JUSTICE 1 COMMITTEE

AGENDA

37th Meeting, 2004 (Session 2)

Wednesday 1 December 2004

The Committee will meet at 10.00 am in Committee Room 4.

1. Dangerous driving and the law: The Committee will consider correspondence relating to closed petitions PE29, PE55, PE299 and PE331 and consider whether there are any issues arising from those petitions that remain outstanding.

2. Emergency vehicles and the law: The Committee will consider correspondence relating to closed petition PE111.


4. Former Justice 1 Committee inquiry into the regulation of the legal profession and public petition PE763: The Committee will examine what progress has been made in relation to implementing the recommendations made by the former Justice 1 Committee in its 11th Report 2002: Report on Regulation of the Legal Profession Inquiry and how the recommendations relate to petition PE763 by the Consumers' Association.

5. Transparency of legal fees: The Committee will consider further correspondence relating to the transparency of legal fees and the role of the auditor of court.

6. European Union justice and home affairs: The Committee will consider recent progress with proposals relating to alternative dispute resolution, parental responsibility and applicable law in divorce and its approach to other recent developments in the area of European Union justice and home affairs.

Alison Walker
Clerk to the Committee
Tel: 0131 348 5195
Papers for the meeting—

Agenda item 1
Note by the clerk (TO FOLLOW) J1/S2/04/37/1

Agenda item 2
Note by the clerk J1/S2/04/37/2

Agenda item 3
Note by the clerk J1/S2/04/37/3

Agenda Item 4
Note by the clerk J1/S2/04/37/4

Agenda item 5
Note by the clerk J1/S2/04/37/5

Agenda Item 6
Note by the clerk J1/S2/04/37/6
Scottish Executive, Ministerial Priorities for the Dutch Presidency J1/S2/04/37/7
Council of the European Union, 4-5 November 2004, Presidency J1/S2/04/37/8
Conclusions

Correspondence from the Scottish Executive enclosing—
European Commission proposal for a directive on certain aspects of mediation in civil and commercial matters;
European Commission annex to the proposal;
Department for Constitutional Affairs explanatory memorandum on the proposal

Papers for information—

Scottish Executive, Post Council Report on the Justice and Home Affairs Council of EU Ministers, 19 November 2004 J1/S2/04/37/10
European Commission, Green Paper on mutual recognition of non-custodial pre-trial supervision measures J1/S2/04/37/12
European Commission, Green Paper on Maintenance Obligations J1/S2/04/37/14
Scottish Executive, Guidance For Integrated Children’s Services Plans 2005-2008 J1/S2/04/37/16
Correspondence from the Lord Advocate about the Constitutional Reform Bill (UK legislation) J1/S2/04/37/17
Correspondence from the Deputy Minister for Justice about the draft Maximum Number of Judges (Scotland) Order 2004 J1/S2/04/37/18
Forthcoming meetings—
Wednesday, 8 December 2004, CR4*;
Wednesday, 15 December 2004, CR2;
Wednesday, 22 December 2004, CR1*.

*denotes a change from the venue or date indicated previously.
Provisional Agenda
Justice and Home Affairs Council
Brussels – 19 November 04

Please note that this Pre Council Report is based on a provisional agenda and may be subject to change.

Asylum and Immigration

Proposal for a Directive on the conditions of entry and residence of third country nationals for the purpose of scientific research – general approach

Common Basic Principles for immigrant integration policy in the European Union – general approach

(Poss) Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status – Minimum common list of countries of origin - general approach

The Executive has a co-ordination role with regard to the provision of services for asylum seekers and refugees. Any changes to operations in Scotland will be for the Home Office to implement.

GENERAL

Evaluation of EU Drugs/Action Plan 2000-2004

Key findings of the evaluation is that there is no evidence to suggest that over the last four years the prevalence of drug use has reduced, or that the availability of illicit drugs has reduced. The UK supports the evaluations conclusions that the plan should be focused on delivering concrete and measurable action. The Commission is in the process of drawing up a new action plan.

Draft Framework Decision on the Retention of data (LA)

There has been difficulty in determining the objective of this draft Framework Decision whether it is to cause the extended retention of data ordinarily retained for business purposes or is it to cause the extended retention of data, or date of a type, not ordinarily retained for business purposes. This has, to date, not been resolved in Working Group

CRIMINAL AND JUDICIAL CO-OPERATION

Terrorism

The EU Anti-Terrorism Co-ordinator will give his regular briefing to the Council.
POLICE AND JUDICIAL CO-OPERATION

Draft Council Conclusions on the strengthening of operational police co-operation (Police Chiefs Task Force)

The Presidency objective is to identify action needed to strengthen EU operational police co-operation following the European Council Declaration on Terrorism of 25 March 2004. The UK welcomes the Presidency proposal particularly that the Police Co-operation Working Party should meet in joint mode with the Police Chief’s Task Force. Executive officials are in contact with Home Office officials on this dossier.

(Poss.) Draft Framework Decision on simplifying the exchange of information and intelligence between law enforcement authorities of Member States of the EU, in particular as regards serious offences including terrorist acts.

No particularly Scottish issues.

JD: EU JHA STRATEGY UNIT
9 November 04

Comments by the Executive

The UK was represented at this Council by the Home Office Parliamentary under Secretary of State Caroline Flint MP. The Council adopted the Decision appointing the President and members of the European Commission. Agreement reached on the role and positions of the Police Chief’s Task Force. Ministers received their regular presentation by the EU Counter-Terrorism Co-ordinator on work currently being taken forward.

AGENDA ITEMS

General

Terrorism

EU Counter Terrorism Co-ordinator, updated Ministers on action to date and in advance of a substantive discussion on Terrorism at the December Council.

Police and Judicial Co-operation

Role and Positioning of the Police Chief’s Task Force with a view to Strengthening the EU Operational Police Co-operation

Agreement was reached that the Task Force should meet jointly with the Article 36 Committee.

Framework Decision on Ship Source Pollution

No conclusion reached by Ministers. This dossier has been on the table for 18 months and there has been difficulty in reaching a consensus. The Framework Decision seeks to approximate criminal sanctions for the unlawful discharge of polluting substances into the environment by shipping across the EU. The Presidency introduced a compromise to Article 4(7) (treatment of EU flagged ships as domestic ships) to make the provision subject to a transitional period during which the EU would seek to bring international shipping up to the standard proposed by the Framework Decision. Some Member States had difficulty with this compromise and the dossier will return to the December JHA Council where discussions will continue on the Presidency’s compromise.

EU Drugs Strategy 2005-2012

Ministers reached a general approach on the Strategy which would be adopted by the Council once any outstanding Parliamentary scrutiny reserves were lifted.

Draft Council Conclusions of the Council and the Representatives of the Governments of the Member States on the Establishment of Common Principles for Immigrant Integration Policy in the EU
The draft Conclusions set out for the first time common basic principles to assist Member States’ in formulating their integration policies. The UK welcomed the Conclusions and indicated that work in this area would be a key feature of the UK’s Presidency. The text was adopted by Ministers.

SEJD - EU JHA ACTION TEAM
EU JHA STRATEGY UNIT
24 November 2004
Please note that this Pre Council Report is based on a provisional agenda set in July and will be subject to substantial change.

Asylum and Immigration

Community Readmission agreements – political agreement – It is highly unlikely that this will be on the final agenda

Introduction of the common application of biometrics in visa and in residence permits – political agreement – It is highly unlikely that this will be on the final agenda

Conclusions on “Access to durable solutions for refugees – political agreement- It is highly unlikely that this will be on the final agenda

Proposal for a Council Regulation on the establishment of a regime of local border traffic at the external borders of the Member States and proposal for a Council Regulation on the establishment of a regime of local border traffic at the temporary external land borders between Member States – political agreement – It is highly unlikely that this will be on the final agenda

(poss) Common Principles of integration + handbook on integration – orientation – It is highly unlikely that this will be on the final agenda

Draft Council Directive on minimum standards for return procedures and mutual recognition of expulsion decisions – orientation – It is highly unlikely that this will be on the final agenda

(poss) Evaluation of joint flights for the removal of third country nationals illegally present in the territory of two or more Member States- It is highly unlikely that this will be on the final agenda.

(poss) Draft Regulation on the establishment and operation of VIS- It is highly unlikely that this will be on the final agenda.

(poss) Annual report on illegal immigration – It is highly unlikely that this will be on the final agenda.

(poss) Conclusions on links between the legal and illegal immigration – It is highly unlikely that this will be on the final agenda

(poss) Council Regulation establishing a Community Code on the rules governing the movement of persons across borders (recast of common manual) – orientation – It is highly unlikely that this will be on the final agenda.
(poss) First report on the monitoring and evaluation of co-operation with third countries in the area of illegal immigration – orientation – It is highly unlikely that this will be on the final agenda.

(Poss) Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status – It is highly unlikely that this will be on the final agenda.

The Executive has a co-ordination role with regard to the provision of services for asylum seekers and refugees. Any changes to operations in Scotland will be for the Home Office to implement.

GENERAL

Evaluation of EU Drugs/Action Plan 2000-2004 – It is highly unlikely that this item will be on the final agenda

Key findings of the evaluation is that there is no evidence to suggest that over the last four years the prevalence of drug use has reduced, or that the availability of illicit drugs has reduced. The UK supports the evaluations conclusions that the plan should be focused on delivering concrete and measurable action. The Commission is in the process of drawing up a new action plan.

Strategy on Drugs 2005-2012 – political agreement

The Strategy on Drugs for 2005-2012 will set out the EU’s twin aims of reducing supply and demand.

Draft Framework Decision on the Retention of data (LA) – It is highly unlikely that this item will be on the final agenda

There has been difficulty in determining the objective of this draft Framework Decision whether it is to cause the extended retention of data ordinarily retained for business purposes or is it to cause the extended retention of data, or date of a type, not ordinarily retained for business purposes. This has, to date, not been resolved in Working Group

CRIMINAL AND JUDICIAL CO-OPERATION

Terrorism

The EU Anti-Terrorism Co-ordinator will give his regular briefing to the Council.

Draft Council Framework Decision on procedural rights in criminal proceedings – progress report

This measure proposes certain minimum standards in criminal proceedings throughout the EU. A Scottish Executive official is attending Working Group meeting in Brussels as part of the UK delegation. There are implications for Scots law in a range of areas arising from these particular proposals.
(poss) Council Framework Decision on the European Evidence Warrant – orientation

This proposal relates to the provision of mutual legal assistance in criminal proceedings. The Evidence Warrant is an order which would be issued by a judicial authority in one Member State to obtain evidence in another Member State, based on the principle of mutual recognition, and would have repercussions for the way in which mutual legal assistance is provided within the EU. Executive Officials have been involved in the formulation of the UK negotiating line on this dossier and have attended Working Group meetings in Brussels as part of the UK delegation.

POLICE AND JUDICIAL CO-OPERATION

Exchange of information and intelligence between intelligence authorities and police (including contra strategy recruitment) – It is highly unlikely that this item will be on the final agenda.

No particularly Scottish issues.

Decision on Cross Border Police Co-operation – political agreement – It is highly unlikely that this item will be on the final agenda.

No particularly Scottish issues.

Future of CEPOL – It is highly unlikely that this item will be on the final agenda

This relates to a proposal for a Council Decision establishing CEPOL as a body of the European Union. The UK is broadly supportive of this proposal.

CIVIL AND JUDICIAL CO-OPERATION

(poss) Proposal for a regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II) – It is highly unlikely that this item will be on the final agenda

This Regulation will decide which country’s law would apply to resolve an international dispute concerning a non-contractual obligation – anything from a negligence action arising from a road traffic accident to defamation to a claim based on environmental pollution. A final set of discussions will take place during November and the Working Group is still considering the revised provision on defamation. Scottish Executive official is attending Working Group meetings as part of the UK delegation.

(poss) European Payment Order – It is highly unlikely that this item will be on the final agenda

This is a proposal for a simplified procedure for obtaining and enforcing a judgement in uncontested claims. The UK is seeking to restrict the proposal to cross-border cases. Still
being discussed in Working Group where Executive Officials have been attending meetings and working closely with DCA on UK negotiating line.

JD: EU JHA STRATEGY UNIT
17 November 04
COVER NOTE

from: Secretary-General of the European Commission,
signed by Ms Patricia BUGNOT, Director

date of receipt: 17 August 2004

to: Mr Javier SOLANA, Secretary-General/High Representative

Subject: Green Paper on mutual recognition of non-custodial pre-trial supervision measures


Encl.: COM(2004) 562 final
GREEN PAPER

on mutual recognition of non-custodial pre-trial supervision measures

(presented by the Commission)

{SEC(2004) 1046}
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GREEN PAPER

on mutual recognition of non-custodial pre-trial supervision measures

The purpose of this Green Paper is to serve as a basis for discussions about the preparation of a Commission proposal for a new legislative instrument on mutual recognition of judicial decisions relating to non-custodial pre-trial supervision measures. A Commission Staff Working Paper associated with the Green Paper (SEC(2004) 1046) contains a detailed analysis of the relevant legal framework in this area and the Commission’s thinking on how such an instrument could be drawn up.

1. WHY IS THE COMMISSION PRESENTING A GREEN PAPER.

1.1. Identification of the problem

The excessive use (and length) of pre-trial detention is one of the main causes of prison overpopulation. Owing to the risk of flight, non-resident suspects are often remanded in custody, while residents benefit from alternative measures.

According to general principles of law, custody pending trial shall be regarded as an exceptional measure and the widest possible use should be made of non-custodial supervision measures. However, the different alternatives to pre-trial detention that exist in national law (e.g. reporting to the police authorities or travel prohibition) cannot presently be transposed or transferred across borders as States do not recognise foreign judicial decisions on these matters.

The introduction of a legal instrument, which would enable the EU Member States to mutually recognise non-custodial pre-trial supervision measures, would help reduce the number of non-resident pre-trial detainees in the European Union. At the same time, the introduction of such an instrument would reinforce the right to liberty and the presumption of innocence in the European Union seen as a whole (i.e. in the common area of freedom, security and justice) and would decrease the risk of unequal treatment of non-resident suspected persons.

1.2. Need for action

There is a clear mandate to take action on this issue under the measures 9 and 10 of the Programme of measures to implement the principle of mutual recognition of decisions in criminal matters of November 2000¹ (hereinafter the “mutual recognition programme”), which was adopted at the request of the Tampere European Council. The details of this mandate are set out in chapter 2.2.1.3. of the Commission Staff Working Paper.

The need for action at European level has been stressed by the European Parliament in several resolutions, as well as identified by other regional cooperation bodies such as the Council of Europe and the Commissioner of the Baltic Sea States. It has also been highlighted by various Non Governmental Organisations (NGOs) operating in the field.

¹ OJ C 12, 15.1.2001, p. 10.
1.3. Possible solution

The main idea of a new instrument on mutual recognition of non-custodial pre-trial supervision measures is to substitute pre-trial detention with a non-custodial supervision measure and to transfer this measure to the Member State where the suspected person normally has his or her residence. This would allow the suspected person to be subject to a supervision measure in his or her normal environment until the trial takes place in the foreign Member State. Different models on how to implement this idea are discussed in the Commission Staff Working Paper.

In order to ensure the compliance with a non-custodial supervision measure, the new instrument must contain, as a last resort, a coercive mechanism to return an uncooperative suspected person to the trial State, if necessary by force. It is rather the mere existence of such a possibility than its actual use that ensures the smooth functioning of the new instrument. It should be underlined that in the absence of possible recourse to coercive measures, there would be a risk (in the short and in the long run) that the relevant category of persons will not benefit from alternative measures at all. The different aspects of such a coercive mechanism are also considered in the Commission Staff Working Paper.

2. The consultation process

The present Green Paper is the third step in the consultation process on alternatives to pre-trial detention.

The first step was to draw up and send out a questionnaire on pre-trial detention and alternatives to such detention in order to identify possible obstacles to cooperation between Member States in this area. The then 15 EU Member States submitted replies to the questionnaire. A summary of the replies concerning, i.a., non-custodial supervision measures (alternatives to pre-trial detention) and applicable penalties in the event of non-compliance (as required under measure 9 of the mutual recognition programme) is in the Commission Staff Working Paper (annex 2).

The second step was to write a Discussion Paper on the basis of the replies to the questionnaire and to organise an experts’ meeting. The Discussion Paper (of 24 April 2003), which was sent to a number of experts on pre-trial detention and alternatives to such detention in the EU Member States (and the then acceding countries), proposes, i.a., the introduction of a so-called European order to report to an authority as a non-custodial pre-trial supervision measures at European Union level. The Discussion Paper further considers the limits and possibilities for taking action in the field of pre-trial detention in general. The experts’ meeting was held in Brussels on 12 May 2003. Several experts, including representatives of NGOs, had been invited on an individual basis, while other experts represented their Member States. Eurojust was also represented. At this meeting, different aspects of pre-trial detention and alternatives to such detention were discussed, in particular the Commission’s thinking on the European order to report. The Green Paper takes fully into account the outcome of that meeting (for further details, see the Commission Staff Working Paper).
3. **OBJECTIVES OF THIS GREEN PAPER**

3.1. **To extend the debate to a wider audience**

The main objective of this Green Paper is to extend this consultation process to a wider audience, including, *i.a.*, practitioners, such as judges, prosecutors and defence lawyers, people working in the social and probation services, pre-detention establishments and prisons, professional organisations, academic circles, relevant NGOs and public authorities.

3.2. **To focus on mutual recognition of non-custodial pre-trial supervision measures**

The present Green Paper focuses on mutual recognition of non-custodial pre-trial supervision measures. Some relevant items (legal assistance, interpreter and translator, vulnerable categories, *e.g.* children and juveniles, consular assistance/right to communication and the “letter of rights”) have already been dealt with by the Green Paper\(^2\) and the Proposal for a Council Framework Decision on certain procedural rights.\(^3\) Although linked to the legal framework of pre-trial detention and alternatives to such detention, the Commission Staff Working Paper does not enter into details on those questions, unless this is deemed necessary.

3.3. **To explore the possibilities of taking action**

The introduction of a mutual recognition scheme for non-custodial pre-trial supervision measures at European Union level must, however, not be separated from the legal framework that governs pre-trial detention in general. It should be remembered that supervision measures in principle are *alternatives* to pre-trial detention. Certain fundamental principles that are applicable to pre-trial detention in general are *mutatis mutandis* also applicable to non-custodial supervision measures. Consequently these principles must be considered when drawing up an instrument on mutual recognition and enforcement of non-custodial pre-trial supervision measures.

The Commission Staff Working Paper explores the possibilities of taking action in this area in the light of existing conventions, case law and national legislation.

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The Commission invites you to comment on this Green Paper (including the Commission Staff Working Paper) and in particular on the questions listed below. The Commission would also welcome your comments on new developments in the field of alternatives to pre-trial detention in the Member States (including applicable penalties in the event of non-compliance with an obligation under a non-custodial supervision measure).

To facilitate exchange of views, a website is opened, hosting this Green Paper and a series of relevant links.

http://europa.eu.int/xxx/livre vert

Until x x 2004, answers may be given, preferably to the following address:

xxx-livre-vert@cec.eu.int

or by post to:

European Commission
Directorate-General Justice and Home Affairs
Unit D3 – Criminal justice
B-1049 Brussels
Belgium

Marked for the attention of Mr. Thomas Ljungquist

The Commission intends to organise a public hearing in 2004.

Question 1:

Considering the negative consequences of the present legal framework as regards the treatment of non-resident suspects in the area of alternatives to pre-trial detention:

(a) Do you agree with the approach of the Commission with respect to mutual recognition of non-custodial pre-trial supervision measure as described in chapter 4.3. of the Commission Staff Working Paper (i.e. the possibility of monitoring the suspected person in his or her country of normal residence and the necessity to introduce a mechanism that ensures the presence of the accused person at the trial unless this person can be judged in his or her absence) in order to ensure the full EU-wide implementation of the right to liberty and the presumption of innocence?

(b) If not, are there alternative solutions?

(c) Please describe them.
(d) Should a mechanism for mutual recognition of non-custodial supervision measures also cover less serious offences (i.e. below the threshold of Article 2(1) of the FD-EAW)?

Question 2:

Should a mechanism for mutual recognition of non-custodial supervision measures cover

– the situation when a suspected person, who already is subject to such measures and who, permanently or temporarily, wants to go to another Member State, makes a request for transfer of these measures to that Member State (as described in chapter 4.2.2.3. of the Commission Staff Working Paper)?

– if yes, under which conditions?

– the situation when the suspect has already gone to another Member State (as described in chapters 4.2.3.1., “suspect in breach of an obligation under non-custodial pre-trial supervision measure” and 4.2.3.2., “late application for non-custodial supervision measures”, of the Commission Staff Working Paper)?

– if yes, under which conditions?

Question 3:

(a) Should the new instrument contain a provision on a specific non-custodial pre-trial supervision measure, such as the European order to report, possibly in combination with a travel prohibition order, as described above?

(b) Would it be appropriate to let the issuing authority decide the non-custodial pre-trial supervision measures to be applied during the monitoring phase (in accordance to its national law) or in what way the suspected person should comply with a European order to report (i.e. how oft he or she should report, to what authority etc.)?

(c) Would it be more suitable to let the executing authority choose the appropriate coercive measures in accordance with its national law, leaving to the issuing authority only to specify the objective to be monitored?

(d) Would the Eurobail model be suitable?

Question 4:

(a) Should the new instrument contain any mandatory grounds of refusal in the event of amnesty, final judgment and other final decisions or relating to the age of criminal responsibility?

(b) Are the other grounds for refusal, contained in Article 4 of the FD-EAW, relevant in the context of an order for transfer of alternative measures?

(c) In particular, should the executing authority have the right to refuse the execution on the ground of lack of double criminality?
Question 5:

Could there be conditions for enforcing an order for transfer of alternative measures other than:

– return to the State of residence for serving the sentence?

– possibility of revision in case of life imprisonment?

Question 6:

(a) Should the issuing authority specify the obligation (relating to the three “classical dangers”, i.e. the dangers of re-offending, flight and suppression of evidence) to be complied with by the suspected person under the non-custodial pre-trial supervision measure in a form (in line with what has been said above) letting the executing authority decide coercive measures other than detention in the event of non-compliance?

(b) Should the executing authority be obliged to report a (severe) breach of an obligation relating to the “three classical dangers”?

(c) Should the executing authority be allowed to remand the suspected person in custody in the event of non-compliance with an obligation under a supervision measure and detain him or her until the trial takes place or should this authority return the suspect immediately to the issuing authority?

(d) Could the participation of the suspected person through a video link from the executing Member State replace the physical presence of this person in the proceedings before the issuing authority as regards (only) the question whether he or she should be remanded in custody in the issuing Member State?

(e) How should the situation be resolved where the issuing and the executing authorities have different views on whether a person who is in breach of an obligation should be remanded in custody or whether the danger can be eliminated by imposing a new obligation?

(f) Should a mechanism to return the suspected person from the executing Member State to the issuing Member State apply to both the monitoring phase and to the trial phase?

(g) Should the issuing authority specify the obligation to come to the trial or/and that the person in question could be judged in absentia in the event that he or she does not attend the trial and would this person have to consent to this obligation before he or she can benefit from an alternative measure in the executing Member State?

(h) Should the executing authority, during the monitoring phase and the trial phase, be allowed to postpone the return of the suspected person?

(i) In particular, should the executing authority have the possibility to postpone the return of a person who is suspected of having committed a new offence within its territory?
COUNCIL OF THE EUROPEAN UNION

Brussels, 10 September 2004

12243/04
ADD 1

DROIPEN 45
COPEN 104

ADDENDUM TO COVER NOTE

from: Secretary-General of the European Commission,
signed by Ms Patricia BUGNOT, Director
date of receipt: 17 August 2004
to: Mr Javier SOLANA, Secretary-General/High Representative
Subject: Annex to the Green Paper on mutual recognition of non-custodial pre-trial supervision measures


Encl.: SEC(2004) 1046
COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 17.08.2004
SEC(2004) 1046

COMMISSION STAFF WORKING PAPER

Annex to the

GREEN PAPER

on mutual recognition of non-custodial pre-trial supervision measures

{COM(2004)562 final}
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1. INTRODUCTION

1.1. Why is the Commission presenting a Green Paper

The excessive use (and length) of pre-trial detention is one of the main causes of prison overpopulation. Owing to the risk of flight, non-resident suspects are often remanded in custody, while residents benefit from alternative measures.

According to general principles of law, custody pending trial shall be regarded as an exceptional measure and the widest possible use should be made of non-custodial supervision measures. However, the different alternatives to pre-trial detention that exist in national law (e.g. reporting to the police authorities or travel prohibition) cannot presently be transposed or transferred across borders as States do not recognise foreign judicial decisions on these matters.

The introduction of a legal instrument, which would enable the EU Member States to mutually recognise non-custodial pre-trial supervision measures, would help reduce the number of non-resident pre-trial detainees in the European Union. At the same time, the introduction of such an instrument would reinforce the right to liberty and the presumption of innocence in the European Union seen as a whole (i.e. in the common area of freedom, security and justice) and would decrease unequal treatment of non-resident suspected persons.

There is a clear mandate to take action on this issue under the measures 9 and 10 of the Programme of measures to implement the principle of mutual recognition of decisions in criminal matters of November 2000\(^1\) (hereinafter the “mutual recognition programme”), which was adopted at the request of the Tampere European Council. The details of this mandate will be set out in chapter 2.2.1.3.\(^2\)

The need for action at European level has been stressed by the European Parliament in several resolutions, as well as identified by other regional cooperation bodies such as the Council of Europe and the Commissioner of the Baltic Sea States. It has also been highlighted by various Non Governmental Organisations (NGOs) operating in the field.\(^3\)

The purpose of the Green Paper is to serve as a basis for discussions about the preparation of a Commission proposal for a new legislative instrument on mutual recognition of judicial decisions relating to non-custodial pre-trial supervision measures.

1.2. The consultation process

The Green Paper is the third step in the consultation process on alternatives to pre-trial detention.

The first step was to draw up and send out a questionnaire on pre-trial detention and alternatives to such detention in order to identify possible obstacles to cooperation between Member States in this area. The then 15 EU Member States submitted replies to the questionnaire. The Green Paper takes into account the information provided in these replies.

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\(^1\) OJ C 12, 15.1.2001, p. 10.
\(^2\) See also chapter 4.1.
\(^3\) The reasons for taking action are set out in detail in chapter 2 (“Background and mandate”).
A summary of the replies concerning, i.a., non-custodial supervision measures (alternatives to pre-trial detention) and applicable penalties in the event of non-compliance (as required under measure 9 of the mutual recognition programme) is in annex 2 to this Commission Staff Working Paper.

The Commission has also had access to documents of the Committee of Experts on remand in custody and its implications for the management of penal institutions (PC-DP)\(^4\) of the Council of Europe, in particular a questionnaire on the law and practice of Member States regarding remand in custody\(^5\), including an analysis\(^6\) of the replies to this questionnaire.

The second step was to write a Discussion Paper on the basis of the replies to the questionnaire and to organise an experts’ meeting. The Discussion Paper (of 24 April 2003), which was sent to a number of experts on pre-trial detention and alternatives to such detention in the EU Member States (and the then acceding countries), proposes, i.a., the introduction of a so-called European order to report to an authority as a non-custodial pre-trial supervision measures at European Union level. The Discussion Paper further considers the limits and possibilities for taking action in the field of pre-trial detention in general. The experts’ meeting was held in Brussels on 12 May 2003. Several experts, including representatives of NGOs, had been invited on an individual basis, while other experts represented their Member States. Eurojust was also represented. At this meeting, different aspects of pre-trial detention and alternatives to such detention were discussed, in particular the Commission’s thinking on the European order to report. The Green Paper takes fully into account the outcome of that meeting.

1.3. Objectives of the Green Paper

1.3.1. To extend the debate to a wider audience

The main objective of the Green Paper is to extend this consultation process to a wider audience, including, i.a., practitioners, such as judges, prosecutors and defence lawyers, people working in the social and probation services, pre-detention establishments and prisons, professional organisations, academic circles, relevant NGOs and public authorities.

1.3.2. To focus on mutual recognition of non-custodial pre-trial supervision measures

The present Commission Staff Working Paper will focus on mutual recognition of non-custodial pre-trial supervision measures. Some relevant items (legal assistance, interpreter and translator, vulnerable categories, consular assistance/right to communication and the “letter of rights”) have already been dealt with by the Green Paper and the Proposal for a Council Framework Decision on certain procedural rights.\(^7\) Although linked to the legal framework of

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\(^4\) where the Commission participates as an observer.


\(^7\)
pre-trial detention and alternatives to such detention, the present Commission Staff Working Paper will not enter into details on those questions, unless this is deemed necessary.\textsuperscript{8}

\subsection*{1.3.3. To explore the possibilities of taking action}

The introduction of a mutual recognition scheme for non-custodial pre-trial supervision measures at European Union level must not be separated from the legal framework that governs pre-trial detention in general. It should be remembered that supervision measures in principle are \textit{alternatives} to pre-trial detention. Certain fundamental principles that are applicable to pre-trial detention in general are \textit{mutatis mutandis} also applicable to non-custodial supervision measures. Consequently these principles must be considered when drawing up an instrument on mutual recognition and enforcement of non-custodial pre-trial supervision measures.

The present Commission Staff Working Paper will therefore explore the possibilities of taking action in this area in the light of existing conventions, case law and national legislation.

\textbf{With this end in mind, the Commission Staff Working Paper will be structured in the following way:}

\textbf{Chapter 2} ("Background and mandate") will introduce the problem and a possible solution that will be developed in more detail at the end of the Paper. This chapter also sets out the mandate under the mutual recognition programme and the reasons for taking action.

In \textbf{chapter 3} ("Basic principles") an overview will be made of the relevant legal framework that govern the use of pre-trial detention and alternatives to such in the EU Member States.

\textit{Subchapter 3.1.} will describe the basic principles in this area, such as the right to liberty, the presumption of innocence and the principles of proportionality and legality. The understanding of those principles is of paramount importance when considering a new instrument on mutual recognition of non-custodial pre-trial supervision measures.

In the following subchapter (3.2.) the legitimate grounds for pre-trial detention will be analysed on the basis of the relevant conventions (taking into account the status of ratification), recommendations and case-law. \textit{Subchapter 3.3.} sets out the relevant international recommendations on alternatives to pre-trial detention. Both subchapters have a section on the national framework. The objective is, however, not to present a complete comparative analysis of the legislation of the Member States in these areas, but only to point out possible problems. Detailed information is presented in annex 2 to this Paper.

On the basis of the overview of the relevant legal framework, \textbf{chapter 4} will consider “\textit{A new instrument on mutual recognition of alternatives to pre-trial detention}” in accordance with measure 10 of the mutual recognition programme. Different situations where the new instrument could be applied will be identified (\textit{subchapter 4.2.}). Solutions that are available under the present legal framework will be analysed in order to explore whether the new

\textsuperscript{8} The present Commission Staff Working Paper will not specifically deal with the trial as such, covered by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Article 47 of the Charter of Fundamental Rights of the European Union (CFREU), or with the detention of foreigners for unauthorised entry with a view to their deportation, covered by Article 5(1) f of the ECHR.
instrument constitutes an added value (subchapters 4.4.2. and 4.6.4.). The elaboration of the new instrument will be considered in detail in the subchapters 4.1., 4.3. – 4.6.

The Commission invites you to comment on the Green Paper and in particular on the questions set out in boxed items and listed in annex 1 to the Commission Staff Working Paper. The Commission would also welcome your comments to the overview of national legislation in the field of pre-trial detention in annex 2, taking into account new developments in the Member States. In particular, the Commission would be interested in comments regarding alternative measures to pre-trial detention and applicable penalties in the event of non-compliance with an obligation under a non-custodial supervision measure.

To facilitate exchange of views, a website is opened, hosting the Green Paper and a series of relevant links.

[http://europa.eu.int/xxx/livre vert](http://europa.eu.int/xxx/livre vert)

Until x x 2004, answers may be given, preferably to the following address:

[xxx-livre-vert@cec.eu.int](mailto:xxx-livre-vert@cec.eu.int)

or by post to:

European Commission

Directorate-General Justice and Home Affairs

Unit D3 – Criminal justice

B-1049 Brussels

Belgium

Marked for the attention of Mr. Thomas Ljungquist

The Commission intends to organise a public hearing in 2004.
2. BACKGROUND AND MANDATE

2.1. Outline of the problem and possible solution

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, 1950), the International Covenant on Civil and Political Rights (ICCPR, 1966) and the Charter of Fundamental Rights of the European Union (CFREU, 2000) provide that everyone has the right to liberty and that everyone who has been charged with a criminal offence shall be presumed innocent until proved guilty according to law. These international instruments also provide that a person may be deprived of his or her liberty on a reasonable suspicion of having committed a criminal offence. In addition there must be one or several special grounds for detention relating to the dangers of re-offending, suppression of evidence and flight.

It should be noted that the international instruments do not contain any provisions on the threshold for pre-trial detention: the threshold for pre-trial detention follows the national law of the Member States. Thresholds vary from Member State to Member State. In some Member States the penalty for the offence in question is not a factor that is taken into account when making remand decisions. Some Member States allow pre-trial detention irrespective of the penalty of the offence when the suspect person has no fixed abode in the territory and there is a risk that this person will abscond, although the general threshold for pre-trial detention is much higher.

There are presently no international instruments that specifically allow the transfer of non-custodial pre-trial supervision measures from one Member State to another. A person suspected of having committed an offence in a Member State where he or she is not a resident can therefore, owing to the risk of flight, often not go back to his or her Member State of normal residence awaiting the upcoming trial in the foreign Member State.

There is a risk of unequal treatment between residents and non-residents as foreigners are often arrested for minor offences, while residents are released or benefit from alternative measures.

The main idea of a new instrument on mutual recognition of non-custodial pre-trial supervision measures is to substitute pre-trial detention with a non-custodial supervision measure and to transfer this measure to the Member State where the suspected person normally has his or her residence. This would allow the suspected person to be subject to a supervision measure in his or her normal environment until the trial takes place in the foreign Member State. Different models on how to implement this idea are discussed in the Green Paper.

In order to ensure the compliance with a non-custodial supervision measure, the new instrument must contain, as a last resort, a coercive mechanism to return an uncooperative suspected person to the trial State, if necessary by force. It is rather the mere existence of such a possibility than its actual use that ensures the smooth functioning of the new instrument. It should be underlined that in the absence of possible recourse to coercive measures, there would be a risk (in the short and in the long run) that the relevant category of persons will not benefit from alternative measures at all. The different aspects of such a coercive mechanism are also considered in this Paper.
2.2. Reasons for taking action and mandate

2.2.1. European Union

2.2.1.1. Studies on problems in connection with pre-trial detention

Several studies point out serious problems in connection with pre-trial detention in the European Union:

In its Report on the situation of fundamental rights in the European Union and its Member States in 2002, the EU network of independent experts in fundamental rights referred to statistics of the Council of Europe that show that, on 1 September 2001, 39.2% of detainees in Luxembourg had not been sentenced yet, not even in the first instance. High levels were also found in France (28.5%), Greece (27.4%), Austria (24.9%) and in Italy (24.6%). Belgium (22.9%), Spain (21.7%) and Denmark (20.3%) were in the middle league. In the UK, England and Wales had a low level (10.5%).

Moreover, the replies to a questionnaire on statistical data on the prison population, including pre-trial detention that the Commission drew up in 2003 at the request of the Italian Presidency, show that there are considerable differences between the EU Member States both as regards the rate of pre-trial detention per 100 000 inhabitants and the proportion of own nationals in relation to foreign detainees. The general tendency regarding the use of pre-trial detention is raising.

2.2.1.2. Resolutions of the European Parliament

In this context, it should also be noted that the European Parliament in its Resolutions on the situation concerning basic rights in the European Union, which are based on the Charter of Fundamental Rights of the European Union (hereinafter “CFREU”) has urged the Commission to take action regarding various aspects in the area of pre-trial detention and alternatives to such detention.

In its Resolution for the year 2001, the European Parliament points out that Article 4 of the CFREU stipulates that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment” and calls for that article to be scrupulously observed in all the Member States (paragraph 29) and considers that the Member States should step up their efforts in this area id est by restricting detention as far as possible and completely avoiding taking children into custody save in absolutely exceptional cases (paragraph 31). The

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9 The report, which was drafted under request of the European Commission, Directorate-General Justice and Home Affairs, Unit A.5 (Citizenship, Charter of fundamental rights, Racism, Xenophobia, Daphne program, was submitted on 31 March 2003.
10 P. 67 – 68 (under the heading “Detention on remand”). These figures correspond to table 4.2.1. c (“Percentage of untried prisoners [i.e. no court decision yet reached]) of the Annual Penal Statistics of the Council of Europe, SPACE I: 2001.
11 In its Programme for 1 July – 31 December 2003, the Italian Presidency stated that it would take an “initiative” for monitoring prison conditions throughout the Union, with a view to drawing up new forms of social defence and prevention.
12 For details see Annex 3: Pre-trial detention rates in the EU Member States.
13 These resolutions are presented continuously once a year.
15 Under the heading Prohibition of torture and inhuman treatment.
16 See chapters 3.3. and 4. below.
European Parliament is of the opinion that serious violations of human rights in one Member State are not just the responsibility of that country but should also be the proper concern of the EU as a whole (paragraph 32).

The European Parliament further urges the Commission to present proposals in the near future on standards for criminal proceedings that should apply in the European Union (paragraph 143). It calls on the Council to adopt a framework decision on common standards for procedural law, for instance on rules covering pre-trial orders, so as to guarantee a common level of fundamental rights protection throughout the EU (paragraph 144). The European Parliament is concerned by the large number of serious violations reported by the European Court of Human Rights (ECtHR) in Strasbourg, i.e. on the presumption of innocence (paragraph 148)\(^{18}\). It urges the Member States to comply scrupulously and in good time with the judgments of the ECtHR concerning procedural safeguards and to ensure that legislation is brought into line with those judgments (paragraph 149) and, inter alia, to guarantee the effective application of the presumption of innocence of the person charged until judgment is delivered (paragraph 151).

In its Resolution on the situation concerning basic rights in the European Union for the year 2002\(^{19}\), the European Parliament notes that the situation of prisoners in the EU deteriorated in some Member States in 2002, mainly as a result of overcrowding in prisons (paragraph 19).

The European Parliament considers it essential, especially as the EU prepares for enlargement, that the Member States, i.a. take far more determined measures with a view to allow prisoners to have access to a lawyer from the outset, ensuring at least minimum standards for the health and living conditions of prisoners and, in particular, examine detention procedures in order to ensure that human rights are not violated, that detention periods are not unnecessarily long and that grounds for detention are reviewed regularly (paragraph 20).\(^{21}\) Moreover, the European Parliament considers that, at a general level, efforts must be made in a European area of freedom, security and justice to improve the operation of the police and prison system (paragraph 23).\(^{22}\)

The European Parliament further reiterates that the Commission swiftly should submit the proposal for a framework decision on procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union (paragraph 140).\(^{24}\) It, once again, calls on the Council to adopt a framework decision on common standards governing procedural law, for example on the rules concerning pre-trial orders, with a view to guaranteeing a uniform level of protection of fundamental rights throughout the EU (paragraph 142). Finally, the European Parliament underlines the importance of the right to have judgment given within a reasonable time (paragraphs 146 – 148).

