EUROPEAN PARLIAMENT

Directorate-General Internal Policies

Policy Department C

Citizens Rights and Constitutional Affairs

What frictions and strains need to be overcome to approximate standards relating to criminal evidence and procedure to promote mutual trust and therefore enable instruments like the European Arrest Warrant, the European Evidence Warrant and follow-up instruments to work effectively in the medium and long-term, avoiding legal conflicts?

BRIEFING PAPER

Résumé: (Times new roman - text size 11 - maximum 15 lines)

Political and legal reasons are combining to block progress with attempts to enhance protection of the rights of criminal suspects and defendants across the Union. Some Member States are politically against the idea of 'interference' by Brussels in this sphere; others, while perhaps sympathetic to approximation, feel there is no clear legal basis for the Commission's proposed legislation. This paper looks behind the frictions and strains in question to see whether EU policy is properly founded: in particular, it asks whether there really is a necessary link between mutual recognition and approximation of procedural and evidential safeguards. Is the importance of approximation being exaggerated, where the European Arrest Warrant is concerned? The legal basis arguments are discussed and an opinion offered on whether the Article 42 TEU bridging clause might provide an answer to the current conflicts.

IP/C/LIBE/FWC/2005-26 **EN**

This note was requested by: The European Parliament's committee on Civil Liberties, Justice and Home Affairs.

This paper is published in the following languages: **EN**.

Authors: Peter J. Cullen, Academy of European Law, Trier (contactable at 5, Rue des Bleuets, L-1242 Luxembourg)

Manuscript completed in (date) **29 June 2006**

Copies can be obtained through:

Tel: 32105
Fax: 2832365
E-mail: japap@europarl.europa.eu

Informations on DG Ipol publications:
http://www.ipolnet.ep.parl.union.eu/ipolnet/cms

Brussels, European Parliament

What frictions and strains need to be overcome to approximate standards relating to criminal evidence and procedure to promote mutual trust and therefore enable instruments like the European Arrest Warrant, the European Evidence Warrant and follow-up instruments to work effectively in the medium and long-term, avoiding legal conflicts?

Introduction

This Note will be structured as follows. The first part will try to identify the 'frictions and strains' surrounding the approximation process (part I); the second part will look at the EU approximation context: what is current EU policy on approximation of criminal procedure and safeguards? (part II); the third part discusses the empirical basis for EU policy (part III); the fourth part examines the EU's legal powers in this field (part IV); the fifth section will try to draw some conclusions (part V).

I. Identifying the frictions and strains: problems with the draft Framework Decision on Procedural Safeguards

Member States have, in principle, embraced limited approximation of criminal procedures in order to support mutual recognition, but they seem unable or unwilling to put their declared policy into practice. The disagreements and delays being experienced in the Council of Ministers with regard to the passage of the Commission proposal of 3 May 2004 for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union certainly indicate that 'frictions and strains' are being created by the attempt to enact common minimum safeguards[1].

The draft Framework Decision proposes five basic rights for suspects and defendants:

- access to legal advice;
- access to interpretation and translation;
- special provisions ensuring that vulnerable suspects and defendants in particular are properly protected;
- consular assistance to foreign detainees;
- notification to suspects and defendants of their rights; the proposal introduces the so-called 'Letter of Rights'.

Even with regard to this rather restricted initiative – the rights concerned are those most closely associated with EU citizens' rights of free movement – progress, let alone agreement, in the Council has proved elusive[2].

The first task of this note is to identify **the root of the frictions and strains surrounding this process**.

The **first reason is political**: some Member States quite simply do not share the Commission's and Parliament's enthusiasm for approximation. The UK, for example, supported mutual recognition in the first place as an alternative to approximation; now to be told that the two go together is unlikely to be welcome[3].

[1] The proposal can be found in COM (2004) 0328, Brussels 28 April 2004; cf. European Parliament resolution P6_TA (2005) 0091, based on report of the Committee on Civil Liberties, Justice and Home Affairs A6-0064/2005 of 21 March 2005 (rapporteur K.M. Buitenweg,).

