Bar Council of England and Wales
Brussels Office

Ave d'Auderghem 36
B-1040 Brussels

Belgium
Tel: 02/230 48 10
Fax: 02/230 45 96

Green Paper on the Approximation, Mutual Recognition and Enforcement of Criminal Sanctions in The European Union

Response on behalf of the Criminal Bar Association of the Bar of England & Wales

Introduction[1]

We take this opportunity to thank the European Commission ("the Commission") for producing a Green Paper that is both thought provoking and of high quality. We are grateful to the Commission for giving the *Bar Council of England and Wales*, as well as the *Criminal Bar Association of England and Wales*, the opportunity to address it at the *Expert's Meeting* held in Brussels on the 10th and the 11th June 2004. We found the meeting informative and constructive.

General principles

The purpose of the Paper is to "*identify differences in penalties that have harmful effects and the limits to be imposed, if any, in order to attain a European law-enforcement area*".[2] By 'harmful effects', we understand the Commission to mean effects that work against the Union's objective of providing citizens with a high level of safety within an area of freedom, security and justice.[3]

We note that the Commission considers that the problem should be seen in comprehensive terms and not merely in terms of approximating the level of penalties: "*it is not enough…for similar penalty levels to be set in the Member States if penalties, once imposed, are applied more flexibly or more strictly in one country than in another."*

We attach considerable significance to the following statement in the Green Paper, "*Opting for one penalty…necessarily entails* ***opting for the way in which it will be enforced***" [Emphasis added][4]. As a matter of domestic law that proposition is obviously true, but we do not accept that the answer to the problem posed by the Commission requires the comprehensive approximation of rules that regulate the sentencing process within the EU. We stress that the definition of sanctions, and whether sanctions are imposed, and how they

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1 Adopting observations made by R. Fortson at the Expert's Meeting in Brussels on the 10th and 11th June 2004.
2 Introduction.
3 See Article 29 TEU; para.2.1.1 of the Green Paper: see Article III-158 of the proposed EU Constitution.
4 Green Paper, para.1.1, page 11.

are enforced if imposed, are intrinsically interlinked with historical, cultural, philosophical, and political considerations associated with each Member State. Disparate sentencing tariffs may be explained by different offending patterns in Member States, or by any of the considerations stated above. Most would agree that rehabilitation is better than social exclusion by incarceration; but variations in sentencing policy that exist do not necessarily reflect differences in moral values in Member States. Who is to be the final arbiter of values? Approximating in a relatively short period of time so much that has developed over centuries is we believe, unattainable, and unworkable.[5]

We are not surprised to learn from the Commission that current Framework Decisions tend to set minimum levels for maximum penalties[6]. We would not be in favour of moving much beyond this. Whilst there might be particular offences that justify standardising the level of penalties, and/or the type of sanctions that should be available to the Courts of Member States in respect of particular offences, we would not support the creation of general rules that harmonise *how* a penalty is to be enforced, still less the circumstances in which a penalty is to be imposed. To go that far would result in sentencing policy itself becoming a 'top-down' EU issue.

Furthermore, harmonisation on this scale would reach into areas of the criminal justice process other than sentencing. The authors of the Green Paper (in which it is said that at least four issues should be considered if there is to be a consistent sentencing policy within the EU) clearly foresee this occurrence. The four issues are:

(i) The level of penalties and the range of penalties,
(ii) The rules governing prosecution,
(iii) The general rules of criminal law, and
(iv) Rules and practices regarding enforcement.

Taking each issue in turn:

Rules governing prosecution would embrace (i) rules relating to the exercise of executive and judicial discretion, (ii) matters relevant to policing (e.g. prioritising offences for investigation and prosecution), and (iii) the structure of prosecuting authorities (e.g. whether a government minister should be permitted to make quasi-judicial decisions on sentencing matters in individual cases).

General rules of criminal law would be likely to include (i) the definition of offences, (ii) rules governing the admissibility of evidence, (iii) rules of practice and procedure in the criminal courts, and perhaps (iv) rules governing discounts on penalties imposed – particularly custodial sentences – for pleas of guilty, co-operation with law enforcement agencies, etc.

Rules of practice regarding enforcement would include (i) the administrative and legal rules governing early release, (ii) rules imposing sanctions for non-compliance

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5 The Commission is clearly alive to this, because it remarks that a penalty served "is ultimately the result of a complex equation involving an extremely large number of variables"; and see the "Introduction".

6 For an interesting discussion as to whether harmonisation of the criminal law is needed at all, see "a *Master Thesis*" by Mareike Braeunlich Faculty of Law, Lund University, Master of European Affairs programme, European Criminal Law, Peter Gjörtler, European Law, Spring 02.http://www.jur.lu.se/Internet/english/essay/Masterth.nsf/0/94E4D9B5A0990798C1256BC900560788/$File/xsmall.pdf?OpenElement.

with the terms of a penalty imposed (e.g. breach of a court order), (iii) living conditions etc within custodial institutions, and (iv) rules regulating the repatriation of foreign offenders.

Given that sentencing has traditionally been a matter of domestic law, a burden is placed on the proponents of harmonisation

(i) To identify, by way of an audit, variations in the treatment of penalties by Member States,

(ii) To establish the existence of a causal link between variations in the treatment of penalties by Member States and the effect said to be 'harmful',

(iii) To show that the 'harmful effect' is of a magnitude justifying harmonisation, and

(iv) To demonstrate that solutions short of harmonisation – e.g. co-operation - would not be sufficient to cure the defect. Although the Green Paper is not entirely silent on these points, it should go into greater depth.[7]

Objectives [para.1.1 of the Green Paper]

The Commission's helpful discussion of the "objectives" of approximation, clarifies the extent to which a comprehensive approach to sanctions would result in the wider harmonisation of substantive criminal law. We note that the Commission has been careful to describe those 'objectives' as "mutually complementary". We take each objective in turn, as set out in the Green Paper.

First objective

"*[By] defining common offences and penalties in relation to certain forms of crime, the Union would be putting out a symbolic message…[and]…would help to give the general public a shared sense of justice*" [para.1.1]. This objective contains components that need to be addressed separately:

(i) In our experience, defining offences and penalties as a method of broadcasting symbolic messages is superficially attractive (particularly to politicians), but often ineffective. Non-lawyers are frequently unaware of the existence of many offences (even quite serious ones), and they are certainly less aware of how offences are defined, punished, or enforced.

(ii) Harmonising the *definition* of an offence necessarily involves the harmonisation (or the standardisation) of the *elements* of that offence. To be a meaningful process, rules relevant to each element of the offence must also be harmonised for otherwise the case law of each Member State is likely to produce divergences of the sort the objective seeks to prevent.

Harmonisation on this scale is not an approach that finds favour with us.

Second objective.

We concede that the "*corollary of a European area of justice would be that the same criminal conduct incurs similar penalties whenever the offence is committed in the Union*".

[7] See the reference to *Commission v Greece* ECJ 68/88; Introduction to the Green Paper, p.8.

Third objective.
"*Preventing offenders…from taking advantage of divergences*". The extent to which offenders take advantage of divergences between penalties is unclear: this issue is considered in greater detail in answer to "Question 1" below.

