitate bilateral information exchanges; (b) to network national criminal records offices; or (c) to establish a genuine European central criminal records office.”*

Measure 22: *“Draw up one or more instruments enabling the listed disqualifications to be enforced in the sentenced person’s Member State of residence and certain disqualifications to be extended to the Union as a whole, at least as regards certain types of offence and disqualification. The question whether a decision to ban a person from entering the territory issued in one Member State should be extended to the entire Union also needs to be dealt with in this context.”*

In 2002 Denmark presented an initiative “with a view to adopting a Council Decision on increasing cooperation between European Union Member States with regard to disqualifications”.⁶¹ This initiative, which is currently before the Council, applies to “disqualifications which are imposed on natural persons as part of a judgment or as a

⁵⁹ In 2001, France, Sweden and Belgium presented an initiative on the execution in the European Union of orders freezing assets or evidence (OJ C 75, 7.3.2001, p. 3) which seeks to render immediately enforceable in a Member State a freezing order issued by another Member State without the enforcing Member State having to issue a fresh order.

⁶⁰ “Aim: To improve enforcement in one Member State of a confiscation order, inter alia for the purpose of restitution to a victim of a criminal offence, issued in another Member State, taking into account the existence of the European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 8 November 1990.”

⁶¹ OJ C 223, 19.9.2002, p. 17.

corollary of a criminal conviction, and which restrict the convicted persons' access to employment, with the exception of driving disqualifications." The draft Decision provides only for the exchange between Member States of information on disqualifications. It does not entail any mutual recognition of disqualifications. It should, however, facilitate future progress in this area in accordance with Measure 22 in the Programme of measures.

Driving disqualifications are covered by the European Union Convention on driving disqualifications of 17 June 1998 (see point 3.2.3.).

2.2.5. Agreements concluded between the Member States of the European Community in the context of European Political Cooperation (EPC)

In connection with the recognition of final judgments in criminal matters, several agreements concluded between the Member States of the European Community in the context of European Political Cooperation (EPC), chiefly to apply or amplify Council of Europe Conventions, need to be borne in mind. The effort made by these agreements between the Member States of the European Community has not been highly fruitful as they have not been ratified by all the Member States and reservations abound. For structural reasons, and to aid comprehension, they will be presented and analysed in the context of the Council of Europe Conventions to which they relate (Chapter 3.2., in particular points 3.2.1.2. and 3.2.1.7.)

2.2.6. Conclusions

Despite the adoption of the Framework Decision on the European arrest warrant and surrender procedures between the Member States, which constitutes major progress in mutual recognition, and even if there is reason to hope that drafts now under discussion or in preparation on the recognition of financial penalties and confiscation and disqualification decisions will be adopted in the near future, the fact remains that the range of mutual recognition instruments in the European Union is still somewhat incomplete. In particular, there are virtually no rules on the mutual recognition of custodial penalties and their enforcement in another Member State.

3. CURRENT SITUATION: NATIONAL LEGISLATION AND INTERNATIONAL AGREEMENTS

3.1. Great diversity between the Member States

The legislation of the Member States on penalties varies widely. The Commission does not intend to offer an exhaustive survey in this Green Paper but feels it would be useful to give a general overview.

3.1.1. General rules of criminal law⁶²

3.1.1.1. Principles governing prosecution – mandatory or discretionary

The Member States' criminal systems are divided on the issue of mandatory or discretionary prosecution. The discretionary principle is applied in Belgium, France, Denmark, Ireland, the United Kingdom, Luxembourg and the Netherlands. In Germany, Austria, Spain, Finland, Sweden, Greece, Italy and Portugal the mandatory prosecution principle applies.

The mandatory prosecution principle is that the prosecution authorities must act – even if no complaint has been lodged – where they suspect that an offence has been committed. The discretionary prosecution principle is that the decision whether to prosecute is at the discretion of the prosecution service.

In practice, however, all legal systems combine elements of the two principles. Certain questions arise in both systems, for example the question of the evidence needed to commence a prosecution. Those that apply the mandatory prosecution principle apply discretionary criteria in certain circumstances, for example with the possibility of conditional discharge, and those applying discretionary criteria allow, for example, instructions from Prosecutors General or criminal policy guidelines from the Ministry of Justice and require reasons to be given for discharge decisions and/or appeal procedures to be available.

In the United Kingdom, for example, there are two rules: the reasonable prospect of a conviction – which is more and more widely used in countries that apply the mandatory prosecution principle – and the public interest. But in systems where the mandatory prosecution principle applies there are criteria for giving priority to certain cases and not prosecuting minor offences.

3.1.1.2. The room for manoeuvre of the criminal courts

Even if the ambition is to establish an area of freedom, security and justice in which the same offence incurs an equivalent penalty everywhere, it is clear that we have to operate with bodies of legislation that provide sets of equations but that the practical outcome will always depend on an unknown factor – the decision of a court that in every case has a discretionary power when it comes to sentencing.

But the first limit on the court's freedom at the sentencing stage flows from the basic principle that penalties must be provided for by law, so that where it holds that an offence has been

⁶² The information in document 12432/01 DROIPEN 83 and in the study on Harmonisation of criminal penalties in Europe (see footnote 10) was used in preparing this Chapter.

committed it must pass a sentence provided for by the law for that offence. This in turn flows from the principle of legal certainty, whereby the penalty incurred for an offence must be specified by law.

The presence of aggravating and mitigating circumstances, considered below, to some extent also limits the court's freedom, as can the possibility, for example, of lowering the penalty or exempting from it.

3.1.1.3. Level of participation: aiding and abetting.

Aiding or abetting and being an accomplice are the commonest form of participation. The accomplice is defined as a person who participated in one way or another in the commission of the offence. In general, being an accomplice requires there to be two elements: a punishable principal offence and an act of aiding and abetting involving an objective component (for example aid or assistance) and a mental state (intention to participate in the offence).

By and large a distinction can be made between two models regarding penalties for participation in offences. In some Member States (for example, France, Italy, Portugal, Austria, Denmark and Ireland), any person involved in the commission of the offence can be punished as for the principal offence, regardless of level of involvement. But the court can take account of the level of participation for sentencing purposes. In other Member States (for example, Germany, Spain, Belgium, Luxembourg, Netherlands, Finland and Greece), the law makes a distinction when sentencing the principal offender and accomplices. Joint offenders and instigators are generally punished in the same way as the principal offender.

3.1.1.4. Level of completion: attempts

It can happen that the result of an offence is not achieved although acts directed towards it have been done. The absence of a result can have one of two causes: acts were commenced but suspended, or the act was completed but the result was lacking, or both.

There are generally possibilities of lower penalties for attempts than for the completed offence, either because the court has a discretion (Austria, Germany, Denmark, France and Ireland) or because there is express statutory provision (Belgium, Spain, Finland, Greece, Italy, Luxembourg, Netherlands, Portugal and United Kingdom).

In these cases the lower penalty is often calculated by reference to the penalty for the completed offence, so that if these penalties differ widely, the penalties for attempts will differ likewise.

3.1.1.5. Aggravating and mitigating circumstances

Aggravating circumstances as regards criminal liability can be general – applicable to offences generally – or specific – applicable to specific offences. For sentencing purposes, some Member States allow the courts to pass a heavier sentence in the presence of

aggravating circumstances,⁶³ whereas others do not allow the ordinary maximum to be exceeded.⁶⁴

Regarding mitigating circumstances, all the Member States' criminal systems allow the courts to reduce the statutory penalty for a specific offence on the basis of mitigating or exonerating circumstances provided for by the law. But in systems where there are no minimum penalties, such as France, the mitigating circumstances mechanism is broadly useless. As in the case of aggravating circumstances, the systems of some Member States provide for a general list of mitigating circumstances – Spain is an example – whereas others do not provide for a list and the court weighs up the facts that might be taken to constitute mitigating circumstances – for example Belgium.

3.1.1.6. A special case – recidivism

Regarding the offender's background, recidivism can be taken into account for sentencing purposes (for example in Italy, Belgium and Austria) or as an aggravating circumstance (for example in Finland, Denmark and Spain). As regards the level of the penalty, as in the case of aggravating circumstances, some Member States provide for a penalty in excess of the standard maximum – Austria, Belgium, France, Italy, Luxembourg, Sweden and Portugal – whereas others do not allow the statutory maximum penalty to be exceeded – for example, Finland, Ireland and Spain.

It should be noted here that the Council Framework Decision of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro⁶⁵ requires each Member State to recognise the principle of the recognition of previous convictions under the conditions prevailing under its domestic law and, under those same conditions, shall recognise for the purpose of establishing habitual criminality final sentences handed down in another Member State for the offences referred to in the Framework Decision.

3.1.1.7. Concurrent offences

“Concurrent offences” means a situation where the same offender commits several offences simultaneously or successively before being finally convicted for one of them. The absence of previous convictions distinguishes this from the recidivism. Several systems – for example in Belgium – distinguish between cases where the same offender commits several separate acts punishable under the criminal law and cases where one and the same act is an offence against several different statutory provisions.

Where a person is prosecuted for related or unrelated offences in several Member States, proceedings could be transferred to a single Member State to facilitate the prosecution. Article 8(1)(d) of the European Convention on the Transfer of Proceedings in Criminal Matters 1972⁶⁶ provides that a Contracting State may request another Contracting State to take proceedings if proceedings for the same or other offences are being taken against the suspected person in the requested State. Article 32 of the Convention provides that States concerned shall examine whether it is expedient that one of them alone shall conduct proceedings.

⁶³ For example, in Greece, Italy and Portugal.

⁶⁴ For example, in Spain, Ireland and Sweden.

⁶⁵ OJ L329, 14.12.2001, p.3.

⁶⁶ Council of Europe, European Treaties No 73. Opened for signature on 15 May 1972, entered into force on 30 March 1978. Accessible at <http://conventions.coe.int/>.

The 1972 Convention provides that a Contracting State which, before the institution or in the course of proceedings is aware of proceedings pending in another Contracting State against the same person in respect of the same offence shall consider whether it can either waive or suspend its own proceedings, or transfer them to the other State. If it deems it advisable in the circumstances not to waive or suspend its own proceedings it shall so notify the other State in good time and in any event before judgment is given on the merits. In that eventuality, the States concerned shall endeavour as far as possible to determine which of them alone shall continue to conduct proceedings. But only five Member States⁶⁷ have ratified the 1972 Convention and five have not even signed it.

In a situation in which an offender commits offences against several different statutory provisions, the question of *ne bis in idem* arises, a fundamental principle of criminal law whereby nobody can be prosecuted or convicted twice for the same act,⁶⁸ as does the *lis pendens* principle whereby a prosecution cannot be brought for an offence if proceedings are already in motion for it.

3.1.2. Custodial penalties

While it has become conventional for sectoral instruments approximating substantive criminal law to set minimum levels for maximum penalties in the Union, there are no **common maximum penalties**, and there are major differences here. The criminal systems of some Member States, such as Belgium, Greece, the United Kingdom, France and Italy, provide for life imprisonment. Others such as Spain and Portugal do not.

In general, in those Member States where there is provision for life imprisonment, there is the possibility of conditional release after a specified minimum period has been served, but that period varies very widely (from 10 years in Belgium to 15 in Germany and 20 in Ireland). In France, a minimum period of up to 30 years can be ordered.

Life imprisonment being a sentence reserved for very serious crimes, the maximum prison sentences for non-life offences also vary from one Member State to another. This ranges from 15 years in Germany to 20 in Austria and 30 in Belgium. Likewise, early release is possible after one third of the sentence has been served in Belgium, two thirds in Denmark and Germany and three quarters in Spain. These periods are usually lengthened in the case of recidivists.

As for the various modes of enforcement of custodial penalties, and before going on to consider whether there are grounds for Union action here, see the more detailed presentation in **Annex I**. That annex deals with suspended sentences, suspended or deferred sentencing, day-release, sentences served in instalments, electronic surveillance and home detention.

On the basis of the inventory and comparative analysis of the Member States' legislation on the various modes of enforcement of custodial penalties, it can be seen that most Member States have a relatively large variety of modes of enforcement allowing a gradual transition from prison to freedom. The approach generally flows from the desire to make use of forms of punishment that are more appropriate than firm imprisonment as a means of supporting the offender's reintegration into society and from problems linked to overcrowding in prisons.⁶⁹

⁶⁷ Austria, Denmark, Netherlands, Spain and Sweden.

⁶⁸ That is to say for the same facts as in the initial decision – same date, place and specific effects.

⁶⁹ In several Member States, the problem of prison overcrowding is a topic of intense public debate, for example in Belgium (see article in *Le Vif/L'Express* of 9.5.2003, p. 26), in France (see articles in *Le Monde*, 12.4. and 30.4.2003) and in Portugal (see article in *Grande Reportagem*, April 2003, p. 78).

The most widespread form is the suspended sentence, available in almost all the Member States. Electronic surveillance is applied in six Member States and is under test or consideration in a further five. All the other instruments (suspended or deferred sentencing, day-release, sentences served in instalments and home detention) are known and applied only in a minority of Member States.

3.1.3. Financial penalties

Certain Member States (such as Denmark, Spain, Portugal and Germany) apply the daily fine system, whereas others (Belgium, Luxembourg, the Netherlands, the United Kingdom and Italy) follow the traditional fixed-amount system. In some countries the two systems coexist (France, Greece, Sweden and Finland).

In the daily fine system, fines are usually determined by the national courts by the following procedure. First, the court decides the term of imprisonment that would be ordered if a prison sentence was in order. Then it determines the amount to be paid in place of each day of that period. The period set by the Member States' legislation generally begins at five days, or possibly less (in France, Finland, Greece, Spain and Germany), though in Sweden it begins at 30 days. The maximum number of days that the courts can impose varies from 150 in Sweden to 730 in Spain. The minimum amounts that the court sets per day vary between 1 euro and 10 euros, though there is a much greater variation in the maximum amounts, between 60 euros in Greece, 300 euros in Spain and 360 euros in France, all the way up to 5000 euros in Germany.

In the traditional fixed-amount system, minimum and maximum amounts reflecting the seriousness of the offence are usually provided for. Between the two extremes, the court commonly has a considerable discretion to set the fine.

In jurisdictions where the traditional fixed-amount system coexists with the daily fine system, the sentencing rules are more complicated and vary from country to country. In Finland, for example, the daily fine system is applied but for certain specific offences the fixed-amount system is used, whereas in France, the system applied depends on the status of the offence.

Whatever the fine system, the legislation or the cases in most Member States require the sentencing court to have regard to the circumstances of the case and/or the offender's financial situation.

Finally, whatever the fine system, the national legislation usually explicitly requires the sentencing court to order imprisonment as an alternative, subsidiary penalty for failure to pay the fine (Germany, Belgium, France, Netherlands, Luxembourg and Portugal).

3.1.4. Disqualification

There is a whole range of disqualification penalties or measures in the Member States' legal systems, from bans on driving certain categories of vehicles for a specified period to prohibition on entering the country or on exercising an occupation.

Driving disqualifications exist in all Member States. But certain disqualifications in relation to specific occupations (company director, armed service) or to being in specific places (football stadiums, licensed premises) do not.

There are also a series of disqualifications in the sense of deprivation of civic and civil rights ordered as secondary measures accompanying another penalty – usually imprisonment for a

certain duration. Such measures relate to the right to vote or stand for election or prohibitions on exercising certain public functions.

3.1.5. *Confiscations*

Confiscation is usually specific (in Germany, Belgium, Denmark, Luxembourg, the Netherlands, Italy or the United Kingdom), applying to articles used in the commission of an offence and to assets derived directly from the offence or assets substituted for them and even to the income from these assets once invested. If these articles cannot be traced in the offender's assets, the court will evaluate them in money's worth and confiscate an equivalent sum (Belgium, Denmark, Luxembourg and France).

All the Member States have ratified the Council of Europe Convention of 8 November 1990 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.⁷⁰ But some of them have made declarations under Article 2⁷¹ on confiscation that they will confiscate only the proceeds of specified offences. Information gathered by the Commission for the forthcoming report on the implementation of the Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime⁷² shows that a large majority of Member States comply with Article 1(a) of the decision, which prohibits reservations regarding Article 2 of the Convention. But some of them will have to review their reservations in line with the Framework Decision.

Clearly, then, there are still divergences in the possibilities for confiscation in the Member States, and some of the States are still not in a position to confiscate the proceeds of all offences that can give rise to prison sentences of more than a year.

3.1.6. *Sanctions for legal persons*

There are considerable differences between the Member States as regards sanctions for legal persons. Some provide for liability – sometimes specifically criminal liability – for legal persons, as in France, Ireland, the United Kingdom, Belgium and the Netherlands. But this is not the case of, for instance, Greece, Germany, Luxembourg or Italy. There is much debate about the criminal liability of legal persons. Those who oppose the idea argue that a legal person cannot have a mind of its own and cannot therefore have a criminal intent (*societas delinquere non potest*). Those who support the idea see things in a very different light. They regard legal persons as more than mere legal fictions. They exist, they hold a predominant place in our society and must be liable for the offences they commit.

In the United Kingdom cases, for example, the liability of legal persons is based on the doctrine of identification. This states that there is a degree of identity between the legal person and the persons who direct it – the managers or directors whose functions in the firm are such that they receive no orders or instructions from anybody hierarchically superior to them. Where an offence is committed by a person or a group of persons identified with the

⁷⁰ Accessible at: <http://conventions.coe.int>.

⁷¹ Article 2 – “*Confiscation measures: (1) Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities and proceeds or property the value of which corresponds to such proceeds. (2) Each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that paragraph 1 of this article applies only to offences or categories of offences specified in such declaration.*”

⁷² OJ L 182, 5.7.2001, p. 1.

organisation, it is therefore an offence by the legal person. But despite their differences from the common law systems, other Member States, France among them, provide for the criminal liability of legal persons.

3.1.7. Alternative sanctions

Non-custodial penalties and measures offer a more creative and humane way of dealing with the issue of crime and punishment. In particular, they limit the use of short prison terms, which most specialists agree are harmful. The involvement of the community (in many cases the local community) is a necessary and unique feature of the application of alternative sanctions.

Alternative sanctions therefore play an important role in crime prevention because they are much better than custodial sentences at promoting the successful rehabilitation of offenders. According to Article 29 (2) of the Union Treaty, the European Union's objective of providing citizens with a high level of safety within an area of freedom, security and justice will be achieved by preventing crime. The rehabilitation of offenders contributes directly to the prevention of re-offending.

On the basis of the inventory and comparative analysis of the Member States' legislation on alternative sanctions (**Annex II**), it can be seen that most Member States have introduced alternative sanctions in recent years or are in the process of doing so. The approach generally flows from the desire to make use of forms of punishment that are more appropriate than firm imprisonment as a means of supporting the offender's reintegration into society and from problems linked to overcrowding in prisons. In some Member States there have been difficulties in securing acceptance of alternative sanctions by the courts. And national legislation tends to focus on specific forms of alternative penalty – community service and mediation.

3.1.8. Enforcement of criminal penalties

To ascertain the situation in the Member States, it is necessary to undertake an inventory and comparative analysis of the Member States' legislation on the enforcement of criminal penalties. **Annex III**, without claiming to be exhaustive, presents the Member States' legislation on suspended sentences, day-release, early release, remission, amnesty and pardon.

Annex III shows that the differences between the Member States' legislation on the enforcement of criminal penalties are also considerable.

Suspended enforcement of a penalty is possible in only a minority of Member States, such as France and Italy. Only a few Member States have the option of day-release (Germany, Belgium, Spain, France, Italy, Portugal) while the sentence is served. The eligibility conditions, the implementing rules and the consequences of violation of the conditions imposed vary widely. Early release is possible in all Member States, but the eligibility conditions and implementing rules again vary widely. The possibility of more or less automatic remission exists in only a small number of Member States (France and Greece). The Member States' legislation on amnesty and pardon diverge widely, usually leaving the public authorities with extensive powers of discretion.

These differences are neatly illustrated by the numbers of prisoners (in absolute terms or per 100 000 inhabitants) in the Member States, though the differences do not reflect only the differences as regards the enforcement of penalties but also as regards the full set of factors in

criminal law that influence the penalty. On 1 August 2003 the Commission sent the current and future Member States a questionnaire on the prison population. It has not yet received all the replies, but there is a geographical breakdown as follows: traditionally, there is a moderate approach in the Scandinavian countries (between 50 and 70 prisoners per 100 000 inhabitants), a group of Member States with a rate below 100 prisoners (Germany, Austria, Belgium, France, Italy, Greece, Luxembourg, Netherlands) and a group with a rate of between 100 and 150 prisoners per 100 000 inhabitants (Spain, Great Britain, Portugal and a few new Member States). Since some of the new Member States have rates of more than 350 prisoners per 100 000 inhabitants, it can be seen that the prison population is proportionately six times higher than in the Scandinavian countries.