[2] The Austrian Presidency recently tried to 'soften' even these rather minimal rights further to make them more acceptable: see Council Conclusions of 1-2 June 2006, Justice and Home Affairs, Council 9409/06 (Presse 144).

[3] Cf. S. Gless, 'Mutual Recognition, Judicial Enquiries, Due Process and Fundamental Rights', in J.A. E. Vervaele (ed.), *European Evidence Warrant: Transnational Judicial Enquiries in the EU* (Antwerp/Oxford: Intersentia, 2005), p. 128.

The **second reason relates to the question of necessity**, in practical and legal terms, for approximation of criminal procedures and evidential safeguards. There seem to be two aspects to this: first, the UK and other reluctant Member States are probably not yet persuaded that their cherished project of mutual recognition can succeed only if accompanied by approximation of safeguards. They are waiting to see if the European Arrest Warrant and other mutual recognition instruments can work without it. The second aspect is that some Member States are of the opinion that Articles 5 and 6 of the European Convention on Human Rights (ECHR) offer a sufficient guarantee of a general European standard of human rights protection, while also leaving national courts and public authorities a 'margin of appreciation' in balancing security interests and defence rights[4]. Some states fear that, given a set of EU safeguards, the European Court of Justice would tip the scales too far in favour of the defence[5].

Even if the necessity test were overcome, there is a **third major stumbling block** to agreement, in the shape of legal basis. The Commission's proposal for common procedural safeguards is based on Article 31 (1) (c) of the Treaty on European Union, but that provision does not refer explicitly to procedural safeguards[6]. Several Member States maintain that Article 31 (1) (c) is an insufficient legal basis for Union action. The competence of the EU in matters of criminal procedure is in fact nowhere clearly defined in the Treaties[7].

We will now take a closer look at current EU policy in this field, in order to understand better the origins of these frictions and strains and to examine whether solutions can be found to them.

II. EU policy context

The Tampere European Council of 1999 assumed that approximation of certain rules of criminal procedure may be necessary – but only in so far as to facilitate mutual recognition. The principle of mutual recognition has repeatedly been stated to be the 'cornerstone' of judicial cooperation in both civil and criminal matters[8]. Mutual recognition was viewed largely as an alternative to approximation, though the precise relationship between the two concepts was left somewhat open. It was not clear from Tampere whether approximation of the law of evidence was also intended[9].

We should recall that by 'approximation' of criminal law in the EU context is meant adjustment to a common minimum standard, not full-scale 'unification'[10].

---

[4] Caroline Morgan refers to these arguments in her article 'The European Arrest Warrant and Defendants' Rights: an Overview' in R. Blextoon and W. van Ballegooij (eds.) *Handbook on the European Arrest Warrant* (The Hague: TMC Asser Press, 2005).

[5] The Luxembourg Court's jurisprudence on criminal law issues arising in the internal market context may justify these fears: cf. S. Peers, 'Criminal Suspects' Rights and EU Law', *ERA-Forum* 4/2004, p. 520 et seq.

[6] It refers rather to measures required to ensure compatibility in rules applicable in the Member States as may be necessary to improve judicial co-operation in criminal matters.

[7] Although the European Court of Justice recently adopted an extensive interpretation of 'First Pillar' powers relating to criminal sanctions in Case C-176/03 *Commission* v *Council* of 13 September 2005, this decision does not have direct implications for procedural safeguards; cf. Commission Communication on the implications of the Court's judgment, COM (2005) 583 final/2, Brussels, 24.11.2005.

[8] The Hague Programme repeats this: see Conclusions of the European Council, III, 3.3.1.

[9] Paragraph 36 of the Conclusions refers to mutual recognition of pre-trial orders and to the mutual admissibility of evidence lawfully gathered in one Member State by other Member States, 'taking into account the standards that apply there'. There is no reference to common evidential standards.

[10] Cf. A. Weyembergh, 'Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme', 42 *Common Market Law Review*, p. 1567.