\(^{17}\) Under the heading Administration of justice.
\(^{18}\) See chapter 3.1.3. below.
\(^{20}\) Under the heading Prohibition of torture and inhuman treatment.
\(^{21}\) See, in particular, chapter 3.2. below.
\(^{23}\) Under chapter VI: Fair access to justice.
2.2.1.3. Mandate under the mutual recognition programme

The mutual recognition programme lists 24 specific mutual recognition measures, including measure 9 (priority 3) and measure 10 (priority 5), which are placed under the headings 2.2.2. Non-custodial supervision measures, 2.2. Orders relating to persons and 2. Enforcement of pre-trial orders.

The aim of measures 9 and 10 is “to ensure cooperation when a person is subject to obligations or supervision as part of judicial supervision pending a court decision.”

Pursuant to measure 9, the measures potentially concerned, the methods of supervision ensuring compliance by the individuals to whom they apply, and the penalties applicable in the event of non-compliance shall be catalogued.

Measure 10 says that on the basis of the above catalogue, the adoption of an instrument enabling control, supervision or preventive measures ordered by a judicial authority pending the trial court’s decision to be recognised and immediately enforced should be considered. This instrument should apply to any person against whom criminal proceedings have been brought in one Member State and who may have gone to another Member State and should specify how such measures would be supervised and the penalties applicable in the event of non-compliance with them.

It should be underlined that the drawing up of such an instrument must be considered in the light of the other measures listed in the mutual recognition programme. According to this programme, mutual recognition is designed not only to strengthen cooperation between Member States but also to enhance the protection of individual rights. The implementation of the principle of mutual recognition of decisions in the area of freedom, security and justice presupposes that Member States have trust in each others' criminal justice systems. The mutual recognition programme also states that in each of the 24 listed mutual recognition measures “the extent of mutual recognition is very much dependent on a number of parameters which determine its effectiveness”. These parameters include “mechanisms for safeguarding the rights of […] suspects” (parameter 3) and “the definition of common minimum standards necessary to facilitate the application of the principle of mutual recognition” (parameter 4).

This is also the reasoning behind the Commission’s Green Paper of 19 February 2003 on procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union (hereinafter the “Green Paper on procedural safeguards”) and the Commission’s Proposal for a Council Framework Decision of 28 April 2004 on certain procedural rights in criminal proceedings throughout the European Union (hereinafter

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25 Although no time-limits are set for these measures, they have been marked with priorities from 1 to 6 (1 being the most urgent).
26 This wording implies that the situation before trial in a court of first instance (i.e. after an apprehension or an arrest) is covered, but also that the situation after such a trial (i.e. after an appeal against a decision to detain a person in custody in the court of first or second instance). A condition is that the decision or judgment in question has not yet become legally binding.
27 The relationship between the measures of this programme that are relevant for a new instrument on mutual recognition of non-custodial pre-trial supervision measures will be considered in more detail in chapter 4.1. below.
“Proposal for a Council Framework Decision on certain procedural rights”). The Green Paper and the Proposal focus on the following questions: The right to legal assistance and representation, the right to a competent, qualified interpreter and/or translator, proper protection for especially vulnerable categories, consular assistance and the knowledge of the existence of rights (“letter of rights”). These questions are of course also relevant for people in pre-trial detention. The Green Paper on procedural safeguards mentions that the right to bail (provisional release pending trial) will be dealt with separately.  

2.2.2. Council of Europe

In its publication “The CPT standards” (15 September 2003), the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the CPT Committee) of the Council of Europe also underlines that the phenomenon of prison overcrowding continues to blight penitentiary systems across Europe and seriously undermines improvements in conditions of detention. Overcrowding is often particularly acute in pre-trial detention establishments. In such circumstances, the CPT Committee notes that throwing increasing amounts of money at the prison estate will not offer a solution. Instead, current law and practice in relation to custody pending trial and sentencing as well as the range of non-custodial sentences need to be reviewed.  

It should also be mentioned that the Committee of Experts on remand in custody and its implications for the management of penal institutions (PC-DP) of the Council of Europe is working on a non-binding recommendation on pre-trial detention. In particular, the PC-DP committee is considering the need to update the CoE Recommendation No. (80) 11 concerning custody pending trial. The members of the PC-DP committee have expressed the wish to coordinate the work of the committee with the work of the Commission in this field.

2.2.3. Commissioner of the Baltic Sea States (CBSS)

Finally, the Commissioner of the Baltic Sea States (CBSS) has initiated a project on “Pre-Trial Detention in the Baltic Sea Area”, which intends to support the ongoing efforts in all its member States to improve and modernise their present pre-trial detention systems. As a first step in that direction, information available on pre-trial detention and its current

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30 In chapter 2.6. (“Rights not covered in the Green Paper”).
31 The CPT standards. “Substantive sections of the CPT’s General Reports, available on the website of the CPT Committee (http://www.cpt.coe.int/). The publication “The CPT Standards” consists of the “substantive” sections of the General Reports of the CPT Committee on police custody, pre-trial detention, imprisonment, training of law enforcement personnel, health care services in prisons etc. in the member States of the Council of Europe.
33 The PC-DP Committee, which has held meetings on 9 – 11 December 2002, on 19 – 21 May, 8 – 10 December 2003 and 10 – 12 May 2004, shall examine the contemporary use legal and judicial justification for the use of remand in custody, the desirability of developing risk assessment instruments and the use of alternatives to remand in custody. It shall further examine ways to improve the conditions of detention of remand prisoners and ways to prevent undue restriction of rights and ill-treatment of remand prisoners. The study conducted by the committee shall lead to a Report and a Recommendation setting out guidelines for good practice, bearing in mind the ECHR, the European Prison Rules, Recommendation No. R (80) 11 as well as the reports by the CPT Committee.
implementation in the Baltic Sea Area has been compiled and published in a report.\textsuperscript{34} According to the report, all CBSS member States seem still far from having found adequate responses to problems such as long periods of detention due to pending cases, overcrowded prisons, violent, physical or verbal abuse of detainees, long periods of isolation, insufficient and out-dated training for the police and the prison staff, or the lack of relevant occupation for pre-trial detainees, to name only a few.

Representatives of the CBSS working group on pre-trial detention\textsuperscript{35} have stressed the need for coordination between the three bodies working on standards in this field: The Council of Europe, the European Commission and the CBSS.


\textsuperscript{35} On 2 – 4 February 2003 the CBSS also held a conference in St Petersburg on “Pre-trial Detention in the Baltic Sea Area”. The participants agreed upon a set of recommendations, the so-called Pushkin Recommendations (annexed to the above mentioned report). According to these recommendations, the CBSS Commissioner shall appoint a Working Group on pre-trial Detention, which shall address and monitor concerns regarding pre-trial detention.
3. BASIC PRINCIPLES

3.1. Introduction

In this chapter, an overview of a number of important principles that govern pre-trial detention and alternatives to such detention will be made.

3.1.1. Freedom, security and justice

Article 6(1) of the Treaty on European Union (TEU) provides that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. Article 6(2) TEU provides that the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, 1950)\(^{36}\) and as they result from the constitutional traditions common to the Member States, as general principles of Community law. This compliance with fundamental rights principles is also affirmed in the Charter of Fundamental Rights of the European Union (CFREU, 2000).

The individual has fundamental rights that must not be violated. The basic characteristic is the non-interference by the State in an area of freedom for the individual. Freedom in the legal sense of the word is thus the same as the absence of legal limitations.

On the other hand, freedom ends where the individual seeks to deny or interfere with the freedom of others. All individuals have a right to security. It is therefore sometimes necessary to deprive one individual of his freedom in order to prevent him or her from interfering with the criminal investigation, or committing new offences, which undermine the security and hence the freedom of others, or absconding (which would undermine the interests of justice).

The individual has also a right to justice. The decision to detain a person must never be arbitrary and can only be allowed in certain conditions and in accordance with a procedure established by law.

A number of protective measures ensuring that individuals are not arbitrarily deprived of their liberty and establishing safeguards against abuse by the state authorities have been developed during the second half of the 20th century. Some of these measures are binding upon States, while others only are minimum standards to which States should aspire.\(^{37}\)

3.1.2. Right to liberty

The most important right or fundamental freedom is the right to liberty. Article 5(1) of the ECHR and provides that “everyone has the right to liberty and security of person”. The right to liberty is also reflected in the (UN) International Covenant on Civil and Political Rights

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\(^{36}\) Ratified (etc) by all EU Member States.

\(^{37}\) The first instrument that was adopted in this context was the Universal Declaration of Human Rights (UDHR, 1948). It is not a legally binding instrument, but is recognised by the international community as the basic catalogue of fundamental human rights, which should be respected by all States.
The right to liberty under Article 5(1) of the ECHR has been made subject to six exceptions (a – f), which prescribe when a person may be deprived of his or her liberty. The ECtHR has stated that the list of exceptions to this right is an exhaustive one and only a narrow interpretation of those exceptions is consistent with the aim and purpose of that provision.\(^{40}\)

The exception to the right to liberty which relates to pre-trial detention is on the grounds of suspicion that a person has committed an offence (Article 5(1)c of the ECHR\(^ {41}\)). It is clear both from the use of the terms *deprived of his liberty*, *arrest* and *detention*, which appear also in paragraphs 2 - 5 of Article 5 of the ECHR, and from a comparison between Article 5 and the other normative provisions of the Convention and its Protocols, that the right to liberty of Article 5(1) addresses individual liberty in its “classic” sense, that is to say the physical liberty of the person. Its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion.

Article 52(3) (Scope of guaranteed rights) of the CFREU provides that insofar the CFREU contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the ECHR and that Article 52(3) shall not prevent Union law providing more extensive protection.\(^ {42}\)

### 3.1.3. Presumption of innocence

The right to liberty is closely linked to the *presumption of innocence*.

Article 6(2) of the ECHR provides that “[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law [emphasis added]”. Article 14(2)\(^ {43}\) of the ICCPR and Article 48 (1)\(^ {44}\) of the CFREU have a similar wording.

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\(^{38}\) Article 9(1): *Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*” The ICCPR has also been ratified (or acceded/succeeded) by all EU Member States - Cyprus (2.4.1969), Sweden (6.12.1971), Denmark (6.1.1972), Germany (17.12.1973), Hungary (17.1.1974), Finland (19.8.1975), the United Kingdom (20.5.1976), Poland (18.3.1977), Spain (27.4.1977), Portugal (15.6.1978), Austria (10.9.1978), Italy (15.9.1978), the Netherlands (11.12.1978), France (accession 4.11.1980), Belgium (21.4.1983), Luxembourg (18.8.1983), Ireland (8.12.1983), Malta (13.9.1990), Estonia (21.10.1991), Lithuania (20.11.1991), Latvia (14.4.1992), Slovenia (6.7.1992), the Czech Republic (22.2.1993), Slovakia (28.5.1993) and Greece (accession 5.5.1997) - and its provisions are subsequently binding upon them. It should, however, be noted that some Member States have made reservations to Articles 9 and 10 of the ICCPR.

\(^{39}\) Article 6 (Right to liberty and security): *Everyone has the right to liberty and security of person*


\(^{40}\) Article 9(3) of the ICCPR uses the expression *on a criminal charge*.

\(^{41}\) Pursuant to Article II-53 (Level of protection) of the draft Treaty establishing a Constitution for Europe, “[n]othing in [the CFREU] shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international and by international agreements to which the Union or all the Member States are party, including the [ECHR], and by the Member States’ constitutions”.

\(^{42}\) Article 14(2) ICCPR: *“Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”*
The presumption of innocence implies a right to be treated in accordance with this principle. It is a duty for all public authorities to refrain from prejudging the outcome of a trial. Pre-trial detention must therefore never be compulsory nor be used for punitive reasons. The legitimate grounds for detention must be thoroughly checked and reviewed.\(^4\) If pre-trial detention is considered necessary, pre-trial detainees must be treated in accordance with certain minimum standards.

The presumption of innocence is evidently also applicable to persons subject to alternative measures to pre-trial detention.\(^4\)

3.1.4. Principle of proportionality

An important principle in the area of pre-trial detention is further the principle of proportionality, which is covered by several recommendations of the Committee of Ministers of the Council of Europe. The principle of proportionality must be seen in the light of the two above-mentioned principles: the right to liberty and the presumption of innocence. The principle of proportionality implies that coercive measures, such as pre-trial detention or alternatives to such detention, only should be used when this is absolutely necessary and only as long as required. The judicial authority must further use the most lenient coercive measure appropriate, i.e. choose an alternative measure to pre-trial detention, if this is sufficient to eliminate the danger of the suspect’s absconding, the danger of his or her interfering with the course of justice and the danger of his or her committing a serious offence. Sometimes this issue also is referred to as the principle of necessity.\(^4\)

3.1.5. Principle of legality

Article 5(1) c of the ECHR provides that the deprivation of liberty must be “in accordance with a procedure prescribed by law”.\(^4\) Article 9(1) of the ICCPR has a similar provision.\(^4\)

It can also be noted that the ECtHR - in cases involving a deprivation of liberty - always makes an independent assessment of whether the requirements of national law have been met in each case.

There can be situations where it is unclear whether a deprivation of liberty has occurred. According to established case-law of the ECtHR, Article 5(1) does not concern mere restrictions upon liberty of movement, which is dealt with in Article 2 of Protocol no. 4 to the

\(^4\) Article 48(1) CFREU: “Everyone who has been charged shall be presumed innocent until proved guilty according to law”
\(^4\) For further details, see chapter 3.2., “Legitimate grounds for detention, threshold and duration”.
\(^4\) For further details see chapters 3.3., “Alternatives to pre-trial detention”, and 4, “A new instrument on mutual recognition of alternatives to pre-trial detention”.
\(^4\) Article 5(1) ECHR: “Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law […] (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;”
\(^4\) Article 9(1) ICCPR, last sentence: “No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”
The ECtHR has, however, pointed out that the distinction between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance.51

Moreover, Article 5(3) ECHR provides that arrested or detained persons shall be entitled to trial within a reasonable time or to release pending trial and that release may be conditioned by guarantees to appear for trial. This means that alternative measures to pre-trial detention, in principle, are considered as restrictions on the liberty of such persons. They may therefore only be ordered when there is a reasonable suspicion that the person has committed an offence and in certain specified circumstances.

One can therefore say that coercive measures, such as arrest and pre-trial detention (and alternative measures to detention), are subject to the principle of legality. This also follows from the Constitutions and other legislative instruments of the Member States.52

3.1.6. The implementation of Article 6 TEU in the area of freedom, security and justice

As expected, the replies to the questionnaire show that all Member States of the European Union guarantee the above-mentioned principles. This follows from the first paragraph of Article 6 TEU. It should also be remembered that Article 49 TEU requires that new EU Member States must respect the principles set out in Article 6(1).

Pursuant to the second paragraph of Article 6 TEU, the European Union shall further respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law. All EU Member States have ratified53 the ECHR and are under a legal duty to ensure that their national law conforms to the standards of the Convention and that everyone within their jurisdiction enjoys the rights and freedoms set out in it.54 The explicit reference in the TEU has important legal consequences for the conditions of pre-trial detention and alternatives to such detention in the European Union.

50 Article 2 – Freedom of movement – of Protocol no. 4 has the following wording: “(1) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. (2) Everyone shall be free to leave any country, including his own. (3) No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. (5) The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.”

51 See, i.a., the judgment of 28 May 1985 in the case of Ashingdane v. UK (paragraph 41).

52 See, i.a., Article 12 of the Belgian Constitution, Article 5(3) of the Greek Constitution, and Chapter 1, § 1, and chapter 2 § 12 of the Swedish Constitution (“Regeringsformen”).


54 Cf. Articles 1 and 46 of the ECHR.
Most EU Member States have incorporated the text of the ECHR\textsuperscript{55} into their national law or are planning to do so. If not, it is applicable on the basis of ratification.

A question to be asked in this context is, however, in what way the standards set out in Article 6 TEU and in the CFREU, are implemented and applied in the area of freedom, security and justice of the European Union. As stated in the Green Paper on procedural safeguards\textsuperscript{56}, differences in the way human rights are translated into practice in national procedural rules do not necessarily imply violations of the ECHR. However divergent practices run risk of hindering mutual trust and confidence, which is the basis of mutual recognition.

Another question is whether there are areas in the field of pre-trial detention and alternatives to such detention that are not covered by the ECHR.

3.2. Legitimate grounds for detention, threshold and duration

3.2.1. European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

This overview of the legitimate grounds for pre-trial detention, including the threshold and duration of such detention, takes as its departure point the ECHR. What is said is, however, in principle, also true for the ICCPR: Differences and similarities in relation to the ECHR will be set out in the footnotes to this chapter.

Article 5(1) c of the ECHR provides that a person may be arrested or detained for the purpose of bringing him or her before the competent legal authority on reasonable suspicion\textsuperscript{57} of having committed an offence\textsuperscript{58} or when it is reasonably considered necessary to prevent his or her committing an offence or fleeing after having done so.\textsuperscript{59}


\textsuperscript{56} P. 9.

\textsuperscript{57} Obviously, the “facts which raise a suspicion [at this initial stage covered by Article 5(1) c of the ECHR] need not be of the same level as those necessary to justify a conviction or even the bringing of a charge, which comes at the next stage of the process of criminal investigations” (paragraph 55 of the judgment of the ECtHR of 28 October 1994 in the case of Murray v. UK).

\textsuperscript{58} What constitutes an offence is primarily a matter of national law.

\textsuperscript{59} It can be noted that the wording of the ICCPR is not identical to the ECHR, although the substance is the same. ICCPR remains, however, silent on the degree of suspicion. Article 9(3) ICCPR uses the wording “on a criminal charge” instead of “reasonable suspicion”.
Article 5(1) c and (3) of the ECHR\textsuperscript{60} require that arrested or detained persons shall be brought \textit{promptly} before a competent \textit{legal authority}.\textsuperscript{61}

In addition to the right to be brought before a competent legal authority, Article 5(4) of the ECHR\textsuperscript{62} provides that a detainee has the right to take proceedings before a \textit{court} (in the “\textit{strict}” sense of the word), which shall decide on the detention and order his or her release if the detention is not lawful. This means that, in the event that the detention has been ordered by a body other than a court, the detained person has the right to challenge the legality of the detention before a court in the \textit{strict} sense. This may also be the case, if the detained person wants to have his or her detention scrutinised by a court at periodic intervals or appeals against a decision by a lower court.

It can be noted that principle 11 of \textit{Recommendation No. R(80) 11} of the Committee of Ministers of the Council of Europe establishes that “[a]ny person against whom custody pending trial is ordered shall be entitled to appeal against the decision and apply for release”. Under principle 14 “[c]ustody pending trial shall be \textit{reviewed} at reasonably short intervals, which the law or the judicial authority shall fix”.

Pursuant to Article 5(4) of the ECHR, the court must decide on the lawfulness of the detention \textit{speedily}. No indications can be found in the text on what is meant by “\textit{speedily}”, but the fact that the person has a right to court proceedings within a reasonable time, implies that the time limit must be very short.

Article 5(3) of the ECHR clearly implies that the persistence of suspicion does not suffice to justify - after a certain lapse of time - the prolongation of the detention. The detention must thus not exceed a \textit{reasonable time}. But what does “\textit{reasonable time}” mean?

This concept cannot be translated into a fixed number of days, weeks, months or years, or into various periods depending on the seriousness of the offence. It can be mentioned that the ECHR organs have approved very long pre-trial detentions (up to two and a half years), but detention will be found justified only if it was necessary in pursuit of a legitimate purpose. When examining the question whether Article 5(3) has been observed, the ECtHR always considers and assesses the reasonableness of the grounds for detention on the basis of the rules of respect for individual liberty and of the presumption of innocence which is involved in every detention without a conviction.\textsuperscript{63}

\textsuperscript{60} This wording corresponds to Article 9(3), first sentence, of the ICCPR: “\textit{Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release}.”

\textsuperscript{61} This is a synonym, or abbreviated form, for \textit{judge or other officer authorised by law to exercise judicial power}. The competent legal authority need thus not be a “court” in the “\textit{strict}” sense of the word, but the ECHR has stated that it must be independent, impartial and apply a procedure giving the detained person suitable guarantees of fairness. See, \textit{i.a.}, the judgments of 28 October 1998 in the case of Assenov v. Bulgaria, of 27 September 1990 in the case of Wassink v. Netherlands and of 4 December 1979 in the case of Schiesser v. Switzerland. Article 9(3) of the ICCPR also uses the expression \textit{a judge or other officer authorised by law to exercise judicial power}. The ECtHR has repeatedly stated that Article 5(1)c must be read in conjunction with Article 5(3) with which it forms a whole.

\textsuperscript{62} Article 9(4) of the ICCPR establishes that \textit{[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that [the] court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful}.

\textsuperscript{63} See, \textit{i.a.}, the judgments of 20 January 2004 in the case of \textit{D.P. v. Poland} (paragraph 83) and of 10 November 1969 in the case of \textit{Stögmüller v. Austria}. 
It is clear that the persistence of the *reasonable suspicion* is a condition *sine qua non* for the validity of the continued detention of the person concerned.64

Principle 13 of *Recommendation No. R(80) 11 of the Committee of Ministers* states that “[c]ustody pending trial shall not be continued beyond what is required […], nor shall it be continued if the period spent in custody awaiting trial would be *disproportionate* to the sentence likely to be served in the event of conviction [emphasis added].”

As regards the *special grounds* for detention, the ECtHR has recognised the *danger of flight* (absconding), the *danger of suppression of evidence*65 and the *danger of repetition of offences* (hereinafter the “classical grounds”).66 These grounds are also mentioned in *Recommendation No. R(80) 11* of the Committee of Ministers of the Council of Europe, which states that “[c]ustody pending trial shall be regarded as an exceptional measure and shall never be compulsory nor be used for punitive reasons” (principle 1) and that “[it] may be ordered only if there is reasonable suspicion that the person concerned has committed the alleged offence, *and* if there are substantial reasons for believing that there is a danger of his absconding or of his interfering with the course of justice or if his committing a serious offence [emphasis added]” (principle 3). Under principle 14, mentioned above, the review of the detention, shall take into account all the changes in circumstances, which have occurred since the person concerned was placed in custody. An example would be that there is no longer any risk that the suspect suppresses evidence, because all evidence have been secured by the prosecution authorities.

Pursuant to principle 4 of the same recommendation, custody pending trial may nevertheless exceptionally be justified in certain cases of particularly serious offences, even where the existence of these grounds cannot be established.

As mentioned above (chapter 3.1.5.), the ECHR67 requires that the deprivation of liberty must be in accordance with a procedure prescribed by law. This requirement also covers pre-trial measures involving a restriction of liberty at the initial stage. The ECHR68 remains, however,

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64 See the judgment of 20 January 2004 in the case of *D.P. v. Poland* (paragraph 85). The (other) initial grounds for arrest or detention mentioned in Article 5(1)c are not a sufficient basis for continued detention at this stage. The detention must be subjected to judicial scrutiny, which should not only consider whether the arrest or detention was justified in the first place, but also whether deprivation of liberty is *still* appropriate. Although the reasonable suspicion that the suspect has committed the offence in question is a *sine qua non* for continued detention, one or more relevant and sufficient *special grounds* for continued detention must also be established (cf. PC-DP [2003] 24 prov, Jeremy McBride).

65 This ground is not explicitly mentioned in Article 5(1)c of the ECHR. However, the ECtHR has recognised this a ground for detention, *i.e.*, in its judgments of 27 June 1968 in the case of *Wemhoff v. Germany* and of 26 January 1993 in the case of *W v. Switzerland*.

66 See, *i.e.*, the judgments of 27 June 1968 in the case of *Wemhoff v. Germany* and of 10 November 1969 in the case of *Matznetter v. Austria*. It should also be mentioned that the ECtHR, in *exceptional cases*, has recognised the *need to maintain public order*, including concern for the protection of an accused person, as a special ground for continuing of deprivation of liberty (see the judgments of 26 June 1991 in the case of *Letellier v. France* and of 23 September in the case of *I A v. France*, paragraph 104).

67 And the ICCPR.

68 And the ICCPR.
silent on who may initially arrest or apprehend such a person.\textsuperscript{69}

Finally, it should be underlined that the ECHR\textsuperscript{70} does not contain any rules about a common threshold for pre-detention linked to the penalty for the offence in question. This has important implications for the mutual recognition of alternative measures in the European Union and will be discussed in detail in chapter 4 below.

3.2.2. National framework\textsuperscript{71}

The replies to a questionnaire\textsuperscript{72} on different aspects of pre-trial detention of the PC-DP Committee show that there is a considerable variation between the member States of the Council of Europe in the period that can elapse between a person suspected of involvement in an offence first being deprived of his or her liberty by the police or other law enforcement officers and a decision having to be taken about remanding him or her in custody.\textsuperscript{73}

As regards the threshold, most - but not all – EU Member States link the possibility of ordering pre-trial detention to the penalty for the offence. The threshold varies, however, depending on the Member State.\textsuperscript{74}

Some EU Member States allow pre-trial detention irrespective of the penalty for the offence when the suspect has no fixed abode in its territory and there is a risk that he or she will abscond, although the general threshold is higher. For example in Sweden, the normal threshold for pre-trial is one year. However, any person suspected on probable cause of an offence may be detained regardless of the nature of the offence if he or she does not reside in

\textsuperscript{69} It can be noted that EU Member States recognise a right for anyone to apprehend a person observed in the act of committing an offence (in flagrante delicto) or fleeing from it. If this is the case, the person apprehended should “promptly” be turned over to the nearest police officer. In most cases, however, apprehensions are made by police officers. If there are grounds to arrest a person, a policeman is - in the case of urgency - empowered to apprehend the suspect without a decision for arrest by a prosecutor or a court.

\textsuperscript{70} The same is true for the ICCPR. It should also be noted that the ECHR does not contain many provisions that even indirectly concern extradition and other cross-border issues. An example is Article 5(1) of the ECHR, which provides that it is allowed to arrest a person if the action taken against him or her is aiming at deportation or extradition. An explanation for this is that the ECHR was not drafted in order to create a common judicial area for the Member States of the Council of Europe, but rather to set minimum standards applicable to each of the national legal systems (Iain Cameron, An Introduction to the European Convention on Human Rights, 3d edition, Uppsala 1998, p. 26). This is, mutatis mutandis, of course also true for the International Covenant on Civil and Political Rights (ICCPR).

\textsuperscript{71} The content of the chapters with the heading “National framework” is to a large extent based on the replies to the above-mentioned questionnaire that was sent to the then 15 EU Member States (annex 4 to this Paper). For further details on the replies see annex 2.

\textsuperscript{72} Nota bene: This is not the questionnaire that is in annex 4 to this present Paper, although many questions are very similar.

\textsuperscript{73} Analysis of the replies to the law and practice of Member States regarding remand in custody, Report by Jeremy McBride, Strasbourg, 13 May 2003, , pc-dp\docs 2003\pc-dp (2003) 9 – e., p. 4 – 6.

\textsuperscript{74} In Italy the threshold for detention is provided by Article 280 of the Code of Criminal Procedure: Imprisonment for more than 4 years in the maximum of the sanction. In Sweden, Chapter 24 section 1 of the Code of procedure provides that pre-trial detention in principle is possible only if the offence is punishable by imprisonment for a term of one year or more. There are, however, exceptions to this rule. In Germany, the general rule is to be found in Article 113 of the Code of Criminal Procedure. Pre-trial detention is, in principle, possible also for less serious offences, although there are certain limitations.
the realm and there is a reasonable risk that he or she will avoid legal proceedings or a penalty by fleeing the country.

The government of the United Kingdom has replied that, in England & Wales the penalty for the offence is not a factor that is taken into account when making remand decisions. The decision to remand or bail a defendant is at the discretion of the court under the provisions set out in the Bail Act 1976. In Northern Ireland the situation is similar. Bail can be granted for any offence so there is no pre-trial detention threshold as such, though the severity of the offence may bear on whether a person is likely to turn up for trial.

In some EU Member States, i.a. Austria, Greece, Italy and the United Kingdom (Scotland), there are maximum time limits for pre-trial detention.

In most EU Member States, however, specific time limits regarding pre-trial detention do not exist. The period of pre-trial detention must, however, not be disproportionate.

Under national law, including case-law, special grounds for detention are also required, although the three classical grounds are not always explicitly mentioned. The government of the United Kingdom has replied that, in England & Wales, the Bail Act provides a presumption to bail (“release from custody”) for all those accused or convicted of an offence, but the defendant “need not be granted bail”, where he or she presents a bail risk.

A presumption to remand persons who are suspected of having committed serious offences in custody exists in several (i.a. Austria, Sweden, Italy and the United Kingdom [England & Wales]) - but not all – EU Member States.

3.2.3. Comments

A conclusion that can be drawn from the above considerations is thus that the international legal instruments do not contain any rules on a maximum length of pre-trial detention in the strict sense of the term, which can be translated into a fixed number of days, weeks, months or years. Some EU Member States provide for specific time limits as regards the length of pre-trial detention.

It is further important to note that the international legal instruments do not contain a common threshold for pre-trial detention. The threshold for detention varies between the different EU Member States. In some EU Member States, a suspect, who has no fixed abode in the territory, may be detained irrespective of the penalty for the offence, when there is a risk that he or she will abscond. In most cases such persons are foreigners, including nationals of other EU Member States. This means that the “normal” (higher) thresholds apply to residents, while no threshold requirements exist with regard to non-residents. This could probably be considered as a source of a difference in treatment and an impediment to the free movement within the European Union. Moreover, it is probably contrary to the principle of proportionality.

In some Member States there is a presumption to remand persons who are suspected of having committed serious offences in custody, although the special grounds for detention cannot be fully established. It is highly doubtful whether this is acceptable, considering the principle of liberty and the presumption of innocence.
3.3. Alternatives to pre-trial detention

3.3.1. Introduction

The aim of alternative measures\(^{75}\) to pre-trial detention is to manage the different risks that can arise pending trial – such as the danger of the person’s absconding, the danger of his or her interfering with the course of justice and the danger of his or her committing a serious offence – by the use of more lenient measures than pre-trial detention. Custody pending trial should be an exceptional measure.

3.3.2. Council of Europe

Article 5(3) of the ECHR establishes that release pending trial may be conditioned by guarantees to appear for trial.

3.3.2.1. CoE Recommendation No. R(80) 11 on Custody Pending Trial

*Recommendation No. R(80) 11* of the Committee of Ministers of the Council of Europe concerning *Custody Pending Trial* says that it is desirable for humanitarian and social reasons to reduce the application of custody pending trial to the minimum compatible with the interests of justice and that certain standards should be established, at European level, to be applied to persons awaiting trial. With the view to implement those aims, the Committee of Ministers has adopted a number of principles. In this context, the following principles should be noted:

- Custody pending trial shall be regarded as an exceptional measure and shall never be compulsory nor be used for punitive reasons (principle 1).

- Whenever custody pending trial can be ordered, the judicial authority shall consider whether the use of custody can be avoided by imposing *alternative measures* such as those mentioned in principle 15 (principle 9), *i.e.*:
  
  - a promise of the person concerned to appear before the judicial authority as and when required and not to interfere with the course of justice (principle 15, measure 1),
  
  - a requirement to reside at a specified address (*e.g.* the home, a bail hostel, a specialised institution for young offenders, etc.) under conditions laid down by the judicial authority (principle 15, measure 2),
  
  - a restriction on leaving or entering a specified place or district without authorisation (principle 15, measure 3),
  
  - an order to report periodically to certain authorities (*e.g.* court, police, etc., principle 15, measure 4),

\(^{75}\) It should be mentioned that there are non-custodial supervision measures that, strictly speaking, are not substitutes for pre-trial detention. Pursuant to chapter 25, section 1, of the Swedish Code of Procedure, for example, the threshold for a travel prohibition order or an order to report to the police is imprisonment, without specification. The general threshold for pre-trial detention is, however, higher: one year (chapter 24, section 1, of the Code of Procedure).
– surrender of passport or other identification papers (principle 15, measure 5),

– provision of bail or other forms of security by the person concerned, having regard to his means (principle 15, measure 6),

– provision of surety (principle 15, measure 7), supervision and assistance by an agency nominated by the judicial authority (principle 15, measure 8).

As noted above (chapter 1.1.2., second paragraph), there is ongoing work in the Council of Europe to update Recommendation No R(80) 11, in particular as regards contemporary legal and judicial justification for the use of remand in custody and the use of *alternatives to custody*.

3.3.2.2. Recommendation No. R(99) concerning Prison Overcrowding etc.

*Recommendation No. R(99) 22 of the Committee of Ministers concerning Prison Overcrowding and Prison Inflation*, which *i.a.* refers to the above-mentioned Recommendation No. R(80) 11 and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, considers that prison overcrowding and prison population growth represent a major challenge to prison administrations and the criminal justice system as a whole, both in terms of human rights and of the efficient management of penal institutions. As regards measures relating to the pre-trial stage, the following recommendations should be noted:

– The application of pre-trial detention and its length should be reduced to the minimum compatible with the interests of justice. To this effect, member states should ensure that their law and practice are in conformity with the relevant provisions of the European Convention on Human Rights and the case-law of its control organs (measure 11)

– The widest possible use should be made of alternatives to pre-trial detention, such as the requirement of the suspected offender to reside at a specified address, a restriction on leaving or entering a specified place without authorisation, the provision of bail or supervision and assistance by an agency specified by the judicial authority. In this connection attention should be paid to the possibilities for supervising a requirement to remain in a specified place through electronic surveillance devices (measure 12).

3.3.3. *United Nations*

Article 9(3), second sentence, of the *ICCPR* explicitly provides that “[i]t shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment”.

Pursuant to rule 6 of the *United Nations Standard Minimum Rules of 14 December 1990 for Non-custodial Measures* (the so-called *Tokyo Rules*) pre-trial detention shall be used as a
means of last resort in criminal proceedings (6.1) and alternatives to pre-trial detention shall be employed at as early a stage as possible (6.2).\textsuperscript{76}

3.3.4. **National framework\textsuperscript{77}**

3.3.4.1. Alternative measures

A conclusion to be drawn from the replies to questions 12 – 16 (concerning alternatives to pre-trial detention) of the above-mentioned questionnaire (annex 4), is that most Member States have some kind of *travel prohibition* (instruction not to leave a certain area) and an *obligation to report* (instruction to report regularly to a court, a prosecutor, the police or other authority) as alternatives to pre-trial detention. They can usually be combined with one another or with other measures. A number of Member States also provide that the suspect may be released or the pre-trial detention imposed on him may be revoked against him, if he or she provides a *surety*.

In the common law countries the decision to remand a suspect in custody or to release him or her (to grant bail) is at the discretion of the court (not linked to any threshold). In granting bail the court also has discretion to impose *any* condition, which it considers appropriate to ensure that the suspect attends the trial.

3.3.4.2. Applicable penalties

Question 14 of the questionnaire referred to penalties in the event of non-compliance of a bail condition. As regards the replies to this question, all Member States provide that the question of pre-trial detention shall be considered again and that the person may be remanded in custody.

Only in two jurisdictions, breach of a bail condition is a separate offence and is liable to a separate fine or imprisonment: Ireland and Scotland.

3.4. **Summary of the present legal framework**

The above analysis has shown that the EU Member States apply the same fundamental principles regarding pre-trial detention. This is, indeed, not surprising as they have all ratified the ECHR and the ICCPR.

Areas that, in principle, *are* covered by those binding international legal instruments, relevant recommendations and case-law are 1) the right to liberty and the presumption of innocence, 2) the legal grounds for detention, 3) the competent authorities that are entitled to decide on the detention, 4) the right of the detained person to challenge the legality of the detention before a court in the strict sense and 5) *approximate* time limits for the different steps at the pre-trial stage and 6) that release from pre-trial detention may be conditioned by guarantees to appear for trial (*i.e.* alternatives to pre-trial detention). The presumption that remand in

\textsuperscript{76} The Tokyo Rules cover both the pre- and the post-trial stage.  
\textsuperscript{77} As noted above, measure 9 of the mutual recognition programme requires that the supervision measures potentially concerned and the penalties in the event of non-compliance with them shall be catalogued. For further details on the replies, see annex 2.
custody should be ordered for serious offences is only covered by a recommendation of the Council of Europe.\textsuperscript{78}

Areas that are \textit{not} covered by those international instruments are, \textit{i.a.}, 1) the threshold for pre-trial detention, 2) who may initially apprehend or arrest a suspect, 3) a \textit{fixed} maximum length for pre-trial detention (and alternatives to such detention) and 4) mutual recognition of alternative measures to pre-trial detention.

Areas where there are significant divergences between the Member States, are, \textit{i.a.}, 1) the threshold for detention, 2) the presumption that remand in custody should be ordered for serious offences and 3) (a fixed maximum) length of pre-trial detention (including alternatives to such detention).

\begin{flushright}
\textsuperscript{78} Principle 4 of Recommendation R(80) 11 concerning Custody Pending Trial.
\end{flushright}
4. A NEW INSTRUMENT ON MUTUAL RECOGNITION OF NON-CUSTODIAL PRE-TRIAL SUPERVISION MEASURES

4.1. The mutual recognition programme

As noted above (chapter 2.2.1.3.), the drawing up of a new instrument on mutual recognition of non-custodial pre-trial supervision measures must be considered in the light of the mutual recognition programme seen as a whole. The measures of this programme cannot be separated from one another, but are designed to interact with one another.

A decision by a court to impose an order to report regularly to the police instead of remanding the suspect in custody, presupposes, for example, that the court is able to make a reliable risk assessment. In particular, when the suspect is a foreigner or has his or her residence in another Member State, the reliability of the risk assessment is dependent on whether the court has access to information of any foreign criminal judgments. This situation is dealt with by measure 2 of the mutual recognition programme. It foresees 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 reoffended. The Commission will issue a proposal on this issue before the end of 2004.

In some situations (e.g. when a person is suspected of having committed an offence in the territory of an Member State where he or she is not a resident), it may also be desirable to transfer the proceedings to the suspect’s Member State of normal residence. Measure 11 of the mutual recognition programme foresees the drafting of an instrument enabling criminal proceedings to be transferred to other Member States, and encouraging appropriate coordination between the Member States.

The Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States79, (the “FD-EAW”) is the first instrument that was adopted under the mutual recognition programme (measures 8, 13 and 15). On the one hand, it could be argued that the FD-EAW is sufficient for the purposes of bringing back an accused person to stand trial80 in the EU Member State where the alleged was committed. A new instrument on mutual recognition of non-custodial pre-trial supervision measures would therefore add little or no value to the legal framework already put in place. On the other hand, it should be remembered that the FD-EAW contains several limitations (i.a. relating to the threshold, the grounds for refusal and the time limits)81 and that it is not designed specifically to ensure the smooth functioning of a new mutual recognition mechanism regarding non-custodial supervision measures (covered by measures 9 and 10 of the mutual recognition programme). In particular, the FD-EAW does not contain any provisions on non-custodial pre-trial supervision measures.

The mutual recognition programme mentions that certain aspects of mutual recognition, in particular those concerning pre-trial orders, have still not been addressed in an international

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80 Article 1(1) of the FD-EAW uses the wording “for the purposes of conducting a criminal prosecution”, which would cover also the trial stage.
81 The limitations of the FD-EAW in relation to mutual recognition of non-custodial pre-trial supervision measures will be analysed in more detail below.
context. It seems therefore necessary to explore (other) possibilities of taking action as regards mutual recognition of alternatives to pre-trial detention:

Pursuant to measure 10, the adoption of an instrument enabling control, supervision or preventive measures ordered by a judicial authority pending the trial court’s decision to be recognised and immediately enforced shall be considered.

