European Judicial Cooperation in Criminal Matters

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Abstract: European judicial cooperation in criminal matters has its origins under Title VI as part of the Third Pillar (JHA) of the Treaty on European Union, signed on 7 February 1992 in Maastricht. Nevertheless, there have been important amendments to this Treaty and to the contents of the Justice and Home Affairs policy through the Treaty of Amsterdam and the Treaty of Nice (the latter in force since last February), such as, for example, the introduction of the European Prosecutors Cooperation Unit (‘Eurojust’). This brief study is concerned with these innovations as well as some legal instruments in the field of criminal judicial cooperation, in particular extradition, mutual recognition of judicial decisions, mutual assistance in criminal matters and the European arrest warrant which are considered as the most relevant.

I Introduction

Now is a particularly opportune and interesting moment to look at any kind of judicial Cooperation in criminal matters, especially after such deplorable events as the attacks of 11 September 2001. In this paper we are going to focus this cooperation on Europe, not only in a geographical sense but in a legal sense as well, for there has been an important amount of progress in Justice and Home Affairs (JHA) here.

In this context, the European Council held a special meeting on 15 and 16 October 1999 in Tampere (Finland) aimed at promoting the creation of an area of freedom, security, and justice in the European Union. Among the so-called ‘Tampere

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1 The European Union has shown its complete solidarity with the government of the United States and the American people, in the international campaign to eradicate terrorism. To see EU actions in this respect, <http://europa.eu.int/comm/justice_home/news/terrorism/index_en.htm>.
milestones	extsuperscript{2}, besides a common European Union asylum and migration policy, two others are contemplated: a genuine European judicial space with measures such as better access to justice in Europe and mutual recognition of judicial decisions, and a EU-wide fight against crime.

The purpose of this brief paper is, first, to present the evolution of the police in European judicial cooperation in criminal matters from its origins to the present day. Second, we will try to examine various legal instruments which make this judicial cooperation possible among the member states today; this will be dealt with basically from a procedural view and in particular will concentrate on those procedures which appertain to criminal processes. Finally, some personal considerations will be also presented.

II Evolution from the Treaty on European Union to the Treaty of Nice

Within this kind of ‘historical’ view, we will now consider the legislative provisions on judicial cooperation in criminal matters. Leaving aside the fact that there are almost certainly even more remote historical antecedents, for example during the 1970s through the TREVI Group or, especially, the 1980s with both the Schengen Conventions and the political cooperation introduced by the European Single Act (1985), the first written text that regulates any kind of police and judicial cooperation was in fact the Treaty on European Union (1992). Since then, there have been essential amendments to the text introduced, first, by the Treaty of Amsterdam (1997) and second by the Treaty of Nice (2001), recently in force.

A Treaty on European Union

The Treaty on European Union, signed on 7 February 1992 in Maastricht elaborates the definitive context of police and judicial cooperation under its Title VI, which

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	extsuperscript{3} For example and among others, extradition, arrest warrant, mutual judicial assistance, mutual recognition of judicial decisions, . . . Anyway, the selection can never be restricted because the police of judicial cooperation is still (and always) in progress.


	extsuperscript{5} See S. Bonneloi, Europe et sécurité intérieure. TREVI. Union européenne. Schengen (Delmas, 1995).


	extsuperscript{7} Remember Article 1: ‘European Communities and the European Political Cooperation have as purpose to contribute jointly to make progress the European Union in reality’.

constitutes the so-called ‘Third Pillar’. The scope of this was originally indicated as one of the specific objectives of the European Union in the previous Article B (up-to-date 2) TEU, whose enumeration works as *numerus clausus*. And more definitively, judicial cooperation in criminal matters is included as one of the subjects contemplated by the original Article K.1 TEU, first precept of Title VI and today Article 29, which also operates as a *numerus clausus* list.

First of all, it is necessary to determine the legal character of these provisions included in the Third Pillar of the Treaty on European Union and, specifically, those related to police and judicial cooperation. So, choosing between the two possible attributes of these provisions, Community law or ‘intergovernmental’ character, it seems more reasonable according to the structure of the Treaty itself to defend the latter. We include here some of the different arguments put forward on behalf of the thesis of this legal character assimilated to Classical International Law of the whole Third (and Second) Pillar:

a) Forecast of a new classification of community acts to replace that used in the old Article 189 (present 249) EC; the usual regulations, directives and decisions with binding force are now substituted by the promulgation of joint positions, joint actions and conventions contained in former Article K.3 TEU, whose legal value is very doubtful because of the draft’s silence in this respect. It is precisely for this reason that the aforementioned classification has been reformed in the sense of new Article 34(2) TEU by the Treaty of Amsterdam as we will show below.

b) Creation also of a new organic structure within Title VI, such as the ‘Work Teams’ or Directorial Committees, of which the former is the most important group in the third level, the Co-ordinating Committee consisting of senior officials and contemplated then in former Article K.4 (hence also called the ‘K.4 Committee’); its function is to give opinions for the attention of the Council and contribute to the preparation of the Council’s discussions in the areas referred to in former Article K(1) TEU. Just above that is the Justice and Home Affairs Council, but this is only a political organ.