The implications of mutual recognition policy for the law of criminal procedure and evidence are nowadays stated much more clearly than at Tampere and in its immediate aftermath[11]. The Hague Programme of 2004 states unequivocally that 'mutual recognition … implies the development of equivalent standards for procedural rights in criminal proceedings'[12]. And in its 2005 policy paper on mutual recognition, the Commission describes the harmonisation of law of criminal procedure as the first of the two legs on which enhanced mutual trust of each other's legal systems should stand[13]. Future EU harmonising legislation should aim at achieving a 'high degree of protection for personal rights in the EU', in four areas:

- improving guarantees in criminal proceedings[14];
- reinforcing the presumption of innocence[15];
- establishing minimum standards on the gathering of evidence[16];
- regulating judgments in absentia[17].

One should also bear in mind the EU's stated objective to enhance protection of fundamental rights in the Union; the enhancement of safeguards in criminal law can be seen as part of this agenda, given that they protect the rights of the defence[18].

III. Empirical Basis for EU policy: lessons of studies and practice?

The Commission's broader ambitions for approximation of criminal procedure and evidence are based, in particular, on its conviction that the diversity of national rules operates as an impediment to mutual recognition. It is important to look at some of the evidence which can be used to support this view, including mutual recognition practice[19].

1. Studies and academic comment

Two major studies were commissioned by the European Commission, to review and compare the position in the Member States with regard to the laws of evidence and procedural safeguards in criminal proceedings. The reports were published in 2004 (evidence[20]) and 2005 (procedural safeguards[21])

---

[11] The Commission's 2000 policy paper suggested that the mutual recognition concept 'goes hand in hand with a certain degree of standardisation of the way states do things'; the two main fields in which the need for common standards was identified were protection of the accused, and protection of the victim, i.e. matters of procedural guarantees, not evidential safeguards. The Council and Commission 'Programme of Mutual Recognition Measures' of 2001 did not, however, specify a legislative follow-up on procedural safeguards. It declared that 'mechanisms [should be found] for safeguarding the rights of third parties, victims and suspects', but the only 'human rights' measure identified among the twenty-four listed concerned the principle of *ne bis in idem* (double jeopardy).

[12] Hague Programme, III, 3.3.1.

[13] The other is practical measures towards encouraging a common judicial culture, such as joint judicial training at European level. See Commission Communication of 29 June 2006.

[14] Building on, but going beyond, the draft Framework Decision referred to above (cf. note 1).

[15] The Commission recently launched consultation on the presumption of innocence; the clear underlying assumption of its Green Paper is that having common evidence-based safeguards would help increase mutual trust and thereby improve judicial cooperation (The Presumption of Innocence, COM (2006), 174 final, Brussels 26.4.2006.)

[16] This is also supported by the European Parliament: see Buitenweg report, op. cit. (note 1), p. 25.

[17] A Green Paper is also planned for this topic in 2006.

[18] The Hague Programme identifies the protection of fundamental rights as a key goal of EU policy, also referring to new forms of institutional protection, notably the idea of a Fundamental Rights Agency for the EU (II.2.) The recent launch by lawyers' groups of the idea of 'European Criminal Law Ombudsman' should also be noted in this context.

[19] Approximation is indeed mainly seen by the Commission as serving the 'auxiliary function' of supporting mutual recognition, and not as a process with 'autonomous' functions: cf. Weyembergh, op. cit. (note 10), 1582-1584.

[20] *Study on the Laws of Evidence in criminal proceedings throughout the European Union*, October 2004, (the study was conducted by the International Department of the Law Society of England and Wales and was funded by

Both studies, unsurprisingly, reveal a number of discrepancies between the laws of the Member States. The standard of protection for persons in the context of evidence-gathering varies, for example, according to the extent of the privilege of self-incrimination conferred by national law or the search powers of police; rights to legal advice and to legal aid in criminal cases also diverge. It is more difficult to determine whether, notwithstanding these differences, the levels of protection given are 'equivalent' in the sense meant by the Hague Programme. The studies refer to national standards with reference to the benchmark of European Court of Human Rights case law; some national laws may fall below this standard[22].

