Informal Meeting
of the Justice and Home Affairs Ministers

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STRENGTHENING JUSTICE – Which European policies for the cross-border recognition and enforcement of criminal convictions?

In every democratic State, the criminal sanction plays multiple roles. First, it is a "sanction" for the sentenced criminal who did not respect the rules of the social contract. It is a "measure for reinsertion" as a means to prepare the return to social life for those who are in prison. By its nature, criminal sanction also seeks to reduce "criminal behaviour" through action aimed at general and specific prevention. A criminal sanction may also consist of disqualifications or loss of certain rights. Finally, criminal sanctions and their enforcement may be adjusted according to a number of criteria and conditions (suspension of sentence, probation, alternative sanctions, etc…).

Every sanction and every penal system are part of a social structure and are but elements of a coherent entity whose purpose is to establish and maintain a social objective. Various criminological studies point to the fact that the role of the penal system and the perception of sanctions reflect the society itself, which explains the differences between States. Penal justice and criminal policies are conscious choices, choices of a political nature within the States in order to guarantee equality before the law and the security of its citizens; choices of means considered appropriate, adequate, proportional and admissible in order to achieve this objective.

1. Which objectives and ambitions for mutual recognition of criminal convictions within the European Union?

When transferring the debate on criminal sanctions from the national level to the European level, it is imperative that the various functions of sanctions and their perception by the European citizen remain intact. Within a common judicial area, the "efficiency" of a sanction, with all its dimensions, must be preserved above and beyond national borders. The European citizen should be able to trust in the functioning of penal justice systems in every Member State of the European Union. He must be sure that criminal sanctions will be applied without obstacles or discriminations based on "national territory" considerations. As yet, this objective has not been achieved. Recent tragic events have again highlighted that the mechanisms in place remain insufficient and do not confer the cross-border dimension onto criminal sanctions, their pronouncement and their enforcement.

The Council has already had the opportunity to take note of these deficiencies and has taken the decision to draft an urgent measure to improve and accelerate the exchange of information between national criminal records. A political agreement was reached in December 2004 on the basic elements of this measure. Technical aspects are being finalised. However, additional steps have yet to be taken in order to give a true European dimension to criminal sanctions.

The core issue concerns the question to which extent legal effects must be granted by a State to criminal sentences pronounced by foreign courts. As for other matters related to Title VI of the TEU, two approaches could theoretically be envisaged: one being based on the approximation of legislation, and the other one being based on mutual recognition. The Commission envisages favouring the option of mutual recognition in its White Paper. This option should allow for the objective to be achieved rapidly, while respecting the legal traditions and systems of every Member State. Hence, cross-border mutual recognition of criminal sentences should allow or even oblige a criminal court to take into consideration every criminal conviction that is pronounced in another Member State of the Union to the same extent as a criminal conviction previously pronounced by a national court, be it at the stage of procedure, of the pronouncement of the sentence or the enforcement of the sanction.

Ministers of Justice are invited to consider the question of whether the principle of mutual recognition of criminal convictions is the right basis to confer a real European dimension to the "criminal sanction" and to indicate the conditions and limits that such a post-sentential mutual recognition should be subject to.

2. Which approach for a cross-border enforcement of disqualifications?

The issue of disqualifications is closely linked to the issue of criminal sanction. Some particularly reprehensible behaviour requires that the judiciary not only respond with a criminal sentence but also pronounce appropriate disqualifications. As for the criminal sanction, it is essential that the European citizen has the guarantee that such disqualifications do not lose their effectiveness simply by crossing borders. However, without a minimal approximation, it will be extremely difficult to envisage a "general" and direct mutual recognition of disqualifications, a view shared by the Commission.

Generally speaking, one could confine oneself to the mutual recognition of criminal sentences and give the possibility to each Member State to recognise a foreign judgment as a reference to which it would "link" disqualifications foreseen by its own national system. Following this logic, each Member State would be obliged to adopt specific procedures that would allow for the possibility to decide upon and impose disqualifications on every person convicted by a foreign court, who wishes to exert certain rights on its national territory.

