



Ten Years after the Geneva Appeal: what are the prospects for European judicial cooperation on in criminal matters?

**Conclusions of the informal meeting
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Over the last ten years, substantial progress has been achieved in the field of European judicial cooperation. Direct communication between European judges and prosecutors is now possible without going through diplomatic channels and thereby lengthening proceedings. Progress has been made in combating fraud, corruption and organised crime, particularly in harmonising the definition of offences between the Member States in a number of areas (trafficking in human beings, cyber-crime, corruption in the private sector, use of forged means of payment, etc.). Also to be welcomed are the creation of OLAF, the successive directives on combating money laundering, and the various instruments signed in the EU and other fora seeking to combat corruption.

The creation of a number of bilateral or multilateral instruments such as the arrangements for liaison magistrates, the European Judicial Network, Eurojust and the European arrest warrant, has considerably facilitated European cooperation between judges. For example, thanks to the Eurojust unit, a number of requests for information from financial centres which had hitherto gone unanswered have now yielded a result. The European arrest warrant is probably the most spectacular advance in this field. Based on the principle of mutual recognition of judicial decisions, it enables wanted or sentenced persons to be surrendered to the courts much more speedily, while giving the persons in question the opportunity to assert certain procedural rights

sooner. It would therefore be wrong to underestimate the progress made. But it would also be dangerous to be complacent about these reforms which are in many ways still incomplete.

I. Limits to current judicial cooperation

A. Mutual recognition of judgments and European arrest warrant

Limited use made of the principle of mutual recognition

The affirmation within the EU of the principle of the mutual recognition of judicial decisions is a real step forward. It gives concrete form to the idea of a European judicial area for the easy movement and cross-border enforcement of judicial decisions. However, it is regrettable that as yet none of the measures adopted on the basis of this principle is applied by all the Member States, and that limits imposed by certain Member States reduce the effectiveness of the European arrest warrant.

Principle of mutual recognition applied very unevenly from one Member State to another

For example, the framework decision permitting the quick and easy freezing of evidence or proceeds of crime within the EU¹ is currently applicable in only 15 Member States, and some states have only partially transposed it, even though it was proposed in 2000 and adopted in July 2003.

Incomplete transposition process

- Some Member States have made use of the **reservations** authorised by the framework decision on the European arrest warrant² :
 1. Some states (Austria, Italy, Slovenia, the Czech Republic and Luxembourg) accept this procedure only for acts committed after 7 August 2002.
 2. Some states currently have constitutional problems with the surrender of their nationals, particularly Germany and Poland.
- Some Member States are lagging behind in their procedures for transposing the European arrest warrant into national law.

The 'speciality' principle restricts the scope of the European arrest warrant

The 'speciality' principle means that the Member State requesting the surrender of an individual may not prosecute that person for other acts committed before his surrender which are not mentioned on the European arrest warrant. To that extent it restricts the scope of the European arrest warrant.

¹ Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (OJ L 196, 02.08.2003)

² Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.07.2002).

B. Slow progress of ratification of the conventions relating to judicial cooperation

There have been delays in the process of ratifying these conventions. The Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union³ and its protocol of 16 October 2001⁴ seeking to improve the exchange of information in the banking sector, are cases in point.

Slow progress is also being made in the ratification of the two recent non-EU conventions relating to corruption: the Council of Europe Convention which was opened for signature on 27 January 1999 and entered into force on 1 July 2002, and the UN Convention which was adopted on 31 October 2003 and entered into force on 14 December 2005. Half a dozen EU Member States have not ratified the former convention, and the latter is still awaiting ratification by around ten of them.

C. Execution of international letters rogatory

While significant progress has been made towards resolving the delays in passing on information from one court to another in connection with requests for the execution of international letters rogatory, we are still seeing some restrictions in this field which hamper judicial investigations across national borders.

Dilatory appeals against the transmission of judicial information

Under the national law of some Member States it is possible to delay the transmission of judicial information for months or even longer, by allowing the persons concerned to contest such transmission during the investigation stage in the requested state: such appeals are mostly used as a delaying tactic, slowing down the progress of investigations, particularly in banking and financial matters, in the most important money-laundering cases. An account holder or banker is thus enabled to oppose the transmission to the requesting state of information obtained by the court in the requested state, by contesting the very principle of such transmission. The court in the requested state has to issue an order, against which an appeal, and then a last-resort appeal to the supreme court, may be lodged. Until a final decision is issued, the court of the requested state will not be able to transmit the information to the court of the requesting state responsible for the investigations.

Cooperation with the Channel Islands is now working well, but most financial centres (Luxembourg, Switzerland, Liechtenstein, etc.) retain the possibility of appeal. These countries' legislatures give banking secrecy priority over the exchange of judicial information, so it regularly takes from six months to a year to identify an account there.

³ Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (OJ C 197, 12.07.2000)

⁴ Council Act of 16 October 2001 establishing, in accordance with Article 34 of the Treaty on European Union, the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (OJ C 326, 21.11.2001).