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9 Regarding this, at this moment, specifically, the collective works directed by the European Union, *The third Pillar of the European Union* (Brussels, 1994) and *Justice and Home Affairs in the European Union: the development of the third Pillar* (Brussels, 1995); in Spain, also from official institutions, A. Salcedo Velasco (ed.), *Política común de justicia e interior en Europa* (Consejo General del Poder Judicial, 1995).
10 In fact, the fourth one, through which the member states will attempt ‘to develop close cooperation in the area of justice and home affairs’.
11 Exactly, it occupied at that time the seventh place, between judicial cooperation in civil matters and customs cooperation.
13 Title V, now Arts 11 et seq TEU, which includes the provisions related with the Exterior Police and Common Security.
14 Abbreviation of EC Treaty.
15 For example, Müller-Graff thinks that the whole legislation provided by this Title VI has no binding effects and its authority is just political; Müller-Graff, n 12 above, 510.
16 Today Art 36, former Art K.8 after the Treaty of Amsterdam Amendment.
c) Intentional exclusion in general terms of the competence of both European Courts of Justice—Court of Justice of the European Communities and Court of First Instance—to judge any affairs in relation with this Third Pillar. The sole exception is provided in former Article K(3)(2)(c) and new 31 TEU in relation to those conventions, which attribute competence to the Court of Justice to make an interpretation of them and to solve the disputes referring to their application.

d) The opportunity to establish an enhanced judicial or police cooperation among member states that this indicated in Title VI, in application of more favourable provisions in order to achieve the purpose described in aforementioned Article B (now 2) TEU. This would not be possible according to the general and binding legal force of Community Law.

e) Last but not least, the possibility of ‘communitarising’ some of the subjects enumerated in former Article K(1) and new 29 through the procedure called ‘passerelle’ and so the application of—today inexistent—Article 100 C EC to actions contemplated in numbers 1 to 6 of Article K(1) TEU with the unanimous vote of the Council and at the initiative of the Commission or a Member State. But the relation of this ancient Article 100 C EC with a visa policy and the restriction of this possibility just to some areas, with the intentional exclusion of judicial cooperation in criminal matters (number 7), customs (number 8) and police (number 9), makes this Community Law process almost impossible in practice.

So, in conclusion, the provisions contemplating judicial and police cooperation belong to the area of interstate relations of member states and hence the intergovernmental character of their legal code instead of it being Community Law.

B Treaty of Amsterdam

The Treaty on European Union (as well as constitutive Treaties) is amended by the Treaty of Amsterdam signed on 2 October 1997. In our context, the most important innovation is constituted by the fact that now Title VI is just restricted to police and judicial cooperation in criminal matters. Judicial cooperation in civil matters is then removed to the First Pillar and thus converted into Community Law.

17 Art L (now 46) TEU restricted at this time this judicial competence to the provisions to the constitutive Treaties such as the EC Treaty, ECSC Treaty and EAEc Treaty as well as a few other provisions of the Treaty on European Union (former Art K.3.2.c and Arts L to S, now Arts 31 and 46–53). Now the regulation is different with the new writing provided by the Treaty of Amsterdam. By the way, we prefer to use the procedural-technical term of ‘competence’ instead of jurisdiction because of the special meaning in this respect.

18 ‘Exactly to develop a close cooperation in the area of justice and home affairs’.

19 Former Art K(9), now 42, TEU; in contrast, the new writing provided in Amsterdam includes the whole list of subjects enumerated by Art 29 TEU, so also judicial cooperation in criminal matters. Former Art 100 C EC was abolished by Treaty of Amsterdam.


21 New Arts 61 and 65 EC, within Title IV dedicated to visa, asylum, immigration and other policies referred to the free movement of persons.
Suggestions to convert the Third Pillar into Community Law were at least partially attended.\(^{22}\)

The specific contents of judicial cooperation in criminal matters is provided in Article 31 (former Article K.3) TEU: the ‘cooperation between competent ministries and judicial or equivalent authorities of the Member States in relation to proceedings and the enforcement of decisions’, the facilitation of ‘extradition between Member States’, the ensuring of ‘compatibility in rules applicable in the Member States’, the prevention of ‘conflicts of jurisdiction between Member States’ and the progressive adoption of ‘measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking’.

All these actions will be possible with the consideration of the general instruments described in common for police and judicial cooperation in criminal matters by Article 29 TEU: first, ‘closer cooperation between police forces, customs authorities and other competent authorities in the Member States, both directly and through the European Police Office (Europol), in accordance with the provisions of Articles 30 and 32;\(^{23}\) second, ‘closer cooperation between judicial and other competent authorities of the Member States in accordance with the provisions of Articles 31(a) to (d) and 32’ and, third, ‘approximation, where necessary, of rules on criminal matters in the Member States, in accordance with the provisions of Article 31(e)’.