3.2. An incomplete range of mutual recognition instruments

3.2.1. *Mutual recognition of custodial penalties.*

A series of Council of Europe Conventions, amplified by instruments agreed in European Political Cooperation (EPC) are relevant here. The main purpose of the EPC Conventions is to facilitate the application of the Council of Europe Conventions and to reinforce judicial cooperation in criminal matters between the Member States. There are also a number of regional conventions between, for instance, the Nordic countries.

3.2.1.1. European Convention of the Council of Europe of 28 May 1970 on the International Validity of Criminal Judgments

The European Convention of the Council of Europe on the International Validity of Criminal Judgments,⁷³ which was concluded on 28 May 1970, has been ratified by 15 of the Council of Europe's 45 members. It entered into force on 26 July 1974. Eleven Member States of the Union have signed⁷⁴ the Convention, and five have ratified it.⁷⁵ Numerous reservations have been entered by most of the contracting parties with respect to the Convention's implementation. The Convention applies to sentences involving deprivation of liberty.

According to the Convention, the sentencing State may request another Contracting State to enforce a sentence only if one or more of the conditions set out in Article 5 are fulfilled, namely: (a) if the sentenced person is ordinarily resident in the other State; (b) if the enforcement of the sentence in the other State is likely to improve the prospects for the social rehabilitation of the sentenced person; (c) if, in the case of a sentence involving deprivation of liberty, the sentence could be enforced following the enforcement of another sentence involving deprivation of liberty which the sentenced person is undergoing or is to undergo in the other State; (d) if the other State is the State of origin of the sentenced person and has declared itself willing to accept responsibility for the enforcement of that sentence; or (e) if it considers that it cannot itself enforce the sentence, even by having recourse to extradition, and that the other State can. In addition, the judgment handed down in the requesting State must be final and enforceable and the offence in respect of which the sentence has been passed must also constitute an offence under the law of the requested State ("double criminality" requirement⁷⁶).

Enforcement requested may be refused, in whole or in part, only in one of the cases listed in Article 6.⁷⁷

⁷³ Accessible at <http://conventions.coe.int/>.

⁷⁴ Austria, Belgium, Denmark, Germany, Spain, Italy, Luxembourg, Netherlands, Portugal and Sweden.

⁷⁵ Austria, Denmark, Spain, Netherlands and Sweden.

⁷⁶ The double criminality requirement has, on the other hand, not been included in the following agreements: the cooperation agreement of 23 March 1962 between Denmark, Finland, Iceland, Norway and Sweden (known as the "Helsinki" agreement), the judicial cooperation agreement concluded in 1983 at Riyadh between certain Arab States and the 1986 Commonwealth Scheme for the Transfer of Offenders.

⁷⁷ Grounds for refusal: (a) where enforcement would run counter to the fundamental principles of the legal system of the requested State; (b) where the requested State considers the offence for which the sentence was passed to be of a political nature or a purely military one; (c) where the requested State considers that there are substantial grounds for believing that the sentence was brought about or

A sentence pronounced in the requesting State may not be enforced in the requested State except by a decision of a court in that State (Article 37). Before a court takes a decision upon a request for enforcement, the sentenced person must be given the opportunity to state his views (Article 39). The judicial decisions taken in the requested State with respect to the requested enforcement and those taken on appeal from decisions by the administrative authority referred to in Article 37 must be appealable (Article 41). The requested State is bound by the findings as to the facts in so far as they are stated in the decision or in so far as it is impliedly based on them (Article 42).

If the request for enforcement is accepted, the court will substitute for the sentence involving deprivation of liberty imposed in the requesting State a sentence prescribed by its own law for the same offence (Article 44). This sentence may, subject to the limitations mentioned below, be of a nature or duration other than that imposed in the requesting State. If this latter sentence is less than the minimum which may be pronounced under the law of the requested State, the court will not be bound by that minimum and will impose a sentence corresponding to the sentence imposed in the requesting State. In determining the sentence, the court may not aggravate the penal situation of the sentenced person as it results from the decision delivered in the requesting State.

Under the Convention, enforcement is governed by the law of the requested State and that State alone is competent to take all appropriate decisions, such as those concerning conditional release. The requesting State alone has the right to decide on any application for review of sentence. Either State may exercise the right of amnesty or pardon.

3.2.1.2. Convention of 13 November 1991 between the Member States of the European Communities on the enforcement of foreign criminal sentences

On 13 November 1991 eight Member States⁷⁸ of the European Communities signed a Convention on the enforcement of foreign criminal sentences.⁷⁹ Since it has never been ratified by any of the Member States, the Convention has never entered into force. In relations between Member States which are parties to the European Convention of the Council of Europe on the International Validity of Criminal Judgments of 28 May 1970, the 1991 Convention was to apply to the extent that it supplements the provisions of that Convention or facilitates the application of the principles contained therein (Article 20).

Pursuant to Article 2 of the Convention, Member States of the European Communities undertake to accord each other the widest possible cooperation with regard to the transfer of

aggravated by considerations of race, religion, nationality or political opinion; (d) where enforcement would be contrary to the international undertakings of the requested State; (e) where the act is already the subject of proceedings in the requested State or where the requested State decides to institute proceedings in respect of the act; (f) where the competent authorities in the requested State have decided not to take proceedings or to drop proceedings already begun, in respect of the same act; (g) where the act was committed outside the territory of the requesting State; (h) where the requested State is unable to enforce the sentence; (i) where the request is grounded on Article 5.e (“if it considers that it cannot itself enforce the sanction, even by having recourse to extradition, and that the other State can”) and none of the other conditions mentioned in that article is fulfilled; (j) where the requested State considers that the requesting State is itself able to enforce the sentence; (k) where the age of the sentenced person at the time of the offence was such that he could not have been prosecuted in the requested State; (l) where under the law of the requested State the sentence imposed can no longer be enforced because of the lapse of time; (m) where and to the extent that the sentence imposes a disqualification.

⁷⁸ Belgium, Denmark, Germany, Greece, Spain, France, Italy and Luxembourg.

⁷⁹ Accessible at <http://ue.eu.int/ejn/>.

enforcement of sentences (custodial or financial penalties). The transfer of enforcement may be requested either by the sentencing State or by the administering State. Each Member State may state in a declaration those offences which it intends to exclude from the scope of the Convention. The other Member States may apply the rule of reciprocity (Article 1).

The transfer of enforcement of a sentence involving deprivation of liberty may be requested where (a) the sentenced person is in the territory of the administering State and is a national of that State or is permanently resident in its territory; or (b) the sentenced person is in the territory of the administering State and his extradition has been refused, would be refused if requested, or is not possible; or (c) the sentenced person is in the territory of the administering State and is serving or is to serve a custodial sentence there (Article 3).

The transfer of enforcement of a sentence needs the agreement of the sentencing State and the administering State and may take place only if it satisfies all the conditions set out in Article 5 of the Convention, namely: (a) the judgment is final and enforceable; (b) the acts or omissions on account of which the sentence has been imposed constitute one of the offences referred to in Article 1(1)(a) according to the law of the administering State or would constitute such an offence if committed in its territory (“dual criminality”); (c) under the laws of the sentencing State or the administering State, the enforcement is not barred by time limitations; (d) final judgment against the sentenced person in respect of the same acts has not been delivered in the administering State; and (e) when a final judgment against the sentenced person in respect of the same acts has been delivered in a third State, the transfer of enforcement would not run counter to the principle of prohibiting double jeopardy.

It should be noted that, unlike Article 39 of the 1970 Council of Europe Convention, the 1991 Convention between the Member States of the European Communities does not provide that the sentenced person must be heard on the question as to where the sentence will be served.

Where the transfer of enforcement of a custodial penalty is accepted, the competent authorities in the administering State must either enforce the penalty imposed in the sentencing State - immediately or through an order – or through a judicial or administrative procedure convert the sentence into a decision of the administering State, thereby substituting the penalty imposed in the sentencing State by a penalty laid down by the law of the administering State for the same offence (Article 8).

The administering State must, if so requested, inform the sentencing State which of these two procedures it will follow. Any Member State may, however, indicate by declaration that it intends to exclude the application of one of the procedures.

If the administering State adopts the first procedure (enforcement of the penalty imposed in the sentencing State), it will be bound by the legal nature and duration of the penalty as determined in the sentencing State. If, however, that penalty is by its nature or duration incompatible with the law of the administering State, or if its law so requires, the administering State may, by a court or administrative order, adapt the penalty to a penalty laid down by its own law for a comparable offence. As to its nature the penalty must, as far as possible, correspond to the penalty imposed by the sentence to be enforced. It may not aggravate by its nature or duration the penalty imposed in the sentencing State, nor exceed the maximum penalty laid down by the law of the administering State for the same offence (Article 8(4)).

If the administering State adopts the procedure of conversion of the penalty, that State (a) will be bound by the findings as to the facts in so far as they appear explicitly or implicitly in the

judgment handed down in the sentencing State; (b) may, unless it has made a declaration to the contrary, convert a custodial penalty into a financial penalty if the penalty is less than or equal to a period of six months; and (c) may not aggravate the penal position of the sentenced person and will not be bound by any minimum penalty which its own law may provide for the offence or offences committed (Article 8(5)).

The sentencing State may not proceed with enforcement of the sentence once it has agreed with the administering State to transfer enforcement. However, if the sentenced person absconds, the right of enforcement will revert to the sentencing State, except where otherwise agreed between that State and the administering State (Article 17).

3.2.1.3. The Treaty of 26 September 1968 between Belgium, the Netherlands and Luxembourg on the enforcement of judgments in criminal matters

This Treaty⁸⁰ concerns the enforcement of judgments in criminal matters between the Benelux countries. It is applicable to judgments sentencing the convicted person to a custodial penalty or measure, a fine, a confiscation or a disqualification and judgments ruling solely on the question of guilt.⁸¹

The Treaty provides that a sentence passed in a Contracting State may be enforced in another Contracting State only if the conduct is an offence also in the second Contracting State or is on a list produced in accordance with the Treaty.⁸²

But the Treaty allows the possibility of refusing enforcement where the offence is a political or military offence or is being prosecuted in the requested State or where the requested State decides to prosecute it itself. The requested State may also refuse enforcement if enforcement would be contrary to its international commitments or the fundamental principles of its legal order, if the offence was committed outside the territory of the requesting State or enforcement concerns a disqualification order.⁸³ The relevant authority of the requesting State must certify that the judgment is enforceable.⁸⁴ The enforcement of sentences passed in absentia is basically subject to the same rules as normal sentences.⁸⁵

It is also provided that where there is an arrest warrant or any other form of detention order in the requesting State and the requesting State asks for the sentence to be enforced, the requested State may immediately arrest the offender. In urgent cases, the requested State may make the arrest before the documents that ought to accompany the request for enforcement have been received.⁸⁶

The possibility of temporary transit for the arrestee is provided for,⁸⁷ as is the seizure of certain articles with a view to subsequent confiscation if, under the Treaty, confiscation can

⁸⁰ The Benelux Treaty of 1968 never entered into force; see C. VAN DEN WYNGAERT, *Strafrecht en strafprocesrecht in hoofdlijnen*, Maklu, Antwerpen, 1998, at p. 1010.

⁸¹ Article 2.

⁸² Articles 3 and 57.

⁸³ Article 5.

⁸⁴ *Idem*.

⁸⁵ Article 17.

⁸⁶ Article 30.

⁸⁷ Articles 32 and 33.

also be enforced in the requested State.⁸⁸ The Treaty also determines when and in what circumstances the offender may serve his sentence in the requesting State.

The requested State may enforce fines and confiscation orders only on the basis of a decision by the Prosecution Service in the requested State, which must check the authenticity and enforceability of the request.⁸⁹ It also checks whether the Treaty's requirements have been met and is responsible for enforcing technicalities. The decision by the Prosecution Service can be challenged in the relevant courts in the requested State.

A Contracting State may enforce a disqualification order in another Contracting State only on the basis of an order from a court in the first Contracting State. It is explicitly provided that the disqualification can have effect in a State other than the one in which it was ordered only if the legislation there provides for disqualification for the same offence or for a corresponding offence on the list provided for by the Treaty.⁹⁰

3.2.1.4. The model for cooperation between the Nordic States

The Nordic States (Denmark, Finland, Iceland, Norway and Sweden) have a long tradition of cooperation in criminal matters. It is based on their geographical proximity, their historical, cultural and language ties⁹¹ and their shared political and economic interests. The instruments of this cooperation were preceded by periods of intense public debate to produce common solutions and harmonise national legislation.

The first instrument is the Convention of 8 March 1948 between Norway, Denmark and Sweden concerning the recognition and enforcement of judgments in criminal matters. This Convention provided that final judgments given in one signatory State were enforceable in another. But its scope was confined to fines, confiscations and court costs. It was followed on 23 March 1962 by a Cooperation Agreement between Denmark, Finland, Iceland, Norway and Sweden, the "Helsinki Agreement". The signatory States were required to adopt – and have adopted – identical or at least similar rules allowing the authorities of one signatory State to recognise and enforce judgments by authorities in the other signatory States and to transfer prisoners to that end. The mutual trust that typifies cooperation between the Nordic States in criminal matters is founded on the existence of identical or similar rules and regulations in all of them.

The transfer of prisoners between Nordic States is based on humanitarian and penal policy considerations. The purpose of the cooperation is, among other things, to promote the rehabilitation and reintegration of the sentenced person. The argument is – quite rightly – that it is easier to prepare the prisoner for a future life of freedom if enforcement takes place in the State where he plans to live. This approach would also facilitate contacts with potential employers and other organisations, which will help to reduce the risk of recidivism.

As regards the enforcement of custodial penalties, the State of enforcement is bound by the number of days' imprisonment set by the decision in the sentencing State. After intensive debate, the possibility of reducing or adapting the level of sentences to those in the State of enforcement was felt to be inadequate. The dual criminality principle was not adopted. The transfer of prisoners does not depend on the prisoner's consent. But his views must be

⁸⁸ Article 33.

⁸⁹ Article 42.

⁹⁰ Articles 50 et 57.

⁹¹ With the exception of Finnish.

obtained before a decision is taken, and his opinion is generally respected. He is further protected by the principle of speciality, whereby the State of enforcement can enforce only the sentence for which the transfer was made. To facilitate the procedure in practice, decisions to transfer prisoners from one State to another are taken by the central prisons administration of the State of enforcement. In Sweden, for example, the central prisons administration is empowered to present requests for the transfer of prisoners to another State and to decide on requests received from other States. Although enforcement is governed by the law of the State of enforcement, the Nordic States have agreed that the State of enforcement may not grant a pardon without first consulting the authorities of the sentencing State.

3.2.1.5. Council of Europe Convention on the Transfer of Sentenced Persons of 21 March 1983

The Council of Europe Convention on the Transfer of Sentenced Persons was concluded on 21 March 1983⁹² and has been ratified by 52 States.⁹³ It entered into force on 1 July 1985. All the European Union Member States have signed and ratified it. Large numbers of reservations have been entered by most of the Member States regarding the application of certain parts of the Convention.

The chief purpose of the Convention is to promote the social rehabilitation of persons sentenced to custodial sentences or measures by allowing foreigners who are deprived of their liberty as a result of their commission of a criminal offence to be given the opportunity to serve their sentences within their own original communities. It is inspired by humanitarian considerations, since it proceeds from an observation that communication difficulties on account of language, social and cultural barriers and the absence of family contact can have deleterious effects on the conduct of foreign prisoners and make it difficult or even impossible to achieve their social rehabilitation.

Under the procedure of Article 2(3) of the Convention, a transfer may be requested both by the sentencing State and by the enforcement (administering) State. The Convention neither generates an obligation for States to transfer sentenced persons nor a right for such persons to be transferred. States have a fairly extensive discretionary power.

A transfer may be made under the Convention only on the following conditions (Article 3): a) if that person is a national of the administering State; b) if the judgment is final; c) if, at the time of receipt of the request for transfer, the sentenced person still has at least six months of the sentence to serve or if the sentence is indeterminate; d) if the transfer is consented to by the sentenced person or, where in view of his age or his physical or mental condition one of the two States considers it necessary, by the sentenced person's legal representative; e) if the acts or omissions on account of which the sentence has been imposed constitute a criminal offence according to the law of the administering State or would constitute a criminal offence if committed on its territory; and f) if the sentencing and administering States agree to the transfer.

As is the case in the Convention between the Member States of the European Communities on the enforcement of foreign criminal sentences of 13 November 1991, the State of enforcement has two options as to the manner of enforcement: the relevant authorities of the State of enforcement must either proceed to immediate enforcement of the sentence or convert the sentence, through a judicial or administrative procedure, into a decision of that State, thereby

⁹² Accessible at <http://conventions.coe.int/>.

⁹³ Some of which are not members of the Council of Europe.

substituting for the penalty imposed in the sentencing State a penalty prescribed by the law of the administering State for the same offence (Article 9). Enforcement is governed by the law of the State of enforcement, and that State has the sole power to take the appropriate decisions.

The procedure for continued enforcement under Article 10 of the 1983 Convention is identical to the procedure of the 1991 Convention (see above). If the nature or duration of the penalty is incompatible with the law of the administering State, or its law so requires, that State may, by a court or administrative order, adapt the penalty to the punishment or measure prescribed by its own law for a similar offence.

In the event of conversion of the sentence (Article 11), the procedure provided for by the legislation of the State of enforcement applies. At the time of conversion, the relevant authority: a) shall be bound by the findings as to the facts insofar as they appear explicitly or implicitly from the judgment imposed in the sentencing State; b) may not convert a custodial sentence to a financial sentence; c) shall deduct the full period of deprivation of liberty served by the sentenced person; and d) shall not aggravate the penal position of the sentenced person, and shall not be bound by any minimum which the law of the administering State may provide for the offence or offences committed. Conditions b) and c) differ from those established in Article 8(5) of the 1991 Convention: that Convention allows conversion of a custodial sentence to a financial sentence, unless expressly stated to the contrary; condition c) has no equivalent in the 1991 Convention.

For the sentencing State, the effect of the sentenced person being taken over by the authorities of the State of enforcement is to suspend enforcement of the sentence. The sentencing State can no longer enforce the sentence if the State of enforcement considers the enforcement of the sentence to be complete (Article 8).

The application of the Convention has been complicated by divergent interpretations of the nationality criterion, the situation of detainees suffering from mental disorders and the treatment of unpaid fines, failure to comply with time-limits for the treatment of transfer requests and differences between the criminal systems of the States concerned.

a. The nationality criterion: the Convention provides that a sentenced person seeking to obtain a transfer must be a national of the State of enforcement (Article 3). But this provision must be read in conjunction with Article 3(4), whereby any State may by a declaration define, as far as it is concerned, the term “national” for the purposes of this Convention. It can therefore extend the application of the Convention to persons other than “nationals”, such as nationals of other States who are permanent residents. Unfortunately, the Member States’ interpretation is not uniform. The Council of Europe, in Recommendation (88) 13, consequently suggested that Member States define the term “national” in a broad sense. It felt that habitual residence should be the principal criterion.

b. The situation of detainees suffering from mental disorders: they are not necessarily sentenced in the usual sense of the term following conviction. Under the Member States’ legislation, their liability is reduced or negated and they are therefore sentenced to a period of internment for an indefinite period or else dispensed from appearing in court but interned in a special establishment because of the danger they represent for the general public. Certain Member States consider that the Convention is not applicable to this category of detainees. To remedy the difficulty of interpretation, the Council of Europe is planning a new recommendation to the effect that the Convention should apply to detainees suffering from mental disorders.

c. Certain Member States (e.g. the United Kingdom and France) allow fines and prison sentences to be imposed for the same offence. In such cases, it is quite common for the sentencing State to block all requests for transfer from the sentenced person until they have paid the fine. The Council of Europe has tried to combat this practice: Recommendation R (92) 18, point 1. f., advised the Member States to take measures so that they would not have to refuse a transfer on the sole ground that fines on the sentenced person in connection with the judgment remained unpaid. Since the recommendation did not stem the practice, the Council of Europe is now planning to look more closely into the problem and suggest a solution in the form of a new Protocol to the Convention.

d. In some sentencing States there has been a tendency to refuse the transfer if it would give the detainee the possibility of serving a lighter sentence in his country of origin than the one imposed in the sentencing State. This situation can arise not only where the State of enforcement opts for conversion (Article 11) but also where it decides to continue enforcement of the sentence (Article 10). In the event of conversion, the risk is obvious since the legislation of the State of enforcement (which can always provide for a lighter sentence) is fully substituted for the legislation of the sentencing State (Article 9(1)(b), referring to Article 11). In the event of continued enforcement of the sentence, the State of enforcement may be obliged to adapt the sentence passed in the sentencing State, for example if the sentence passed exceeds the maximum allowed by the legislation of the State of enforcement. Lastly, in practice, a lighter sentence and even immediate release can flow from the considerable differences between the Member States' legislation as regards enforcement,⁹⁴ in particular as regards early release (see above). To solve the problem of immediate release, the Council of Europe adopted a Recommendation on 27 June 2001⁹⁵ that the Member States set a minimum enforcement rate (e.g. 50% of the total duration of the sentence), below which State would be entitled to refuse a transfer.⁹⁶

3.2.1.6. Additional Protocol to the Council of Europe Convention on the transfer of sentenced persons of 18 December 1997

An Additional Protocol to the Council of Europe Convention on the transfer of sentenced persons was concluded on 18 December 1997.⁹⁷ It entered into force on 1 June 2000. It has been ratified by sixteen of the Member States of the Council of Europe. Eleven of the EC Member States have signed it, and five have ratified it.