Academic opinion seems to support introducing greater equivalence of standards in criminal procedure and evidence. Academics and other experts in the main support the view that mutual trust cannot be taken for granted in the EU, notwithstanding adherence by all Member States to the European Convention on Human Rights[23]. Academic analysis and research does not, however, prove that judges will refuse to apply different criminal law standards of other Member States; only practice with mutual recognition instruments can indicate that. We now turn to this.

2. Experience with Mutual Recognition in practice

2.1. Evaluation of the European Arrest Warrant

Practice with mutual recognition instruments has to date has been largely limited to operation of the European Arrest Warrant[24]. The Commission's first evaluation report on the European Arrest Warrant[25] is, understandably, mainly concerned with transposition of the Warrant in national law, i.e. '**implementation**'[26] as opposed to '**application**'[27].

---

the European Commission; the report's author was Roger Ede and it was compiled by Charlotte Ford). The evidence study was broadly based and ranged over Member State laws on obtaining, handling and using evidence.

[21] *Procedural Rights in Criminal Proceedings: Existing Level of Safeguards in the European Union*, by Taru Spronken and Marelle Attinger of Maastricht University (available online at: http://arno.unimaas.nl/show.cgi?fid=3891). This report was also funded by the European Commission. The procedural rights study was closely related to the draft Framework Decision on procedural safeguards for suspects and defendants and reviewed compliance by Member States with the five rights covered by it.

[22] See, for example, the discussion in the Evidence Study of the right to silence and the question whether negative inferences can be drawn from it: pp. 10-11.

[23] See among others S. Gless, 'Eine akademische Kritik des "EU-Acquis" zur grenzüberschreitenden Beweissammlung' in P. Cullen (Ed.) *Dealing with European Evidence in Criminal Proceedings: National Practice and European Policy*, *ERA-Forum Special Issue* 2005, p. 52); Spencer, writing in the same publication, repeats calls for the Member States to adopt 'a common corps of admissible evidence' to avoid fundamental differences between their systems (J. Spencer, 'An Academic Critique of the EU Acquis in Relation to Trans-Border Evidence Gathering', in P. Cullen (Ed.), op. cit., p. 37); Vervaele, in a somewhat different perspective, emphasises the crucial role to be played by the European Court of Justice in elaborating the parameters for a judicial review of mutual recognition instruments by national judges (J.A.E. Vervaele, 'European Criminal Law and General Principles of Union Law' in J.A.E. Vervaele (Ed.), *European Evidence Warrant: Transnational Judicial Enquiries in the EU* (Intersentia: Antwerp and Oxford), 2005, p. 154).

[24] For a discussion in French of practice with the Warrant to date see S. Combeaud, 'Premier Bilan du Mandat d'Arret Européen', *Revue du Marché Commun et de l'Union européenne*, no. 495, février 2006. The second mutual recognition measure adopted by the Council concerns the recognition of orders freezing property or evidence (Framework Decision on execution in the European Union of orders freezing property or evidence, OJ L 196, 2.8.2003, p. 45). Although Member States were supposed to apply it from 2 August 2005, the first report on its implementation is due only in August 2006; evaluation is thus not yet possible. In relation to the Framework Decision on the application of the principle of mutual recognition to financial penalties, OJ L 76, 22.3.2005, p. 16, the deadline for implementation is 22 March 2007.

[25] The Arrest Warrant instrument had to be transposed into national law by 31 December 2003 for the 'old' 15 Member States and 1 May 2004 for the ten 'new' Member States (i.e. by the date of the their accession to the Union). The Commission was obliged by the terms of the Framework Decision to report on the 'operation' of the Warrant procedures by 31 December 2004. Its report was in fact first published on 23 February 2005, following implementation of the Warrant in twenty-four Member States; further delays in enactment of Italian implementing

Implementation in national laws is revealed, despite delays, to have been basically successful, with the 'surrender' procedure having replaced extradition between all Member States. There is general acceptance of the abolition of the double criminality requirement. German, Polish and most recently Cypriot courts have, however, declared implementing legislation unconstitutional in some respects, meaning new legislation must be drafted[28].