Appeals all the way up the court hierarchy make it possible to delay the course of justice at each stage of the investigation and for each account in question. A recent example in Switzerland showed that one such series of appeals was able to hold up the forwarding of the requested bank document for four years.

Interaction among judges: practical and cultural difficulties

As well as resistance at Member State level, there are also certain limiting factors among the judiciary which reduce the opportunities for the execution of international letters rogatory. In this connection, one cannot help but observe that the sense of belonging to a common European judicial area is not very strong among the national judiciaries.

- **Judges of the requested state give priority to their own cases**

The fact that judges set their priorities in this way results from two factors: firstly the fact that the request for the execution of international letters rogatory come on top of judges' already heavy case loads (it is common for some judges to have to deal with 200 requests); and secondly the subordinate status which the judge of the requested state accords to the request: he sees himself as merely executing the request of his foreign counterpart. Accordingly it is not his case and is given second-class treatment.

- **Ignorance of the EU's cooperation instruments**

National judges also often seem often to lack awareness of the EU cooperation instruments (liaison magistrates, European Judicial Network, Eurojust). For example, many judges, including those dealing with transnational criminal cases, do not realise that Eurojust has special investigative powers. Similarly, local judges are not always familiar with the European Judicial Network, and the members of the EJM also have many other tasks which prevent them from giving all the necessary attention to mutual assistance in judicial matters. It should also be stressed that some judges encounter difficulties in executing some requests for the execution of international letters rogatory because they have been poorly drafted or translated by the requesting party.

Countries outside the Schengen area

In these countries, international letters rogatory can only be executed if the act in respect of which a search or seizure measure is requested is an extraditable offence: this reduces the potential scope for investigations.

D. Eurojust

The powers of Eurojust members differ greatly from one Member State to another, and this causes distortions which detract from the effectiveness of Eurojust.

E. Current blocks to progress: unanimous decision-making

Ten years after the Geneva Appeal, then, much still remains to be done to create a genuine European area for the easy and effective movement and enforcement of judicial decisions. It is

galling to note that the initial enthusiasm of the Geneva Appeal now seems to be wearing off. While the EU institutions heard the Appeal and responded to it by adopting the Treaty of Amsterdam which enshrined the creation of an area of freedom, security and justice as one of the Union's fundamental objectives, any further progress now seems to be blocked, mainly by the requirement for unanimity in the Council on all the topics covered by Title VI of the EU Treaty. The creation of a genuine European judicial area thus seems to have reached a dead end; solutions do, however, exist.

II. Nine proposals

To give a fresh boost to the fight against serious trans-national crime, we propose solutions seeking to tackle the problem in two main ways: firstly by improving the effectiveness of the existing judicial cooperation arrangements, and secondly by working towards the creation of a genuine European judicial area.

A. **Enhancing the effectiveness of existing European judicial cooperation arrangements**

Action should be taken both at EU Member State level and at the level of national judges.

At Member State level:

1/ Speeding up the process of ratification of conventions on cooperation in criminal matters

National parliaments and governments should speed up the process of ratification of conventions on cooperation in criminal matters.

2/ Taking a fresh look at the restrictions on the application of the European arrest warrant

The Member States of the EU should demand the abolition of

- the 'speciality' rule affecting the scope of the European arrest warrant
- the reservations concerning the surrender of their nationals.

3/ Abolishing appeals in investigations with an international dimension

4/ Lifting the obscurity surrounding financial transactions

- Front companies ('brass plate' companies)

The purpose of a company should be to exercise an economic activity, of whatever kind. However, many companies are used as 'front' companies whose only purpose is to conceal the identity of the people who really control them. It is therefore essential that the public authorities should be able to identify these people.

- Banking secrecy should not be maintained in criminal proceedings

Every Member State must require banks to identify the natural person who is the real beneficial owner of accounts opened in the name of legal persons where these include front companies, and must require that the criminal courts have free access to such information.

This does not go far enough, however, where only the banker knows the identity of the natural person in question. Each Member State must identify and centralise information on the holders and real beneficial owners of all bank accounts opened in the name of the same person in the same country. It is illogical for investigations to be carried out with an identified bank in one country while the person in question holds other accounts with other banks in the same country of which the court knows nothing and is unable to know anything. If the court could question the central authority, it could have access to all the accounts, whether identified or not, of the same person in a given country.

At the level of national judges:

5/ Supporting judicial training and exchanges

Given the multiplication of legal texts and the ever-increasing complexity of legal work, there is a need for extra judicial training. Such training should in particular enable judicial practitioners to complete a training course abroad; it should increase the frequency of meetings between judges, prosecutors, and lawyers in Europe with a view to enhancing their sense of belonging to a single professional community, raising their awareness of the differing legal systems and of the European judicial cooperation instruments, and improving their language skills with a view to promoting direct contacts. This should make it possible to reduce the current differences in treatment between national cases and requests for the execution of international letters rogatory.