The Protocol amplifies the 1983 Convention on the transfer of sentenced persons and lays down rules applicable to the transfer of enforcement of sentences as regards sentenced persons who have fled from the sentencing State to return to the State of which they are nationals and sentenced persons who are subject to an expulsion or deportation order on account of their conviction.

⁹⁴ Enforcement of the sentence is governed by the law of the State of enforcement, and that State alone has jurisdiction to take the requisite decisions (Article 9(3) of the Convention).

⁹⁵ Recommendation 1527 (2001) on the functioning of the Council of Europe Convention on the transfer of sentenced persons.

⁹⁶ But the Committee of Experts on the functioning of the Conventions on criminal matters, in an opinion issued on 22 January 2003, objected that setting a minimum rate would run counter to the flexibility that is an acknowledged quality of the Convention. Moreover a fixed rate would preclude case-by-case solutions. The Committee accordingly supports an approach based on the idea of a certain period compatible with the needs of justice.

⁹⁷ Accessible at <http://conventions.coe.int/>.

3.2.1.7. Agreement on the application, between the Member States of the European Communities, of the Council of Europe Convention on the transfer of sentenced persons of 25 May 1987⁹⁸

In relations between the Member States that have ratified the Council of Europe Convention on the transfer of sentenced persons of 1983 (the “Transfer Convention”), this Agreement amplifies the Convention (Article 1). It has been signed by eleven Member States and ratified by four.

For the purpose of applying Article 3(1)(a) of the Transfer Convention, each Member State is to regard as its own nationals the nationals of another Member State whose transfer is deemed to be appropriate and in the interest of the persons concerned, taking into account their habitual and lawful residence in its territory (Article 2). Declarations made pursuant to the Convention on Transfer are not to apply with respect to the Member States that are party to this Agreement. In its relations with Member States that are party to the Agreement, each Member State may make, renew or alter any declaration provided for by the Convention on Transfer (Article 3).

3.2.2. *Recognition of judgments imposing a suspended sentence, conditional release or alternative sanctions*

3.2.2.1. Description and identification of the problem.

As regards supervision and assistance measures in the context of suspended sentences accompanied by probation orders or conditional release, the Programme of Measures to implement the principle of mutual recognition of decisions in criminal matters mentioned above sets the following objective and measure in Chapter 4 (Post-sentencing follow-up decisions):

“Aim: To ensure that authorities cooperate in dealing with a person who is subject to obligations or undergoing supervision and assistance, in particular persons on probation or parole.

Measure 23: Endeavour to optimise application of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders of 30 November 1964. It would be especially useful to determine the extent to which certain reservations and grounds for refusing enforcement could cease to be enforceable as between Member States, if necessary by means of a specific instrument.”

These supervision and assistance obligations or measures in the context of suspended sentences accompanied by probation orders or conditional release raise the same problems as the recognition of alternative sanctions.

The mutual recognition of alternative sanctions raises difficulties for the following reasons. First, as was seen in the section on approximation of alternative sanctions, there are considerable differences regarding their function and their legal nature: in some Member States, certain alternative sanctions are principal or substitute penalties, whereas in others, the same penalties are measures accompanying suspended prison sentences. Then, there is a great variety of alternative sanctions themselves. And certain alternative sanctions – including the social supervision and supervisory bodies that belong with them – do not exist in all Member

⁹⁸ Accessible at <http://ue.eu.int/ejn/>.

States. Lastly, in certain Member States there are simplified procedures for some of the alternative sanctions – those within the category of criminal mediation – that operate outside the conventional criminal procedure and regularly entail terminating the prosecution if the simplified procedure is completed successfully.

Even if the Member States' legislation seeks to avoid overt discrimination, the fact is that in practice the national courts do not pass suspended sentences combined with rehabilitation measures where convicted offenders have their habitual residence in another Member State. Since the sentencing State cannot carry out supervision measures in the State where the offender has his habitual residence,⁹⁹ the offender is liable to be sentenced to actual imprisonment even for a minor offence, with the result that the offender is punished more severely than if he had committed the same offence in his Member State of residence. The conclusion must be that the chief cause of difficulties in this context is not a foreign nationality but the fact that the convicted offender is habitually resident in another Member State.

The present position is that in the European Union there is no legislation dealing with the enforcement of alternative sanctions beyond national borders. Admittedly the Belgian Government presented an initiative for a Council Decision setting up a European network of national contact points for restorative justice in 2002.¹⁰⁰ The purpose of that initiative is to develop and promote the various aspects of restorative justice in the Union by setting up a European network of national contact points. But it does not deal with the mutual recognition of alternative sanctions.

3.2.2.2. Existing instruments

The **European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders**,¹⁰¹ prepared under the auspices of the Council of Europe, sets out to solve these problems. It was signed on 30 November 1964 and entered into force on 22 August 1975. It has been ratified by sixteen States. So far eleven Member States have signed¹⁰² and eight have ratified.¹⁰³

The Convention aims to allow sentenced persons to leave the territory of a Contracting Party (requesting State) where they have been sentenced or conditionally released and be placed under proper supervision by the authorities of another Contracting Party (requested State). It concerns persons who have been found guilty by a court and placed on probation without sentence having been pronounced, or have been given a suspended sentence involving deprivation of liberty, or a sentence of which the enforcement has been conditionally suspended, in whole or in part, either at the time of the sentence (“suspended sentence”) or subsequently (“early release”).¹⁰⁴

⁹⁹ Without an international agreement or without European Union rules, the sentencing State would commit a violation of the sovereignty of the offender's State of habitual residence if it took supervisory measures in the latter State's territory.

¹⁰⁰ OJ C 242, 8.10.2002, p.20.

¹⁰¹ Accessible at <http://conventions.coe.int/>.

¹⁰² Austria, Belgium, Denmark, Germany, France, Greece, Italy, Luxembourg, Netherlands, Portugal, Sweden.

¹⁰³ Austria, Belgium, France, Italy, Luxembourg, Netherlands, Portugal, Sweden.

¹⁰⁴ In most Member States, early release is a conditional release (see above).

The Contracting Parties undertake to grant each other the mutual assistance necessary for the social rehabilitation of offenders sentenced abroad. The Convention deals with three types of assistance:

(1) The first form of assistance is supervision (Part II of the Convention). The requesting State (State which pronounced the sentence) may request the State in whose territory the offender establishes his ordinary residence to carry out supervision only. The requested State may adapt the prescribed supervisory measures.

If so, supervision may be accepted without formality, for example where it also exists in the requested State and there is no need to adapt it. If the conditions for a suspended sentence are supervised by the State of enforcement, the question arises whether the sentencing State should have the possibility of ensuring that the sentenced person complies with the conditions? What mechanism should be provided for?

Where the legislation of the requested State makes no provision for the prescribed supervision measures, that State adapts them in accordance with its own legislation (Article 11(1) of the Convention). This entails modifying part of the sentence or of the decision of the body ordering the offender to be conditionally released. In no case may the supervisory measures applied by the requested State, as regards either their nature or their duration, be more severe than those prescribed by the requesting State (Article 11(2) of the Convention).

Under the Convention, where there is a risk that the conditional release decision might be withdrawn, because the offender has either re-offended or breached the obligations imposed on him, the requesting State alone has jurisdiction to judge, on the basis of the information and comments supplied by the requested State, whether or not the offender has satisfied the conditions imposed upon him, and, on the basis of such appraisal, to take any further steps provided for by its own legislation (Articles 13 and 15 of the Convention). It must inform the requested State of its decision.

(2) The second form of assistance consists of enforcement of the sentence (Part III of the Convention) if the requesting State so requests and if it has withdrawn the conditional release decision. Enforcement takes place in accordance with the law of the requested State (Article 17). The requested State, if need be, substitutes for the penalty imposed in the requesting State, the penalty or measure provided for by its own legislation for a similar offence. The nature of such penalty or measure must correspond as closely as possible to that in the sentence to be enforced. It may not exceed the maximum penalty provided for by the legislation of the requested State, nor may it be longer or more rigorous than that imposed by the requesting State (Article 19). The requesting State may no longer itself take any of the measures of enforcement requested, unless the requested State indicates that it is unwilling or unable to do so (Article 20).

(3) The third form of assistance is relinquishment to the requested State (Part IV of the Convention). Here the requested State adapts to its own penal legislation the penalty or measure prescribed as if the sentence had been pronounced for the same offence committed in its own territory. The penalty imposed by the requested State may not be more severe than that pronounced in the requesting State (Article 23). The requested State ensures complete application of the sentence thus adapted as if it were a sentence pronounced by its own courts (Article 24). The acceptance by the requested State of a request in accordance with Part IV extinguishes the right of the requesting State to enforce the sentence (Article 25).

In most cases, the effect of withdrawal of the conditional release decision is that the offender must serve a term of imprisonment in the State of enforcement. Consequently, the same questions arise as at points 3.2.1.

The 1964 Convention has two major drawbacks: the large number of reservations¹⁰⁵ entered by most of the Member States and the grounds for refusal¹⁰⁶ which make it ineffective in operation.

3.2.3. *Recognition of disqualification decisions*

Driving disqualifications are covered by the European Union Convention on driving disqualifications of 17 June 1998.¹⁰⁷ This Convention, which has so far been ratified only by Spain, makes no provision, however, for a genuine mutual recognition mechanism. It does not provide for the possibility of a driving ban being recognised directly in all Union Member States but requires the Member State of residence to intervene. That State has three options for the enforcement of driving disqualifications: it can enforce the disqualification order directly, it can enforce it indirectly via a judicial or administrative decision, or it can convert it into a domestic judicial or administrative decision, which is tantamount to replacing the decision in the original Member State by a new decision of the Member State of residence (Article 4(1) of the Convention). In the latter two cases, the Member State of residence can shorten the duration of the disqualification. This possibility does not seem compatible with the mutual recognition principle. The Convention also provides for mandatory and optional grounds for refusing to give effect to the disqualification. Once again, some of these do not seem compatible with the mutual recognition principle.

3.2.4. *Conclusions*

Apart from the Council of Europe Convention of 21 March 1983 on the transfer of sentenced persons, signed and ratified by all the EU Member States, none of the other conventions considered above has been signed and ratified by all the Union States. Among the few EU Member States that have ratified the conventions, many have made declarations and reservations, which considerably limit their effectiveness. Without wishing to reiterate the various criticisms of the substance of the planned rules set out at points 3.2.1 and 3.2.2. here, since that will be examined more closely at point 4.2., the range of instruments applicable between the EU Member States to meet the concern to recognise and enforce sanctions in another Member State is also rather incomplete and, where it actually exists (as in the case of

¹⁰⁵ These reservations exclude in particular the application of Parts III and IV.

¹⁰⁶ According to Article 7, supervision, enforcement or complete application must be refused: a) if the request is regarded by the requested State as likely to prejudice its sovereignty, security, the fundamentals of its legal system, or other essential interests; b) if the request relates to a sentence for an offence which has been judged in final instance in the requested State; c) if the act for which sentence has been passed is considered by the requested State as either a political offence or an offence related to a political offence, or as a purely military offence; d) if the penalty imposed can no longer be exacted, because of the lapse of time, under the legislation of either the requesting or the requested State; e) if the offender has benefited under an amnesty or a pardon in either the requesting or the requested State. Supervision, enforcement or complete application may also be refused: a) if the competent authorities in the requested State have decided not to take proceedings, or to drop proceedings already begun, in respect of the same act; b) if the act for which sentence has been pronounced is also the subject of proceedings in the requested State; c) if the sentence to which the request relates was pronounced *in absentia*; d) to the extent that the requested State deems the sentence incompatible with the principles governing the application of its own penal law, in particular, if on account of his age the offender could not have been sentenced in the requested State.

¹⁰⁷ "Explanatory report on the convention on driving disqualifications", OJ C 211, 23.7.1999, p. 1.

the Council of Europe Convention of 21 March 1983 on the transfer of sentenced persons),
capable of improvement.

4. OUTSTANDING PROBLEMS AND NEED FOR ACTION BY THE EUROPEAN UNION

4.1. Approximation of custodial penalties and alternative sanctions

Here as elsewhere, action by the European Union is governed by the subsidiarity and proportionality principles. Under the Protocol on the application of the principles of subsidiarity and proportionality, Community action is justified where the issue under consideration has transnational aspects, where actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty or where action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.

This approach was to the fore in the Council (JHA) conclusions of 25 and 26 April 2002,¹⁰⁸ which emphasised the internal consistency of the Member States' criminal systems and the acceptance that there will be differences in matters of penalties. As has already been seen, there are historical, cultural and legal reasons for this, deeply-rooted in their legal systems, which have evolved over time and are the expression of the way in which Member States have faced and answered fundamental questions about criminal law. These systems have their own internal coherence. This is ultimately an area which lies at the very heart of the Member States' sovereignty.

The principle governing action in judicial cooperation in criminal matters is mutual recognition, as the Tampere conclusions make clear. But there are grounds for considering the consequences of diversity in criminal penalties. In particular, there is the question whether this creates a barrier to the attainment of the area of freedom, security and justice which the Union has set itself as an objective.

The Commission considers that Union action can be envisaged where it is needed to ensure the effectiveness of a policy in harmonised sectors. There is the question, for example, whether the harmonised response within the limits described above to a criminal phenomenon developed in the Union really works. In other words, can the desired objective of a high level of security be attained if certain conduct is not classed as an offence or not actually prosecuted?

There is also the question whether there is a risk that certain criminals might relocate to a Member State where their nefarious activity is not classified as an offence or attracts lighter penalties. It would be interesting to consider whether this is a purely academic hypothesis or corresponds to reality in the event, for example, of financial, business or computer crime.

Another question worth debating is whether and to what extent the absence of approximation impedes freedom of movement, or whether the public must expect that conduct that is lawful in their own country might be unlawful in another (offences related to racism, paedophilia or drug-use, for instance).

Question 1: To what extent do the differences between sentencing systems raise barriers to the establishment of the area of freedom, security and justice such as:

¹⁰⁸ See above, point 2.1.5.

(1) criminals relocating their activities owing to disparities between the way the offences are defined, prosecuted and punished; or

(2) barriers to the free movement of persons?

Regarding the possibilities of action as perceived by the Commission for the various types of penalty, using the breakdown followed above, distinctions can be made as follows:

4.1.1. General rules of criminal law

4.1.1.1. Prosecution – mandatory or discretionary?

The choice between one or other system brings us to the question whether there should be a European criminal policy giving priority to prosecutions for certain types of offence.

Incidentally, the Commission, in its Green Paper on the European Prosecutor,¹⁰⁹ as regards fraud against the Community budget, expressed a preference for a mandatory prosecution system modified by exceptions. This basically implies uniformity in prosecutions throughout the European area of justice, with no discretion for the European Public Prosecutor. At a public hearing on the Green Paper in September 2002, there was a majority in favour of the mandatory prosecution principle, subject to specific exceptions.

The chief objective is to strike a balance and secure efficiency in the administration of justice. As a rule it is for each Member State to find that balance, but there is no doubt something to be said for there being no major divergence between Member States as regards the decision to prosecute at least such offences as are harmonised in Europe.

4.1.1.2. The room for manoeuvre of the criminal courts

Independence is one of the court's prerogatives; it flows from the principle of the separation of powers that is recognised in all Member States. As a general rule, the criminal courts have considerable discretion in sentencing. It would not be right to lay down mandatory rules on this. And as the Treaty stands, following Declaration No 8 to the Amsterdam Treaty a Member State which does provide for minimum penalties cannot be obliged to do so.

The study on the approximation of criminal penalties in Europe mentioned in section 1.1. proposes envisaging *soft law* instruments recommending the adoption of penalties lying in a range between a minimum and a maximum (*sentencing guidelines*) or *areas for common application in standard cases*. Another option might be to conduct regular comparison exercises in the form of meetings and case studies, for example, to ascertain the sentencing practice of the Member States' courts. It might also be possible to consider the possibility of taking as a European model a system like the High Court Sentencing Information System developed in Scotland, to which all Scottish courts have access, containing all the High Courts' sentencing decisions by way of practical guidance for the courts.

4.1.1.3. Level of participation: aiding and abetting.

The Framework Decisions that have been adopted and those in the process of adoption¹¹⁰ generally contain provisions defining offences and sanctions – which must at least be

¹⁰⁹ COM(2001)715 final, 11.12.2001, point 6.2.2.1.

¹¹⁰ See above, point 2.1.5.

effective, proportionate and dissuasive¹¹¹ – for instigation and participation in the commission of the offences to which they refer.

It is simply not possible to embark on the approximation of penalties applicable on the basis of the level of participation without approximating the penalties for the principal offender, as the penalty incurred by the accomplice in Member States that differentiate sentences in such cases generally depends on the penalty for the principal offence.

4.1.1.4. Aggravating and mitigating circumstances

Given that aggravated sentences in certain circumstances provided for by the law are usually determined by reference to the penalty for the basic offence, which is not harmonised in general terms, it is difficult to envisage approximation here.

Regarding mitigating circumstances, it must be ensured that a proportional reduction system does not violate declaration No 8 to the Amsterdam Treaty, which does not allow Member States to be required to introduce minimum penalties if they do not have them already.

Union action would probably be rather limited; the justification for it is doubtful.

4.1.1.5. Recidivism

The Programme of measures to implement the principle of mutual recognition of decisions in criminal matters¹¹² contains a number of measures to ensure that courts in one Member State take account of sentences passed in another Member State to evaluate the offender's criminal background and draw the appropriate conclusions when sentencing.

Measure 2, in particular, provides for the adoption of one or more instruments establishing the principle that a court in one Member State must be able to take account of final criminal judgments rendered by the courts in other Member States for the purposes of assessing the offender's criminal record and establishing whether he has re-offended, and in order to determine the type of sentence applicable and the arrangements for enforcing it.

The Member States hold differing views on the question of taking account of final criminal judgments rendered by the courts in other Member States for the purposes of Measure 2. Article 56 of the European Convention on the International Validity of Criminal Judgments 1970¹¹³ provides that "*Each Contracting State shall legislate as it deems appropriate to enable its courts when rendering a judgment to take into consideration any previous European criminal judgment rendered for another offence after a hearing of the accused with a view to attaching to this judgment all or some of the effects which its law attaches to judgments rendered in its territory. It shall determine the conditions in which this judgment is taken into consideration.*" But only four Member States have ratified the Convention without entering reservations on Article 56.¹¹⁴

¹¹¹ For example, Articles 2 and 3 of the Council Framework Decision on combating trafficking in human beings (OJ L 203, 1.8.2002, p. 1); Articles 5 and 6 of the Council Framework Decision combating fraud and counterfeiting of non-cash means of payment (OJ L 149, 2.6.2001, p. 1).

¹¹² OJ C12, 15.1.2001, p.10.

¹¹³ Council of Europe, European Treaties No 70. Opened for signature on 28 May 1970, entered into force on 26 July 1974. Accessible at <http://conventions.coe.int/>.

¹¹⁴ Austria, Denmark, Spain and Sweden.

Obviously a judicial authority that is to take account of a foreign decision when passing sentence must first be acquainted with the foreign decision. To facilitate mutual information, Measure 3 of the Mutual Recognition Programme states that a standard form like that drawn up for the Schengen bodies, translated into all the official Union languages, should be introduced for criminal records applications. The Commission proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters,¹¹⁵ introduces a standard form for applying for a criminal record which would satisfy Measure 3 of the programme of measures to implement the principle of mutual recognition in criminal matters.

Finally, Measure 4 in the Programme states that a feasibility study should be carried out to determine how best to ensure, while taking full account of requirements relating to personal freedoms and data protection, that the competent authorities in the European Union are informed of an individual's criminal convictions. The Commission has financed two studies. It will evaluate the extent to which they contribute to the feasibility study called for by the Programme.

The question of information on penalties ordered in other Member States and the action to be taken on such information in the event of a fresh prosecution or conviction will be considered in a separate Commission study and proposals.

However, the question of recidivism can give rise to debates that deserve mention here.