Fourth objective: ne bis in idem.
We concede that discussions around *ne bis in idem* would be easier if penalties were comparable and applied similarly across the EU. However, the same result can be achieved by closer co-operation between Member States and by an application of the principles of mutual recognition.

Fifth objective: judicial cooperation.
We acknowledge that the approximation of rules relating to criminal law penalties and their enforcement might make the acceptance of foreign judicial sanctions easier. However, we do not accept that these justify a move towards such approximation. Again, we favour closer co-operation between Member States, and an application of the principles of mutual recognition.

Sixth objective – the effect of the [Draft] Constitution
The concept of Mutual Recognition is embodied in Article III-158(1) of the proposed Constitution that requires Member States[8] to maintain an EU area "*of freedom, security and justice with respect for fundamental rights and the different legal traditions and systems of the Member States*".[9] This is to be achieved by judicial cooperation in criminal matters "*based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article III-172*"[10].

Paragraph 2 refers to "*criminal matters having a cross-border dimension, European framework laws may establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States*". Article III-172(1) relates to areas of particularly serious crime, namely, "*terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime*".

The expression "organised crime" is imprecise, but it is sufficiently broad to encompass almost any planned criminal action that is 'particularly serious' (whether the planning is sophisticated or not) and where the offending action has a cross-border dimension.

Although cooperation is likely to be achieved more readily if legal principles and sanctions have been approximated/harmonised, the proposed Constitution envisages that approximation of criminal legislation might be appropriate only if it is "*essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures*", so that "*European framework laws may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such*

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8 See Article I-1 for the definition of the European Union, and the role of Member States to "confer competences to attain objectives they have in common. The Union shall coordinate the policies by which the Member States aim to achieve these objectives."

9 CIG86; section 1, General Provisions.

10 Article III-171(1)

framework laws shall be adopted by the same procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article III-165".

The Commission has made it clear that there are no plans (currently) for an EU criminal code. The Commission states that approximation is not a pre-condition of mutual recognition, and that the two concepts complement each other. We would be concerned if the policy were to change if the legal base exists under the Constitution permitting the creation of such a code. We hope that Member States and the Commission would abide by the restrictions set out in Article III-165 of the proposed Constitution, and strive to improve cooperation between Member States rather than enforcing compliance by the approximation of legal principles in respect of the definition of criminal offences, or in the structure of sanctions, or in respect of the principles of sentencing. We feel fortified in our position by virtue of Articles 3 and 4 of the Consolidated Draft Constitution [Title III] both of which reflect the enduring consensus of Member States towards the principles of subsidiarity and proportionality.[11]

In pursuit of the overarching duty set out in Article III-158 of the Constitution, Member States must be vigilant to ensure that they do more than pay lip service to the concept of proportionality, and respect for fundamental rights. The notion of "fundamental rights" imports a minimum level of protection, whereas what is actually required is an effective level of protection for suspects, defendants, and the victims of crime. In this regard, we attach great importance to the excellent work carried out by the Commission resulting in its recent proposal for a framework decision providing for *Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union.*[12]

Seventh objective

"*[The] approximation of rules of criminal law concerning penalties and their enforcement also helps to secure acceptance of the mutual recognition of judgments*". It is evident from the above that as between approximation and mutual recognition, the Bar Council supports the concept of mutual recognition. We believe the concept to be the most pragmatic and the most effective method of enforcing, across the EU, judicial and executive decisions taken in accordance with the rule of law, and which comply with domestic as well as international standards of justice, and respect the judicial protection of individual rights. We agree with the Commission that the principle of Mutual Recognition of judgments presupposes mutual trust between the Member States in their respective criminal justice systems, on matters such as the principles of freedom, democracy, respect for human rights,

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11 "3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence the Union shall act only if and insofar as the objectives of the intended action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The Union Institutions shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments shall ensure compliance with that principle in accordance with the procedure set out in the Protocol.
4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Constitution. The Institutions shall apply the principle of proportionality as laid down in the Protocol referred to in paragraph 3." [CIG 86/04]

12 COM (2004) 328 final, 28 April 2004.

fundamental freedoms, and the due process of law[13]: it is a point that we have emphasised before.[14] Trust is the cornerstone of mutual recognition.

Other offences that attract low penalties

The Commission also seeks representations on matters relating to conduct likely to attract no more than low custodial sentences, or alternative non-custodial sanctions. Such penalties are not indicative of offending that is "particularly serious" [note Article III-172(1)]. Accordingly, we do not consider that these sanctions should be included.

The *Tampere European Council* in October 1999 confined its efforts to reaching agreement on common definitions, incriminations, and sanctions, on a limited number of offences of particular relevance. Insofar as there is a need for approximation in respect of such action, it should continue to be confined to cases of organised crime, and to other serious offences, particularly in the context of cross-border crime.[15]

However, we acknowledge "*the establishment of a genuine area of freedom, security and justice, demands recognition of all criminal penalties including alternative sanctions*" [emphasis added].[16] We note that Questions 21 to 24, detail grounds on which a Member State might seek to refuse to recognise a judgment. The solution here is to *enhance* "trust" and tolerance as between the legal systems of Member States. Recognition of judgments should not be achieved by merely removing differences through the vehicle of approximation.

Priorities

We suggest that Member States and the Commission should prioritise its efforts. First, by first focussing their attention on problems of enforcement that pose a significant threat to the security and freedom of the EU area. Problems that are theoretically possible, or which might occur but at an insignificant level, do not warrant approximating legal principles.

Mutual recognition and legal development

Mutual recognition might seem to be a recipe for piecemeal legislation, but a more optimistic view is that it promotes organic legal development. In the long term, mutual recognition is more likely to produce widely supported beneficial results than would a strategy of approximating rules relating to the criminal law.

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13 See para.1.2; Brussels, 30.04.2004; COM (2004) 334 final.

14 Bar Council and Criminal Bar Association *Joint Response to the "Communication from the Commission to the Council, and to the European Parliament", Mutual Recognition of Final Decisions in Criminal Matters*, R. Fortson, 2000.

15 See para. 2.1.3 of the Green Paper.

16 Para.4.2.1.2.

<u>Question 1: (see point 4.1.)</u>: To what extent do the differences between sentencing systems raise barriers to the establishment of the area of freedom, security, and justice such as:

(1) criminals relocating their activities owing to disparities between the way the offences are defined, prosecuted and punished: or

(2) barriers to the free movement of persons ?

The view of the majority of representatives who attended the Expert's Meeting[17] was that criminals do not tend to relocate their activities because disparities exist in the way offences are defined, prosecuted, or punished in Member States.

The geographic distribution of crime (sometimes styled 'crime tourism'), and crime mapping, are complex topics about which the Bar Council cannot hold itself out to be fully competent to address. Our information is largely anecdotal. However, we incline to the view that persons are likely to relocate if activities are criminal in one Member State, but not in another (the 'host State').[18] Even if acts are not directed against the interests of the host State, such persons might use that place to obtain results against the interest of other States (e.g. internet offences; breach of copyright and other intellectual property offences/violations).