In particular, the new instrument should;

- (1) apply to any person against whom criminal proceedings have been brought in one Member State and who may have gone to another Member State;
- (2) specify how such measures would be supervised; and
- (3) specify the penalties applicable in the event of non compliance.

To define further the type of instrument, which would best fulfil that mandate, it is necessary to make an analysis of possible situations, where the new instrument could be applied and constitute an added value.

4.2. Identification and description of the problem

4.2.1. Introduction

According to the first indent mentioned immediately above the new instrument should

- apply to any person against whom criminal proceedings have been brought in one Member State and
- who may have gone to another Member State.

Theoretically, a number of situations can be envisaged, where the suspected person has left the Member State, where the alleged offence was committed. The wording “may have gone” implies, however, that the new instrument could cover situations, where the suspected person still is present in the State, where the alleged offence was committed and the judicial authority is considering whether it should allow the suspect to return to his or her Member State of residence or, possibly to another Member State. Different situations that are covered by measure 10 will be described below.

4.2.2. Suspect is still present in the Member State where the alleged offence was committed

Situations where the suspected person is still present in the Member State where the alleged offence was committed could be the following:

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83 This will be considered in chapters 4.4. and 4.5. below.
84 This will be considered in chapter 4.6. below.
85 In this and the following chapters, the word suspect is used for all persons suspected of having committed a criminal offence until finally judged, irrespective of the terminology in national legislation (accused etc.).
4.2.2.1. Serious offences (covered by the FD-EAW)

A person is suspected of having committed a serious offence (covered by the FD-EAW, i.e. punishability of one year) in the territory of a Member State where he or she is not ordinarily a resident. After the termination of the preliminary investigation (and evidence gathered), the suspect is either (still) detained in custody or is subject to another coercive measure, such as a travel prohibition order combined with an obligation to report to the local police authority. The ground for the coercive measures is that there are reasons to fear that the person will abscond. The competent judicial authority considers, in other words, that the presence of the suspected person cannot be ensured at the upcoming trial, if such measures are not ordered.

A concrete example could be a tourist, who during his or her visit to another Member State is suspected of assault and causing grievously bodily harm to a resident of that other Member State.

If the suspected person is in pre-trial detention, this will cause him or her much suffering, in particular if the person is not familiar with the habits or language of the country. Most important: the person could lose his or her job. The suspected person will also be cut off from contacts with family and friends, who could have come to visit the person if he or she was detained in the home country. It will also entail costs for State of detention. In the event that the suspect only is subject to a travel prohibition order and must report to the local police authority, this will still have a negative influence. Apart from the inconvenience caused by the obligation to stay in a foreign country, the risk of losing his or her job and the restrictions on the liberty of the person, this also entails extra costs for accommodation and food. Typically a foreign suspect will therefore be in a more vulnerable position than a person who normally is resident in the country.

4.2.2.2. Less serious offences (not covered by the FD-EAW)

Pre-trial detention is also possible for less serious offences (not covered by the FD-EAW, i.e. below the threshold of one year):

As noted above (chapter 3.2.2.), some Member States detain suspected persons in custody, if they do not reside in the territory of the Member State and there is a reasonable risk that the person will avoid legal proceedings or a penalty by fleeing the country. In some Member States this possibility exists also in relation to acts punishable only by a fine (even if the threshold for pre-trial detention generally is much higher). The judicial authorities of these Member States therefore sometimes consider that they must remand such a person in custody. This means that foreigners (but not residents) can be held in pre-trial detention for minor offences.

4.2.2.3. Request for transfer of non-custodial supervision measures

It should further be considered whether a suspected person, who is already subject to a non-custodial pre-trial supervision measure in one Member State, and, who, permanently or temporarily, wants to go to another Member State should be allowed to make a request for transfer of the non-custodial pre-trial supervision measure to the latter Member State.

86 If the suspect does not confess the offence and the matter cannot be resolved by issuing an order of summary punishment, the judicial authority may be inclined not release him or her if it wants to ensure the trial.
4.2.3.  Suspect has left the Member State where the alleged offence was committed

Situations where the suspected person has left the Member State where the alleged offence was committed could be the following:

4.2.3.1. Suspect in breach of an obligation under a non-custodial supervision measure

A suspect person, who is already subject to a non-custodial supervision measure, such as a travel prohibition order, has fled the Member State which ordered this measure and has gone to another Member State. The suspect is, in other words, in breach of an obligation under a supervision measure. As different solutions would be possible depending on whether a European arrest warrant could be issued, a distinction should also be made between serious and less serious offences. This problem is linked to the question on what consequences should follow in the event of a non-compliance with an obligation under a non-custodial supervision measure (chapter 3.6.).

4.2.3.2. Late application for non-custodial supervision measures

Finally, one could, at least theoretically, envisage the situation where a person has gone to another Member State without being subject to any coercive measures. During the preliminary investigation or before the hearing takes place, the competent judicial authority discovers elements that indicate the need to order coercive measures in order to eliminate one or several of the “classical dangers” that justify pre-trial detention. A question to be asked is whether this authority should be allowed to make an application to the Member State where the suspected person now resides to apply less coercive measures than detention for the purposes of ensuring the presence of the suspect at the upcoming trial.

It could of course be argued that the above reasoning would push the principle of free movement of persons too far. On the other hand, nothing in the wording of measure 10 of the mutual recognition programme seems to prevent such an alternative. Besides, the application of an alternative measure to pre-trial detention in the State of residence of the suspected person would constitute a more lenient coercive measure than issuing a European arrest warrant.87

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**Question 1:**

Should a mechanism for mutual recognition of non-custodial supervision measures cover

- the situation where a suspected person, who already is subject to such measures and who, permanently or temporarily, wants to go to another Member State, makes a request for transfer of these measures to that Member State (as described in chapter 4.2.2.3. above)?

- if yes, under which conditions?

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87 Cf. chapter 4.4.2.2., (Nordic Extradition Acts). This possibility would not, strictly speaking, substitute pre-trial detention in the trial-State with a non-custodial supervision measure. It would, however, be an alternative to issuing a European arrest warrant. Cf. also Article 12, last sentence, of the FD-EAW.
- the situation where the suspect has already gone to another Member State (as described in chapters 4.2.3.1., “suspect in breach of an obligation under a non-custodial pre-trial supervision measure” and 4.2.3.2., “late application for non-custodial supervision measures”, above)?

- if yes, under which conditions?

4.3. General considerations

4.3.1. Introduction

This Commission Staff Working Paper will focus on the situations described in chapter 4.2.2. (Suspect is still present in the Member State where the alleged offence was committed) above.

The drawing up of an instrument on pre-trial non-custodial supervision measures should be considered in the light of the principles that are applicable for pre-trial detention in general, as described in chapter 3 (“Basic principles”) above. This implies, in particular, that no one shall be deprived of his or her liberty unless this is absolutely necessary, and, in general, that coercive measures must be proportionate in relation to the aim pursued.

It is also important to take into account changes in the situation of the suspect during the whole period where he or she is subject to coercive measures. The basic principles described in chapter 3 above require that the existence of the grounds for such coercive measures must be reviewed regularly.

4.3.2. Aim

The general aim of the new instrument would be to reinforce the right to liberty and the presumption of innocence in the European Union seen as a whole, while, at the same time, ensuring that the trial-State (i.e. the State that issues an order to transfer the non-custodial pre-trial supervision measure - the issuing Member State - to the State that executes this order - the executing Member State) receives some kind of guarantee that the suspect does not escape from justice.

4.3.2.1. Monitoring in the executing Member State

Measure 10 of the mutual recognition programme says that the new instrument should cover “control, supervision or preventive measures”. In line with the title of that part of the programme, this means that the new instrument only should cover non-custodial pre-trial supervision measures that are aiming at eliminating the above-mentioned classical special grounds for detention (i.e. flight, suppression of evidence and re-offending) from the moment when these measures are decided by the judicial authority of the issuing EU Member State until the trial takes place. The monitoring will thus take place in the executing Member State. The scope of the new instrument, the choice of appropriate supervision measures to be taken over, how they shall be applied by the judicial authority in the executing EU Member State

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88 Depending on the scope of the future instrument (e.g. it would not be correct to speak of a “transfer” if the new instrument would cover the situation described in chapter 4.2.3.2. (Late application for non-custodial supervision measures).

89 See chapter 1.2. above.
and whether the latter State should have any grounds to refuse an order to monitor the suspected person will be discussed below.

4.3.2.2. Return to the issuing Member State

The principle that only non-custodial supervision measures should be used during the monitoring phase, does not mean that the new instrument should not contain a possibility, as a last resort, to return an uncooperative suspected person to the trial State, if necessary by force. It is rather the mere existence of such a possibility than its actual use that would ensure the smooth functioning of any new instrument. It should be underlined that in the absence of possible recourse to coercive measures, there would be a risk (in the short and in the long run) that the relevant category of persons will not benefit from alternative measures at all. The consequences in the event of non-compliance with an obligation under a non-custodial pre-trial supervision measure will be discussed in chapter 4.6. below.

4.3.2.3. Added value

The introduction of an instrument on mutual recognition and enforcement of non-custodial supervision measures would constitute an added value;

firstly, as it would enable a suspect to go back to his or her country of normal residence, eliminating the negative consequences of the present legal framework (as described above).

secondly, as it would allow the trial-State to ensure the monitoring of the suspect and that he or she does not escape the course of justice.

thirdly, as it would be more appropriate than the European arrest warrant to ensure the return of the suspected person to the issuing authority, thereby implementing the principle of proportionality. (i.e. during the monitoring of the compliance with such a measure in the executing Member State).

4.3.3. The three classical dangers

4.3.3.1. Dangers of suppression of evidence and of re-offending

A new instrument on mutual recognition of non-custodial supervision measures will probably mostly be used, where there is a danger of the suspect’s absconding.

It could also be used to minimise the other two dangers, i.e. the risk of suppression of evidence and the risk of repetition of offences. In the former case, the suspect could be subject to an obligation not to contact a witness or a victim. In the latter case, the suspect could be ordered to undergo a medical treatment (for drug addicts etc.).

The danger of suppression of evidence obviously relates to the offence for which there is a reasonable suspicion. The aim of the corresponding non-custodial supervision measure would be to eliminate that the suspect interferes with the course of justice and endangers the outcome of the upcoming trial relating to that specific offence.

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90 See chapter 2.2. ("Legitimate grounds for detention, threshold and duration") above, in particular subchapter 2.2.1., paragraphs 11 and 12, with references to the relevant case law of the ECtHR.
As regards the danger of re-offending, it could be argued that the question of what is meant by “new” offences also should be interpreted in the light of the criminal law of the issuing Member State. In a purely national context, it is clear that the “new” offences must be offences as defined under the criminal law of the issuing authority (i.e. the judicial authority that decides whether alternative measures should be applied, nullum crimen sine lege). In a European Union context, the situation is more complex. As described above, the monitoring of the suspected person will take place in the executing Member State. The elimination of the danger of committing new offences will therefore probably be more in the interest of the executing Member State. The problem will be analysed in the chapter dealing with non-compliance with an obligation aiming at eliminating the danger of re-offending (4.6.2.4.).

4.3.3.2. Danger of flight (absconding)

What does the danger of the suspect’s absconding mean?

Pursuant to Article 5(1) c of the ECHR it is, i.a., permitted to deprive a person of his or her liberty when there is

- a reasonable suspicion that he or she has committed an offence and
- when it is reasonably considered necessary to prevent his or her fleeing after having done so.

The word “fleeing”, which is a synonym of “absconding” cannot be interpreted in the abstract. The risk of flight must always be seen in relation to something else.

It should be noted that the last sentence of Article 5(3) provides that “[r]elease may be conditioned by guarantees to appear for trial [emphasis added]”. This sentence should be read in conjunction with the first sentence of the same Article and the first sentence of Article 6(1), which give the accused the right to trial (hearing) within a reasonable time (or to release pending trial). It should be noted that the word “right” indicates that the accused may have the choice whether to attend the trial or not.91

The risk that must be eliminated under Article 5(1) c is thus that the suspect avoids the “determination of […] any criminal charge against him [or her]” (Article 6(1), first sentence), i.e. in a trial, where the suspect is present or absent. It is difficult to see that the danger of the suspect’s absconding could be interpreted otherwise.92

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91 Several national legal systems allow that an accused person may be tried in his or her absence under certain conditions. See, i.a., Article 420 quater (“contumacia”) and Articles 165 – 296 (“latitanza”) of the Italian Code of Criminal Procedure, Articles 232 and 233 of the German Code of Criminal Procedure and chapter 46, section 15, of the Swedish Code of Procedure.

92 This interpretation seems also to be in accordance with the case-law of the ECtHR. See, i.a., the two judgments of 26 June 1968 in the case of Neumeister v. Austria (paragraph 9, in particular the last sentence of the second sub-paragraph, and paragraph 12) and in the case of Wemhoff v. Germany (paragraph 15). It could also be noted that Article 112 of the German Code of Criminal Procedure defines the danger of absconding (“Fluchtgefahr”) as the danger that the accused will avoid the criminal proceedings. Chapter 24, section 1, point 1, of the Swedish Code of Procedure uses the wording “flee or otherwise evade legal proceedings”. See further, i.a., paragraph 175, point 2, of the Austrian Code of Criminal Procedure.
In accordance with the principle of proportionality, non-custodial supervision measures should, whenever possible, be used to ensure the presence of the suspected person at the trial: The ECtHR has “emphasise[d] that the concluding words of Article 5(3) of the Convention show that, when the only remaining reasons for continued detention is the fear that the accused will abscond and thereby subsequently avoid appearing for trial, his release pending trial must be ordered if it is possible to obtain from him guarantees that will ensure such appearance”.

Therefore (as has been noted above), the new instrument would probably need a mechanism that ensures the appearance of the suspected person at the trial (unless he or she can be judged in absentia) in order to pre-empt any potential problems in case that the suspect decides not to come to the trial at a later stage (the “trial phase”, i.e. when the date of the trial has been decided). This problem will be considered in more detail below (chapter 4.6.3.).

4.3.4. Scope

Measure 10 of the mutual recognition programme seems to imply that the instrument should not be limited to serious (or "extraditable") offences. In fact, nothing is said about what offences should be covered, whether the envisaged instrument should be linked to a certain level of penalty for the offence in question, or about a threshold for ordering of coercive measures.

As there is no such thing as a common threshold for pre-trial detention in the Member States of the European Union, it could be argued that the new instrument also should cover less serious offences, i.e. that it should not be linked to the threshold for issuing a European arrest warrant (which is one year for the pre-trial situation). As noted in chapter 3.2.2., in the common law countries, pre-trial detention is not linked to a threshold.

The question of whether to include less serious offences in a new instrument on mutual recognition of non-custodial pre-trial supervision measures was discussed in the experts’ meeting on 12 May 2003. Several participants pointed out that foreigners often are arrested for minor offences: “Indeed, such an instrument should be available for less serious offences, where currently non-residents are sometimes kept in pre-trial detention, while residents benefit from alternative measures.”

It could be argued that the provisions on pre-trial detention in the Member States are a source of difference in treatment between residents and non-residents. As noted above (chapter 2.2.1.), principle 13 of Recommendation No. R(80) 11 of the Committee of Ministers of the Council of Europe states that custody pending trial shall not be continued if the period spent in custody awaiting trial would be disproportionate to the sentence likely to be served in the event of conviction. There is therefore reason to ask whether prolonged pre-trial detention of

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93 Judgment of 26 June 1968 in the case of Wemhoff v. Germany (paragraph 15).

94 The ECHR neither covers the question of the threshold for pre-trial detention nor for non-custodial supervision measures that are not substitutes for pre-trial detention. Pursuant to chapter 25, section 1, of the Swedish Code of Procedure, for example, the threshold for a travel prohibition order or an order to report to the police is imprisonment, without specification. The general threshold for pre-trial detention is, however, higher: One year (chapter 24, section 1, of the Code of Procedure).

95 Pursuant to Article 2(1) of the FD-EAW, a European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months (in the pre-trial situation).
non-residents for, at least, less serious offences constitutes a breach of the proportionality principle.

The new instrument should therefore not only cover serious offences, but should, in principle, be extended to all kinds of offences irrespective of penalty.

Differences between the Member States regarding the threshold for detention should not be an obstacle when a more lenient measure than pre-trial detention is considered. In other words it would be an option whenever there is a possibility under the criminal procedural law of the issuing Member State\(^96\) to order that a suspect be remanded in custody.

4.3.5. Promoting equality of treatment

One of the most important objectives of the European Union is to develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured. At present, however, residents of the Union sometimes are kept in pre-trial detention in a foreign Member State, although they could have been subject to less severe coercive measures in their State of normal residence, if the right to liberty and presumption of innocence would have existed in relation to the European Union as a whole.\(^97\)

The Court of Justice of the European Communities has consistently held that the EC rules regarding equality of treatment between nationals and non-nationals forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria, lead to the same result.\(^98\) The CFREU confirms this by providing, in Article 21(1), that “within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union […] any discrimination on grounds of nationality shall be prohibited”. The Court of Justice has also held that a national rule which draws a distinction on the basis of residence, in that non-residents are denied certain benefits which are, conversely, granted to persons residing within the national territory, is liable to operate mainly to the detriment of nationals of other Member States, since non-residents are in the majority of cases foreigners, constitutes indirect discrimination by reason of nationality.\(^99\) A difference in treatment between resident and non-resident offenders may, however be allowed when this is justified by objective circumstances.\(^100\) The penalties chosen by a Member State must, however, not go beyond what is necessary in order to achieve the aim pursued.\(^101\)

\(^{96}\) i.e. the Member State where the alleged offence has been committed (trial State).

\(^{97}\) Pursuant to Article 5(1) ECHR the deprivation of the liberty of a person must follow in accordance with a procedure prescribed by law, i.e. the national law of each of the Contracting Parties. It should, however, be noted that the ECHR was not drafted to create a common judicial area for the member States of the Council of Europe, but rather to set minimum standards to each of the national jurisdictions. The ECHR contains very few provisions on cross-border issues.


\(^{100}\) Case C-398/92, Mund & Fester v Hatrex International Transport [1994] ECR I-467, paragraphs 16 and 17.

\(^{101}\) See the judgment of the Court of Justice of the 11 February 2003 in Case C-29/95 (Eckehard Pastoors and Trans-Cap GmbH v. Belgian State), where the Court discussed the legality of a requirement to pay a sum of money upon discovery that certain road transport offences had been committed (in particular paragraph 26 and the summary).
In order to ensure the full implementation of the right to liberty and the presumption of innocence in the area of freedom, security and justice, the Member States must cooperate to avoid that suspects (i.e. including non-resident suspects) are remanded into custody when it is not absolutely necessary. In other words the right to liberty and the presumption of innocence should be applicable to all Member States jointly. One could therefore talk of a principle of loyal cooperation between Member States to implement the right to liberty and the presumption of innocence within the European Union as a whole.102

Question 2:

Considering the negative consequences of the present legal framework as regards the treatment of non-resident suspects in the area of alternatives to pre-trial detention:

(a) Do you agree with the approach of the Commission with respect to mutual recognition of non-custodial pre-trial supervision measure as described above (i.e. the possibility of monitoring the suspected person in his or her country of normal residence and the necessity to introduce a mechanism that ensures the presence of the accused person at the trial unless this person can be judged in his or her absence) in order to ensure the full EU-wide implementation of the right to liberty and the presumption of innocence?

(b) If not, are there alternative solutions?

(c) If yes, please describe them.

(d) Should a mechanism for mutual recognition of non-custodial supervision measures also cover less serious offences (i.e. below the threshold of Article 2(1) of the FD-EAW)?

4.4. Choice of appropriate non-custodial pre-trial supervision measures

4.4.1. Introduction

As required by measure 9 of the mutual recognition programme, an inventory of the potentially concerned obligations or supervision measures has been established in annex 2. Pursuant to measure 10 of this programme, the new instrument should specify how such measures should be supervised.

Several models to implement measure 10 are possible and will be discussed below.

4.4.2. Possible models under the present legal framework

In order to find out whether there are any provisions on recognition of foreign decisions on alternatives to pre-trial detention that are applied between Member States, which could be

102 See also Article 10 TEC. Pursuant to Article 5(2) of the draft Treaty establishing a Constitution for Europe, the Union and the Member States shall, following the principle of loyal cooperation, in full mutual respect assist each other in carrying out tasks which flow from the Constitution. Article 7 (fundamental rights) provides that the Union shall recognise the rights, freedoms and principles set out in the CFREU, which constitutes Part II of the Constitution, i.a. the right to liberty (Article II-6) and the presumption of innocence Article II-48. Article II-53 (Level of protection) provides that nothing in the CFREU shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms.
used as a model for the new instrument, the European Commission asked the Member States to reply to questions 15 and 16 of the questionnaire.\textsuperscript{103} The answers are in the negative as regards foreign decisions on alternatives to pre-trial detention.

The question is whether there are any solutions under the present legal framework in related areas that should be considered in this context.

4.4.2.1. European Convention on the Supervision of Conditionally Sentenced Offenders etc.

A number of conventions on recognition of foreign decisions in penal matters have been adopted under the framework of the Council of Europe. Although these conventions mostly cover the post-trial situation, it should be considered whether they could contain elements that might be useful for the adoption of an instrument on mutual recognition on non-custodial pre-trial supervision measures in accordance with measure 10 of the mutual recognition programme.\textsuperscript{104}

An instrument that could contain such elements is the European Convention of 30 November 1964 on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (ETS No 51).\textsuperscript{105}

This convention contains rules on supervision of conditionally released persons. It is a classical convention based on the principle of double criminality. Article 4 provides that the offence on which any request is based shall be one punishable under the legislation of both the requesting and the requested State. There are a number of mandatory or optional grounds to refuse a request. Under Article 6, supervision, enforcement or complete application of the sentence shall be carried out, at the request of the State in which the sentence was pronounced, by the State in whose territory the offender establishes his ordinary residence. Pursuant to Article 10, the requesting State shall inform the requested State of the conditions imposed on the offender and of any supervisory measures with which he or she must comply during his period of probation. Article 11 provides that in complying with a request for supervision, the requested State shall, if necessary, adapt the prescribed supervisory measures.

\textsuperscript{103} Question 15: Does your country recognise or transpose decisions by legal authorities of foreign countries regarding supervision or other alternatives to pre-trial detention?, and question 16: If this is the case, please describe these rules.

\textsuperscript{104} Legal instruments of the Council of Europe that should be mentioned in this context are the European Convention of 28 May 1970 on the International Validity of Criminal Judgments (ETS No. 70), the European Convention of 21 March 1983 on the Transfer of Sentenced Persons (ETS No. 112) and the Additional Protocol of 18 December 1997 to the latter Convention (ETS No. 167). See also the Convention of 13 November 1991 between the member states of the European Communities on the enforcement of foreign criminal sentences (which was adopted to facilitate the application of the CoE Convention on the International Validity of Criminal Judgments) and the Agreement of 25 May 1987 on the application among the EC Member States of the CoE Convention on the transfer of sentenced persons. An analysis of these conventions can be found in the Commission Green Paper on the approximation, recognition and enforcement of criminal sanctions in the European Union, COM(2004) 334 final.

in accordance with its own laws. 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.

Although there are some elements of this convention that could be useful for an instrument on mutual recognition and enforcement of non-custodial supervision measures, the aim is different. The supervisory measures regarding conditionally sentenced or released persons aim at securing and reinserting a convicted person into society. The supervisory measures regarding the alternatives to pre-trial detention in principle only aim to eliminate the three classical dangers that allow deprivation of liberty. An instrument on non-custodial supervision measures must be drawn up against the background of the presumption of innocence.

4.4.2.2. Nordic Extradition Acts

The Nordic Member States replied (to questions 15 and 16 of the above-mentioned questionnaire) that the Nordic Extradition Acts could contain elements that would be useful in this context. The Nordic Extradition Acts, which, i.a. cover pre-trial detention, are applicable in cases where a request has been made for an inter-Nordic extradition. Denmark, Finland and Sweden apply uniform legislation in force between them relating to inter-Nordic extradition106 (the Swedish Act has been translated to English: Act [1959:254] concerning extradition to Denmark, Finland, Iceland and Norway for criminal offences). Section 12 of the Swedish Act provides that the prosecutor, in order to ensure extradition, may – if the offence is punishable by Swedish law – use and in the court demand the use of coercive measures in accordance with what is generally provided in criminal proceedings. These measures are pre-trial detention, travel prohibition and order to report to the police. Pursuant to Section 17 of the Swedish Act, a person who is suspected, accused (or convicted) of a crime, which, under the Act, can give rise to an extradition may also, at the request of a police or prosecution authority in the foreign state or by reason of arrest issued there, pending extradition, be immediately arrested or issued with a travel prohibition or reporting order by a prosecutor in accordance with the provisions generally applicable in criminal proceedings, if the offence or an offence of a corresponding nature is punishable under Swedish law by imprisonment.

Less coercive measures than pre-trial detention, i.e. travel prohibition and order to report to the police, are thus available under the Nordic extradition acts in order to ensure extradition.107

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106 In Sweden: Lag (1959:254) om utlämning för brott till Danmark, Finland, Island och Norge (This Act has been translated into English by the Swedish Ministry of Foreign Affairs - Act (1959:254) concerning extradition to Denmark, Finland, Iceland and Norway for criminal offences). In Denmark: Lov nr. 27 af 03.02.1960 om udlevering af lovovertrædere til Finland, Island, Norge og Sverige. In Finland: Lagen om utlämning för brott Finland och de övriga nordiska länderna emellan (270/1960). St 402 (Swedish) and Laki rikoksen johdosta tapahtuvasta luovuttamisesta Suomen ja muiden pohjoismaiden välillä 3.6.1960/270 (Finnish).

107 It should be noted that Article 12 of the FD-EAW provides that a person arrested on the basis of an European arrest warrant may be released provisionally, provided that the executing Member State takes all measures necessary to prevent the person absconding. A difference in relation to the FDEAW is that the Nordic Extradition Acts have a lower threshold for surrender. Section 3 of the Swedish Act provides that “[e]xtradition may not take place if the act is punishable in the foreign state by fines only, unless extradition also takes place for an offence for which a heavier penalty than fines can be imposed”. Moreover they do not require double criminality and do not contain any fixed time limits for surrender.
4.4.2.3. Summary

There are presently no international instruments that specifically allow the transfer of alternative measures to pre-trial detention or other coercive measures from one EU Member State to another. The solutions that are available under the present legal framework in related areas are insufficient or inadequate in relation to the specific aim of measures 9 and 10 of the mutual recognition programme, i.e. cooperation between EU Member States regarding persons subject to “obligations or supervision as part of judicial supervision pending a court decision”. It is therefore necessary to consider the adoption of a new instrument covering this issue.

4.4.3. Possible solutions in the new instrument

4.4.3.1. European order to report

The choice of alternatives to pre-trial detention to be taken over in an instrument on non-custodial supervision measures was analysed in the experts’ meeting of 12 May 2003. In the Discussion Paper of 24 April 2003, which was sent to the experts in order to prepare the meeting, it was suggested to use an order to report to an authority, possibly in combination with a travel prohibition order (“European reporting order”). Most participants of the experts’ meeting also came to the conclusion that the most appropriate measure would be “an order to report periodically to certain authorities (in particular the police authorities)”.

An order to report periodically to an authority in combination with a travel prohibition order would probably be a good choice: most Member States have these alternatives in their legal systems and they are mentioned in Recommendation No. R(80) 11 (principle 15, measures 3 and 4). This solution would therefore not impose a legal instrument that is foreign to the legal traditions of the EU Member States.

Some participants pointed out that, in some Member States, there were more lenient measures than reporting to the police. These measures also had to be taken into consideration (principle of proportionality).

4.4.3.2. Degree of involvement of the issuing authority

Different degrees of involvement of the issuing authority are possible:

According to a first model, the issuing judicial authority would decide the non-custodial pre-trial supervision measures to be applied during the monitoring phase (in accordance with its national law) or in what way the suspect should comply with his or her obligation to report to an authority (combined with a travel prohibition order); for example, by reporting to the police (and not to a court) every day (and not merely once a week), that the suspect shall wear an electronic tag, etc. The executing Member State would simply execute the detailed order of the issuing Member State.

Under a second model the role of the issuing judicial authority would merely be to decide that the suspect should report to an authority. It would be left to the executing Member State to designate this authority (police, prosecutor, court, other authority), to decide how often the suspect shall report and to impose additional obligations.
4.4.3.3. Discretion left to the executing authority

Alternatively, the choice of coercive measures could be left entirely to the executing Member State. The judicial authority in the Member State where the alleged offence has been committed (issuing Member State), would only specify the objective of monitoring the individual and send the suspected person back to his or her country of normal residence (the executing Member State).

The executing Member State would simply be under an obligation to cooperate with the issuing Member State regarding the specified objective. The executing authority would, however, apply its own national law, which means that it would impose the most suitable supervision measures among those available in its domestic law. The executing Member State should also have the obligation to send the summons to attend the trial to the suspected person.

A reason to let the executing judicial authority decide on the coercive measures is that it is best placed to take into account changes in the situation of the suspect. An additional reason is that equality of treatment would be ensured.

4.4.3.4. Eurobail

In the experts’ meeting on 12 May 2003, an alternative model, the so-called Eurobail model, was presented: This model - which presents some (though limited) similarities with the model presented above - is based on a division of functions between the trial court and the court of the suspect’s country of residence. The trial court makes a preliminary assessment whether the offence is “bailable”. If the answer is yes, the suspected person is sent back to his or her country of residence, where the court makes the final decision on the provisional release. According to the Eurobail model, the court of the country of residence is in a better position to make the risk assessment than the trial court. The State of residence is responsible for sending the person back to the trial-State. In order for the European arrest warrant to be applicable, it is suggested that a new category of “enforceable offence” be created and added to the FD-EAW. The category might be called “Fugitive from Justice”.

Question 3:

(a) Should the new instrument contain a provision on a specific non-custodial pre-trial supervision measure, such as the European order to report, possibly in combination with a travel prohibition order, as described above?

(b) Would it be appropriate to let the issuing authority decide the non-custodial pre-trial supervision measures to be applied during the monitoring phase (in accordance to its national law) or in what way the suspected person should comply with a European order to report (i.e. how often he or she should report, to what authority etc.)?

(c) Would it be more suitable to let the executing authority choose the appropriate coercive measures in accordance with its national law, leaving to the issuing authority only to specify the objective to be monitored?

108 For further details, see the website of the NGO “Fair Trials Abroad”: http://www.f-t-a.freeserve.co.uk/reports/.
4.5. Procedure

4.5.1. Competent authorities

Quite logically, according to measure 10 of the mutual recognition programme, the issuing authority should be a judicial authority: It is indeed the same authority which may order either that a person is remanded in custody, or that alternative measures are imposed to ensure pre-trial control.

Regarding the executing authority, it should, by analogy with the previous instruments or draft instruments, be provided that this authority should be a judicial authority having jurisdiction at the suspect's place of residence.

4.5.2. Grounds for refusal

4.5.2.1. General considerations

Should the executing authority have any grounds to refuse the execution of an order of transfer of a non-custodial supervision measure under the new instrument? In this context, it should be considered that the objective of the new instrument, in principle 109, is to substitute pre-trial detention in the issuing Member State with a non-custodial supervision measure in the executing Member State, i.e. rather the inverse situation compared to the FD-EAW. It should also be born in mind that the threshold of the FD-EAW is punishability of one year, while the new instrument possibly should cover all offences, i.e. also less serious offences.

Articles 3 and 4 of the FD-EAW list a number of mandatory and optional grounds for refusal. It should be considered whether all of them are relevant in this context, and whether the status of some of them should not be adapted to the new instrument.

The starting point is that the grounds for refusal should be very limited (if any): The consequence of a refusal will in many situations be that the trial-State keeps the suspect in detention.

4.5.2.2. Ne bis in idem

A ground for refusal that clearly is to the advantage of the suspect is when the executing Member State discovers that this person has already been tried for the same offence (ne bis in idem). The right not to be tried or punished twice in criminal proceedings for the same criminal offence is enshrined in Article 50 of the CFREU. This is a mandatory ground for refusal under Article 3(2) of the FD-EAW. If, in such a case, the grounds for refusal are communicated to the issuing judicial authority, this authority will hopefully reconsider whether it should impose any coercive measures at all and release the suspect from custody (and halt the proceedings). This ground for refusal would, in other words, operate as a safeguard for the suspect.

In its judgment of the 11 February 2003 in Joined Cases C-187/01, Gözütok, and C-385/01, Brügge, the European Court of Justice held that the ne bis in idem principle, laid down in

109 Depending on the scope of a future instrument (see chapters 3.2.2. and 3.2.3. above).
Article 54 of the 1990 Schengen Implementation Convention\textsuperscript{110}, also applies to procedures whereby further prosecution is barred by which the public prosecutor of a Member State discontinues criminal proceedings brought in that State, without the involvement of a court, once the accused has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the public prosecutor.

That situation corresponds to Article 4(3) of the FD-EAW and this ground for refusal is for the benefit of the suspect. Possibly the burden of proof of such a decision should be put on the suspect.

4.5.2.3. Amnesty

Pursuant to Article 3(1) of the FD-EAW, \textit{amnesty} in the executing Member State for the offence on which the European arrest warrant is based constitutes a mandatory ground for refusal. A condition is that the executing State had jurisdiction to prosecute the offence under its own criminal law. Should this also constitute a mandatory ground for refusal under the new instrument?

4.5.2.4. Age of criminal responsibility

Another mandatory ground for refusal under the FD-EAW relates to the \textit{age of criminal responsibility} for the acts on which the European arrest warrant is based (Article 3(3)). In a situation where it is possible to prosecute the suspect in the issuing State, but not in the executing State because of his or her age, the executing State may be of the opinion that it would be against its “\textit{ordre public}” to give any assistance at all to the issuing State.\textsuperscript{111}

The international instruments\textsuperscript{112} regarding children and juveniles indicate that pre-trial detention should be avoided as far as possible for this category. Article 37 of the Convention of the Rights of the Child (CRC)\textsuperscript{113} emphasises, \textit{i.a.}, that arrest and detention of a child shall be used only as a measure of last resort and for the shortest period of time.

It should be noted that the international instruments do not contain any binding rules on the age of criminal responsibility. In the European Union the minimum age of criminal responsibility varies from 7 years in Ireland to 16 years in Portugal.\textsuperscript{114}

As the objective of the new instrument is to extend the use of non-custodial supervision measures as an alternative to pre-trial detention, it seems justified that differences in the age

\textsuperscript{110} Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed on 19 June 1990 at Schengen.

\textsuperscript{111} This situation was discussed in the experts’ meeting of 12 May 2003: A participant pointed out that the ‘age of criminal responsibility’ should possibly not be included as a mandatory ground for refusal, as this in some Member States would have the consequence that minors would be kept in detention. This is, indeed, true.

\textsuperscript{112} See also the United Nations Standards Minimum Rules of 29 November 1985 for the Administration of Juvenile Justice (the so-called Beijing Rules) and the United Nation Rules of 14 December 1990 for the Protection of Juveniles Deprived of their Liberty.

\textsuperscript{113} The CRC has been ratified by almost all of the member States of the United States. The only exceptions are Somalia and the United States of America, which only are signatories.

\textsuperscript{114} On the age of criminal responsibility in the member States of the Council of Europe in relation to Article 3 of the ECHR and other questions in this context, see the judgment of the EctHR of 24 November 1999 in the case of \textit{T. v. UK} (in particular, paragraphs 48, 71, 72 and 78).
of criminal responsibility should not be accepted as grounds for refusal for mutual recognition of non-custodial pre-trial measures.

The following situation should be considered: A young non-resident person is suspected of having committed a serious offence. Under the criminal law of the trial-State, it could be possible to remand him or her in custody (owing to a low age of criminal responsibility). Under the criminal law of the child’s State of normal residence, the age of criminal responsibility could be much higher than in the trial-State. Pursuant to Article 37 of the CRC, pre-trial detention shall be used only as a measure of last resort. If the trial-State releases the young person and he or she goes back the Member State of normal residence, it cannot make use of the European arrest warrant, as the judicial authority of the Member State of the young person’s residence must refuse the execution of a European arrest warrant under Article 3(3) of the FD-EAW. Under certain circumstances, the trial-State may well be forced to keep the young non-resident in pre-trial detention, as the danger of absconding is too high. This problem could be resolved, if the trial-State\textsuperscript{115} receives a guarantee from the executing State\textsuperscript{116} that it will return the suspect to the upcoming trial.

4.5.2.5. (Other) optional grounds for refusal

Other grounds of refusal are provided in Article 4 of the FD-EAW, in particular:

- lack of dual criminality,
- suspect being prosecuted in the executing Member State for the same act, offence having become statute barred in the executing State,
- suspect having been sentenced in a third country,
- issuing Member State having exercised extraterritorial jurisdiction (under certain conditions).

They are all optional under the FD-EAW.

These grounds for refusal should be carefully considered. Problems may arise, if the executing authority has the right to refuse an order for transfer, for example, when the conduct is criminalized in the issuing State, but not in the executing State (\textit{i.e.} lack of double criminality). If this would be the case, the issuing State might not want to release the suspect in such a case, as the executing State probably would not be able to give it any assistance according to its national law. The same reasoning could be applied to the situation, when the offence is statute-barred in the executing Member State, but not in the issuing Member State.

Question 4:

\textbf{(a) Would it be acceptable to provide for mandatory grounds of refusal in the event of amnesty, final judgment and other final decisions or relating to the age of criminal responsibility?}

\textsuperscript{115} \textit{i.e.} the issuing Member State (where the trial takes place).

\textsuperscript{116} \textit{i.e.} the Member State where the suspect is supervised (normally the Member State of normal residence).
(b) Are the other grounds for refusal, contained in Article 4 of the FD-EAW, relevant in the context of an order for transfer of alternative measures?

(c) In particular, should the executing authority have the right to refuse the execution on the ground of lack of double criminality?

4.5.3. Guarantees

The new instrument would be a measure aimed at allowing a suspect to enjoy as close as possible to a normal life for the period before the trial, while ensuring that he or she would not abscond, interfere with the course of justice or commit other offences. Pursuing the same primary goal would naturally lead to the conclusion that the executing authority could impose as a condition that the person, if sentenced, would be returned to his or her State of residence, by definition the executing state, in order to serve the sentence there. Such a provision corresponds to Article 5(3) of the FD-EAW.

It would also be conceivable to provide that the executing authority could subordinate the enforcement of the new instrument to the condition that, in case the person be sentenced to life imprisonment, a possibility of revision or similar guarantees be foreseen by the judicial system of the issuing Member State, along the lines of Article 5(2) of the FD-EAW on European arrest warrant.

Question 5:

Could there be conditions for enforcing an order for transfer of alternative measures other than:

- return to the State of residence for serving the sentence?
- possibility of revision in case of life imprisonment?