Application of the mutual recognition principle should mean treating a judgment of a court in another Member State in the same way as a judgment of a national court for an equivalent offence. If an equivalent national judgment is the first of a series of repeat offences, the judgment in the other Member State must likewise be treated as such.

However, application of this simple principle in practice can come up against difficulties. The first difficulty relates to the classification of the offence by the trial court. This is the traditional question of dual criminality, much written about in the European Union. But there is a specific aspect where the question of recidivism comes up since for certain offences certain Member States apply the special recidivism principle whereby there is a repeat offence only if the second conviction is for the same offence as the first (example: two successive drug-dealing offences). It might be possible as a line of least resistance to consider a Union-based special recidivism mechanism whereby account would be taken in all the Member States of convictions in another Member States if they concern repeat instances of specific offences.

The second difficulty concerns the type of judgment, the type of authority giving it (court, but in certain cases a prosecutor whose decision terminates proceedings, or administrative authorities in some cases), the type of penalty or order (imprisonment, suspended or not, alternative penalty, discharge, out-of-court settlement, mediation, etc.), and the quantum of the penalty. These parameters, under the legislation of some countries, can be used to determine whether or not the first judgment is the beginning of a series of repeat offences. It could be necessary for the various bodies of national legislation to take a common approach.

National legislation diverges on the period within which a conviction is taken into account to be regarded as the first of a series of repeat offences and the circumstances that can make the

¹¹⁵ COM(2003)688 final, 14.11.2003.

first judgment ineffective for that purpose. Here again, there might be something to be said for approximation.

4.1.1.6. Concurrent offences

The Greek Presidency has presented an initiative¹¹⁶ for the adoption of a Council Framework Decision to harmonise the application of the “*ne bis in idem*” principle, including the *lis pendens* principle. It is under discussion in the Council.

For the moment there is nothing to suggest that general approximation measures should be proposed here until the results of the negotiations on that instrument are known.

4.1.2. Custodial penalties

In particular, it would be worth considering common penalties for the offence of participating in a criminal organisation, since the Joint Action adopted by the Council on 21 December 1998 making it a criminal offence to participate in a criminal organisation in the Member States of the European Union does not provide for a minimum penalty.

While it has become conventional for sectoral instruments approximating substantive criminal law to set minimum levels of maximum penalties in the European Union, there is no **common maximum penalty**, and the differences here are substantial as has been seen. Certain Member States provide for life imprisonment, whereas others do not. There are grounds for considering whether life imprisonment should be abolished or modified in the Union.

Abolishing life imprisonment would be justified from the point of view of the objective of re-educating and rehabilitating the offender. As is well known, a person’s conduct can change during imprisonment and the absence of all hope of ever being released will not stimulate efforts at reintegration. But in certain circumstances provided for by the law (good conduct, studies, vocational training while in detention, etc.) a life term can be reduced substantially in a Member State where it is actually provided for, while a long term served in a Member State where there is no life imprisonment can amount in practice to a life term.

Life imprisonment could be replaced by fixed-term sentences. For the most serious crimes, associated with certain personal characteristics, which represent a manifest threat, consideration could be given to the possibility of reducing the penalty to a fixed period of, say, 20 to 30 years, the offender’s situation being regularly reviewed, or ensuring that the situation of offenders sentenced to unlimited terms come up for periodic review. Combining the two options is a real alternative. A degree of approximation would avert difficulties for the enforcement of custodial penalties imposed in the sentencing State in a State where they are unknown.

However, there are no Union instruments providing for **minimum penalties**. It should be remembered that Declaration 8 annexed to the Amsterdam Treaty provides that a Member State which does not provide for minimum penalties cannot be obliged to adopt them.

The question arises whether the legislation of the Union States (summed up in **Annex I**) concerning the enforcement of custodial penalties needs harmonising. At first sight it might be thought that the enforcement of custodial penalties raises no special problems beyond the typical problems of recognising penalties that do not exist in all the Member States or are

¹¹⁶ OJ C100, 26.4.2003, p.24.

applied in different ways (see Chapter 4.2.). But major divergences could have the effect that only residents enjoy the more flexible arrangements.

4.1.3. *Financial penalties*

Where the approximation of rules of criminal law is indispensable for the effective implementation of a Union policy in an area where there are harmonisation measures, it is possible to establish minimum rules for the definition of offences and penalties. It might also be appropriate to do so for financial penalties for failure to comply with Community provisions in the context of a Union policy. The exercise need not be confined to the principle of financial penalties but extend to the way in which they are calculated, which vary from one Member State to another.

The need for this might arise in order to ensure that financial or other penalties imposed by Member States for violation of a Union policy really are effective, proportionate and dissuasive.

4.1.4. *Disqualification*

Regarding disqualification, the approach favoured by the Union in the mutual recognition programme¹¹⁷ is to recognise and enforce disqualification throughout the Union. There is no obvious need for the moment to propose general approximation measures here. Even so, it might be possible to consider specific disqualification measures linked to specific offences, as was done for the sexual exploitation of children and corruption in the private sector.¹¹⁸

4.1.5. *Confiscation*

As has already been seen, there has been a degree of approximation of confiscation measures through the adoption of Union Framework Decisions. There is therefore something to be said for waiting until the instruments already adopted are implemented before preparing new measures concerning the confiscation of the proceeds of crime. The Commission is working on a report on the Member States' implementation of the Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime.¹¹⁹

4.1.6. *Legal persons*

There are no general instruments providing for common sanctions applicable to legal persons. It must be remembered that most legal persons have activities and assets in several Member States. If these measures are not available in all the Member States, there is a risk that legal persons will relocate their activities and or assets in the Member State where the risk of penalty is lowest or even non-existent.

As is the case for financial penalties, thought might be given to approximating sanctions ordered against legal persons where this is indispensable for the effective implementation of a Union policy in an area where there are harmonisation measures.

¹¹⁷ See point 2.2.4.

¹¹⁸ See point 2.1.7.

¹¹⁹ See point 2.1.8.

Question 2: How can major divergences between Member States as regards the decision to prosecute be avoided, at least for offences that are harmonised in the Union?

Question 3: To what extent could European sentencing guidelines be developed, that is to say basic principles for sentencing, without interfering with the courts' room for discretion?

Question 4: Should studies of the sentencing practice of the Member States' courts be carried out?

Question 5: Would it be helpful to establish a sentencing information system to provide guidance for the courts?

Question 6: Is it enough to recognise a final criminal judgment given in other Member State (and/or treat it in the same way as a national judgment) for it to be taken into account in a national court for recidivism purposes?

Question 7: Should there first of all be a degree of approximation of legislation in matters such as:

- determination of the offences to be taken into account systematically as the beginning of a series of repeat offences (establishment of a special European recidivism system);
- determination of the type of final criminal judgments to be taken into account for recidivism purposes (type of decision and authority, type and quantum of penalty);
- the period during which final criminal judgments should be taken into account as the beginning of a series of repeat offences in another Member State and the circumstances that might neutralise the effect of a conviction for recidivism purposes?

Question 8: To what extent should the divergences between national rules on the procedures for enforcement of custodial penalties be reduced, particularly with a view to avoiding the risks of discrimination against non-resident offenders in the application of such penalties?

Question 9: Are there categories of offences on the list in Article 2(2) of the Framework Decision on the European arrest warrant and/or the proposal for a Framework Decision on the application of the principle of mutual recognition to financial penalties for which the penalties (and the definitions of the offences) should be harmonised as a matter of priority?

Question 10: To what extent should criminal fine systems be approximated (for example in relation to economic crime, including offences committed by legal persons)?

Question 11: To what extent should divergences between national rules governing the criminal or administrative liability of legal persons be narrowed, particularly to avert the risk of criminals relocating their activities in the field of financial crime?

Question 12: Could the same range of sanctions as provided for by the current Framework Decisions apply on a general basis to legal persons?

4.1.7. *Alternative sanctions*

Given the advantages of alternative sanctions as compared with custodial sentences, the question must be asked whether measures should be taken at European level to promote - or even to impose - alternative sanctions for certain offences. An example would be Article 6(4) of the Commission proposal for a Council Framework Decision on combating racism and xenophobia.¹²⁰

Which alternative sanctions should be encouraged? And what steps should be taken to promote these penalties? Acceptance of alternative sanctions by judges could be improved, for example by setting up mechanisms at European Union level to disseminate information and allow the pooling of experience and the establishment of good practice in this area.

As regards community service, the question is whether there should be harmonisation at European Union level of the conditions under which such alternative sanctions are imposed and the practical arrangements for implementation, to facilitate recognition and implementation in other Member States. As was seen in the introduction, there is a strong complementary relationship between approximation and mutual recognition. The presentation must be considered in the light of section 4.2.

A minimal approach would be to regulate the following aspects: conditions in which these penalties may be imposed; duration of the penalty, with a possible indication of a minimum and/or a maximum period; conditions of implementation; the nature of the work to be done which, like the practical arrangements for community service, may differ according to the offence committed (for example hospital work for a person who has caused grievous bodily harm or work in old people's home for a young person who has attacked an elderly person); monitoring of alternative sanctions; penalties for failure to respect the conditions imposed for their implementation and, finally, as regards probation, the consequences of not abiding by the conditions set. With regard to mediation in criminal cases, it is important to look at whether it is necessary to take measures at European Union level other than those laid down in Article 10 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings,¹²¹ to harmonise certain conditions and practical arrangements for mediation in criminal cases in order to facilitate the recognition of measures and arrangements arising from mediation procedures and their implementation in another Member State. A minimum framework would govern, for example, the categories of offence concerned, the procedure for mediation, the status of mediators, including the extent of their independence from the courts, training and conditions of eligibility for mediators. Finally, it should be decided whether steps should be taken at European Union level, as far as mediation in criminal cases is concerned, other than those laid down in the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, to take account of the interests of victims - including those who do not reside in the Member State in which the offence was committed - when imposing alternative sanctions.

Question 13: To what extent should divergences between national rules governing alternative sanctions be narrowed, in particular to avoid them being applicable in practice only to residents?

Question 14: What mechanisms might be envisaged to reduce the legal and practical

¹²⁰ OJ C 75 E, 26.3.2002, p.269.

¹²¹ OJ L82, 22.3.2001, p.1.

difficulties potentially precluding the mutual recognition and enforcement of alternative sanctions in another Member State?

***Question 15:** Is it necessary to take measures at European Union level, other than those laid down in Article 10 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, to harmonise certain conditions and practical arrangements for mediation in criminal cases, to facilitate the recognition of measures and arrangements arising from mediation procedures and their implementation in another Member State? Should a minimum framework govern:*

- the categories of offence concerned?*
- the mediation procedure?*
- the status of mediators, including the extent of their independence from the courts?*
- training and conditions of eligibility for mediators?*

***Question 16:** To what extent should measures be taken at European Union level to take account of the interests of victims - including those who do not reside in the Member State in which the offence was committed - when imposing alternative sanctions? If so, what should they be?*

4.1.8. Enforcement of penalties

As can be seen in **Annex III**, suspended sentences, day-release and remission are only known in a minority of Member States. Since they do not raise specific problems beyond those relating to the recognition of penalties that do not exist in all the Member States, or whose conditions of eligibility and implementation vary from one Member State to another (see Chapter 4.2.), the Commission feels that the time is not ripe for a debate on possible harmonisation of these instruments. The same conclusion is valid for instruments such as amnesty and pardon, as the relevant authorities generally enjoy extensive discretionary powers there. The only instrument for which such a debate is not prima facie excluded is early release, which exists in all Member States. As has been seen, the conditions of eligibility and implementation vary widely between them. In the practical application of the Council of Europe Convention of 21 March 1983 on the transfer of sentenced persons,¹²² the differences in the Member States' legislation regarding the minimum term of imprisonment to be served (Belgium, for instance, allows early release after a third of the sentence has been served whereas in Spain the corresponding period is three quarters¹²³) have created difficulties of application and in some cases even refusals to transfer as they can entail lighter penalties and even immediate release. Approximation of the Member States' legislation on this minimum period would thus be conducive to the transfer of prisoners.¹²⁴

The fundamental question arising here is whether provision should be made in the European Union for common minimum conditions covering, in particular: a) the minimum period of imprisonment to be served before early release, b) the criteria for ordering or refusing to order

¹²² Available at <http://conventions.coe.int/>.

¹²³ Article 90, Criminal Code.

¹²⁴ See also points 3.2.1.3. and 4.2.2.2.

early release, c) the release procedure, d) the supervision conditions and the duration of the probation period, e) penalties for failure to comply with the conditions imposed at the time of early release, f) procedural safeguards for offenders, and g) victims' interests.

Regarding victims' interests, the question arises how they can be reflected at the enforcement stage and whether provision should be made in the Union for early release to be allowed only if the victim or victims have been compensated or if the offender has made a serious effort to do so or the order can be revoked in default.

Question 17: To what extent should measures be taken at European level to provide for approximation of certain conditions of eligibility and implementation of early release, to facilitate the recognition of prison sentences and their enforcement in another Member State? Should minimum standards govern:

- regarding life sentences, the possibility of periodic review with a view to early release?*
- regarding sentences to specific periods, the minimum period of imprisonment that should be served before early release can be allowed? If so, how long should it be? Are there any prospects of approximation along the lines that, for non-life sentences, early release should be possible after half the sentence has been served in normal circumstances and two thirds in repeat offence cases?*
- the criteria for allowing or refusing early release?*
- the release procedure? Should procedural standards be provided for?*
- supervisory arrangements and the duration of the trial period?*
- penalties for failure to comply with the conditions for early release?*
- the procedural safeguards for offenders?*
- victims' interests? Should the European Union provide that early release can be allowed only if the victim or victims have been compensated or the offender has made serious efforts to compensate them, or can be revoked if this condition is not met?*

4.2. Recognition and enforcement of custodial penalties and alternative sanctions in another Member State

This Chapter deals only with the mutual recognition of custodial penalties (and their enforcement rules) and alternative sanctions. There are initiatives under discussion in the Council for the recognition of financial penalties and confiscation orders. The Commission will consider disqualifications in a separate communication. With regard to the mutual recognition of final sentences involving deprivation of liberty, the Programme of measures intended to implement the principle of mutual recognition of decisions in criminal matters lays down, in Chapter 3.1.1., the following aim and measure:

“Aim: It is necessary to assess international instruments on final sentences involving deprivation of liberty and to see whether such instruments allow full arrangements for mutual recognition.”

Measure 14: Assess the extent to which more modern mechanisms make it possible to envisage full arrangements for mutual recognition of final sentences involving deprivation of liberty.”

Measure 13¹²⁵ in the Programme of measures was implemented in part by the Framework Decision on the European arrest warrant and the surrender procedures between Member States. But it also provides for the adoption of an instrument establishing a new principle of “extraditing or enforcing”. The principle was implemented by Articles 4(6) and 5(3) of the Framework Decision on the European arrest warrant and surrender procedures between Member States.

Measure 13 states moreover that a new instrument at European Union level “*should include the practical modalities for enforcing the sentence, for example, continued enforcement or conversion of the sentence*”. With regard to the transfer of sentenced persons, which is a specific form of recognition of custodial penalties, since enforcement of a judgment implies recognising it, the Programme of measures lays down, in Chapter 3.1.3. “Transfer of sentenced persons in the interests of social rehabilitation”, the following aim and measure:

“Aim: To enable a Member State’s residents to serve their sentences in their State of residence. In this connection, Article 2¹²⁶ of the Agreement on the application between the

¹²⁵ “Aim: If it is not possible for a Member State to relinquish the principle that it does not extradite its own nationals, to ensure that the sentence for which extradition has been requested is enforced by that Member State in its territory. Measure 13: Adoption of an additional instrument to the EU Convention relating to Extradition of 27 September 1996 and the European Convention on Extradition of 13 December 1957. Only situations where the transfer of enforcement is requested are covered by Article 3(b) of the Convention between the Member States of the European Communities on the enforcement of foreign criminal sentences signed in Brussels on 13 November 1991. The future instrument could apply a new principle to such situations: “either extradite or enforce the sentence”.”

¹²⁶ “For the purpose of applying Article 3(1)(a) of the Convention on Transfer, each Member State shall regard as its own nationals the nationals of another Member State whose transfer is deemed to be appropriate and in the interest of the persons concerned, taking into account their habitual and lawful residence in its territory.”

Member States of the European Communities of the Council of Europe Convention on the Transfer of Sentenced Persons of 25 May 1987¹²⁷ should be borne in mind.”

Measure 16: Adoption of an additional instrument to the European Convention on the Transfer of Sentenced Persons of 21 March 1983 extending that Convention, which applies to the nationals of the States concerned, in order to cover their residents.”

In view of the growing mobility of Union citizens, it is increasingly common for an offender to be sentenced in a Member State other than that in which he is permanently resident. As already indicated in point 9.1. of the Communication of 26 July 2000, two sets of interests have to be accommodated in the area of the mutual recognition of custodial penalties: the interest of the Member State where the sentence was pronounced in having it enforced, and the interest of the sentenced person in having a realistic chance of reintegration into society. The Communication concludes from this that “custodial penalties should as a general rule be executed as close to the social environment into which the offender is to be reintegrated as possible” and that “in most cases, this will be in the offender’s Member State of residence”.

For a sentenced person, the sentence will be all the more severe for having to be served in a Member State other than that of which he is a national or in which he is permanently resident. Owing to differences in culture, language, customs, religion and social conditions, foreign prisoners are in a much more difficult position than national ones. Language difficulties alone can significantly affect the way in which they are able to exercise, or even learn about, their rights, considerably complicate prisoners’ daily lives (e.g. in relation to medical treatment) and thus lead, as a result of the separation from family and friends, to greater social isolation of the foreign prisoner and often also to his exclusion from rehabilitation and resocialisation programmes both inside and outside prison.

In general, the recognition of a penalty and its enforcement in the Member State of permanent residence is therefore not only in the interest of the sentenced person but also in that of the sentencing State and the enforcing State. For the sentencing State, the enforcement of penalties imposed on foreign nationals involves considerable extra cost (to overcome the abovementioned problems) which it can avoid by transferring enforcement. Lastly, the sentenced person’s reintegration into society in the enforcing Member State – where this is the State in which the sentenced person is permanently resident – also serves that State’s interests.

If the European Union enacted rules governing mutual recognition by the Member States of custodial penalties, including suspended sentences and early release and alternative sanctions, they would have to cover the following aspects:

4.2.1. Scope of possible European Union rules

4.2.1.1. Personal scope

First of all, the personal scope of the possible rules would have to be defined, in particular with regard to recognition of a criminal judgment whose enforcement has already begun (transfer of enforcement): to which sentenced persons should the rules apply? Experience with the Council of Europe Convention on the transfer of sentenced persons of 21 March 1983 shows that confining the possibility of a transfer to nationals of the State of enforcement

¹²⁷ The Convention has been signed by 11 Member States and ratified by only 4.

would discriminate against persons who are habitually resident in the State of enforcement. The solution in the agreement on the application between Member States of the European Communities of the Council of Europe Convention on the transfer of sentenced persons of 25 May 1987 should therefore be confirmed, so that each Member State would treat in the same way as its own nationals the nationals of all other Member States if they have their habitual and regular residence in the territory of that State.

As specified in the Communication to the Council and Parliament of 26 July 2000 on the mutual recognition of final decisions in criminal matters,¹²⁸ the rules of criminal law relating to the treatment of minors and mental patients vary widely from one Member State to another. Consequently, in the absence of a detailed analysis of the legal situation in all the Member States, it might be preferable, for the time being at least, to exclude judgments concerning them from the scope of any mutual recognition rules.

Question 18: What categories of sentenced persons should be eligible for transmission of enforcement in the State of enforcement: nationals of the State of enforcement, persons who habitually reside there, sentenced persons who are in the territory of the State of enforcement where they are serving or are due to serve a custodial sentence? Should there be specific conditions for minors and mental patients to be eligible also?

4.2.1.2. Material scope

There is also the question of what decisions should be eligible for mutual recognition between the Member States. The Commission's view is that the establishment of a genuine area of freedom, security and justice demands recognition of all criminal penalties, including alternative sanctions and measures and arrangements emerging from criminal mediation and settlement procedures. It would be quite unacceptable for alternative sanctions to be available in practice only for residents and not for people who live in another Member State.

As regards suspended prison sentences (combined with supervision and re-education measures), there is a clear need – see points 3.2.2.1 and 3.2.2.2 – to cover them as well in a recognition scheme to ensure that those who offend in a Member State other than their State of habitual residence are not discriminated against by being punished more severely than if they had offended in the Member State of their habitual residence because suspended sentences are not available to them.

As long as measures and arrangements emerging from criminal mediation and settlement procedures require the offender to compensate for the damage or pay the victim damages, the question arises whether they can be treated as equivalent to agreements covered by civil law, with the consequence that their recognition in other Member States would be governed by the rules described in the Green Paper of 19 April 2002 on alternative dispute resolution in civil and commercial law.¹²⁹ The question arises here whether agreements emerging from criminal mediation and settlement procedures are enforceable and whether there is a need for European Union rules.