It is not apparent to us that nuances and variations between legal systems, in the definition of offences, or differences in the principles of case disposal, result in significant relocation of offending. That said, English courts have long justified the imposition of severe custodial sentences on those who illegally import/export controlled drugs, in order to prevent the United Kingdom being a soft target for the illegal drugs trade. The same principle applies in respect of human trafficking and terrorism. We have no evidence one way or the other as to the effectiveness of this policy.

We tentatively suggest that *the risk of detection* is of greater relevance than differences in case disposal.

We draw the Commission's attention to a collection of essays in the *Forum on Crime and Society* Vol.1, No.2, 2001, UNODCCP, which suggests that crime migration is largely explained by (i) environmental factors (including level of financial reward, corruption of public officials), and (ii) by the intensity of interception/detection. The authors leave unanswered the extent to which crime distribution is influenced by sanction type, or sentencing tariffs. See also, *Assessing Organized Crime: the Case of Germany*, Klaus Von Lampe, September 2002.[19] Both works suggest that there is simply too little reliable data to be able to build models for understanding the development of organised crime. The social and institutional environment, as well as the "immediate task environment of criminal actors", is an important component of organised crime.[20]

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17 Brussels, 10th and 11th June 2004, European Commission.

18 In cases where no corresponding, or like offence exists.

19 ECPR Standing Group eNewsletter Organised Crime No.3.

20 Klaus Von Lampe.

<u>Question 2 (see point 4.1.1.1.)</u>: How can major divergences between Member States as regards the decision to prosecute be avoided, at least for offences that are harmonised in the Union?

The essence of Mutual Recognition is confidence and trust in the legal process of Member States, whilst recognising that differences exist – perhaps major differences – exist in the way cases are investigated, presented, and disposed of in each State. Proportionality (objectively determined) has the potential to influence in a practical way (restrictively) the parameters of divergence. Accordingly, the instruments of human rights, and EU procedural safeguards for defendants and suspects in criminal matters, are highly relevant to the efficacy of Mutual Recognition principles.

Most States enjoy a measure of discretion as to whether a criminal act should be prosecuted to conviction. The exercise of discretion is an increasingly important tool in the English criminal justice process, and one that is increasingly regulated by the law. We believe that the existence of discretion, and the rules by which discretion is exercised, fall comfortably within the margin of consideration that Member States enjoy in the EU to regulate their affairs.

If penalties, and rules regulating the decision to prosecute, were harmonised, then logically one would harmonise the elements of criminal offences. The latter is not, and should not be, the object of the Commission. Indeed, as stated above, there is currently no legal basis, much less political will, for full harmonisation of the criminal law.

<u>Question 3 (see point 4.1.1.2.)</u>: To what extent could European sentencing guidelines be developed, that is to say basic principles for sentencing, without interfering with the courts' room for discretion?

As a matter of domestic law in England and Wales, sentencing guidelines pronounced by the Court of Appeal (Criminal Division) have proved very successful in promoting consistent sentencing by inferior courts. Although sentencing guidelines are not intended to interfere with the discretion of the sentencing court to make a just disposal,[21] they do have the effect of setting the parameters of discretion. The development of sentencing guidelines has become statutory with the creation of two bodies, namely, the *Sentencing Advisory Panel* (SAP)[22], and the *Sentencing Guidelines Council* (SGC).[23] Guidelines are now proposed by the SAP to the SGC who, in turn, consults the Secretary of State for the Home Department,[24] and such other persons as the SGC considers to be appropriate consultees (for example, the Lord Chancellor, while that office continues to exist). The *House of Commons Select Committee on Home Affairs* is likely to be consulted. The Court of Appeal (Criminal Division) is now free to formulate its own non-statutory sentencing guidelines.[25]

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21 Criminal courts do not always impose sanctions, but may make an order designed to rehabilitate, or to provide support to, the offender, rather than to punish him/her.

22 Crime and Disorder Act 1998, s.81: repealed and the section replaced by the Criminal Justice Act 2003, s.169.

23 Criminal Justice Act 2003, s.l67.

24 The Home Secretary.

25 See ss.80 and 81, Crime and Disorder Act 1998.

The statutory scheme is open to the complaint that statutory sentencing guidelines weaken judicial independence, and introduce politics into sentencing. We make this point because a vertical approach to formulating sentencing guidelines is likely to engender a feeling of EU political interference in domestic sentencing policy. All are agreed that sentencing is a complex function that is not confined to a determination of the gravity of the offence, but takes into account a range of other matters including social, environmental, and cultural considerations. European sentencing guidelines are thus likely to be so general in nature as to state the obvious, and therefore be of minimal value. That said there would be value in an EU database of corresponding offences and sentencing tariffs.

Question 4 (see point 4.1.1.2.): Should studies of the sentencing practice of the Member States' courts be carried out?

Such studies can only be of assistance in promoting understanding between Member States, and therefore we answer the question in the affirmative: and see our answer to Question 3.

Question 5 (see point 4.1.1.2.): Would it be helpful to establish a sentencing information system to provide guidance for the courts?

This has been answered above: see Questions 3 and 4.

Question 6 (see point 4.1.1.5): Is it enough to recognise a final criminal judgment given in other Member State (and/or treat it in the same way as a national judgment) for it to be taken into account in a national court for recidivism purposes?

In English law, the point remains open whether a foreign conviction is a 'conviction' for the purpose of statutes applicable there and which use that word. However, in English criminal proceedings, a foreign conviction may nevertheless be regarded as evidence of that person's 'bad character': *El-Delbi* [2003] EWCA Crim 1767.[26] Accordingly, a court may take into account the fact of a finding of guilt abroad, and the underlying facts, for sentencing purposes. Those facts will be treated judiciously, that is to say, the conviction must be relevant, e.g. to rebut an assertion advanced in mitigation. The offender will only be sentenced for the offence before the court, on facts either proved against the offender or admitted by him: he will not be sentenced for his past offending, but previous convictions might be relevant to a determination as to whether members of the public are at risk of harm from him/her.

English law already applies the sprit/principles of Mutual Recognition to foreign convictions.

[26] Conviction in Holland, subject to an appeal (and therefore not final in the Netherlands). The finding of guilt remained a relevant fact for the trial judge in England when deciding how best to direct the jury as to the character of the accused.

<u>Question 7 (see point 4.1.1.5)</u>: Should there first of all be a degree of approximation of legislation in matters such as:

- determination of the offences to be taken into account systematically as the beginning of a series of repeat offences (establishment of a special European recidivism system);

- determination of the type of final criminal judgments to be taken into account for recidivism purposes (type of decision and authority, type and quantum of penalty);

- the period during which final criminal judgments should be taken into account as the beginning of a series of repeat offences in another Member State and the circumstances that might neutralise the effect of a conviction for recidivism purposes?

In the light of the answer to Question 6, and the matters we have set out in the Introduction to our Response, the answer is 'not at the moment'. A comparative study or audit might usefully address how Member States treat foreign convictions/findings of guilt in judicial proceedings. Attention would need to be given to the meaning of a "conviction" (e.g. would an English 'caution' taken at a police station, be deemed to be a "conviction" or a "final criminal judgment"?).[27]

<u>Question 8 (see point 4.1.2.)</u>: To what extent should the divergences between national rules on the procedures for enforcement of custodial penalties be reduced, particularly with a view to avoiding the risks of discrimination against non-resident offenders in the application of such penalties?