But, although judicial cooperation in criminal matters is still maintained in the third pillar, there is also a mention in the first. In fact, the new Article 61(e) EC includes, within the measures to be adopted by the Council, also those ‘in the area of police and judicial cooperation in criminal matters’, except when these measures contemplate a specific aspect such as ‘the prevention and the fight against delinquency in the Union, according to the provisions of the Treaty on European Union’. And always looking forward to achieving the new aim incorporated by Amsterdam, the creation of ‘an area of freedom, security and justice’ contained in this Article 61 EC as well as in new Article 2 (formerly B) TEU.\(^{24}\)

Another innovation emerging from the Treaty of Amsterdam is the incorporation to the Treaty on European Union of both Schengen Conventions as well as the acts adopted by the Committee constituted by these agreements. To this end, a Protocol\(^ {25}\) was signed to establish the application of Schengen in thirteen Member States, excluding Great Britain and Ireland and with the assumption of the special position of Denmark.

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\(^{23}\) Art 30 TEU contemplates the common actions in the field of police cooperation, meanwhile Art 32 TEU provides the possible action by the authorities referred to in former Art 30 and 31 ‘in the territory of another Member State in liaison and in agreement with the authorities of that State’, under the conditions and limitations laid down by the Council. About Europol, remember its creation by the so-called ‘Europol Convention’ signed at 26 July 1995, OJ C 316, 27 November 1995; among many commentaries, L. Van Otrive, ‘La colaboration policière en Europe; de Schengen a Europol’, in B. Nascimbene (ed.), Da Schengen a Maastricht; aperture delle frontiere, cooperazione giudiziaria e di polizia (Giuffrè, 1995), 71.

\(^{24}\) Remember the special European Council held on this subject on 15 and 16 October 1999 in Tampere (Finland).

\(^{25}\) Protocol, which incorporates the ‘Schengen acquis’ in the area of European Union, situated after the new Art 42 (former K(14)) TEU.
But the really important amendment produced by Amsterdam is the provision for a jurisdictional control in relation to police and judicial cooperation in criminal matters. In this respect, two articles are modified to allow the attribution of competence to the Court of Justice: Articles 35 and 46 TEU. Then Article 35 contemplates the possibility to interpose by national judges and courts preliminary rulings on the interpretation and/or validity (it depends on every case) of the new rules enforced by the new Article 34 TEU: common positions, framework decisions, decisions and conventions.

It is anyway surprising that the employment of these preliminary ruling proceedings depend on the submission of a declaration by the member states to accept the jurisdiction of the Court of Justice. Besides, this body will have to specify whether the proposal for preliminary rulings is admissible by any national judge or court or only by those for ‘whose decisions there is no judicial remedy under national law’, without any indication of whether this absence of judicial remedy is referred to in general terms or related to the single case. Of course, we recognise the need for a provision in this sense attributing competence to the Court of Justice because of the ‘intergovernmental’ character of this pillar but we think that such a clause is not the best way of doing it.

Besides, the same Article 35 TEU provides a judicial remedy against the legality of framework decisions and decisions similar to that contemplated by new Article 230 (formerly 173) EC, as well as a procedure dedicated to solving any dispute between member states regarding the adoption of acts enumerated by Article 34(2)(d) TEU. Meanwhile nowadays, according to Article 230 EC both European Courts of Justice, Court of Justice of the European Communities and Court of First Instance, have competence to judge this legality in function of the legitimisation of the plaintiff. Nothing is specified in Article 35(6) TEU. We consider as a more probable option the attribution to the Court of Justice because this is the general provision contained in Article 46 TEU.

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26 The last one provides the extension of the regulation contained in the Treaty establishing the European Community in relation with the procedure before the European Court of Justice to Title VI of the Treaty on European Union ‘subject to the conditions laid down in Article 35 TEU.

27 ‘preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under this Title and on the validity and interpretation of the measures implementing them’ (official translation). Regarding this, M. Jimeno Bulnes, La cuestión prejudicial del artículo 177 TCE (Bosch, 1996).

28 The general attribution of jurisdiction made by new Art 46 TEU providing the application of all or part of the procedures contained now in Art 220 (formerly 164) EC et seq would have been sufficient. On the contrary, the submission of such a declaration of Arts 35(2) and (3) TEU reflects the juridical value of the Court of Justice and even its judgements, now closer to an arbitral court. See, Jimeno Bulnes, n 7 above 110 et seq.

29 Textually, ‘the Court of Justice shall have jurisidiction to review the legality of framework decisions and decisions in actions brought by a Member State or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers. The proceedings provided for in this paragraph shall be instituted within two months of the publication of the measure’.

30 ‘The Court of Justice shall have jurisdiction to rule on any dispute between Member States regarding the interpretation or the application of acts adopted under Article 34(2) whenever such dispute cannot be settled by the Council within six months of its being referred to the Council by one of its members. The Court shall also have jurisdiction to rule on any dispute between member States and the Commission regarding the interpretation or the application of conventions established under Article 34(2)(d)’.

31 ‘The provisions of the Treaty establishing the European Community, the Treaty establishing the European Community of Coal and Steel and the Treaty establishing the European Community of Atomic Energy referred to the competence of the European Court of Justice and the exercise of this competence will be only applicable to the following provisions of the present Treaty: b) provisions of Title VI, in conditions established in Article 35’.
Finally and leaving aside other changes caused by the Treaty of Amsterdam in relation to the ‘passerelle’ procedure in Article 42 TEU\(^{32}\) or an enhanced cooperation between member states now provided in new Title VII,\(^{33}\) is the aforementioned recapitulation of acts ruled by Article 34 to be adopted by the Council; in this sense, the new text maintains common positions and conventions and creates framework decisions (equivalent to directives in Community Law)\(^{34}\) and decisions, both with binding force. The same rule also contemplates the increase of the initiative power of the Commission to be equal to Member States in relation to the proposal for the adoption of all these acts by the Council.