Regarding the mutual recognition of disqualifications and the implementation of Measures 20 and 22 of the mutual recognition programme (see point 2.2.4.), the Commission will present, in the second half of 2004, a non-legislative Communication announced in its Legislative and

¹²⁸ COM(2000)495 final.

¹²⁹ COM(2002)196 final, point 3.2.2.3.

Work Programme,¹³⁰ identifying the need for action here and suggesting possible European Union solutions. This will have to take into account what the Commission already noted in its Communication of 26 July 2000 to the Council and the European Parliament *Mutual Recognition of Final Decisions in Criminal Matters*,¹³¹ which is that a disqualification would be substantially deprived of its effect if the person disqualified – being banned from exercising a given occupation or function in the State where judgment was given – could escape the penalty just by crossing a border to exercise the same function or occupation in neighbouring Member States. As regards the recognition of financial penalties and confiscation orders, draft Framework Decisions are currently under discussion in the Council (see points 2.2.2. and 2.2.3.).

Question 19: Is there a need to make agreements emerging from criminal mediation and settlement procedures in the Member States more effective? What is the best solution to the problem of recognition and enforcement of such agreements in another Member State of the European Union? For instance, should specific rules be adopted to make such agreements enforceable? If so, what guarantees should apply?

4.2.2. Conditions for recognition

4.2.2.1. Right of initiative in the recognition procedure

Unlike what is provided for by the Council of Europe Conventions of 30 November 1964,¹³² 28 May 1970¹³³ and 21 March 1983,¹³⁴ the Convention between the Member States of the European Communities of 13 November 1991¹³⁵ provides that the two States concerned – the State in which judgment is given and the State in which enforcement is sought – may ask for the judgment to be enforced in the other State. This solution seems preferable not only on grounds of practical flexibility but also because the State of enforcement has, or should have, an interest in a judgment concerning one of its nationals or a person habitually resident in its territory being enforced in it.

Question 20: Should it be possible only for the sentencing State to ask for transmission of enforcement, or should it also be possible for the State of enforcement?

4.2.2.2. Grounds for refusal

In the event of a refusal by the State of enforcement to recognise a criminal judgment, there is the question of the grounds that can be legitimately put forward. At any rate, given that the objective is to secure the free movement of judgments in criminal matters, the grounds for refusal should be very limited and concern only those provided for by the Council Framework Decision of 13 June 2002 on the European arrest warrant and surrender procedures between Member States.¹³⁶ It is questionable whether all these grounds are actually transposable, given

¹³⁰ COM(2003)645 final, reference 2003/JAI/142.

¹³¹ COM(2000)495 final.

¹³² Council of Europe Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders, 30 November 1964. Accessible at <http://conventions.coe.int/>

¹³³ Council of Europe Convention on the International Validity of Criminal Judgments, 28 May 1970. Accessible at <http://conventions.coe.int/>

¹³⁴ Council of Europe Convention on the Transfer of Sentenced Persons, 21 March 1983. Accessible at <http://conventions.coe.int/>

¹³⁵ Convention between the Member States of the European Communities on the enforcement of foreign criminal sentences, 13 November 1991. Accessible at <http://ue.eu.int/ejn/>

¹³⁶ OJ L 190, 18.7.03, p.1.

that recognition and enforcement operate primarily for the benefit of the person concerned. That Framework Decision lists the mandatory and optional grounds for non-enforcement. It would be worth considering whether all these grounds should be applied *mutatis mutandis* in the context of recognition of criminal penalties, and in particular alternative sanctions, or whether the status of some of them should be adapted or whether others should be added, and if so, which ones and why.

The first mandatory ground for non-enforcement concerns cases where the offence on which the arrest warrant is based is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law (Article 3(1) of the Framework Decision of 13 June 2002).

The second mandatory ground for non-enforcement concerns situations where the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State (Article 3(2) of the Framework Decision, “*ne bis in idem*” principle).

In Joined Cases C-187/01 *Gözütok* and C-385/01 *Brügge*,¹³⁷ the Court of Justice held that the “*ne bis in idem*” principle, enshrined in Article 54 of the Convention implementing the Schengen Agreement, signed on 19 June 1990, applied also to proceedings for withdrawal of prosecutions, such as those in the principal action, whereby the prosecution service in a Member State, without a court order, terminates the criminal proceedings commenced in that State after the accused has met certain obligations, in particular by paying a certain sum of money set by the prosecution service (out-of-court settlements).

This situation is also covered by Article 4(3) of the Framework Decision: the enforcing judicial authority can refuse to enforce a European arrest warrant if the judicial authorities in the Member State of enforcement have decided to refrain from prosecuting the offence on which the European arrest warrant is based or to drop its prosecution. This is an optional non-enforcement situation but it should become mandatory following the judgment referred to above.

Although the Court has now made it clear that the “*ne bis in idem*” principle applies also to out-of-court settlements, there is still the question whether criminal mediation procedures, which differ from the former in that the victim plays an active part in negotiating a solution, should not also be covered by “*ne bis in idem*” and whether European legislation should be envisaged.

There is currently an initiative from the Greek Republic for the adoption of a Council Framework Decision on the application of the “*non bis in idem*” principle,¹³⁸ under discussion in the Council. The initiative contains additional provisions on *lis pendens* in criminal matters (Articles 1(d) and 3) and the criteria for determining the Member State having jurisdiction.

Applying the third mandatory ground for non-enforcement provided for by the Council Framework Decision of 13 June 2002 (Article 3(3)), the judicial authority of the Member State of enforcement refuses to order enforcement if a person against whom a European arrest

¹³⁷ [2003] ECR I-1345 (judgment given on 11 February 2003).

¹³⁸ OJ C 100, 26.4.2003 p. 24.

warrant has been issued cannot, on grounds of age, be held criminally liable for the act on the basis of the warrant under the law of the Member State of enforcement.

These mandatory grounds for non-enforcement should be applied in the context of recognition of criminal penalties, whether or not the offence is one to which the European arrest warrant applies.

All the other grounds for non-enforcement in Article 4 of the Framework Decision of 13 June 2002 are optional:

- the absence of dual criminality in cases other than those listed in Article 2;
- where the person is being prosecuted in the executing Member State for the same act;
- where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State;
- if the requested person has been finally judged by a third State in respect of the same acts;
- if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law;
- if the Member State in which judgment was given has exercised its extra-territorial jurisdiction (in certain circumstances).

The ground stated at the second item of the list (“where the person is being prosecuted in the executing Member State for the same act”) will be covered by a future instrument on *lis pendens*. The fifth item is obviously not relevant for present purposes. Given the main objective, which is to facilitate reintegration, and the corollary of preserving only such grounds as contribute to that objective, only the grounds in the third and fourth items (statute-bar, *ne bis in idem*) should be adopted.

Other grounds might include the following:

As seen at point 3.2.1.3.c, certain Member States (e.g. the United Kingdom and France) allow fines and prison sentences to be imposed for the same offence. In such cases, it is quite common for the sentencing State to block all requests for transfer from the sentenced person until they have paid the fine. Given the prospect of the adoption of the Framework Decision on the application of the principle of mutual recognition to financial penalties,¹³⁹ the question arises whether the sentencing State should be entitled to refuse to transfer enforcement until the sentenced person has paid the fine.

Given the differences between the Member States’ legislation on early release (see **Annex III**, point 3), a sentenced person can be released immediately after transfer to the requested State: a person who has been sentenced to nine years in Member State A and after serving four years applies to be transferred for enforcement in Member State B could be released immediately if the law of Member State B allows early release after, say, a third of the sentence has been

¹³⁹ OJ C 278, 2.10.2001, p. 1.

served (in this case three years). The question here is whether the risk of early release might be seen in Member State of judgment A as a legitimate ground for refusing to transfer.

A solution to this problem in the European Union might consist of setting a minimum period during which the sentenced person would continue to serve his sentence in the convicting Member State so as to avoid situations in which he might be released immediately on transfer to the State of enforcement or serve a much lighter sentence than in the sentencing State. How long should that period be?

Question 21: What are the grounds that the State of enforcement could legitimately put forward for refusing recognition and enforcement in its territory of a criminal penalty imposed in another Member State?

Question 22: Where national legislation allows financial penalties to be imposed concurrently with prison sentences, given the prospect of the adoption of the Framework Decision on the application of the principle of mutual recognition to financial penalties,¹⁴⁰ should the sentencing State be entitled to refuse to transfer enforcement until the sentenced person has paid the fine?

Question 23: Given the differences between the Member States' legislation on early release, a sentenced person may be released immediately after transfer to the requested State. Could this be seen in the relevant Member States as a legitimate ground for refusing to transfer?

Question 24: Should a minimum period be set in the European Union during which the sentenced person would continue to serve his sentence in the convicting Member State so as to avoid situations in which he might be released immediately on transfer to the State of enforcement or serve a much lighter sentence than in the sentencing State? How long should that period be? Would the introduction of a minimum period jeopardise flexibility and preclude case-by-case solutions? Would determining a period compatible with the needs of justice, as proposed by the Committee of Experts on the operation of the Council of Europe Conventions on criminal law (see point 3.2.1.5.d.), be preferable?

4.2.2.3. The power of the State of enforcement to adapt, convert or substitute a penalty imposed in the State of judgment

The recognition and enforcement of a penalty imposed in another Member State can pose problems if the type or duration of the penalty is incompatible with the legislation of the State of enforcement. The problem of the incompatibility of the type of penalty with the legislation of the State of enforcement arises in particular in the context of alternative sanctions. The Council of Europe Conventions of 30 November 1964 and 21 March 1983 and the Convention between the Member States of the European Communities of 13 November 1991 give the State of enforcement a choice¹⁴¹ between **adapting** the penalty to be recognised into the penalty provided for by its own legislation for comparable offences (Conventions of 1964, 1983 and 1991) and the possibility of **substituting** for the penalty ordered in the State of judgment a penalty provided for by its own legislation for the same offence (Conventions of

¹⁴⁰ OJ C 278, 2.10.2001, p. 1.

¹⁴¹ The Convention of 28 May 1970 allows only substitution.

1964 and 1970) or **converting** the penalty ordered in the State of judgment into a penalty provided for by its own legislation for the same offence (Conventions of 1983 and 1991). In practical terms these three possibilities give the same results, namely that the State of enforcement may change the penalty to be recognised by adapting it into a penalty provided for by its own legislation for comparable offences. **Yet this possibility does not seem to be consistent with the principle of mutual recognition.** All these Conventions provide that the penalty imposed in the State of enforcement may not be heavier than the penalty imposed in the State of judgment; that the penalty imposed in the State of enforcement must correspond as closely as possible, in type and duration, to the penalty imposed in the State of judgment; and that the State of enforcement is not bound to respect the minimum penalty, if any, provided for by its own legislation for the relevant offence or offences. In this context, the question arises whether rules should be adopted in this respect in the European Union – and if so, what rules – to guide the Member States (States of enforcement) in seeking an equivalent penalty.

Regarding alternative sanctions and the supervisory schemes that go with suspended sentences, if the enforcing State does not have the measures prescribed by the convicting State, the question arises how the enforcing State can come up with an adequate measure corresponding most closely in terms of functions and objectives to what is prescribed in the convicting State. To avoid the convicted offender being put at a disadvantage by the conversion, the Max Planck Institute for Foreign and International Criminal Law in Freiburg suggests, in a study on Recognition of alternative sanctions in the European Union, commissioned by the European Commission and published in December 2001, that the court in the State of enforcement should make a “functional comparison” between the (alternative) penalties or measures of the sentencing State and the State of enforcement.

This functional comparison should be made on the basis of a set of “functional categories” and a certain analysis and evaluation method that distinguishes three levels of analysis:

At the first and highest level, the “procedural level”, a distinction must be made between alternative sanctions adopted “in the course of criminal proceedings” and those adopted “outside criminal proceedings”, regarded as being non-punitive and seeking to avoid criminal proceedings. The latter category includes the alternative sanctions described in the Chapter on criminal mediation. At the second level of functional comparison, the “functional level”, the Max Planck Institute suggests that within the category of alternative sanctions adopted “in the course of criminal proceedings”, a distinction be made between two categories of “formal” and “substitute” penalties. At the third level, the “substantive level” the comparison highlights the content of the alternative penalty: within “substitute penalties”, a distinction must be made between alternative sanctions adopted before, during and after the judgment stage. The “formal penalties” category is to be subdivided into two sub-categories: penalties that restrict freedom of movement (e.g. house arrest, with or without electronic surveillance) and those which, without actually restricting freedom of movement, merely affect the offender’s life-style. This last category includes all forms of suspended sentence accompanied by supervision measures (including community service) and training and treatment schemes, and all ancillary measures (such as the ban on certain professional activities or on driving a vehicle).

Proceeding from the functional classification scheme described above and the suggested functional comparison method, the task for the authorities of the State of enforcement would be to transpose the alternative penalty imposed by the authorities of the sentencing State into an alternative penalty as nearly equivalent as can be without changing its function, sense or purpose. In other words, the authorities of the State of enforcement, when transposing the sentencing State’s alternative sanctions, may use only such alternative sanctions of their own

system that belong to the same functional category. Only if the State of enforcement has no alternative penalty in the same functional category can it use another functional category at the same level. If no alternative penalty at this level is available, it could move up a level. When choosing the corresponding penalty, the fullest possible account must be taken of the objective of reintegrating the offender in society and the penalty most likely to achieve that should be chosen.

But the approach suggested above disregards quantitative criteria for classifying alternative sanctions on the basis of their rigour or severity. Establishing a quantitative classification – like the Sentencing Guidelines in the United States – presupposes, as the Max Planck Institute points out, a degree of consistency among alternative sanctions in Europe which currently does not exist. In the meantime, all quantitative comparison will have to be within the discretion of the courts in the State of enforcement.

Question 25: Where the type or duration of the penalty imposed in the State of judgment is incompatible with the legislation of the State of enforcement, should the latter State enjoy the possibility of adapting the penalty imposed in the State of judgment into a penalty provided for by the State of enforcement for comparable offences?

Question 26: Should provision be made in the European Union for the possibility of adapting, converting or substituting penalties, or should the State of enforcement be left with full powers of discretion?

Question 27: Would the approach proposed by the Max Planck Institute of Foreign and International Criminal Law in Freiburg, which consists of making a functional comparison between (alternative) sanctions or measures in the State of judgment and the State of enforcement by a certain analysis and evaluation method provide a solution? What shortcomings does this approach have? How can they be remedied?

4.2.2.4. Participation of the sentenced person

Article 39 of the 1970 Council of Europe Convention provides that “Before a court takes a decision upon a request for enforcement the sentenced person shall be given the opportunity to state his views”. In this context, the question arises whether the sentenced person should be given more rights to make the transfer of enforcement subject to his request or consent.

Question 28: Should the transfer of enforcement of a criminal judgment be subject to the request, the consent or merely the consultation of the person sentenced? Would the answer to this question be different if the person sentenced has already begun serving his sentence in a prison in the sentencing State?

4.2.2.5. Participation of the victim

Regarding the participation of the victim in proceedings for recognition of criminal penalties, including the transfer of prisoners, the question arises whether the European Union should make provision for information for the victim (as to the existence of a request for recognition and transfer and the outcome of the proceeding), consultation or even consent, as a possible

condition for the recognition and transfer of enforcement (Article 13(2)d) of the Council Framework Decision of 15 March 2001 on the status of victims in criminal proceedings¹⁴²).

Question 29: How can the victim's interests be taken into account in the transfer of enforcement of the penalty? Should provision be made for information for the victim (as to the existence of a request for recognition and transfer and the outcome of the proceeding), consultation or even consent, as a possible condition for the recognition and transfer of enforcement?

4.2.3. *Questions of procedure and practical arrangements for implementing the recognition of judgments in criminal matters and the transfer of prisoners*

4.2.3.1. Time-limits

The application of the Council of Europe Convention of 21 March 1983 is bureaucratic, slow and rigid.¹⁴³ In most cases, the time taken to process a transfer request (generally ranging from a year to eighteen months) is considerably longer than the implicit six-month limit in Article 3(1)(c) of the Convention. There are several reasons for this: the large number of administrative documents that the two States must exchange; the fact that certain States exceed the Convention's requirements and demand even more documents; and the fact that transfer requests, even when made by the prisoner himself, are not processed with due dispatch.

The first question arising in this context is therefore whether the European Union should make provision for a time-limit for processing requests for recognition of criminal penalties, and in particular for processing requests for transfer of prisoners. The question of the transfer of prisoners is closely bound up with the question whether the European Union should require that a minimum of x months of the sentence should remain to be served, below which a transfer request would be out of time on account of the time needed to process it. The departments responsible for handling transfer requests encounter internal structures and procedures that differ from one State to another. For these reasons, the Council of Europe Parliamentary Assembly recommends the Committee of Ministers to set a time-limit for responding to requests for information. Finally the Council of Europe Parliamentary Assembly recommends rationalising and harmonising the information requested by States and organising training seminars on transfer procedures to exchange information and study the possibilities for improving practices and making them more transparent.

4.2.3.2. Reimbursement of expenditure incurred by the State of enforcement of penalties

Another question not addressed by the existing conventions but liable to arise with the transfer of enforcement concerns the reimbursement of detention-related expenditure. In its Communication of 26 July 2000 (point 9.1) the Commission posits the principle that, *"whoever is interested in a certain measure to be taken, ought also to bear the financial burden. When a Member State issues a decision sentencing a person to imprisonment, it does so in the implementation of its criminal law policy. One can safely assume that this measure is thus in that Member State's interest. Certainly, there may be an interest of other Member*

¹⁴² OJ L 82, 22.3.2001, p.1.

¹⁴³ J.C. Froment, *Les avatars de la Convention sur le transfèrement des détenus en Europe*, in "Panorama européen de la prison", Paris 2002, p.133.

States or rather of society as a whole that certain offenders are kept in prison for a certain period, notably with regard to prevention, but it appears difficult to charge prison costs to society as a whole. Thus, the basic rule could be that it is the issuing Member State that has to bear the cost of imprisonment.” On the other hand, reintegrating the sentenced person in society in the State of enforcement – which is the sentenced person’s Member State of habitual residence – is also in the interests of the latter State. Moreover, at the end of the day, each State of enforcement will be a State of judgment and vice versa. For these reasons, but also on grounds of administrative simplicity, no reimbursement of expenditure incurred should be envisaged. That is the solution adopted in Article 17 of the Initiative of the Kingdom of Denmark for the adoption of a Framework Decision on the execution in the European Union of confiscation orders.¹⁴⁴

Question 30: *Should the European Union make provision for a time-limit for processing requests for recognition of criminal penalties, and in particular for processing requests for transfer of prisoners, and if so what limit?*

Question 31: *Given the administrative burden of processing a request for transfer of a prisoner, should the European Union provide that only prisoners sentenced to at least a specified term of imprisonment or who still have a specified minimum time to serve should be eligible for transfer? If so, what would be a proper period?*

Question 32: *Should the European Union make provision for a time-limit for responding to a request for information needed in connection with the recognition of criminal penalties, and in particular for the transfer of prisoners?*

Question 33: *Given the complexity of judicial and administrative structures in the Member States and the differences between them, what simple and effective structures should be provided to implement the mutual recognition of criminal penalties and the transfer of prisoners?*

Question 34: *Should there be a standard form in the European Union to facilitate the implementation of the recognition of criminal penalties and the transfer of prisoners?*

Question 35: *Should the State of enforcement be able to ask for reimbursement of expenditure incurred in the enforcement of penalties that it has recognised?*

Question 36: *Should a network of contact points be set up to facilitate – and perhaps even help to evaluate – the practical application of a European Union legislative instrument on the mutual recognition of criminal penalties and the transfer of prisoners?*

¹⁴⁴

OJ C 184, 2.8.2002 p. 8; Article 17 reads: “Without prejudice to Article 14 on the sharing of assets, Member States may not claim from each other the refund of costs resulting from application of this Framework Decision”.

4.2.4. Allocation of powers between the State of judgment and the State of enforcement

The Council of Europe conventions and several European Union instruments providing for recognition¹⁴⁵ provide as a general rule that enforcement is governed by the law of the requested State (State of enforcement). In this context, point 9.1 of the Communication of 26 July 2000 on Mutual recognition of Final Decisions in criminal matters states that “*mutual trust should work both ways: while the executing Member State trusts the issuing Member State that the decision it has handed down is correct, the issuing Member State should trust the executing Member State that the way it handles the execution is correct. Thus, it would appear that decisions relevant for the execution, which are based on the behaviour of the prisoner, should fall within the competence of the executing Member State. Practical reasons also speak for this solution: it is the authorities of the executing Member State who are in direct contact with the prisoner and thus best placed to form an opinion on his or her behaviour*”. There will be even greater justification for this once mechanisms are in place to allow the sentenced person to serve his sentence in his State of residence.