The European judicial training network (EJTN), with its permanent secretariat in Brussels, seems to be the most appropriate place for dispensing this training and intensifying these exchanges.

6/ Setting up a standard form for requesting the execution of international letters rogatory

To avoid difficulties resulting from the poor drafting of requests for the execution of international letters rogatory, the procedure should be streamlined by providing courts with a standard request form.

B. Outlining a genuine European area of judicial cooperation in criminal matters

7/ Decisions by qualified majority

The application of Article 42 of the Treaty on European Union would permit judicial cooperation in penal matters to be subject to qualified majority voting in the Council; it would enable the European Parliament to play its role as joint legislator, and to exercise the democratic controls which are so essential in this area at the heart of civil liberties. It would also enable the Court of Justice to exercise to the full its role as guarantor of the correct and uniform

application by the Member States of the provisions of the Treaty and of legislation, and of the protection of fundamental rights.

8/ Establishment of prosecuting bodies at EU level: a European Public Prosecutor's Office

The principle of the sovereignty of states implies a monopoly of jurisdiction for the national courts, particularly in the field of criminal justice. But whatever the courts' prerogatives, their powers can in practice be exercised only in part, owing to the existence of networks whose activities cover several states. A national court exercises its prerogatives only on the territory of its own state. Beyond its borders, it can only call upon the assistance of its foreign counterparts and of Eurojust, which is still in many respects an intergovernmental cooperation body.

To create a genuine European judicial area, a European Public Prosecutor's Office responsible for effectively controlling investigations and prosecutions in the field of cross-border crime would be a possible solution for the future.

One initial step in this direction, as provided for in the *Corpus juris* project and the Constitutional Treaty⁵, would be to create, from Eurojust, a European Public Prosecutor's Office for cases of fraud affecting the EU's interests, brought before the national courts.

The European Public Prosecutor's Office would thus be linked to the existing national public prosecution services

The European Parliament, which enjoys democratic legitimacy, could take on the role of initiating body for the implementation of a policy on criminal law, while the task of controlling the European Public Prosecutor's Office would fall to another, independent and impartial body, as set out in the Commission's Green Paper on the European Prosecutor.⁶

At this stage, however, it is hard to imagine all the EU Member States unanimously agreeing to support the idea of creating an integrated authority such as the European Public Prosecutor's Office.

That being so, the establishment of an **enhanced cooperation** arrangement as provided in the EU Treaty⁷ and restated in the Constitutional Treaty⁸ seems to be a possible legal basis for creating a European Public Prosecutor's Office.

Eventually, the terms of reference of the Public Prosecutor's Office could be extended as set out in the Constitutional Treaty,⁹ in the direction of combating serious crime with a cross-border dimension (financial crime, drug dealing, trafficking in human beings, terrorism, etc.) and could gradually be opened up to other Member States of the EU.

⁵ Article III-274 of the Constitutional Treaty : "1. In order to combat crimes affecting the financial interests of the Union, a European law of the Council may establish a European Public Prosecutor's Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament."

⁶ Green Paper on criminal law protection of the financial interests of the Community and the establishment of a European Prosecutor (COM(2001) 715 final).

⁷ Articles 40 and 40A of the EU Treaty.

⁸ Articles I-44 and III-270, 4 of the Constitutional Treaty.

⁹ Article III-274 of the Constitutional Treaty : "4. The European Council may, at the same time or subsequently, adopt a European decision amending paragraph 1 in order to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension and amending accordingly paragraph 2 as regards the perpetrators of, and accomplices in, serious crimes affecting more than one Member State."

9/ Uniform protection for fundamental rights

In the European states based on the rule of law which are all committed to upholding the principles of the European Convention on Human Rights, an improvement in the conditions of judicial cooperation cannot be at odds with the fundamental rights of European citizens. European courts, which are the guarantors of individual liberties, can only cooperate fully if, notwithstanding the differences among legal systems and while respecting national traditions, they can be certain that all citizens against whom a prosecution is brought are offered a common and precise set of fundamental guarantees. The European judicial area can only progress if there is a certainty of a high level of respect for human rights throughout Europe. With that in mind, the proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union constitutes an excellent point of reference which should not be abandoned, even though it has not been adopted by the Council (owing to the unanimity rule referred to above).

Conclusion :

In ten years, the process of creating the European judicial area has moved forward, but is still incomplete. Further progress now depends on the political commitment of national governments and parliaments to respecting and implementing in their own countries the decisions taken at European level, and to encouraging all measures seeking to boost confidence between legal systems, particularly as regards individual rights.

As regards the EU in particular, an institutional reform enabling majority voting to take place by virtue of the bridging clause of Article 42 of the Treaty on European Union, and the gradual creation of the proposed European Public Prosecutor's Office, would constitute substantial progress towards the creation of a genuine area of freedom, security and justice.