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EU update (including the Green Paper on the Presumption of Innocence)

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Traditionally, if one can speak of tradition in a subject that is only a few years old, the powers of the EU in the criminal law field, and by implication the limits to that power, are set out in Title VI of the Treaty on European Union (which started as the Maastricht Treaty). In my talk, I will refer briefly to a decision of the European Court of Justice (in Luxembourg) that may change the picture, but at this stage, this is unclear.

It's important to remember when discussing what the EU is or isn't doing, that the Commission, that makes most of the proposals, doesn't have a free hand. The work programme is established by the governments of the Member States (Tampere, the Hague Programme and soon "Tampere II"). I mention this because it is essential to understand that whilst it's useful to have a dialogue with the Commission, it's even more important that your governments (and in particular Ministries of Justice) are aware of defence lawyers' point of view.

The most articles are Article 29:

“Without prejudice to the powers of the European Community, the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia.

That objective shall be achieved by preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud, through:

- closer cooperation between police forces, customs authorities and other competent authorities in the Member States, both directly and through the European Police Office (Europol), in accordance with the provisions of Articles 30 and 32;

- closer cooperation between judicial and other competent authorities of the Member States in accordance with the provisions of Articles 31(a) to (d) and 32;
- approximation, where necessary, of rules on criminal matters in the Member States, in accordance with the provisions of Article 31(e).”

And Article 31:

“Common action on judicial cooperation in criminal matters shall include:

- (a) facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States in relation to proceedings and the enforcement of decisions;
- (b) facilitating extradition between Member States;
- (c) ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation;**
- (d) preventing conflicts of jurisdiction between Member States;**
- (e) progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking.”

In this presentation, I will highlight some of the current proposals and consultations that are of specific interest to defence lawyers.

Pending legislative proposals

Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law

This was proposed by the Commission on 13 March 2001 and amended on 30 September 2002. It requires Member States to create criminal or other offences and penalties in respect of a number of activities (pollution of air, soil, water) committed intentionally or with serious negligence. Following the annulment by the European Court of Justice on 13 September 2005 of Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment by criminal law, the Commission is in the process of examining how to resume work on this Directive.

Proposal for a Council Framework Decision on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings

Information on convictions handed down in other Member States is currently governed by the 1959 European Convention on Mutual Assistance in Criminal Matters (Council of Europe), according to which the State of nationality is kept informed of convictions handed down against its nationals in the other States. This is not considered reliable results and the information held by the State of nationality is rarely complete. The need to improve the quality of information exchanged on criminal records was prioritised in the European Council Declaration on Combating Terrorism of March 2004. The Hague Programme called on the Commission to make proposals in this regard. Objectives are set out in a joint action plan adopted by the Commission and the Council on 2/3 June 2005.

A Council Decision on the exchange of information extracted from the criminal record (an “emergency measure” following the Fourniret case) was adopted by the Council on 21 November 2005¹ and must be implemented by Member States by 21 May 2006. It aims to secure rapid improvements in the current mechanisms for exchanging information between the Member States, mainly by providing time-limits for the transmission of information.

On 17 March 2005, a proposal was presented for a Council Framework Decision on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings². Improving the circulation of information is considered of limited use if Member States are unable to make use of the information transmitted. The proposal defines the conditions under which a conviction handed down in another Member State can be taken into account in new criminal proceedings concerning different facts. The proposal is under discussion.

France and Germany which, together with Spain and Belgium, are already working on networking their criminal records within the framework of the 1959 Convention (their project is operational since the end of March 2006³).

Future plans are as follows: for obtaining information on convictions handed down against EU nationals, one would continue to rely upon the Member State of nationality. This requires however an in-depth reform of existing mechanisms. In December 2005, the Commission made a proposal for a Framework Decision in order to ensure that the Member State of nationality will be in a position to provide exhaustive and complete

¹ OJ L 322, 9.12.2005, p. 33.

² COM (2005) 91.

³ For requests and answers. A second phase (spontaneous sending of information each time one of the partners convicts a national of the three other Member States) should be implemented in May 2006.

information in relation to its nationals' criminal records upon request from another Member State. The proposal also sets up a framework to develop a computerised system allowing faster transmission of information on criminal convictions, in a form that Member States can understand and use more easily.

Proposal for a Framework Decision on certain procedural rights applying in proceedings in criminal matters throughout the European Union

The proposal was adopted by the Commission on 28 April 2004. It has been in negotiation in the Council since September 2004. Under the Hague Programme, Member States were asked to adopt a Framework Decision by the end of 2005. This was not achieved, although the discussions have almost led to a final draft after the third reading. The draft text is not ideal but was a compromise of all views and could have been adopted as a Framework Decision after some tidying up; the end result, if adopted, would still represent added value in relation to the current situation.

Proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects documents and data for use in proceedings in criminal matters

It applies the principle of mutual recognition to a European Evidence Warrant for the purpose of obtaining evidence for use in criminal proceedings. It is a first step towards progressively replacing the existing regime of mutual assistance within the EU by a single EU body of law based on mutual recognition.