4.6. Consequences in the event of non-compliance

4.6.1. Introduction

4.6.1.1. Meaning of “penalty” under the mutual recognition programme

Measure 10 of the mutual recognition programme indicates that the new instrument should “specify […] the penalties applicable in the event of non-compliance with [‘control, supervision or preventive measures’] ordered by a judicial authority”, considering the solutions provided for in national law.

The objective of the penalty should thus, more particularly, be to ensure the compliance with a non-custodial pre-trial supervision measure during what could be called the monitoring phase.

Although the mutual recognition programme does not explain what is meant by “penalty”, it seems reasonable to interpret this word in the light of the basic principles that are applicable for pre-trial detention in general (see chapter 3, above).

In the event of non-compliance with a non-custodial obligation, all Member States provide that the question of pre-trial detention shall be considered again and that the suspect may be
remanded in custody: The alternative to pre-trial detention has proved inefficient, therefore the judicial authority returns to the basic option. Only in two jurisdictions, breach of a bail condition is also a separate offence and liable to a separate fine or imprisonment: Ireland and Scotland (see chapter 3.3.4.2. above).

The question of penalties was discussed in the experts’ meeting of 12 May 2003. Most participants were of the opinion that there should be no separate penalties for breach of bail conditions in the sense of imprisonment or fines in the new instrument. One participant was of the opinion that this would be contrary to the principle of innocence.

4.6.1.2. The European Union context

It must be born in mind that the consequences of a breach of an obligation under a non-custodial supervision measure in a cross-border situation could imply particular problems in relation to the corresponding situation within a single national jurisdiction.

The problem is that the person in question passes a border. In the European Union anyone is free to move between different Member States, but cannot be forced to pass a border, unless there is a legal basis for this, such as the FD-EAW. To identify the problems that could arise in a cross-border situation, the following should be considered.

Before a legal authority makes its decision on whether to remand a suspected person in custody or to impose alternative measures to pre-trial detention, there must always be a reasonable suspicion that the person has committed an offence. In addition, the authority has to make a risk assessment in relation to the actual danger. 117 If the suspected person does not comply with his or her obligations under the alternative measure, the legal authority always has the possibility to reconsider the question of pre-trial detention. This possibility exists at least when it can be assumed that the person will not leave the country, i.e. if the person is a resident (national) of the trial-State without any family or other ties to another State.

However, if the suspected person is a non-resident (foreign national) without any ties to the trial-State, it is clear that the danger of his or her absconding is considerable, where there are only few instruments on judicial cooperation or these instruments still contain many grounds for refusal of assistance.

In particular if the suspected person is a non-resident, the legal authority that makes the decision on whether granting this person bail must always consider that this person may abscond if released. There is, in other words, always a risk that the legal authority will be cut off from reconsidering the question of pre-trial detention in the event that the suspect does not cooperate on a voluntary basis. 118

117 In principle one of the three “classical” special grounds for detention that justifies pre-trial detention (see chapter 3.2.1., paragraph 11, above).
118 In a purely national context, the fact that the trial will take place in a different place than the normal residence of the accused person, does not mean that the person’s appearance at the trial is at risk. In a European Union context the situation is more complex. It should, however, be considered whether a person who is suspected (accused) of having committed an offence in Member State A and who only wants to go back to his or her normal country of residence (Member State B) awaiting the trial in his or her normal social environment really should be regarded as being fundamentally different in an area of freedom, security and justice. The adoption of a number of measures (e.g. the Schengen Information System (SIS), also facilitates the tracking down and surrender of suspects within the European Union. The fact that the suspected person is present in another EU Member State rather than in the Member
4.6.2. Breach of an obligation under a non-custodial pre-trial supervision measure

4.6.2.1. Introduction

As noted above, a new instrument on mutual recognition of non-custodial supervision measures would probably mostly be used, where there is a danger of the suspect’s absconding. A non-custodial pre-trial supervision measure aiming at eliminating this danger could, for example, be an obligation for the suspected person to report to the police once a week in combination with a travel prohibition order. Depending on the model for supervision measures (degree of involvement of the executing Member State), which is taken over in the new instrument, other obligations could also be used (e.g. prohibition of driving a vehicle in combination with temporary withdrawal of the driving licence).

An obligation under a non-custodial supervision measure could also be aimed at reducing the other two special dangers that allow pre-trial detention or alternative measures. As regards the danger of suppression of evidence, the suspected person could be under an obligation not to contact certain persons or otherwise tamper with evidence. An obligation aiming at eliminating the danger of re-offending could be an order to undergo medical treatment for drug addicts.

4.6.2.2. Measures to be taken in the event of a breach of an obligation

In a purely national context, the competent judicial authority would be informed by other national authorities in case the suspected persons does not comply with an obligation under a non-custodial supervision measure and would (at least regarding severe breaches) reconsider the question of pre-trial detention, alternatively to impose a different obligation.

In a European Union context, however, the issuing judicial authority would need the assistance of the executing judicial authority (and indirectly other authorities of the executing Member State) to solve the problem. The executing judicial authority should therefore report at least severe breaches to the issuing judicial authority without delay.

An important question in this context is whether the issuing judicial authority in this situation should have the competence to require that the suspected person be returned already before the date of the trial has been decided.

If the executing judicial authority can eliminate the actual danger by a less coercive measure than remanding the suspect in custody (e.g. by imposing a new obligation) the return of the suspected person would possibly not be necessary. This would allow the suspect to stay in his or her normal environment awaiting the trial and would also be in accordance with both the logic of the new instrument and the principle of proportionality. Pre-trial detention shall be regarded as an exceptional measure and shall never be compulsory nor be used for punitive reasons.\textsuperscript{119} Theoretically, an alternative to sending back the person to the issuing judicial State where the trial will take place, no longer necessarily means \textit{per se} that this person is beyond reach of the trial court. However, in order to allow a suspected person to benefit from an alternative measure to pre-trial detention, the new instrument on mutual recognition of non-custodial pre-trial supervision measures would have to contain a coercive mechanism to bring back the person to the trial-State. For further details, see chapters 4.6.3. below.

\textsuperscript{119} See principle 1 of Recommendation No. R(80) 11 of the Committee of Ministers of the Council of Europe concerning custody pending trial.
authority could also be to let the executing authority remand the suspect in custody under its national law (where the danger cannot be eliminated with less coercive measures than detention) and keep him or her in pre-trial detention until the trial takes place in the issuing Member State. This solution may be problematic where the offence on which the original supervision measure is based is not covered by the double criminality condition. The same reasoning could be applied to the situation where less coercive measures are used.

The new instrument must resolve the question whether the executing judicial authority should be allowed to postpone the surrender of the suspected person to the issuing Member State during the monitoring and the trial phase.

Moreover, the issuing and executing judicial authorities may have different views on whether a person who is in breach of an obligation should be remanded in custody or whether the danger can be eliminated by imposing a new obligation. The new instrument must therefore also resolve this kind of problems.

Different problems that could arise from breaches of obligations aiming at eliminating the dangers of suppression of evidence, re-offending and flight (absconding), respectively, and possible solutions will be considered in more detail below.

4.6.2.3. Danger of suppression of evidence

If the executing authority receives information that the suspect tries to contact a witness (for example by telephone or e-mail) in order to influence him or her, or to suppress or alter a piece of written evidence, the outcome of the upcoming trial (regarding the offence for which the non-custodial supervision measure has been decided) could be endangered. A solution to this situation, could – in line with the above reasoning - be to provide (in the new instrument) that the executing authority should report the breach to the issuing authority without delay. In the event that there is an imminent danger of suppression of evidence, the executing authority could be allowed or even required to use coercive measures in accordance with its national law in order to eliminate this danger. Provisional arrest in a cross-border context is already a possibility under several international agreements. Apart from the FD-EAW, the Nordic Extradition Acts (chapter 3.5.2.2.) and Article 27(1) b of the European Convention on the Transfer of Proceedings in Criminal Matters (chapter 3.5.2.1.) could be mentioned.

4.6.2.4. Danger of re-offending

As regards the danger of re-offending a distinction must be made between a breach of an obligation aiming at eliminating this danger and the fact that the person in question is suspected of actually having committed a “new” offence. If the suspected person has committed a “new” offence, he or she is obviously in breach of an obligation not to re-offend. However, the important question for the issuing authority in this context is whether this can be done in a form (in line with the annex to the FD-EAW). Otherwise the executing authority would not be in a position to make an independent assessment at the monitoring stage.

In this context, a distinction must also be made between the original offence, on which the non-custodial pre-trial supervision measure is based (which relates to the criminal law of the issuing Member State) and the condition not to commit “new offences” while on bail (which, during the monitoring phase, primarily relates to the criminal law of the executing Member State).
be seen as an indication that there still is a danger of re-offending. If the competent judicial authority in the executing Member has remanded this person in custody for the “new” offence, which is an act that is criminalised under the law of the executing Member State, this danger is eliminated, at least as long as the person is in pre-trial detention.

Even if the executing judicial authority should report a severe breach of an obligation aiming at eliminating the danger of re-offending (e.g. an order to undergo medical treatment for drug addicts), it is not obvious that it is necessary to return the person to the issuing judicial authority at this stage. The executing judicial authority may be better placed to assess the situation and could use less coercive measures than pre-trial detention under its national in order to enforce the obligation.

The fact that the person in question is suspected of having committed a “new” offence could be seen as an indication that he or she will continue to commit further “new” offences. If the suspected person is not in pre-trial detention the danger of re-offending still exists.

The question is, however, whether the elimination of this danger primarily is in the interest of the issuing Member State or whether it should be seen in relation to the maintenance of law an order of the executing Member State. Difficult problems as regards the procedure against a person suspected of having committed a “new” offence could arise depending on differences between the issuing and the executing Member States concerning jurisdiction. For principal or practical reasons, it seems difficult to require that the executing Member State reacts to or reports “new” offences that are not criminalised in the executing Member State (principles of legality and double criminality). On the other hand, all EU Member States have a common interest to combat (at least) particularly serious offences. It should further be born in mind that, to a large extent, the same type of offences can be found in all of the Criminal Codes of the Member States. This does, however, not mean that all the constituent elements are exactly the same.

Another question is when and how the executing judicial authority should report “new” offences to the issuing authority, i.e. at what stage of the procedure (degree of suspicion).

A practical solution could be to let the issuing authority specify which offences should be covered by the condition not to re-offend (i.e. the objective of the monitoring, chapter 3.4.3.3.). The specification could be provided in a form (in line with what has been said above) by the issuing authority, which should give it to the executing authority and the person in question. This would also be to the benefit of the suspected person, who would know the limits of his or her obligation not to re-offend under the non-custodial supervision measure. A different matter is that the suspect is under a legal obligation, generally speaking, not to commit any offences under the criminal law of the executing Member State when staying in the territory of that State.

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124 In principle (at least) the following situations are possible: 1) Both the issuing and the executing Member States have jurisdiction; 2) Only the issuing Member State has jurisdiction; and 3) Only the executing Member State has jurisdiction.

125 See the “list” of serious offences contained in Article 2(2) of the FD-EAW for which the double criminality condition has been abolished.

126 A different matter is that the suspect is under a legal obligation, generally speaking, not to commit any offences under the criminal law of the executing Member State when staying in the territory of that State.
authority should list the categories of offences that are covered by the condition not to re-offend so that the executing authority can “translate” those offences to the corresponding offences under its own criminal law. The executing authority should report a “new” offence under its criminal law that is of the same type as the corresponding offence in the specification of the issuing authority.  

4.6.2.5. Coordination of prosecutions between the issuing and the executing Member States as regards “new” offences

In the event that a suspected person, who is subject to a supervision measure under the new instrument, commits a “new” offence, which falls within the jurisdiction of the executing Member State that is more serious than the “old” offence (on which the supervision measure is based), the executing judicial authority may not want to return this person to the issuing judicial authority, at least not immediately. This would, in particular be the case when the suspect has been remanded in custody by the executing Member State. Should the executing judicial authority have the possibility to refuse the return of a person who is suspected of having committed a “new offence” (irrespective of whether it is more serious than the “old” offence) which could be prosecuted by both the issuing and the executing Member States? Other situations, where such problems could arise are “new” offences that fall within the exclusive jurisdiction of either the issuing or the executing Member State.

Should the new instrument contain any provisions that resolve this kind of conflict of interests?

A possibility would be to transfer the proceedings to the Member State that is most suitable with due consideration of all the circumstances.

A convention that should be mentioned in this context is the European Convention of 15 May 1972 on the Transfer of Proceedings in Criminal Matters (ETS No. 73). Article 6 of this convention states that, when a person is suspected of having committed an offence under the law of a Contracting State, that State may request another Contracting State to take proceedings in the case. The convention is based on the principle of double criminality (Article 7). Article 8 indicates the cases (subparagraphs (a) to (h) in which one Contracting State may request the taking of proceedings in another Contracting State. The list is

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127 This is also how the concept of double criminality is applied in practice. In the past (as regards extradition) a requested State often has found that there is double criminality, when the offence under the criminal law of the requesting State and the corresponding offence under the criminal law of the requested State belong to the same type of offences: If it is a criminal offence in State A for an accused person to lie under oath and this State makes a request to State B for a person based on this offence, the requested State (B) may be of the opinion that the double criminality condition is fulfilled even if lying under oath is criminalised in State B only for witnesses but not for accused persons.


129 I.a. (a) if the suspected person is ordinarily resident in the requested State, (d) if proceedings for the same or other offences are being taken against the suspected person in the requested State, (f) if it considers that the enforcement in the requested State of a sentence if one were passed is likely to improve the prospects for the social rehabilitation of the person sentenced and (g) if it considers that the presence of the suspected person cannot be ensured at the hearing of proceedings in the requesting State and that his presence in person at the hearing of proceedings in the requested State can be ensured.
exhaustive. The grounds for refusal are provided in Article 11, which, *i.e.* allows refusal because the suspect is not ordinarily a resident in the requested State. The effects of a request for proceedings is in principle that the requesting State loses the right to prosecute the suspect for offence for which the proceedings have been requested (Article 21), *i.e.* to avoid double jeopardy. It could, however, be difficult to choose the “right” Member State. If the items of evidence are located in the Member State where the “old” offence was committed and the witnesses are residents of that State, it would often be unpractical to make a request for transfer of proceedings to the Member State where the suspect ordinarily is a resident (in the event that this Member State has ratified the European Convention on the Transfer of Proceedings in Criminal Matters, 1972).

It should be noted that Article 16 of the FD-EAW contains a rule on the decision in the event of multiple requests that could be “translated” to the situation of conflicting prosecutions in the event of “new” offences as described above. The new instrument could thus provide that the decision on which prosecution shall take precedence shall be taken with due consideration of all circumstances and especially the relative seriousness and place of the offences and the date of the offences in line with. Both States could seek the advice of Eurojust (under the conditions provided in the Council Decision setting up this body).\(^{130}\)

The new instrument could further provide that the return of the person could be postponed until the proceedings in the executing Member State with regard to the “new” offence have been finished or/and that temporary surrender could take place in the meantime. This solution would be in line with Article 24 of the FD-EAW.

### 4.6.2.6. Danger of flight (absconding)

The meaning of the danger of flight (absconding) has been explained above (chapter 4.3.3.2.). The aim of the obligation (*e.g.* reporting to the police in combination with a travel prohibition order) is to eliminate the danger of the suspect’s absconding, *i.e.* that the suspected person avoids the determination of any criminal charge against him or her. The suspect must not always come to his or her trial (depending on the law of the issuing Member State in question and the penalty of the offence), but must, in principle, at least be in a position to receive a summons so that he or she can be judged *in absentia.*

If the suspect does not report to the police and cannot be located by the authorities of the executing Member State, the executing authority should immediately make a report to the issuing authority. The executing judicial authority could (be required to) use coercive measures under its national law, including arrest, to assist the issuing judicial authority. If in such a situation, no immediate coercive measures are taken, it may not be possible at a later stage to bring the person in question to the trial. The suspect may have gone to a third State. Both the issuing and the executing authorities could issue an alert for the suspected person in the Schengen Information System (SIS).

If the person in question is found and the danger of his or her absconding still exists, the issuing judicial authority could order the executing judicial authority to send back the suspect. Alternatively, the executing authority could use coercive measures under its national law in line with the reasoning above.

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\(^{130}\) See Articles 3(1) and 4 of the Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (OJ L 63, 6.3.2002, p. 1).
4.6.3. **Non-compliance with an obligation to be available to receive a summons or to come to the trial**

At this stage (“trial-stage”), the issuing judicial authority has fixed the date of the trial. It will then send a summons through the executing judicial authority. Where the person has complied with the obligations under the non-custodial supervision measure, he or she should always be given the opportunity of attending the trial voluntarily. However, the new instrument would also have to solve the problems that arise when this person refuses to cooperate on a voluntary basis. The new instrument should provide that the person in question should be under a legal obligation to be available to receive the summons and to come to his or her trial (where a judgment *in absentia* is not possible). Non-compliance with that legal obligation would consist in; 1) the person not being available to receive the summons or 2) choosing not to come to the trial, although legally summoned.\(^{131}\)

Under the present legal framework, the national court of the trial-State would – in the situation where the accused person does not come to the trial - have the choice between 1) issuing a European arrest warrant under the conditions provided under the FD-EAW, 2) issuing a national arrest warrant, 3) issuing an order to bring the person before the court or 4) waiting for the suspected person to enter into the territory spontaneously.

As noted above (chapter 4.1., paragraph 4), the European arrest warrant seems, however, not to be appropriate to ensure the smooth functioning of a new mechanism on mutual recognition of non-custodial pre-trial supervision measures, which is designed to reinforce the right to liberty in a European context and not to limit this right.

The two possibilities mentioned under 2) and 3) above, are, for instance, explicitly provided in Article 133, second subparagraph, of the German Code of Criminal Procedure. Under the Swedish Code of Procedure the two possibilities also exist and are applied in practice, although under different chapters. The issuing of an arrest warrant is covered by chapter 24, sections 1, 2, 8 and 17. As regards the second possibility (the issuing of an order to bring the person before the court), chapter 46, section 15, provides that the court – in the event that the defendant fails to appear at a main hearing or appears only by counsel although directed to appear in person - either shall direct him or her to appear in person under penalty of a default

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131 At this stage of the procedure the legal status of the person changes from suspect to accused
fine or shall order that he be brought before the court immediately or on a later date. The latter possibility constitutes a more lenient coercive measure than an arrest warrant and its scope of application seems wider. It could, for example, probably be used where the reasons to assume that the person in question will avoid the criminal proceedings are not sufficient to constitute a real danger of flight (i.e. does not fulfil the requirements of an arrest warrant). The question is whether the possibility mentioned under 3) above, could be taken over in a European Union context. This will be considered in more detail in chapter 4.6.5. below.

4.6.4. Available solutions, limitations and problems

The following mechanisms exist, which could be seen as addressing the circumstances of a breach of an obligation under a non-custodial pre-trial supervision measure. They have, however, little relevance with regard to the problems of interfering with the gathering of evidence or of possible re-offending.

4.6.4.1. European arrest warrant

The trial-State could consider issuing a European arrest warrant in accordance with the provisions of the Framework Decision of 13 June 2002. Article 1(1) of the FD-EAW provides that a European arrest warrant may be issued “for the purposes of conducting a criminal prosecution”, which, in principle, would cover the situation where the suspect is in breach of an obligation under a non-custodial pre-trial supervision measure (at least where one of the three “classical” dangers still exists) as well as the situation where the suspected person voluntarily fails to come to his or her trial (at least where there is a real danger of the suspect’s absconding). A condition is, however, that the offence is a serious offence under the national law of the issuing Member State covered by the threshold in Article 2(1) of the FD-EAW (i.e. punishability of one year). It should also be remembered that a EAW can or must be refused on one or several of the grounds listed in the Articles 3 and 4 of the FD-EAW. In this context, special attention should be drawn to the situation of particularly young offenders (see chapter 4.5.2.4. above).

This means that there are several situations where the system of the FD-EAW will not lead to the surrender of the requested person to the issuing Member State. If the new instrument (which also should cover less serious offences below the threshold of the FD-EAW) only would mean that non-custodial supervision measures are enforced in the country of residence (the executing Member State), without any obligation to return the suspected person, if

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132 See also paragraphs 174, 175, 221 and 413 of the Austrian Code of Criminal Procedure, Articles 122 and following Articles of the French Code of Criminal Procedure (Article 122, last paragraph, of the French Code of Criminal Procedure provides that “[a]n arrest warrant [mandate d’arrêt] is the order given to the law-enforcement authorities to collect the person against whom it is made and to bring him to the remand prison mentioned on the warrant, where he will be received and detained.”), Articles 486 and following Articles (in particular Article 487) of the Spanish Code of Criminal Procedure and chapter II (Du mandate d’amener), paragraphs 3 – 15, and chapter III, Article 16, in particular the second paragraph, of the Belgian Act of 20 July 1990 on pre-trial detention.

133 In this context, see also paragraph 413 of the Austrian Code of Criminal Procedure.

134 Similar problems could also arise, when the executing judicial authority can invoke an optional ground for refusal: For example, under Articles 2(4) and 3(1) of the FD-EAW, the executing judicial authority may refuse to execute a European arrest warrant for an act – not covered by the list in Article 2(2) – which does not constitute an offence under its national law (i.e. lack of double criminality).

135 See also Article 24 of the FD-EAW on postponed or conditional surrender and Article 33 of the FD-EAW regarding Austria(ns).
necessary by coercion, its added value could well be very limited and its use significantly reduced. In this case, the trial-State would take the risk that the person goes back to his or her State of residence, knowing in advance that the European arrest warrant could not be issued in case he or she does not appear voluntarily (for offences not covered by that instrument) or, if issued, that the executing authority could refuse to execute the European arrest warrant on the basis of one or several of the grounds provided by the FD-EAW.

In the event that a judicial authority in the State where the suspect has his or her residence refuses to cooperate with the trial-State, it is likely that the suspect will be detained by the judicial authority of the trial-State instead of benefiting from an alternative measure. This would probably also mean that the right to liberty and the presumption of innocence is put at risk in the European Union seen as a whole.

Subsequently the question arises instead whether the new instrument should allow arrest and surrender under conditions different from those in the FD-EAW or where the offence falls outside the scope of the European arrest warrant.

Moreover, in the case that a European arrest warrant could be issued (i.e. that the offence is sufficiently serious and that there are no grounds of refusal), the following should be considered. The issuing of such a warrant would, in principle, imply that the suspected person is arrested and surrendered by the executing Member State to the issuing Member State within the time limits provided in the FD-EAW. In principle, a suspected person could thus be detained for several weeks before the actual surrender takes place. Although detention is not mandatory under the FD-EAW, it is not obvious that this solution is the most suitable for the specific situation dealt with by measures 9 and 10 of the mutual recognition programme. Legal certainty requires that shorter time limits be explicitly provided in the new instrument as its objective precisely would be to avoid the use of pre-trial detention.

It could thus be argued that the principle of proportionality (chapter 3.1.4.) constitutes an impediment for issuing a European arrest warrant in a situation, where it would be theoretically possible to do so.

4.6.4.2. *In absentia* judgments

Another solution to the problem that an accused person tries to avoid the determination of criminal charges could be to judge him or her *in absentia*.  

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136 Article 17 of the FD-EAW provides that the final decision on the execution of the EAW should be taken within 60 days after the arrest of the person and within 10 days if consent has been given. These time limits can, however be extended by a further 30 days. Pursuant to Article 23 the surrender of the person shall take place within 10 days after the decision on the execution of the EAW. Under certain circumstances this time limit can be extended. Article 24 deals with the question of postponed or conditional surrender.

137 Article 12, last sentence, of the FD-EAW provides that “[t]he person may be released provisionally at any time in conformity with the domestic law of the executing Member, provided that the competent authority of the said Member State takes all the measures it deems necessary to prevent the person absconding”.

138 See also chapter 4.6.2. (Breach of an obligation under a non-custodial pre-trial supervision measure). If the elimination of the danger that justifies the use of pre-trial detention can be obtained by a less coercive measure, this is indeed an argument in favour of dealing with all aspects of mutual recognition of non-custodial pre-trial supervision measures in a separate instrument.
The ECtHR has held that proceedings that take place in the accused's absence will not of themselves be incompatible with the right to a fair trial under Article 6 of the ECHR, if the accused may subsequently obtain, from a court which has heard him in person, a fresh determination of the merits of the charge. In principle (and at least for serious offences), the accused should also have the right to be effectively defended by a lawyer, assigned officially if need be. This would imply that the accused, at least in some Member States, has the choice as to attend the trial or not.

But what happens, if the accused person cannot be found or summoned? He or she could have gone to a third Member State, i.e. where he or she is not normally a resident. In some Member States, an accused person, who wilfully tries to avoid the proceedings or cannot be summoned, could be tried in absentia, while this would be impossible in other Member States. There could also be differences between the Member States as regards the possibility of judging someone in absentia relating to the penalty of the offence.

4.6.4.3. Provision of a surety

It should also be noted that under the national law of several Member States the suspect may be released from custody, if he or she provides a surety (see annex 2). The provision of a surety does not require the involvement of another Member State and allows the suspect to go back to his or her country of normal residence.

The provision of a surety is, however, not a guarantee the suspect will be available at the trial. The judicial authority of the trial-State may consider that a surety is not sufficient (if available under its national law).

4.6.4.4. Long distance proceedings through videoconference

Some EU Member States (Italy and Sweden) have – as an experiment – introduced the possibility of using video links in criminal proceedings. The Swedish legislation on long distance proceedings through videoconference does not only cover examination of witnesses,
but is also applicable to the main proceedings and to the proceedings concerning the question on whether a suspect should be remanded in custody.

The reason for the introduction of this system is to avoid costs and difficulties for the transport of the person in question over long distances. If a court in the extreme south of Sweden has issued an arrest warrant for a suspected person and this person is arrested in the extreme north of the country, that person would have to travel 1500 km to attend the proceedings before the issuing court. The participation of the arrested person through a video link is considered to be equal to the person being present before the issuing court.

According to the preparatory work to the Swedish Act on videoconferences, participation through a video link is considered to be compatible with Article 5(3) of the ECHR, which requires that “[e]veryone arrested or detained in accordance with the provisions of paragraph 1.c of [Article 5] shall be brought promptly before a judge or other officer authorised by law to exercise judicial power”.

4.6.5. Compatibility of a coercive measure under the new instrument with Article 5 of the ECHR

4.6.5.1. Introduction

The above analysis of the present legal framework has shown that the FD-EAW is insufficient or inadequate to ensure the smooth functioning of the new instrument on mutual recognition on non-custodial pre-trial supervision measures. The same is true for judgments in absentia and provision of a surety (these possibilities are available only in relation to certain Member States). Although the possibility of using long distance proceedings through videoconference could contain some useful elements for the return mechanism (see chapter 4.6.7.2. below), it is difficult to see that it could be seen as a real alternative to the accused being physically present in the main proceedings in the trial-State in the cross-border situation considered in the present Paper. Consequently the new instrument on mutual recognition of non-custodial pre-trial supervision measures would need a different coercive mechanism to return an uncooperative person to the trial-State.

As the EU Member States are under a legal obligation to respect the provisions of the ECHR, the coercive measure under the new instrument must be compatible with at least one of the six exceptions to the right to liberty under Article 5(1) of the ECHR.

4.6.5.2. Compatibility with Article 5(1) c of the ECHR

The most logical approach seems to be to let a coercive mechanism follow the requirements of Article 5(1) c of the ECHR. Article 5(1) c is the legal basis under the ECHR for the initial arrest of the suspected person under the national law of the issuing authority (see chapter 3.2. above) before the transfer of the alternative measure to the executing authority. If the suspected person has not complied with a non-custodial supervision measure, the issuing authority should have the possibility to reconsider the question of pre-trial detention: The alternative to pre-trial detention has proved inefficient, therefore the issuing authority returns to the basic option.

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146 See Article 2 of the Swedish Act.
147 Chapter 24, section 14 of the Swedish Code of Procedure.
148 On the basis of their ratification of this convention as well as Article 6(2) TEU.
A condition under Article 5(1) c of the ECHR is, however, that there is a reasonable suspicion that the person in question has committed the offence on which the supervision measure is based and that there still is at least one special ground for detention. The danger of re-offending would, for example, be excluded where the executing authority has remanded the suspect in custody on the reasonable suspicion of having committed a new offence (which is an act that is criminalised under its law), at least as long as this person is in pre-trial detention (see chapter 4.6.2.2. above). The executing authority could also have decided other coercive measures under its national law that have eliminated the actual danger.

The aim of the arrest and detention of the suspected person by the executing authority in the situation described above should be the return of this person to the issuing authority. The “competent legal authority” to which the suspect would be brought pursuant to Article 5(1) c of the ECHR, would in this case be the judicial authority of the issuing Member State that has decided the transfer of the non-custodial pre-trial supervision measure to the executing Member State.

The executing authority would have to inform the issuing authority of a (serious) breach that could not be solved by less coercive measures than arrest and detention under the law of the executing Member State. The issuing authority would decide whether the suspect should be returned.149 The legal authorities of the executing Member State would then simply act on behalf of the issuing authority in accordance with their national law. If those measures would be the arrest of the person in question, the time limits (including the return of the suspect to the issuing authority) would have to be very short and in any case much shorter than those provided in the FD-EAW. Although Article 5(1) c of the ECHR remains silent on the threshold for pre-trial detention linked to the offence in question (see, in particular, chapter 3.2.1., last paragraph, and chapter 3.2.2., above), it seems not to be in accordance with the principle of proportionality to allow more than very short time limits, at least as regards less serious offences. Those EU Member States that have high thresholds for pre-trial detention (e.g. where the offence must be punishable by imprisonment for two years) would also have to adapt their legislation to the requirements of the new instrument concerning the return of suspects as described above.

Immediately after the physical return of the suspected person to the issuing authority, there must be full judicial protection under Article 5(3 and 4) of the ECHR. This would, however, not be a problem in this context as it would follow from the existing legislation of the issuing EU Member State, which is under a legal obligation to respect the provisions of the ECHR.

The coercive mechanism under the new instrument (even as regards less serious offences) would thus be compatible with Article 5(1) c of the ECHR. The general aim of the new instrument on mutual recognition of non-custodial pre-trial supervision is reducing pre-trial detention in the European Union seen as a whole. This means that it is compatible with the aim of Article 5, which (under the established case law of the ECtHR) is to ensure the right to liberty and that no one is deprived of this right in an arbitrary manner.

149 As regards possible grounds for the executing judicial authority to refuse the return at this stage of the procedure and the coordination of prosecutions between the issuing and the executing Member States see chapter 3.6.2. above.
4.6.5.3. Compatibility with Article 5(1) b of the ECHR

An alternative or additional solution would be to let the coercive mechanism follow the requirements of Article 5(1) b of the ECHR, i.e. “the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law”.

Article 5(1) b of the ECHR allows arrest and detention for the purposes of bringing accused persons (and witnesses) to the main hearing. It can also be used for the purposes of bringing suspects before legal authorities at earlier stages of the criminal investigation.\(^{150}\)

In all those situations very short time limits are applicable. The time limits seem to vary from Member State to Member State, but do usually not exceed 24 hours.\(^{151}\)

The wording of Article 5(1) b of the ECHR seems to cover the order of the issuing authority (provided that it is a court) to comply with the obligations under the non-custodial pre-trial supervision measure that replaces pre-trial detention. This interpretation would probably also be consistent with the aim of Article 5 as the new instrument on mutual recognition of non-custodial supervision measures, seen as a whole, is designed to strengthen the right to liberty in the common area of freedom, security and justice, not to limit it.

A condition is, however, that the issuing authority sufficiently specifies the obligations that the suspected person has to follow under the supervision measure.\(^{152}\) The ECtHR has held that the words “secure the fulfilment of any obligation prescribed by law” concern only cases where the law permits the detention of a person to compel him or her to fulfil a “specific and concrete” obligation which he or she has failed to satisfy.\(^{153}\) The arrest and detention must further not be punitive in character.\(^{154}\)

An obligation not to contact certain persons (danger of suppression of evidence) or to undergo medical treatment for drug addicts (danger of re-offending) seems to satisfy the requirement that the obligation must be “specific and concrete”. As soon as the relevant obligation has been fulfilled, the basis for detention under Article 5(1) b ceases to exist. An obligation not to commit criminal offences in general seems not to fulfil this requirement.\(^{155}\) The type of offences would, at least, have to be specified (and not in too general terms) by the issuing authority (in line with what has been said above). There would still have to be a danger of committing certain specified offences. As has been noted above, this danger could be

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\(^{150}\) Pursuant to chapter II, Article 3, of the Belgian Act of 20 July on pre-trial detention, the investigating judge may issue an order for the purposes of questioning a person on serious suspicion of having committed an offence that is not considered as being minor.

\(^{151}\) See, for example Article 127 of the French Code of Criminal Procedure.

\(^{152}\) In its judgment of 22 February 1989 in the case of **Ciulla v. Italy**, the ECtHR held that an obligation to go and live in a designated locality was sufficiently specific and concrete for the purposes of Article 5(1) b of the ECHR, but the obligation on a mafia suspect to change his behaviour generally speaking was not (paragraphs 36 and 46).

\(^{153}\) See the judgments of the ECtHR of 8 June 1976 in the case of **Engel and others v. Netherlands** (paragraph 69) and of 6 November 1980 in the case of **Guzzardi v. Italy** (paragraph 101).

\(^{154}\) See the judgments of the ECtHR of 25 September 2003 in the case of **Vasileva v. Denmark** (paragraphs 36 and 37) and of 3 December 2002 in the case of **Nowicka v. Poland** (paragraphs 60 and 61) and the Commission decision of 18 March 1981 in **McVeigh and Others v. UK**.

\(^{155}\) Cf. what has been said about the suspect being under an obligation not to commit any offences under the criminal law of the executing Member State, generally speaking.
excluded in certain situations (e.g., where the suspect is in pre-trial detention in the executing Member State).

The fact that there is only a reasonable suspicion that the person in question has committed an offence would probably not prevent the use of Article 5(1) b. A period of detention will in principle be lawful if it is carried out pursuant to a court order. A subsequent finding that the court erred under domestic law in making the order will not necessarily retrospectively affect the validity of the intervening period of detention. For this reason the Strasbourg organs have consistently refused to uphold applications from persons convicted of criminal offences who complain that their convictions or sentences were found by the appellate courts to have been based on errors of fact or law.\textsuperscript{156}

As regards the length of the detention under Article 5(1) b, the Commission for Human Rights has approved a detention period of 45 hours. The circumstances in that particular case were, however, rather exceptional.\textsuperscript{157} In principle, it is also possible to detain a person under Article 5(1) b to secure the fulfilment of the obligation to pay of a sum of money\textsuperscript{158} or for the purposes of ascertaining identity, where a person does not have any identifications documents (an offence punishable by a fine).\textsuperscript{159} In the latter case, the person was detained 13.5 hours, which the ECtHR considered not to be proportionate to the cause of detention.

4.6.5.4. Compatibility with Article 5(1) f of the ECHR

Finally, it should be mentioned that Article 5(1) f of the ECHR allows “\textit{the lawful arrest or detention […] of a person against whom action is being taken with a view of deportation or extradition}”. Even if the “return” of a suspected person from the executing Member State to the issuing Member State, as described above, is not called “extradition” it contains an extraterritorial element, which probably also would be covered by this sixth exception to the right to liberty.

The remaining three exceptions to the right to liberty in Article 5(1) of the ECHR, \textit{i.e., a), d) and e)}, seem not be relevant for the purposes of the new instrument on mutual recognition of non-custodial pre-trial supervision measures.

4.6.6. Possible objections

There are, however, reasons in favour as well as against including a mechanism in order to return an uncooperative suspect to the issuing authority in the new instrument. A main objection would be that this would constitute a disguised form of “extradition”. One should not introduce a \textit{parallel system} for \textit{surrender} between EU Member States as this is already covered by the FD-EAW. In particular, it could be argued that less serious offences should

\textsuperscript{156} See the judgments of the ECHR of 10 June 1996 in the case of \textit{Benham v. UK} (paragraphs 39 and 42) and in the case of \textit{Bozano v. France} of 18 December 1986 (paragraph 55).

\textsuperscript{157} Commission decision of 18 March 1981 in \textit{McVeigh and Others v. UK}. The obligation in question was on people entering Great Britain to submit to “further examination” at an entry port to determine if they were involved in acts of terrorism.

\textsuperscript{158} See the judgment of the ECHR of 10 June 1996 in the case of \textit{Benham v. UK}.

\textsuperscript{159} See the judgment of the ECHR of 25 September 2003 in the case of \textit{Vasileva v. Denmark}. Mrs. Vasileva had refused to disclose her identity to the police. Section 750 of the Danish Administration of Justice Act provides that failure to do so is punishable by a fine. The ECtHR held that “[i]n these circumstances […] it was in accordance with the [Act] and Article 5(1) b [of the ECHR] to detain the applicant in order to establish her identity” (paragraph 40, last sentence).
not be covered, as this would mean the introduction of a lower threshold for surrender than under the European arrest warrant. It could be contrary to the principle of proportionality to extend the guarantee or mechanism to coercively return persons, who are only suspected of less serious offences.

These arguments seem, however, not to take into account that the new instrument is aiming at reducing pre-trial detention in the European Union seen as a whole. A coercive mechanism (as a last resort) is necessary to make this system work.

Within a single national jurisdiction, reconsidering pre-trial detention regarding a suspect, who does not comply with his or her obligations under an alternative measure, or the use of other legal possibilities to bring an accused person before a court, would not necessarily be contrary to the principle of proportionality. The question is whether to take over this possibility in a European Union context.

4.6.7. Possible solution in a new instrument

4.6.7.1. Conditions for transfer to the executing Member State

Before the issuing authority decides whether a non-custodial pre-trial supervision measure should be transferred to the executing authority (i.e. that the suspected person can be sent back to his or her country of normal residence and benefit from an alternative measure), it should obtain a consent by the suspected person (or by his or her legal representative) 1) to come to the trial 2) alternatively to let the issuing authority judge him or her in absentia and 3) to the consequences of his or her non-appearance at the trial.

The idea of obtaining the consent of the suspect (discussed at the experts’ meeting of 12 May 2003 and in the above mentioned Discussion Paper of 24 April 2003) to come to the trial seems to be a logical approach. All pre-trial measures apart from detention require confidence on the part of the individual concerned.160

Although the suspected person, strictly speaking, cannot be forced to cooperate, the new instrument could provide incentives for him or her to do so. The suspected person should therefore be aware that he or she could be returned by force to stand trial (in case the in absentia alternative is not available).

The conditions for an in absentia judgment should logically follow the national law of the issuing State.

For the same reason, the suspected person should reimburse the costs for bringing him or her by force to the trial, regardless of how litigation costs in the case would otherwise be apportioned.161 The suspect may further also, in certain conditions, partly receive

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160 In this context it can be noted that Article 3(1) d of the European Convention of 21 March 1983 on the Transfer of Sentenced Persons (ratified and in force between all (new and old) EU Member States) requires that the transfer is consented to by the sentenced person or, where in view of his or her age or his physical or mental condition one of the two States considers it necessary, by the sentenced person’s legal representative. Under the Additional Protocol of 18 December 1997 to that Convention, transfer can, in certain conditions, take place without the consent of the sentenced person. The latter solution seems, however, not to be appropriate for the purposes of the new instrument on mutual recognition of non-custodial pre-trial supervision measures.