The experience of application, although not extensive, also seems in the main to have been positive: the Warrant is being used more frequently and operates much more swiftly than previous extradition procedures. Most Member States who used not to extradite their nationals are now doing so in practice[29].

To date, most national courts seem willing to trust their counterparts in other Member States and have confidence in the safeguards applying in those states to suspects and defendants, even if they are formulated differently from those applying on its territory[30]. Divergences in procedural or evidential standards between Member States do not seem to be a major obstacle to the functioning of the European Arrest Warrant procedures. This verdict is, however, provisional[31].

2.2. Proposed European Evidence Warrant

The proposal to introduce a European Evidence Warrant was agreed politically shortly before the time of writing[32]. The European Evidence Warrant aims to facilitate the speedy transfer of evidence across the EU. It applies mutual recognition to judicial orders for the obtaining of objects, documents and data but is only the first step of Commission plans to introduce a single mutual recognition instrument to replace mutual legal assistance[33]. Like the European

---

legislation resulted in a revised report being published to cover all Member States on 24 January 2006 (see COM (2006) 8 final, Brussels, 24.1.2006).

[26] This term refers to the legislative process of 'transposition' of the terms of the EU Framework Decision in national law.

[27] This term refers to the practical experience with use of the national implementing laws or regulations within Member States.

[28] The case law in Germany of 18 July 2005 has prevented surrender of German nationals, and this in turn has had some repercussions for other Member States. The rulings of the Polish Constitutional Tribunal of 27 April 2005 suspended the effects until 1 November 2006. These judgments can be accessed on the respective websites (www.trybunal.gov.pl/eng/ and www.bundesverfassungsgericht.de/). As for the Cypriot decision, see decision of the Supreme Court of 7 November 2005, no. 294/2005 (accessible at: www.cylaw.org).

[29] In general, the rather strict time limits for the procedure are also being respected. The Commission also reports that the number of refusals to execute an Arrest Warrant have been 'modest' (see COM (2006) 8 final, para. 2.2.1). There have, however, been some practical problems with applying the Warrant, relating *inter alia* to avenues of transmission and translation problems with the forms; these are technical rather than legal issues. See also the results of the 'strategic meeting' Eurojust conducted with legal practitioners on the implementation of the European Arrest Warrant in May 2005, reported in its 2005 Annual Report, pp. 39-41 (downloadable from www.eurojust.europa.eu). And note Combeaud, op. cit. (note 24).

[30] This is consistent with the decision of the European Court of Justice in Joined Cases C-187/01 and C-385/01 *Gözütok* and *Brügge*, judgment of 11 February 2003, published in [2003] European Court Reports I-1345.

[31] There are concerns that national courts will begin to make use of the extensive grounds of refusal to execute Warrants which some national legislation has conferred. At the time of writing of this Note, publication by the Commission of a second evaluation report is pending. The practical application of the Warrant is also now being examined by the Council; it is not yet clear when or even whether the results of these evaluations will be published: see Council document 14272/05 of 11 November 2005.

[32] See Council Conclusions of 1-2 June 2006, Justice and Home Affairs, Council 9409/06 (Presse 144).

[33] See para. 39 of the Explanatory Memorandum which precedes the text of the proposal: 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, COM (2003), 688 final, Brussels, 14.11.2003.

Arrest Warrant, the Evidence Warrant also contains safeguards clauses designed to protect individual rights; these built-in safeguards do not go far enough for some NGOs[34].

Will the ultimate goal of 'free movement' of objects of evidence across the EU be tolerated by judges in the absence of harmonised evidence-based standards? Academics have their doubts and have in particular warned that mutual admissibility of evidence before national courts depends on greater equivalence of evidential rules[35]. The Commission has initiated a consultation process on evidence-based safeguards, perhaps recognising that stronger common safeguards will be needed before the European Evidence Warrant can be built upon[36].