We believe that English law already adequately addresses problems raised by the question. The use of the word 'discrimination' is best avoided as it imports a suggestion that the domestic legal process consciously acts to the offender's prejudice. Sentencers in the United Kingdom do not impose custody on any offender if a non-custodial sentence is appropriate.

For the reasons given in the Introduction to our Response, mutual recognition is the way forward and not harmonisation. The latter might produce results more draconian than is the case now. For example, harmonisation might produce the result that the commission of a foreign offence during the operational period of a suspended sentence, imposed in United Kingdom, might trigger the sentence.[28]

The fact that the offender is a non-resident might serve to mitigate the length of sentence imposed on him/her.

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27 A caution can only be administered if the person concerned admits his/her guilt.

28 In English law, a suspended sentence might be activated if the offender commits another offence during the suspended part of the sentence. By 'offence' we mean an offence contrary to United Kingdom law, and not an offence contrary to foreign law. The position might well change if rules relating to penalties were harmonised so that an offence committed in Italy would put the offender in breach of a suspended sentence imposed in England.

<u>Question 9 (see point 4.1.3)</u>: Are there categories of offences on the list in Article 2(2) of the Framework Decision on the European arrest warrant and/or the proposal for a Framework Decision on the application of the principle of mutual recognition to financial penalties for which the penalties (and the definitions of the offences) should be harmonised as a matter of priority?

The procedure adopted in the EAW Framework Decision and in the proposed Framework Decision on the application of the principle of mutual recognition to financial penalties is that of a generic category of offence. For example in the EAW Framework Decision the list is:

1 Participation in a criminal organisation.
2 Terrorism.
3 Trafficking in human beings.
4 Sexual exploitation of children and child pornography.
5 Illicit trafficking in narcotic drugs and psychotropic substances.
6 Illicit trafficking in weapons, munitions and explosives.
7 Corruption.
8 Fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests.
9 Laundering of the proceeds of crime.
10 Counterfeiting currency, including of the euro.
11 Computer-related crime.
12 Environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties.
13 Facilitation of unauthorised entry and residence.
14 Murder, grievous bodily injury.
15 Illicit trade in human organs and tissue.
16 Kidnapping, illegal restraint and hostage-taking.
17 Racism and xenophobia.
18 Organised or armed robbery.
19 Illicit trafficking in cultural goods, including antiques and works of art.
20 Swindling.
21 Racketeering and extortion.
22 Counterfeiting and piracy of products.
23 Forgery of administrative documents and trafficking therein.
24 Forgery of means of payment.
25 Illicit trafficking in hormonal substances and other growth promoters.
26 Illicit trafficking in nuclear or radioactive materials.
27 Trafficking in stolen vehicles.
28 Rape.
29 Arson.
30 Crimes within the jurisdiction of the International Criminal Court.
31 Unlawful seizure of aircraft/ships.
32 Sabotage.

If we take for example category 1. In English law this relates to a conspiracy. Every conspiracy is penalised and defined in accordance with the substantive offence, which, during the agreed course of conduct, will be committed. It would therefore be impossible to harmonise or approximate sentences or definitions for this so far as the UK is concerned.

Terrorism is also such a wide generic description that it is not possible to harmonise on the basis of such a category. For instance terrorism under the Terrorism Act 2000 in the UK covers offences from simple membership of a proscribed organisation to providing material support to a terrorist organisation to directing and carrying out terrorist acts.

There are one or two categories such as Murder, Rape or Arson that are relatively specific. However, even with such specific offences the definition differs within Member States. For example the distinction between murder and manslaughter, and the distinction between rape and statutory rape are immeasurably important when sentence is imposed. Such categories of offences are not in their nature trans-national and therefore the advantages of harmonisation are minimal.

<u>Question 10 (see point 4.1.6)</u>: To what extent should criminal fine systems be approximated (for example in relation to economic crime, including offences committed by legal persons)?

The English experience of trying to harmonise fine levels imposed on individual offenders for the same English crime has not been a success. The principle was to introduce unit fines[29] where for example drink driving required the imposition of a number of unit fines within a given range. Each unit fine was then calculated in relation to the individual's means.[30] In practice this system was found to produce injustice and inequality and was discontinued.[31] The basic problem was the removal of the element of judicial discretion that is essential to just and fair sentencing. A useful summary of the history of unit fines in England, appears in the *Review of Monetary Penalties in New Zealand* (chpt.5, Criminal Justice Policy Group, June 2000).[32]

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29 See the Criminal Justice Act 1991.

30 "Means" represents the income and wealth of the offender.

31 Criminal Justice Act 1993.

32 "A unit fine system was trialled in four courts in England and Wales between 1988 and 1990, with the unit being a week rather than a day. At the end of the trial (which had no special legislative authority) all four participating courts elected to continue unit fines. The pilots were not a comprehensive test of the day fine system because the legislation under which they operated only permitted fines to be reduced to take account of the lack of means of an offender and did not allow fines to be increased for the better-off. The British Government subsequently provided a legislative framework for unit fines (which allowed courts to impose larger fines on the affluent) in sections 19 to 23 of the Criminal Justice Act 1991 and the Magistrates' Courts (Unit Fines) Rules 1992, and the system entered into force on 1 October 1992. The system applied only in the magistrates' courts to offences committed by individuals. It provided for up to 50 units to be imposed (that is, 50 weeks or one year) depending on the seriousness of the offence and provided for each unit to be valued at between £4 and £100 depending on the net income of the offender. Thus it was possible for the fine amount for a 50-unit offence to be £200 if the minimum unit of £4 applied and to reach £5,000 (the maximum allowed under the scale) if the maximum rate was applied. This was higher than the range of between £3 and £20 (which meant a maximum fine of £2,000) that applied with the pilot schemes. In arriving at a value for each unit, every court established local standard allowances for basic living (food, housing, heating, a community charge, clothing, and travel to work) which were deducted from the net income of the offender, with discretion to amend this figure to take account of "exceptional" expenditure. There were also allowances for dependant spouses, partners, and children. The resulting figure divided by 3 became the "disposable income" figure used to value each unit, up to the maximum of £100."

In England & Wales all serious offences are tried in the Crown Court where the imposition of a fine for any offence is unlimited. The sentencing judge determines the amount judicially. Fines are imposed taking into consideration the means and circumstance of the offender. What would be a large fine to one individual may be insignificant to another.

For all these reasons, it is difficult to see how a just and workable system could result from an attempt at harmonising fines throughout the EU.

The American Federal system imposes sentencing guidelines on judges that are strictly applied. The International Commission of Jurists has voiced concern at the interference of the executive in the realm of the judiciary when imposing sentences.[33] The imposition of any form of mandatory sentencing is a serious interference by the executive into the sphere of the judiciary and does not respect the separation of powers necessary in a democratic society.