161 Cf. chapter 31, section 4 of the Swedish Code of Procedure.
compensation for the costs he or she incurred by attending court voluntarily. This could possibly be done in accordance with the national law of the issuing authority, which normally covers this issue.

Moreover, the suspect should be informed by the issuing authority of his or her obligations under the non-custodial pre-trial supervision measure (in line with what has been said above) and that he or she must consent to them in order to benefit from the alternative measure.

The suspected person should only benefit from an alternative measure, if he or she consents to the conditions mentioned above.

Finally, the suspected person should be under an obligation to inform the executing (and the issuing) authority of his or her address for the summons.

After this has been done, the issuing authority should give the executing authority the opportunity to evoke any grounds for refusal (and guarantees) relating to the monitoring phase (see chapters 4.5.2. and 4.5.3. above).

If there are no such grounds, the transfer can take place. A question is whether both or one of the Member States involved should assist the suspected person to travel back to his or her country of normal residence. There could be certain risks involved, especially where there is a danger of the suspect’s absconding.

The issuing authority should also hand over the form with the specification of the obligation(s) of the suspected person to the executing authority.

4.6.7.2. Monitoring phase

Theoretically, the coercive mechanism could be applied to monitoring phase as well as the trial phase. The reasons for this have been discussed above.

In the event that the suspected person breaches an obligation under the supervision measure during the monitoring phase, the question arises whether the executing authority should be allowed to postpone the return of the suspect to the issuing authority. It seems clear that the executing State should have the possibility to postpone the return of the suspect, in particular where he or she has been remanded in custody in the executing Member State, or for serious humanitarian reasons relating to the health of the person in question, but to allow other grounds for refusal at this stage of the procedure would probably make the coercive mechanism under the new instrument useless.

If this is not the case, the suspected person can be arrested on the basis of a court order of the issuing authority and be returned to the issuing authority.

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162 As mentioned in chapter 4.6.2. above, this could also be the case when the executing judicial authority can eliminate the danger in question by using a less coercive measure than detention.

163 Cf. Article 23 of the FD-EAW, in particular paragraph 4, which provides that the surrender exceptionally may be postponed for serious humanitarian reasons, for example if there are substantial grounds for believing that it would manifestly endanger the requested person’s life or health. In such a case the execution of a European arrest warrant shall take place as soon as these grounds have ceased to exist.
In this context, it could be discussed whether a videoconference between the executing and issuing Member States could, in certain conditions, replace the physical presence of the suspected person in the proceedings before the issuing judicial authority as regards only the question whether this person should be remanded in custody (see chapter 4.6.4.4. above). The participation of the suspected person in these proceedings through a video link would enable the issuing judicial authority to make a quicker decision, which would be to the benefit of the suspect (travel costs and other practical problems would also be avoided) and would probably be in accordance with the aim of Article 5 of the ECHR.\textsuperscript{164}

The \textit{time limits} for the entire procedure (covering the report of a breach of an obligation under a supervision measure to the issuing authority, the evocation of any additional grounds for postponement, the issuing of an order to return the person to the issuing authority and the arrest and transfer of the person in question) would have to be very short as the aim of the new instrument, seen as a whole, is to reduce pre-trial detention. In particular, the time limits of the coercive measure (arrest and return of the person) would have to be much shorter than the time limits of the FD-EAW, perhaps one day. Possibly there could be different time limits depending on the seriousness of the offence on which the non-custodial pre-trial supervision measure is based. All periods of detention arising from the application of the coercive measure of the new instrument should, in line with Article 26 of the FD-EAW, be \textit{deducted} from the final sentence in the event that the suspect is found guilty by the issuing authority. It could, for practical reasons, be discussed whether the time limits could be linked to the distance between the executing and the issuing authority (or the place where the suspect is arrested) or whether this would be contrary to the principle of equality of treatment.

Finally, the law enforcement authorities should accompany the suspected person to the issuing Member State. A question is whether they should be allowed to accompany the suspect to the issuing authority or only to the border.

4.6.7.3. Trial phase

Alternatively, the coercive mechanism would only be applicable to the trial phase. The same reasoning as above can be applied to this phase.

At this stage, the date of the trial has been fixed: The suspected person would be under a legal obligation to be available to receive the summons to come to the trial and be aware of the consequences of a breach of this obligation. The issuing State shall then send the summons to the executing authority, which in its turn takes responsibility that the suspect is legally summoned. The executing State shall inform the issuing State of the result. In the event that the suspect, after having been legally summoned, does not come to the trial or has not been located by the executing Member State and there is reason to believe that he or she tries to avoid the criminal proceedings in the trial-State, the issuing authority should communicate to the executing authority whether it demands that the suspect shall be arrested for the purposes of standing trial at a later date (in the situation when the suspect could not be judged \textit{in absentia}).\textsuperscript{165}

\textsuperscript{164} See the preparatory work to the Swedish Act on proceedings through videoconference: Regeringens proposition 1998/99:65, p. 17 – 19.

\textsuperscript{165} Alternatively, it could be left to the executing authority to decide which coercive measures should be used in accordance with its national law.
As regards the legal basis for the coercive measure during the trial phase, the time limits would have to be extremely short. The uncooperative suspect could probably be arrested maximum one day before the trial (main hearing) takes place.

**Question 6:**

(a) Should the issuing authority specify the obligation (relating to the three “classical dangers”) to be complied with by the suspected person under the non-custodial pre-trial supervision measure in a form (in line with what has been said above) letting the executing authority decide coercive measures other than detention in the event of non-compliance?

(b) Should the executing authority be obliged to report a (severe) breach of an obligation relating to the “three classical dangers”?

(c) Should the executing authority be allowed to remand the suspected person in custody in the event of non-compliance with an obligation under a supervision measure and detain him or her until the trial takes place or should this authority return the suspect immediately to the issuing authority?

(d) Could the participation of the suspected person through a video link from the executing Member State replace the physical presence of this person in the proceedings before the issuing authority as regards (only) the question whether he or she should be remanded in custody in the issuing Member State?

(e) How should the situation be resolved where the issuing and the executing authorities have different views on whether a person who is in breach of an obligation should be remanded in custody or whether the danger can be eliminated by imposing a new obligation?

(f) Should a mechanism to return the suspected person from the executing Member State to the issuing Member State apply to both the monitoring phase and to the trial phase?

(g) Should the issuing authority specify the obligation to come to the trial or/and that the person in question could be judged in absentia in the event that he or she does not attend the trial and would this person have to consent to this obligation before he or she can benefit from an alternative measure in the executing Member State?

(h) Should the executing authority, during the monitoring phase and the trial phase, be allowed to postpone the return of the suspected person?

(i) In particular, should the executing authority have the possibility to postpone the return of a person who is suspected of having committed a new offence within its territory?
ANNEX 1

Questions to consider

Question 1:
Should a mechanism for mutual recognition of non-custodial supervision measures cover
- the situation when a suspected person, who already is subject to such measures and who, permanently or temporarily, wants to go to another Member State, makes a request for transfer of these measures to that Member State (as described in chapter 4.2.2.3. above)?
- if yes, under which conditions?
- the situation when the suspect has already gone to another Member State (as described in chapters 4.2.3.1., “suspect in breach of an obligation under non-custodial pre-trial supervision measure” and 4.2.3.2., “late application for non-custodial supervision measures”, above)?
- if yes, under which conditions?

Question 2:
Considering the negative consequences of the present legal framework as regards the treatment of non-resident suspects in the area of alternatives to pre-trial detention:
(a) Do you agree with the approach of the Commission with respect to mutual recognition of non-custodial pre-trial supervision measure as described above (i.e. the possibility of monitoring the suspected person in his or her country of normal residence and the necessity to introduce a mechanism that ensures the presence of the accused person at the trial unless this person can be judged in his or her absence) in order to ensure the full EU-wide implementation of the right to liberty and the presumption of innocence?
(b) If not, are there alternative solutions?
(c) If yes, please describe them.
(d) Should a mechanism for mutual recognition of non-custodial supervision measures also cover less serious offences (i.e. below the threshold of Article 2(1) of the FD-EAW)?

Question 3:
(a) Should the new instrument contain a provision on a specific non-custodial pre-trial supervision measure, such as the European order to report, possibly in combination with a travel prohibition order, as described above?
(b) Would it be appropriate to let the issuing authority decide the non-custodial pre-trial supervision measures to be applied during the monitoring phase (in accordance to its national law) or in what way the suspected person should comply with a European order to report (i.e. how oft he or she should report, to what authority etc.)?
(c) Would it be more suitable to let the executing authority choose the appropriate coercive measures in accordance with its national law, leaving to the issuing authority only to specify the objective to be monitored?

(d) Would the Eurobail model be suitable?

**Question 4:**

(a) Would it be acceptable to provide for mandatory grounds of refusal in the event of amnesty, final judgment and other final decisions or relating to the age of criminal responsibility?

(b) Are the other grounds for refusal, contained in Article 4 of the FD-EAW, relevant in the context of an order for transfer of alternative measures?

(c) In particular, should the executing authority have the right to refuse the execution on the ground of lack of double criminality?

**Question 5:**

Could there be conditions for enforcing an order for transfer of alternative measures other than:

- return to the State of residence for serving the sentence?

- possibility of revision in case of life imprisonment?

**Question 6:**

(a) Should the issuing authority specify the obligation (relating to the three “classical dangers”) to be complied with by the suspected person under the non-custodial pre-trial supervision measure in a form (in line with what has been said above) letting the executing authority decide coercive measures other than detention in the event of non-compliance?

(b) Should the executing authority be obliged to report a (severe) breach of an obligation relating to the “three classical dangers”?

(c) Should the executing authority be allowed to remand the suspected person in custody in the event of non-compliance with an obligation under a supervision measure and detain him or her until the trial takes place or should this authority return the suspect immediately to the issuing authority?

(d) Could the participation of the suspected person through a video link from the executing Member State replace the physical presence of this person in the proceedings before the issuing authority as regards (only) the question whether he or she should be remanded in custody in the issuing Member State?

(e) How should the situation be resolved where the issuing and the executing authorities have different views on whether a person who is in breach of an obligation should be remanded in custody or whether the danger can be eliminated by imposing a new obligation?
(f) Should a mechanism to return the suspected person from the executing Member State to the issuing Member State apply to both the monitoring phase and to the trial phase?

(g) Should the issuing authority specify the obligation to come to the trial or/and that the person in question could be judged \textit{in absentia} in the event that he or she does not attend the trial and would this person have to consent to this obligation before he or she can benefit from an alternative measure in the executing Member State?

(h) Should the executing authority, during the monitoring phase and the trial phase, be allowed to postpone the return of the suspected person?

(i) In particular, should the executing authority have the possibility to postpone the return of a person who is suspected of having committed a new offence within its territory?
ANNEX 2

National legislation in the area of pre-trial detention

Legitimate grounds for detention, duration and threshold\textsuperscript{166}

Threshold for detention\textsuperscript{167}

In \textit{Belgium}, the threshold is linked to the penalty of the offence: Imprisonment of one year or more (Article 16, paragraph 1, of the Act of 20 July 1990).

In \textit{Sweden}, the normal threshold for pre-trial detention is also one year. Pursuant to chapter 24, section 2, paragraph 2, of the Code of Procedure, any person suspected on probable cause of an offence may, however, be detained regardless of the nature of the offence, if he or she does not reside in the realm and there is a reasonable risk that he or she will avoid legal proceedings or a penalty by fleeing the country.

\textit{Finland} has a similar provision (chapter 1, section 3, paragraph 4, of the Coercive Means Act).

In \textit{Germany}, the general rule is to be found in Article 113 of the Code of Criminal Procedure: Pre-trial detention is, in principle, possible also for less serious offences. In cases of offences, which attract a custodial sentence not exceeding six months or a fine not exceeding 180 units of daily income, pre-trial detention may, however, not be ordered merely because there is a risk that course of justice will be perverted. Such an order may, further, only be issued if there is a risk that the accused will attempt to abscond if he has done so previously or has made preparations to do so, if he or she has no fixed place of abode in the area in which the Code of Criminal Procedure is effective, or cannot prove his or her identity. A special provision for certain offences is to be found in Article 112a, which provides that, in those cases, pre-trial detention only may be ordered if a custodial sentence of more than one year is expected.

\textit{Spanish} law distinguishes between arrest (detención) and pre-trial detention (prisión provisional or prisión preventiva). The basic provision for both is Article 17(1) of the Constitution. In principle, the police can arrest a suspect suspected of having committed an offence, which is punished with a penalty of more than three years. The police may also arrest a person suspected of having committed an offence, which is punished by imprisonment of more than 6 months up to less than three years, when it can be expected that the suspect will not appear before the judge when summoned. Theoretically, there is also a possibility to arrest a suspect for minor offences, when he or she does not have a fixed abode and does not provide a surety. As regards \textit{pre-trial detention}, the general rule is that the offence in question must be punished by imprisonment of more than three years. However, the judge may decide not to remand the suspect into custody, if there are grounds against pre-trial detention. On the other hand, pre-trial detention is also possible for offences below the threshold of one year, if the judge considers this necessary according to the circumstances.

In \textit{England & Wales} the penalty for the offence is not a factor that is taken into account when making remand decisions. The decision to remand or bail a defendant is at the discretion of

\textsuperscript{166} Chapter 2.2. of the Green Paper (chapter 2.2.2. National framework).
\textsuperscript{167} Question 3 b of Annex 4.
the court under the provisions set out in the Bail Act 1976. In Northern Ireland the situation is similar. Bail can be granted for any offence so there is no pre-trial detention threshold as such, though the severity of the offence may bear on whether a person is likely to turn up for trial.

Maximum time limits for pre-trial detention

Some Member States have maximum time limits for pre-trial detention. Pursuant to § 194, section 1 of the Austrian Code of Criminal Procedure, pre-trial detention on the basis of the risk that evidence will be suppressed must not exceed two months. The accused must also be released from detention in any case, if he or she has already been in custody for six months, and the main proceedings have still not begun. Other time limits are, however, applicable for serious offences. If an offence has been committed wilfully and attracts a sentence exceeding three years of imprisonment, pre-trial detention until the start of the main proceedings is limited to one year, and if an offence has been committed wilfully and attracts a sentence five years of imprisonment, pre-trial detention until the start of the main proceedings is limited to two years (§ 194, section 2). In addition, pre-trial detention may only be maintained beyond six months, if this unavoidable on account of special difficulties or the specific scope of the examination with regard to the importance of the reason for detention (§ 194, section 3). Pre-trial detention and more lenient measures must be terminated as soon as the factors relating to them cease to exist or their continuation would be unreasonable (§ 193, section 2). The duration of a period of pre-trial detention is in any case inappropriate (disproportionate) in relation to the prescribed penalty if there can be no doubt that it has lasted as long as the prescribed penalty.

Article 6(4) of the Greek Constitution provides that the maximum duration of detention pending trial shall be specified by law. Such detention may not exceed a period of one year in the case of felonies or six months in the case of misdemeanours. In entirely exceptional cases, the maximum durations may be extended by six or three months respectively, by decision of the competent judicial council.

In Italy, Article 13 of the Constitution provides that the maximum time limit for pre-trial detention has to be fixed by law.168

The Government of the United Kingdom has replied that, in Scotland, there are also different time limits depending on the seriousness of the offence. Where the accused is to be tried on indictment (before a judge and jury for a serious offence, he or she may not be detained in custody for more than 80 days without the indictment being served on him or her. Where an accused is to be tried on indictment, he or she may not be detained in custody for more than 110 days before being brought to trial. If the 110-day period is exceeded, the accused must be liberated immediately and is then free from any process in respect of the offence. The courts can, however, grant an extension or extensions to the 110-day period. Where the accused is to be tried summarily (by a judge sitting without a jury for an offence, which is not sufficiently serious to merit being tried on indictment), he or she may not be detained in custody for a total of more than 40 days after bringing of the complaint to court. If the 40-day period is exceeded, the accused must be liberated immediately and is then free from any process in respect of that offence. Extensions of this period can, however be granted.

168 See Article 303 of the Code of Criminal Procedure.
In most Member States, specific time limits regarding pre-trial detention do not exist. The period of pre-trial detention must, however, not be disproportionate.

*Special grounds for detention*¹⁶⁹

Under national law, including case-law, special grounds for detention are also required, although the three *classical grounds* are not always explicitly mentioned. In *England & Wales*, the Bail Act provides a presumption to bail (“release from custody”) for all those accused or convicted of an offence, but the defendant “need not be granted bail”, where he or she presents a bail risk. According to the reply to the questionnaire, examples where bail need not be granted are where there are substantial grounds for believing that if released on bail the defendant would fail to return to court, commit an offence, or interfere with witnesses or otherwise obstruct the course of justice. Another exception to bail is that the offence is indictable (*i.e.* a serious offence) and appears to have been committed while on bail for another offence.

*Presumption to remand suspects into custody for serious offences*¹⁷⁰

A *presumption* to remand persons who are suspected of having committed *serious offences* in custody exists in several - but not all - Member States. In *Austria* pre-trial detention will be imposed pursuant to § 180 section 7 of the Code of Criminal Procedure, in the case of crimes for which a minimum sentence of ten years’ imprisonment is prescribed. In *Italy* Article 275, paragraph 3, of the Code of Criminal Procedure states that where there is strong evidence of guilt with regard to Mafia-type association (Article 416 *bis* of the Criminal Code), pre-trial custodial detention is applied, except where evidence has been acquired of the non-existence of pre-trial remedies. In *Sweden* Chapter 24 section 1, second paragraph of the Code of Criminal Procedure provides that if a penalty less severe than imprisonment for two years is not prescribed for the offence, the suspect shall be detained unless it is clear that detention is unwarranted. Another example is *England & Wales*, where Section 25 of the Criminal Justice and Public Order Act 1994 provides a presumption against bail in cases of murder, manslaughter, rape (including attempts) if the defendant has a previous conviction for one of those serious offences.

*Alternatives to pre-trial detention and applicable penalties*¹⁷¹

*Alternative measures*

In *Austria*, § 180 Section 5 of the Code of Criminal Procedure provides an exhaustive list of the more lenient measures than pre-trial detention. The alternative measures are the following: 1) An *oath* neither to abscond or go into hiding, not to change address, before the effective completion of legal proceedings without the approval of the preliminary examining judge (paragraph 1). 2) An *oath* not to make any attempt to frustrate investigations (paragraph 2). 3) An *order* to live at a specified location, with a specified family, at a specified address, avoiding specified locations or associates, to refrain from alcoholic beverages and other intoxicants or engage in specified employment (paragraph 3). 4) An *order to report* any change of address, or report to a court or other office at specified intervals (paragraph 4). 5) With the consent of the suspect, an *order to undergo treatment* to cure addiction or other

¹⁶⁹ Question 4 of annex 4.
¹⁷⁰ Question 5 of annex 4.
¹⁷¹ Questions 12 – 16 of annex 4.
medical treatment or psychotherapy or health-related action (paragraph 4a). 6) Temporary withdrawal of all travel documents (paragraph 5). 7) Temporary withdrawal of all documents required to drive a vehicle (paragraph 6). 8) The provision of a surety (paragraph 7). 9) The arrangement of temporary probation (paragraph 8). Pre-trial detention may not be imposed if the purposes of detention can also be achieved by means of simultaneous imprisonment or other form of detention.

Belgian law provides that the suspect may be released on certain conditions or if he or she provides a surety (Article 35 § 3 of the Act of 20 July 1990).

In Denmark, the following alternative measures may be considered, with the consent of the suspect and if the conditions for pre-trial detention are otherwise fulfilled: 1) Submitting to supervision imposed by the court. 2) Complying with special provisions concerning place of residence, work, use of free time and association with certain persons. 3) Staying in a suitable home or institution. 4) Submitting to psychiatric treatment or treatment for alcohol abuse or similar, if necessary in a hospital or special institution. 5) Reporting to the police at specified times. 6) Surrendering passport or other identity documents to the police. Provision of a surety set by the court in order to ensure the appearance at the hearing (Section 765, paragraph 2, of the Administration of Justice Act).

In Finland, travel prohibition is used as an alternative to pre-trial detention. This means that a suspect’s freedom to travel is restricted in order to prevent him or her from escaping or continuing his or her criminal activity, i.e. the suspect is not allowed to leave an area stated in the prohibition order. The suspected person may also be subjected to other restrictions, such as being required to be available at certain times at home or at the work place or to report to the police. The suspect cannot get a passport and if he or she already possesses one, it must be submitted to the police. A travel prohibition can be ordered for a maximum period of 60 days, but the court can order its extension.

In France, Article 138a 12 of the Code of Criminal Procedure provides that the judge, i.a., may prohibit the suspected person to leave an area defined by the judge, to leave his or her place of abode or residence, or to visit certain places. The judge may also demand that the suspected person reports when he or she leaves a specified area. Moreover, the judge may order the suspected person to appear before an authority at regular intervals and to surrender certain identity documents.

In Germany, § 116, paragraph 1, of the Code of Criminal Procedure, provides that the judge shall defer the execution of an arrest warrant, which is only justified by the risk that the suspect will attempt to abscond, if less coercive measures are sufficient. The following measures may be considered: 1) An instruction to report to a judge, criminal prosecution authority or other office appointed by them at a given time. 2) An instruction not to leave a place of abode or residence or a specified area without the permission of the judge or the criminal prosecution authority. 3) An instruction to leave his home only in the charge of a specified person. 4) The furnishing of an appropriate surety by the suspect or other person. The list of measures is not exhaustive and combinations between these measures are also possible.

Greece has similar provisions: The provision of surety, the obligation of the suspect to appear before an authority at regular intervals, the prohibition to travel and/or reside in a specific area and/or abroad and/or the prohibition of association with and/or meeting with certain persons (Article 282, paragraphs 1 and 2, of the Civil Procedure Code).
In Ireland, Section 6(1) of the Bail Act (1997) sets down the conditions which may be attached to bail (release pending trial). In addition to the requirement of attendance at the court at the end of the period of remand, they include that the accused must not commit an offence while on bail and must be of good behaviour. It is also open to the court to impose any conditions which it considers appropriate having regard to the circumstances of the accused. These conditions may include that the accused 1) reside or remain in a particular place, 2) reports to a specified police station at specific intervals, 3) surrenders any passport or travel document or refrains from applying such, 4) keeps away from any specified premises or place and 5) does not have contact with a specified person or persons.

The Italian Code of Criminal Procedure provides following alternative to pre-trial detention: Prohibition to leave the country (Article 281); obligation to appear before the judicial police (Article 282) prohibition or obligation to remain in a certain place (Article 283) and house arrest (Article 284, paragraph 5).

In Luxembourg, release may be ordered if the suspect provides a surety (Article 114 of the Code of Criminal Procedure).

In The Netherlands, pre-trial detention may be suspended if, by imposing certain conditions, it is possible to avoid depriving the suspect of his or her liberty. In order to ensure compliance with the conditions, the suspect or a third party must provide a surety (Article 80 of the Code of Criminal Procedure). The suspect might also be required to surrender his or her passport or to commit himself or herself to an institution.

Portuguese law allows house arrest\(^{172}\), provision of surety, prohibition to contact certain persons, performing certain public functions and travelling abroad, further restrictions on residence. According to the Portuguese reply to the questionnaire, the most widely used alternative measure is the obligation to report at regular intervals to the police. In addition, anyone who is a defendant in criminal proceedings must make a declaration in respect of his or her identity and residence, and may not leave his or her declared residence for more than five days without first informing the court of his or her new residence.

According to Spanish reply to the questionnaire, the judge can order the suspect to report to a court regularly. The judge can also impose restrictions on residing in a particular area or to stay in a certain locality, prohibiting him or her from travelling inside or outside the country without prior authorisation from the court. Spanish law also provides for “attenuated detention”, i.e. arrest at the suspect’s residence. Attenuated detention occurs if the defendant’s health would be at risk, if kept in “normal” pre-trial detention.

In Sweden, the alternative measures to pre-trial detention are travel prohibition and order to report to the police (chapter 25, section 1, of the Code of Procedure).

In England & Wales, the court has discretion to impose any condition while granting bail, including curfew and restrictions on entering into a particular area (i.e. the home area of the alleged victim). The court may also decide not to impose any conditions.

In Scotland there are three alternatives to pre-trial detention: 1) The police have the power to decide whether the person should be detained in custody or released when a person has been

\(^{172}\) The time spent in house arrest is deducted from the actual prison sentence imposed.
arrested and charged with a minor offence. If the person is released it can be with or without an undertaking to appear at a specific court at a specific time. 2) The courts have the power to release the person on bail when a person has been arrested and charged with an offence. 3) The accused may simply be ordained by the court to appear in summary proceedings at an intimated time and date. In granting bail, the judge imposes on the accused the standard conditions on bail and any further conditions considered necessary to secure that the standard conditions are observed and that the accused makes himself available for the purpose of participating in an identification parade or of enabling any print, impression or sample be taken from him. The standard conditions are that the accused a) appears at the appointed time at every diet relating to the offence with which he or she is charged or of which he or she is given due notice, b) does not commit an offence while on bail, c) does not interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or herself or any other person, and d) makes himself or herself available for the purpose of enabling enquiries or a report to be made to assist the court in dealing with him or her for the offence with which he or she is charged. Examples of further conditions, which may be imposed, are a) the imposition of money bail as caution, b) a curfew (not electronic tagging), c) the requirement to report to a police station at a certain time every day, d) for the accused to keep away from a specific place or person, e) the requirement to live at a specific address, and f) in relation to young offenders under the age of 16 years, the requirement to report to a social worker or community worker.

According to the reply from Northern Ireland, the alternative to pre-trial detention is bail.

Applicable penalties

As regards the replies to this question, the legislation of the EU Member States provides that the question of pre-trial detention shall be considered again and that the person may be remanded in custody:

Austria (§ 180, section 6, of the Code of Criminal Procedure), Belgium, Denmark, Finland (chapter 2, section 9 of the Coercive Measures Act), France (irrespective of the penalty for the offence, Article 141-2 of the Code of Criminal Procedure), Germany (§ 116, paragraph 4, of the Code of Criminal Procedure), Greece (Article 282(4) of the Civil Procedure Code), Italy (Article 276 of the Code of Criminal Procedure), Luxembourg (Article 125 of the Code of Criminal Procedure), The Netherlands (Article 82 of the Code of Criminal Procedure. The surety will be forfeited and remain in the possession of the State, Article 83 of the Code of Criminal Procedure), Portugal, Spain, Sweden (chapter 25, section 9, of the Code of Procedure), the United Kingdom - England & Wales (and forfeiture of any money that the defendant, or other person, has agreed to pay if the defendant violates his or her bail condition), and Northern Ireland (including forfeiture of the surety, Article 138(1) (2).

In two jurisdictions, breach of a bail condition is also a separate offence and is liable to a separate fine or imprisonment:

In Ireland, section 13 of the Criminal Justice Act of 1984, provides that it is an offence for a person released on bail to appear in court in accordance with the recognisance into which he or she has entered on being granted bail. On conviction of the offence the person will be liable to a fine to up to 1269 EURO or to imprisonment for up to twelve months or both. The section

173 Question 14 of annex 4.
also provides that any sentence imposed on a person under the section must be consecutive to any sentence passed on the person for a previous offence in accordance with the provisions of section 11 of the same Act.

In Scotland, breach of a bail condition (other than the condition than an accused should not commit an offence while on bail) is an offence, normally punishable by imprisonment for not more than three months and/or a fine not exceeding £ 1000. Failure to appear at a diet in respect of solemn proceedings is also an offence and liable on conviction on indictment to a fine and imprisonment for a period not exceeding two years. A sentence imposed for a breach of a bail condition may be imposed in addition to any other penalty competent to the court. Offending while subject to an earlier bail order now falls to be disposed of as an aggravation of the substantive offence.
ANNEX 3

Pre-trial detention rates in the EU Member States

The below figures (rounded up to one decimal point) are based on the replies of the (old and new) EU Member States to the questionnaire on statistical data on the prison population, including pre-trial detention (mentioned in chapter 1.1.1) that was drawn up by unit D.3 (criminal justice), Directorate D (Internal security and criminal justice) of the Directorate-General Justice and Home Affairs, European Commission, in 2003 at the request of the Italian Presidency.

The figures must, however, only be seen as indicative. The dates of reference for the statistics vary from Member State to Member State. Statistics on the rate between nationals and non-nationals are not always available. Most important: there are no figures that indicate whether nationals and non-nationals are residents of the Member State of detention. In some instances, the Commission has not received any reply at all (or only to some of the questions). The symbol “X” below indicates that statistics are not available (or have not been provided or checked). The figures provided by the Member States on the pre-trial detention rate and the total prison population per 100 000 inhabitants have (as regards the years 2002 and 2001) been checked against the figures under the Annual Penal Statistics of the Council of Europe. Differences between those figures and the figures provided by the Member States are indicated in the footnotes.

This being said, it seems, however, clear that the rate of non-nationals in pre-trial detention is very high in several old EU Member States (see, in particular, Austria and Belgium, but also Italy and The Netherlands). However, in most new EU Member States (with the exception of Cyprus), there are very few non-nationals in pre-trial detention. As regards the figures on the total prison population, the high rates of the Baltic Member States should be noted.
1. The pre-trial detention rate in the EU Member

a) Period: 2002

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<th>Pre-trial detention rate per 100.000 inhabitants</th>
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<tr>
<td>Austria</td>
<td>22,5&lt;sup&gt;174&lt;/sup&gt;</td>
<td>97,5&lt;sup&gt;175&lt;/sup&gt;</td>
<td>45,4</td>
<td>54,6</td>
</tr>
<tr>
<td>Belgium</td>
<td>26,2&lt;sup&gt;177&lt;/sup&gt;</td>
<td>84,9&lt;sup&gt;178&lt;/sup&gt;</td>
<td>47&lt;sup&gt;179&lt;/sup&gt;</td>
<td>53</td>
</tr>
<tr>
<td>Denmark</td>
<td>19&lt;sup&gt;181&lt;/sup&gt;</td>
<td>64&lt;sup&gt;182&lt;/sup&gt;</td>
<td>X&lt;sup&gt;183&lt;/sup&gt;</td>
<td>X</td>
</tr>
<tr>
<td>Finland</td>
<td>9,7</td>
<td>66</td>
<td>78,7&lt;sup&gt;184&lt;/sup&gt;</td>
<td>21,3</td>
</tr>
<tr>
<td>France</td>
<td>34&lt;sup&gt;186&lt;/sup&gt;</td>
<td>90,3&lt;sup&gt;187&lt;/sup&gt;</td>
<td>X&lt;sup&gt;188&lt;/sup&gt;</td>
<td>X</td>
</tr>
</tbody>
</table>


<sup>175</sup> For 2002. No specific date indicated. According to the Annual Penal Statistics of the Council of Europe, SPACE I: 2002 (table 1) as of 1 September 2002 this rate is: 92,3.

<sup>176</sup> According to the Austrian reply, a breakdown by nationality of non-Austrian nationals cannot be given. Moreover, no data can be provided on the place of residence of non-nationals. A study ("Die Entwicklung der Haftzahlen in Österreich – Darstellung und Analyse der Ursachen", carried out by Dr. Arno Pilgram, of the Institute for Sociology of Law and Criminology, Vienna), annexed to the reply, shows that the number of non-Austrian nationals in prisons in the Federal Länder were relatively stable during the period 2000 – 2002, but two groups of non-nationals accounted for the marked increase in new prisoners in Vienna: these are nationals of eastern European States (not the 2004 accession countries) and of African States. The increase in those two groups in the jurisdiction of the Vienna District Court account for most of the increase in Austria as a whole.

<sup>177</sup> Source: Annual Penal Statistics of the Council of Europe, SPACE I: 2002 (table 5 d) as of 1 September 2002.


<sup>179</sup> On 1 March 2002.

<sup>180</sup> On 1 March 2002.


<sup>182</sup> For 2002. No specific date indicated.

<sup>183</sup> No figures on the pre-trial rate (in %) between nationals and foreigners are available. It could, however, be noted that the rate between those categories regarding sentenced prisoners is 83 % (nationals) and 16,4 % (foreigners).

<sup>184</sup> Yearly average.

<sup>185</sup> On 1 October 2002.
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
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<td>X</td>
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</tr>
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<td></td>
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<td></td>
</tr>
<tr>
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</tr>
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<td>Ireland</td>
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<td>78</td>
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<td>X</td>
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</tr>
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<td>66,1</td>
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</tr>
<tr>
<td>Portugal</td>
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<td>133,2</td>
<td>76,2</td>
<td>23,8</td>
</tr>
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<td>126,2</td>
<td>X</td>
<td>X</td>
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<tr>
<td>Sweden</td>
<td>X</td>
<td>73</td>
<td>X</td>
<td>X</td>
</tr>
</tbody>
</table>

---

188 Under the French statistics it is not possible to make a distinction between sentenced prisoners and pre-trial detainees among foreigners. It could, however, be noted that the rate (in %) as regards the total prison population is 78 % (for nationals) and 22 % (for foreigners).
189 The German statistics do not include cases of pre-trial detention, where proceedings were dropped or a final decision was taken not to institute proceedings. Moreover, the figures do not include pre-trial detention in the new Länder or the relation between national and non-national prisoners (pre-trial detainees).
192 These figures were calculated on the basis of the total number of (national and non-national) pre-trial detainees on 16 December 2002 and the figures for the non-national pre-trial detainees on 1 January 2002.
197 On 31 December 2002.
198 The corresponding figure in the Annual Penal Statistics of the Council of Europe, SPACE I: 2002 (table 1) is 100,8 as of 1 September 2002.
199 On 31 December 2002.
201 Sweden had not yet published the exact data for 2002, when the questionnaire was sent.
203 No figures on the relation between nationals and non-nationals are available under the Swedish statistics.
b) Period: 2001

<table>
<thead>
<tr>
<th></th>
<th>Pre-trial detention rate per 100,000 inhabitants</th>
<th>Total prison population (including pre-trial detainees) per 100,000 inhabitants</th>
<th>Pre-trial detention % between</th>
<th>Pre-trial detention % between foreigners</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>Nationals</td>
<td>Foreigners</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>EU nationals (not including new EU MS)</td>
<td>Third country nationals</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Country</th>
<th>Rate</th>
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<th>Rate</th>
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<th>Rate</th>
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<td>50.3</td>
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<tr>
<td>Denmark</td>
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<td></td>
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<td></td>
</tr>
<tr>
<td>Finland</td>
<td>X</td>
<td>58.7</td>
<td>80.3</td>
<td>19.7</td>
<td>6.8</td>
<td>93.2</td>
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<td></td>
</tr>
<tr>
<td>France</td>
<td>21.9</td>
<td>77.1</td>
<td>X</td>
<td>X</td>
<td>X</td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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204 Statistics for England & Wales only (as of 30 June 2002). The pre-trial detention rate for England & Wales include persons, who are convicted, but not yet sentenced.

205 The corresponding figure for England & Wales in the Annual Penal Statistics of the Council of Europe, SPACE I: 2002 (table 5 d) is 14.8 as of 1 September 2002.

206 Corresponds to the figure of the Council of Europe (137,1)


213 The corresponding figure in the Annual Penal Statistics of the Council of Europe, SPACE I: 2001 (table 4.2.1. d) is 12. Table b “rate of prisoners without final sentence per 100 000 inhabitants” has 16.1.

214 No figures on the pre-trial rate (in %) between nationals and foreigners are available. It could, however, be noted that the rate between those categories regarding sentenced prisoners is 84.1 % (nationals) and 15.9 % (foreigners).


216 Yearly average.


<table>
<thead>
<tr>
<th>Country</th>
<th>Percentage</th>
<th>Total Population</th>
<th>Sentenced Prisoners</th>
<th>Pre-trial Detainees</th>
<th>National</th>
<th>Foreigner</th>
</tr>
</thead>
<tbody>
<tr>
<td>Germany</td>
<td>X</td>
<td>95,8</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Greece</td>
<td>21,6²²²</td>
<td>79²²³</td>
<td>57,1²²⁴</td>
<td>42,9</td>
<td>2,6²²⁵</td>
<td>97,4</td>
</tr>
<tr>
<td>Ireland</td>
<td>X</td>
<td>80²²⁶</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Italy</td>
<td>23,4²²⁷</td>
<td>95,3²²⁸</td>
<td>64</td>
<td>36</td>
<td>2,6</td>
<td>97,4</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>45,9²²⁹</td>
<td>90,7²³⁰</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Netherlands</td>
<td>33,8²³²</td>
<td>69²³³</td>
<td>66,8</td>
<td>33,2</td>
<td>14</td>
<td>86</td>
</tr>
<tr>
<td>Portugal</td>
<td>36,9²³⁵</td>
<td>131,1²³⁶</td>
<td>82,9</td>
<td>17,1</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Spain</td>
<td>25,4²³⁷</td>
<td>117²³⁸</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Sweden</td>
<td>X</td>
<td>70²³⁹</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
</tbody>
</table>

²²⁰ Under the French statistics it is not possible to make a distinction between sentenced prisoners and pre-trial detainees among foreigners. It could, however, be noted that the rate (in %) as regards the total prison population is 78,1 % (for nationals) and 21,9 % (for foreigners).


²²⁴ These figures were calculated on the basis of the total number of (national and non-national) pre-trial detainees on 16 December 2001 and the figures for the non-national pre-trial detainees on 1 January 2001.


²²⁹ Although no definition is given for “pre-trial detainee”, it can be assumed that it means “prisoner without final sentence”. The figure according to the Annual Penal Statistics of the Council of Europe, SPACE I: 2001 (table 4.2.1. d) is 31,7 (table 4.2.1. a, has 45,1).

³³⁰ The corresponding figure in the Annual Penal Statistics of the Council of Europe, SPACE I: 2001 is 80,9 (table 1).


³³² No figure available under the statistics of the Council of Europe.

³³³ The corresponding figure in the Annual Statistics of the Council of Europe, SPACE I: 2001 is 95,4 (table 1) as of 1 September 2001.


³³⁵ No figure available under the statistics of the Council of Europe.

³³⁶ The corresponding figure in the Annual Statistics of the Council of Europe, SPACE I: 2001 is 132 (table 1) as of 1 September 2001.


c) Period: 2000

<table>
<thead>
<tr>
<th></th>
<th>Pre-trial detention rate per 100,000 inhabitants</th>
<th>Total prison population (including pre-trial detainees) per 100,000 inhabitants</th>
<th>Pre-trial detention %/ between</th>
<th>Pre-trial detention % between foreigners</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Nationals</td>
<td>Foreigners</td>
<td>EU nationals (not including new EU MS)</td>
<td>Third country nationals</td>
</tr>
<tr>
<td>Austria</td>
<td>X</td>
<td>X</td>
<td>49,7</td>
<td>50,3</td>
</tr>
<tr>
<td>Belgium</td>
<td>29,5</td>
<td>84,7</td>
<td>50</td>
<td>26,8</td>
</tr>
<tr>
<td>Denmark</td>
<td>16,6</td>
<td>61,5</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Finland</td>
<td>X</td>
<td>X</td>
<td>85,6</td>
<td>14,4</td>
</tr>
<tr>
<td>France</td>
<td>28,3</td>
<td>75,6</td>
<td>249X</td>
<td>X</td>
</tr>
<tr>
<td>Germany</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Greece</td>
<td>X</td>
<td>X</td>
<td>56,7</td>
<td>43,3</td>
</tr>
</tbody>
</table>


244 The addition of the figures on pre-trial detainees from Belgium, old EU MS, new EU MS and third countries (1437+385+59+993=2874) does not correspond to the figure on the total number of people in pre-trial detention (3023) forwarded by Belgium. The pre-trial detention rate between nationals and foreigners is calculated on the basis of the former figures (as of 1 March 2000).