IV. EU Legal Powers

In principle, the European Union has a restricted remit to approximate national criminal rules; the aim of Title VI of the Treaty on European Union (the 'Third Pillar') is closer cooperation between national systems, not the creation of a European criminal justice system. Article 31 (1) (e) does, however, confer competence to approximate certain rules of substantive criminal law, and European criminal justice bodies in the shape of Europol and Eurojust serve to co-ordinate national action to a certain extent.

Where criminal procedures are concerned, the framers of the Treaty on European Union were, however, particularly cautious: no provision explicitly confers a competence to approximate rules of criminal procedure or evidence. The European Parliament supports the Commission's choice of Article 31 (1) (c) for its draft Framework Decision on procedural safeguards, but most observers believe that a more explicit basis such as that provided by the Constitutional Treaty would be desirable[37]. It is clearly very difficult for some Member States to proceed with approximation of safeguards without a more explicit legal basis. Here, the loss of the Constitutional Treaty is thus sorely felt[38].

The Commission has recently suggested that Article 42 of the Treaty on European Union be invoked to avoid blockages in the Council owing to the unanimity requirement for decision-making under Title VI[39]. Even if agreement to use this provision were achieved, it can be argued that this step would not bridge the 'competence gap' of the Treaties, where criminal procedures and safeguards are concerned. Article 42 cannot be used to establish competences which are not already present in Title VI, as it cross-refers to Article 29. By creating the possibility of decision-making by qualified majority, the adoption of one or more safeguards measures would, however, become much more likely. Probably, Member States in the minority would then challenge the legality of such measures. Certainly, the Article 42 route is inferior to the Constitutional Treaty, but it offers a chink of light for the 'approximators'.

---

[34] Compare Statewatch's critical opinion of 15 March 2004 (available from www.statewatch.org) with Charles Williams' robust defence of the safeguards: C. Williams, 'The European Evidence Warrant: the Proposal of the European Commission', in P. Cullen (Ed.), op. cit. (note 23), pp. 23-25.

[35] See John Spencer, 'An Academic Critique of the EU in relation to Trans-Border Evidence-Gathering', in P. Cullen, op. cit. (note 23), 2005, pp. 35-37, who endorses tailor-made European evidence-gathering procedures.

[36] See Green Paper, The Presumption of Innocence, COM (2006), 174 final, Brussels 26.4.2006.

[37] Weyembergh, op. cit. (note 10), 1568-1571.

[38] Note in particular Article III-270, para. 2 of the Constitutional Treaty which provides for approximation of rules relating to mutual admissibility of evidence, the rights of individuals in criminal procedures and the rights of victims of crime.

[39] See Commission Press Release Memo/06/254, 28.06.06, referring to Commission Communication 'Implementing the Hague Programme : the way forward'.

V. Conclusions: Finding solutions?

Delicate 'checks and balances'[40] have been built up over many years by national systems of criminal justice, in relation to evidence and procedure. Even the Constitutional Treaty, with its rather extensive provisions on approximation, calls for respect for the differences between the legal traditions and systems of Member States[41].

Frictions and strains are therefore almost inevitably bound to arise from a process which tries, albeit to a minimum extent, to even out national differences. The principal frictions to be overcome in this context have their roots in the fact that some Member States do not believe common rules of criminal evidence and procedure are necessary for mutual recognition, or because they believe the ECHR offers a sufficient level of protection for individuals. Political objections merge with legal ones in the case of these Member States.

From a Commission and European Parliament perspective, there seems to be no option but to convince the recalcitrant states to agree to common standards; the Article 42 'bridge' solution, which the Commission seems to envisage for use in relation to procedural safeguards, would also in the first instance require unanimity[42]. A series of high-profile cases involving judicial refusals, on human rights grounds, to execute a European Arrest or Evidence Warrant, might begin to alter entrenched positions; no such cases have yet arisen.

[40] Sabine Gless, op. cit. (note 3), p. 128.
[41] Article III-270 of the Constitutional Treaty.
[42] Ratification according to national constitutional procedures would also be required. The Article 42 method is more laborious than it looks.