In relation to legal persons the situation is somewhat different in that the imposition of unit fines (if such units were equated to turnover) may be more just. Therefore in relation to economic crimes, especially those that contravene European Directives and Union policy, such as anti-competition laws, there might be some room for manoeuvre to approximate particular penalties based on turnover (or perhaps based on a profit calculation).

<u>Question 11 (see point 4.1.6)</u>: To what extent should divergences between national rules governing the criminal or administrative liability of legal persons be narrowed, particularly to avert the risk of criminals relocating their activities in the field of financial crime?

With reference also to the answer given to question 10, such harmonisation is not possible unless all Member States accept that legal persons can be criminally liable. As at present Greece, Germany, Luxemburg and Italy do not recognise such criminal liability. Those States would have to change their laws to make them so liable.

A further question arises as to whether such liability should be in the common law mode based on the 'identification principle' or on the principle of 'vicarious liability'. Whilst the latter principle perhaps meets the objections of systems that favour non-criminality of companies (on the grounds that they have no criminal *mens rea*) it does not deal with the true fraudulent enterprise where the company only acts to the financial detriment of another by the deliberate actions of one or more persons who in effect represent the hands and mind of the company.[34]

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33 ICJ press release 18th August 2003

34 It will be appreciated that this is a complex area of law. Under English law, a company can be prosecuted for crimes perpetrated by its officers or servants if the statute creating the offence is unambiguous that liability is imposed on a company: see s.734, Companies Act 1985. There was a time in English law when it was believed that a company could not be liable for a crime at all [*Anon* (1701) 12 Mod Rep 560], but much later (i.e. shortly before and shortly after the turn of the 20th century) the courts seemed ready to hold that a company would be criminally liable for unlawful acts performed by employees of the company who were acting within the scope of their employment, and that this was so if the offence required *mens rea* – which a company logically cannot have. However, since that time, English case law has resisted interpreting statutes in that way notwithstanding that the Interpretation Act 1889 defined "person" to include a "body of persons corporate or unincorporated" (so that a 'person' liable for a crime under statute was/is capable of making a legal person criminally

The CBA supports the criminal liability of legal persons based on the identification principle, and we urge that there be accord between Member States that there should be liability on this basis in order to further mutual recognition of judgments.

Question 12 (see point 4.1.6): Could the same range of sanctions as provided for by the current Framework Decisions apply on a general basis to legal persons?

Obviously the question of imprisonment for a legal person does not arise. Accordingly the Decisions relating to suspended sentences, day-release, early release, remission, amnesty and transfer are inapplicable.

Sanctions such as exclusion from entitlement to public grants or aid, temporary or permanent disqualification from business or some areas of business, or judicial winding-up, closing of premises or establishments are all possible.

At present the availability of these alternative sanctions, imposable, on companies is patchy. For example closing of premises or establishments relating to child pornography is possible, but not as a general sanction in relation to say ordinary fraud.

The CBA would welcome a Framework Decision promoting EU enforcement of such sanctions in accordance with Mutual Recognition principles.

Question 13 (see point 4.1.7): To what extent should divergences between national rules governing alternative sanctions be narrowed, in particular to avoid them being applicable in practice only to residents?

The term "alternative sanctions" in the Green Paper means penalties that are not custodial penalties, fines, confiscations or disqualifications. It follows that sentences in the UK such as 'Community Punishment Orders' (formerly styled 'Community Service Orders') and 'Community Rehabilitation Orders' (formerly 'Probation Orders') are available alternative sanctions.

Such sanctions are usually linked with the local community where reparation and rehabilitation are carried out. However, they are often imposed as a direct alternative to a custodial sentence. In such circumstances non-residents are not assessed as suitable for a community penalty because they will not be in the country to carry out the Community Punishment Order or be supervised by the probation service.

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liable): see now s.5 and sch.1 of the Interpretation Act 1978. The test now applied is whether (if the relevant facts are proved) the acts and the intention of the servant of the company were the acts and intention of the company [see *Criminal Law*, Smith & Hogan, 8th ed., page 186; and see *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500; *P&O European Ferries Ltd* (1990) 93 Cr.App.R.72; [1991] Crim.L.R.695].

It seems where such a sentence is imposed as a direct alternative to imprisonment there is no reason in principle why the sentence should not be carried out and enforced in another Member State.

We believe this to be achievable by an application of the principles of Mutual Recognition. That said, steps should be taken to secure agreement between Member States as to minimum standards of service and quality in the enforcement of a community penalty or other "alternative sanction".

Question 14 (see point 4.1.7): What mechanisms might be envisaged to reduce the legal and practical difficulties potentially precluding the mutual recognition and enforcement of alternative sanctions in another Member State?

The following mechanism is proposed:

1. That the following criteria be met:
   (i) The individual sentenced must not be ordinarily resident in the State where the sentence is imposed.
   (ii) The individual sentenced must be (a) a national of the State of enforcement, or (b) a person who habitually resides there, or (c) a person who is in the territory of the State of enforcement where they are serving or are due to serve a custodial sentence.
2. The State where the sentence is to be enforced must register such community sentence as is available for enforcement which could be imposed in corresponding circumstances and enforce the same;
3. The sentence registered must not be longer in duration than the sentence imposed in the sentencing State unless the enforcing State must pass a sentence of a minimum duration in which case that shall be the sentence registered;
4. The enforcing State shall not enquire into the merits of the conviction but the sentenced person shall retain all rights of appeal in the sentencing State;
5. Failure to comply with the community order (over a *de minimis* breach) in the enforcing State should be dealt with in the sentencing State which could issue a EAW to obtain the return of the offender.

Question 15 (see point 4.1.7.): Is it necessary to take measures at European Union level, other than those laid down in Article 10 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, to harmonise certain conditions and practical arrangements for mediation in criminal cases, to facilitate the recognition of measures and arrangements arising from mediation procedures and their implementation in another Member State? Should a minimum framework govern:
- the categories of offence concerned?
- the mediation procedure?
- the status of mediators, including the extent of their independence from the courts?
- training and conditions of eligibility for mediators?

It is not thought necessary to take any further measures.

<u>Question 16 (see point 4.1.7)</u>: To what extent should measures be taken at European Union level to take account of the interests of victims - including those who do not reside in the Member State in which the offence was committed - when imposing alternative sanctions? If so, what should they be?

The interests of the victim are but one factor in the sentencing process, albeit an important factor. However, the weight that a court should attach to those interests will always be a finely balanced judgment dependent on the individual facts of the case. In the United Kingdom, the role of the victim in the sentencing process is carefully circumscribed to the production of "impact witness statements" whereby s/he can provide the sentencing tribunal with important information as to how the crime has affected him or her. It is obviously important that this information be credible and relevant. However, the choice and intensity of penalty is the sole decision of the Court. We have no objection to this approach being taken at an EU level.