246 No figures on the pre-trial rate (in %) between nationals and foreigners are available. It could, however, be noted that the rate between those categories regarding sentenced prisoners is 83,8 % (nationals) and 16,2 % (foreigners).

247 Yearly average.

248 On 1 October 2000.

249 Under the French statistics it is not possible to make a distinction between sentenced prisoners and pre-trial detainees among foreigners. It could, however, be noted that the rate (in %) as regards the total prison population is 77 % (for nationals) and 23 % (for foreigners).

250 These figures were calculated on the basis of the total number of (national and non-national) pre-trial detainees on 1 December 2000 and the figures for the non-national pre-trial detainees on the same date.
<table>
<thead>
<tr>
<th>Country</th>
<th>Year 1</th>
<th>Year 2</th>
<th>Year 3</th>
<th>Year 4</th>
<th>Year 5</th>
<th>Year 6</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ireland</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Italy</td>
<td>X</td>
<td>X</td>
<td>58,4</td>
<td>41,6</td>
<td>2,2</td>
<td>97,8</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>43</td>
<td>89,3</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
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<td>32,1</td>
<td>65,3</td>
<td>67,9</td>
<td>32,1</td>
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<td>84,6</td>
</tr>
<tr>
<td>Portugal</td>
<td>39,3</td>
<td>128</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
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<td>Spain</td>
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<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Sweden</td>
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<td>65,254</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
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<td>UK</td>
<td>22</td>
<td>124</td>
<td>90</td>
<td>10</td>
<td>X</td>
<td>X</td>
</tr>
</tbody>
</table>

251 On 1 December 2000.
252 On 1 December 2000.
254 On 1 October 2000.
255 England & Wales.
2. The pre-trial detention rate in the new EU Member States

a) Period: 2002

<table>
<thead>
<tr>
<th></th>
<th>Pre-trial detention rate per 100,000 inhabitants</th>
<th>Total prison population (including pre-trial detainees) per 100,000 inhabitants</th>
<th>Pre-trial detention % between</th>
<th>Pre-trial detention % between foreigners</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>Nationals</td>
<td>Foreigners</td>
</tr>
<tr>
<td>Cyprus</td>
<td>X</td>
<td>252,4</td>
<td>52,8</td>
<td>47,2</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>15,8(^{257})</td>
<td>159</td>
<td>72</td>
<td>28(^{258})</td>
</tr>
<tr>
<td>Estonia</td>
<td>95,4(^{259})</td>
<td>225,6(^{260})</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Hungary</td>
<td>42,7(^{261})</td>
<td>130,8(^{262})</td>
<td>92,8</td>
<td>7,2</td>
</tr>
<tr>
<td>Latvia(^{263})</td>
<td>151(^{264})</td>
<td>354(^{265})</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Lithuania</td>
<td>36(^{266})</td>
<td>326,4(^{267})</td>
<td>X</td>
<td>X</td>
</tr>
</tbody>
</table>

---

\(^{256}\) On 31 December 2002.
\(^{258}\) Including persons concerning whom there exist doubts whether they are citizens of the Czech or the Slovak Republics.
\(^{259}\) April 2003.
\(^{261}\) The corresponding figure in the Annual Penal Statistics of the Council of Europe, SPACE I: 2002 (table 5 d) is 33,2 as of 1 September 2002.
\(^{262}\) The corresponding figure in the Annual Penal Statistics of the Council of Europe, SPACE I: 2002 (table 1) is 177,4 as of 1 September 2002.
\(^{263}\) On 15 August 2003.
\(^{264}\) The corresponding figure in the Annual Penal Statistics of the Council of Europe, SPACE I: 2002 (table 5 d “rate of untried prisoners – no court decision yet reached – per 100 000 inhabitants”) is 20,9 as of 1 September 2002. The corresponding figure in table 5 b (“rate of prisoners without final sentence per 100 000 inhabitants”) is 160,1.
\(^{265}\) The corresponding figure in the Annual Penal Statistics of the Council of Europe, SPACE I: 2002 (table 1) is 363,1 as of 1 September 2002.
### Malta

<table>
<thead>
<tr>
<th></th>
<th>Pre-trial detention rate per 100.000 inhabitants</th>
<th>Total prison population (including pre-trial detainees) per 100.000 inhabitants</th>
<th>Pre-trial detention % between</th>
<th>Pre-trial detention % between foreigners</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>Nationals</td>
<td>Foreigners</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>EU nationals (not including new EU MS)</td>
<td>Third country nationals</td>
</tr>
<tr>
<td>Malta</td>
<td>21,3[^268]</td>
<td>71,4</td>
<td>61,6</td>
<td>38,4</td>
</tr>
<tr>
<td>Poland[^269]</td>
<td>X</td>
<td>210,3[^270]</td>
<td>95,8</td>
<td>4,2</td>
</tr>
<tr>
<td>Slovakia</td>
<td>43[^271]</td>
<td>144</td>
<td>94,8</td>
<td>5,2</td>
</tr>
<tr>
<td>Slovenia</td>
<td>2,2[^272]</td>
<td>56,2[^273]</td>
<td></td>
<td></td>
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</tbody>
</table>

**b) Period: 2001**

<table>
<thead>
<tr>
<th></th>
<th>Pre-trial detention rate per 100.000 inhabitants</th>
<th>Total prison population (including pre-trial detainees) per 100.000 inhabitants</th>
<th>Pre-trial detention % between</th>
<th>Pre-trial detention % between foreigners</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>Nationals</td>
<td>Foreigners</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>EU nationals (not including new EU MS)</td>
<td>Third country nationals</td>
</tr>
<tr>
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<td>6,6[^274]</td>
<td>285,6</td>
<td>53,6</td>
<td>46,4</td>
</tr>
<tr>
<td>Czech Republic[^275]</td>
<td>27,3[^276]</td>
<td>188[^277]</td>
<td>70,7</td>
<td>29,3[^278]</td>
</tr>
</tbody>
</table>

[^269]: On 31 December 2002.
[^270]: The corresponding figure in the Annual Penal Statistics of the Council of Europe, SPACE I: 2002 (table 1) is 208,7 as of 1 September 2002.
[^271]: No figure available under the Council of Europe statistics.
[^277]: The corresponding figure in the Annual Penal Statistics of the Council of Europe, SPACE I: 2001 (table 1) is 207 as of 1 September 2001.
[^278]: Including persons concerning whom there exist doubts whether they are citizens of the Czech or the Slovak Republics.
<table>
<thead>
<tr>
<th>Country</th>
<th>Proportion (%)</th>
<th>Total (thousands)</th>
<th>Proportion (%)</th>
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c) Period: 2000

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<sup>296</sup> Including persons concerning whom there exist doubts whether they are citizens of the Czech or the Slovak Republics.

<sup>297</sup> On 31 December 2000.
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ANNEX 4

Questionnaire on different aspects of pre-trial detention sent to the EU Member States

Right to liberty
Q. 1) Which general (constitutional) provisions regarding the right to liberty exist in your national legal system?

European Convention on Human Rights
Q. 2) Has your country incorporated the text of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, 1950) as a whole into the national legal system?

Legitimate grounds for detention
Q. 3) Which are the general conditions in which a person may be detained:
   a) Which is the degree (or degrees) of reasonable suspicion of having committed an offence?
   b) Which is/are the (possible) threshold/thresholds for pre-trial detention in relation to the prescribed penalty of the offence?
Q. 4) Which are the special conditions for pre-trial detention:
   a) risk of failing to attend trial (absconding)?
   b) risk of interfering with evidence or witnesses, or otherwise obstruct the course of justice?
   c) risk of committing an offence on bail (if not detained)?
   d) be at risk of harm against which he or she would be inadequately protected or to be a disturbance to public order?
   e) other?
Q. 5) Is pre-trial detention mandatory in certain conditions?

Who may initially arrest a suspect
Q. 6) Who may initially arrest a suspect and which time limits must be observed:
   a) Does your country recognise a right for anyone to apprehend a person observed in the act of committing an offence (in flagrante delicto) or fleeing from it?
   b) If this is the case, which is the time limit for turning over such a person to the competent authorities?
c) Which authorities/officials may take the initial decision on arrest/apprehension?

d) Which is the time limit for contacting the prosecutor/other legal authority/court after the initial decision on arrest/apprehension?

**Competent legal authorities**

Q. 7) Which legal authorities may decide on the detention:

a) If your legal system provides that there may be a preliminary decision on detention, which legal authority is empowered to take such a decision (prosecutor/other legal authority/police)?

b) Is there an obligation for the prosecutor/other authority to present the case for a court?

c) If this is the case, which is the time limit?

d) Which is the time limit for the court to decide on the detention?

e) Are there any remedies against the decision of the court?

f) Are there any remedies against the decision of a court in the second instance, third instance?

g) If this is the case, which are the time limits (e and f)?

h) Is there an obligation to review the decision on detention after a certain time limit?

i) If this is the case, which are the time limits and are there any remedies against that decision?

j) Pursuant to Article 5(3) ECHR a detained person is entitled to trial within a “reasonable time”. Is it possible, under your legal system, to translate this concept into a specific time period (is it, *i.e.*, related to the gravity or nature of the offence)?

**Special categories**

Q. 8) Are there any special provisions for certain categories of suspects (such as juveniles, terrorists, mentally ill)?

**Treatment of detainees**

Q. 9) How are pre-trial detainees to be treated:

a) Are there any minimum rules regarding the treatment of remand prisoners in your country?

b) If this is the case, please describe these rules.
c) Are detainees only suspected of having committed an offence segregated from convicted persons?

**International covenant on Civil and Political Rights**

Q. 10) Has your country made any reservations with respect to Articles 9 and 10 of the (UN) International Covenant on Civil and Political Rights (ICCPR, 1966)?

Q. 11) Does your country accept the optional procedure under Article 41 of the ICCPR?

**Alternatives to pre-trial detention**

Q. 12) Which are the alternatives to pre-trial detention in your legal system?

Q. 13) Which different methods of supervision exist in your legal system?
   a) electronic tagging [so-called bail curfew]?
   b) reporting to the police, restrictions to reside in a special area?
   c) other?

Q. 14) Which penalties are applicable in the event of non-compliance?

Q. 15) Does your country recognise or transpose decisions by legal authorities of foreign countries regarding supervision or other alternatives to pre-trial detention?

Q. 16) If this is the case, please describe these rules.

"12) Which are the alternatives to pre-trial detention in your legal system?

13) Which different methods of supervision exist in your legal system?
   a) electronic tagging [so-called bail curfew]?
   b) reporting to the police, restrictions to reside in a special area?
   c) other?

14) Which penalties are applicable in the event of non-compliance?

15) Does your country recognise or transpose decisions by legal authorities of foreign countries regarding supervision or other alternatives to pre-trial detention?

16) If this is the case, please describe these rules."
EXPLANATORY MEMORANDUM ON JUSTICE AND HOME AFFAIRS

SUBJECT MATTER

The Commission’s Green Paper discusses the need for a new legislative instrument on the mutual recognition of judicial decisions relating to non-custodial pre-trial supervision of defendants in criminal proceedings. The aim of any such instrument would be to allow the substitution, in suitable cases, of pre-trial detention of defendants from other Member States, with non-custodial supervision in the person’s normal State of residence.

2. The Green Paper identifies the risk that non-resident defendants in criminal proceedings may be remanded in custody for even minor offences because of the danger of absconding from justice whereas residents can benefit from alternative non-custodial measures. The Commission argues that the application of the principle of mutual recognition to pre-trial supervision measures would reinforce the right to liberty and the presumption of innocence by allowing a defendant to be subject to a supervision measure in his or her state of residence until required for trial. Supervision in the State of residence would need to address the classical risks associated with the decision to remand in custody or on bail, i.e. flight from justice, suppression of evidence and re-offending. The Green Paper also argues that the proposal should provide a guarantee that the defendant will be returned to face trial, if necessary by coercive measures.

3. The Green Paper notes that there are at present no international instruments that specifically allow the transfer of non-custodial pre-trial supervision measures from one Member State to another. The Programme of Measures to implement the principle of mutual recognition of decisions in criminal matters addresses this in Measure 9 (to catalogue non-custodial pre-sentencing supervision measures) and Measure 10 (to draw up an instrument on recognition and immediate enforcement of non-custodial pre-sentencing measures).

4. The Green Paper proposes different models for consideration:

**European Order to Report**

Based on its earlier consultations on alternatives to pre-trial detention, the Commission proposes that one model would be to apply an order to report to
an appropriate authority, possibly in combination with a travel prohibition order. The extent to which the issuing judicial authority would determine the full terms of the supervision measure (e.g. how often the defendant should report) is a matter for further consideration. Different models are discussed in the Green Paper, including allowing the issuing authority full discretion to decide the conditions to be enforced by the executing authority, or the reverse position whereby the executing authority would only be required to achieve the objective sought by the issuing authority, while retaining discretion to impose the most suitable supervision measures available under its domestic law.

**Eurobail**

Under this model, the trial court would make an initial assessment of whether the offence is one which is “bailable”. If so, the defendant would be sent back to their state of residence, where a court would make a final decision on bail. This recognises that the court in the country of residence may be in a better position than the trial court to make the required risk assessment. The State of residence would also be responsible for ensuring that the defendant is returned to face trial.

5. The Green Paper asks what, if any, grounds should be available to the executing authority to refuse to accept the transfer of a defendant under supervision. It also asks what the consequences should be in the event of the defendant’s failure to comply with supervision measures. The Green Paper examines whether the issuing judicial authority should have the right to require that the defendant be returned before the trial or whether the executing authority should be allowed to eliminate the risk identified by the imposition of less coercive measures.

6. The Green Paper suggests that it would not be sufficient to rely on the European Arrest Warrant (EAW) to provide the guarantee that a defendant will be returned in the event that he or she fails to comply with supervision or to report for trial. The EAW contains certain limitations on its use including mandatory or optional grounds for refusing extradition. These limitations could undermine confidence in allowing a defendant to return to his State of residence pending trial. The Green Paper therefore discusses the scope for a separate coercive measure to be included in any new instrument to allow persons who are unco-operative to be returned to the trial State.

7. The issuing authority would inform the executing authority whether it requires the defendant to be arrested for surrender to it (unless the issuing authority chooses, where available, to hear the case in absentia). The executing authority would then act on the order of the issuing authority to detain and surrender the person within very short time limits. The Green Paper argues that, although this might represent a lowering of the existing threshold for surrender procedures, this should be considered against the overall aim of the proposal to reduce pre-trial detention. The initial conditions for allowing a defendant to return to their State of residence under supervision would include requiring the defendant to give their consent to being
summoned for trial or to face being returned coercively or tried in absentia. The executing State would also be given the opportunity to invoke any specified grounds for refusal prior to transfer.

SCRUTINY HISTORY

8. None. The document is being deposited for the first time.

MINISTERIAL RESPONSIBILITY

9. The Home Secretary has overall responsibility for criminal procedural law including bail. Responsibility in Scotland and Northern Ireland rests with Scottish Executive Ministers and the Secretary of State for Northern Ireland.

LEGAL AND PROCEDURAL ISSUES

Legal Basis

10. None. This is not a legislative proposal. The legal basis of any future legislative instrument is likely to be Articles 31(a) and 34 of the Treaty on European Union.

European Parliament procedure

11 None. This is not a legislative proposal.

Voting procedure in the Council

12. None. This is not a legislative proposal.

Impact on United Kingdom Law

13. In England and Wales, the general provisions relating to bail are contained in the Bail Act 1976. The decision to remand or bail a defendant is at the discretion of the court. The Act provides a presumption to bail but the defendant ‘need not be granted bail’ where he presents a bail risk. The court has discretion as to what to impose as a condition of bail to secure that the defendant:

- Surrenders to custody;
- Does not commit an offence while on bail;
- Does not interfere with witnesses or otherwise obstruct the course of justice; or
- For the defendant’s own protection, or if he is a child or young person, for his own welfare.

14. Bail conditions should be specific and capable of being enforced. Conditions may include requirements to report to the police, curfew, restrictions on entering a particular area (i.e. the home area of the alleged victim), surrender of passport and an order not to leave the country, and a condition of residence.
15. A defendant may appeal against the refusal of bail or to vary bail conditions to the court. The defendant may also make a fresh bail application at any time, if there are new circumstances, and the court must consider the issue of bail or remand in custody each time the defendant appears before it.

16. Under the 1976 Act, there is a power to arrest where there are reasonable grounds for believing that the person is likely to breach any of the conditions of bail or for suspecting that the person has broken any conditions. The court may then order the revocation of bail (i.e. the defendant can be remanded in custody), and the forfeiture of any money put up as recognisance (i.e. money that the defendant, or another person, has agreed to pay if the defendant violates his bail conditions) or impose more stringent bail conditions. Failure to surrender to bail is also an offence under the Act.

17. In Scotland, the provisions relating to bail are contained in the Criminal Procedure (Scotland) Act 1995. Under that Act, the judge has a duty to consider whether to grant or refuse bail on the first appearance of an accused in court, with or without the need for an application by him. It is at the discretion of the court to grant bail.

18. When bail is granted the court is obliged by law to impose on the accused a set of standard conditions designed to ensure that he will:
- be available for enquiry;
- appear in court when required;
- not offend while on bail; and
- not interfere with witnesses or obstruct justice.

- The court also has the discretion to impose additional conditions such as the accused reporting to a police station, surrendering his passport, curfew.

GIBRALTAR

19. The issue of application to Gibraltar does not arise at this time. The Government of Gibraltar is consulted on the application of specific proposals on a case by case basis, as appropriate.

20. None. This is not a legislative proposal.

SUBSIDIARITY

21. The Green Paper addresses the development of judicial co-operation between Member States in criminal proceedings under the principle of mutual recognition. Any legislative proposal is likely to comply with the principle of subsidiarity.
POLICY IMPLICATIONS

22. The Green Paper poses a number of questions for the development of a mutual recognition measure for non-custodial pre-trial supervision. We will be consulting and giving detailed consideration to these questions. The Government will provide the Committee with its detailed view of the Green Paper in due course.

23. The Commission proposal is consistent with the Programme of Measures on Mutual Recognition and offers a useful development of judicial co-operation in the EU. The Commission’s proposal would have the benefit of promoting equality of pre-trial treatment for non-nationals, allowing more UK citizens charged with offences in other Member States to return home under supervision instead of being held in custody in the State of offence. The same would be true of other EU nationals facing trial in this country, which would help maintain home ties and aid long-term rehabilitation.

24. The decision to remand in custody or to transfer supervision under suitable conditions will depend on a reliable assessment of the risk. This would be addressed in part by developments at EU level on the sharing of information from criminal records. There may also be demands for assessment reports from the relevant UK authorities in support of criminal proceedings in other Member States, which may have resource implications.

25. Conditions and methods of supervision are not consistent across the EU and the Government sees advantage in a system of mutual recognition which provides the executing State with appropriate flexibility to reflect national practice and resources. The National Probation Service does not supervise or monitor defendants on bail in this country (other than those on bail for very serious offences) and we would therefore wish to seek discretion to decide the authorities involved in supervision of a transferred defendant. We would also need to be satisfied that robust arrangements could be put in place to deal with breaches of supervision conditions or the defendant’s failure to surrender for trial. The Green Paper’s suggestion to create a new coercive measure, rather than relying on the EAW, will also require further detailed consideration.

REGULATORY IMPACT ASSESSMENT

26. Not applicable. This is not a legislative proposal.

FINANCIAL IMPLICATIONS

27. None. This is not a legislative proposal. The Government will consider the possible resource implications as part of its consultations on the Green Paper.
CONSULTATION

28. The Green Paper is available publicly. We are consulting the police, Crown Prosecution Service, other Government Departments and other interested parties.

TIMETABLE

29. The consultation period on the Green Paper lasts until the end of November. The Commission has not indicated how it intends to take work forward.

CAROLINE FLINT
PARLIAMENTARY UNDER SECRETARY OF STATE
HOME OFFICE
GREEN PAPER

Maintenance obligations

(presented by the Commission)
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1. PURPOSE OF THE GREEN PAPER

The purpose of this Green Paper is to launch a wide-ranging consultation of circles interested in the legal and practical questions arising in situations with an international element in matters of maintenance obligations.

It proceeds from a study commissioned by the European Commission, from contributions from experts in the Member States of the European Union and from information gathered in the course of work at the Hague Conference on Private International Law.

It sets out the various aspects where there is an apparent need for Community rules, or new conventions in cases transcending the borders of the European Union, and suggests avenues to be explored. Gathering the reactions and opinions of all those concerned by the question should provide input for the discussion of the objectives to be pursued both in the Community and in the Hague Conference.

2. CONSULTATION PROCEDURE

The Commission invites all persons interested to send their replies to the questions in the Green Paper, a full list of which is given at the end of the document. The list is obviously not exhaustive, and all comments on additional points will be welcome.

Replies and observations should be sent by 30 September 2004. But in the run-up to negotiations to be held at the Hague Conference on Private International Law in June 2004, it would be very helpful if they could be sent to the Commission as quickly as possible, and preferably by 15 May, to the following address:

European Commission
Directorate-General Justice and Home Affairs
Unit JAI.C.1 (LX46 0/26)
B – 1049 Brussels

Fax: + 32 (0) 2 299 64 57
E-mail: jai.coop.jud.civil@cec.eu.int

Persons interested are requested to send their contribution in a single copy and by a single means of communication – post, e-mail or fax.

You are specifically asked to state if you do not wish your reply or observations to be published on the Commission’s website.

The Commission is planning to organise a public hearing.
3. INTRODUCTION

3.1. General background

3.1.1. Planned work in the Community

The Tampere European Council on 15 and 16 October 1999 called on the Council to establish, on the basis of Commission proposals, special common procedural rules to simplify and accelerate the settlement of cross-border disputes concerning, in particular, maintenance claims. Among other things it recommended abolishing intermediate measures needed for the recognition and enforcement in one Member State of a judgment given in another Member State.

The Programme of Measures for the implementation of the principle of mutual recognition of decisions in civil and commercial matters, which refers to the Tampere conclusions, stresses that the question of maintenance obligations directly concerns the everyday lives of citizens and that guaranteeing effective recovery of claims is essential for the welfare of many people in Europe, and recommends the abolition of the exequatur procedure. Maintenance creditors are already eligible for the provisions of the Brussels Convention of 1968, now incorporated in Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Article 5(2) of that Regulation provides: “A person domiciled in a Member State may, in another Member State, be sued ... in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident or, if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties”. Maintenance creditors can thus opt to sue either in the court for the Member State where the debtor is domiciled or in the Member State where they are domiciled or habitually resident. Where the debtor sues, the only possibility is to sue in the courts for the Member State where the other side is domiciled.

The question of maintenance obligations is thus one of the areas partly covered by existing Community instruments, where the Programme provides for the adoption of a series of measures including the introduction of provisional enforcement and of interim measures of protection.

The Programme further states in general terms that “It will sometimes be necessary, or even essential, to lay down a number of procedural rules at European level, which will constitute common minimum guarantees intended to strengthen mutual trust between the Member States’ legal systems” and even that “discussions should be directed towards a certain degree of harmonisation of the procedures”. It envisages the adoption of a “series of ancillary measures [which] would consist in seeking to make more efficient the enforcement, in the requested State, of judgments delivered in another Member State”, notably by allowing “precise identification of a debtor's assets in the territory of the Member States” so that mutual recognition can operate in the context of “enhancing cooperation between Member States' courts”, and measures for the “harmonisation of conflict-of-law rules”.

5
To gather the information needed for this programme, the Commission had a study done on the recovery of maintenance claims in the Member States of the European Union.

The summary report concluding the study done for the Commission states that “The recovery of maintenance claims in the Member States accounts for a vast mass of litigation as a result of the fragile state of family relationships” and “a Community problem as a result of the free movement of Community citizens”.

Even so, the statistics relating to cooperation between Member States do not appear to reveal the true volume of cases requiring them to take action.

As the report on the study says, “a detailed analysis of the French figures throws up a few surprises. Last year France received 11 requests from Germany, where it sent five. It received four cases from the United Kingdom and sent six. The German and English reports contain comparable figures. We are bound to be surprised by these low numbers of cases. Given the size of the population of these three States, their geographical proximity and their close links, it can reasonably be assumed that there must be thousands or even tens of thousands of potential cases”.

There are no European statistics on the number of maintenance claim cases requiring cross-border recovery, but a number of figures offer interesting pointers.

According to Community statistics, in 1999, about six million citizens of Union Member States resided in another Member State.

In many Union countries the number of divorces per 1000 inhabitants is close to half the number of marriages.

The report on the study for Italy records that in 2000 the courts handled 155 621 divorce or separation petitions. Yet that year Italy had a divorce rate of 0.7 per 1000 inhabitants, which is four times lower than that for ten of the fifteen Member States.

The Spanish report shows that 80% of the divorce or separation orders award maintenance, but that it is not actually paid in 50% of cases.

And the report for Sweden, which has a population of 8.8 million, states that in 2001 about 21 000 maintenance debtors registered at the social security authorities resided abroad. The total maintenance payments made by them were approximately €7 million.

All these figures together give an idea of the importance, in several respects, of the question of the recovery of maintenance claims in the European law-enforcement area.

Large numbers of people are concerned; the difficulties met by some of them can be extremely costly to them, both in material and in psychological terms; and the sums that States have to pay out to make up for the defaults of certain debtors are considerable.

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1 It can be consulted on the website of the Directorate-General Justice and Home Affairs at: [http://europa.eu.int/comm/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm](http://europa.eu.int/comm/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm)
It is true that the cross-border recovery of maintenance claims does not always demand cooperation between States, either because debtors pay up spontaneously or because creditors apply individually for the enforcement measures available to them. But many creditors probably do not insist on their rights because they are unaware of the cooperation mechanisms on which they can call, because there are no assistance facilities in their case, as in the case of an adult debtor residing in a country that provides cooperation only for minors, or because they give up after years of trying in vain.

The study report shows that the cross-border recovery of maintenance payments in the European law-enforcement area encounters all manner of difficulties even before the judgment awarding maintenance is given, on account of the deficiencies in cooperation between States, or at the actual enforcement stage.

Merely abolishing the exequatur would not suffice to remove all obstacles to recovery of maintenance claims in the European law-enforcement area, and other measures would have to be put into effect.

3.1.2. Work done at the Hague Conference

The Hague Conference on Private International Law\(^2\) has also launched work on maintenance obligations so as to modernise the rules in the existing Conventions – a series of regional and bilateral agreements and five international conventions.

These are:

– The Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children (ratified by Austria, Belgium, France, Germany, Italy, Luxembourg, the Netherlands, Portugal and Spain);

– The Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children (ratified by Austria, Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Portugal, Spain and Sweden);

– The Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations (ratified by France, Germany, Italy, Luxembourg, the Netherlands, Spain and Portugal). This Convention replaces the Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children in relations between the States that are parties to it;

– The Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations (ratified by Denmark, Finland, France, Germany, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom). This Convention replaces the Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children in relations between the States that are parties to it;

and:

- The New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance, concluded in the UN\(^3\) (ratified by all the European Union Member States).

In 1995 the Hague Conference convened a Special Commission at which a set of recommendations were addressed to the States parties to these Conventions. Four years later another Special Commission unfortunately had to conclude that little improvement had been made to the set of Hague and New York Conventions. It suggested preparing a new instrument that would “be comprehensive in nature, building upon the best features of the existing Conventions”.

Following the conclusions of this second Commission, the Special Commission on General and Policy Affairs of the 19\(^{th}\) Diplomatic Session of the Hague Conference in April 2002, accepting the conclusions of the previous meeting, held in 2000, decided to enter as a priority agenda item the preparation of a new general convention on maintenance obligations.

An initial Special Commission to exchange views between the delegations of the Member States of the Conference met in May 2003, and a second meeting is scheduled for 2004.

### 3.2. Relationships between the Community instruments and the Hague Conventions

The commencement of work at the Hague Conference in parallel with work in the Community inevitably raises questions of the relationship between the two. As the Commission sees it, the relationship should be seen in terms of the search for possible synergies between them. The Community should be in a position to adopt a coherent strategy in the negotiations at the Hague so as to make a positive contribution to improving international cooperation in the recovery of maintenance claims.

In April 2003 the Commission accordingly presented the Council with a recommendation for a decision authorising it to open negotiations on behalf of the European Community for the adoption of a Convention on maintenance obligations in the Hague Conference.

The Commission regrets that to date the Council has not decided to give the Commission that authorisation and that the Community is therefore absent from the negotiating table.

Certain Member States consider that priority should be given to work at the Hague Conference over work done at Community level. They feel it would be preferable to await the results of the Hague negotiations before proceeding to give effect to the Tampere conclusions and the Mutual Recognition Programme.

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\(^3\) Incidentally, a Convention on the simplification of procedures for the recovery of maintenance claims was adopted by the Member States in 1990 but never came into force.
The Commission cannot share this view. In the past the Hague Conference has been an important instrument for reinforcing judicial cooperation between the Member States of the European Union. In the absence of powers conferred on the Community by the Treaties in matters of judicial cooperation, the Member States were obliged to use treaty instruments such as the Treaties concluded between themselves (the Brussels Convention of 1968 or the Rome Convention of 1980, for instance) or negotiated in various international organisations, the Hague Conference being foremost among them.

But with the Amsterdam Treaty, the Member States decided to confer direct powers on the Community to adopt instruments and take action for judicial cooperation in civil matters. Since Amsterdam, the construction of the European law-enforcement area in civil matters no longer depends on international conventions being negotiated and ratified but on regulations, directives and decisions being adopted.

The Hague Conference has thus lost one of the functions that it exercised over the decades: a forum where the Member States pursued an objective of closer integration with each other. It is interesting that Article 65 of the Amsterdam Treaty refers expressly to two specific areas previously governed by Hague Conventions extensively ratified by the Member States – the service of documents and the gathering of evidence, where two Community Regulations have now been adopted.

Even so, the Hague Conference has not ceased to be of interest to the European Community. For the European Community this international organisation, which has absorbed many new members in recent years, represents an international forum for the development of a policy of cooperation with the world at large in the area of civil justice. This is, of course, why the Community decided to apply for accession to it, and negotiations are ongoing, conducted by the European Commission.

The experience of the Hague Conference in private international law and the discussion forum that it constitutes for a large number of countries are an inestimable source of inspiration for work being done in the European Community.

This is especially obvious in the specific case of maintenance obligations, where the Commission is glad to have had the benefit of the Hague Conference’s preparatory documents and the discussions held in May 2003, where it had observer status.

While it is quite possible that in certain areas the Hague negotiations might yield results reducing the need for a Community instrument – as would be the case for the conflict-of-laws rules if satisfactory solutions were adopted, provided the Community could accede to the Convention – the difference as regards the level of integration between the Member States as compared with non-member countries and the scale of the objectives pursued raises the need to seek specific Community solutions. Cooperation between the Member States, which have at their disposal not only a more fully consistent and more complete system of rules of direct jurisdiction and recognition of judgments but also an operational European Judicial Network, can without doubt be closer than with non-member countries.

But while the ambitions and possibilities clearly remain different, there is both scope and a need for excellent synergies in work done in the community and in the world at large respectively.

The Commission has accordingly decided to launch a general debate on the two exercises by issuing this Green Paper.
4. SCOPE OF THE FUTURE INSTRUMENTS

The scope of an instrument is difficult to define when its content has not yet been determined. Very different rules in matters such as the applicable law, legal aid, or cooperation might be adopted, depending on the scope of the instrument.

But some of the questions that will arise can already be identified. They are the definition of maintenance obligations and the nature of the claims to which the future instruments should apply, the categories of decisions or acts, and the people to be affected.

4.1. Concept of maintenance obligations

On the concept of maintenance obligations, the Court of Justice of the European Communities, in a case concerning the Brussels Convention of 1968, took a broad view. In L. de Cavel v J. de Cavel⁴ the Court held that the “compensatory payment” after divorce provided for by French law was to be treated as a maintenance obligation since it was “fixed on the basis of their respective needs and resources”. Likewise, in A. Van den Boogaard v P. Laumen,⁵ it held that “a decision rendered in divorce proceedings ordering payment of a lump sum and transfer of ownership in certain property by one party to his or her former spouse must be regarded as relating to maintenance ... if its purpose is to ensure the former spouse's maintenance”. But the Court felt no need to rule on maintenance obligations in the succession context. For the avoidance of doubt, it might be necessary to define the maintenance obligations covered by a future European instrument.

The Hague Conventions and the New York Convention do not define maintenance obligations. But there is a specific provision in Article 8 of the 1973 Convention on the Law Applicable to Maintenance Obligations that removes all ambiguity as to the application of the Convention to maintenance obligations between divorced spouses.⁶

4.2. Arrears

The question of arrears, that is to say the recovery of maintenance awarded by a court but not actually paid, arises in a number of cases.

Difficulties can arise in particular if the law of the country where the judgment is to be enforced provides that the judgment awarding maintenance can be enforced, after exequatur, only for future payments, or permits the recovery of arrears only in respect of a limited period.

⁶ Hague Conference on Private International Law. Preliminary Document No 1, September 1995. Note on the operation of the Hague Conventions relating to maintenance obligations and of the New York Convention on the Recovery Abroad of Maintenance, page 8, which states that the uncertain nature of the maintenance allowance to a divorced spouse (which, according to the State, may have the character of maintenance or of an indemnity, or a mixed character) justified the Convention containing a special solution.
4.2.1. The Community project

Regarding the recognition and enforcement in one Member State of a judgment given in another Member State, the abolition of the exequatur procedure would not change the current position whereby the effects of the judgment in the requested State are the same as in the State of origin.

But as enforcement procedures are governed by the law of the requested State, the question of the possibility of having an earlier decision enforced and therefore obtaining payment of arrears can arise in States where the limitation rules are regarded as procedural.

4.2.2. Draft Hague Convention

At the Special Commission in May 2003, the question of arrears was raised, and several delegations pointed out that difficulties can arise where a judgment is to be enforced abroad on account of the major divergences between the different systems of law and the absence of clear rules in the common law systems.

Article 11 of the Hague Convention of 1973 on the recognition and enforcement of decisions relating to maintenance obligations provides: “If a decision provided for the periodical payment of maintenance, enforcement shall be granted in respect of payments already due and in respect of future payments”, and this could be taken over in the future Convention.

On the international scale there is a further difficult in that some States refuse to recognise and enforce certain foreign judgments because they consider that the court that gave them lacked jurisdiction, and they accordingly commence new proceedings on the merits. If the new judgment does not order the payment of arrears, part of the amount due to the creditor under the initial judgement can no longer be claimed from the debtor.

4.3. Persons to whom the future instruments should apply

An analysis of the rules of domestic law in the European Union Member States shows that the types of relationship that can generate a maintenance obligation between two people vary from one State to another, since sometimes only parents and their children or spouses or ex-spouses are concerned whereas elsewhere the family circle is broader, extending even to cohabiters and “registered partners”.

Moreover, the recovery of maintenance is sometimes handled by public agencies, acting either on behalf of the creditor or subrogated to the creditor’s rights or seeking recovery of welfare benefits paid to help the creditor meet his or her needs in the event of default by the debtor. But certain Member States refuse to cooperate in recovering sums that these agencies claim. The assistance given to maintenance creditors by public bodies, whatever its form, is based on a policy of national solidarity. It is costly, and the sums paid to maintenance creditors should not be left to be borne definitely by States where the debtor has the means to settle the debt.
In *Gemeente Steenbergen v Luc Baten*, the Court of Justice of the European Communities interpreted the first paragraph of Article 1 of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters as meaning that “the concept of ‘civil matters’ encompasses an action under a right of recourse whereby a public body seeks from a person governed by private law recovery of sums paid by it by way of social assistance to the divorced spouse and the child of that person, provided that the basis and the detailed rules relating to the bringing of that action are governed by the rules of the ordinary law in regard to maintenance obligations”. It also held that the concept of ‘social security’ does not encompass the action, as it is excluded from the scope of the Convention. But it held that “Where the action under a right of recourse is founded on provisions by which the legislature conferred on the public body a prerogative of its own, that action cannot be regarded as being brought in ‘civil matters’”.

This question is also being considered in the Hague Conference. The two most recent Hague Conventions went for a broad scope, as they apply “to maintenance obligations arising from a family relationship, parentage, marriage or affinity, including a maintenance obligation in respect of a child who is not legitimate”. The Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations adds that it applies “to a decision rendered by a judicial or administrative authority in a Contracting State in respect of a maintenance obligation arising ... between:

1. a maintenance creditor and a maintenance debtor; or

2. a maintenance debtor and a public body which claims reimbursement of benefits given to a maintenance creditor.”

But both Conventions provide for the possibility of entering reservations as to their application to maintenance obligations between persons related collaterally or by affinity. Several States, including certain Member States of the European Union, have exercised this right when ratifying the Conventions.

The question also arose at the first Special Commission to elaborate a draft Convention at the Hague Conference on Private International Law in May 2003, given that the cooperation obligations imposed on the States by a broad scope would be very heavy.

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7 Case C-271/00 (Fifth Chamber) [2002] ECR I-10489 (judgment given on 14 November 2002).
It could also arise in the European Community, as certain Member States seem reluctant to accept the idea of providing assistance to adults or public bodies in the enforcement of foreign judgment given for them.

Question 1

Should the future instruments:

a. – define the concept of maintenance obligations? If so, how?

b. – apply to the recovery of arrears?

c. – apply to public bodies, in particular as regards cooperation?

d. – apply to all persons likely to enjoy maintenance claims in the different legal systems?

Should distinct solutions be adopted for the future Community instrument and the future Hague Convention? If so, what solutions?

5. RULES OF PRIVATE INTERNATIONAL LAW

5.1. Direct jurisdiction

5.1.1. Community rules

As has already been seen, Regulation (EC) No 44/2001 is applicable to maintenance obligations, and Article 5(2) lays down special rules of jurisdiction alongside the general rule.

When Regulation (EC) No 2201/2003 of 27 December 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 was being drafted, the question arose whether Regulation (EC) No 44/2001 should specify that actions concerning parental responsibility were included within the concept of actions relating to the status of persons so as to enable the relevant authorities ruling on such cases to rule also on the related maintenance claims.

The possibility of joining the two types of action, concerning parental authority and maintenance obligations, could be very useful. By way of example, judgments giving one of the parents custody of the child commonly award maintenance against the other parent, and the simplest solution is clearly to confer jurisdiction over the two questions to the authorities of the same State.

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At the end of the day the conclusion was that questions relating to parental authority were already covered by Article 5(2) of Regulation (EC) No 44/2001. To avoid all ambiguity, the eleventh recital to Regulation (EC) No 2201/2003 reads: “Maintenance obligations are excluded from the scope of this Regulation as these are already covered by Council Regulation No 44/2001. The courts having jurisdiction under this Regulation will generally have jurisdiction to rule on maintenance obligations by application of Article 5(2) of Regulation (EC) No 44/2001”.

Most questions relating to the direct jurisdiction of the authorities empowered to rule on applications for the determination or modification of maintenance claims have thus been settled as regards the Community.