**C Treaty of Nice**

The Treaty of Nice was signed in Nice on 26 February 2001\(^{35}\) and has recently come into force.\(^{36}\) We now consider the amendments produced in the field of judicial cooperation in criminal matters as well, forgetting for the moment other important changes, for example in the chapter on jurisdictional reforms,\(^{37}\) some of them also related with this area.

Briefly, perhaps the most important change produced by this Treaty is the introduction of the European Judicial Cooperation Unit (‘Eurojust’) as an instrument of judicial cooperation in criminal matters. In fact, Eurojust has been recently created by Decision of the Council, 28 February 2002, with a singular challenge to strengthen the fight against dangerous forms of delinquency.\(^{38}\) For this reason, its mention is included in several articles; for example, in Article 29 TEU, whose second indent refers now to a ‘closer cooperation between judicial and other competent authorities of the Member States’ or in Article 31 inside the first indent in relation with the ‘cooperation between competent ministries and judicial or equivalent authorities of the member States’.

In addition, the role of Eurojust will be encouraged by the Council ‘enabling [it] to facilitate proper co-ordination between Member States’ national prosecuting authori-
ties; promoting support . . . for criminal investigations in cases of serious cross-border crime, particularly in the case of organised crime, taking account, in particular, of analyses carried out by Europol; [and] facilitating close cooperation between Eurojust and the European Judicial Network, particularly, in order to facilitate the execution of letters rogatory and the implementation of extradition requests’. As can be appreciated, the European Union is particularly concerned about international organised crime and hence the introduction of several legal instruments dedicated to its prevention and control, some of them dealt with below.39

As for Eurojust, this Unit will be composed of a relevant person from every member state, with the quality of prosecutor, judge or police official, who can be accompanied by one or more assistants (Article 2); all these national members will form a college (Article 10) with the competencies and the functions also described in the previous Decision40 and will work with the cooperation of the national authorities of member states. Eurojust will be able to process personal data but always respecting the legal limits and provisions besides the obligation of confidentiality also imposed by rule.41 Of course, for the accomplishment of all of these tasks, Eurojust has legal personality as an organ of the Union (Article 1) and can elaborate its own budget (Articles 34 et seq).

Finally, the amendments proposed by The Treaty of Nice will produce effects in the area of enhanced cooperation between Member States; thus, Articles 40 et seq of the Treaty on European Union are rewritten, establishing the strict conditions and limits to this enhanced cooperation.

III Legal Instruments of Judicial Cooperation to be Employed in Criminal Process

This part will look at some examples of the legal instruments provided for in the field of judicial cooperation in criminal matters. We are conscious of the existence of many more42 in different areas which we omit here but we try to make the selection from amongst the most interesting or relevant ones to achieve the objectives of this judicial cooperation, always with application in criminal process.


40 See Arts 4, 5, 6, and 7, which contemplate the different crimes related with Eurojust (for example, cyber crimes, financial fraud and corruption, money laundering, environment . . .), the general functions of Eurojust, the functions of Eurojust through its national members and the functions of Eurojust working as a college.

41 Art 25. Besides, the regulation of the treatment of such personal data is very wide in the Decision: from Arts 14 to 24 included, establishing the person responsible, access to them, rectification and elimination, the terms of maintenance, etc.

A Extradition

The area of extradition between Member States is regulated in the European Union by two Conventions (as complements to the European Convention on Extradition 1957), contemplating the extradition proceeding with and without consent respectively of the requested person. In fact, the Convention on simplified extradition procedure between the Member States of the European Union, signed on 10 March 1995, provides the application of this simplified procedure in the extradition of the requested person if this last one consents to the surrender. By the opposite, the Convention on extradition between member states of European Union, 27 September 1996, contemplates the ordinary extradition proceeding without consent to the surrender by the requested person. Both Conventions have the task of fulfilling and facilitating the application of the European Extradition Convention signed in the area of the Council of Europe on 13 December 1957.

As regards the first Convention 1995, it indicates the obligation of the Member States to proceed to the surrender of the requested national person if they have been arrested in the territory of the requested Member State. For this it must have the consent of the arrested person as well as the agreement of the requested state to waive the principle of speciality (Articles 2 et seq), traditionally provided by other extradition conventions such as the European Extradition Convention. This new Convention also contemplates a direct intercourse between both national authorities of the requesting state and requested state, as well as a brief limit term to surrender the extradited person, in fact twenty days as maximum (Article 11(1)).

The second Extradition Convention signed in 1996, as we have said, regulates the ordinary extradition proceeding and, in this sense, the field in which this extradition operates, according to the limit of the punishment imposed for the crime; in addition, the minimum limits of this punishment will be different for both participant states, twelve months for the requesting state and six for the requested state (Article 2(1)). Another interesting provision is the suppression of the qualification of some crimes under the political offence exception, as a way to avoid extradition and till now excepted by the European Extradition Convention, although the possibility of some restrictions is also contemplated. Finally, among other innovations, the previous requirement of authentication for the documents and copies employed in this extradition procedures is also omitted (Article 15).