<u>Question 17 (see point 4.1.8.)</u>: To what extent should measures be taken at European level to provide for approximation of certain conditions of eligibility and implementation of early release, to facilitate the recognition of prison sentences and their enforcement in another Member State? Should minimum standards govern:
- regarding life sentences, the possibility of periodic review with a view to early release?
- regarding sentences to specific periods, the minimum period of imprisonment that should be served before early release can be allowed? If so, how long should it be? Are there any prospects of approximation along the lines that, for non-life sentences, early release should be possible after half the sentence has been served in normal circumstances and two thirds in repeat offence cases?
- the criteria for allowing or refusing early release?
- the release procedure? Should procedural standards be provided for?
- supervisory arrangements and the duration of the trial period?
- penalties for failure to comply with the conditions for early release?
- the procedural safeguards for offenders?
- victims' interests? Should the European Union provide that early release can be allowed only if the victim or victims have been compensated or the offender has made serious efforts to compensate them, or can be revoked if this condition is not met?

There must be a mechanism in place for ensuring that rules for early release are not more draconian in the enforcing State (or if they are, that the prisoner consents) than in the sentencing State.

In setting minimum standards, care must be taken to avoid unduly restricting the degree of flexibility required in managing prison populations and when providing an individualised response to prisoners.

We deal with each of the topics listed in the question:

- *regarding life sentences, the possibility of periodic review with a view to early release?* – It is not enough that there is the possibility of periodic reviews: there *must* be such reviews. We believe reviews to be a necessary part of the sentencing process and required by the ECHR in any event. In cases where a person has been sentenced to life imprisonment, the sentence is likely to fall into two parts, namely,

(i) that period of detention imposed for punishment and deterrence, taking into account the seriousness of the offence, and (ii) the remaining part during which the prisoner's detention might be justified in order to protect the public from harm from the offender (perhaps by virtue of psychiatric illness, or chronic drug addiction).[35] It follows that periodic reviews are necessary in order to carry out the function of assessing when it is appropriate for the offender to be returned to the community. Minimum standards are necessary to put in place a system for periodic reviews, the relevant periods, the criteria by which assessments are to made, the role of Executive in the making of early release decisions, and so on.

- *regarding sentences to specific periods, the minimum period of imprisonment that should be served before early release can be allowed? If so, how long should it be? Are there any prospects of approximation along the lines that, for non-life sentences, early release should be possible after half the sentence has been served in normal circumstances and two thirds in repeat offence cases?* It is necessary to clearly define a "long term" and a "short term" sentence. In the United Kingdom a sentence of 4 years' imprisonment or longer is a "long term" sentence. By section 33(1) of the Criminal Justice Act 1991, as soon as a short-term prisoner has served one-half of his sentence, it shall be the duty of the Secretary of State (a) to release him unconditionally if that sentence is for a term of less than twelve months; and (b) to release him on licence if that sentence is for a term of twelve months or more. By section 33(2) of that Act, as soon as a long-term prisoner has served two-thirds of his sentence, it shall be the duty of the Secretary of State to release him on licence. However, provision must be made to allow a prisoner to be released earlier than stated in the statutory periods in specified circumstances (e.g. on medical, or other compassionate grounds, or where it is in the interests of the State to do so). Bear in mind that in English law, statutory rules governing early release are complex and have regard to the age and capacity of the offender.

- *the criteria for allowing or refusing early release?* – these should be framed as part of a package of measures in support of the Mutual Recognition of judgments and sanctions (and see the preceding paragraph).

- *the release procedure? Should procedural standards be provided for?* In part, we have addressed this issue in earlier answers. We would welcome agreement (and encourage Member States to agree) on procedural standards that exceed the minimum standards laid down by the ECHR in respect of this and other aspects of the justice process.

- *supervisory arrangements and the duration of the trial period?* Our response to this issue has been expressed in the preceding paragraphs, but we would add a general observation, namely, that agreement reached between Member States on matters that improve the quality of service provided by professionals operating within the criminal justice process can only enhance *trust* and *confidence* in that process.

- *penalties for failure to comply with the conditions for early release?* The answer to this question is likely to turn on the type of sentence originally imposed on the

[35] See, for example, Specified period of detention Practice Direction (Criminal Proceedings: Consolidation), para. 47, [2002]1W.L.R. 2870.

offender, and the consequences that are likely to flow from non-compliance. For example, in respect of a suspended sentence of imprisonment imposed in England, would it be sufficient for the suspended part of the sentence to be activated by a minor offence committed in France? Should the original sentencing court be responsible for activating the sentence? If the breach is administrative rather than involving the commission of another offence (e.g. failing to attend counselling sessions), such matters might best be dealt with by the court of local jurisdiction subject to agreement between Member States as the procedure to be followed. We accept that this is a vexed and complex matter about which we have expressed only provisional views.

- *the procedural safeguards for offenders?* We repeat that agreement reached between Member States on matters that improve the quality of service provided by professionals operating within the criminal justice process can only enhance *trust* and *confidence* in that process.

- *victims' interests? Should the European Union provide that early release can be allowed only if the victim or victims have been compensated or the offender has made serious efforts to compensate them, or can be revoked if this condition is not met*? The requirement for early release to be conditional on compensation seems a regressive step. Whilst it may be a factor in exercising discretion to release early, it would be wrong to prevent release on this ground alone. It would effectively turn the law back (at least in England) to the situation that a prisoner who denied his guilt might not get parole.

Question 18 (see point 4.2.1.1.): What categories of sentenced persons should be eligible for transmission of enforcement in the State of enforcement: nationals of the State of enforcement, persons who habitually reside there, sentenced persons who are in the territory of the State of enforcement where they are serving or are due to serve a custodial sentence? Should there be specific conditions for minors and mental patients to be eligible also?

All such persons should be eligible for transmission of enforcement provided that they consent to the transmission (and see the answer to Question 28).

Question 19 (see point 4.2.1.2.): Is there a need to make agreements emerging from criminal mediation and settlement procedures in the Member States more effective? What is the best solution to the problem of recognition and enforcement of such agreements in another Member State of the European Union? For instance, should specific rules be adopted to make such agreements enforceable? If so, what guarantees should apply?

Criminal mediation and settlement should not be the subject of mutual recognition and enforcement. It is too low down the scale of criminal punishment to warrant European wide action and too intricate and personal a mechanism to standardise. Mutual recognition and enforcement should be limited to penalties properly so-called. Thus it would only apply to mediation and settlement if for whatever reason the settlement failed and a penalty was imposed

<u>Question 20 (see point 4.2.2.1.)</u>: Should it be possible only for the sentencing State to ask for transmission of enforcement, or should it also be possible for the State of enforcement?

It should be possible for either State to seek transmission.

<u>Question 21 (see point 4.2.2.2.)</u>: What are the grounds that the State of enforcement could legitimately put forward for refusing recognition and enforcement in its territory of a criminal penalty imposed in another Member State?

No dual criminality, breaches of ECHR rights, political offence exception and ne bis in idem.

<u>Question 22 (see point 4.2.2.2.)</u>: Where national legislation allows financial penalties to be imposed concurrently with prison sentences, given the prospect of the adoption of the Framework Decision on the application of the principle of mutual recognition to financial penalties, should the sentencing State be entitled to refuse to transfer enforcement until the sentenced person has paid the fine?

Under the umbrella of "financial penalties" we include 'costs' that the court has ordered the offender to pay.

Our answer to the question is a qualified 'yes': the qualification is that if it is possible to secure payment of the penalty (in full) by an agreement enforceable overseas, then this should enable the transfer to take place. The difficulty is a practical one. The cost of enforcing an agreement overseas might be prohibitive.