5.1.2. Draft Hague Convention

The rules set out above, of course, do not apply in relations between Member States of the European Union and non-member countries.

And the various international conventions applicable in certain Member States of the European Union do not contain provisions on the direct jurisdiction of the original court, that is to say provisions designating the country whose authorities have jurisdiction to rule on applications for the determination of maintenance obligations where a case involves an international element, and the question arose of the need to introduce such rules in the future Hague instrument.

In general terms, the absence of rules of direct jurisdiction binding the States parties to an international instrument leaves a degree of uncertainty as to the law since recognition and enforcement can be refused abroad on the ground that the trial court lacked jurisdiction. The parties to a case might elect to go to the authorities of different States to obtain a judgment. There would then be a difficulty when recognition and enforcement are applied for abroad as each of the parties seeks the application of different judgments. The adoption of rules of direct jurisdiction would avoid these problems and indeed facilitate the recognition and enforcement of judgments.

The current absence of uniform rules binding the Member States of the Hague Conference generates two types of difficulty.

5.1.2.1. Initial applications

Regarding initial applications, that is to say the original application to the relevant authority by one person for determination of a maintenance claim against another, a very substantial number of Hague Conference Member States apply similar rules of jurisdiction (jurisdiction of the court or other authority for the debtor’s or creditor’s domicile or residence). This is the case of the Member States of the European Union and also of the Latin American States.

But other States do not recognise the jurisdiction of the authorities of the State of the maintenance creditor’s habitual residence. In the United States, for example, the courts for the creditor’s domicile or residence consider that the American constitutional principle of due process does not allow them to accept the jurisdiction if they do not have a sufficient connection with the debtor.
Where a maintenance creditor is habitually resident in the United States, unlike the debtor who has no connection with that country, the American authorities ask the authorities of the State of the debtor’s domicile or residence to take proceedings for the determination of the maintenance obligation or the paternity of the child for whom maintenance is applied for.

Since the New York Convention of 1956, Article 6 of which provides “The Receiving Agency shall, subject always to the authority given by the claimant, take, on behalf of the claimant, all appropriate steps for the recovery of maintenance, including the settlement of the claim and, where necessary, the institution and prosecution of an action for maintenance ...”, is not applicable in their relations with the United States, where it has not been ratified, certain States consider that they are not required to provide the relevant cooperation.

The result for certain American litigants who cannot afford legal representation and court costs abroad is that they cannot obtain a judgment determining their maintenance claim.

5.1.2.2. Applications for modification

In the Member States of the Hague Conference, various rules of jurisdiction apply as regards applications for modification of the initial decision determining maintenance obligations.

Regulation (EC) No 44/2001 allows creditors to sue the debtor either in the courts for their own domicile or habitual residence or in the courts for the debtor’s domicile, whereas the debtor can sue the creditor only in the courts for the creditor’s domicile. The Regulation also allows prorogation of jurisdiction.

The Inter-American Convention of Montevideo of 15 July 1989 on support obligations makes a distinction between applications to increase the amount of the maintenance, applied for by the creditor, who has an option, and applications to discontinue or reduce support, generally made by the debtor, where the authorities of the State that set the amount of support have sole jurisdiction. But prorogation of jurisdiction is allowed.

Certain States maintain the jurisdiction of the court that rules on the initial claim, provided one of the parties still resides within the area of its geographical jurisdiction at the time of the application for modification.

Consequently difficulties can arise from differences between the rules applicable in the different systems where the parties change their domicile or residence. This can generate conflicting judgments where different courts are recognised as having jurisdiction, and in some cases it can be impossible for the parties to obtain a judgment if no court accepts the jurisdiction.

Certain Commonwealth States have a system in which all judgments on the initial claim or applications for modification are given in two stages, the first of them in the creditor’s country of residence and the second in the debtor’s country of residence. This system has also been adopted in agreements with a number of other States that are not Commonwealth members. Obviously a system like this can operate only if the States of the creditor’s and the debtor’s residence apply the same rules. Where the State of the debtor’s residence does not have this system, the first stage of the trial process is not followed up and there can be no enforceable judgment.

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9 But the United States has cooperation agreements with several States.
Certain States consider that some of these difficulties could be settled by means of rules of cooperation.

Others, in their replies to the Hague Conference questionnaire or at the meeting of the Special Commission in May 2003, stated their wish for the future convention to contain rules of direct jurisdiction.

Cases where the American courts decline to rule on claims by creditors residing within their geographical jurisdiction will be relatively few and far between as recent legislation has determined a fairly extensive list of cases in which they can accept the jurisdiction for maintenance obligations even though the debtor resides abroad.

There are a variety of possible solutions: insert no rules of direct jurisdiction in the future convention but include provisions only for modification judgments, endeavour to devise universally acceptable rules without weakening the principle of the jurisdiction of the court for the creditor’s place of residence, adopt rules inspired by Regulation (EC) No 44/2001 or the Montevideo Inter-American Convention, provide for the possibility of a general reservation or a reservation applicable solely in specific cases, or insert optional rules of direct jurisdiction in the future convention.

Question 2
Should the future Hague Convention:

a. – contain a full set of rules of direct jurisdiction? If so, what rules should be adopted?

b. – contain rules of direct jurisdiction applicable only to application for modification of an earlier judgment? If so, what rules should be adopted?

5.2. Recognition and enforcement of judgments

As regards judgments concerning maintenance obligations, the Programme of Measures for the implementation of the principle of mutual recognition of decisions in civil and commercial matters, as already seen, expressly provides for the abolition of the exequatur, that is the procedure that must be followed in the courts of a State to have judgments given in other States recognised and enforced. Means of facilitating the recognition and enforcement of judgments are also being sought at the Hague Conference.

The question arises differently in the Community, where the movement of judgments has been fairly free for some years now, especially since Regulation (EC) No 44/2001 came into force, and as between Member States of the Hague Conference, which are not always bound by the same Conventions, which have sometimes very different legal systems and levels of development and which are to be found in all four corners of the globe.

But in both cases it is clearly indispensable to seek out means of enabling judgments to be recognised and enforced as quickly as possible. It must be borne in mind that the settlement of a maintenance claim is always rather urgent and that, as long as debtors have a remedy allowing them to defend their rights in the event of a dispute, the creditor’s rights must be regarded as predominant.
5.2.1. Community project

5.2.1.1. Abolishing the exequatur

A European instrument abolishing the exequatur could be inspired by Council Regulation (EC) No 2201/2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealing Regulation (EC) No 1347/2000, or by the draft Regulation establishing a European enforcement order for uncontested claims.

Both instruments provide that relevant judgments given by the courts of a Member State are to be recognised in the other Member States without any declaration of enforceability being required and without any possibility of opposing recognition.

If the idea of abolishing the exequatur for maintenance judgments comes up, there will be the question whether there are difficulties to preclude it.

Council Regulations (EC) Nos. 1347/2000 and 44/2001, which contain rules relating to the exequatur procedure, provide that the defendant in the principal action may oppose recognition and enforcement of judgments given in another Member State, in particular where they are manifestly contrary to the public policy of the requested State or where defence rights have not been respected.

On the first point, the report on the study done for the European Commission shows that, even if there are “several potential conflicts, the concept of international public policy is a false problem rather than a real barrier. It is clear from the national reports that the concept is applied in only a handful of cases”.

A few questions might remain for certain States, such as the recognition and enforcement of judgments accepting a maintenance claim from parties to the new forms of marriage and partnership recently introduced.

Regarding defence rights, the report on the study done for the European Commission states that no decisions taken in certain countries by mediators were notified. By the same token, the administrative authorities of certain countries issue certificates of entitlement unknown to the debtor. Elsewhere the service of procedural documents is handled by a guardian *ad litem* where the debtor cannot be traced, which certain requested States would regard as an unacceptable procedure.
The question is whether there are real difficulties here and, if so, what solutions would remove them. It must be borne in mind that the Mutual Recognition Programme calls for the adoption in certain areas, and particularly where abolition of the exequatur is planned, of minimum procedural guarantees to ensure that the requirements for a fair trial are strictly observed. This is reflected in, for instance, Regulation (EC) 2201/2003, which provides for judgments relating to rights of access to be recognised and enforceable in another Member State without the need for a declaration of enforceability if all parties concerned, and in particular the child, were given an opportunity to be heard.

Question 3

Are there considerations that might make it difficult to abolish the exequatur in the Community on grounds of:

a. – public policy?

b. – failure to respect defence rights?

If so, how could these difficulties be solved? Should certain procedural guarantees be adopted or reinforced?

5.2.1.2. Provisional enforcement

The legislation of certain Member States provides that judgments relating to maintenance obligations are automatically provisionally enforceable; in other States’ systems, provisional enforcement is merely an option for the courts; and in some systems the possibility does not exist. Where there is no provision for provisional enforcement, it is sometimes possible for the creditor to obtain a provisional decision applicable from the beginning of the procedure until the judgment on the merits has become final.

Generally speaking, the very subject-matter of a judgment making a maintenance order, the aim of which is to enable creditors to cover their basic daily needs, would justify a general possibility for the court to order provisional enforcement, and consequently for the judgment to be enforced immediately after being given.

The possibility of ordering payment of maintenance by a decision made in the course of proceedings until final judgment is given on the merits is even more effective since it enables the creditor to be paid maintenance from the very beginning of the proceedings until the time allowed for an appeal has expired or an appeal has been brought, but it would not genuinely facilitate the recovery of maintenance abroad as it would require the enforcement of two successive judgments. Generally speaking, where maintenance claims are to be recovered abroad, the existence of time limits in judicial cooperation procedures makes it all the more necessary to seek means of expediting the procedure as a whole. Provisional enforcement of the judgment at least assures the creditor that the judgment can be served immediately on the relevant authority in the debtor’s country of residence for enforcement.
There are a number of reasons why it is clearly difficult to contemplate provisional enforcement being available only for judgments likely to come up for enforcement abroad. After all, when judgment is given, the situation may not already be an international one. But the fact remains that there is no good reason for applying solutions that are less favourable to creditors simply on the ground that the debtor is abroad.

It might be possible to envisage making provisional enforcement generally available for judgments relating to maintenance obligations given in the Member States.

This, incidentally, is the solution recommended by the study done for the Commission on making more efficient the enforcement of judicial decisions within the European Union.\(^{10}\)

Article 41 of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, relating to access rights, provides: “Even if national law does not provide for enforceability by operation of law of a judgment granting access rights, the court of origin may declare that the judgment shall be enforceable, notwithstanding any appeal”. Article 42, relating to the return of children removed illegally, contains a similar provision.

These provisions could be taken as a model for a future European instrument on maintenance obligations. But a provision merely giving the court the option of ordering enforcement might not be sufficient, given the interests at stake, and it would be better to provide for judgments relating to maintenance obligations to be automatically eligible for provisional enforcement.

\begin{tabular}{|c|}
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\textbf{Question 4} \\
Are there specific difficulties that would preclude the principle of automatic provisional enforcement of judgments relating to maintenance obligations? \\
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\subsection*{5.2.1.3. Enforcement procedure as such}

In certain States, the facilities for enforcing a judgment awarding maintenance can be put into effect by a professional officer as soon as the judgment is enforceable; in others, once the judgment has been given and has become enforceable, it is enforced by officials of the court under the authority of a judge, who must authorise enforcement by a decision that may be appealable. This procedure is also applicable to foreign judgments declared enforceable by the exequatur procedure.

The need for a judicial procedure for enforcement and the redress procedures and remedies available to the defendant are probably serious brakes on the enforcement of the judgment, not only because enforcement can be suspended during the proceedings but also, more generally, because of the long time taken by proceedings in some Member States.

\footnote{Accessible on the website of the Directorate-General Justice and Home Affairs at: \url{http://europa.eu.int/comm/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm}}
The recommendations of the Tampere European Council calling on the Council to abolish “the intermediate measures which are still required to enable the recognition and enforcement of a decision or judgment in the requested State … for maintenance claims”\textsuperscript{11} and to “establish … special common procedural rules for simplified and accelerated cross-border litigation on … maintenance claims”\textsuperscript{12} are difficult to reconcile in certain cases with the slowness of the procedures for authorising enforcement of a judgment in an area where speedy enforcement is truly necessary.

The first question is whether it might be possible to simplify and expedite the procedure in the court of enforcement. It might be possible to simplify certain formalities or to set time limits.

Without wishing to deprive the debtor of all the possibilities for challenging seizure of his assets where he has settled the debt in full or if he voluntarily makes the maintenance payments to which he has been ordered, for example, it could be provided that no action would basically suspend enforcement. Suspension might, of course, be warranted in some cases, but would then be ordered only exceptionally, on application.

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\textbf{Question 5} \\
\textbf{As regards the enforcement of judgments, can provision be made for:} \\
ap. simplification of procedures for the enforcement of judgments that exist in certain Member States? Time limits to be set? \\
b. enforcement to be suspended only in exceptional cases? \\
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5.2.2. Enforcement measures

The study on making more efficient the enforcement of judicial decisions within the European Union, mentioned above, suggests that the principle of territoriality of enforcement measures be abandoned in favour of a principle of universality and of a degree of mutual recognition of enforcement measures.

It recommends a number of improvements, some of which could usefully be deployed in the recovery of maintenance claims.

In particular it suggests introducing a European Statement of Assets for debtors, based on the measure that exists in certain European Union Member States and enables creditors to question the other side on their assets. It also mentions a European Bank Account Seizure Order on the basis of an enforceable judgment that could be enforced abroad. Such innovations, the former in particular, would be very useful for the recovery of maintenance claims.

But in this particular area it could also be provided that a salary attachment order in one European Union Member State is enforceable without further proceedings in the other Member States.

\textsuperscript{11} Tampere European Council. Presidency Conclusions, point 34.
\textsuperscript{12} Tampere European Council. Presidency Conclusions, point 30.
Such an innovation would not necessarily be useful for the recovery of claims in States where court bailiffs are responsible for enforcement measures, but elsewhere it would save time since it would obviate the need to apply to a court or other authority for an attachment order on the debtor’s salary.

**Question 6**

Could it be provided that a salary attachment order against a maintenance debtor in one European Union Member State is enforceable without further proceedings in the other Member States?

What other specific measures would be helpful?

5.2.3. *Draft Hague Convention*

In accordance with the guidelines agreed by the General Affairs Commission of the Hague Conference in 2000 and 2002, the draft Convention should basically contain rules on the recognition and enforcement of judgments concerning maintenance obligations, based on those in the two Conventions adopted by it in 1958 and 1973. In their replies to the questionnaire sent them by the Conference, a substantial majority of the Member States recommended the insertion of such rules in the future convention. But a variety of delicate questions arise here.

5.2.3.1. Procedures for recognition and enforcement

The Permanent Bureau of the Hague Conference has argued in favour of abolishing the exequatur, as provided by Articles 41 and 42 of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, though it does wonder about the conditions in which the certificate from the State of origin that is to accompany the judgment under the Regulation is to be issued.

This suggestion has prompted a great variety of reactions, as some delegations agree to the abolition of the exequatur provided the debtor still has a redress procedure after the judgment has been served by the authorities of the requested State or at the enforcement stage, following the process familiar in certain common-law systems, or by the simplified exequatur procedure provided for by Council Regulation (EC) No 44/2001. Others argue that abolishing the exequatur is not possible without harmonisation of the conflict-of-laws and jurisdiction rules, or that it would be impossible internationally on account of the disparities between bodes of domestic legislation.
Many delegations have expressed interest in using quicker procedures.

**Question 7**

Should the future Hague Convention provide for a simplified exequatur system similar to the one provided for by Regulation No 44/2001? What other solutions are possible for facilitating and accelerating recognition and enforcement of judgments?

5.2.3.2. Indirect jurisdiction as a condition for recognition and enforcement

The Hague Conventions on the recognition and enforcement of judgments relating to maintenance obligations contain rules of indirect jurisdiction on which their application depends. Both provide for the jurisdiction of the courts for the debtor’s or creditor’s habitual residence and the court to whose jurisdiction the debtor submits. The 1973 Convention further provides that the authority of a Contracting State which has given judgment on a maintenance claim shall be considered to have jurisdiction for the purposes of the Convention if the maintenance is due by reason of a divorce or a legal separation, or a declaration that a marriage is void or annulled, obtained from an authority of that State recognised as having jurisdiction in that matter, according to the law of the State addressed.

There is no controversy about the criteria of the debtor’s habitual residence or submission to the jurisdiction of the court in which the creditor brought the action, which are universally accepted or at least could be in the context of an international agreement.

But the criterion of the creditor’s habitual residence raises difficulties in relations between the United States and all the other Member States of the Hague Conference. The Hague Conference suggests adopting a “fact-based” approach, whereby “Either State is in effect permitted to apply its own standards. In other words, a decision given in the originating State will be recognised and enforced if, on the same facts, the exercise of jurisdiction would have been possible in the requested State. Under this principle, it would not matter what jurisdictional bases the requesting State’s court articulated when it rendered the judgment. The crucial question is whether, regardless of the reason stated by the court of the requesting State, the facts of the case would support jurisdiction under the rules of the requested State. If so, the judgment should be recognised. If not, the requested State should take appropriate steps to establish a new decision.”

The fact-based approach to indirect jurisdiction raises a practical difficulty, since it presupposes that when examining the application for recognition and enforcement, the relevant authority of the requested State has adequate information on the grounds on which the trial court assumed jurisdiction to be able to make the comparison with the rules of jurisdiction in its own law. This would require the trial court, at the time of judgment, to be familiar with the criteria for jurisdiction taken by the court in the State that is to be requested and to take pains to make clear in the judgment that this or that criterion was indeed present. The difficulty lies in the fact that when the judgment is given the situation is not necessarily an international one.

The Permanent Bureau report suggests that the information that could help the court entertaining the application for recognition and enforcement to rule on the indirect jurisdiction of the original court be sent by the authorities of the requesting State by way of cooperation measures. The question is obviously linked to the functions that could be entrusted to the authorities in the Contracting States responsible for cooperation. But this still depends on their having the means of gathering the requisite information.

The Permanent Bureau of the Hague Conference proposes adopting the following provisions:

“1. A maintenance decision made by a court / authority in one Contracting State (the State of origin) shall be recognised and enforced in all other Contracting States if—

a. ...

b. ...

c. the facts in the case would, mutatis mutandis, have supported jurisdiction under the rules of the requested State; or

d. the creditor was (habitually) resident in the State of origin at the time proceedings were instituted.

2. A Contracting State whose own authorities or courts are not permitted to make a maintenance decision based solely on the residence of the creditor within the jurisdiction may make a reservation in respect of paragraph 1(d).”

States making the reservation provided for by paragraph 2 should undertake to commence new proceedings to obviate this difficulty. But it must be remembered that this solution would cause two distinct decisions to coexist, having effect in different States, with all the difficulties that could flow from this situation if the debtor changes residence. It might also make the recovery of part of the arrears impossible.

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Question 8

Would the “fact-based” approach be workable in practice?

Is there another preferable solution? If so, what solution?

In the course of discussions at the Special Commission in The Hague in May 2003, three other criteria for indirect jurisdiction were considered – the common nationality of the parties, the divorce, or questions related to parental responsibility. The possibility of leaving the parties with a degree of autonomy was also raised.

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None of the delegations wished to maintain the criterion of the parties’ common nationality. But the indirect jurisdiction of a court hearing an action to determine personal status did not seem to raise difficulties. And this solution would be perfectly compatible with Community legislation. As for the autonomy of the parties, some experts felt it would be dangerous to allow complete freedom in an area where the relative strengths of the parties might be seriously out of balance and consequently to allow the indirect jurisdiction of a court agreed on by debtor and creditor.

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<th>Question 9</th>
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<tr>
<td>Should indirect jurisdiction be based on:</td>
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<tr>
<td>a. the solution adopted by Article 8 of the Hague Convention of 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations?</td>
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<tr>
<td>b. the court agreed on by debtor and creditor? Should the parties’ freedom of choice be limited?</td>
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</tbody>
</table>

5.2.3.3. Grounds for refusing recognition

The Hague Conventions of 1958 and 1973 provide that recognition and enforcement may be refused if they are manifestly incompatible with the public policy ("ordre public") of the State addressed or if the decision is incompatible with a decision rendered in the State addressed. The 1973 Convention adds two further grounds – fraud in connection with a matter of procedure and the existence of proceedings between the same parties and having the same purpose.

At the Special Commission in The Hague in May 2003, several delegations supported confining the grounds for refusing recognition and enforcement basically to violation of defence rights, violation of public policy, conflicting decisions and *lis pendens*.

But the question of conflicts of decisions is particularly acute in matters of maintenance obligations, as several successive decisions can be given perfectly correctly as the respective situations of the parties evolve. Obviously priority must be given to recognition and enforcement of the latest decision, provided it was given by the proper authority. If this question is not settled by the introduction of a rule of direct jurisdiction in the Convention, it will have to be settled by a rule of indirect jurisdiction.

Apart from that, most States seem to be in broad agreement on rejecting the principle of decisions being reviewed as to substance by the requested State.

But it seems that when the authorities of certain European Union Member States are requested to recognise and enforce a judgment given on the merits, whether in a European Union Member State or elsewhere, they commence new proceedings to determine the maintenance claim, even though the original judgment meets the conditions for recognition and enforcement, arguing that the judgment cannot be enforced as the debtor is insolvent or the respective situations of the parties have changed.
This practice is not compatible with Regulation (EC) No 44/2001 or with the Hague Conventions, which prohibit reviewing the substance of foreign judgments at the exequatur stage, or even with the New York Convention of 1956, which allows fresh proceedings only within the limit of the powers conferred by the creditor.

### Question 10

At the exequatur stage:

- a. what grounds for refusing recognition and enforcement should be in the future Convention?
- b. in the event of a conflict of judgments, how should the judgment to be enforced be distinguished?
- c. should there be a strict prohibition on reviewing judgments given in the State of origin, or should exceptions be allowed, and if so, in what circumstances and for what purposes?

### 5.3. Applicable law

Neither Regulation (EC) No 44/2001 nor any other Community instrument contains conflict-of-law rules concerning maintenance obligations. Article 1 §2 b), third indent, of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations, the only instrument of civil law applicable between the European Union Member States containing conflict-of-law rules, excludes from its scope “rights and duties arising out of a family relationship, parentage, marriage or affinity, including maintenance obligations in respect of children who are not legitimate”.

The Hague Conventions of 1956 and 1973 on the law applicable to maintenance obligations having been ratified by only some of the European Union Member States, the conflict-of-law rules applicable in the European law-enforcement area are not currently harmonised.

It was planned that the work in hand at The Hague would extend to this question as the General Affairs Special Commission in May 2000 decided to prepare an exhaustive convention improving the existing Conventions, and in particular the two Conference Conventions on the law applicable to maintenance obligations.

Similar questions arise in the Community and in the world at large. But there is the question whether different responses reflecting the specific features of the two exercises might be called for in the Community draft and the future Hague Convention.
5.3.1. The situation today

There are major divergences in the domestic legislation of States, including European Union Member States, as regards maintenance obligations.

The age at which children cease to be eligible for a maintenance claim on their parents varies from one State to another. The legislation of certain countries does not use an age criterion but looks at children’s situations and their ability to cover their needs.

Some legal systems provide that at least in certain circumstances one of the divorced spouses has a maintenance claim against the other. But other systems apply the contrary principle.

Certain legislations allow maintenance obligations between different family members or unrelated “near ones”, whereas others confine maintenance claims to children and spouses.

The rules of jurisdiction in the different legal systems generally offer the parties an option between the courts of different States, including the State of the creditor’s or defendant’s residence or domicile. The domestic legislation of many Hague Conference Member States recognises the jurisdiction of the courts of nationality or of domicile in the common-law sense. The European legislation offers litigants a variety of possibilities through the combined effects of Regulations (EC) Nos 44/2001 and 1347/2000. The attempt to harmonise the conflict-of-law rules applicable to situations with a foreign element so as to improve certainty in the law is therefore justified both in the Community and in the Hague Conference on Private International Law.

Yet the two Hague Conventions on the law applicable to maintenance obligations have been ratified by very few States, most of which are European Union Member States. The earliest of the Conventions, which was to be replaced by the most recent one, remains applicable in relations between States that failed to ratify the “successor”.

This situation is obviously unsatisfactory in more than one way. The existence of two Conventions binding different States is deleterious to the foreseeability of solutions and is a source of difficulty for practitioners. The absence of treaty-based rules between certain other States aggravates matters.

The Special Commissions that met in 1995 and 1999 showed up a number of difficulties flowing from the content of the Conventions.

The case-law consequently tends to diverge as there are no rules designating the law applicable to paternity, where certain courts apply the law designated by their conflict rules while others apply the law applicable to the maintenance obligation. In more general terms, there is the question of the law applicable to maintenance entitlement.

Article 8 of the 1973 Convention provides that “the law applied to a divorce shall, in a Contracting State in which the divorce is granted or recognised, govern the maintenance obligations between the divorced spouses and the revision of decisions relating to these obligations”. But this rule, which has the advantage of securing continuity in the treatment of a situation under the same law and thus secures certainty as to the law, was disapplied by a judgment of the Supreme Court of the Netherlands on 21 February 1997 on the ground that it was not incompatible with the possibility for the parties to choose the applicable law.
Lastly, the question of the law applicable to limitation periods has prompted difficulties at the stage of the application for recognition and enforcement or of the implementation of enforcement measures abroad. Certain legal systems regard limitation as a matter of substance governed by their own conflict rules, whereas others see it as a rule of procedure, governed by the *lex fori*.

At the Special Commission in The Hague in May 1999, several delegations representing States in the Roman-Germanic legal tradition were in favour of inserting in the new Convention conflict rules inspired by the rules in the 1973 Convention.

Several arguments have been put forward for this, in particular the need to unify and modernise the current convention-based rules and adapt them in such a way as to make them acceptable to all Conference Member States.

The representatives of the common-law countries, on the other hand, argued that there would be difficulties for the courts and additional costs for the parties as a result of applying a foreign law.

Several solutions were considered, including the insertion in the future Convention of a full set of conflict rules, or just of a few rules to amplify the existing Conventions, the absence of conflict rules and the adoption, between States wishing to be bound by such rules, of a Protocol on the law applicable to maintenance obligations.

The attempt to come up with harmonised solutions could be more complex in the broader context than in the narrower context of the European Union Member States.

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<th>Question 11</th>
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<tr>
<td>Should the future Community instrument or the future Hague Convention contain:</td>
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<tr>
<td>a. a full set of conflict-of-laws rules?</td>
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<tr>
<td>b. conflict rules governing specific problems?</td>
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</table>

5.3.2. **Questions to be settled by conflict rules**

5.3.2.1. The principal question

The 1973 Hague Convention, the most recent and the fullest of them, contains a multi-stage system under which maintenance obligations are governed by the law of the maintenance creditor’s habitual residence or, in the alternative, if that law does not allow the creditor to qualify for maintenance, by the common national law of the debtor and the creditor, or, if that law does not give the creditor satisfaction, the *lex fori*.

The Montevideo Convention provides for a different system, since Article 6 reads:

> “Support obligations, as well as the definition of support creditor and debtor, shall be governed by whichever of the following laws the competent authority finds the most favourable to the creditor:

- a) that of the State of domicile or habitual residence of the creditor;
- b) that of the State of domicile or habitual residence of the debtor.”
The law of certain countries also provides for a multi-stage approach or for a system like Montevideo. In others, the law of the creditor’s nationality governs maintenance entitlement.

At the meeting of the Special Commission in The Hague in May 2003, it was observed that if the jurisdiction of the creditor’s lex fori was accepted, along with the application of the law of the creditor’s domicile or residence, the lex fori would be applicable, and this solution would bring the civil and common-law systems into line.

The routine use of the domestic lex fori was also contemplated since at the stage of the original claim it is the creditor who chooses the court and it is therefore up to the creditor to decide which is the most favourable law. But this solution would encourage forum-shopping.

Some commentators have also pointed out that States applying Islamic law, for example, might wish to ratify the future Convention and that the best solution for them would be the lex fori, including its rules of private international law.

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<th>Question 12</th>
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<tr>
<td>What general rules of conflict of laws should be adopted, internationally and for the Community, as regards maintenance obligations?</td>
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</table>

As regards maintenance obligations between former spouses, the question is whether the solution provided for by Article 8 of the 1973 Hague Convention should be maintained. It came in for much criticism at the time but does not seem to have caused major difficulties in practice.

The Hague Conference has considered the idea of leaving scope for the autonomy of the parties on the basis of the ruling of the Dutch Supreme Court, allowing the parties to designate a law applicable to their maintenance obligations differing from the law applicable to their divorce. If this solution were felt to be appropriate, the question would arise whether the parties should be entirely free or whether there should be some ground rules to ensure that one party cannot impose the application of a law that is particularly unfavourable to the other.
As for divorces ordered by a court having jurisdiction under Regulation (EC) No 1347/2000, rules of applicable law could in future be established by a Community instrument, and the question of maintenance obligations between former spouses will be considered in that context.

Question 13

What rule to solve the conflict of laws relating specifically to maintenance obligations between spouses or former spouses should be inserted in the future Hague Convention?

Question 14

Should the parties be allowed to choose the applicable law, and if so, should there be rules applicable to the choice?

5.3.2.2. Scope of the applicable law

The 1973 Hague Convention and the 1989 Montevideo Convention provide that the applicable law determines the status of creditor and debtor, who is entitled to institute maintenance proceedings, and the time limits for their institution. The Montevideo Convention adds that the applicable law governs the amount of support due and the timing of and conditions for payment and other conditions necessary for enjoyment of the right to support. The Hague Convention provides that the law applicable to the maintenance obligation also determines the extent of the obligation of a maintenance debtor, where a public body seeks reimbursement of benefits provided for a creditor.

Under the conflict rules of certain Hague Conference Member States, however, the law of the creditor’s domicile governs the question of maintenance claims and the law of the debtor’s domicile governs the determination of the conditions of the maintenance claim, and in particular the amount awarded.

In certain countries, maintenance obligations are determined on the basis of sometimes highly complex scales of rates. In others, on the other hand, they are determined on the basis of the creditor’s needs and the debtor’s resources in accordance with the principle taken by the 1973 Hague Convention.

The question of how maintenance obligations are determined is particularly important when creditor and debtor reside in countries with very different standards of living. The most serious difficulty arises where the creditor resides in a country with a high standard of living while the salary paid in the debtor’s country of residence is too low to cover the maintenance.

Article 11 of the 1973 Hague Convention provides: “However, even if the applicable law provides otherwise, the needs of the creditor and the resources of the debtor shall be taken into account in determining the amount of maintenance”. Implementing this rule, of course, requires the authority determining the maintenance obligation to have the requisite information, which might involve assistance from foreign authorities. But it would appear difficult to go any further internationally. On the other hand it might be possible to go for a degree of approximation of the rules for determining the amount of maintenance obligations as between European Union Member States.
Moreover, many legal systems have an index-linking scheme that enables maintenance obligations that have been set to be adapted to fluctuations in the cost of living. The procedures for calculating such adjustments vary, of course, from one country to another; they are difficult to understand, and in some cases impossible to apply in a foreign country in the absence of a corresponding reference scale.

It is difficult to envisage international unification of index-linking schemes for maintenance awards. But it might be possible to imagine it in the Community context.

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<tr>
<th>Question 15</th>
<th>What questions should be governed by the system of conflict of laws?</th>
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<tr>
<td>Question 16</td>
<td>How should the question of setting the amount of maintenance obligations be approached, in particular in the Community?</td>
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<tr>
<td>Question 17</td>
<td>How should the question of index-linking maintenance obligations be approached, in particular in the Community?</td>
</tr>
</tbody>
</table>

5.3.2.3. Specific questions

5.3.2.4. Establishment of “family relationships”.

Neither the Hague Conventions nor the Montevideo Convention contain provisions on the law applicable to this question. The 1973 Hague Convention, applicable to “maintenance obligations arising from a family relationship, parentage, marriage or affinity, including a maintenance obligation in respect of a child who is not legitimate” provides even that “Decisions rendered in application of this Convention shall be without prejudice to the existence of any of the relationships referred to in Article 1.”

The application of different conflict rules by the courts in different countries can, of course, engender two paternity decisions in relation to the same child or the recognition of a marriage in one State that is not regarded as valid in another.

On the paternity issue, the question can arise in different terms depending whether States give different effects to decisions given in paternity suits and decisions in maintenance proceedings where paternity arises as a secondary issue.

The Hague Commission meeting in 1995 to study the implementation of the maintenance obligations Conventions recommended that the preliminary issue of paternity be governed by the law applicable to the maintenance obligation, but it does not seem to have had much influence on the case-law in States where the status of persons is governed by the rules of private international law.

At the Special Commission in May 2003, there was some support for adopting a rule whereby the preliminary issue should be governed by the law applicable to the maintenance obligation, but others felt that a decision on the paternity issue given as a secondary decision should never be valid *erga omnes.*
5.3.2.4.1 Mobility conflict

As has been seen, where the creditor or debtor changes domicile or habitual residence, this causes difficulties as to jurisdiction over applications for modification of earlier judgments. The question of the applicable law in such cases now arises.

The 1973 Hague Convention, under which the domestic law of the maintenance creditor’s habitual residence is basically applicable, provides: “In the case of a change in the habitual residence of the creditor, the internal law of the new habitual residence shall apply as from the moment when the change occurs”.

This solution has its advantages, as the creditor’s situation can be adapted to the new environment. It can also be seen as inciting creditors to change residence to obtain a change in their claim. The principal conflicts rule to be adopted here will have some effect on this point.

5.3.2.4.2 Agreements between the parties

Certain States encourage agreements between parties whereas others prohibit them. The question therefore arises as to the law applicable to them in terms of both form and substance.

In the absence of specific pointers, it is not clear whether they are governed by the Hague Conventions. In any event the question remains entirely open for States that are not parties to the Conventions.

5.3.2.4.3 Limitation

Limitation is a procedural matter in some legal systems and a substantive matter in others. The solution adopted by the 1973 Hague Convention and the Montevideo Convention is that the limitation of a maintenance action is a matter of substance and therefore governed by the law applicable to the maintenance obligation.

But these instruments do not expressly address the issue of limitation of exequatur and recovery actions, and it is clear from the case-law that their status as procedural or substantive matters is interpreted in divergent ways.

One specific difficulty is that maintenance obligations can subsist between two parties for many years and the need for exequatur or enforcement abroad may become apparent only a long time after the original judgment.
At the Special Commission in The Hague in May 2003, many delegations stated that they wished the various aspects of the problem to be tackled, if need be by the adoption of substantive rules.

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<th>Question 18</th>
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<tr>
<td>Should specific conflict-of-laws rules be adopted on:</td>
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<tr>
<td>a. the family relationships that can engender maintenance obligations?</td>
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<tr>
<td>b. the question of the mobility conflict?</td>
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<tr>
<td>c. agreements relating to maintenance obligations?</td>
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<tr>
<td>d. limitation of maintenance, exequatur and enforcement actions?</td>
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</table>

Should different solutions be adopted in the future Community instrument and the future Hague Convention?

6. COOPERATION

The Hague Special Commission in May 2003 was extensively devoted to cooperation and, according to certain options, could provide the bulk of the future convention. While there are grounds for doubting whether the establishment of rules of this kind would suffice to overcome the legal difficulties that have been met, it must be acknowledged that preparing rules of law alone will not guarantee the quick and efficient recovery of maintenance claims when creditor and debtor reside in different countries.

The problems to be solved in the international or purely Community context are similar, of course, but much fuller and more effective solutions can be put in place here too, in the Community area.

6.1. Authorities responsible for cooperation

6.1.1. Designation of authorities

The system provided for by many international or Community instruments, whereby central authorities are responsible for cooperation, has proved its worth and should be preserved.

Even so, while there ought to be a single interlocutor – or possibly one in each component of non-centralised States – responsibility for relations with other States on certain important questions, direct communications between regional or local authorities might be preferable in a number of cases. Transmission of documents between successive intermediaries is a source of hold-ups and loss of information.

The review of cooperation in matters of maintenance obligations in the European Union Member States, in the study ordered by the European Commission, shows that many central authorities designated under the New York Convention or other agreements plays only a minor role in the processing of cases, or even serve as no more than a channel for transmission to local authorities.
It is by no means certain that there is scope for substantial simplification of this organisation in the operation of an international instrument.

As regards the European Union Member States, it would be worth considering extensive decentralisation, that is to say the designation of local authorities to be in direct contact with their counterparts in the other Member States. The designation of such authorities would constitute an opportunity for certain Member States to take a fresh look at the effectiveness of the cooperation structure set up under the current instruments. The reports for the European Commission’s study on recovery of maintenance claims highlight the delays and malfunctioning that could probably be remedied by structural reforms.

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<th>Question 19</th>
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<tr>
<td>Should provisions be made in the European Union for the designation of “decentralised” authorities responsible for certain cooperation functions?</td>
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<tr>
<td>How can the situation be improved in international terms?</td>
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</table>

6.1.2. Functions of designated authorities

6.1.2.1. Transmission of cases

Internationally speaking it would be possible to provide at least for a semi-direct system such as that provided for by the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters. There is no apparent reason why requests for recognition and enforcement from abroad should have to be received by a central authority and retransmitted forthwith to a regional or local authority, provided always that they are ready for immediate treatment. This would mean that the decentralised authorities in the requested State would have to be identifiable by the authorities of the requesting State and that cases would have to be fully prepared and need no further action by the requested central authority.

As regards the identification of decentralised authorities, it would clearly be sufficient for States to notify the Permanent Bureau of the Hague Conference of the relevant information for distribution, as is the case of other Conventions.

As for the content of case files, this would be checked by the central authority of the requesting State, which would be able to do this in the semi-direct system prior to transmitting requests for recognition and enforcement.
In the European law-enforcement area, the role of central authorities could be reduced even further, provided the content of case files was checked by requesting authorities, and direct communications between local authorities could thus be promoted. But there would still have to be a central authority responsible for checking the functioning of the cooperation mechanisms and the general functions provided for by certain Community Regulations.

### Question 20

What mechanisms should be set up for the transmission of cases between requesting and requested State?

In the Community context, would provision be made for direct transmission of case files between authorities with local powers to deal with them?

### 6.1.2.2. Commencement of proceedings

#### 6.1.2.2.1 Proceedings for recognition and enforcement of foreign judgments

Working on the principle that, in the Community context, proceedings for the recognition and enforcement of judgments must be abolished, this question needs to considered only in terms of the Hague Conference.

In the system set up in the various States under the 1956 New York Convention, requested central authorities act themselves or via a local service, or instruct lawyers to commence the proceedings.

While there is nothing to choose in terms of principles between the modes of organisation, the two systems do not tend to be equally efficient. Public authorities commonly operate more quickly than lawyers. The reason is that lawyers are usually acting on the basis of legal aid, which entails a preliminary procedure.

Given that there are manifest difficulties in the international recovery of maintenance claims, there is a need to review the effectiveness of existing systems and remove whatever bottlenecks are discovered.

### Question 21

How can the functioning of cooperation on the recognition and enforcement of judgments be improved?