45 Whose Art 14 provides that there is no possible judgement or punishment to the extradited person because of previous and different facts than those ones, which produced his extradition application form, except if he consents or he had not left the country in the mandatory term.
46 According to Art 5(2), for example, the possibility to limit the extradition to the facts qualified as conspiracy or illicit association.
B  Mutual Recognition of Judicial Decisions

This procedural instrument, included as one of the ‘milestones’ in the Tampere European Council as a way to achieve a genuine European area of justice,\(^{47}\) is still awaiting binding legislation. Until now, there has only been a Communication from the Commission to the Council and the European Parliament adopted on 26 July 2000\(^{48}\) as well as a programme of measures to implement the principle of mutual recognition adopted by the Council and Commission in December 2000.\(^{49}\)

Both texts enunciate some measures to make this mutual recognition of judicial decisions between Member States possible using the same concept to define such recognition. In fact, it implies, in general terms, that ‘a measure adopted in a judicial decisions by a jurisdiction of a member state will be immediately accepted in all other member states and it will produce in all of them the same or similar effects’.\(^{50}\)

For this reason, the aforementioned texts consider several aspects of this mutual recognition, such as the following:\(^{51}\)

- Direct execution of final criminal decisions in the whole territory of the European Union; there is no reason to convert previously the foreign judicial decision into a national one, which reproduces its contents (exequatur). This second procedure is an indirect execution still maintained by other international juridical instruments. On the other hand, the European Union is more favourable to a direct execution, with the proposal even in Tampere of substituting extradition procedures with the simple transfer of condemned persons by definitive judgements who are fleeing from justice,\(^{52}\) objective today reached through the European arrest warrant.
- Adoption of the *ne bis in idem* principle, that it is to say that a person who has been judged in a Member State for a specific fact or facts cannot be judged again for the same facts, either in the same or in another Member State. In this context, an identical solution must be adopted whether the final judgement is a conviction or an acquittal and, as for the discussion reproduced in the European papers on the consideration of whether it is the ‘conduct’ or the ‘offence’ for which the principle applies, we are firmly convinced that it is the former think that it is the former, in accordance with the most essential doctrine of *ne bis in idem* as the negative effect of *res iudicata*.\(^{53}\)
- Consideration of other convictions adopted in the European Union as part of the criminal antecedents of the accused. This measure can be more disputable and even difficult to implement because there is not always real knowledge about these antecedents in foreign Member States. Besides, to make this aspect

\(^{47}\) See note 2 supra.
\(^{49}\) OJ C 12, 15 January 2001, 10.
\(^{50}\) González Cano, n 48 above, 27
\(^{51}\) Extracted from the Communication from the Commission to the Council and the European Parliament, n 48 above, 8
\(^{52}\) See Presidency Conclusions, n 2 above, conclusion 35.
possible, it would be absolutely essential to register all antecedents and proceed to transfer this information in the territory of the European Union.  

C Mutual Assistance in Criminal Matters

There is also an interesting regulation on mutual assistance in criminal matters between the Member States of the European Union provided by a Convention established by the Council in accordance with Article 34 (formerly K(3)) TEU on 29 May 2000. This regulation is also implemented by a Protocol signed on 16 October 2001, which adds some other measures especially referred to organised crime, money-laundering, and finance crimes.

In fact, the area of this Convention on mutual assistance in criminal matters is very wide because it not only contemplates judicial processes but administrative procedures as well, according to Article 3. Besides, it deals with several aspects from a procedural point of view and, especially, from a material one; the latter referring to the different kinds of mutual assistance which can be requested.

In relation with the procedure provided to offer the required assistance, the rule exposed in Article 4 gives priority to the methods and procedure indicated by the Member State, which requires the assistance in every case, except express prohibition of this Convention or possible conflict of the specific method or procedure with the fundamental principles of the law of the requested Member State. It also indicates the compulsory execution of the requested assistance in the limit term provided by the requesting Member State, but there is still the possibility that the requested Member State cannot offer the required assistance or only be able to do so partially, or perhaps not in the ‘time and manner’ established. All of this information must be given immediately to the Member State which asks for the assistance.

The following article, still ruling the procedural aspects, provides for the way in which the mailing and notification of procedural documents is to be done. In fact, Article 5 prescribes direct notification by mail (it is supposed to be ordinary mail) of such documents to the addressee and only disposes the mailing through the national authorities of the requested Member State in special cases. Of course, the specific document might be accompanied by a translation (or otherwise, part of it) if it is presumed that the addressee does not understand the original language. By analogy the addressee has the fundamental right to a free interpreter in the trial provided in Article 6(3)(e) European Convention of Human Rights.