Since the sentenced person will probably want to live in the State of habitual residence, which is the State of enforcement, he should be prepared for integration into local society there after release. This is a further reason for leaving this aspect in the hands of the State of enforcement. But the possibility for the authorities of the Member State of judgment to be consulted, or at least informed, before a major measure such as early release is taken should not be excluded. Another possibility would be for the Member State taking the decision to impose limits or conditions at the time of transfer (for example to protect or inform the victim).

Lastly, the question arises of which State (State of judgment or of enforcement) should have jurisdiction to withdraw custodial sentences passed subject to conditions or whose enforcement has been suspended conditionally, and alternative sanctions, if the sentenced person has not met the conditions imposed.

Under the 1970 Convention, the requesting State alone has the right to rule on applications for review of the sentence but each of the two States can exercise the right to give an amnesty or pardon.

Question 37: Where a custodial penalty or an alternative penalty is recognised, are there any reasons for departing from the rule that enforcement should be governed entirely by the law of the State of enforcement?

Question 38: If the conditions attached to a suspended sentence are supervised by the State of enforcement, should the State of judgment be given the possibility of ensuring that the sentenced person complies with the conditions? What mechanisms should be envisaged for that purpose?

Question 39: Which of the two States should be able to exercise the right to give an amnesty or pardon?

¹⁴⁵ For example Article 6(2) of the Council Framework Decision of 13 June 2002 (European arrest warrant).

ANNEX I

Inventory and comparison of Member States' legislation regarding the way that custodial penalties that are imposed as part of the sentence are enforced

1. SUSPENDED SENTENCES

The suspended sentence is traditionally seen as a means of preventing re-offending. Experience shows that imprisonment - and particularly short prison sentences - can have a harmful rather than a beneficial effect. A suspended sentence encourages the offender to behave because failure to do so may lead to the suspension being revoked and consequently the sentence being enforced.

While recognising the major differences between the criminal systems of the Member States as regards the rules and conditions of suspended sentences, we propose defining it as a provisional stay of execution of the sentence. Thanks to this stay of execution the effects of the sentence are suspended.

As far as the conditions of use are concerned, those found guilty of serious offences are usually not eligible for suspended sentences. However, the maximum prison terms for which a suspended sentence may be handed down differ from one system to the next, ranging from a term of imprisonment of up to one year in Germany¹⁴⁶ and the Netherlands, two years in Greece, the United Kingdom and Spain and five years in Belgium and France. There is usually a margin of discretion for the judge in deciding whether or not to apply the measure. In certain Member States (e.g. Italy and Belgium), the administration is responsible for monitoring the measure.

A probation period may also be imposed, during which the penalty is deferred. During this period the offender is usually subject to various forms of supervision and/or assistance. A wide range of conditions may be imposed: victim reparation, exclusion from contact with certain people or places, supervision, training or community service.

The probation period is usually between one and five years for the most serious offences and between six months and three years for the least serious. Fines, daily fines and alternative sanctions may also be suspended, for example in France and the Netherlands.

If the offender complies with the terms of the probation order the conviction will be expunged at the end of the probation period. However, if the offender does not comply with the conditions or commits an offence, probation will be revoked.¹⁴⁷

In practice, one of the consequences of the differences between the Member States' legislation is that some judges are reluctant to hand down suspended sentences for people who are habitually resident in a Member State other than the state where they are convicted. A degree of approximation of the conditions under which suspended sentences are passed and

¹⁴⁶ In exceptional cases a prison term of up to two years may be suspended (Article 56(2) of the German Criminal Code.

¹⁴⁷ According to UK law (section 119(1) of the Powers of Criminal Courts (Sentencing) Act), only convictions for offences punishable by imprisonment, committed during the probation period, can lead to revocation.

the rules for supervising them would undoubtedly simplify the conditions for mutual recognition and enforcement of these measures by the Member States.¹⁴⁸

2. SUSPENSION/DEFERMENT OF SENTENCING

In a minority of Member States (e.g. Belgium and France) sentencing may be deferred to a later hearing. In the meantime the accused is placed on probation.

In Belgium, the Act of 29 June 1964 on suspension, deferment and probation allows for sentencing to be deferred, with the agreement of the person concerned, if the accused has no previous conviction for a felony or has never received a primary sentence of more than six months' imprisonment for a misdemeanour, provided the offence is not a misdemeanour for which the primary sentence is imprisonment of more than five years or a more serious penalty, and provided the charge has been proved (Article 3 of the Act). Deferment can always be ordered *ex officio*, required by the Public Prosecutor's Office or requested by the accused. The decisions ordering deferment will specify the period of postponement, which may not be less than one year or more than five years from the date of the decision, and, where necessary, the terms of probation.¹⁴⁹ Providing they are not revoked, such decisions mark the end of the proceedings. Deferment may be revoked if a new offence is committed during the probation period that results in a conviction for a felony or a primary prison sentence of at least one month (Article 13 of the Act).

In France, under Article 132-60 of the Criminal Code, the court may defer sentencing if it appears that the offender is successfully undergoing rehabilitation, reparation is being made for the damage caused and the nuisance caused by the offence will cease. In its decision the court sets the date for sentencing. A deferment may only be ordered where the accused (in the case of a natural person) or the representative (in the case of a body corporate) is present at the hearing.

A court may place the accused on probation (deferment with probation, Article 132-63 of the Criminal Code). The probation system is the same as for suspension with probation. French law even allows for injunctions to be served on those convicted requiring them to comply with one or more provisions laid down by law or regulation (Article 132-66 of the Criminal Code).

The sentencing decision is taken no later than one year after the first decision on deferment (Article 132-62 of the Criminal Code). At the reconvened hearing, the court may exempt the defendant from penalty (while still recognising his guilt),¹⁵⁰ or impose the penalty set out by law, or defer sentencing once more (Article 132-61 of the Criminal Code).

3. DAY RELEASE

Day release allows offenders to leave the prison in which they are serving their sentences in order to engage in a professional activity, attend an educational course or vocational training programme, gain work experience or hold a temporary job with a view to their rehabilitation,

¹⁴⁸ See point 3.2.2.

¹⁴⁹ In which case it is referred to as "probationary deferment".

¹⁵⁰ Articles 132-58 and 132-59 of the Criminal Code. Unless an exception is made, the decision will appear on the criminal record.

or alternatively to play a vital role in their family life or undergo medical treatment, without being under the constant supervision of the prison administration.

The system seeks to offset one of the major disadvantages of prison, namely the desocialisation of the prisoner. Compared with suspended sentences with probation, detention with day release seems more successfully to reconcile the needs of rehabilitation and public protection.

Among the small number of Member States using this measure, day release is generally used during the term of the sentence¹⁵¹ as a transitional stage between prison life and the return to life on the outside.¹⁵² Only in a minority of Member States¹⁵³ can it be ordered from the outset by the court that convicts the offender.

Offenders benefiting from such a measure from the outset are those sentenced to short terms of imprisonment (three months in Portugal¹⁵⁴ and one year in France). In Portugal, it can only be granted if the prison sentence to which it applies cannot be replaced by a fine, another non-custodial sentence or weekend detention. Day release sometimes requires the consent of the offender (in Germany and Portugal). It may be used as way of serving sentences in Italy if the offender has been sentenced to a term of no more than six months or, in the case of longer prison sentences, if the offender has already served half of the sentence. In France it may be used at the end of a sentence if the prison term that remains to be served is no more than one year.

A number of conditions may be attached to day release. Offenders are required to return to the prison according to a timetable decided by the competent authority, taking into account the time necessary for the professional activity, schooling, vocational training, work experience, involvement in family life or medical treatment that was the reason for allowing the day release arrangement. Offenders are normally required to remain in prison on those days when they have no obligations outside.

Offenders on day release continue to be subject to all disciplinary rules. The arrangement may be revoked if they do not comply with their obligations, if they are guilty of misconduct or if the conditions that led to the arrangement being made cease to apply. In this case offenders must complete their sentences in prison. In certain Member States the act of evading the supervision to which an offender is subject under this scheme or of returning to the prison late will earn the offender a penalty for escaping (France).

4. SENTENCES SERVED IN INSTALMENTS (WEEKEND DETENTION)

A sentence may be served in instalments, i.e. with one or more interruptions. The length of the sentence remains unchanged, but it is served in different ways. It is a system used particularly for short custodial sentences, but exists only in a minority of Member States

¹⁵¹ E.g. Germany (§11 StVollzG), Belgium, Spain, Finland (Law on enforcement of criminal sanctions of 19.12.1889/39A, Chapter 3, Article 8 and Chapter 4, Articles 4 and 5), France (Article 132-25 of the Criminal Code) and Italy (Article 50 of Act No. 354 of 26/7/1975).

¹⁵² In France it is even a pre-requisite for release on parole (Article 723-1 of the Code of Criminal Procedure).

¹⁵³ This is the case for France (Article 132-25 of the Code of Criminal Procedure), Italy (Article 50 of Act No. 354 of 26/7/1975) and Portugal (Article 46 of the Criminal Code).

¹⁵⁴ Article 46 of the Portuguese Criminal Code.

(Belgium,¹⁵⁵ Spain,¹⁵⁶ France,¹⁵⁷ Greece¹⁵⁸ and Portugal.¹⁵⁹ This is different from the power which the prison administration has to allow an interruption in the sentence on the grounds of serious illness.¹⁶⁰

In **France** an instalment arrangement may be applied at the time of sentencing or in the course of the prison term. It entails an extension of the period over which the sentence is enforced (up to a maximum of three years). The measure may be used for serious medical, family, professional or social reasons in the case of prison sentences of one year or more. The instalments may not be less than two days.

The offender is released on the specified date without assistance or supervision, as if the full sentence had been served. During the period of interruption offenders who are subject to social or judicial supervision must continue to fulfil the obligations this entails,¹⁶¹ compliance with which is monitored primarily by the prison administration.

Offenders return to the same establishment from which they were released, at the stipulated time and date. Failure to return to prison as required is punishable in the same way as an escape¹⁶² by both the court and the prison administration.

The judge responsible for enforcing sentences may allow, adjourn, refuse, withdraw or revoke the suspension or division of the prison sentence into instalments. Cases are referred to this judge *ex officio* at the request of the offender or the Public Prosecutor. The judge's decision (which can be appealed) is taken after consulting the representative of the prison administration, following an adversarial debate in chambers, where the submissions of the Public Prosecutor and the comments of the offender or his/her counsel are heard.

In **Spain** weekend detention is ordered at the time of sentencing. It lasts for 36 hours and is equivalent to two days of imprisonment. A maximum of 24 weekend detentions may be imposed, except where this measure replaced another custodial sentence. The weekend detention is normally served on Friday, Saturday and Sunday in the prison nearest to the offender's place of residence.

The judge or court passing sentence may, however, order the detention to take place on other days of the week or in another location. If an offender has two unauthorised absences the supervising judge may order the sentence to be served without interruption.

Spain is currently debating a bill to abolish weekend detention on the grounds that it is ineffective, based on seven years of (unsatisfactory) experience with this type of sentence. This bill would replace weekend detention with a prison sentence, fine, community service or electronic surveillance, depending on the nature and severity of the offence.

In **Portugal** prison sentences of up to three months that cannot be replaced by a fine or other non-custodial sentence are enforced in the form of periods of weekend detention, if this is appropriate and sufficient for the purpose of the penalty. Each weekend detention lasts for a

¹⁵⁵ Referred to as "*arrêt de fin de semaine*", this system plays only a very marginal role in Belgium.

¹⁵⁶ "*Arresto de fin de semana*", Article 37 of the Criminal Code.

¹⁵⁷ Article 132-27 of the Criminal Code.

¹⁵⁸ Article 63 of the Code of Penal Enforcement.

¹⁵⁹ *Prisão por dias livres*, Article 45 of the Criminal Code.

¹⁶⁰ See for example Article 46 of the German rules on the enforcement of sentences (StVollstrO).

¹⁶¹ Article 763-7 of the Code of Criminal Procedure.

¹⁶² Article 434-29, 3° of the Criminal Code.

minimum of 36 hours and a maximum of 48, which is equivalent to five days of continuous imprisonment. A maximum of 18 periods of weekend detention may be imposed. Public holidays immediately before or after a weekend may also be used for this type of detention.

5. ELECTRONIC SURVEILLANCE

Electronic surveillance works by requiring offenders or prisoners to wear a transmitter (usually an electronic bracelet) which makes it possible to detect their presence in (or absence from) a particular location (usually the home) designated by the competent authority for a given period. Offenders are prohibited from leaving the designated location except at times specified by the authority.

Electronic surveillance is a relatively new measure used by six Member States (Belgium, Spain, France, Italy, Sweden and the United Kingdom). It is being introduced on a trial basis in Hesse (Germany), the Netherlands, Finland and Portugal and is being discussed in Germany and Denmark.

The legislator's main reason for introducing such a measure is to diversify the means of enforcing penalties in order to reduce the prison population and thus limit the harmful consequences of imprisonment (social stigma, loss of employment and consequent financial difficulties for the family, parental absence and loss of parental authority, etc.), to facilitate the rehabilitation of offenders by providing strict supervision and thereby to reduce the risk of re-offending, to reduce the tensions caused by overcrowding in prisons and to achieve savings on the daily cost of prison care.¹⁶³

The measure may serve various functions, depending on the stage of the procedure at which it is used. It can be used as the main sentence (Italy, Sweden¹⁶⁴), or as an alternative to imprisonment on remand (France, Italy, Portugal).¹⁶⁵ It is also to be used on a trial basis for conditional release (Belgium, France,¹⁶⁶ the Netherlands, Sweden), in conjunction with the open prison system (Spain) or weekend detention (Spain). A pilot project has been under way in Sweden since 1 October 2001 using electronic surveillance in the final phase (last three months) of prison sentences of at least two years.

Offenders eligible for electronic surveillance are those sentenced to a term of imprisonment up to a certain limit (France: one year or more for offenders who have less than a year left to serve; Italy: four years; Sweden: three months). In Belgium the scheme is intended for those sentenced to a maximum of three years, in which case electronic surveillance may be used from the start of the sentence, or for offenders sentenced to longer terms, in which case electronic surveillance is used when they become eligible or are recommended for release on parole.

Certain categories of offenders are excluded from the scheme: e.g. in Belgium, those convicted of sexual offences, trafficking in human beings or drug trafficking.

¹⁶³ In France, for example, prison costs around €60 per day, compared with €20-€30 for day release and €22 for electronic surveillance (*Le Monde*, 29.4.2003).

¹⁶⁴ To replace short prison sentences of up to three months.

¹⁶⁵ The Swedish legislation, on the other hand, explicitly excludes this possibility.

¹⁶⁶ In France for a period of no more than one year.

In all Member States the measure requires the explicit consent of the offender, in some cases in the presence of a lawyer (France). In certain Member States those who live with the offender must also give their consent (Belgium).

Several Member States lay down minimum periods (Belgium: one month) and maximum periods for applying the scheme (Belgium: three months; England and Wales: six months;¹⁶⁷ Scotland: 12 months¹⁶⁸).

Several Member States (e.g. France) allow for the possibility of consulting a doctor (at the offender's request) in order to check that the procedure is not harmful to the individual's health.

Depending on the individual circumstances, the offender may be prohibited from leaving the designated location outside the periods specified, for example for employment, training, medical treatment or involvement in family life.

The competent authority may also impose one or more suspended sentences with probation (Belgium, France). It may alter the conditions of electronic surveillance either *ex officio* or at the request of the offender.

Electronic surveillance may be revoked according to the procedure in force if requested by the offender or in the event of a refusal to accept a change in the arrangement, failure to comply with the obligations imposed or deliberate evasion of surveillance (which is equivalent to an escape under certain legal systems, e.g. in France). In this case the offender will serve the sentence that remained outstanding, but the period of surveillance will count towards the period served (France).

Failure to comply with the conditions, and particularly the way time is spent, is punished by a warning or a tightening up of the conditions. In the event of a major violation (repeated absences, deliberate destruction of the bracelet or monitoring equipment, new offences, etc.) the measure may be revoked and the offender will be returned to serve the sentence in prison.

6. HOME DETENTION

Home detention was designed as a way of giving privileged treatment to certain categories of offenders in view of their particular status, to enable them to serve their sentence at home or in another location where they receive treatment or assistance. With the exception of the United Kingdom and Italy, home detention exists only in conjunction with electronic surveillance (see above). Home detention in Spain was abolished with the entry into force of the new Criminal Code in 1995.¹⁶⁹

In the **United Kingdom**, Article 37 of the Powers of Criminal Courts (Sentencing) Act 2000 provides for the imposition of a "curfew order", a form of home detention (or detention in another location) for a given length of time. They can be used for any offences other than murder and the other crimes listed in Articles 109 to 111 of the Act referred to above.

¹⁶⁷ "Curfew order" which is enforced partly by private companies.

¹⁶⁸ "Restriction of liberty orders".

¹⁶⁹ Articles 27 and 30 of the 1973 Criminal Code.

The curfew order specifies the location or locations where the offender must remain and the periods during which the offender may not leave these places. The maximum duration of such an order is six months for those aged 16 and over and three months for offenders under 16 years of age. The curfew period may be no more than 12 hours and no less than two. Observance of the curfew may be monitored by electronic surveillance. The court decision imposing such detention must specify the name of the person responsible for monitoring the offender during the period of home detention. Imposition of this penalty does not require the agreement of the offender.

Offenders who violate the terms of the curfew order may be fined £1000. Alternatively the curfew order may be revoked and the offender is likely to receive a more severe sentence. The same treatment (revocation and re-conviction) is given to individuals who commit another offence while under a curfew order.

In **Italian law** home detention is used to reconcile the conflicting demands of punishment and public safety on the one hand and protection of certain fundamental rights of the individual (like the right to health, the right/duty to support and educate one's children and the right to maternity protection) on the other.¹⁷⁰ In Italian law home detention is intended either as a way of enforcing provisional detention during the investigation stage (in which case it is referred to as "house arrest")¹⁷¹ or as a means of serving prison sentences of up to four years, or longer prison sentences of which no more than four years remain to be served. In the latter case the home detention order is not issued at the time of the initial judgment but while the prison term is being served. The following are eligible for home detention: a) pregnant women and mothers of children under 10 who live with them; b) fathers who exercise parental authority over children under 10 who live with them if the mother is dead or incapable of caring for their children; d) those over 60 years of age if they are incapacitated, even partly; e) those under 21 where there are duly substantiated reasons connected with their health, education, work or family situation.¹⁷² There are also special provisions for offenders with AIDS. The authorities have recently introduced the possibility for all offenders - not just those referred to in categories a) to e) above - to be granted home detention in order to serve sentences (including residual sentences) of up to two years, if the conditions do not exist for probation and provided there is no risk of their committing other offences.¹⁷³

It is for the supervising court in Italy to determine the arrangements for applying home detention and to specify the conditions relating to the role of the social services. The supervising judge will order offenders not to leave their home or other private residence or public healthcare establishment. If necessary, judges may restrict or prohibit communication between offenders and people other than those who live with them or care for them. Offenders who cannot provide for their essential needs or are completely destitute may be authorised by the judge to leave their place of detention during the day for as long as is strictly necessary to provide for these needs or engage in employment. The Public Prosecutor or police may at any time check that offenders are complying with the conditions imposed on them.¹⁷⁴

The measure is revoked if an offender leaves the place where the detention has to be served (which may constitute an escape under Article 385 of the Criminal Code) or if the offender's behaviour is against the law or violates the conditions imposed and is incompatible with the

¹⁷⁰ Article 47ter of Act No 354/1975.

¹⁷¹ Article 284 of the Code of Criminal Procedure.

¹⁷² Article 47ter of Act No 354/1975.

¹⁷³ Article 47ter (1bis) of Act No 354/1975.

¹⁷⁴ Article 284 of the Code of Criminal Procedure.

continuance of the measure. It will also be revoked if the conditions for awarding it cease to exist or if the sentence is expunged.

ANNEX II

Inventory and comparison of Member States' legislation regarding alternative sanctions

1. COMMUNITY SERVICE

This punishment consists of performing unpaid work for a public authority, public institution or non-profit-making organisation.

In view of the need to relieve prison overcrowding and to find alternatives to prison, the Council of Europe, in its Resolution (76) 10 on certain alternative penal measures to imprisonment, advocated community service as a way “for the community to contribute actively to the rehabilitation of the offender by accepting his cooperation in voluntary work”.