If it is the offender who is requesting transfer then it is likely that he/she will be motivated to pay the fine in good time in order to advance the application for transfer. If it is another State that is requesting transfer, then one option is for that State to enter into a bond that it will pay the Requested State the value of the fine/costs in the event the offender defaults (within the time stipulated by the court for payment). It would be for the Requesting State to recover the debt from the offender under its domestic laws.

Although this question has been framed in respect of offenders who concurrently receive a financial penalty and custody, it is pertinent to consider the position of persons who have received a fine only and perhaps a costs order (or a fine/costs and a non-custodial sentence) and who wish to leave the jurisdiction. There has been a tendency for the courts of the United Kingdom to find ways of ensuring that offenders do not leave the jurisdiction until the amount is paid, but in truth the courts' powers in this regard are exceedingly limited. As soon as the court has imposed a financial order (and if no other sentence has been imposed on the offender that empowers the court to exercise supervisory jurisdiction over him/her) the court is no longer seized of the matter: the sentencing court is not the enforcement authority for the purpose of recovering the value of the order. The sentencing court cannot bail the offender until the order is paid, and therefore the court is powerless to attach conditions restricting travel. The sentencer might attempt to obtain the offender's consent

not to obtain travel documents, and not to leave the jurisdiction until the value of the order is paid, but it is a debatable issue whether (as a matter of English law) a breach of that agreement is a contempt of court or not.[36] We suggest that steps should be taken at an EU level to address this problem.

Question 23 (see point 4.2.2.2.): Given the differences between the Member States' legislation on early release, a sentenced person may be released immediately after transfer to the requested State. Could this be seen in the relevant Member States as a legitimate ground for refusing to transfer?

If the matter were approached applying Mutual Recognition principles, one consequence is that the Requesting State should enforce the sentence imposed for the duration intended, and as ordered, by the Requested State. The fact that the Requesting State (had it been seized of the matter) would have imposed a sentence lower or even higher than the term imposed by the Requested State seems to us to be immaterial. Mutual Recognition entails 'give and take', and a recognition that there cannot be equivalence in a process that is dealing with cases that will be as varied as to fact as life itself.

Question 24 (see point 4.2.2.2.): Should a minimum period be set in the European Union during which the sentenced person would continue to serve his sentence in the convicting Member State so as to avoid situations in which he might be released immediately on transfer to the State of enforcement or serve a much lighter sentence than in the sentencing State? How long should that period be? Would the introduction of a minimum period jeopardise flexibility and preclude case-by-case solutions? Would determining a period compatible with the needs of justice, as proposed by the Committee of Experts on the operation of the Council of Europe Conventions on criminal law (see point 3.2.1.5.d.), be preferable?

This would not arise if Member States adopted our approach as stated in answer to Question 23. In any event, the length of a sentence is the length that is commensurate with the seriousness of the offence (or to protect the public from harm from the offender). Accordingly a person should not be detained for administrative reasons.

Question 25 (see point 4.2.2.3): Where the type or duration of the penalty imposed by the State of judgment is incompatible with the legislation of the Sate of enforcement, should the latter State enjoy the possibility of adapting the penalty imposed in the State of judgment into a penalty provided for by the State of enforcement for comparable offences?

If the measures proposed by us in answer to Question 23 were adopted, the enforcing State would (and we suggest should) enforce the judgment as envisaged by the sentencing court of the Requested State. Logically, the sentence remains that of the Requested State, and therefore the enforcing State becomes merely the administrative agent on behalf of the former.

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[36] We recognise that rules relating to (what is styled in English law as) 'contempt of court', are likely to vary widely across Member States, and that such a concept might be unknown in some jurisdictions.

If this analysis remains incompatible with the laws of the enforcing State then the fallback position would be adapting the penalty in a way that makes it compatible with the laws of the enforcing State. We are bound to say that such an approach sits uncomfortably with the principle of mutual recognition, but in cases where this approach is the only practicable solution, then Member States should strive to adopt an EU instrument to assist States in their approach to adapting, converting and or substituting foreign judgments. The instrument should promote a consistent approach (and include safeguards for the defendant).

Question 26 (see point 4.2.2.3): Should provision be made in the European Union for the possibility of adapting, converting or substituting penalties, or should the State of enforcement be left with full powers of discretion.

See our answer to Question 25.

Question 27 (see point 4.2.2.3): Would the approach proposed by the Max Planck Institute of Foreign and International Criminal Law in Freiburg, which consists of making a functional comparison between (alternative) sanctions or measures in the State of judgment and the State of enforcement by a certain analysis and evaluation method provide a solution? What shortcomings does this approach have? How can they be remedied?

In our view it is essential to analyse the purpose behind a sanction if one is to select an equivalent sanction in another Member State. In the circumstances a functional analysis is the most logical approach to the exercise. We commend the Max Planck approach. In practice, so far as UK alternative sanctions are concerned, the most relevant level of analysis is number 3. However, it is important that each level comprises further categories, which allow a sensitive analysis of the purpose behind a measure. For example, a Community Punishment Order may combine a structured treatment programme for an addiction to drugs. The sanction incorporates both a curb on the offender's lifestyle in addition to a treatment programme. The functional approach to sentences should reflect such flexible sentences that both punish and rehabilitate.

Plainly, this approach fails to incorporate a quantitative assessment of the severity and or rigour of any particular sanction. In our answer to question 3 we have made observations upon the merit of developing sentencing guidelines. For the reasons set out we question the desirability and/or necessity of such a system. What is important is that the Enforcement State is obliged to impose the same or similar punishment but retain a degree of discretion in how it approaches this task. Such a system would promote mutual trust and preserve a flexible sentencing practice. This system represents the best solution but should incorporate safeguards so that the offender is not punished more harshly and has a right of appeal.

Question 28 (see point 4.2.2.4): Should the transfer of enforcement of a criminal judgment be subject to the request, consent or merely the consultation of the person sentenced ? Would the answer to this question be different if the person sentenced has already begun serving his sentence in a prison in the sentencing State ?

We see no reason why the process should only be triggered at the request of the offender. The approach should not differ where the offender has begun to serve his or her sentence of imprisonment and/or begun comply with any alternative sanction (we recognise that the latter type of penalty, when served in part, may require the deployment of a more sophisticated conversion technique in the enforcement State).

In our view the decision to transfer should be subject to the views of the offender. The offender should be given the option of consenting (in writing), or stating his/her objection to a transfer – again in writing. Where the offender merely remains silent on the issue, that fact should be recorded. The consultation process should be straightforward: in other words, the views of the offender are to be taken into account but the offender would not have the power to block a transfer merely by declining to give his/her consent to it. The process should not engender delay. However, it needs to be recognised that a decision of a public authority to transfer an offender against his/her will, might be the subject of legal challenge in any event (e.g. applying the ECHR), for example, on grounds that the Requesting State is acting in bad faith.

Question 29 (see point 4.2.2.5)*: *How can the victim's interests be taken into account in the transfer of enforcement of the penalty? Should the provision be made for information for the victim (as to the existence of a request for recognition and transfer and the outcome of the proceeding), consultation or even consent, as a possible condition for the recognition and transfer of enforcement ?