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54 See the communication from the Commission to the Council and the European Parliament, n 48 above, 10 and the programme of measures to implement the principle of mutual recognition adopted by the Council and European Parliament, n 49, 12.
57 Despite this, the Spanish version uses the term ‘judicial assistance’ instead of ‘mutual assistance’.
58 A wide regulation is provided in this respect, contemplating all kinds of possibilities, always with intercourse of both Member States, in Arts 4(3) and (4).
59 Specifically, unknown address where to deliver the document, provision by the required Member State of another kind of notification different to the post mail, impossibility to deliver the document by mail and the reasonable consideration by the requirer Member State that the delivery by mail will be inefficient.
60 Remember, ‘every accused has, as minimum, the following rights: e) to be attended without costs by an interpreter, if he does not understand or does not speak the language employed in the hearing’.
Meanwhile Articles 6 and 7 are referred to the transmission of these applications of mutual assistance directly between the judicial authorities connected and the possibility of them exchanging information without being especially requested, from Article 8 henceforth the Convention is dedicated to explaining the different kinds of mutual assistance which may be required. Then, for instance, the restitution of illicit effects (Article 8), the temporary surrender of arrested persons to make possible the investigation of the crime (Article 9), the hearing by videoconference or telephone\textsuperscript{61} (Articles 10 and 11), the supervised handing over (Article 12) . . . besides other measures such as the possibility of creating joint investigation teams between authorities of two or more member states (Article 13) and even the authorisation to act as ‘mask agent’ in another member state to investigate aims (Article 14) are provided for. In addition, an independent title is dedicated to the intervention of telecommunications\textsuperscript{62} and to the protection of personal data (Article 24).

Finally, the Protocol mentioned implementing this Convention on mutual assistance includes other measures as, for example the request of information about bank accounts or bank transactions; in this context the confidentiality of this supervision is guaranteed in relation to the client (Article 4) as well as the prohibition to invoke the banking secret (Article 7). Another provision of this Protocol is the prohibition imposed on Member States to qualify a crime as political as a way to avoid the mutual assistance required (Article 9).\textsuperscript{63}

\section*{D The European Arrest Warrant}

If there is a ‘star’ rule on judicial cooperation in criminal matters, this is the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between the Member States.\textsuperscript{64} Its popularity has been further increased because of the attacks in the United States of America on 11 September 2001, as a measure to fight against international terrorism. As a juridical and procedural instrument, this European arrest warrant is planned to supplant the current system of extradition between Member States,\textsuperscript{65} whose Conventions—except in the area of the

\footnotesize{\textsuperscript{61} Only possible as witness or expert and never as accused because of the compliance with the essential principle of contradiction in criminal process, which requires the physical presence of the accused in the hearing as it is legally provided. Only exceptionally the development of the hearing in absence of the accused is allowed; for example, in Spain when the punishment asked for is less or equal two years of prison or six if it is of different character (Art 786.1.II Ley de Enjuiciamiento Criminal).}

\footnotesize{\textsuperscript{62} Title III, Arts 17 et seq, which regulates the application to require this intervention in another Member State as well as other possibilities; for example, the intervention in the same Member State through service suppliers and without the technical assistance of the affected Member State despite the fact that the latter must be informed. Of course, all these kinds of provisions are looking forward to the employment of the newest technology in the territory of the European Union (Internet, satellite reception, etc.) and hence sometimes the difficult comprehension of such regulations.}

\footnotesize{\textsuperscript{63} In fact and as it was said at the time, this provision was also included previously in Art 5 of the Convention on Extradition between the Member States of European Union (1996) with the same writing; see note 44 supra. Anyway, both Extradition Convention in the area of European Union are not very successful because they have only been ratified for a few Member States and today substituted by the Council Framework Decision on the European arrest warrant.}

\footnotesize{\textsuperscript{64} OJ L 190, 18 July 2002, 1.}

\footnotesize{\textsuperscript{65} Again one must not forget the Presidency Conclusions of European Council in Tampere on 15 and 16 October 1999, n 2 above, conclusion 35: ‘the formal extradition procedure should be abolished among the Member States as far as persons are concerned who are fleeing from justice after having been finally}
European Union—have in any case not been very successful because of the few ratifications produced till now.

The scope of this European arrest warrant will be ‘acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months’ (Article 2(1)). But the legal text also now enumerates all the offences which give rise to surrender of the pursuant to an European arrest warrant without verification of the ‘double criminality’ principle and always that they be ‘punishable in the issuing Member State by a custodial sentence of a maximum of at least three years’ (Article 2(2)),66 with the possibility of adding other categories of offence to the list at any time in conditions determined by Article 2(3). For offences other than those referred to, surrender is subject to the double criminality principle and so they would have to constitute an offence under the law of the executing State.

There also exists the possibility of establishing some conditions for the execution of the European arrest warrant by the executing Member State. For example, if the decision in the issuing Member State has been rendered in absentia without the arrested person being summoned in person, surrender may be subject to the condition of giving the person the chance to lodge an appeal or oppose this decision in the issuing State. The same Article 5 describes other particular cases for the putting into operation this European arrest warrant,67 while Article 6 establishes a general rule to determine the competent authorities to put it into effect; in fact, the judicial authority which is competent to issue an arrest warrant in both states (the judge as well as the public prosecutor, although this determination is lastly silenced).