Community service has since been introduced in all Member States and works reasonably successfully in most of them.¹⁷⁵

Community service may serve various functions depending on the stage of the procedure at which it is used: it may be a factor in the decision as to whether or not to prosecute, often as part of a mediation or settlement procedure (see below), in order to avoid a conviction (Belgium,¹⁷⁶ Germany,¹⁷⁷ France¹⁷⁸), or it may be used as the primary sentence (Belgium,¹⁷⁹ France, Italy,¹⁸⁰ the Netherlands), or as an additional sentence (France), or for certain offences in the category of *contraventions graves* (Belgium, France¹⁸¹). It may also be used as an alternative to civil imprisonment¹⁸² for the recovery of fines (Germany,¹⁸³ Italy), a fine (Spain, Italy, Portugal) or weekend detention (Spain). A community service order may also be accompanied by a suspended prison sentence (Belgium, Germany, Denmark, France, Sweden). In Greece a prison sentence or fine may be partially converted, at the request of the offender, into a term of community service.

In certain Member States community service may only be imposed for particular offences defined by their nature (Denmark, Italy) or by the severity of the punishment it replaces (e.g. penalty for a summary offence (*peine de police*) or misdemeanour (*peine correctionnelle*) in Belgium, prison sentence of up to six months (the Netherlands) or one year (Portugal)).

The consent of the person concerned is required in some form or other by all the Member States' legislation. Various international texts require such consent, specifically Article 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which states that “No one shall be required to perform forced or compulsory labour.” Article

¹⁷⁵ Some Member States (e.g. France), however, have difficulty applying it (delays in implementation, lack of available jobs, etc.).

¹⁷⁶ Article 216ter of the Code of Criminal Procedure.

¹⁷⁷ §§ 153, 153a StPO.

¹⁷⁸ As part of a settlement.

¹⁷⁹ Introduced as a primary penalty by the Act of 17 April 2002.

¹⁸⁰ For minor offences heard by a cantonal court.

¹⁸¹ Traffic offences.

¹⁸² Civil imprisonment is used to force a person to pay a sum owed to the Treasury as a result of a criminal conviction.

¹⁸³ Germany is currently considering extending the use of community service as part of a wider reform of the penal system: in future community service will be the primary alternative penalty to a fine (replacing civil imprisonment for the recovery of fines).

5 of the Charter of Fundamental Rights of the European Union uses exactly the same wording.

The number of hours of community service to which a person may be sentenced ranges between 20 and 300 hours (Belgium¹⁸⁴), 20 and 200 hours (Finland), 30 and 240 hours (Denmark), 40 and 240 hours (France, Sweden, United Kingdom¹⁸⁵) and 36 and 380 hours (Portugal). In the case of a criminal law settlement (with a view to avoiding a conviction), the maximum figures are lower (60 hours in France).

The work must usually be performed within a certain period (e.g. 12 months in the United Kingdom, 18 months in France, except in the case of a settlement when it is 6 months).

The work to be performed has traditionally involved maintenance, cleaning and repairs for local authorities and administrations.

If the community service was the primary penalty an offender who deliberately fails to perform the work will be liable to prosecution for non-performance (a specific offence in France, for example).¹⁸⁶ If the community service was a condition of a sentence being suspended, the suspension is liable to be revoked. In this case, if the offender has completed some of the work he or she may be entitled under the legislation of certain Member States (e.g. Portugal) to a corresponding reduction in the prison term.

2. MEDIATION IN CRIMINAL CASES

Mediation in criminal cases is a structured procedure in which the victim and the offender both participate, which aims to find a negotiated solution to the conflict caused by an offence with the help of a qualified mediator.¹⁸⁷ The objective is to make good the damage caused, to put an end to any problems resulting from the offence and to contribute to the rehabilitation of the author of the offence. It also aims to bring about a lasting change in the behaviour of the parties involved to ensure that the same thing does not happen again for the same reasons.

It allows the victim to meet voluntarily with the offender, encourages the latter to understand the consequences of his actions and to take responsibility for the damage caused, and gives the victim and the offender the chance to agree compensation for the damage done.

Mediation in criminal cases in the strict sense differs from other forms of contract or arrangement (“compromise procedures”) between the public prosecutor and the author of the offence which avoid criminal sanctions, such as *la composition pénale* (settlement) and *la*

¹⁸⁴ The cut-off point between a summary offence and a misdemeanour is 45 hours.

¹⁸⁵ The maximum sentence is 240 hours for a “community punishment order” and 100 hours for a “community punishment and rehabilitation order”.

¹⁸⁶ In France such an offender may be sentenced to a term of imprisonment, a fine or another period of community service.

¹⁸⁷ Article 1(e) of Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings defines mediation in criminal cases as follows “mediation in criminal cases” shall be understood as the search, prior to or during criminal proceedings, for a negotiated solution between the victim and the author of the offence, mediated by a competent person.” Recommendation No R (99)19 of the Committee of Ministers of the Council of Europe of 15 September 1999 concerning mediation in penal matters contains the following definition of mediation: “any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the crime through the help of an impartial third party (mediator)”.

transaction pénale (plea agreement) in French law, in that the latter do not involve active participation by the victim in a negotiated solution.

Mediation in criminal cases is part of the broader concept of “restorative justice”, in which repairing the damaged relationship between victim, community and offender, in material and immaterial terms, is a guiding principle. This approach is supported in the European Union by several non-governmental organisations, some of which have received grants under the GROTIUS or AGIS programmes.

In June 2002, Belgium put forward a formal initiative on “Setting up a European Network of National Contact Points For Restorative Justice”.¹⁸⁸ The purpose of this European network was to contribute to developing, supporting and promoting the various aspects of restorative justice within the Member States and at Union level. The initiative has not been debated in the Council.

As regards the existing legislation at European Union level, Article 10 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings,¹⁸⁹ provides that Each Member State must seek to promote mediation in criminal cases for offences which it considers appropriate for this sort of measure. They must also ensure that any agreement between the victim and the offender reached in the course of such mediation is taken into account. However, this provision does not come into force until 22 March 2006 (see Article 17 of the Framework Decision).

Austria, Belgium, Finland, France, Germany, Luxembourg, Sweden and the United Kingdom have already adopted quite detailed legislation on mediation in criminal cases. In Denmark, Ireland, the Netherlands, Portugal and Spain, pilot projects are under way.

There are special provisions in several Member States on mediation in criminal cases involving young people. Such provisions are often adopted before those on mediation for adults.

Mediation in criminal cases can come in to play at various points in the procedure: it may be at the stage at which a decision is made on whether to initiate criminal proceedings, in order to avoid a conviction (Austria,¹⁹⁰ Belgium,¹⁹¹ Germany,¹⁹² France¹⁹³), it may be part of the judgment (as it is for example in Germany¹⁹⁴ and the United Kingdom¹⁹⁵) or it may only come into play during sentencing (as in Belgium¹⁹⁶).

In **Germany**, mediation in criminal cases was introduced in 1994 by Article 46a of the German Criminal Code as a “third way” of imposing criminal penalties, in addition to the main penalties (custodial sentences and fines) and educational and guarantee measures. This provision provides that the court can mitigate a sentence (according to the rules laid down in Article 49 of the Criminal Code) or even decide not to impose a sentence provided that the

¹⁸⁸ OJ C 242, 8.10.2002, p.20.

¹⁸⁹ OJ L 82, 22.3.2001, p.1.

¹⁹⁰ Article 90a Code of Criminal Procedure (“Diversion”)

¹⁹¹ Article 216b of the Criminal Code and Royal Decree of 24.10.1994.

¹⁹² Articles 153 and 153a of the Code of Criminal Procedure.

¹⁹³ As part of a criminal settlement. Article 41-2 of the Code of Criminal Procedure.

¹⁹⁴ Article 46a of the Criminal Code, Article 155a of the Code of Criminal Procedure.

¹⁹⁵ Compensation order in accordance with Articles 130 to 134 of the Powers of Criminal Courts (Sentencing) Act.

¹⁹⁶ With the help of a restorative justice counsellor in each prison.

sentence would not have exceeded one year or 360 daily fines, provided that the author of the offence has a) undergone the mediation procedure (Täter-Opfer-Ausgleich) and has made full or almost full reparation for the damage caused, or has genuinely tried to do so or, b) made full or almost full reparation for the damage caused, provided that this required considerable personal effort on the part of the author of the offence. In both cases, reparation requires more than the mere payment of damages and involves the active participation of the offender.

In **Austria**, legislation on mediation in criminal cases provides for two options according to the seriousness of the offence:

a. Offences which would incur a fine or custodial sentence of a maximum of three years are not considered punishable¹⁹⁷ if a) the offence is deemed to be very minor b) the offence had no negative consequences or negligible negative consequences, or if the author of the offence made reparation for the consequences of his act or genuinely tried to do so, and c) there is no need to impose a sentence as a deterrent.¹⁹⁸

b. For offences carrying a custodial sentence of a maximum of five years, provided that the offence is deemed to be minor and did not cause anyone's death, the public prosecutor must drop proceedings if, as a result of mediation ("aussergerichtlicher Tatausgleich"), payment of a fine, imposition of community service or a probationary period with certain conditions attached, no other sentence is necessary as a deterrent.¹⁹⁹ According to Article 90g of the Austrian Criminal Code, mediation implies that the author of the offence should acknowledge his misdeed, agree to examine the cause, make reparation for the negative effects of the offence and, where necessary, undertake to demonstrate that he is prepared to abandon the kind of behaviour which led to the offence. Mediation presumes the consent of the victim, unless the reasons for his refusal are inadequate. The essential element of the procedure is a mediation interview between the victim and the offender. This interview is organised by an independent mediator. The results of the interview are recorded in a written agreement which the mediator puts before the public prosecutor, the implementation of which is overseen by the mediator. If the offender fulfils the conditions of the agreement, criminal proceedings are dropped; if not proceedings take their normal course, up to and possibly including conviction.

In **Belgium**, according to Article 216b of the Criminal Code, the public prosecutor can summon an offender and, so long as the offence does not appear to be punishable by a prison term of over two years or a heavier penalty, invite him to compensate or make reparation for the damage caused by the offence and to provide proof that he has done so. A lawyer may represent the offender and the victim. The public prosecutor is assisted in the various phases of mediation and in particular at the implementation stage by the Ministry of Justice department of "Maisons de justice" (law centres). The staff of this department (counsellors and mediation assistants) carry out their work in close cooperation with the public prosecutor, who oversees their activities. The rules on how mediation procedures are to be conducted are laid down in a Royal Decree.²⁰⁰ The rules on implementation of the results of mediation are set down in an official report. Once the offender has satisfied all these conditions, court proceedings are dropped.

¹⁹⁷ "so ist die Tat nicht strafbar, wenn".

¹⁹⁸ Article 42 of the Austrian Criminal Code.

¹⁹⁹ Article 90a of the Austrian Criminal Code ("Diversion").

²⁰⁰ Royal Decree of 24.10.1994 "laying down implementing measures for the procedures governing mediation in criminal cases".

In **France**, Article 41-1(5) of the Code of Criminal Procedure allows the public prosecutor to use mediation in cases of petty crime (misdemeanours or petty offences), with the consent of the victim and the offender, before deciding whether to take criminal proceedings, if he feels that this will ensure that reparation is made to the victim, that any difficulties arising from the offence will be resolved and that it will help with the rehabilitation of the offender.

Mediation in criminal cases can only be authorised by the public prosecutor. The parties may not directly approach the mediator. Mediation suspends limitation periods. To implement the results of mediation, the prosecutor enlists the help of a mediation service or an independent mediator.²⁰¹ The procedure for appointing and empowering mediators is laid down in Article R. 15-33-30 of the Code of Criminal Procedure. Mediation is optional for the parties involved. It respects the rights of complainants and suspected offenders who may be advised or assisted by the lawyer of their choice at their own expense. The type of offence concerned is decided solely by the public prosecutor. It may include petty crimes of violence, theft, minor cases of swindling, non-payment of alimony, non-representation of children, deliberate damage, threats, injuries, failure to report an accident, use of drugs etc. Mediation is free to the parties. There are various ways in which damage can be made good: financial, material or symbolic.

Mediation in criminal cases usually follows the pattern below: at the request of the public prosecutor, the mediation service or independent mediator:

- summons the parties in writing;
- receives the parties separately or together, explains to them the objectives of mediation, and secures, where the Public Prosecutor has not already done so, the consent of the parties to participate in mediation;
- organises the mediation meeting, which involves getting all the parties to attend so that they can establish or re-establish contact and enter into dialogue with a view to finding solutions to the problem;
- draws up the written agreement between the parties;
- informs the Public Prosecutor in writing of the results of the mediation procedure, having monitored the progress of the case for the period laid down by the Public Prosecutor's office.

The Prosecutor checks that the conditions of the agreement have been fulfilled (reparation, reimbursement). He takes the legal decision either to drop court proceedings or to take action before the appropriate court. If the public prosecutor drops proceedings after mediation, the complainant will be informed.

²⁰¹ Since the establishment in 1990 of the "Maisons de Justice et du Droit" (law centres), mediation procedures increasingly take place there. These centres are under the authority of the president of the regional court and the public prosecutor.

3) SETTLEMENT²⁰²

Settlement is a procedure by which disputes in criminal cases may be resolved by agreement between the complainant and the defendant, without the need for legal proceedings in the strict sense. In this type of settlement, there is no negotiation between the offender and the public prosecutor as regards sentencing. The state makes an offer through the authority whose task it is to implement the penalty, which the defendant can take or leave. There is no negotiated agreement between the defendant and the public authorities. It would be erroneous to regard a settlement as contractual in nature, because it involves the imposition of sentence, albeit a light and an agreed one, which is nonetheless a penalty and fulfils the function of a sentence.

As we have seen, several Member States have settlement procedures, or similar procedures by other names, where the state will drop action against an individual, on the basis of a legal authorisation, and in some systems, without any legal decision, after he has paid a certain fine or satisfied other conditions.

This form of administration of criminal justice does not, however, apply to all offences. It is specifically designed to punish certain types of behaviour, which are not considered serious in social terms, and which do not require the full machinery of the state to be set in motion nor, consequently, the full implementation of the guarantees of the criminal justice system through the intervention of a judge.

Settlement allows the offender to acknowledge his guilt, explicitly or implicitly, without having to go through legal proceedings, and to expiate it by carrying out obligations agreed between himself and Public Prosecutor, within the limits laid down by the legislation, which will in any case be less constraining than the normal criminal procedure to which he would be subject in the absence of an agreement. In return, the state drops proceedings.

Under **German** law,²⁰³ the public prosecutor's office may decide to discontinue criminal proceedings provided that the offender agrees to the obligations imposed on him and fulfils them. Although, as a general rule, the approval of the competent court is required, it is not essential in the case of minor offences punishable by a penalty which does not exceed the minimum provided for in the Criminal Code and if the damage caused is slight. If there is agreement, the prosecutor fixes a time limit for fulfilment of what has been agreed and, once it has been fulfilled, the liability is finally extinguished and 'the offence cannot be prosecuted as a crime'.²⁰⁴

Austria²⁰⁵ has a procedure which is called 'diversion', which allows the prosecutor (or the trial judge) to abandon criminal proceedings in exchange for payment of a sum of money, community service, a probationary period or mediation (aussergerichtlicher Tatausgleich).

²⁰² With the exception of Belgium and France, the text in this chapter on settlement procedures is mostly taken from the Opinion of Mr Advocate General Ruiz-Jarabo Colomer given on 19 September 2002 in Joined Cases C-187/01 and C-385/01, paragraph 61 *et seq.*

²⁰³ Article 153a of the Code of Criminal Procedure. See also Case C-385/01 *Brügge* (judgment given on 11 February 2003).

²⁰⁴ Paragraph 1 of Article 153a. The German Criminal Code differentiates between a misdemeanour (Vergehen) and a crime (Verbrechen). An offence punishable by a term of imprisonment of one year or more is a 'crime'. The others, which receive lighter punishments, are 'misdemeanours'.

²⁰⁵ Articles 90a to 90m of the Code of Criminal Procedure.

Once the accused has fulfilled the obligations imposed, the criminal action is permanently discontinued.²⁰⁶

In **Belgium** there are two kinds of procedure within the jurisdiction of the public prosecutor's office: settlement and mediation (see preceding chapter), provided for in Articles 216a and 216b of the Criminal Code, which allow the Prosecutor to order the final discontinuance of proceedings if the accused fulfils certain conditions. Under the terms of Article 216a, the prosecutor may, for an offence which is punishable by a fine or by a maximum of five years imprisonment, impose no more than a fine or a fine and confiscation. Complete reparation must be made for any damage caused before settlement can be proposed. However, it may also be proposed if the author of the offence has acknowledged his civil liability for the damage in writing, and has produced proof of payment of the uncontested part of the damages and the practical arrangements for paying them off. In any event, the victim can claim his rights before the competent court. In this case, acceptance of the settlement by the author of the offence constitutes an unquestionable presumption of his liability (paragraph 4 of Article 216a).

Under Article 41-2 of the **French Code of Criminal Procedure**, the Public Prosecutor may, provided that a prosecution has not already been brought, suggest a settlement to an adult who recognises having committed one or more offences punishable by a maximum of three years imprisonment, consisting of one or more of the following measures: 1) paying a "settlement fine" to the public treasury not exceeding €3750 or half of the maximum fine incurred; 2) surrendering to the state the means of committing the offence or the profit from it; 3) surrendering his driving licence to the regional court for a maximum of six months, or his hunting permit for a maximum of four months; 4) carrying out unpaid community service for a maximum of 60 hours over a maximum period of six months; 5) undertaking a training period or course in a health, social or professional organisation for a maximum of three months over a maximum period of 18 months.

Where the victim has been identified, the public prosecutor must also ask the offender to make good the damages caused in a maximum of six months, unless he can prove that he has already done so. He must inform the victim of this proposal. The settlement may be proposed in a "*maison de justice et du droit*" (law centre). The person to whom the settlement is offered is informed that he may request the assistance of a lawyer before agreeing to the proposal made by the public prosecutor. An official record is made of the agreement. A copy of this record is given to him.

If the offender agrees to the proposal, the Public Prosecutor asks the President of the Court to validate the settlement. The Prosecutor informs the offender and, where appropriate, the victim, of this request. The President of the Court may hear the offender and the victim, assisted where necessary by their lawyers. If the judge validates the settlement, it will be implemented. If the offender does not accept the settlement, or if after agreeing to it he does not carry out all the measures contained in it, the usual procedure is followed up until the point at which a conviction may be imposed. The time-limit for court action is suspended between the date on which the Public Prosecutor proposes a settlement and the date on which the time limit laid down for implementation of the settlement expires. Implementation of the settlement implies discontinuance of court proceedings.

²⁰⁶ Articles 90c(5), 90d(5), 90f(4) and 90g(1) of the Code of Criminal Procedure.

Denmark provides²⁰⁷ that, in the case of an offence punishable by a fine, the Public Prosecutor's office may suggest to the defendant that the proceedings will be discontinued if he acknowledges his guilt and undertakes to pay a fine within a certain period. At the end of the two-month period prescribed for reversal of the proposal by a higher authority, the decision to discontinue proceedings becomes final.

The **Spanish legal system**²⁰⁸ permits the accused to agree with the penalty sought by the prosecutor, in which case the court pronounces sentence in accordance with the mutually agreed penalty.

Finnish law²⁰⁹ does not have a settlement procedure as such; however, it does have measures in the nature of a settlement which may lead to the discontinuance of criminal proceedings. It is a simplified procedure for misdemeanours, in which the prosecutor may impose a fine without the need to refer the matter to a court. That decision is final and has the force of res judicata.

Ireland²¹⁰ has means of preventing an offence being the subject of criminal prosecution, for various reasons. One example is the payment of a fine, which puts an end to the matter.

Although under **Italian law** there is in general no settlement or penal mediation (except for offences committed by minors), there is a particular procedure called *patteggiamento*.²¹¹ It is a special procedure which presupposes the existence of a settlement agreement in respect of both the proceedings and the sentence, which must not be more than two years. Both the Prosecutor and the accused may introduce the *patteggiamento* procedure. In any event, the agreement must be ratified by a court.

In **Luxembourg**, the Act of 6 May 1999 incorporated a fifth paragraph into Article 24 of the Criminal Code, under which, before bringing proceedings, the prosecutor may have recourse to mediation, which may lead to a decision to continue with the proceedings or to allow the criminal action to lapse.

The **Netherlands** also has the settlement procedure ("*transactie*"),²¹² which is governed by Article 74 *et seq.* of the Netherlands Criminal Code. The criminal action is discontinued when the accused fulfils the conditions imposed by the prosecutor. That discontinuance is expressly provided for in Article 74(1).

In **Portugal**²¹³ proceedings may be temporarily suspended. This mechanism authorises the Public Prosecutor's Office to bring a halt to a criminal action by imposing certain obligations during a specific period. The decision is subject to the acceptance of the accused and, where appropriate, the prosecution and to the approval of the trial judge. Once the accused fulfils what has been agreed, the case is discontinued and cannot be reopened.

²⁰⁷ Article 924 of the Code of Criminal Procedure.