In the United Kingdom, the victim's role in the sentencing process is carefully circumscribed to the production of "impact witness statements" whereby s/he can provide the sentencing tribunal with important information as to how the crime has affected him or her. However, the choice, and the intensity, of the penalty imposed is the sole responsibility of the Court. Such a system flows logically from the separation of powers in a democratic society and the goals of sentencing which incorporate not merely retribution and deterrence but also rehabilitation. Accordingly, although the views of the victim might be relevant, the victim should not be vested with a power of veto. For example, the views of the victim might be relevant if there are well-founded grounds (not just fears) that transfer might put the victim, or a family member, at risk of harm from the offender (particularly if the effect of transfer is his/her early release). It is plainly important that the criminal justice system retains the support and confidence of the general public whom it serves. In our view this requires that as a pre-requisite to transfer, the victim should be informed (a) that an application has been made, (b) of the right to make representations [and to be told the limits of representations – e.g. limited to facts material to the decision whether to transfer or not], (c) of the outcome of the application, (d) of the reasons for such a process and (e) of its effects.

Indeed, the wider education of the public on these topics is desirable.

Question 30 (see point 4.2.3.1)*: *Should the European Union make provision for a time-limit for processing requests for recognition of criminal penalties, and in particular for processing requests for transfer of prisoners, and if so what limit?

Speed and therefore finality is the essence of a fair and just sentencing process. It is imperative that time limits are imposed following an application to transfer, and following a decision to transfer. Their effect should be directory rather than mandatory (some of our members would say that they ought to be mandatory), but even if directory there must be incentives to comply with time limits, and perhaps penalties for non-compliance. Letters of Request can take very many months to process – sometimes resulting in cases being tried before information is forwarded in response to such Letters. Delays of that sort are unacceptable. Some of our members have suggested a time limit as short as 3 months.

Question 31 (see point 4.2.3.1): Given the administrative burden of processing a request for transfer of a prisoner, should the European Union provide that only prisoners sentenced to at least a specified term of imprisonment or who still have a specified minimum time to serve should be eligible for transfer? If so, what would be a proper period?

In our view a sentence that requires the offender to serve no more than 6 months (after applying early release provisions) should not be subject to transfer.

In making this suggestion we are mindful that transfers are likely to carry their own administrative burdens and demands on resources. Accordingly, the transfer of prisoners sentenced to short terms might place a burden on the transfer system to the detriment of all prisoners.

It is conceivable that the use of short-term sentences will decrease if Courts can be persuaded to impose alternative sanctions as part of the 'inclusionary approach' to sentencing.[37] Secondly, the effect on short term prisoners of serving a sentence in another Member State are less acute compared with longer term prisoners. Finally, the EU is likely to concern itself with offences that will attract more substantial penalties. Indeed, as stated in the introduction to this response, we are of the view that penalties indicative of offending that is not "particularly serious" should not be included in this exercise at all.

Question 32 (see point 4.2.3.1): Should the European Union make provision for a time-limit for responding to a request for information needed in connection with the recognition of criminal penalties, and in particular for the transfer of prisoners?

Yes.

Question 33 (see point 4.2.3.1): Given the complexity of judicial and administrative structures in the Member States and the differences between them, what simple and effective structures should be provided to implement the mutual recognition of criminal penalties and the transfer of prisoners?

If the experience is that the processing of Letters of Requests takes 12-18 months, clearly structures and procedures must be put in place to streamline the process. Government departments need to identify specific persons or establish desks particularly responsible for

[37] The 'inclusionary approach' is keeping offenders out of custodial institutions if possible.

receiving and approving requests on a consistent basis to ensure continuity. A network needs to be created (perhaps linked to an existing body or network such as Eurojust or the EJN?) between these persons to forge regular contact and refine inter-State relations. It can be used to exchange information and organise training. The same initiatives should be taken with national prison authorities that are responsible for implementing the requests that have been processed.

Question 34 (see point 4.2.3.1): Should there be a standard form in the European Union to facilitate the implementation of the recognition of criminal penalties that it has recognised?

Yes, a standard form would greatly assist in streamlining the process. In this way, the information required by each State could be included in a standardised format, which would create certainty and efficiency.

Question 35 (see point 4.2.3.1): Should the State of enforcement be able to ask for reimbursement of expenditure incurred in the enforcement of penalties that it has recognised.

No, it would further complicate the already cumbersome procedure. As the prisoner would be a resident of the Enforcement State, it should be responsible for the costs of the imprisonment. The working assumption must be that such exchanges, in the longer term, would balance out in cost terms as between the Member States.

Question 36 (see point 4.2.4): Should a network of contact points be set up to facilitate – and perhaps even help to evaluate – the practical application of a European Union legislative instrument on the mutual recognition of criminal penalties and the transfer of prisoners?

Yes, as it would serve as a mechanism to monitor, aid, and improve the implementation of the legislation.

Question 37 (see point 4.2.4): Where a custodial penalty or an alternative penalty is recognised, are there any reasons for departing from the rule that enforcement should be governed entirely by the law of the State of enforcement?

We draw the Commission's attention to our answer to Questions 23 to 26 inclusive.

Question 38 (see point 4.2.4) : If the conditions attached to a suspended sentence are supervised by the State of enforcement, should the State of judgment be given the possibility of ensuring that the sentenced person complies with the conditions? What mechanisms should be envisaged for that purpose?

We answer this question in the context of our answers to Questions 23-27, and Question 37 above.

The State of Enforcement should be responsible for the *supervision* of the penalty ("supervisory matters"). That responsibility would include ensuring compliance with all conditions imposed by the State of judgment at the sentencing stage, and thereafter by the State of Enforcement. Consultation with the State of judgment should be a requirement (a) in the event of a significant or serious breach of the sentence, or (b) if a major departure from the sentence is contemplated or sought by the State of Enforcement. As a general rule final determinations on supervisory matters should be made by the State of Enforcement. This reasoning is consistent with the principles of mutual recognition and trust.

However, difficult issues arise in connection with offences committed during the operational period of a suspended sentence.[38] We identify three such issues, (i) whether all (or part) of a suspended term of imprisonment may or should be activated by a court of the State of judgment if, during the operational period of the sentence, the offender commits an offence outside the jurisdiction of that State; (ii) whether, the State of Enforcement[39] should be entitled to activate a suspended sentence in respect of a further offence committed within its jurisdiction, (iii) whether a suspended sentence may be activated if the offender is before a criminal court of any Member State no matter where in the EU the subsequent offence was committed. At this stage we are not in a position to make any firm proposals on these issues.

Question 39 (see point 4.2.4): Which of the two States should be able to exercise the right to give an amnesty or pardon?

Either of the two States should be able to recognise the right to give an amnesty or pardon. The interests and circumstances in each State need to be taken into account as either could justify an amnesty or pardon. The prisoner should also be permitted to benefit from the conditions applicable in each State.

30th September 2004

James Lewis QC. **Rudi Fortson**
Clare Montgomery QC. **Thomas Forster**
Rodney Dixon QC.

[38] See the answer to Question 17.
[39] That is to say, not the State of original judgment.