#### 6.1.2.2.2 Proceedings on the merits

In international relations, as has been seen, certain States which do not acknowledge the jurisdiction of the courts for the creditor’s domicile or habitual residence ask the State of the debtor’s domicile or habitual residence to commence proceedings to determine the maintenance claim or the paternity of the creditor, being a minor, and certain requested States refuse to do this. But this situation does not arise within the Community, as Regulation (EC) No 44/2001 confers jurisdiction of the authorities for the creditor’s domicile or habitual residence.
On the paternity issue, several delegations at the Special Commission in The Hague in May 2003 argued that such a procedure was complex and costly, since it demanded expert assessment measures, and could not therefore be commenced by a central authority on behalf of a creditor residing abroad.

Certain States seem to fear that they will be submerged by all manner of requests relating to questions of parental authority.

As regards judgments on the merits, there is another question: should the authorities responsible for cooperation provide assistance to debtors who wish to obtain a modification of an earlier judgment. This question arises not only in the work on preparation of the future Hague Convention but also for the future Community instrument, as under Regulation (EC) No 44/2001 the debtor has no option but to sue in the courts of the State of the creditor’s domicile or habitual residence.

There are some who argue that the debtor, like the creditor, may have financial difficulties preventing him from meeting the costs of proceedings abroad. Others consider that the sole objective is the recovery of maintenance claims and that there is no call for cooperation for other purposes. Incidentally, the possibility of legal aid in such circumstances is provided for by a number of other instruments, in particular Council Directive 2002/8/EC of 27 January 2003.

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<th>Question 22</th>
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<tr>
<td>Should the future Hague Convention provide that the authorities of the Contracting State in which the debtor has his domicile or habitual residence must commence proceedings on the merits for the determination of the maintenance claim or the paternity of the creditor, being a minor, where the rules of jurisdiction applicable by the courts of the State where the creditor has his domicile or habitual residence do not allow them to give a ruling?</td>
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<th>Question 23</th>
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<td>Should this cooperation also be given to a maintenance debtor under the future Hague Convention? Under the future Community instrument?</td>
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6.1.2.3. Transmission of information

The processing of case files relating to maintenance obligations can generate a need to gather information abroad on, for example, a debtor’s address, assets and resources, on matters requiring expert opinions, in particular to establish paternity, or on the law applicable in another country.

Knowledge of the debtor’s address is needed at the time of the initial action to determine the maintenance claim so as to ensure that all parties can make their views known in the proceedings. Knowledge of the debtor’s assets and resources enables the authority responsible for ruling on the maintenance claim to set the amount on the basis of the facts.

The creditor does not always have this information and can have difficulties in commencing or winning a case if no help is available to obtain it.
The international and regional instruments currently applicable do not provide that an authority can be required to seek out the address of a debtor in its territory to allow proceedings to go ahead in another country.

Regarding the gathering of information on a debtor’s assets, the courts can use the 1956 New York Convention on the recovery abroad of maintenance, the 1970 Hague Convention on the taking of evidence abroad in civil or commercial matters or Regulation (EC) No 1206/2001 cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, as the case may be.

These three instruments mainly provide for a system of requests from the judicial authorities of the requesting State to the authorities of the requested State, and only the Community Regulation imposes deadlines on the courts for acting on requests addressed to them. The use of the schemes provided for there is somewhat mismatched with requests for information on debtors’ assets, for instance, but better matched to requests for expert opinions on paternity issues.

Article 3 of the 1990 Convention between Member States of the European Communities on simplification of procedures for the recovery of maintenance claims, which never came into force, provided that:

“2. On receipt of the application mentioned in Article 5 the Central Authority in the State addressed shall take or cause to be taken without delay all appropriate and useful measures to:

(i) seek out and locate the debtor or his assets;

(ii) obtain, where appropriate, relevant information from Government Departments or agencies in relation to the debtor; ...”

This provision, however, does not entrust central authorities with an investigation role regarding the debtor’s and assets prior to the exequatur stage.

Certain States have population registers so that a person residing in the territory can be traced very quickly. Others operate different forms of registration for company, tax, banking or whatever purposes. These schemes should make it possible to gather the basic information required for processing files on maintenance obligations.

But administrations or courts do not always have access to these different forms of registration as there are data-protection principles of varying strictness, and sometimes the material possibilities are also lacking.

It would be worth taking inspiration from the 1990 European Convention, in particular in preparing the future Community instrument, entrusting the central authorities with the various tasks provided for in it and requiring these to be accomplished also at the stage of the initial application for determination of a maintenance claim. It might also be possible to entrust the central authorities with other tasks not provided for by that Convention.

In the Community context, it would be helpful if the central authorities were supplied with the means they need to gather the information.
Regarding the States’ domestic law, the Council of Europe Convention of 7 June 1968 on Information on Foreign Law allows the judicial authorities of the States Party to seek information via the central authorities for the purposes of proceedings already commenced. But this Convention, ratified by a large number of European Union Member States, does not seem to have been activated very often.

In the Community area, the transmission of information on national law can be handled by the European Judicial Network in Civil and Commercial Matters.15

Internationally, the transmission of information on national law could also be entrusted to the central authorities.

| Question 24 |
| Should the central authorities responsible for cooperation in matters of maintenance obligations be entrusted with the transmission of information, locating debtors and seeking other information about their assets? Should they be entrusted with the transmission of other information, in particular about their national law? |

| Question 25 |
| Should the central authorities be entrusted with the preparation of expert opinions, to enable a court hearing a maintenance claim in respect of a minor to rule on the paternity issue? |

| Question 26 |
| Should other tasks be entrusted to the central authorities? |

| Question 27 |
| In what areas could more detailed rules of cooperation be envisaged in the Community? |

6.2. Costs

While there is general agreement on the principle that functions carried out by the central authorities in international judicial assistance should be free of charge, the principle being followed with a few exceptions in the international instruments that provide for cooperation rules, opinions differ on the question of costs of exequatur and enforcement proceedings.

These differences proceed in particular from differences in the way requests for cooperation under the existing conventions are handled.

In certain States, foreign case files are handled at the exequatur and enforcement stages by actual judicial or administrative bodies. In others the requested central authority transmits the request to court auxiliaries acting on a liberal profession basis and the cost of the procedure, which must be paid for, is generally borne by the creditor. Between the two extremes, there is a whole series of intermediate solutions in various States on the basis of their domestic organisation.

Apart from being free of charge for the creditor, the direct handling of requests by the judicial or administrative authorities of the requested State commonly saves much time, provided of course that these authorities are not overloaded. But this cooperation free of charge is commonly available only for maintenance claims for children, and adult creditors often receive no assistance from the authorities in countries that have such a system.

In countries where files are processed by court auxiliaries operating on a liberal-profession basis, creditors may be eligible for legal aid if the relevant international agreements or the State’s domestic law allow this, as will be the case between the European Union Member States under the provision transposing Council Directive 2002/8/EC of 27 January 2003. These various sets of provisions generally provide for means-tested legal aid. This system can be beneficial as adults can be eligible for assistance in the same way as minors. It can also have drawbacks, chief among them the major delays in processing files on account of the time taken to examine legal aid applications and of the need to renew them each year, and the fact that the entire family’s income is taken into account, even where the application is made on behalf of a minor.

If the aim is to avoid negotiations both for the future Hague Convention and for the future European instrument culminating in the adoption of the solution corresponding to the lowest common denominator, improvements will have to be made to the operation of most of the existing schemes. It must be borne in mind that a creditor residing abroad cannot act to assert his rights vis-à-vis the relevant authorities in the requested State, but in the law of several countries he can do so vis-à-vis the local authorities. Giving creditors residing abroad more extensive rights of access to legal aid cannot therefore be regarded as breaching equality in relation to creditors residing locally.

The most ambitious solution would be, of course, to require all States to bear all the costs that all maintenance creditors have to cover. But there would probably have to be an agreement on what costs would be covered, as it was clear at the Special Commission in The Hague in May 2003, for example, that many States would refuse to bear the costs of expert opinions on paternity. The fears expressed on this point clearly need to be played down, as the cost of the techniques used is likely to decline quite seriously as time goes by.

Another solution might be to make distinctions, for example depending whether the creditor is a child, a spouse or another person.
The principle raised at The Hague that States bound by the same instrument should supply services of an equivalent level irrespective of the means deployed for the purpose should be accepted in any event. The cooperation procedures operated by certain Member States might be reviewed from a cost-cutting angle without impairing the effectiveness of the assistance.

Question 28

Should it be provided that all maintenance creditors are eligible for the provision free of charge by central authorities in the requested State of the measures needed for the recognition and enforcement of judgments given in their favour?

Could different solutions be envisaged in the Community and internationally?

Question 29

Is it possible to envisage establishing less costly cooperation procedures in certain countries than those currently used?

Should or could these specific cooperation procedures be reserved for certain creditors?

Should the future Community instrument provide for more generous conditions than would be applicable under the future Hague Convention in the international context?

7. PRACTICAL MATTERS

The report on the study done for the European Commission and the various meetings in The Hague on maintenance obligations have all revealed that the central authorities regularly face practical difficulties that make the treatment of the files before them more complicated and sometimes even impossible. Solutions must be found to these recurring problems.

7.1. Translations

Translation problems arise in communications between central authorities, but above all with documents that must be in the file on the request for judicial assistance.

7.1.1. Forms

For communications between central authorities, a two-language form has been prepared by the Hague Conference, and this could be taken over with the requisite adaptations for the future Convention.

Specific forms will have to be prepared for the purposes of communications between authorities in the European Union Member States as more languages are involved and the type of information to be transmitted depends on the content of the instruments.

In certain specific cases, the forms might not be enough, and rules will have to be prepared on the use of languages both between States parties to the future Hague Convention and between European Union Member States.
7.1.2. Items in the file

Regarding the content of the files, the report on the study done for the European Commission reveals among other things that there are problems on account of the poor quality of the translations of certain important documents. And there are complaints about the high cost of translations borne by the central authorities.

Several solutions have been envisaged at The Hague, in particular translating only the part of the judgment relating to maintenance obligations if a judgment rules on several issues or translating only if specifically requested by the judicial authorities acting on the request for exequatur. None of the suggestions was well received, and many experts argued that all documents referred to their national courts should be in their national language.

The future Community instrument could take over the solutions provided for by Regulation (EC) No 2201/2003 as regards judgments relating to rights of access and the return of a child wrongfully removed. Article 41 of the Regulation provides that rights of access granted by an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State if the judgment has been certified in the Member State of origin. The translation of the certificate is required solely as regards Article 10, relating to the exercise of rights of access, and the other sections of the certificate do not have to be translated. Article 42, on the return of the child, contains similar provisions.

The future Community instrument could likewise provide that judgments to be enforced in the requested Member State must be certified by the authority of the Member State of origin. The certificate would contain information allowing the parties to be identified and would incorporate the components of the judgment needed for its enforcement: total amount to be recovered or monthly instalments, index-linking (if any), etc.

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<th>Question 30</th>
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<td>What should be the solution to the question of the languages to be used in relations between authorities in the States parties to the future Hague Convention and between authorities of the European Union Member States?</td>
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<td>Could the future Community instrument be based on the solutions adopted in Regulation No…?</td>
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7.2. **Items to be supplied**

Certain central authorities complain about difficulties in relations with their counterparts in certain countries who send incomplete files or demand more and more documents, for example on requests for legal aid.

There are apparently a number of sources for these difficulties: failure by central authorities to check the content of files transmitted, impossibility of obtaining all the requisite documents from the creditor, lack of information on the needs of the authorities of the requested State, failure to understand why the documents matter, etc.

Regarding failures to understand, mutual information systems should be feasible in the context of the future Hague Convention.

In the Community context, information could be obtained via the central or local authorities responsible for the case, but also through the contact points of the European Judicial Network, and even, where general information is concerned, from the EJN website.

At the Special Commission in The Hague in May 2003, several delegations suggested that certain documents be replaced by certificates issued by central authorities. This solution follows the solution adopted by Articles 41 and 42 of Regulation (EC) No 2201/2003. The electronic transmission of certain documents was also raised. But certain experts stated that originals or certified copies of certain documents were needed for procedures to be valid.

But it might be possible to replace certain documents by certificates issued on forms removing the need for translation: for example, certificates of birth, marriage and death or documents establishing the amount of the creditor’s or debtor’s resources.

But some solutions that are perfectly acceptable in relations between European Union Member States might be more difficult to accept in international relations.

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<td>How should the flow of information between central authorities be organised?</td>
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<td>Is it possible to envisage electronic transmission of files or of certain documents in the future Hague Convention or only in the future Community instrument?</td>
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7.3. **Time limits**

At the Special Commission in The Hague in May 2003, several delegations wanted time limits to be imposed on the States parties to the future Convention for processing case files. The report on the study done for the European Commission cites particularly worrying examples of the time taken to process requests for judicial assistance, as in some countries no procedure for initial payment of maintenance can reach a conclusion in less than one, two or even three years, sometimes even more.

Clearly, if the debtor’s address is unknown, or the debtor is insolvent, or if there is real property that must be sold, the creditor will not obtain rapid satisfaction. But what is not acceptable, given the interests at stake, is that proceedings where there are no particular difficulties cannot be completed within a reasonable period.

The first question is whether to continue with amicable proceedings against a debtor who has commenced formal proceedings, as is currently the case in certain countries under the New York Convention, Article 6 of which provides that “The Receiving Agency shall ... take, on behalf of the claimant, all appropriate steps for the recovery of maintenance, including the settlement of the claim and, where necessary, the institution and prosecution of an action for maintenance and the execution of any order or other judicial act for the payment of maintenance”. It might be possible to contemplate imposing deadlines for doing these things.

It might also be possible to contemplate imposing deadlines for the various procedural steps required of them in order to give the relevant authorities an incentive to act with diligence. But this solution raises a number of delicate questions, as several procedural steps, particularly judicial proceedings on which it is difficult to impose time limits, must be gone through on the way to recovering maintenance.

But time limits have been set by certain Community Regulations. Regulation (EC) No 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters lays down time limits for requested entities to advise requesting entities that the requisite action has been taken. Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters likewise provides for time limits within which requested courts must send information to requesting courts, but also for the time limit within which the request for the taking of evidence must be acted on. And Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealing Regulation (EC) No 1347/2000, provides that the court to which an application for return of a child is made must issue its judgment no later than six weeks after the application is lodged.

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8. WELFARE ASSISTANCE

Many European Union Member States have established welfare assistance schemes that can be available to maintenance creditors.

Certain of these schemes apply without discrimination to all persons in difficulty. Others are intended precisely to offset failure to settle maintenance claims.

In Italy, persons in difficulty, in particular children who are maintenance creditors, receive assistance. In Belgium a minimum integration income is paid to persons lacking resources.

The situation of persons who might be eligible for these forms of assistance is considered and their family might be asked to contribute.

In Austria a federal fund pays advances on maintenance for children. In Portugal a “Child support guarantee fund” pays allowances of up to €319 per month to minors who do not receive the maintenance due to them. In Luxembourg a National solidarity fund performs this role for spouses and relatives in the ascending line.

These bodies are generally subrogated to the creditor’s rights and can therefore take action against the debtor for reimbursement of sums paid on his behalf.

These systems that pay all or part of the sums due from the debtor to the creditor on the debtor’s behalf are certainly effective, partly because they do not require the creditor to prove a lack of resources and partly because they take care of proceedings against the debtor.

Obviously they cannot be made compulsory in the context of the future Hague Convention. But a Community instrument could provide for an obligation for the European Union Member States to adopt such schemes.

Question 37

Should there be an obligation for the European Union Member States to have maintenance claims taken over by a public body where the debtor defaults?
9. **LIST OF QUESTIONS**

**Question 1**

Should the future instruments:

a. – define the concept of maintenance obligations? If so, how?

b. – apply to the recovery of arrears?

c. – apply to public bodies, in particular as regards cooperation?

d. – apply to all persons likely to enjoy maintenance claims in the different legal systems?

Should distinct solutions be adopted for the future Community instrument and the future Hague Convention? If so, what solutions?

**Question 2**

Should the future Hague Convention:

a. – contain a full set of rules of direct jurisdiction? If so, what rules should be adopted?

b. – contain rules of direct jurisdiction applicable only to application for modification of an earlier judgment? If so, what rules should be adopted?

**Question 3**

Are there considerations that might make it difficult to abolish the exequatur in the Community on grounds of:

a. – public policy?

b. – failure to respect defence rights?

If so, how could these difficulties be solved? Should certain procedural guarantees be adopted or reinforced?

**Question 4**

Are there specific difficulties that would preclude the principle of automatic provisional enforcement of judgments relating to maintenance obligations?

**Question 5**

As regards the enforcement of judgments, can provision be made for:

a. simplification of procedures for the enforcement of judgments that exist in certain Member States? Time limits to be set?

b. enforcement to be suspended only in exceptional cases?
Question 6
Could it be provided that a salary attachment order against a maintenance debtor in one European Union Member State is enforceable without further proceedings in the other Member States?

What other specific measures would be helpful?

Question 7
Should the future Hague Convention provide for a simplified exequatur system similar to the one provided for by Regulation No 44/2001? What other solutions are possible for facilitating and accelerating recognition and enforcement of judgments?

Question 8
Would the “fact-based” approach be workable in practice?
Is there another preferable solution? If so, what solution?

Question 9
Should indirect jurisdiction be based on:

a. the solution adopted by Article 8 of the Hague Convention of 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations?

b. the court agreed on by debtor and creditor? Should the parties’ freedom of choice be limited?

Question 10
At the exequatur stage:

a. what grounds for refusing recognition and enforcement should be in the future Convention?

b. in the event of a conflict of judgments, how should the judgment to be enforced be distinguished?

c. should there be a strict prohibition on reviewing judgments given in the State of origin, or should exceptions be allowed, and if so, in what circumstances and for what purposes?

Question 11
Should the future Community instrument or the future Hague Convention contain:

a. a full set of conflict-of-laws rules?

b. conflict rules governing specific problems?
Question 12

What general rules of conflict of laws should be adopted, internationally and for the Community, as regards maintenance obligations?

Question 13

What rule to solve the conflict of laws relating specifically to maintenance obligations between spouses or former spouses should be inserted in the future Hague Convention?

Question 14

Should the parties be allowed to choose the applicable law, and if so, should there be rules applicable to the choice?

Question 15

What questions should be governed by the system of conflict of laws?

Question 16

How should the question of setting the amount of maintenance obligations be approached, in particular in the Community?

Question 17

How should the question of index-linking maintenance obligations be approached, in particular in the Community?

Question 18

Should specific conflict-of-laws rules be adopted on:

a. the family relationships that can engender maintenance obligations?

b. the question of the mobility conflict?

c. agreements relating to maintenance obligations?

d. limitation of maintenance, exequatur and enforcement actions?

Should different solutions be adopted in the future Community instrument and the future Hague Convention?

Question 19

Should provisions be made in the European Union for the designation of “decentralised” authorities responsible for certain cooperation functions?

How can the situation be improved in international terms?
Question 20
What mechanisms should be set up for the transmission of cases between requesting and requested State?
In the Community context, would provision be made for direct transmission of case files between authorities with local powers to deal with them?

Question 21
How can the functioning of cooperation on the recognition and enforcement of judgments be improved?

Question 22
Should the future Hague Convention provide that the authorities of the Contracting State in which the debtor has his domicile or habitual residence must commence proceedings on the merits for the determination of the maintenance claim or the paternity of the creditor, being a minor, where the rules of jurisdiction applicable by the courts of the State where the creditor has his domicile or habitual residence does not allow them to give a ruling?

Question 23
Should this cooperation also be given to a maintenance debtor under the future Hague Convention? Under the future Community instrument?

Question 24
Should the central authorities responsible for cooperation in matters of maintenance obligations be entrusted with the transmission of information, locating debtors and seeking other information about their assets? Should they be entrusted with the transmission of other information, in particular about their national law?

Question 25
Should the central authorities be entrusted with the preparation of expert opinions, to enable a court hearing a maintenance claim in respect of a minor to rule on the paternity issue?

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COMMISSION GREEN PAPER ON MAINTENANCE OBLIGATIONS DATED 15 APRIL 2004

RESPONSE OF THE SCOTTISH EXECUTIVE

Introduction

1. The Scottish Executive is the devolved administration in Scotland established by the Scotland Act 1998. It is accountable to the directly elected Scottish Parliament, which has legislative competence over a wide range of subject areas, including family law and court structures. Even before the creation of the Scottish Executive, the Hague and UN Conventions on Maintenance were operated separately in Scotland by a Scottish Central Authority, which is now based in Scottish Executive Justice Department. This reflects the fact that Scotland has its own legal system, legal professions and courts.

2. The Scottish Executive thanks the European Commission for the opportunity to comment on this Green Paper, and welcomes the transparent consultation process which is underway.

3. The Commission Green Paper must be viewed in the context of the continuing negotiations in The Hague for a new worldwide Convention on Maintenance Obligations. It is important that any new EU instrument in the same field adds value to the Hague project, and does not duplicate it. There is no point in having separate EU and worldwide regimes purely for the sake of it. This would only be liable to cause confusion and put obstacles in the way of recovery of resources for families in need. For this reason, it is important that EU thinking in this area proceeds in the light of what emerges from The Hague, and the timetable for the Community project needs to reflect this.

4. The Scottish Executive’s response to this Green Paper deals only with the issues relating to content of any future EU instrument. We have arrangements for ensuring that our views are factored into the UK position on the Hague negotiations, and those arrangements will continue. We would only comment that at the last Special Commission there was very limited enthusiasm amongst third countries for rules of direct jurisdiction, or for applicable law rules.

5. Many of the problems encountered in maintenance recovery are practical rather than legal. The major reason for low take-up of the mechanisms for recovery of maintenance abroad is simple lack of awareness amongst the general public that these mechanisms exist. Even amongst the legal professions there is not universal awareness. The Scottish Central Authority has experience of sudden increases in enquiries from members of the public after a radio broadcast or newspaper article on this topic. It is currently running a publicity campaign to try to reach the “untapped market” which undoubtedly exists. A very short and user-friendly leaflet is being sent to law firms, advice agencies, local authorities and others for distribution. Use of local authorities to distribute leaflets to schools and libraries may be especially helpful. There must be action which could be taken to publicise what is available across Europe too, using the Civil Judicial Network. There might be scope for some material translated into all the national languages, which Member States would be responsible for distributing, and for use of the website. Links to all the websites of the Member State Central Authorities could be included.
6. Lack of resources and priority for international recovery of maintenance (particularly when compared with more high profile instruments like the Hague Child Abduction Convention), and poor communications between government agencies, both across frontiers and within the same state, are also obstacles to swift and effective enforcement. If a new EU instrument is adopted then the Commission should produce a Good Practice Guide to its operation, in consultation with the Civil Judicial Network.

7. We now turn to the specific questions contained in the Green Paper.

**Question 1**

**Should the future instrument:**

*a. define the concept of maintenance obligations? If so, how?*

*b. apply to the recovery of arrears?*

*c. apply to public bodies, in particular as regards cooperation?*

*d. apply to all persons likely to enjoy maintenance claims in the different legal systems?*

8. The Scottish Executive is unconvinced that a definition of what constitutes a “maintenance obligation” is necessary. The core content of the term is reasonably obvious. There may however be value in stating that certain types of obligation are included. In Scotland, when a couple divorce the court will often make an order for financial provision. This is not called “maintenance”, and is concerned with a fair division of matrimonial assets. Usually the order will be for payment of a lump sum and/or transfer of property, as the courts are not keen to encourage continuing financial dependence by one former spouse on the other after the marriage has ended. Nonetheless, a recipient needs to use what is gained under an order for financial provision to provide for his or her future maintenance. It should be made clear that such orders come within the scope of any EU instrument.

9. Arrears should undoubtedly be covered, though we are not convinced that it is necessary to state this explicitly.

10. Public bodies should also be included, although the requested Member State should not be required to provide legal aid where the applicant is such a body.

11. We would favour a broad scope, with same-sex relationships for example incorporated. The fact that certain relationships are included may need to be specified, where not all Member States regard this sort of relationship as one which may give rise to a maintenance obligation.

**Question 3**

*Are there considerations that might make it difficult to abolish the exequatur in the*
Community on grounds of:

a. public policy?

b. failure to respect defence rights?

If so, how could these difficulties be solved? Should certain procedural guarantees be adopted or reinforced?

12. We think it may be difficult to do without a public policy rule, at least in some form. It would be better for instance to have an instrument with a broad scope, but which allowed Member States a safety valve so that they would not need to recover maintenance in certain situations which they would find unacceptable. Same-sex couples would be an obvious example. Maintenance by a parent where the child has long since reached adulthood might be another.

13. As regards defence rights, it may be possible for a maintenance judgement to be certified in the Member State of origin to show that these have been respected, and then to prohibit further enquiry in the requested Member State. Council Regulation (EC) No 2201/2003 (“Brussels II bis”) provides a precedent for this.

Question 4

Are there specific difficulties that would preclude the principle of automatic provisional enforcement of judgements relating to maintenance obligations?

14. This is an area which should continue to be regulated at Member State level (or, in Scotland’s case, at the level of the different jurisdictions within the UK). This question envisages an inappropriate level of harmonisation. There may be good reasons for not allowing provisional enforcement in certain cases, e.g. when there is doubt about whether the claimant is entitled to maintenance at all, and not just the amount. Provisional enforcement should only be an issue where the domestic appeal process can take a long time. Where there are swift procedures then there should be little need for it. Regulation at EU level would be too much of a “one size fits all” solution.

Question 5

As regards the enforcement of judgements, can provision be made for:

a. simplification of the procedures for enforcement of judgements that exist in certain Member States? Time limits to be set?

b. enforcement to be suspended only in exceptional cases?

15. One area where an EU instrument may well be able to add value is time lines. While it should not be for the EU to regulate the detail of court procedure in this area, it would be entirely appropriate to state that, other than in exceptional circumstances which must be explained, the process should conclude within a certain time. This could act as a spur to improvements in practice and allocation of greater priority and resources.
16. It should be for the debtor to come to court and seek suspension of enforcement, not the other way round. This is already the case under Council Regulation (EC) 44/2001 (“Brussels I”). It may be possible to envisage some further restrictions of the grounds on which enforcement could be refused compared with Brussels I. Defence rights could be dealt with through judicial certification in the Member State of origin. One possibility might be not to specially privilege a conflicting judgement issued in the requested Member State, but to prioritise any later judgement on maintenance given in that State or in a third State and entitled to recognition. Arguably pending proceedings in the requested Member State which were started first should also be protected.

**Question 6**

| Could it be provided that a salary attachment order against a maintenance debtor in one European Union Member State is enforceable without further proceedings in the other Member States? |
| What other specific measures would be helpful? |

17. The Scottish Executive does not believe that automatic transfer of attachment of salary orders is likely to prove feasible. Living costs and standards and protected earnings levels differ too radically across the EU for this to work.

18. In contrast, strong pan-EU mechanisms for recovering information about the debtor’s assets could be extremely helpful.

**Question 11**

| Should the future Community instrument contain: |
| a. a full set of conflict-of-laws rules? |
| b. conflict rules governing specific problems? |

19. Any new EU instrument should not contain a comprehensive set of conflict rules. Working on such a set of rules would be a distraction. If Member States are obliged to recognise and enforce judgements from other Member States, without regard to which law was applied, then this means there is no need to harmonise applicable law approaches. Recognition and enforcement without an applicable law regime has proved perfectly possible in other Community instruments, including of course the Brussels I Regulation which covers maintenance claims at present. We see no reason why the same would not prove true here.

20. The Scottish Executive does not see “forum shopping” as a major issue in this context. Under the Brussels I jurisdictional rules, the maintenance creditor has the option of suing in his or her own jurisdiction or in that of the debtor. Both these choices are perfectly legitimate, and there is nothing wrong with continuing to allow a maintenance claimant to go to the forum which will apply the more favourable law, if there is any difference of approach. This is to the benefit of maintenance creditors and their families.
21. An applicable law regime might be very difficult to operate in countries which have administrative systems. These are well-established in Scandinavia. The countries which have them are often amongst the most efficient at recovering maintenance for foreign creditors, and it would make no sense to undermine or disrupt their systems.

22. Such a regime would also be very difficult for the UK jurisdictions. Judges here do not regard themselves as qualified to apply a legal system in which they have not been trained, using only textbooks or the internet. They require expert evidence of foreign law. This is expensive and causes delay. The UK jurisdictions are nonetheless happy to have applicable law solutions which do more precise justice between the parties in other legal fields, where the parties are likely to be businesses, or insurers are liable to be involved. In maintenance cases the priority is to set and pay a reasonable amount of maintenance as quickly as possible, without eating into the limited funds available to support the family through increased legal costs.

23. On the question of conflicts rules on specific issues, we could perhaps envisage a rule on prescription and limitation at the stage of enforcement of the judgement in the requested Member State, applying either the law of the requested or the requesting country, whichever is more favourable to the recovery of arrears. Such a narrow and self-contained rule should be relatively simple to operate (disputes about the content of the foreign law would be fairly unlikely). It would offer useful protection to creditors in some cases. Otherwise, we would not favour any special conflict rules either.

**Question 12**

**What general rules of conflict of laws should be adopted for the Community as regards maintenance obligations?**

24. None. See the answer to question 11 above.

**Question 15**

**What questions should be governed by the system of conflict of laws?**

25. Possibly prescription and limitation when a judgement from one Member State comes to be enforced in another and the issue of arrears arises. Nothing else.

**Question 16**

**How should the question of setting the amount of maintenance obligations be approached, in particular in the Community?**

26. The law of the forum should be applied. See the answer to question 11 above. There is increasing use of complex formulae for calculating maintenance claims, which it would be tricky for the authorities of another Member State unfamiliar with a particular system to apply, and which in any case only make sense in the economic and social environment which produced the formula.

**Question 17**
27. This should remain a matter for the forum. When a judgement comes to be enforced in another Member State, the requesting Member State should provide full certified information about the current required rate of payment, which should be updated whenever necessary.

**Question 18**

**Should specific conflict-of-laws rules be adopted on:**

a. the family relationships that can engender maintenance obligations?

b. the question of the mobility conflict?

c. agreements relating to maintenance obligations?

d. limitation of maintenance, exequatur and enforcement actions?

28. With the possible exception of prescription and limitation as regards recovery of arrears on enforcement abroad, the Scottish Executive sees little case for applicable law rules on any of these issues. It would be straightforward to insert an article in any Community instrument to cover agreements enforceable in the Member State of origin, and also authentic instruments, so that they would require to be recognised and enforced in the same way as judgements. Scotland has a well-established practice of encouraging mediated settlements in domestic maintenance cases and of registering agreements in a way which renders them enforceable in the same way as a court order, so we would strongly support a rule which ensured enforceability throughout the EU. However, an applicable law rule should not be required. Modification similarly should be dealt with as a jurisdictional not an applicable law issue.

**Question 19**

**Should provision be made in the European Union for the designation of “decentralised” authorities responsible for certain co-operation functions?**

29. The Scottish Executive does not believe that decentralisation would bring about improvement; in fact it would risk undermining the expertise and networks of contacts built up by Central Authorities. Decentralisation can work for narrow one-off tasks, like service of documents. Recovery of maintenance internationally is a protracted process. Even where initial recovery is prompt, payment is likely to require to continue for many years and to encounter later problems where the debtor or creditor moves, the debtor changes job, family circumstances alter and so on. Running the process effectively requires sensitivity to the needs of families and children, experience of dealing with stressed members of the public, experience of the process itself and personal knowledge of colleagues in other jurisdictions who can be relied on to help with difficulties.

30. Central Authorities would in fact benefit from more powers, such as to trace debtors and recover information about their assets. Some need better resources and a higher status within their domestic systems. Time lines for both Central Authorities and the courts to take action
might also speed up the process. Any Community instrument should seek to strengthen not weaken Central Authorities. The absence of a Central Authority system, and thus of a single, cost-free point of enquiry in the creditor’s own country to help navigate the case through the foreign system, is a major gap in the Brussels I Regulation.

**Question 20**

*What mechanisms should be set up for the transmission of cases between requesting and requested State?*

*In the Community context, would provision be made for direct transmission of case files between authorities with local powers to deal with them?*

31. Transmission should be from Central Authority to Central Authority by the quickest means possible. The use of technology should be maximised and the use of standard forms promoted.

32. Direct transmission of case files between locally based authorities should not take place. Especially in small jurisdictions such as Scotland, the involvement of the experienced Central Authority as a filter is invaluable. Given the small number of international cases, very few lawyers, enforcement professionals and court staff have had the opportunity to build up expertise at dealing with them.

**Question 21**

*How can the functioning of cooperation on the recognition and enforcement of judgements be improved?*

33. If a new Community instrument is adopted, then a Good Practice Guide produced by the Commission in consultation with the Civil Judicial Network would be invaluable.

34. It should not be assumed that the use of public authorities throughout the court process is to be preferred to the use of private lawyers. Such an assumption would fail to respect the different traditions of Member States. Some public authorities are extremely efficient, while others are poorly resourced and take a long time to recover any money. Some have to juggle maintenance with a host of other commitments. Legal aid need not be a cause of delay. Scotland provides full legal aid without means testing under the Hague Convention to any applicant entitled to total or partial exemption from costs in his or her own country, and this system of “passporting” cuts out unjustifiable delays. A combination of free Central Authority services with the services of a lawyer who has a strong incentive to progress the case in order to obtain payment can be very effective.

**Question 23**

*Should cooperation be extended to a maintenance debtor who wishes to bring proceedings of his own in relation to the maintenance claim?*
35. Cooperation through the Central Authority network should be given to a debtor wishing to modify. Central Authorities are there to attempt to ensure the smooth operation of an instrument and to uphold its values. They are neutral in the process and should not be seen as there to act for maintenance creditors only.

**Question 24**

| Should the Central Authorities responsible for cooperation in matters of maintenance obligations be entrusted with the transmission of information, locating debtors and seeking other information about their assets? Should they be entrusted with the transmission of other information, in particular about their national law? |

36. Yes, all of this would be helpful. Ability to trace debtors is an issue in the UK jurisdictions at the moment, and it may be that an EU instrument could do something to improve the situation across the Member States, by requiring procedures for access to official records to be in place. When giving out information on national law, it would be important for a Central Authority to forge good relations with the Civil Judicial Network Contact Point in the same country. This would be no problem in Scotland, where the Maintenance Central Authority and Civil Judicial Network Contact Point are located in the same place.

**Question 25**

| Should the central authorities be entrusted with the preparation of expert opinions, to enable a court hearing a maintenance claim in respect of a minor to rule on the paternity issue? |

37. In principle yes, although it would be preferable for this to be in connection with actual court proceedings in another Member State, and not a “fishing expedition”. Council Regulation (EC) 1206/2001 on Taking of Evidence in Civil and Commercial Matters could also be used. The cost of medical testing should normally be treated as a cost in the foreign proceedings.

**Question 26**

| Should other tasks be entrusted to the central authorities? |

38. The Central Authorities should always be available as alternative points of communication for the applicant, even if another public authority or an external lawyer is dealing with the case. A Central Authority should always be kept up-to-date with developments and should monitor the case, chase progress and ensure that the applicant is being kept informed. It should also provide statistics on progress of cases in its jurisdiction. If a new Community instrument is produced then it is essential that there is regular evaluation of how it is working.

**Question 27**

| In what areas could more detailed rules of cooperation be envisaged in the Community? |
39. See the answer to question 26 above. It may be that some or all of this will be dealt with in the new Hague Convention, in which case it would be something which did not need to be done at Community level. It might be possible though to envisage provision of information using particular technologies within the EU only, e.g. by providing that every Central Authority must have its own website.

**Question 28**

| Should it be provided that all maintenance creditors are eligible for the provision free of charge by Central Authorities in the requested State of the measures needed for the recognition and enforcement of judgements in their favour? |

40. Central Authority services should be free. As regards legal aid, this should certainly be provided to those already shown to be entitled to it in the Member State of origin, without having to go through domestic means testing in the requested Member State.

**Question 29**

| Is it possible to envisage establishing less costly cooperation procedures in certain countries than those currently used? |
| Should or could these specific cooperation procedures be reserved for certain creditors? |

41. It should not be for an EU Regulation to oblige Member States to have a court-based system or an administrative system, or to require the courts to handle maintenance cases directly without the parties being represented. This is a matter of choice for each Member State jurisdiction in the light of the structure of the legal system as a whole. Speed and cost are separate issues, and can be dealt with by time lines and by appropriate provision for free Central Authority services and for legal aid, without undermining the principle of subsidiarity.

**Question 32**

| Could the future Community instrument’s approach to translation issues be based on the solutions adopted in Regulation No 2201/2003? |

42. The question of translation of any certificate to be provided with the judgement of another Member State is a difficult one. The certificates provided for in the access and return provisions of Brussels II bis are slightly different, as those will go direct to enforcement professionals in the requested State. Courts are likely to be resistant to material being lodged which is not in their national language. Court staff and judges may not understand the form. In that case, if there is no requirement to translate in the requesting Member State then it would just have to be done in the requested State and there would be no obvious reduction in delay. If Member States were required to accept at least one Community language other than their own, court staff could be familiarised with the form in the other languages accepted, but this would be impossible to do for all languages. Alternatively the form could be so self-explanatory that no translation was needed. However, in both these instances it would be difficult to guarantee that none of the information filled in by the judge relating to the individual case would need translation.
43. This topic requires further discussion in the light of some possible formats for forms.

**Question 33**

**How should the flow of information between central authorities be organised?**

44. Central Authorities should communicate by the swiftest means possible. Whilst recognising that often courts will need original or certified copy documents to be lodged, this is not a reason why a Central Authority cannot get a case underway meantime. Electronic or faxed documents should be perfectly acceptable if the versions required by the court are to follow.

**Question 34**

**Can solutions such as certificates issued by central authorities in place of original documents be envisaged?**

45. This seems rather cumbersome. We should perhaps instead be asking which documents are necessary at all, rather than having certificates in place of them. Unless something relates closely to a potential ground of non-recognition, does the court of the requested State require to see it, or any certificate relating to it?

**Question 35**

**Is it possible to envisage electronic transmission of files or certain documents?**

46. Courts should not be required to accept electronic versions of documents if this is not catered for by national laws or procedures at present. All Member States are moving in this direction, but inevitably with different resources available and at different speeds. This is an issue which affects justice systems as a whole, not just maintenance claims.

47. However, there is no reason why Central Authorities should not be able to get the case underway on the basis of faxed or electronic documents, even if originals will be required when the case arrives with the court. Nor is there anything unreasonable about requiring all Central Authorities to be readily contactable by fax and e-mail.

**Question 36**

**Should time limits be set in the future Community instrument?**

48. Any Community instrument should definitely set a number of realistic time limits for different stages of the process. Inevitably there will be some circumstances where exceptional circumstances mean that these cannot be met, but the requesting State should be entitled to a prompt and full explanation where this occurs. It may be that this is an area where the EU can add value compared with the Hague Conference, which has to take account of the problems faced by developing countries.

49. It should also be necessary for Central Authorities to gather statistics on progress of cases in their jurisdictions, so that there is accountability for systemic slowness.
Question 37

Should there be an obligation for the European Union Member States to have maintenance claims taken over by a public body where the debtor defaults?

50. No, absolutely not. Maintenance is normally set at a level which is reasonable having regard to the resources of the parties and the past lifestyle of the family. Where the debtor is well-off then the level of maintenance will reflect this. The State’s responsibility is not to maintain families in a condition of wealth, but to cater for actual needs. It would be unreasonable to impose a requirement on Member States to take over maintenance payments.