Proposal for a Council Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union

This proposal is a Member State initiative which was submitted by Austria, Finland and Sweden in January 2005. It is currently being discussed in the Council. The initiative is designed to further the social rehabilitation of offenders, on the ground that it is more appropriate for measures of rehabilitation to be taken in a State where the offender understands the language and with which he has close personal links.

Negotiations with a view to concluding an agreement between the EU and Iceland and Norway on the surrender procedure between the Member States of the EU and Iceland and Norway

Negotiation of mutual assistance and extradition agreements with Iceland and Norway.

Initiative of the Kingdom of Belgium with a view to the adoption by the Council of a Framework Decision on the recognition and enforcement in the European Union of prohibitions arising from convictions for sexual offences committed against children.

The proposal, submitted by Belgium, is intended to supplement the Council Decision on the exchange of information extracted from criminal records, which is presently on its way to adoption. The initiative limits its scope of application to sexual offences committed against children. Based on the principle of mutual recognition, the initiative envisages regulating the recognition and enforcement of prohibitions pronounced in any Member State. It lays down rules according to which a person convicted of sexual offences against children on the territory of one Member State would be prevented from pursuing activities likely to bring that person into contact with children.

Proposal for a Framework Decision on mutual recognition of non custodial pre-trial supervision measures

This proposal is a follow-up to the Green Paper on the same subject, which was adopted in 2004. It aims to extend the right to liberty and the presumption of innocence to the whole area of freedom, security and justice by creating a mechanism for transferring a non custodial pre-trial supervision measure (e.g. travel prohibition, reporting to the police) from the Member State where the person is suspected of having committed an offence, to his Member State of habitual residence. Under the present legal framework this is not possible as States do not mutually recognise such measures. The mechanism will contain a coercive mechanism to return an uncooperative suspected person to the trial State if necessary. To be adopted in May 2006.

Communications, White Papers and Green Papers

Communication on mutual recognition⁴

This Communication is part of the Commission's general process of drawing up a plan of action to give effect to the Hague Programme. It maps the general prospects for the five years ahead, although it focuses on the initial implementation period (2005-07), given

⁴ COM (2005) 195 f of 19.05.2005

that there will be a mid-term review. As the Hague Programme emphasised the importance of evaluating the implementation of policies, the results of the evaluation undertaken will have to be taken into account and may even inspire changes to the agreed priorities.

Communication on the implications of the Court's judgment of 13 September 2005 (Case C-176/03 *Commission v Council*)

The ECJ's judgment of 13 September 2005 in Case C-176/03 *Commission v Council* clarifies the distribution of powers between the first and third pillars as regards criminal law provisions. This clarification removes doubts about a question which has long been controversial. The Commission's aim in the Communication is to explain the conclusions to be drawn from it. A list of the instruments affected by the implications of the judgment is annexed to it. One of the aims of the Communication is to suggest a method to correct the situation with regard to texts which were, in the light of the Court's ruling, not adopted on the proper legal basis. It also aims at setting the direction of the future use of the Commission's right of initiative.

Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in criminal proceedings

With this Green Paper, which was adopted on 23 December 2005, the Commission aims to launch an EU wide consultation of interested parties on issues of conflicts of jurisdiction in criminal matters in the EU, including the principle of *ne bis in idem*. The Green Paper identifies current problems and suggests possible options as to the line that a future EU legislative initiative should take in addressing the issue of conflicts of jurisdiction in criminal proceedings. Furthermore, it makes suggestions for clarifying the scope and applicability of certain elements /definitions of the EU wide *ne bis in idem* principle which is contained in Articles 54-58 of the Convention Implementing the Schengen Agreement (CISA). Based on the responses to the Green Paper, a Proposal for a Framework Decision on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in criminal proceedings could be presented in the second half of 2006.

Communication on disqualifications in the European Union

This was presented by the Commission on 21 February 2006⁵. It seeks to clarify the concept of disqualification, assess the relevant legislation at European level and outline the approach likely to be followed in this regard.

⁵ COM(2006) 73

Green Paper on the presumption of innocence

The Green Paper examines what is meant by the presumption of innocence in each Member State, whether we all mean the same thing when we refer to this concept and whether any rights could stem from the presumption at EU level. Topics covered are the right not to be pronounced guilty prior to any finding of guilt by a court, pre-trial detention, the burden of proof, the right to silence and the right to not incriminate oneself (refusal to disclose documents and other evidence). The Green Paper will be adopted on 26 April 2006.

Common principles:

Article 6(2) ECHR (The right to a fair trial):

“Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”

Art 48 EU Charter of Fundamental Rights:

Presumption of innocence and right of defence

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.
2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.”