²⁰⁸ See Articles 655, 791(3) and 793(3) of the Law of Criminal Procedure.

²⁰⁹ Laki rangaistusmääräysmenettelystä/ lagen om strafforderförfarande 26.7.1993/692

²¹⁰ Road Traffic Acts, 1961-1995; Litter Pollution Act, 1997, p. 28.

²¹¹ Governed by Articles 444 to 448 of the Code of Criminal Procedure

²¹² See also Case C-385/01 *Brügge* (judgment given on 11 February 2003).

²¹³ See Articles 281 and 282 of the Código de Processo Penal and the particular case of the simplified procedure (processo sumaríssimo), provided for in Articles 392 to 398 of the Code. Article 282(3) of the Code of Criminal Procedure.

In the **United Kingdom**, there is a settlement procedure under English law for road traffic offences. A fixed penalty notice offers a person the opportunity of avoiding criminal proceedings by paying a fine and having penalty points entered on his driving licence. Once the conditions have been fulfilled, the criminal action lapses.²¹⁴ It should be borne in mind that Lord Justice Auld has recommended²¹⁵ that the field of compromise procedures should be extended and that his proposal was the subject of a White Paper issued by the British Government in the middle of July 2002. Under Scottish law²¹⁶ the Prosecutor is permitted to make a conditional offer to the accused in order to avoid criminal proceedings, in respect of the offences which may be judged by District Courts. If the accused accepts the proposal, he must pay a fine and, once that has been done, the criminal action lapses.²¹⁷

Finally, there is in **Sweden**²¹⁸ a procedure for imposing penalties without the intervention of a court (*stafföreläggande*), which is used for minor offences such as driving under the influence of alcohol and petty theft. If the Prosecutor's order is accepted by the accused (with the agreement of the possible victims), the imposition of the penalty acquires the force of *res judicata*.

²¹⁴ Section 52(1) of the Road Traffic Offenders Act 1988.

²¹⁵ A Review of the Criminal Courts of England and Wales.

²¹⁶ Section 302 of the Criminal Procedure (Scotland) Act 1995.

²¹⁷ Section 302(6) of the Criminal Procedure (Scotland) Act 1995.

²¹⁸ Chapter 48, Article 4 of the Rättegångsbalk (Criminal Code) 1942.

ANNEX III

Inventory and comparison of Member States' legislation regarding the enforcement of criminal penalties

The mechanisms for applying and enforcing **custodial sentences** must be inspired by the constant concern to strike a balance between the demand from the enforcement authorities that sentences that are passed should actually be enforced and the interest for both sentenced persons and society at large in having them enforced in such a way as to best ensure social rehabilitation.

Day release, electronic surveillance and enforcement in instalments (weekend detention), can be decided in certain Member States not only *ab initio* by the sentencing court but also subsequently by the enforcement authority. For these measures, see **Annex I**.

1. SUSPENDED SENTENCES

Suspension of enforcement of the penalty – which is not the same thing, incidentally, as suspension of part or all of the sentence itself – is possible only after enforcement has commenced. It is available in only a minority of Member States such as France and Italy.

Under Article 720-1 of the French Code of Criminal Procedure, where the sentenced person has no more than one year of the term of imprisonment to serve, the enforcement of the sentence may be suspended for up to three years by the court that reviews penalties or the Tribunal correctionnel, depending whether the suspension is for more than three months or three months or less, where there are serious medical, family, professional or social considerations.

The Italian Criminal Code provides for suspension of the enforcement of the sentence in two situations, one of them mandatory (section 146) and one optional (section 147). The decision falls to the Supervision Court. The two situations in which enforcement of the sentence can be suspended under the law concern protection of maternity, health and dignity of AIDS sufferers and protection of the health of prison inmates. Given the very close resemblance between the conditions for admission to house-arrest and the conditions for suspending enforcement of the penalty, the areas in which the two measures are applicable tend to coincide.

2. DAY RELEASE

This measure, which is described in detail above, can be decided not only *ab initio* by the sentencing court but also sometimes at a later date by the enforcement authority.²¹⁹

3. EARLY RELEASE

Early release means the release of the offender before his prison term is finished. It is possible only while the sentence is still being served.²²⁰ All the Member States' legal systems provide

²¹⁹ As in France.

for it, but the characteristics and definitions vary from one Member State to another.²²¹ In many Member States, it is known as conditional release, which emphasises its principal feature (which is that early release is available only in the event of good conduct during detention) but it can exist in unconditional form (Netherlands, United Kingdom).

All the Member States' criminal systems require a certain minimum portion of the sentence to have been served prior to early release. The minimum is expressed in some countries as a percentage of the sentence and/or in absolute terms as so many months or years. Specific rules apply in the event of life imprisonment.

For limited-duration sentences, the minimum period that a sentenced person must serve in prison to be eligible for early release varies from a third (Belgium) to three quarters (Spain) of the original sentence and the maximum (in particular in cases of recidivism) between two thirds and five sixths (Portugal).²²² But most Member States provide for a minimum of one half and a maximum – especially in cases of recidivism- of two thirds.

In absolute terms, the minimum varies from one month (Sweden) to two months (Germany), three months (Belgium) and six months (Belgium, Germany, Netherlands, Portugal).

For life sentences, the minimum to be served by an offender before gaining eligibility for early release ranges from ten years (Belgium) to 26 years (Italy). But most of the Member States set the minimum at 15 years.

In certain Member States, early release is not allowed if the sentence is within certain duration parameters – two years or less (Germany²²³) or four years (France). In others (e.g. Portugal), the minimum varies with the sentence, from one half where the sentence is for less than five years to two thirds above five years.

Member States' legislation contains a wide range of conditions of eligibility for early release. A few examples:

- The offender must consent (Belgium, Germany, France, Greece, Luxembourg, Portugal);
- The offender must have made a serious effort at social rehabilitation (France);
- The offender must, prior to release, be subject to a less severe enforcement regime (Spain, France) and have successfully undergone a period of day-release, placement in society etc;
- The offender must remit all or part of accounts in his name to the prisons service (France);

²²⁰ This distinguishes it from suspended enforcement of a penalty, which can be ordered only by a court judgment.

²²¹ In German law it is called “Aussetzung des Strafrestes” (suspended enforcement), § 57 StGB. Belgian law distinguishes between conditional release and provisional release. The latter is not provided for by statute but by ministerial circulars. The conditions for provisional release are more flexible than those for conditional release since, for example, all offenders sentenced to a total of no more than three years can be released after serving a third of their sentence, even if they are repeat offenders.

²²² A special situation predicated solely on the effluxion of time, Article 61(5) of the Criminal Code.

²²³ Only if the offender wishes to obtain early release after serving half his sentence.

- The offender must join the army or another of the armed forces (France);
- If the offender is a foreigner, he must be expelled from French territory (France);
- Conditional release is excluded during the period of firm imprisonment;
- Victims must be compensated;²²⁴
- There are more favourable provisions for offenders who are aged over 70, seriously ill (Spain, Greece) or exercise parental authority over a child aged less than ten and habitually resident with this parent (France);
- The offender must not constitute a threat to the public (Germany) or there must be no counter-arguments based on a serious risk for society (Belgium); this condition is evaluated on the basis of the following criteria: possibilities for reintegrating the offender (Belgium), offender's personality (Belgium, Germany), offender's conduct during detention (Belgium, Spain, Finland, Greece, Italy), risk that offender will re-offend (Belgium, Germany), offender's attitude to victims (Belgium), seriousness of offence (Germany).

In most Member States early release is conditional, i.e. subject to a trial period during which the offender must not re-offend if he does not wish to run the risk of the release decision being withdrawn. But two Member States (Netherlands and United Kingdom) provide for unconditional early release.

In most Member States, the trial period depends on the time remaining to be served at the time of release (e.g. Belgium, Germany, Spain, Finland, Greece,²²⁵ Sweden), but may not be less than one year (Sweden) or, in Belgium, two years or five years for more serious sentences (more than five years imprisonment ordered by a Tribunal correctionnel), with a maximum of three years (Finland) or 10 years (Belgium). The trial period in the event of life imprisonment is five years in Germany, Italy and Portugal.

Early release is usually accompanied by a series of prohibitions or obligations, such as the prohibition on exercising certain occupations (France, Portugal), being in certain places (Germany, France, Greece, Portugal, Sweden), residing in certain places (France, Greece, Portugal), being with certain people (Germany, France, Greece, Portugal), associations and meetings (Portugal), owning certain articles (Germany, Portugal), driving certain vehicles (France), owning or bearing arms (France), or the obligation to reside in certain places (France, Greece, Sweden), to appear before the authorities from time to time (Germany, Portugal), to follow vocational training (France, Sweden), medical treatment (Greece, Sweden), with the offender's consent (Portugal), to do community service (Greece), pay costs (France, Portugal) or damages (France, Portugal, Sweden), compensate for damage (Germany), give the victim moral satisfaction (Portugal), pay a sum of money to a charitable organisation (Germany, Portugal) or public funds (Germany), present a rehabilitation programme (Belgium) or a social reintegration programme (Portugal), pay maintenance obligations (Germany, France, Greece) or submit to a form of guardianship (Belgium).

²²⁴ Under Belgian legislation, victims may be given the opportunity to make their views known, if they so request, on the conditions to be imposed on the offender.

²²⁵ Only if at least three years remain to be served. Otherwise the trial period is three years.

Where the conditions for the early release are breached, the early release can be suspended (Belgium), withdrawn (Belgium, Germany, France) or be left in place on amended conditions (Belgium, Germany). The legislation of several Member States allows a graduated response, ranging from a warning (Sweden) to time in prison of 15 days for every breach (Sweden).

There are major differences between the Member States' legislation on the powers of those concerned (courts, Justice Ministry, regional or local prisons administration), the extent of the authorities' discretion (in particular the question whether release is mandatory or optional), the early release procedure, the possibilities for challenging a decision refusing to allow early release, supervisory arrangements etc.

4. REMISSION

In some Member States (e.g. France, Greece) a remission or reduction of sentence is possible while the sentence is being served.

In France, the possibility is available in different forms: an ordinary reduction (virtually automatic for good conduct: 7 days per month or 3 months per year) and a supplementary reduction (4 days per month or 2 months per year if the offender manifests "serious efforts at social rehabilitation, in particular by passing school, university or vocational examinations"). The supplementary reduction is even given in the event of a repeated offence (2 days per month or 1 month per year). In Greece, the legislation provides for a system whereby each day worked is equivalent, on a sliding scale depending on the nature of the work, to 2½, 2, 1¾ or 1½ days' imprisonment.

In both Member States (France and Greece), the reduction can be combined with conditional release thus bringing forward the time at which the prisoner can apply for conditional release.

5. AMNESTY AND PARDON

Amnesty is a measure that retroactively decriminalises certain acts. It thus legally precludes enforcement of the sentence or brings it to an immediate end if it has begun. Pardon is a personal measure whereby an individual convicted and sentenced is released from the sentence in whole or in part. Since the Member States' legislation varies widely on amnesty and pardon, which are given in the exercise of wide discretion enjoyed by the authorities, the Commission feels it would not be right to discuss their approximation in the European Union.

ANNEX IV

Table of questions

Question 1 (see point 4.1.): *To what extent do the differences between sentencing systems raise barriers to the establishment of the area of freedom, security and justice such as:*

(1) criminals relocating their activities owing to disparities between the way the offences are defined, prosecuted and punished; or

(2) barriers to the free movement of persons?

Question 2 (see point 4.1.1.1.): *How can major divergences between Member States as regards the decision to prosecute be avoided, at least for offences that are harmonised in the Union?*

Question 3 (see point 4.1.1.2.): *To what extent could European sentencing guidelines be developed, that is to say basic principles for sentencing, without interfering with the courts' room for discretion?*

Question 4 (see point 4.1.1.2.): *Should studies of the sentencing practice of the Member States' courts be carried out?*

Question 5 (see point 4.1.1.2.): *Would it be helpful to establish a sentencing information system to provide guidance for the courts?*

Question 6 (see point 4.1.1.5): *Is it enough to recognise a final criminal judgment given in other Member State (and/or treat it in the same way as a national judgment) for it to be taken into account in a national court for recidivism purposes?*

Question 7 (see point 4.1.1.5): *Should there first of all be a degree of approximation of legislation in matters such as:*

- determination of the offences to be taken into account systematically as the beginning of a series of repeat offences (establishment of a special European recidivism system);

- determination of the type of final criminal judgments to be taken into account for recidivism purposes (type of decision and authority, type and quantum of penalty);

- the period during which final criminal judgments should be taken into account as the beginning of a series of repeat offences in another Member State and the circumstances that might neutralise the effect of a conviction for recidivism purposes?

Question 8 (see point 4.1.2.): *To what extent should the divergences between national rules on the procedures for enforcement of custodial penalties be reduced, particularly with a view to avoiding the risks of discrimination against non-resident offenders in the application of such penalties?*

Question 9 (see point 4.1.2.): *Are there categories of offences on the list in Article 2(2) of the Framework Decision on the European arrest warrant and/or the proposal for a Framework Decision on the application of the principle of mutual recognition to financial penalties for which the penalties (and the definitions of the offences) should be harmonised as a matter of priority?*

Question 10 (see point 4.1.3): *To what extent should criminal fine systems be approximated (for example in relation to economic crime, including offences committed by legal persons)?*

Question 11 (see point 4.1.6.): *To what extent should divergences between national rules governing the criminal or administrative liability of legal persons be narrowed, particularly to avert the risk of criminals relocating their activities in the field of financial crime?*

Question 12 (see points 2.1.9 and 4.1.6.): *Could the same range of sanctions as provided for by the current Framework Decisions apply on a general basis to legal persons?*

Question 13 (see point 4.1.7.): *To what extent should divergences between national rules governing alternative sanctions be narrowed, in particular to avoid them being applicable in practice only to residents?*

Question 14 (see point 4.1.7.): *What mechanisms might be envisaged to reduce the legal and practical difficulties potentially precluding the mutual recognition and enforcement of alternative sanctions in another Member State?*

Question 15 (see point 4.1.7.): *Is it necessary to take measures at European Union level, other than those laid down in Article 10 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, to harmonise certain conditions and practical arrangements for mediation in criminal cases, to facilitate the recognition of measures and arrangements arising from mediation procedures and their implementation in another Member State? Should a minimum framework govern:*

- *the categories of offence concerned?*
- *the mediation procedure?*
- *the status of mediators, including the extent of their independence from the courts?*
- *training and conditions of eligibility for mediators?*

Question 16 (see point 4.1.7.): *To what extent should measures be taken at European Union level to take account of the interests of victims - including those who do not reside in the Member State in which the offence was committed - when imposing alternative sanctions? If so, what should they be?*

Question 17 (see point 4.1.8.): *To what extent should measures be taken at European level to provide for approximation of certain conditions of eligibility and implementation of early release, to facilitate the recognition of prison sentences and their enforcement in another Member State? Should minimum standards govern:*

- *regarding life sentences, the possibility of periodic review with a view to early release?*
- *regarding sentences to specific periods, the minimum period of imprisonment that should be served before early release can be allowed? If so, how long should it be? Are there any prospects of approximation along the lines that, for non-life sentences, early release should be possible after half the sentence has been served in normal circumstances and two thirds in repeat offence cases?*

- *the criteria for allowing or refusing early release?*
- *the release procedure? Should procedural standards be provided for?*
- *supervisory arrangements and the duration of the trial period?*
- *penalties for failure to comply with the conditions for early release?*
- *the procedural safeguards for offenders?*
- *victims' interests? Should the European Union provide that early release can be allowed only if the victim or victims have been compensated or the offender has made serious efforts to compensate them, or can be revoked if this condition is not met?*

Question 18 (see point 4.2.1.1.): What categories of sentenced persons should be eligible for transmission of enforcement in the State of enforcement: nationals of the State of enforcement, persons who habitually reside there, sentenced persons who are in the territory of the State of enforcement where they are serving or are due to serve a custodial sentence? Should there be specific conditions for minors and mental patients to be eligible also?

Question 19 (see point 4.2.1.2.): Is there a need to make agreements emerging from criminal mediation and settlement procedures in the Member States more effective? What is the best solution to the problem of recognition and enforcement of such agreements in another Member State of the European Union? For instance, should specific rules be adopted to make such agreements enforceable? If so, what guarantees should apply?

Question 20 (see point 4.2.2.1.): Should it be possible only for the sentencing State to ask for transmission of enforcement, or should it also be possible for the State of enforcement?

Question 21 (see point 4.2.2.2.): What are the grounds that the State of enforcement could legitimately put forward for refusing recognition and enforcement in its territory of a criminal penalty imposed in another Member State?

Question 22 (see point 4.2.2.2.): Where national legislation allows financial penalties to be imposed concurrently with prison sentences, given the prospect of the adoption of the Framework Decision on the application of the principle of mutual recognition to financial penalties, should the sentencing State be entitled to refuse to transfer enforcement until the sentenced person has paid the fine?

Question 23 (see point 4.2.2.2.): Given the differences between the Member States' legislation on early release, a sentenced person may be released immediately after transfer to the requested State. Could this be seen in the relevant Member States as a legitimate ground for refusing to transfer?

Question 24 (see point 4.2.2.2.): Should a minimum period be set in the European Union during which the sentenced person would continue to serve his sentence in the convicting Member State so as to avoid situations in which he might be released immediately on transfer to the State of enforcement or serve a much lighter sentence than in the sentencing State? How long should that period be? Would the introduction of a minimum period jeopardise flexibility and preclude case-by-case solutions? Would determining a period compatible with the needs of justice, as proposed by the Committee of Experts on the

operation of the Council of Europe Conventions on criminal law (see point 3.2.1.5.d.), be preferable?

Question 25 (see point 4.2.2.3.): Where the type or duration of the penalty imposed in the State of judgment is incompatible with the legislation of the State of enforcement, should the latter State enjoy the possibility of adapting the penalty imposed in the State of judgment into a penalty provided for by the State of enforcement for comparable offences?

Question 26 (see point 4.2.2.3.): Should provision be made in the European Union for the possibility of adapting, converting or substituting penalties, or should the State of enforcement be left with full powers of discretion?

Question 27 (see point 4.2.2.3.): Would the approach proposed by the Max Planck Institute of Foreign and International Criminal Law in Freiburg, which consists of making a functional comparison between (alternative) sanctions or measures in the State of judgment and the State of enforcement by a certain analysis and evaluation method provide a solution? What shortcomings does this approach have? How can they be remedied?

Question 28 (see point 4.2.2.4.): Should the transfer of enforcement of a criminal judgment be subject to the request, the consent or merely the consultation of the person sentenced? Would the answer to this question be different if the person sentenced has already begun serving his sentence in a prison in the sentencing State?

Question 29 (see point 4.2.2.5.): How can the victim's interests be taken into account in the transfer of enforcement of the penalty? Should provision be made for information for the victim (as to the existence of a request for recognition and transfer and the outcome of the proceeding), consultation or even consent, as a possible condition for the recognition and transfer of enforcement?

Question 30 (see point 4.2.3.): Should the European Union make provision for a time-limit for processing requests for recognition of criminal penalties, and in particular for processing requests for transfer of prisoners, and if so what limit?

Question 31 (see point 4.2.3.): Given the administrative burden of processing a request for transfer of a prisoner, should the European Union provide that only prisoners sentenced to at least a specified term of imprisonment or who still have a specified minimum time to serve should be eligible for transfer? If so, what would be a proper period?

Question 32 (see point 4.2.3.): Should the European Union make provision for a time-limit for responding to a request for information needed in connection with the recognition of criminal penalties, and in particular for the transfer of prisoners?

Question 33 (see point 4.2.3.): Given the complexity of judicial and administrative structures in the Member States and the differences between them, what simple and effective structures should be provided to implement the mutual recognition of criminal penalties and the transfer of prisoners?

Question 34 (see point 4.2.3.): Should there be a standard form in the European Union to facilitate the implementation of the recognition of criminal penalties and the transfer of prisoners?

Question 35 (see point 4.2.3.): Should the State of enforcement be able to ask for reimbursement of expenditure incurred in the enforcement of penalties that it has recognised?

Question 36 (see point 4.2.3.): Should a network of contact points be set up to facilitate – and perhaps even help to evaluate – the practical application of a European Union legislative instrument on the mutual recognition of criminal penalties and the transfer of prisoners?

Question 37 (see point 4.2.4.): Where a custodial penalty or an alternative penalty is recognised, are there any reasons for departing from the rule that enforcement should be governed entirely by the law of the State of enforcement?

Question 38 (see point 4.2.4.): If the conditions attached to a suspended sentence are supervised by the State of enforcement, should the State of judgment be given the possibility of ensuring that the sentenced person complies with the conditions? What mechanisms should be envisaged for that purpose?

Question 39 (see point 4.2.4.): Which of the two States should be able to exercise the right to give an amnesty or pardon?