Also of use is the application form attached as an Annex to the Council Framework Decision,68 which encloses the information required by Article 8 regarding the European arrest warrant: basically, identity and nationality of the requested person, personal data of the issuing judicial authority, kind of judicial decision (enforceable judgement, arrest warrant, or any other enforceable judicial resolution according to previous Article 2), the nature and legal classification of the offence, description of the circumstances in which the offence was committed as well as the participation in it of sentenced, and replaced by a simple transfer of such persons, in compliance with Article 6 TEU’. The same explanatory memorandum of such ‘euro-warrant’ looks forward qualifying as ‘obsolete’ the extradition mechanism; for that reason several Member States have already started bilateral discussions to prepare treaties of simple surrender of arrested persons to judicial authorities as Italy and Spain and Spain and the United Kingdom (see note 64 supra, 1–2).

Specifically, ‘participation in criminal organisations, terrorism, trafficking in human beings, sexual exploitation of children and child pornography, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in weapons . . . corruption, fraud, laundering of the proceeds of crime, counterfeiting of the euro, computer-related crime, environmental crime, facilitation of unauthorised entry and residence, murder, illicit trade in human organs, kidnapping, racism and xenophobia, organised or armed robbery, illicit trafficking in cultural goods, swindling, racketeering and extortion, counterfeiting and piracy of products, forgery of administrative documents, forgery of means of payment, illicit trafficking in hormonal substances, illicit trafficking in nuclear or radioactive materials, trafficking in stolen vehicles, rape, arson, crimes within the jurisdiction of the International Criminal Court, unlawful seizure of aircraft/ships and sabotage’.

Cases like the punishment of the offence in the issuing State by life sentence or life-time detention order as well as the return of the arrested person to the executing State to serve the sentence or detention order passed against him in the issuing State.

See n 65 above.
the requested person, the penalty imposed or the prescribed scale of penalty and, if possible, other consequences of the offence. This application form will be sent directly to the executing judicial authority (Article 9), but it is also possible to introduce an alert in the Schengen Information System (SIS) for the purpose of the surrender of the requested person if his or her whereabouts are not known (Article 10).69

Afterwards, the Framework Decision contemplates a very important area: the rights belonging to the requested person, such as to be informed of the warrant and its content, about the possibility of consenting the surrender and about the right to be assisted by a legal counsel and, if necessary, an interpreter (Article 11). The possibility of suspension of the European arrest warrant by the executing judicial authority is also foreseen,70 with the obligation of an immediate release of the requested person and the possibility of substituting the detention by another precautionary measure such as the provisional release adopted by the executing judicial authority (Article 12).71

An essential content of this rule is the regulation of the judicial procedure for surrender in Articles 15 et seq, Article 17 establishing the term limits to execute the European arrest warrant,72 which depends whether there is or not consent by the requested person. If there is such consent, the final decision on the execution of the European warrant arrest should be done within a period of 10 days after this consent; if there is not, the period shall be extended to 60 days after the arrest of the requested person. Days of grace are provided when the arrest warrant cannot be executed in the previous time limits, cases in which the period may be extended by a further 30 days. Any kind of refusal to execute a European arrest warrant must be reasoned by the executing Member State, although the possibility of a delay because of exceptional circumstances is also contemplated (Article 17(7)). Also, interesting provisions are contained in Articles 26 and 27, completely new in comparison with an extradition system; the deduction of the period of deprivation of liberty arising from the execution of the European arrest warrant from the total period of deprivation of liberty, which is imposed as a penalty as well as the possibility of prosecuting other offences committed prior to the surrender if there is a consent of both Member States concerned.

Finally and logically, the Framework Decision we have just commented on also contemplates the possibility that the executing Member State refuses the execution of the European arrest warrant, whose grounds have been now brought forward to Articles 3 and 4 differentiating between a mandatory non-execution or an optional non-execution.73

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69 It is not specifically imposed as a confidentiality duty but such an obligation of confidentiality is referred in the explanatory memorandum, see note 65, supra, at 2 (para 10). Instead, there is a specific provision to forward the European arrest warrant ‘by any secure means capable of producing written records under conditions allowing the executing Member State to establish its authenticity’ Art 10(4).

70 What it is exactly regulated is the provisional of the requested person if according with the domestic law he or she should not remain in detention.

71 In this context, the executing judicial authority may make its decision subject to conditions under national law in the event of provisional release, such as the payment of a security, a ban on moving outside specified geographical limits, the obligation to appear regularly before control authorities, etc.

72 The time limit is completely different for surrender of the person, which must be done ‘as soon as possible on a date agreed between the authorities concerned’ and always no later than ten days after the decision to execute the European arrest warrant (Art 23).

73 A ground for mandatory non-execution is, for example, the provision of amnesty in the executing member state for the offence on which the arrest warrant is based (Art 3(1)); meanwhile, grounds for optional non-execution are the inexistence of this offence according to the law of the executing member state or, on the other hand, the prosecution in the executing state for the same act as that on which the European arrest warrant is based, etc.
IV Final Considerations

Finally, a brief recapitulation and some ‘pro futuro’ suggestions as to the effectiveness of all this regulation contained in the European Treaties on judicial cooperation in criminal matters as well as the practice of the judicial instruments mentioned. In this context, it must be remembered that some of them are still pending definitive legislation (for example, mutual recognition of judicial decisions) and many of them have not yet been—neither probably will be—ratified (both Extradition Conventions). For this reason, there is still a long way to go for the European Union as a whole but there is nothing to prevent any Member State from beginning to apply these instruments on their own through the signature of bilateral agreements.74