What does “the presumption of innocence” mean? The Commission is launching this Green Paper as part of a consultation exercise to establish whether the concept of the presumption of innocence is understood in the same way throughout the EU. The Commission has identified certain threads that could make up the presumption of innocence. The presumption of innocence means that the accused is to be treated as not having committed any offence until the State (through the prosecuting authorities) adduce sufficient evidence to satisfy an independent and impartial tribunal that he is guilty as charged. This leads to certain propositions:

- that he should not be detained in pre-trial custody unless there are overriding reasons to do so (presumption in favour of bail)
- that if he is detained in pre-trial custody, he should benefit from detention conditions consistent with his presumed innocence (such as entitlement to wear own clothes, to contact family and to communicate with his legal advisers etc.)

- that the burden of proving the accused's guilt is generally on the State and that any doubt should benefit the accused
- that the accused should be able to refuse to answer questions (right to silence)
- that the accused should generally not be expected to provide evidence (refusal to disclose documents and other evidence).

Pre-trial detention

This is covered in the Commission's Green Paper on mutual recognition of non-custodial pre-trial supervision measures⁶ and is not covered again in the Green Paper.

The burden of proof

The general rule is that the prosecution must prove the accused's guilt beyond reasonable doubt. There are possible situations where the burden of proof does not rest entirely with the prosecution: (a) strict liability offences, (b) offences where the burden of proof is reversed and (c) confiscation.

The privilege against self-incrimination

The presumption of innocence also includes the privilege against self-incrimination. A witness should be able to decline to answer a question where such answers might expose him to subsequent criminal proceedings. It is a privilege that applies in any legal proceedings and relates not only to oral testimony but also would permit a witness to refuse to produce documentary and real evidence.

The right to silence

The protection from coercive pressure to answer an investigator's questions, whether inside or outside court, is a fundamental aspect of Article 6's guarantees of a fair hearing and of the presumption of innocence. The right to silence applies in relation to police questioning and in court where the accused should have the right not to testify and, perhaps, the right not to disclose the nature of his defence before trial.

In the legislation of certain Member States there are now exceptions to the right to silence allowing for drawing of inferences (guilt) from the refusal to answer questions in certain situations. The ECtHR has allowed this within limits.

The Green Paper contains a number of questions. Replies are invited by 9 June 2006.

Commission Communication on Judicial Training in the EU

The Action plan implementing the Hague programme calls for a Commission Communication on judicial training in the EU. The Communication will focus on

⁶ COM(2004) 562 final of 17.8.2004

problems, best practice and possible solutions in this area with a view to developing a coherent strategy for training in the future. Adoption is planned for June 2006.

Working Paper from the Commission on the feasibility of an index of third-country nationals convicted in the European Union, to be followed by a proposal for a Council Decision on the creation of an index of third-country nationals convicted in the European Union

The objective is to improve access to information on convictions handed down against third country nationals on the EU territory. The Working Paper is part of the preparatory work to assess the impact of future legislative proposal on the creation of an index of third-country nationals convicted in the EU, which is one of the aspects of work carried out at EU level in order to improve access to information on criminal convictions. The Working Paper should be adopted in the first semester of 2006. The Commission aims to adopt a legislative proposal in 2007.

Communication on the evaluation of EU justice policies

The Commission will soon adopt (June 2006) a Communication on evaluation of JLS policies. A more specific Communication is planned for the autumn which will examine how justice (criminal and civil) policies and instruments are evaluated, both in the Member States and by the Commission

Communication on Eurojust and the EJM (December 2006)

The Commission will adopt a Communication on the development of Eurojust and the European Judicial Network in criminal matters in the 4th quarter of 2006.

Proposal for a Framework Decision on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in criminal proceedings

This Proposal will be a follow-up to the Green Paper on this subject, which was adopted in December 2005. It will cover the creation of a mechanism for the choice of the most appropriate jurisdiction when two or more Member States intend to prosecute the same case. It should also deal with the scope and the applicability of the trans-national EU principle of *ne bis in idem*, as set out in Articles 54-58 of the Convention Implementing the Schengen Agreement (CISA). The Commission plans to present this Proposal in the second half of 2006.

Green Paper on the gathering and handing of evidence in criminal proceedings (summer 2006)

The transfer of evidence under the European Evidence Warrant can only function in a climate of trust, whereby each Member State is satisfied that rights are respected in each of the other Member States involved in any request for cooperation, and that any evidence will be gathered and used fairly. The Green Paper will examine whether there can be any common European standards in the field of evidence-based safeguards, by looking at the gathering of evidence (including samples and identification evidence, interception of communication, witnesses, experts, documentary evidence and access of defence to evidence gathering). It will also cover disclosure (by both prosecution and defence) and criteria for admissibility.

Green Paper on default (*in absentia*) judgments (December 2006)

In the Hague Programme Action Plan, the Commission undertakes to adopt a Green Paper on default (*in absentia*) judgments in 2006. The Green Paper will cover definitions and legal basis, recognising *in absentia* judgments and also problems arising from *in absentia* judgments for the operation of the European Arrest Warrant and other mutual recognition instruments.

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