At the same time, one could, based on a sectorial approach, conceive a "direct" mutual recognition of disqualifications whenever sufficient "common grounds" exist between Member States. Belgium has made a proposal for a framework decision at the end of 2004 regarding the recognition and enforcement in the European Union of disqualifications resulting from convictions for sexual crimes committed against children; the Commission envisages proposing a new instrument regarding the forfeiture of the driving license.

Ministers of Justice are invited to express themselves with respect to the suggested approaches and to indicate whether they could envisage a general mechanism of mutual recognition of disqualifications or whether they would prefer limiting direct mutual recognition of disqualifications to sectors, commonly identified as being particularly sensitive on a European level.

The Ministers are also invited to expose their points of view regarding the limits (conditions and obstacles) that they may identify in relation with these approaches and to indicate the sectors in which the direct mutual recognition of disqualifications appears to be indispensable.

3. **How to ensure an optimal exchange of information with respect to criminal convictions and disqualifications?**

Every mechanism of mutual recognition is built on the premise of an adequate and sufficient exchange of information. The mutual recognition of criminal convictions is directly linked to the organisation and structure of national criminal records as well as to the possibilities of exchange between these records. The Commission intends to dedicate a substantial part of its White Paper to the issue of improving information exchange of criminal convictions.

Again, different options are possible: improvement of bilateral exchanges, network of national criminal records, setting-up of a European criminal record, …

A similar debate took place in relation with a speedy and efficient exchange of information for "wanted persons and objects" in criminal proceedings and which resulted in the configuration – considered the most appropriate – of the second generation of the *Schengen Information System* (SIS II), still based on the initial concept of SIS I.

In order to respond to a Europe with 25 Member States, the Commission is currently examining an option similar to the architecture of SIS II, - a solution which it considers to be most appropriate -, by envisaging the creation of some kind of a "European index system". Such an index system would enable the identification of the State in which a person has a criminal record (without indicating supplementary information while consulting the index – *hit/no hit* system), and would be completed by a mechanism of exchange of complementary information between competent national authorities.

For the last 10 years, such an approach has proven to be effective with respect to the signalisation of wanted persons and objects – and recently with respect to the enforcement of

European arrest warrants – within the context of the *Schengen* cooperation, an approach that has been further confirmed by the Council for the development of SIS II. The approach to be suggested by the Commission would not only benefit from the experience and the work accomplished in this similar field, but would also allow for a rapid implementation.

Ministers of Justice are invited to react to these proposals concerning the exchange of information relating to criminal convictions and disqualifications, and to point out obstacles, limits and weaknesses that they could eventually detect in the option examined by the Commission.

4. Which European approach regarding the transfer of convicted persons?

At present, the transfer of convicted persons is governed by the Convention of the Council of Europe of 1983. However, according to this Convention, a sentenced person can only be transferred, for the purpose of execution of a custodial sentence, to the State of which he / she is a national, with his / her consent and with the consents of the concerned States.

Even considering that the additional protocol to the Convention (1997) allows disregarding the consent of the sentenced person in some cases, there is no legal instrument that imposes an obligation to receive sentenced persons for the purpose of completing their sentence.

In its initiative, Austria envisages a new step in relation to the transfer of convicted persons within the common area of justice and suggests to establish the principle according to which every Member State would be obliged, on the basis of mutual recognition mechanisms, to take charge, for the purpose of enforcing their sentence, even without the individuals' consent, its nationals and residents having been convicted to a custodial sentence in another Member State, provided that there are no specific grounds for refusal.

Such an approach would be consistent with the logic underlying the common area of justice by introducing a concept of aid and assistance between the judiciary at the level of enforcement of sanctions. For the person subject to a custodial sentence, the transfer to his State of residence, as a measure of reinsertion, should allow to better prepare the return to social life.

Ministers of Justice are invited to indicate whether the principle suggested by Austria in relation with the transfer of convicted persons is a necessary and justified step within the common area of justice and to indicate possible obstacles and limits with respect to this mechanism.

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