Traditionally one of the main grounds for the difficulty of achieving more and faster judicial cooperation in criminal (or in civil) matters has been the big differences existing between the national procedures and legal orders of all the Member States.75 That is a reality. Hence the presentation of some proposals by the European institutions and bibliography76 to create a European and even single Corpus Iuris—a thesis which is also criticised77—as well as the introduction of some kind of common judicial authority in the European Union.78

Certainly, these are very ambitious projects and perhaps their suitability in still in question, at least up until now; but the European Union has already provided technical media to make some degree of judicial cooperation possible. Since 1996 there has been a regulation to allow the exchange between member states of ‘liaison magistrates’,79 consisting in the transfer of a magistrate or public official from one Member State to another, and since 1998 there has been a ‘European judicial net’,80 which furnishes several ‘contact places’ (one or more for each Member State) supplying useful information to the national judicial authorities, basically through a telecommunication network. And also every year information, research and practice in the field of judicial cooperation in criminal matters is promoted through annual programmes

74 Remember, for example, the bilateral treaty concluded between Italy and Spain about surrender of arrested persons in December 2000 and which has been used as a pattern for the European arrest warrant proposal (see note 65 supra).
75 For example, J. P. Zanoto, ‘Les systèmes judiciaires confrontés à la criminalité organisée’, (2000) 438 Revue du Marché commun et de l’Union européenne 335, 336, with the proposal of the creation of a ‘truly European judicial system’ as well as a ‘European judicial organ’.
76 See M. Delmas-Marty, ‘Necesidad, legitimidad y factibilidad del Corpus Iuris’, Diario La Ley, 5 April 2000, n 5028, 1, at this time president of the commission, which has the task of elaborating this Corpus Iuris in the European Union.
financed with European funds such as certain R&D frame programmes\textsuperscript{81} or, especially, Grotius\textsuperscript{82} and Falcone,\textsuperscript{83} all of them now replaced by Programme AGIS.\textsuperscript{84}

All of these initiatives adopted from Europe are contributing to an increase in information and interest in the field of judicial cooperation and its instruments by the different justice professionals as well as legal researchers. In addition, modern technology makes good communication between European Member States possible, which is happening with more and more frequency. For this reason, most of the juridical instruments provided in Europe include as medium such technological innovation.\textsuperscript{85}

Only the national legislator seems at times to be far removed from the reality of European and thus there are still big differences between national rules, even in such important subjects as access to justice by European citizens. In this context, European institutions have also shown a preoccupation to establish minimum standards ensuring a common level of judicial protection in Europe as well as multilingual forms or documents to be used throughout the Union; both ideas were suggested in the Tampere European Council celebrated in 1999.\textsuperscript{86} Only in the field of judicial cooperation in criminal matters there has recently edited a ‘green book’ (\textit{Libro Verde} in Spanish) about the procedural safeguards for suspects and defendants in criminal proceedings;\textsuperscript{87} this one results after a Consultation Paper adopted by the Commission on 26 March 2002 inviting any national experts in the member states to answer a set of questions about this.\textsuperscript{88}

To conclude, we are optimistic about a progressive judicial cooperation between Member States and the integration in national law of all these legal instruments provided by the European institutions, as a matter of fact, the European arrest warrant in Spain through Law 3/2003, 14 March.\textsuperscript{89} But this last one is however subject of another work.\textsuperscript{90}

\textsuperscript{81} As an example, mention of the Proposal of a Council Decision for establishing a frame programme on the basis of Title VI of the Treaty on European Union—Police and judicial cooperation in criminal matters, OJ C 51 E, 26 February 2002, 345, to be applied in the period between 1 January 2003 and 31 December 2007 (Art 1).
\textsuperscript{82} Last notice in OJ C 66, 15 March 2002, 16, destined to improve knowledge of the juridical and judicial systems of the member states as well as to facilitate the judicial cooperation in criminal matters between them.
\textsuperscript{83} Programme to improve exchanges, formation and cooperation among those responsible for the fight against organised crime; also last notice in OJ C 66, 15 March 2002, 26.
\textsuperscript{84} As it is explained in first paragraph, ‘the programme extends the work of the programmes that formerly operated under Title VI (TEU), Grotius II Criminal, Oisin II, Stop II, Hippocrates and Falcone’; see annual work programme and call for applications for 2003 in OJ C 5, 10 January 2003, 5.
\textsuperscript{85} Remember, for example, the use of the videoconference system provided by Convention on mutual assistance in criminal matters of 2000 (see note 55 supra) or the European arrest warrant (see note 65 supra) or the proposal to create a European Criminal Registration (see note 54 supra), etc.
\textsuperscript{86} See Presidency Conclusions, n 2 above, especially conclusions 30 and 31.
\textsuperscript{87} COM (2003) 75 final.
\textsuperscript{88} Very interesting in this context is the response of a British Human Rights Organisation as Justice offered in April 2002, considering the respective rules in United Kingdom.
\textsuperscript{89} Spanish Official Journal (BOE) n 65, 17 March 2003, 10244. Some comments are exposed by J. L. Manzanares Samaniego ‘El Anteproyecto de Ley sobre la orden europea de detención y entrega’, (2003) 1 Actualidad Penal, 1.
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